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# STRICT PRODUCTS LIABILITY AND THE AUTOMOBILE INDUSTRY: MUCH ADO ABOUT NOTHING†

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*The rise of strict liability in tort and warranty has been heralded as ushering in a new era of consumer protection. But does the rise of strict liability really mark a significant advance—from the standpoint of the consumer—over negligence theories? How are most automobile products liability disputes really resolved? To answer these questions, Professor Whitford conducted a comprehensive study of the resolution of products liability disputes in the automobile industry. Professor Whitford discovered that the single most important factor in automobile products liability disputes and the factor most determinative of the pattern of dispute settlement is the type of damages suffered by the consumer. His most important conclusion is that the current controversy over the application of strict liability is not terribly relevant. His data reveal that the gradual relaxation by courts of the standards of proof in negligence suits against the automobile manufacturers and their dealers has created a "strict liability in fact," and, therefore, the "strict liability revolution" heralded by the commentators is simply not very revolutionary.*

## I. INTRODUCTION

The law of products liability is in ferment. Cases are being decided at such a rate that the Commerce Clearing House has recently established a reporter just for products liability cases.

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† Copyright © 1967 by William C. Whitford. Many persons and institutions assisted me in this project. Only a few of them are mentioned here. Consumers Union and Walter E. Meyer Research Institute of Law provided financial support for the survey of new car purchasers. The survey was actually conducted by the University of Wisconsin Survey Research Laboratory. The project was initiated while I was attending a seminar in sociological methodology sponsored by the Russell Sage Foundation through its Law and Society Program at the University of Wisconsin. The instructor for the seminar was Professor Burton Fisher of the University of Wisconsin Sociology Department and he gave me much valuable advice. Mr. Louis Milan, Executive Vice President of the Wisconsin Automotive Trades Association, gave me valuable assistance in arranging interviews with various automobile dealers throughout Wisconsin. Professor Stewart Macaulay read and criticized an earlier version of this article. Two students at the University of Wisconsin Law School, Messrs. John L. McCormack and Richard J. Olbrich, gave me valuable research assistance. Despite all this assistance, however, there may remain errors, and the responsibility for them and for the conclusions is mine.

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The law reviews are being inundated with articles on the subject.<sup>1</sup> The typical products liability dispute arises out of a situation in which a manufactured product causes personal or economic injury to a consumer. According to the leading appellate cases, and most of the law reviews, products liability law is rapidly changing.<sup>2</sup> From a law which imposed many and often insurmountable barriers to recovery by the injured consumer, we are told that we are moving to a streamlined version which explicitly recognizes that a manufacturer is always liable to a consumer for injuries caused by a defective product. In other words, we are told that the law is changing to make a manufacturer strictly, or absolutely, liable for his defective products.<sup>3</sup>

From studies in other areas of the law we know that leading cases are not always reflective of the decisions in the much larger group of less publicized cases. Moreover, reported (generally appellate) court decisions may not be indicative of the manner in which the vast majority of disputes are settled outside the courtroom.<sup>4</sup> It seems appropriate, therefore, to determine how products liability disputes are actually resolved on all levels. It may be that many of the recent reforms are not being effectuated at the less visible but more important levels of decision making or at least have not yet "trickled down" to those levels. Alternatively, it may be discovered that the reforms are not really significant changes in products liability law, for the assumed barriers to recovery by the injured consumer, which the reforms are designed to do away with, may not be the real barriers.

To attempt a study encompassing all products liability disputes would indeed be a monumental task and one which I have not attempted to undertake. What I have done, however, is to attempt a comprehensive study of the settlement of products liability disputes in the automobile industry. Although there is no particular reason to suppose that products liability in the automobile industry, nor in any other particular industry, is representative of products

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<sup>1</sup> The *Index to Legal Periodicals* lists 59 separate articles, excluding casenotes, published between September 1965 and August 1966 which concern products liability. The appellate courts have been active also. As of February 1967, 26 column inches of *Shepard's Citations* were occupied by citations to *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), a leading case in the products liability field.

<sup>2</sup> E.g., Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

<sup>3</sup> Most writers seem to refer to products liability without proof of negligence as "strict liability," rather than absolute liability, and I shall abide by that convention in this article. See Freedman, "Defect" in the Product: *The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 n.2 (1966).

<sup>4</sup> See S. MACAULAY, *LAW AND THE BALANCE OF POWER* (1966); Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 478 (1966); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

liability generally,<sup>5</sup> the automobile industry does have several features which make it attractive for study. Many of the famous appellate court decisions in the products liability area have concerned automobiles.<sup>6</sup> Automobiles affect nearly every American, and defects in them are numerous and capable of causing serious personal and financial injury. Perhaps most significantly, in recent years the automobile manufacturers have introduced an express warranty guaranteeing, for quite an extensive period of time, repair or replacement of parts defective in manufacture—an overt and conspicuous announcement of the manufacturers' willingness to absorb many of the losses arising from defects in their products.<sup>7</sup> As a result of this action, an extensive but extra-judicial system has been established for the resolution of many automobile products liability disputes. This system must be studied to understand the true state of products liability in the automobile industry. And to the extent one expects other industries to emulate the automobile industry and conspicuously extend warranty protection to their customers, a study of products liability in the automobile industry may suggest the future course of products liability generally.

I shall restrict this article to an evaluation of that part of the automobile manufacturers' products liability which is not explicitly recognized in their express warranties; that is, the liability other than the obligation to repair or replace defective parts. Therefore, I will discuss the manufacturers' liability for consequential damages (in particular, injury to persons or property other than defective parts and commercial losses such as the loss of income), and their obligation to afford remedies other than repair (such as rescission of the sales contract or monetary damages for breach of warranty) in the event an automobile proves defective. An exam-

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<sup>5</sup> For example, the law of products liability with respect to foods and beverages historically has been considered different from the law with respect to other products. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-10 (1960). See also L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* (1960).

<sup>6</sup> E.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>7</sup> The long term warranty was first introduced with the 1961 model year, when all major domestic automobile manufacturers extended a warranty promising repair or replacement of all parts defective in manufacture for the first 12 months or 12,000 miles after delivery, whichever came first. For many years prior to then, all manufacturers offered a warranty which covered defective parts for only 90 days or 4,000 miles. With the 1963 model, Chrysler Corporation introduced a warranty which covered certain parts, known as the power train, for 5 years or 50,000 miles. Other parts were covered for 12 months or 12,000 miles. General Motors Corporation and Ford Motor Company responded with a warranty which covered nearly all parts for 24 months or 24,000 miles. At the beginning of the 1967 model year, the warranties again became uniform throughout the industry, with most major parts covered for 5 years or 50,000 miles and the remaining parts covered for 24 months or 24,000 miles.

ination of the process by which the manufacturers and the automobile dealers administer their express warranty to repair or replace defective parts will be the subject of a subsequent article.<sup>8</sup>

I will begin with a brief narration of the history of products liability in the automobile industry, including some analysis of the theoretical problems which appear most pressing today. Of necessity this discussion will be sketchy and will only treat the major problems and developments in automobile products liability. My purpose will be simply to provide the reader an orientation and a basis for evaluating the manner in which automobile products liability disputes are settled today. Thereafter I shall describe the manner in which these disputes are in fact resolved today. The situation today will then be evaluated in terms of various doctrinal approaches to products liability and a few conclusions will be suggested, particularly about the direction legal research has taken to date and some different directions it might take in the future.

## II. HISTORY AND THEORY

If one has to choose a point in time at which products liability for the automobile industry began, one would probably choose the day in 1916 when the New York Court of Appeals, speaking through Justice Cardozo, handed down its famous decision in *MacPherson v. Buick Motor Company*.<sup>9</sup> In that case the Buick Motor Company was held liable to a remote vendee for negligence in the manufacture of a defective vehicle. Although the holding of *MacPherson* on the privity question has been uniformly adopted throughout the United States,<sup>10</sup> one lasting difficulty in the application of

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<sup>8</sup> The article dealing with the administration of the express warranty will appear in a later issue of the *Wisconsin Law Review*.

<sup>9</sup> 217 N.Y. 382, 111 N.E. 1050 (1916). Prior to the decision in *MacPherson* most reported automobile cases were decided on the authority of an 1842 English decision, *Winterbottom v. Wright*, 10 M. & W. 109, 11 L.J. Ex. 415 (1842), which had held that a manufacturer was legally responsible for the quality of his product only to parties in "privity of contract." Since automobiles are typically marketed through dealers, who are usually considered independent businessmen and not simply agents of the automobile manufacturers, the manufacturers were rarely if ever in privity of contract with a consumer injured by a defective automobile.

It has been suggested that this rule of nonliability was developed for the quite functional purpose of protecting the many new industries emerging at the time from a liability possibly too heavy to be borne. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). See generally W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY* (1964); L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965). One commentator has suggested that a rule of nonliability, based on a different theory, might be applied today to infant or experimental industries for the same reason. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 841-51 (1965).

<sup>10</sup> Shortly after the decision in *MacPherson*, the question arose whether any defective part causing injury subjected the manufacturer to negligence

the case has concerned the types of injuries compensable under the doctrine. In *MacPherson* the plaintiff had suffered extensive personal injuries and it was principally damages for this type of injury which was litigated in the earlier years. Although there seems to have been some doubt about this matter originally,<sup>11</sup> it is now generally held that damages for property destruction, whether to the defective vehicle or to other property, are recoverable in a negligence action, providing the injury occurred in what would commonly be considered an accident.<sup>12</sup> The difficulty came when the plaintiff sought the cost of repairing the defect or the diminution in the automobile's value caused by the defect, and when the defective part caused the destruction of other parts but in a gradual way not involving an accident. I have not been able to discover a case decided before 1960 in which the plaintiff sought recovery for the former type of injury in negligence, which suggests a general assumption that such recovery has been unavailable in negligence. Only one case of the latter type was reported prior to 1960 and in it recovery was denied.<sup>13</sup> Similarly, it has been

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liability. In reaching his conclusion in *MacPherson*, Cardozo argued that his conclusion was compelled by previous case law. He cited a number of cases which had dispensed with the privity requirement if the product causing injury was "inherently dangerous"—*e.g.*, *Thomas v. Winchester*, 6 N.Y. 397 (1852)—and then stated that obviously an automobile which was defective was "inherently dangerous." Subsequently, a few courts held that minor defects did not render an automobile inherently dangerous, with the result that the manufacturer was relieved of negligence liability to parties not in contractual privity. *E.g.*, *Cohen v. Brockway Motor Truck Corp.*, 240 App. Div. 18, 268 N.Y.S. 545 (1934) (defect in the door handle). By the 1950's, however, these decisions had largely lost influence and all cars with defective parts were considered inherently dangerous. See C. GILLAM, *PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY* 70-83 (1960).

<sup>11</sup> See note 13 *infra*.

<sup>12</sup> *E.g.*, *Fentress v. Van Etta Motors*, 323 P.2d 227 (Cal. Super. App. Div. 1958); *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N.Y.S. 131 (1915). See generally C. GILLAM, *supra* note 10, at 148.

<sup>13</sup> *Wyatt v. Cadillac Motor Car Div., General Motors Corp.*, 145 Cal. App. 2d 423, 302 P.2d 665 (1956). The plaintiff alleged that in the manufacture of the automobile a piece of paper had negligently been sealed in the breather pipe, thereby preventing proper motor ventilation and causing the complete but gradual destruction of the engine. The rationale offered for the denial of recovery was that the manufacturer's tort duty was confined to the exercise of reasonable care so that the automobile would be free from defects "which might be reasonably expected to produce bodily injury or damage to other property." Other types of defects did not render the vehicle inherently dangerous. This rationale, of course, put in question even recovery for damage to the defective vehicle itself occurring in an accident, and it was for this reason that some doubt existed at one point about the recoverability of such damages. See note 11 *supra* and accompanying text. With the subsequent establishment of recovery for damage to the vehicle in accident cases, the asserted rationale for nonrecovery in nonaccident cases would seem to fail. Nevertheless, whether because some other, unspoken rationale supported that result or for some other reason, prior to 1960 it was generally assumed that recovery was not available for damage to the vehicle not suffered in an accident, and this assumption was

generally assumed, and supported by non-automobile cases, that recovery in negligence is unavailable for purely economic loss, such as loss of goodwill.<sup>14</sup>

In the period before 1960, injured consumers who sued the manufacturers increasingly relied on a theory of breach of an implied warranty of the quality of their automobile. Breach of implied warranty has certain advantages over negligence as a theory of recovery; principally, it is unnecessary to prove negligence in the manufacturing process. Moreover, a seller is liable for breach of warranty for all types of loss caused by the defect, subject only to the foreseeability limitations of *Hadley v. Baxendale*.<sup>15</sup> Nevertheless, there were two principal barriers to recovery in warranty that up to 1960 were perceived as largely negating the utility of warranty from the plaintiff's point of view. One barrier was the lack of contractual privity between the injured consumer and the manufacturers. Implied warranties pertaining to the quality of goods were considered contractual in origin and the only contract was between the purchaser and the automobile dealer.<sup>16</sup> The other barrier was the disclaimer of liability provision that was contained in the manufacturers' express warranties.<sup>17</sup> These warranties provided that the limited right to have defective parts repaired or replaced free of charge for a limited period of time was "expressly in lieu of all other warranties express or implied and of all other obligations or liabilities on its part." Although there were

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supported in large part by cases concerning other products. *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955).

<sup>14</sup> *Karl's Shoe Stores, Ltd. v. United Shoe Machine Corp.*, 145 F. Supp. 376 (D. Mass. 1956); *Lucette Originals, Inc. v. General Cotton Converters, Inc.*, 8 App. Div. 2d 102, 185 N.Y.S.2d 854 (1959). See Kessler, *Products Liability*, 76 YALE L.J. 887, 897 (1967); Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1382 n.184 (1966).

<sup>15</sup> 9 Ex. 341, 156 Eng. Rep. 145 (1854).

<sup>16</sup> For a general discussion of the privity defense and other barriers to recovery in warranty, see C. GILLAM, *supra* note 10, at 83-86; Prosser, *supra* note 5, at 1124-34.

<sup>17</sup> During most of the period before the decision in *Henningsen*, the major domestic manufacturers extended an identical warranty which had been drafted by the Automobile Manufacturers Association, a trade association for the manufacturers. The uniform warranty provided for repair or replacement of defective parts which were discovered to be defective within 90 days or 4,000 miles of delivery, whichever came first. The recent developments in the extension of these warranties are briefly described in note 7 *supra*.

There is, of course, a certain inconsistency between the privity and disclaimer defenses. If lack of contractual privity prevents the creation of an implied warranty, it should also prevent the creation of a valid contractual disclaimer. Few courts have discussed this inconsistency, however, although it has been noted by a few commentators. C. GILLAM, *supra* note 10, at 174-82. *But cf.* *Browne v. Fenestra, Inc.*, 375 Mich. 566, 134 N.W.2d 730 (1965).

well known decisions which on various intriguing grounds avoided the effect of these disclaimers,<sup>18</sup> it was believed that in most cases the principle of freedom of contract prevailed and the disclaimer was enforced to bar recovery in warranty. Because the disclaimer provision provided that the express warranty was in lieu not only of any other warranty liability but also "of all other obligations or liabilities," the manufacturers might have argued that the disclaimer barred even a negligence action based on *MacPherson*. For some reason, however, prior to 1950 no reported case indicated that the manufacturer even advanced that defense in an action for personal injury based on a *MacPherson* theory, and certainly the commentators did not think that a *MacPherson* theory was barred by the disclaimer.<sup>19</sup>

There were multiple variations on the two basic theories just discussed that were employed from time to time with varying success by plaintiffs in suits against the manufacturers. These variations were principally attempts to circumvent sundry barriers to recovery in negligence or in implied warranty, despite the lack of clear doctrinal support for circumvention.<sup>20</sup> It would serve little purpose to specify all of these theories here. The most interesting was probably the attempt to establish that the manufacturer's advertising claims about its products constituted an express warranty running directly from the manufacturer to the consumer.<sup>21</sup> This express warranty theory offered the dual advantages that, if accepted, it obviated the necessity of proving negligence and it avoided the privity barrier to recovery in implied warranty.

This, then, was the perceived status of products liability in the automobile industry when in 1960 the Supreme Court of New Jersey handed down its famous decision in *Henningsen v. Bloomfield*

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<sup>18</sup> See cases cited in Prosser, *supra* note 5, at 1132 n.194.

<sup>19</sup> C. GILLAM, *supra* note 10, at 192.

<sup>20</sup> One particularly industrious commentator has identified 29 separate theories, mostly grounded in negligence or warranty, that have been employed successfully to impose products liability on the manufacturer. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957). Although not all these theories were used in automobile cases, many of them were. C. GILLAM, *supra* note 10, at 66-102.

<sup>21</sup> *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521, *aff'd en banc*, 15 P.2d 1118, *aff'd on 2d appeal* (1932), 179 Wash. 123, 35 P.2d 1090 (1934). The plaintiff had purchased a new automobile advertised by the manufacturer to have a windshield of "Shatter-Proof Glass." Unfortunately, upon being struck by a pebble the windshield proved quite shatterable and plaintiff lost the use of his eye. The Supreme Court of Washington upheld liability seemingly on the theory that the manufacturer's advertising created an express warranty running directly to the consumer, thereby circumventing the ordinary warranty requirement of privity. At least one other state has followed *Baxter* in an automobile case, *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939), and several have indicated they would apply it to automobiles by adopting it in cases involving other products. See Prosser, *supra* note 16, at 1135 n.213.



*Motors, Incorporated.*<sup>22</sup> Claude Henningsen had purchased a new 1955 Plymouth and had given it to his wife as a gift. Ten days after delivery of the car Mrs. Henningsen was driving on a straight roadway when suddenly the vehicle veered sharply to the right and struck a brick wall. The automobile was damaged so severely that it was judged a total loss by the collision insurance carrier, and Mrs. Henningsen suffered serious personal injuries requiring hospitalization. The evidence at trial was not very definite as to the cause of the accident. Mrs. Henningsen testified that she heard a noise from under the hood and then the steering wheel spun in her hands. An insurance inspector testified that—based solely on the description of the accident—he thought something must have gone “wrong from the steering wheel down to the front wheels.” The trial judge ruled that there was insufficient evidence to establish a prima facie case of negligence, the principal theory relied on at trial by plaintiffs, but he permitted the jury to determine if there had been a breach of implied warranty, a theory plaintiffs had pleaded but not really pursued at trial. No explanation was tendered why a case in warranty had been made out but not one in negligence.<sup>23</sup> The jury returned a verdict against both the dealer and Chrysler.

The New Jersey Supreme Court found it unnecessary to rule on plaintiffs' cross-appeal from the directed verdict on the negligence claim; instead, it affirmed in all respects the verdict based on implied warranty. The opinion is unusual, and famous, because it met head on the traditional barriers to recovery in warranty. Thus, the lack of contractual privity between Chrysler Corporation and the Henningsens was deemed immaterial; the court explicitly held that “when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.”<sup>24</sup> Many justifications were offered for this conclusion. Among these were the manufacturer's attempts through advertising to reach the buying public directly and the close relationship between manufacturer and dealer, even though it could not be denominated an agency relationship.<sup>25</sup> The

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<sup>22</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>23</sup> Record at 340a-341a, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Most of the facts described in the text are reported in the opinion by the New Jersey Supreme Court.

<sup>24</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 384, 161 A.2d 69, 84 (1960).

<sup>25</sup> Support was also drawn from a series of cases concerning defective foods and drugs which had utilized a similar rationale to impose direct warranty liability on the manufacturer to a remote consumer. *E.g.*, *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942). Emphasis was placed on the need to protect the public from defective products “dangerous to life or limb” by eliminating privity so that the manufacturer, the one best able to guard against defects, would be

considerations which supported imposition of warranty liability directly from the manufacturer to the purchaser, Mr. Henningsen, were also deemed to support warranty protection for Mrs. Henningsen "who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile."<sup>26</sup> The defense based on the disclaimer of liability clause was similarly directly met and overcome; the court found the disclaimer "so inimical to the public good as to compel an adjudication of its invalidity."<sup>27</sup> The court offered so many alternative reasons for this conclusion that it is difficult to precisely determine what so utterly damned the disclaimer. At one point, the court suggested that disclaimers of warranty liability in standardized form contracts entered into by consumers should never be enforced. The court noted the inequality in the bargaining power of the parties,<sup>28</sup> and the "public interest" in the existence of implied warranties which were designed to induce care on the part of the manufacturer and to protect private persons from injury. The court also interjected objections to the form of the disclaimer, principally that it was written in very small print and that no effort had been made to call Mr. Henningsen's attention to the provision or to explain its meaning to him. Thus, it was not en-

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directly liable to an injured party.

By way of "perspective," the court reviewed, with obvious joy, the inadequacy of the manufacturer's express warranty guaranteeing repair or replacement of defective parts for a limited period of time. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 374-78, 161 A.2d 69, 78-80 (1960). The court's greatest objections, however, were reserved for the disclaimer of all consequential damages resulting from a defective part.

The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose. . . . But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability. To call it an "equivocal" agreement . . . is the least that can be said in criticism of it.

*Id.* at 375, 161 A.2d at 78.

<sup>26</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 413, 161 A.2d 69, 99-100 (1960). The court found it unnecessary to rely on the trial court's theory that Mr. Henningsen had informed the dealer that the car was being purchased for his wife.

<sup>27</sup> *Id.* at 404, 161 A.2d at 95.

<sup>28</sup> Although it is commonly assumed that an automobile purchaser is in an inferior bargaining position, it is interesting to note that Bloomfield Motors, the selling dealer, argued in its petition for rehearing of the supreme court's decision that, if there were any inequality of bargaining power between purchaser and dealer, it was the dealer who was in the inferior position. They cited the extreme competition between dealers and noted that the Henningsens purchased their ill-fated car from a dealer located 40 miles from their home, presumably because they received a better price.

tirely clear whether the automobile manufacturers could have met the court's objections by drafting its disclaimer in a different manner, or whether the disclaimer was inherently bad.

The court finally concluded that the testimony of the insurance inspector was sufficient to raise an inference that a manufacturing defect, albeit a substantially unidentified one, had caused the mishap. Accordingly, the trial court had acted properly in submitting the case to the jury and the verdict had to be sustained.

The commentators were quick to herald the *Henningsen* decision as the beacon for a new era in which an automobile manufacturer, and other manufacturers, would be strictly liable for injuries caused by defective products.<sup>29</sup> Strict liability was said to mark a significant advance over the *MacPherson* doctrine. To establish strict liability it was still necessary to prove the existence of a "defect" which "caused" the injury, and most commentators conceded that "[p]roperly applied, warranty liability does not aid the plaintiff in either of these endeavors."<sup>30</sup> But *Henningsen* was thought to relieve plaintiffs of the burden of establishing that the manufacturer's negligence was the cause of the defect, a "hurdle which is so frequently disastrous."<sup>31</sup>

The commentators were also ready with a multitude of policy arguments to support the manufacturer's liability without privity and without proof of negligence; many of these reflected arguments advanced by the *Henningsen* court. The core argument centered around the companion notions of enterprise liability and loss spreading.<sup>32</sup> Enterprise liability theory recognizes that an activity such as automobile manufacturing will necessarily introduce costs to society, including the cost represented by injuries caused by defectively manufactured automobiles. In other words, in an assembly line technology a certain number of automobiles inevitably will be defectively manufactured and a proportion of that number will cause injuries which should be seen as social costs. Enterprise liability theorists argue that these costs ought to be borne by the parties who benefit from the activity, automobile manufacturing. Otherwise the activity of automobile manufacturing in effect will be subsidized by whoever does bear these costs,

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<sup>29</sup> See Prosser, *supra* note 2. Many other articles to similar effect are cited in *id.* at 793 n.9; Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501, 517 n.99 (1964).

<sup>30</sup> Milling, *Henningsen and the Pre-Delivery Inspection and Conditioning Schedule*, 16 RUTGERS L. REV. 559, 567 (1962).

<sup>31</sup> *Id.* See also Kessler, *supra* note 14, at 895.

<sup>32</sup> The best exposition of these theories can be found in Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965). See also Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Products Cases*, 18 STAN. L. REV. 974, 1004-12 (1966); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

and the market mechanisms for determining what goods and services are produced and in what quantities will not work properly. The prices of new cars will be less than the total costs of producing them and accordingly some people will purchase cars when their marginal utility is less than the new cost. In short, too many cars will be manufactured and sold.<sup>33</sup> The goal of ensuring that the cost of automobile manufacturing is borne by those who benefit can best be achieved, enterprise liability theorists contend, by charging the costs attributable to defective automobiles in the first instance to the manufacturers who will then pass them on to consumers in the form of higher prices.<sup>34</sup> The enterprise liability argument is essentially equivalent in its result, therefore, to a loss spreading argument which asserts that manufacturers are best able to insure against injuries caused by defective products and then spread the cost of the insurance among all users through higher prices. The desirability of promoting care in the manufacture of automobiles has also been advanced as a justification for strict liability.<sup>35</sup> It is contended that manufacturers could adopt more safety measures than they have to guard against negligence liability, and that they would be induced to do so if they were liable for defective products regardless of negligence. This argument assumes, at least implicitly, that frequently an injured consumer is barred from remedy because of an inability to prove negligence even though the manufacturer could have prevented the defect from occurring. Many other arguments have been advanced in support of strict liability.<sup>36</sup>

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<sup>33</sup> See Calabresi, *supra* note 32, for a fuller explanation of this rather sophisticated argument.

Enterprise liability theorists would not deny the possible desirability of subsidizing a particular activity for political reasons. Thus, the various federal and state highway programs may be a form of subsidy to the activity of automobile manufacturing (or at least truck manufacturing). The theorists would insist that the political decision be made overtly, however, and should not be hidden in jungle-made rules concerning the allocation of losses arising out of an automobile accident.

<sup>34</sup> The goals of the enterprise liability theorists, and to a large extent the goals of the loss spreaders as well, could be attained if automobile owners could be relied upon to purchase extensive private insurance to cover the risk of injuries attributable to manufacturing defects and if the price of automobiles were lower to reflect this individual cost imposed upon the consumer. There are, however, obvious difficulties in relying on the consumer to protect himself through insurance. See notes 55-56 *infra* and accompanying text. Moreover, automobile manufacturers are already liable for many, and perhaps most, injuries caused by defects in manufacture. Since the manufacturers reflect the costs of that liability in their prices, a consumer will be paying twice for the same protection. The actual costs of owning an automobile will therefore exceed the true costs attributable to that activity.

<sup>35</sup> *E.g.*, Speidel, *supra* note 9, at 809-13.

<sup>36</sup> One argument is based on protection of the consumer's expectations. It is argued that by placing a product on the market, and advertising it, the manufacturer induces an expectation by the purchaser that it will be

In the period since *Henningsen* there has been born still a third theory an injured consumer can use against the manufacturer—strict liability in tort. The theory first saw the light of a majority opinion in 1962 with the California Supreme Court's decision in *Greenman v. Yuba Power Products, Incorporated*.<sup>37</sup> Two years later the same court applied the theory to an automobile case,<sup>38</sup> and since then several other states have done likewise.<sup>39</sup> Basically, strict liability in tort is similar to the warranty theory of *Henningsen*: the manufacturer is liable, without proof of negligence, for injuries caused by his defective products. The liability is in tort, however, and not in contract. Much has been written in the past two years about just what differences exist between the two theories. The promoters of strict liability in tort seem to rest principally on two advantages, from a plaintiff's point of view, of their theory over a *Henningsen* based warranty theory.<sup>40</sup> The first advantage concerns the warranty defenses based on a lack of privity and the disclaimer of liability clause. Despite *Henningsen*, these defenses are still advanced in many jurisdictions against claims based in warranty. In tort, it is said, the existence of a disclaimer is "immaterial,"<sup>41</sup> and lack of privity has not been recog-

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suitable and safe for ordinary use. If that expectation is defeated, it matters little to the purchaser that the manufacturer was not negligent. Another argument stresses avoidance of a multiplicity of suits. It is suggested that a manufacturer can be held responsible eventually through a series of breach of warranty actions, with the purchaser suing the retailer, the retailer suing the jobber, and the jobber suing the manufacturer. It is much more efficient simply to allow the purchaser to sue the manufacturer in the first instance. Much of the current support for strict liability is also based on a desire to compensate the injured plaintiff, who if deprived of a cause of action will suffer personally a severe economic dislocation. For further exposition of these and other arguments, see Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1963); Speidel, *supra* note 9; Prosser, *supra* note 5.

<sup>37</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The opinion was written by Traynor who, with his usual foresight, had proposed the theory 18 years earlier in a concurring opinion. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

<sup>38</sup> *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). This opinion was also written by Traynor.

<sup>39</sup> *E.g.*, *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965). The American Law Institute has incorporated the strict liability in tort theory in RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>40</sup> There have been several law review articles written recently comparing the relative merits of imposing strict liability on a *Henningsen* based warranty theory and on a strict liability in tort theory. *E.g.*, Prosser, *supra* note 5; Speidel, *supra* note 9; Franklin, *supra* note 32; Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965).

<sup>41</sup> *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

nized as a valid defense since the decision in *MacPherson*. The second advantage concerns the historical condition on a cause of action for breach of warranty that the buyer notify the seller of any breach within a reasonable time after its discovery. This rule is recognized today and it is included in the Uniform Commercial Code.<sup>42</sup> It is contended that the rule is a "trap" for the consumer, who is not versed in commercial law and therefore is unaware of the notice requirement.<sup>43</sup> Tort law has not developed a counterpart principle and consequently a strict liability in tort theory is a means of obviating the notice "trap."

As with *MacPherson* based negligence liability, however, doubt has arisen whether all types of injury are compensable in strict liability in tort. In *Seeley v. White Motor Company*,<sup>44</sup> another opinion by Justice Traynor, the plaintiff was denied recovery under a strict liability in tort theory for the payments on a new truck and for profits lost in his business because he was unable to make normal use of the truck. Justice Traynor argued that tort law existed to deal with the "distinct problem of physical injuries," while sales law, including warranty, had "been articulated to govern the economic relations between suppliers and consumers of goods."<sup>45</sup> Consequently, remedies like those sought in *Seely* ought to be regulated only by sales law. In connection with another part of the case, Justice Traynor stated that physical damage to a vehicle occurring in a defect caused accident would be compensable in strict liability in tort, because such physical damage is so like personal injury "that there is no reason to distinguish them."<sup>46</sup> Not all courts and commentators have been receptive to Justice Traynor's limitation on the types of injury compensable under a strict liability in tort theory,<sup>47</sup> however; and the status of this limitation on the types of injury compensable under either a negligence or a strict liability in tort theory remains unclear.

To summarize, judging from the leading cases and commentators, when an automobile purchaser suffers injury caused by a defect in his vehicle, he may have three different legal theories on which to base a cause of action against the manufacturer: negligence under

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<sup>42</sup> UNIFORM COMMERCIAL CODE § 2-607 (3) (2).

<sup>43</sup> Prosser, *supra* note 5, at 1130-31.

<sup>44</sup> 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

<sup>45</sup> *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21. Traynor has expounded this theory at greater length in Traynor, *supra* note 9.

<sup>46</sup> *Seely v. White Motor Co.*, 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965).

<sup>47</sup> *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965). Franklin, *supra* note 32; Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966). One recent case has supported Traynor's limitation on the scope of tort theories. *Inglis v. American Motors Corp.*, 30 Ohio Op. 2d 181, 197 N.E.2d 921 (1964).

*MacPherson*, breach of warranty, and strict liability in tort. The latter two theories are supposed to have the principal advantage that the injured purchaser need not demonstrate negligence in the manufacture of the automobile. Overriding all these theories, however, is the manufacturer's disclaimer of liability, which if read and applied literally, would avoid all types of liability.

Disclaimers of or other limitations on liability which would otherwise attach to a transaction have historically been upheld in the name of freedom of contract. Although an implied warranty of merchantability is attached to most sales of goods in part because courts and legislatures have believed that the seller *should* guarantee the quality of his goods, it is usually recognized that this generalization does not apply in every case. In some circumstances it makes more sense for the buyer to bear the risk that the goods are inferior, a risk allocation that can be reflected in lower prices.<sup>48</sup> Freedom to include a disclaimer in the contract is allowed to permit decision by the persons most likely to know whether a particular transaction is one in which ordinary liabilities should attach, namely the parties to the transaction. A similar argument could be used to justify disclaimers of ordinary negligence liability since the possibility of ordinary negligence is often actuarially measurable and consequently can be reflected in the price.<sup>49</sup>

For many years it has been argued that this justification for upholding disclaimers does not necessarily apply if the buyer is a consumer. Consumers have neither the technical ability nor the inclination properly to evaluate the various risks that need to be allocated between buyer and seller in a sale of goods. In the sale of an automobile, for example, most purchasers simply cannot evaluate, monetarily or in any other way, the risks they assume if the seller disclaims all liability as to the quality of the vehicle. Moreover, consumers are rarely afforded an opportunity to bargain over who should assume the various risks involved in a sale, since most sellers of consumer goods use standardized form contracts which leave at most only a few terms to be negotiated at the time

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<sup>48</sup> Consider, for example, the sale between two manufacturers of a used production machine. If the seller were not able to pass the risks concerning the quality of the machine to the buyer, the seller may not even be willing to enter into the sale; he would rather scrap the used equipment. The buyer, on the other hand, is willing to gamble, presumably in return for a reduction in price, that the used machine is still usable profitably. Thus, if disclaimers were not allowed, the sale may not even take place.

For a more comprehensive discussion of theoretical justifications for disclaimers, see Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 325-28 (1963). See generally Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936); *id.* 37 COLUM. L. REV. 341 (1937).

<sup>49</sup> Thus, a few courts, in other contexts, have upheld disclaimers of negligence liability. *E.g.*, *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 ILL. 2d 436, 155 N.E.2d 545 (1959); *Ciofalo v. Vic. Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961).

of sale. In the case of automobiles those terms are generally price and payment terms. Thus, it is argued, the consumer does not have the necessary knowledge to evaluate the risks he assumes nor the ability to bargain about them. Accordingly, the usual justification for freedom of contract does not apply to the consumer transaction.<sup>50</sup>

Since freedom of contract should not be relied upon to supply the terms of the contract, commentators often contend that in consumer sales the allocation of the risks related to the quality of the goods ought to be determined solely in light of social policy. Having reached that position, they have no difficulty in deciding that automobile manufacturers should bear the responsibility for all injury, or at least injury to person and tangible property which is caused by a defect in their product. The reasons cited for this conclusion are basically those advanced in support of the *Henningesen* decision. If negligence by the manufacturer can be established, the case for ignoring the disclaimer and holding the manufacturer liable is said to be even stronger, for a contrary result would positively encourage carelessness as the cheaper manufacturing method.<sup>51</sup>

A few commentators have questioned some of this analysis. They concede that most consumers in fact exercise little freedom of choice with respect to disclaimers of liability but argue that this is largely due to the average consumer's unawareness that buried in the fine print of the form contract is a disclaimer. Something can be done to overcome this barrier to the exercise of free choice; it can be made a condition of the disclaimer's validity that manufacturers make bona fide efforts to convey notice of any disclaimer of liability clause. If notice of the disclaimer is conveyed to consumers, it is argued that they would have some choice. They can decide not to buy the product if it can be bought only with a disclaimer. With regard to many products, including automobiles, a consumer can bargain about price. Moreover, in a competitive industry (e.g., automotive), to some extent one ought to be able to rely on the forces of competition to ensure that the price reflects the risks the manufacturer avoids through the disclaimer clause. Indeed, insisting on notice may effectively legislate against disclaimer clauses, for the manufacturers may be reluctant in effect to advertise their unwillingness to stand behind their products. With notice of the disclaimer the consumer can also take steps to protect himself in other ways from the risks he assumes. In the case of automobiles a consumer could purchase collision, personal liability, and medical insurance. Although such insurance will not afford a consumer quite as much protection as

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<sup>50</sup> See, e.g., Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>51</sup> Franklin, *supra* note 32, at 1004-12.



he would have if there were no disclaimer (for example, the insurance would not pay for the consumer's pain and suffering as a result of a defect caused accident), certainly it would supply a substantial degree of protection.<sup>52</sup>

In addition to arguing that some real freedom of choice for the consumer can be ensured by requiring that the manufacturers convey notice of any disclaimers contained in their form contracts, these commentators also doubt the ability of courts, legislators, and legal scholars to arrive at a solution to the defect caused injury problem that is necessarily wiser than the one dictated in the form contract. They argue that those who would negate the disclaimer through strict liability base their argument for the imposition of strict liability on many unproven assumptions. For example, some of these commentators contend that insisting the manufacturer assume liability for injuries caused by defects in its product will not necessarily induce greater care in production. They suggest that a manufacturer's concern with his reputation may be more than sufficient to induce it to adopt any reasonable safety measure, and this may be true even if the manufacturer is permitted to disclaim liability for negligence.<sup>53</sup> After all, disclaimers of negligence liability have been allowed in some areas without visibly disastrous consequences.<sup>54</sup> And nobody argues against products liability insurance on the ground that it removes the incentive to be careful. Furthermore, the wide availability of private insurance permits a substantial degree of loss spreading—perhaps the principal goal of those who advocate strict liability—even with a valid disclaimer clause. Commentators have discussed at great length the relative efficiencies of spreading the losses attributable to defective products by the imposition of strict liability and by reliance on private insurance.<sup>55</sup> Arguments for the efficiency of spreading the losses through the manufacturer stress avoidance of the "start-up" costs accompanying private insurance, such as salesmen's commissions on millions of policies. It is also claimed that loss spreading through strict liability is more fail safe: it does not depend on the sometimes unreliable consumer taking the initiative to protect himself by obtaining insurance. In considering

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<sup>52</sup> Commentators placing great emphasis on the importance of notice include: Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. IND. & COM. L. REV. 285 (1963). Although limiting himself to a discussion of the proper interpretation of the UCC, Hawkland also seems impressed with this approach. Hawkland, *Limitation of Warranty Under the Uniform Commercial Code*, 11 HOWARD L.J. 28 (1965).

<sup>53</sup> Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

<sup>54</sup> See note 49 *supra*.

<sup>55</sup> E.g., Franklin, *supra* note 32, at 1004-12.

relative efficiencies, however, it is necessary to take account of some of the costs of imposing strict liability on the manufacturers. For example, there is concern about the increasing number of fraudulent claims being asserted against manufacturers, that is, claims for injuries assertedly caused by defects but in fact caused in some other way, usually through the injured person's negligence.<sup>56</sup> Certainly no one will argue that our jury system filters out all of these fraudulent claims, not to mention the inefficiency represented by the litigation expenses in defending against them. Private insurance better guards against this misallocation of resources, for under many policies the cause of injury is unrelated to recovery.

Thus, these commentators contend that the various arguments for the imposition of strict liability or negligence liability irrespective of the existence of a disclaimer rest on a number of imponderables about how the world really works and that the empirical data needed to evaluate these arguments are not generally available. The information needed to arrive at intelligent answers (the "input") simply is unavailable, particularly to courts, and the courts have not established a workable system for learning the consequences of the decisions they reach (the "feedback"). A safer approach, these commentators suggest, would be to insure that freedom of choice can be exercised as much as possible by requiring sellers to give notice of the provisions contained in their standardized form contracts. After requiring notice, however, courts should be strongly biased towards enforcing the contract provisions as written, for they are in no position to evaluate the consequences of deviating from them. As Macaulay has written with regard to the standardized provisions on the back of today's credit cards:

The input and feedback difficulties I have described prompt me to counsel caution in regulating in ways far removed from transactional policy. As long as we leave the individual with a fair and realistic chance to protect himself, at least some of the errors of a generally haphazard approach to facts about problems and consequence of solutions may not plague us as much as when we remove this safety valve. From this standpoint we are safest when our legal standard asks whether the people in question know about an obligation or have a good reason for not knowing, somewhat less safe when we set up rules designed to de-

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<sup>56</sup> Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

Jury verdicts for larger amounts than needed fully to compensate the injured party must also enter into an evaluation of relative efficiencies. Although perhaps not particularly relevant to the automobile industry, the extra capital required to finance a system of strict liability may discourage new entrepreneurs from entering into a particular industry and this furnishes another argument for the limited enforcement of disclaimers. See Speidel, *supra* note 9, at 841-51.

fine arbitrarily when fair warning is given, and in the most trouble when we begin imposing absolute liability blindly.<sup>57</sup>

The Uniform Commercial Code is also relevant to the contemporary theoretical status of the disclaimer. Automobiles are, of course, movable goods and contracts for their sale are governed by article 2.<sup>58</sup> Logically, therefore, even the validity of disclaimers of tort liability, which are, after all, contract provisions, and certainly the validity of disclaimers of warranty liability, should be determined by reference to the Code.<sup>59</sup>

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<sup>57</sup> Macaulay, *supra* note 52, at 1119-20.

<sup>58</sup> UNIFORM COMMERCIAL CODE §§ 2-102, -105(1).

<sup>59</sup> One significant commentator, Marc Franklin, has recently argued that the Uniform Commercial Code not only should govern the validity of all disclaimers of liability but also should be viewed as preempting most of the area of products liability. Franklin points out that the UCC contains extensive provisions which were obviously drafted with products liability disputes in mind. By and large these provisions concern suits based in warranty. He then asserts that the draftsmen intended the UCC to be the exclusive regulation of products liability litigation in which the plaintiff does not allege negligence. Accordingly, because of "the statutory preeminence of the Code," suits based on strict liability can be litigated only on theories provided for in the UCC, thereby eliminating Traynor's strict liability in tort theory. It would be senseless to conclude otherwise, Franklin argues, for then there would exist UCC sanctioned liability under certain conditions while tort law provided essentially the same remedy without those conditions. See Franklin, *supra* note 32.

There is good reason to question Franklin's thesis. It is just not clear that the UCC was intended to be preemptive. Indeed, § 1-103 would seem to indicate just the opposite. It provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Comment 3 to this provision assures us that the failure to mention specific negligence or strict liability in tort is not conclusive. It states that the "listing . . . is merely illustrative; no listing could be exhaustive." In addition, it may not be true that strict liability in tort, if it exists at all, necessarily provides the same remedy as warranty theories under the UCC. One obvious potential difference may lie in Traynor's theory that only certain types of injury are compensable on a strict liability in tort theory. Moreover, other provisions of the UCC seemingly provide a *comprehensive* regulatory scheme of a problem area, yet it is generally assumed that relevant legal principles continue to coexist outside of the UCC. For example, the UCC goes to some length to prescribe rules regarding the formation of a contract by offer and acceptance and these rules appear to be quite liberal and provide for formation in situations where pre-UCC law would not. Most would agree, nevertheless, that the principle of promissory estoppel, expounded in RESTATEMENT OF CONTRACTS § 90 (1932) but not embodied in the UCC, can be resorted to even if the UCC does not permit the finding of a contract. Finally, there can be little doubt that the trend of decisions is against Franklin; despite the widespread adoption of the UCC, more and more courts are adopting Traynor's strict liability in tort approach, thereby circumventing the UCC in precisely the situations Franklin would say they should not. See Prosser, *supra* note 2.

Even if the UCC does not preclude resort to strict liability in tort or

There are no provisions in article 2 dealing specifically with disclaimers of tort liability.<sup>60</sup> On the other hand, the Code has several provisions dealing specifically with disclaimers of warranty liability. To over-generalize, one section seems to validate clauses disclaiming all implied warranty liability, while another section partially invalidates clauses which only limit the remedies available upon a breach of warranty.<sup>61</sup> The validity of disclaimers of both tort and contract liability is subject, however, to the Code's section 2-302, which authorizes a court to invalidate a contract clause it finds "to have been unconscionable at the time it was made . . . ." What makes a clause "unconscionable" is left very unclear by the

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negligence theories, it may be that it does exclusively govern the validity of disclaimers of that type of liability. Although tort liabilities arise more or less as a function of the status of the manufacturer and injured consumer, and exist irrespective of any contract provisions between them, the disclaimer is exclusively a result of contract—there would be no disclaimer absent a contract provision containing one—and it is a contract concerning movable goods. In other words, though Franklin is probably incorrect in assuming that the UCC precludes development of a strict liability in tort theory of recovery, he would be on sounder ground if he argued that the UCC preempts the regulation of disclaimers.

<sup>60</sup> Section 1-102(3), a general introductory section, provides that "obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement," but since the act nowhere prescribes the tort liability with which we are concerned, this provision has dubious applicability to the automobile disclaimer.

<sup>61</sup> Section 2-316(2) requires disclaimers of implied warranties of merchantability to be in writing, to be "conspicuous," and to mention the word merchantability. Disclaimers of implied warranties of fitness must be in writing and conspicuous. The implication of this section is that a disclaimer satisfying these conditions is enforceable. Section 2-719 applies to clauses which only limit the remedies available upon breach and do not disclaim liability altogether. Subsection (3) provides: "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable . . ." The incongruity of enforcing total disclaimers of liability but invalidating partial disclaimers has been noted by several commentators. *E.g.*, Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 *YALE L.J.* 199, 282-83 (1963). The resolution of the incongruity may be found in the application of § 2-302, the general unconscionability section, to disclaimers even if they comply with the conditions of § 2-316(2). See Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 *U. PA. L. REV.* 401 (1961).

The distinction drawn in the UCC between disclaimers of warranty liability and limitations on the remedies available upon breach has obvious implications for the theoretical validity of the automobile disclaimer. In the disclaimer paragraph attached to the end of each new car warranty, the manufacturers disclaim all implied warranties in a manner complying with the conditions contained in § 2-316(2). Another part of the new car warranty, however, limits the remedies available for breach of the express warranty to repair or replacement of defective parts. Section 2-719(3) would seem to render this limitation unconscionable insofar as it excludes remedies for injury to the person. Consequently, if personal injury is caused by a defective part before the express warranty expires—that is, within the mileage and time limitations on the express warranty—a purchaser has a persuasive argument for recovery under the UCC.

Code, perhaps purposely so.<sup>62</sup> It is unnecessary for purposes of this article to discuss these Code provisions in detail, for, as will be seen, the Code has played almost no role in the settlement of automobile products liability disputes.<sup>63</sup>

In summary, therefore, the theoretical status of the current automobile disclaimer clause is unclear. Almost everybody agrees that to be valid some notice of the disclaimer must be provided the purchaser. There is debate whether policy considerations should determine the disclaimer's validity if notice is given. Assuming they should, there is debate again about what those considerations indicate, although the majority of commentators argue that disclaimer in consumer sales should be invalidated on substantive grounds, particularly disclaimers of tort liability. The Uniform Commercial Code would seem to apply to all aspects of the automobile disclaimer, but it has rarely affected actual dispute settlement.

### III. THE SITUATION TODAY

I shall now attempt to describe the manners in which automobile products liability disputes are resolved in fact today. It is always difficult to obtain an accurate picture of the ways in which a category of legal disputes is settled. Published (usually appellate) court opinions are the most obvious source of data. But appellate court decisions often concern such issues as the sufficiency of the pleadings or the jury instructions. The actual final resolution of the dispute which is the subject of the litigation may be at the trial level and unreported. We often assume such resolutions are consistent with the implications of the reported appellate decisions. Evidence from other areas of the law suggests, however, that this assumption is not always correct. The assumption will be correct even less often if the further assumption is made that the leading cases are representative of reported cases generally. Moreover, the vast majority of automobile products liability disputes never get to court; they are instead settled privately between the parties. This informal dispute settlement is even less visible, and for that reason may follow even less the guidelines established by the appellate courts.<sup>64</sup>

I have consulted four different sources of information in my effort to discover the true pattern of automobile products liability disputes settlement. I have, of course, examined the reported cases. In an effort to avoid the fallacy of generalizing just from the

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<sup>62</sup> The meaning of § 2-302 has been discussed by several commentators. E.g., Cudaby, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Hawkland, *supra* note 52; Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843 (1960); Note, *supra* note 61.

<sup>63</sup> See note 152 *infra* and accompanying text.

<sup>64</sup> See authorities cited in note 4 *supra*.

leading cases, I have attempted to discover all cases reported since the decision in *Henningsen* and before May 1, 1967. To make this task somewhat easier, I have restricted myself to cases concerning alleged defects in new automobiles and have excluded cases concerning defects in trucks, tractors, and other types of motor vehicles. This restriction may have infirmities. There are a number of significant leading cases of the latter types which no doubt will affect the settlement of disputes concerning automobiles.<sup>65</sup> Moreover, because certain facets of products liability disputes concerning trucks and tractors differ from disputes concerning automobiles, it should not be assumed my findings apply to vehicles other than automobiles.<sup>66</sup> I have only looked at cases decided since *Henningsen* because of the importance of that decision and because only fairly recent cases can indicate the pattern of dispute resolution today. Given these restrictions I have uncovered 94 cases involving new automobiles, 83 of which were deemed to have been decided on grounds possibly relevant to the pattern of dispute resolution.<sup>67</sup> No claim is made that this number constitutes the entire body of reported cases. I believe, though, that it covers most of the cases. Furthermore, there is no reason to suppose that any cases missed would suggest a substantially different pattern of dispute resolution. In other words, there is no reason to suspect that my collection of reported automobile cases is unrepresentative of all cases.

I have also written letters to a small number of attorneys who represented parties in reported cases. The attorneys were asked certain questions concerning the informal aspects of a litigated case which might affect the final dispute resolution. I have also inter-

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<sup>65</sup> *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966). Of course, there are also a number of cases completely outside of the motor vehicle area which will no doubt influence decisions in cases involving automobiles. *E.g.*, *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the case involving a defective home carpentry device in which Traynor first applied the strict liability in tort theory, is an obvious example of such a case.

<sup>66</sup> Thus, most of the cases dealing with recovery of damages for commercial loss tend to involve trucks and tractors, probably because these vehicles are more often purchased for commercial purposes. *See, e.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965).

<sup>67</sup> The cases considered irrelevant were generally decided on procedural grounds. Two cases were categorized as irrelevant because the report revealed only that the plaintiff sought "damages because of alleged defects" in the vehicle. Consequently, it was not possible to categorize these cases by the type of injury sustained. *Friedman v. Ford Motor Co.*, 179 So. 2d 371 (Fla. App. 1965); *Brown v. Chrysler Corp.*, 112 Ga. App. 22, 143 S.E.2d 575 (1965).

All the cases used in this study, including the cases deemed irrelevant, are listed in the Appendix according to the type of injury suffered.

viewed numerous employees of the three major domestic automobile manufacturers, as well as employees of a number of dealers in southern Wisconsin, to determine the pattern of informal, out-of-court resolutions of automobile products liability disputes. Finally, I have conducted 300 interviews of recent Wisconsin purchasers of new automobiles. Among other things, these purchasers were asked to describe any occasion on which they had to request a remedy other than repair or replacement of parts defective in manufacture.<sup>68</sup>

Upon examination of my data, I have concluded that automobile products liability disputes must be categorized according to the type of injury allegedly suffered by the complaining party: the patterns of dispute resolution differ substantially according to the type of injury. My subsequent discussion will be categorized, therefore, into disputes in which: (1) compensation is sought for personal injuries allegedly caused by a defective automobile, (2) compensation is sought for property damage to the automobile as a result of an accident (as that term would be used by a layman) allegedly caused by a defect, (3) repairs are sought of a part not defective in manufacture but damaged by other parts which are defectively manufactured, (4) rescission of the sale and return of the purchase price, or alternatively, compensation is sought for the diminution in the automobile's value because one or more alleged defects exist in the vehicle, and (5) miscellaneous remedies are sought, including compensation for commercial loss. There are a number of cases in which the plaintiff sought recovery both for personal injury and damage to the automobile as a result of an accident. Since in these cases the courts have not distinguished between the two types of injury, I have categorized them exclusively as personal injury cases. There are a few other cases in which the plaintiff sought a remedy in one of the major categories and, in addition, sought some miscellaneous remedy, such as recovery of towing costs. These cases have been categorized under the major category and will also be noted later for the miscellaneous remedy sought.

#### A. *Personal Injury*

Forty-five of the cases categorized involved compensation for personal injuries. The following table groups these cases according to the substantive theories advanced by the plaintiffs and the treatment given the disclaimer of liability clause by the court.<sup>69</sup> The theories include: (1) negligence based on *MacPherson*, (2) breach

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<sup>68</sup> The method of selecting the lawyers to whom letters were sent and the purchasers who were interviewed is described at the point in the text at which the results obtained from the letters and interviews are reported.

<sup>69</sup> In the subsequent discussion, reference to the disclaimer of liability clause means the limitation on the remedies available upon breach of the express warranty as well as the disclaimer of implied warranties and other obligations.

of implied warranty, typically of merchantability or fitness, (3) breach of express warranty, usually either one found in advertising or in the manufacturer's limited guarantee against defective materials and workmanship, (4) strict liability in tort, and (5) miscellaneous. A case was placed in a category only if the plaintiff was still pursuing that theory in the court which wrote the reported opinion. No doubt in many cases the plaintiff pursued theories in the trial court which were abandoned on appeal, and to that extent the table is not an accurate reflection of the theories actually used. Because suits are often litigated on more than one theory, the totals exceed 45, which is the number of cases categorized. The treatments of the disclaimer are grouped under three headings: (1) disclaimer clause not mentioned in the opinion, (2) disclaimer clause mentioned in the opinion but on some ground circumvented or overcome by the court, or found unnecessary to consider because the case was decided on other grounds, and (3) disclaimer enforced as written to bar the lawsuit.

TABLE 1

## Treatment of Disclaimers by Courts in Personal Injury Lawsuits

Substantive Theory	TOTAL	Disclaimer Not Mentioned	Disclaimer Mentioned But Circumvented	Disclaimer Upheld
Negligence	34	33	0	1
Implied warranty	19	17	2	0
Express warranty	9	7	1	1
Strict liability in tort	7	5	2	0
Miscellaneous <sup>70</sup>	1	1	0	0

From this table, two conclusions appear obvious. First, nearly three-fourths of the cases (34 out of 45) were litigated at least in part on a negligence theory based on *MacPherson*. Indeed, in 17 of the cases, over one-third, negligence was the only theory cited. Second, in very few cases was the disclaimer of liability clause even discussed.<sup>71</sup> In only seven opinions was the disclaimer even mentioned and in only two was it upheld.<sup>72</sup> These

<sup>70</sup> In this instance, the case was litigated on a tort misrepresentation theory. *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App. 1965).

<sup>71</sup> This basic finding—that a substantial portion of the personal injury cases are litigated in negligence—remains true even in the last year or two. Thus, negligence was at least one of the theories advanced in 7 of the 10 cases decided in 1966 that I have discovered. In the years 1965 and 1966, negligence was advanced in 12 out of 18 cases.

<sup>72</sup> One of these cases upheld the disclaimer to bar a cause of action based on express warranty against the dealer. At the same time the court sustained a verdict against the dealer based on negligence in refusing to repair the vehicle sometime prior to the accident. *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App. 1965). The other case upholding the



statistics do not conclusively show that defendants almost never rely on the disclaimer paragraph or that courts even less often bar suits on that ground. In many cases the court undoubtedly found it unnecessary to discuss the disclaimer, although it was raised, because it ruled for the manufacturer or dealer on some other ground or because it considered the defense so lacking in merit as not to require mention. Other cases concerned a demurrer to the complaint on one specific ground, such as lack of privity, and thus it was not appropriate to discuss the disclaimer clause. Still, it is probably safe to conclude, on the basis of the table, that in personal injury suits manufacturers and dealers do not rely heavily on the disclaimer as a defense and courts rarely bar suits because of the disclaimer. The nonuse of the disclaimer appears not only with respect to tort theories but also with respect to warranty theories, where it is used with only slightly greater frequency.<sup>73</sup>

One inference that might be drawn from these statistics is that plaintiffs are relying heavily on a negligence theory because it is commonly believed that disclaimers of tort liability are more likely invalid than disclaimers of warranty liability. The relatively few cases litigated in strict liability in tort would be attributed to the "newness" of that theory. This conclusion would suggest that, although rarely litigated, disclaimers do have a substantial effect on the resolution of automobile products liability disputes by inducing plaintiffs to frame their cause of action in a particular manner.<sup>74</sup> Alternatively, one might reach a similar conclusion by

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disclaimer applied the clause to bar even an action in negligence. *Williams v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964). The case has been criticized, has not been followed by any other court, and must be viewed as an aberration. See Lorensen, *Product Liability and Disclaimers in West Virginia*, 67 W. VA. L. REV. 291 (1965).

<sup>73</sup> The defense of lack of privity is apparently interposed more often in cases litigated in implied warranty. The privity defense was mentioned in 13 of the 19 cases in which an implied warranty theory was advanced and actually sustained in six cases. Most of the cases in which the privity defense was sustained occurred early in the period studied. Of the two recent cases sustaining the defense, one has apparently been overruled recently, and in the other the court noted that the UNIFORM COMMERCIAL CODE, § 2-318, would require a different result when it became effective. *Johnson v. General Motors Corp.*, 243 F. Supp. 694 (E.D. Tenn. 1965), apparently overruled in *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W. 2d 240 (1966); *Tomle v. New York Cent. R.R.*, 234 F. Supp. 101 (N.D. Ohio 1964).

<sup>74</sup> Similarly, it might be assumed that fear of the privity defense induces plaintiffs to rely heavily on a negligence theory. Because the privity defense is more discussed and sustained in the reported opinions, see note 71 *supra*, this assumption may be more plausible. Unfortunately, in the letters I sent to attorneys, which are discussed subsequently in the text, I neglected to ask about the role played by the threat of a privity defense in formulating strategy or in settlement negotiations. Nevertheless, I do not think it can be said that the privity defense represents an important barrier to recovery against a manufacturer. The frequency with which

inferring that, although rarely mentioned or upheld in opinions, disclaimers play a large role in settlement negotiations. Although it is not easy to determine with certainty what motivates plaintiffs to take certain actions, it does not appear either inference should be drawn in automobile cases. In letters sent to the attorneys for both plaintiff and defendant in several of the cases,<sup>75</sup> I asked generally what role the disclaimer played in their case. In particular the attorneys were asked with respect to both negligence and warranty theories whether the defendant ever advanced the disclaimer as a defense either formally in a pleading or brief or informally in the course of settlement negotiations. The responses suggest that the disclaimer clause is almost never advanced, formally or informally, as a defense to a negligence theory. The reasons cited were either that the disclaimer clause does not apply to negligence liability (although read literally it does)<sup>76</sup> or that, if raised, the disclaimer would surely be invalidated as against public policy. There seems to be a slightly greater propensity to advance the disclaimer against a warranty theory, although even here there is a surprising percentage of cases in which the disclaimer is not mentioned formally or informally. An attorney for one plaintiff did suggest that he avoided a warranty theory and relied solely on negligence in part because he feared the disclaimer. Even this attorney emphasized that he took this approach only after concluding with some confidence that he had sufficient evidence to get to the jury on the negligence theory.<sup>77</sup> And the responses of other attorneys indicated that the disclaimer played almost no role in their choice of theories.

A study of the cases and the attorneys' letters suggests a more likely reason for the large percentage of cases litigated on a negligence theory. It is commonly suggested by commentators;

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the privity defense has been sustained in the courts has declined in recent years. See note 73 *supra*. In my interviews with the legal staffs of the manufacturers, they reported that while originally they relied quite heavily on the privity defense in defending court actions, in recent years they have placed less reliance on the defense because they believe it will be sustained less often. Most importantly, as I report subsequently in the text, in most cases a plaintiff is required to adduce the same proof to get to the jury whether the case is litigated in warranty or negligence. Accordingly, there is no particular advantage to a plaintiff in suing on a warranty theory. Since the privity defense does not apply to a negligence theory, it is unlikely therefore that fear of a privity defense substantially affects dispute settlement.

<sup>75</sup> The attorneys to whom I sent letters were chosen on an arbitrary basis. They were picked simply because they represented parties in cases in which a possible reason for the plaintiff's or the defendant's litigation strategy was not suggested by the reported opinion. Consequently, the attorneys selected do not constitute a valid sample of all attorneys appearing in personal injury suits.

<sup>76</sup> See note 19 *supra* and accompanying text.

<sup>77</sup> Letter from Frank Scarborough, attorney for the plaintiff in *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963).

and some of the leading cases, that it is important for a plaintiff to have available a strict liability theory, either in contract or tort, because it is so difficult to establish that a manufacturing defect causing injury resulted from the manufacturer's negligence. Thus, it might be supposed that to establish negligence on the part of a manufacturer it would be necessary to prove that procedures not as well designed to discover defects as the prevailing procedures in the industry were employed in the production of the vehicle.<sup>78</sup> Under this supposition it would not suffice to argue that a proven manufacturing defect must have arisen from the negligence of somebody on the assembly line. It is impossible for the manufacturer to completely prevent defects due to employee negligence on the assembly line, and in any event the defect may not have been caused by negligence. Thus, a plaintiff would have to show that the manufacturer should have employed additional inspectors who would have been likely to have discovered the defect and corrected it. An alternative supposition would be that a plaintiff is required to associate a proven defect to the negligence of a specific person in the production process, an impossible burden for any plaintiff in this assembly line age.

As reasonable as these suppositions might seem, they do not represent reality. Prosser recently observed that if a plaintiff establishes in a negligence action that a product was defective at the time it left the manufacturer's possession and that the defect caused the plaintiff's injuries, "all trial lawyers know that he usually recovers in a negligence action against the manufacturer."<sup>79</sup> His assumption is that adequate proof of a defect and causation will prevent a directed verdict for the manufacturer, and that a jury, once it gets the case, will always rule for the plaintiff, at least on the issue of negligence in the manufacturing process. Certainly Prosser's conclusion is verified by the automobile cases studied here. If the part alleged to be defective was one which the automobile manufacturer actually produced, or if the defect related to the assembly of the various parts by the manufacturer, in none of the opinions studied was it held that there was insufficient evidence of negligence to get to the jury, and rarely is the point even discussed.<sup>80</sup> Interviews I have conducted with the

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<sup>78</sup> If the alleged defect in the vehicle is not attributed to an alleged mistake in the production line but rather to the design of the vehicle, the definition of negligence would obviously have to be somewhat different. See notes 94-99 *infra* and accompanying text.

<sup>79</sup> Prosser, *supra* note 2, at 842.

<sup>80</sup> A good example is *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962), *aff'd in part* 320 F.2d 130 (3d Cir. 1963), a case in which the plaintiff contended that he suffered personal injuries in an accident caused by a defective steering column. The briefs on appeal suggest that, although the defendant manufacturer vigorously contested the question whether the steering was defective at the time the vehicle left the factory, it did not seriously contend at either the trial or appellate level that (as-

legal staffs of the three major domestic automobile manufacturers revealed their belief that juries rarely rule against plaintiffs on the negligence issue, although juries might conclude that the accident was not caused by a manufacturing defect.

A considerable amount has been written about whether the doctrine of *res ipsa loquitur* justifies a finding of negligence in cases in which the part or assembly that proved defective was produced or assembled by the defendant manufacturer. It is said that *res ipsa* is not available to show negligence in a products liability case because the product has not been exclusively in defendant's control, and that certainly is, or at least was, hornbook law.<sup>81</sup> Nevertheless, *res ipsa* is ostensibly applied in many cases.<sup>82</sup> In the cases I have examined, the courts more often infer negligence directly from the proof of the defect without the aid of *res ipsa*.<sup>83</sup> One leading commentator has suggested that proof that due care had been used in manufacture should be sufficient to overcome this inference of negligence, whether derived directly or through the use of *res ipsa loquitur*.<sup>84</sup> Yet despite the frequency with which manufacturers offer such evidence,<sup>85</sup> I have not discovered a single automobile case of this type in which a verdict was explicitly directed for failure to prove negligence. And the research of other commentators suggests that such has generally been the case for all products.<sup>86</sup>

Somewhat different are cases in which the part alleged to be defective was produced by a supplier and simply assembled into the vehicle by the defendant automobile manufacturer. With regard to such parts it is sometimes held that the automobile manufacturer's only duty is to adopt a reasonable inspection procedure, and that reasonableness will be determined in light of prevailing industry standards. The only three cases in my survey in which the court held the plaintiff had not proved negligence

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suming the car was defective) the defect was not the product of negligence in the manufacturing process.

<sup>81</sup> C. GILLAM, *supra* note 10, at 150-60; Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 680-87 (1963). Cf. *Ford Motor Co. v. Fish*, 232 Ark. 270, 335 S.W.2d 713 (1960), *aff'd on second appeal* 233 Ark. 634, 346 S.W.2d 469 (1961).

<sup>82</sup> See Keeton, *supra* note 81, at 680-87; Comment, *supra* note 14, at 1362-68.

<sup>83</sup> E.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 260, 37 Cal. Rptr. 896, 898 (1964). See note 78 *supra*.

<sup>84</sup> Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1 (1951).

<sup>85</sup> In interviews with the manufacturers' legal staffs, I was told that evidence of due care in manufacture was often introduced. The purpose of introducing such evidence is principally to establish the unlikelihood that the vehicle contained a defect when it left the factory, and not to establish that, if a defect existed, it was not the product of negligence in the manufacturing process. The manufacturers rarely contest the latter point.

<sup>86</sup> Prosser, *supra* note 5, at 1115.

were of this type. Thus, in *Pabon v. Hackensack Auto Sales, Incorporated*,<sup>87</sup> a New Jersey case decided shortly after *Henningsen*, an individual ball bearing in a ball bearing assembly was proved to have been defective and to have caused serious personal injury. The bearing assembly had been manufactured by a large producer of bearings and had been sold to Ford Motor Company which incorporated it into the vehicle. The evidence indicated Ford could not have discovered the alleged defect in the individual bearing without dismantling the assembly and subjecting the bearings to self-destructive tests. In affirming a directed verdict on the negligence count, the court stated:

The manufacturer of an automobile, in purchasing "assembled" parts of an approved pattern and standard quality from another reputable manufacturer, is entitled to place considerable reliance upon the efficiency and care of the original maker, and need exercise only reasonable precaution by means of inspection to ascertain whether the assembled or already-manufactured parts have been properly constructed.<sup>88</sup>

While these cases suggest that the requirement of proving

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<sup>87</sup> 63 N.J. Super. 476, 164 A.2d 773 (1960). The other two cases are: *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961) (applying Alabama law); *Woolley v. Uebelhor*, 239 Md. 318, 211 A.2d 302 (1965). In *Cordle v. Renault, Inc.*, 361 F.2d 332 (6th Cir. 1966), the trial court directed a verdict for the defendant on a negligence count but permitted the jury to decide for the plaintiff on an implied warranty count. There was no explanation why the trial court felt a cause of action had been made out in implied warranty but not in negligence. The plaintiff did not appeal the verdict on the negligence count.

*Henningsen* itself may be another example of this type of case. Plaintiffs asserted that there was a defect somewhere in the steering mechanism and sought recovery both in negligence and implied warranty. Without giving any reason for its action, the trial court directed a verdict on the negligence count while sending the case to the jury on the warranty count. Record at 340a-341a, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Although plaintiffs appealed the directed verdict, the New Jersey Supreme Court found it unnecessary to consider the sufficiency of the proof as to negligence because of its affirmation of the verdict based on warranty. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 417, 161 A.2d 69, 102 (1960). One possible explanation for the trial judge's action stems from plaintiffs' failure to identify the specific part of the steering mechanism that allegedly was defective. Since several parts of the steering mechanism undoubtedly were produced by component manufacturers, and there was no proof pertaining to Chrysler Corporation's inspection procedures, the judge may have thought that the possibility there was only a duty to inspect with regard to the defective part required a directed verdict. Something like this theory seemed to be suggested in Chrysler's brief on appeal arguing against reversal of the negligence verdict. Brief for Chrysler Corporation at 44-46, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>88</sup> *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 492, 164 A.2d 773, 781 (1960). Although the court directed a verdict on the negligence count, on the basis of *Henningsen* the court sustained a cause of action in implied warranty.

negligence can pose a barrier to an injured plaintiff in a case involving a defective component, they must be read in light of other cases which have held that an assembler (the position occupied by the automobile manufacturers in these cases) is vicariously liable for the negligence of a component manufacturer, regardless of the inspection procedure used. Thus, in *Ford Motor Company v. Mathis*<sup>89</sup> the plaintiff was injured when an allegedly defective dimmer switch, manufactured by another company for Ford, caused the headlights to go out and, consequently, caused an accident. The court found Ford negligent, holding that since Ford held itself out as manufacturer it was responsible for the negligence of its component suppliers. The court relied on the original *Restatement of Torts* section 400 which stated that "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."<sup>90</sup> Similar results have been reached in several other jurisdictions.<sup>91</sup> Indeed the results in these cases are sufficiently numerous to induce one commentator to characterize them as representing a "modern trend."<sup>92</sup> In addition to these vicarious liability cases, it should be remembered that it is often possible for plaintiffs to get to a jury by offering sufficient proof of unreasonable inspection of a component part.<sup>93</sup>

A different proof of negligence problem arises when the plaintiff argues that the basic design of the automobile was defective and caused injury, rather than that the vehicle was aberrational—that is, not manufactured as it was designed. The number of cases which have been initiated claiming defective design has increased dramatically in recent years.<sup>94</sup> These cases present the courts with

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<sup>89</sup> 322 F.2d 367 (5th Cir. 1963) (applying Texas law).

<sup>90</sup> Comment c to this section provides that one who assembles parts manufactured by others into a finished product has a duty to inspect, but "he does not escape liability by so doing. He is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously defective condition which the . . . [assembler] could not discover after it was delivered." RESTATEMENT (SECOND) OF TORTS § 400 (1965) contains a similar provision.

<sup>91</sup> *Standard Motor Co. v. Blood*, 380 S.W.2d 651 (Tex. Civ. App. 1964) (alternative ground of decision); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Levitt v. Ford Motor Co.*, 28 Misc. 2d 740, 215 N.Y.S.2d 679 (1961); *Monahan v. Ford Motor Co.*, 231 N.Y.S.2d 187 (Sup. Ct. 1962); *Markel v. Spencer*, 5 App. Div. 2d 400, 171 N.Y.S.2d 770, *aff'd* 5 N.Y.2d 958, 157 N.E.2d 713, 184 N.Y.S.2d 835 (1958). Cf. *Shramek v. General Motors Corp.*, 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966). See generally Annot., 3 A.L.R.3d 1016 (1965).

<sup>92</sup> Comment, *supra* note 14, at 1359.

<sup>93</sup> See, e.g., *Standard Motor Co. v. Blood*, 380 S.W.2d 651 (Tex. Civ. App. 1964).

<sup>94</sup> Most of the cases have concerned the 1961 Pontiac Tempest, which is alleged to have a defective design of the front end main cross member causing the vehicle to become suspended on railroad tracks and the like, and the 1960-1963 Chevrolet Corvair, which is alleged to have a defective

a difficult problem, for to evaluate the design of an automobile the court not only must consider automotive engineering but also must make value judgments about the extent to which the design may subordinate safety to considerations of price, style, convenience, and several other factors.<sup>95</sup> One might expect that courts would in effect delegate such decisions to the automobile manufacturers, who presumably are more expert, by denying the existence of liability for defective design. To some extent, this approach has been taken; regardless of the theory of liability the courts often hold as a matter of law that a design is not defective or negligent, even though it is indisputable that another design would have prevented some injuries.<sup>96</sup> Some courts, however, have upheld the possibility of liability for defective design. For example, one court permitted the jury to decide whether liability existed for placing the gas tank in the trunk where escaping gas fumes could collect and explode.<sup>97</sup> And several cases involving the infamous 1960 to 1963 models of the Chevrolet Corvair, which is alleged to have had a defectively designed rear suspension system causing excessive handling difficulties, have been submitted to the

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rear suspension system causing handling difficulties. Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE U.L. REV. 181 nn.1 & 2 (1966). Other articles advocating court policing of the design of products are Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader, *Automobile Design: Evidence Catching Up With the Law*, 42 DENVER L. CENTER J. 32 (1965); Noel, *Manufacturer's Negligence of Design or Directions For Use of a Product*, 71 YALE L.J. 816 (1962).

<sup>95</sup> There is no law today imposing upon automobile manufacturers the obligation to design the safest car that they know how to design, irrespective of such factors as cost, style, or the appeal to the buying public. Without legislation, the courts have evolved certain standards of quality and safety that must be met by product manufacturers and distributors. If higher standards and obligations are to be imposed upon automobile manufacturers than are now required by court-evolved law, they must come from legislation enacted by the state legislatures or the Congress of the United States.

*Drummond v. General Motors Corp.*, 35 U.S.L.W. 2119 (Cal. Super. Ct. 1966). This opinion can be recommended generally for an excellent discussion of the difficulties in determining whether a particular design is "defective" or "negligent."

<sup>96</sup> There are five cases so holding in the cases in my collection. *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *General Motors Corp. v. Muncy*, 367 F.2d 493 (5th Cir. 1966); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963); *Drummond v. General Motors Corp.*, 35 U.S.L.W. 2119 (Cal. Super. Ct. 1966); *Muncy v. General Motors Corp.*, 357 S.W.2d 430 (Tex. Civ. App. 1962).

Until recently, nonliability seems to have been the general rule in design cases. The rationale at that time was often that a properly manufactured automobile was not inherently dangerous, even if defectively designed, and therefore such a vehicle did not qualify for the exception to the privity rule established in *MacPherson*. See C. GILLAM, *supra* note 10, at 104-10.

<sup>97</sup> *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961).

jury.<sup>98</sup> When a court does submit a design case to the jury, it will frame the issue in terms of the "defectiveness" of the design or in terms of the manufacturer's negligence in so designing an automobile. If the jury concludes safety has not been sufficiently taken into account in the design of the vehicle, presumably they will conclude either that the design is "defective" or that the manufacturer has been "negligent" in the design of the automobile. So far as can be ascertained, both determinations involve similar considerations. In a design case litigated on a strict liability theory the same determinations as would be made in a negligence case are made first by the judge and then by the jury, but under the rubric of "defectiveness" instead of negligence.<sup>99</sup>

The conclusion to be drawn, therefore, is that, contrary to popular belief, proof of negligence is not in most instances a significant barrier to recovery against the manufacturer on a *MacPherson* based negligence theory.<sup>100</sup> No doubt this conclusion in large part explains the high percentage of cases litigated on a negligence theory. The principal advantage a strict liability theory is assumed to offer a plaintiff is simply not a significant advantage.

All this is not to say, however, that a plaintiff in a personal injury case does not face serious proof problems. Proving the existence of a defect at the time the vehicle left the manufacturer's possession and proving that the defect proximately caused plaintiff's injuries has been very troublesome to plaintiffs. Indeed, of the 34 personal injury cases litigated on a negligence theory that were examined, 12 were decided for the manufacturer because of insufficient proof of a defect or causation, as compared with only 3 won for a failure to prove negligence. Yet proof of a defect

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<sup>98</sup> *E.g.*, *Dunn v. General Motors Corp.*, D. Okla. reported in *Wall Street Journal*, Nov. 21, 1966, at 3, col. 5. The jury returned a verdict for the manufacturer.

<sup>99</sup> This point is best illustrated by the large number of law review articles now appearing by commentators who accept eagerly strict liability theories but conclude that the problem now is to determine what products are "defective." *E.g.*, Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 *TEXAS L. REV.* 855 (1963); Prosser, *supra* note 2, at 807-14; Traynor, *supra* note 9.

One cannot escape the feeling that the problem of determining when a manufacturer is liable for personal injuries caused by the design of its automobile is largely past us. Given the obvious difficulties in having either courts or juries determine whether a particular design is "defective" or "negligent," it seems probable the courts will quickly look to the design standards established under the new Automobile Safety Law, 15 U.S.C. §§ 1381-1409 (Supp. 1967), and hold as a matter of law that any vehicle complying with those standards is not defectively or negligently designed. For a possibly different view, see Kessler, *supra* note 14, at 930.

<sup>100</sup> One instance not yet mentioned in the text in which proof of negligence may be a significant barrier to recovery is when the plaintiff sues just the selling dealer and not the manufacturer. See notes 122-23 *infra* and accompanying text.



and of causation are also requirements for a cause of action based on a strict liability theory, and 8 of the 36 strict liability theories advanced in the cases examined were rejected on just those grounds.

The *Henningsen* case itself is an excellent illustration of the proof problems facing a plaintiff when he contends an automobile is defective in the sense that a particular part is aberrational (as opposed to being "defectively" designed). It also suggests that, regardless of the liability theory advanced, determination of the evidence needed to get to the jury on the issues of defectiveness and causation is probably the most pressing contemporary issue in the area of automobile products liability. The Henningsens' automobile was so severely damaged in the accident that the only automotive expert who examined the vehicle, an insurance inspector, was unable to determine whether there had been any defect prior to the accident. On the basis of Mrs. Henningsen's description of the accident (that after she heard a noise, the steering wheel spun in her hands), the inspector testified that something must have gone "wrong from the steering wheel down to the front wheels." He did not, however, offer any opinion about what particular part had been defective. Chrysler was unable to offer definite proof of an alternative explanation of the accident. It had not learned that there would be a dispute until the lawsuit was filed two years after the accident and just before the statute of limitations expired. By that time the car could not be traced, so Chrysler's technicians were unable to examine the steering mechanism. Chrysler did discover that the hospital records where Mrs. Henningsen was admitted indicated that the steering wheel had slipped in her hands, and that the police records indicated some 95 feet of skid marks. In cross-examination, Chrysler's lawyers clearly suggested the possibility that the accident could have been caused by inattentive driving or by striking a rock or other foreign object on the highway.<sup>101</sup> Relying heavily on Mrs. Henningsen's testimony and the fact that the vehicle had been purchased only 10 days prior to the accident, the New Jersey Supreme Court held that there was sufficient evidence to justify an inference that something went wrong in the steering mechanism and therefore submission of the case to the jury.<sup>102</sup>

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<sup>101</sup> For a further description of the evidence at trial, and a recitation of some of the testimony, see Ashe, *So You're Going to Try a Products Liability Case*, 13 HASTINGS L.J. 66, 95-101 (1961); Schreiber, *The Henningsen Case—An Analysis From the Defense Viewpoint*, in ABA PROCEEDINGS, SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 205 (1965).

<sup>102</sup> The court also concluded that the testimony of the plaintiff's expert, although "not entitled to very much probative force," could not "be rejected as a matter of law." 32 N.J. at 411, 161 A.2d at 98.

A bus driver driving in the opposite lane at the time of accident testified that Mrs. Henningsen's car seemed to veer off at a 90 degree angle into the wall. This evidence was contradicted by police records which

There are other recent cases which have been submitted to the jury with only circumstantial evidence of a defect in the vehicle. For example, in another famous case, *Vandermark v. Ford Motor Company*,<sup>103</sup> plaintiff testified that his vehicle suddenly started pulling to the right, eventually going off the highway and striking a utility pole. The car had been driven only six weeks and 1500 miles. A driver behind the plaintiff testified that the tail lights came on before plaintiff began swerving and skidding and a police report indicated that there were skid marks on the highway. Largely on the basis of this testimony, an expert testified in response to a hypothetical question that the accident was caused by a failure in the piston in the master brake cylinder, a failure which caused the brakes to apply themselves. He further opined that this difficulty could have been caused by any of several defects, all of which plaintiff offered to show were attributable to the defendants, manufacturer and dealer. The trial judge nonsuited the plaintiff in part because there was no direct evidence of a specific defect; but the California Supreme Court reversed, holding that a rational inference of the existence of a defect could be drawn from the circumstantial evidence and accordingly that plaintiff could get to the jury on both negligence and strict liability in tort.<sup>104</sup>

*Vandermark* differs from *Henningsen* in that plaintiff's expert in the former case had an opinion concerning the specific part which became defective. Plaintiff's case did not rest simply on the assertion that "something must have gone wrong." *Vandermark* resembles *Henningsen*, on the other hand, in that no expert had examined the damaged vehicle to see if it was possible to show that some part must have been defective prior to the accident. The proof of a defect was purely circumstantial in both cases and rested on the plaintiff's recollection of the events preceding the accident.<sup>105</sup>

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indicated the skid marks were at a gradual angle. The court did not rely on the bus driver's testimony in upholding the sufficiency of the evidence.

<sup>103</sup> 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). The opinion should be consulted for a more detailed recitation of the facts than appears in the text.

<sup>104</sup> The intermediate appellate court, which had also sustained the sufficiency of the proof of negligence, apparently took an even more liberal position:

Since it is a matter of common knowledge that new cars, properly driven, and subjected only to the ordinary stresses of usual driving and routine maintenance checking, do not suddenly leave the highway and end up against utility poles, an inference of negligence on the part of assembler and manufacturer arises as a matter of fact.

*Vandermark v. Ford Motor Co.*, 34 Cal. Rptr. 723, 728 (Dist. Ct. App. 1963).

On retrial after the remand from the California Supreme Court, the jury ruled for the defendants (manufacturer and dealer). The defendants' position was that the probable cause of the accident was driver malfeasance. The plaintiff is presently appealing the jury verdict. Letter from Vernon G. Foster, Attorney for defendant, Ford Motor Company.

<sup>105</sup> Other post-*Henningsen* cases which take a liberal approach to the sufficiency of the proof of a defect include: *Wood v. Hub Motor Co.*, 110

Not all courts have been so willing to consider circumstantial evidence resting on a personal description of the accident sufficient to sustain the plaintiff's burden of proof on the issues of defectiveness and causation. For example, in *Moyer v. Ford Motor Company*,<sup>106</sup> a Pennsylvania decision, the facts were similar in some ways to *Vandermark* but the court reached the opposite result. A little more than two months after purchase, plaintiff's automobile went out of control and he suffered personal injuries. Plaintiff's expert witness had not examined the vehicle but testified that on the basis of plaintiff's description of the accident, the wheel must have "locked" or "frozen." The expert also testified that this defect could have resulted from causes attributable to the manufacturer. Ford also produced expert witnesses in this case, one of whom had actually disassembled the damaged vehicle. It was their opinion that the wheel had not locked or frozen and they suggested that the accident was caused by inattentive driving. The appellate court affirmed the trial court's judgment *n.o.v.*, emphasizing that plaintiff's expert had neither seen nor examined the damaged automobile and that no factual evidence had been presented to prove that the wheel of the automobile locked or froze.<sup>107</sup>

Because plaintiffs often rely only on circumstantial evidence to show defect and causation, they sometimes invoke the doctrine of *res ipsa loquitur* for this purpose as well as to establish negligence. Their theory is that from the fact, to which plaintiff testifies, of the malfunctioning of an automobile, it can be inferred that the vehicle must have been defective in some manner.<sup>108</sup> Objection can be made to use of *res ipsa* for this purpose on several grounds. It is true that an accident can occur in such a manner as to suggest the possibility that a mechanical malfunctioning caused the accident. Even in the most extreme cases, however, mechanical malfunction will usually be only a probable and not a certain cause. Indeed, statistically, mechanical difficulties cause only a small percentage of even those accidents which at first

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Ga. App. 101, 137 S.E.2d 674 (1964); *Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 108 N.W.2d 347 (1961); *Williams v. Ford Motor Co.*, 411 S.W.2d 443 (Mo. Ct. App. 1966); *Denna v. Chrysler Corp.*, 1 Ohio App. 2d 582, 206 N.E.2d 221 (1964). For a nonautomobile case to similar effect, see *Lewis v. U.S. Rubber Co.*, 414 Pa. 626, 202 A.2d 20 (1964).

<sup>106</sup> 205 Pa. Super. 384, 209 A.2d 43 (1965).

<sup>107</sup> Other cases decided since *Henningsen* which have held the plaintiff introduced insufficient evidence of the existence of a defect include: *Kapp v. Bob Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962); *Shramek v. General Motors Corp., Chevrolet Motor Div.*, 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966); *Rogers v. Ford Motor Co.*, 191 So. 2d 713 (La. App. 1966); *Wright v. General Motors Corp.*, 158 So. 2d 309 (La. App. 1963); *Wheat v. New Orleans & N.W. R.R.*, 153 So. 2d 543 (La. App. 1963); *Price v. Ashby's, Inc.*, 11 Utah 2d 54, 354 P.2d 1064 (1960).

<sup>108</sup> *E.g.*, *Ford Motor Co. v. Fish*, 232 Ark. 270, 335 S.W.2d 713 (1960) (truck case). See *Greening v. General Air Conditioning Corp.*, 43 Cal. Rptr. 662 (Dist. Ct. App. 1965).

glance seem to suggest the possibility of a mechanical cause.<sup>109</sup> Moreover, since the vehicle has not been exclusively in the manufacturer's control, the malfunctioning, even if assumed to exist, may have been caused by alterations or repairs to the vehicle made by some third party subsequent to purchase or by owner misuse of the vehicle.<sup>110</sup> If *res ipsa* is to be used at all, therefore, its availability should be conditioned on the plaintiff's offering of some proof that the vehicle has not been abnormally used or altered in a manner likely to have produced the malfunctioning.<sup>111</sup> Further objection to the use of *res ipsa* can be based on the inapplicability of the traditional ground for invoking the doctrine, that it is easier for the defendant to sustain the burden of showing nonliability than it is for the plaintiff to sustain the opposite burden. The only way to obtain other than circumstantial evidence of the existence or nonexistence of a defect is to examine the damaged vehicle. Presumably a plaintiff, who usually is in possession of the damaged automobile, is in at least as good a position to have it examined as the manufacturer.<sup>112</sup> Perhaps because of these objections, many courts hold the *res ipsa* doctrine inapplicable to these situations,<sup>113</sup> although these holdings may not be very significant if the court permits a direct inference of the existence of a defect from the mere fact of a malfunctioning, such as was done in *Henningsen* and *Vandermark*. If the accident has occurred only a short time after the plaintiff received his automobile, courts may be more willing to allow an inference that it was caused by a defect, either drawn directly from the description of the accident or

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<sup>109</sup> Numerous studies have established this fact. See James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 770 (1950); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1339-43 (1966); Milwaukee Journal, April 13, 1967, *Accent* §, at 1, col. 7. In addition, in a large proportion of the accidents having mechanical causes, the defect did not exist at the time the vehicle left the factory but was created by some form of owner misuse or neglect.

<sup>110</sup> Perhaps because of this kind of possibility, it has been hornbook law that to invoke *res ipsa* it is necessary that the dangerous instrumentality have been exclusively in defendant's control. See note 81 *supra* and accompanying text.

<sup>111</sup> See *Zentz v. Coca Cola Bottling Co.*, 39 Cal. 2d 826, 193 P.2d 1 (1948); Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30, 33-34 (1965).

<sup>112</sup> For a general criticism of the use of *res ipsa* whenever it cannot be said the defendant has easier access to the facts, see Jaffe, *supra* note 84.

<sup>113</sup> C. GILLAM, *supra* note 10, at 150-60; Lascher, *supra* note 111, at 32-37; Comment, *supra* note 14, at 1362-68.

Another objection to use of *res ipsa* was raised in *Ford Motor Co. v. Fish*, 232 Ark. 270, 335 S.W.2d 713 (1960). There the plaintiff sought to use the doctrine although the allegedly defective brake assembly was still intact after the accident. The court held that in these circumstances plaintiff must have the brake assembly disassembled and prove the existence of a defect directly. On retrial, plaintiff did just that and won a jury verdict, which was affirmed on appeal. *Ford Motor Co. v. Fish*, 233 Ark. 634, 346 S.W.2d 469 (1961).

through the use of *res ipsa*.<sup>114</sup>

My interviews with the legal staffs of the three major domestic automobile manufacturers bear out the conclusion derived from the reported cases that the principal problem in personal injury litigation concerns proof of defect and causation.<sup>115</sup> Despite the publicity given to the development of strict liability theories in recent years, the manufacturers uniformly were of the view that their principal problem today is the liberality with which courts are defining the quantity of proof needed to get to the jury on the issues of defect and causation. Indeed, Chrysler's lawyers stated that the *Henningsen* case itself was appealed primarily on the sufficiency of the evidence issue rather than on the technical defenses to warranty recovery discussed by the New Jersey court. The manufacturers further agreed that proof of negligence in a *MacPherson* based lawsuit is not a significant problem; if a plaintiff can establish a defect at the time the vehicle left the manufacturer's control and can establish causation, he will almost certainly get to the jury on the issue of negligence, and therefore will almost certainly win a verdict.

More specifically, the manufacturers identified as a problem the cases like *Henningsen* in which the plaintiff is permitted to get to the jury without any evidence, direct or circumstantial, about the specific part alleged to be defective but with only a general argument that "something must have gone wrong." They do not believe, however, that most jurisdictions would permit another such case to get to a jury. The manufacturers are also concerned about those cases in which the evidence that a specific part was defective is purely circumstantial. An even more pressing problem in their view, however, is due to the growing number of cases in which the plaintiff effectively prevents the manufacturer from physically examining the damaged vehicle, typically by not giving the manufacturer notice of the possible lawsuit until some years after the accident and after the vehicle has been sold or repaired. The manufacturers consider it a significant handicap to be unable to examine the vehicle, since as a practical matter they will have to defend a lawsuit principally on the facts by arguing lack of a defect or causation. Moreover, they believe that in most cases their technicians, using advanced techniques in metallurgy and engineer-

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<sup>114</sup> Keeton, *supra* note 81, at 687-89.

<sup>115</sup> I have had lengthy interviews with the legal staffs of each of the three major domestic manufacturers, General Motors Corporation, Ford Motor Company, and Chrysler Corporation. In some instances, the legal staffs indicated they wished not to be identified as the source of a particular statement. Although there are some differences in the approaches of the three manufacturers to products liability litigation, the differences tend to be minor and not very relevant to the inquiries made in this article. For these reasons, in the subsequent text discussion no specific statement by a manufacturer will be cited in support of the assertion in the text. Each assertion is substantially true for all three manufacturers.

ing, would be able to determine whether a defect in the vehicle existed prior to the accident or resulted from the accident. The manufacturers have introduced this type of scientific evidence in defense of lawsuits; they claim that on the basis of it they are often able to convince juries that the accident was not caused by a defect. If the technicians are not able to examine the damaged automobile, however, the manufacturers are forced to rely for a defense solely on cross-examination of plaintiff's witnesses. The manufacturers guard against being placed in this unfortunate situation by instructing their dealers to notify them any time the dealers learn of an accident in which a products liability claim is likely to be made. The factory will send representatives to examine the car immediately upon receiving such notification and hopefully before any repairs or other alterations have been made on the vehicle.

The manufacturers' account of the informal settlement negotiations also indicates that the dominant problem in personal injury disputes is proof of a defect. All three major domestic manufacturers categorically state that, aside from the issue of damages, the only issue they consider in determining whether to settle a personal injury claim is the adequacy of the evidence that the accident was caused by a defect attributable to manufacture. If the dispute goes to the litigation stage, they may well rely on technical defenses such as the disclaimer clause or a lack of contractual privity; they may even argue that the defect was not caused by negligence. But in considering settlement, the manufacturers insist, they do not consider the likelihood of winning a lawsuit on any of these grounds. Conversely, they also insist—although clearly they do not mean uniformly<sup>116</sup>—that there is a policy against settling claims for compromise amounts if they are convinced there is insufficient evidence of defect or causation. The manufacturers believe such a policy is necessary to guard against nuisance suits.

At this point it might well be asked why there has been such a rapid movement towards strict products liability. If, as the evidence indicates, it is rarely difficult to establish negligence in a *MacPherson* based suit, and if it is still necessary to establish defect and causation under any of the strict liability theories, as apparently it is, what advantage is there to a plaintiff to be able to sue on other than the time-tested *MacPherson* theory? There is not a completely satisfactory answer to this question. Prosser, who recognizes that proof of negligence is not difficult, has suggested that the existence of strict liability is a hotly contested issue be-

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<sup>116</sup> Thus, General Motors Corporation has settled several lawsuits involving the 1960-1963 Corvairs, although clearly they do not agree that those vehicles were defectively designed. *Wall Street Journal*, April 12, 1967, at 5, col. 1.

cause of the effect the negligence issue may play in settlements. Although lacking empirical evidence, he argues, perhaps correctly, that the plaintiff's "lingering doubts" about his proof of negligence, and the possibility that a jurymen who is persuaded that the defect was not caused by the manufacturer's negligence might hold out for a compromise verdict, often make a claim in negligence worth fewer settlement dollars than one in strict liability.<sup>117</sup> It might also be assumed that a strict liability theory would enhance a plaintiff's position before a jury by preventing the defendant from introducing evidence of due care in manufacture, such as evidence that the inspection procedures are adequate and that other quality control measures are utilized. The attorneys for the manufacturers state, however, that usually they can get such evidence admitted on the existence of a defect issue, arguing that care in manufacture suggests the unlikelihood of a manufacturing defect. One consequence that the manufacturers attribute to the rush to strict liability is a substantial increase in the number of lawsuits for consequential damages. Although I do not, of course, have access to the manufacturers' litigation files, the manufacturers confirm the generally held impression that the number of personal injury suits has increased dramatically since *Henningsen*. To a large extent, the increase can probably be attributed to the greater awareness on the part of lawyers and potential plaintiffs of possibilities of recovery—a result of the publicity given *Henningsen* and other leading cases. Another important factor is the large number of cases now litigated on the theory that the basic design of the vehicle, rather than its particular manufacture, is defective.<sup>118</sup> Until recently, very few cases were litigated on that theory.<sup>119</sup>

The manufacturers also attribute to the growth of strict liability the increased propensity of courts to let cases go to the jury on very little evidence of defect or causation. Commentators generally agree that a strict liability theory should not call for a relaxation of standards of proof for defectiveness and causation nor a redefinition of those concepts.<sup>120</sup> Still there apparently is a "spiritual," if not a doctrinal, connection between the observed relaxation of standards of proof and the growth of strict liability. An example should illustrate the point. One of the manufacturers was sued in California for extensive damages arising from a rather bizarre set of events. A dealer had removed a defective gas tank from a vehicle and taken it into his service garage. Gas leaked from the tank, exploded and caused half a city block to burn down.

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<sup>117</sup> Prosser, *supra* note 5, at 1116.

<sup>118</sup> See notes 91-96 *supra* and accompanying text.

<sup>119</sup> See note 96 *supra*.

<sup>120</sup> *E.g.*, Keeton, *supra* note 109, at 1339-43. Commentators also agree that there is little difference in the minimum proof of defectiveness and causation required by a warranty theory and by a strict liability in tort theory. See Speidel, *supra* note 9, at 824-34.

The case went to the jury that returned a verdict against the manufacturer. The manufacturer planned to appeal on the causation issue, arguing that the dealer's negligence in failing to drain the tank and in bringing it into an enclosed building was an unforeseeable intervening cause as a matter of law. However, because of the California Supreme Court's decision in *Vandermark*, which applied the strict liability in tort theory to automobiles for the first time, the manufacturer decided not to appeal.<sup>121</sup>

There are other doctrinal differences between negligence and strict liability; most of these differences have not been discussed in the automobile cases, but they could potentially affect the disposition of future cases. Perhaps the most important difference relates to the liability of the dealer. Although negligence by the manufacturer is usually proved easily, given sufficient proof of a defect and causation, it is often difficult for a plaintiff to adduce sufficient proof of a dealer's negligence to get to the jury. Because the dealer neither manufactures nor holds himself out as the manufacturer of automobiles, it is typically held that to prove negligence by the dealer the plaintiff must show inadequate inspection, failure to make a proper adjustment, or some such thing.<sup>122</sup>

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<sup>121</sup> I was told about this case by the legal staff of one of the manufacturers. So far as I know, there was no reported opinion in the case.

In view of the holding in *Vandermark* that the manufacturer was liable for the dealer's failure to properly prepare the new vehicle for delivery, see note 127 *infra* and accompanying text, the manufacturer may have felt that it was liable for the dealer's negligence in this case. It seems unlikely, however, that *Vandermark* would have been extended to include a dealer's negligence in repairing a defective part. And certainly nothing else in the *Vandermark* opinion should have caused the manufacturer to believe that a defense of unforeseeable intervening cause was no longer valid. The manufacturer was nevertheless convinced that the California Supreme Court was determined to hold the manufacturer liable for almost anything.

A recent Second Circuit decision was more explicit in raising the possibility that causation need not be established as rigorously under a strict liability theory. In *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966) (applying New York law), the plaintiff was a pedestrian who was struck by a taxicab manufactured by Ford Motor Company. The taxi had stalled in the street allegedly due to a defect in the gear shift mechanism. The driver attempted to move the taxi to the curb by "bucking," that is by using the accelerator and ignition to move the vehicle in short jumps. While the "bucking" was going on, the hood flew up, obscuring the driver's vision. The driver nevertheless continued his "bucking," eventually striking and injuring the plaintiff. As to the negligence count, the court held that the driver's negligence in continuing to "buck" the car after his vision was obscured was an unforeseeable intervening cause which broke the chain of causation. With regard to the implied warranty count, the majority stated that causation "may not be measured precisely the same way as legal cause in negligence liability." *Id.* at 718. They concluded nevertheless that even a different causation standard had not been met. The extent to which this suggestion of a different standard of causation will be accepted is at present undeterminable but to my knowledge no other automobile case has even acknowledged the possibility.

<sup>122</sup> *E.g.*, *Denna v. Chrysler Corp.*, 1 Ohio App. 2d 582, 206 N.E.2d 221



Since many defects originate at the factory and are not ordinarily discoverable in the dealer's predelivery inspection, the dealer is often absolved of negligence liability. Strict liability, of course, overcomes this proof problem and it is generally conceded the dealer is subject to the contemporary strict liability theories.<sup>123</sup>

Strict liability may also make the manufacturer liable to a greater degree for the dealer's negligence. When an automobile leaves the factory bound for the dealer, it is not in proper condition for immediate sale to a customer. The dealer performs certain operations, principally adjustments, before delivery of the vehicle and many of these pertain to parts essential to the vehicle's safe operation.<sup>124</sup> It has probably always been the rule that the manufacturer could not escape liability in negligence simply because the dealer failed during the predelivery conditioning to discover a defect that existed when the vehicle left the factory. But what if the defect consists of an adjustment the dealer should have made but did not? In negligence cases it is often stated that the plaintiff must show that the vehicle was defective at the time it left the

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(1964), where a verdict on the negligence count was directed for the dealer, apparently because he could not reasonably have been expected to have discovered a defect in the power steering mechanism. *Contrast* McKinney v. Frodsham, 57 Wash. 2d 126, 356 P.2d 100 (1960), where a dealer was held liable in negligence because he should have discovered that the design of the doors made it possible for them to appear closed although they were not latched.

<sup>123</sup> See Speidel, *supra* note 9, at 820-24. In *Vandermark* Traynor justified imposition of strict liability in tort on the dealer in the following manner:

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. . . . 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 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. Accordingly, as a retailer engaged in the business of distributing goods to the public, Maywood Bell [the dealer] is strictly liable in tort for personal injuries caused by defects in cars sold by it.

*Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899 (1964).

The only exception to this rule that I have discovered is *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964). The court held, under a statute since repealed by the Uniform Commercial Code, that "the sale of articles procured from reputable manufacturers, which in practical use in retail trade [the seller] cannot feasibly examine for imperfections, is not subject to the implied warranty." *Id.* at 109, 137 S.E.2d at 681.

<sup>124</sup> For a description of the purposes of pre-delivery conditioning by the dealer, see Milling, *supra* note 30, at 562-65.

possession of the manufacturer. Thus, the manufacturer would not be liable for a defect solely attributable to the dealer's failure to properly condition the car.<sup>125</sup> In warranty, the manufacturer's liability in this circumstance is little discussed and consequently somewhat up in the air.<sup>126</sup> Doctrinally, the issue would seem to turn on the rather esoteric distinction between extending to the purchaser the manufacturer's warranties to the dealer—in which case the manufacturer would not warrant the dealer's pre-delivery conditioning—and holding the manufacturer liable on the dealer's warranties to the purchaser.

The manufacturers' liability in strict liability in tort for dealer malfeasance has been more discussed but the answer is similarly uncertain. In *Vandermark* Justice Traynor held the manufacturer strictly liable for defects attributable to the inadequacy of the pre-delivery conditioning on the theory that the manufacturer could not escape liability by delegating his tort duties.<sup>127</sup> On the other hand, a recent strict liability case from Missouri held that the plaintiff must prove the defect existed when the vehicle left the manufacturer's control.<sup>128</sup> Section 402A of *Restatement (Second) of Torts*, which has adopted the strict liability in tort theory, is ambiguous on this point.<sup>129</sup> So is Prosser, who argues that a plaintiff must show that the "defect was in the product when it was sold by the particular defendant,"<sup>130</sup> while at the same time

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<sup>125</sup> *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951); C. GILLAM, *supra* note 10, at 173-74. An argument can be made that the manufacturer should be held liable in negligence for defects attributable to faulty pre-delivery conditioning. See *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425, 153 A.2d 321 (1959); Milling, *supra* note 30, at 564.

<sup>126</sup> In the *Henningesen* case itself, Chrysler through cross-examination induced an admission from the plaintiffs' expert that the defect may have been attributable to inadequate pre-delivery conditioning but the court took no note of that testimony. See Milling, *supra* note 30, at 562.

<sup>127</sup> *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 261, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964).

<sup>128</sup> *Williams v. Ford Motor Co.*, 411 S.W.2d 443 (Mo. App. 1966).

<sup>129</sup> The text of section 402A limits the imposition of strict liability to "one who sells any product in a defective condition . . . [which] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Presumably the last clause would not exempt the manufacturer for defects attributable to the dealer's pre-delivery conditioning, for if the dealer is expected to make a substantial change in the condition of the automobile, then the manufacturer would not be liable for any defect whether or not attributable to pre-delivery. Has the manufacturer sold a "product in a defective condition"? The content of "defectiveness" is hardly agreed upon. Certainly the vehicle is in no condition to drive on the highway. Yet if the vehicle is in the same condition as most other vehicles the manufacturers provide the dealers, it would seem difficult to conclude the vehicle was defective without concluding that all vehicles sold by the manufacturer are defective. Comment *g* to section 402A tends to support an argument that such a vehicle is not defective. See Speidel, *supra* note 9, at 831-32.

<sup>130</sup> Prosser, *supra* note 2, at 841.

stating categorically that an automobile manufacturer is responsible for the inadequacies of predelivery conditioning.<sup>131</sup> In policy terms the answer would seem to depend on the substantive justification for imposing strict liability in the first place. If "fault" is considered important, then the manufacturers probably will not be held responsible for dealer malfeasance and plaintiff would have to show that the vehicle was defective at the time it left the factory. If greater emphasis is placed on enterprise liability theory, however, then Justice Traynor's rationale becomes more appealing, for a certain amount of dealer malfeasance in predelivery conditioning is a predictable cost of automobile manufacturing.<sup>132</sup>

Another possible difference between negligence and strict liability relates to the defenses of contributory negligence and assumption of risk. There are two situations in which these defenses are likely to arise. In some cases it is conceded that plaintiff's own negligence and not the alleged defect caused the accident, but it is argued that the defect aggravated the injuries. Typically these cases concern claims that the vehicle was not designed properly and that unnecessary injuries were sustained in the so-called second collision. Although a contributory negligence defense to an action based on *MacPherson* would seem obvious in this situation, as a general rule the defense has not been raised in automobile cases. Instead the manufacturers argue, often successfully, that they have no duty in tort to foresee the possibility that the vehicle would be used in the manner it was—that is, in a negligent manner causing an accident.<sup>133</sup> If the manufacturer were held to have a duty to foresee the possibility of accident, however, a contributory negligence defense possibly could be raised.<sup>134</sup> In strict liability, on the other hand, although a "no duty" argument would still be appropri-

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<sup>131</sup> *Id.* at 806-07.

<sup>132</sup> For a discussion of enterprise liability theory and the distribution of the costs of an activity among those who benefit from it, see notes 32-35 *supra* and accompanying text.

The manufacturers control the content of pre-delivery conditioning, by which I mean they decide which operations are to be performed at the factory and which are to be performed by the dealer. Since it may be that some operations presently performed by the dealer could be performed by the factory at a smaller risk of defective performance, and vice versa, imposition of strict liability on the manufacturer for defects attributable to pre-delivery conditioning can also be justified on the grounds of promoting safety. Indeed, if the manufacturer directs the dealer to perform an operation which the dealer is poorly equipped to do adequately, it could be argued the manufacturer has been negligent.

<sup>133</sup> *E.g.*, *Evans v. General Motors Corp.*, 359 F.2d 493 (5th Cir. 1966); *Kahn v. Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963). See Comment, *supra* note 14, at 1368.

<sup>134</sup> See generally C. GILLAM, *supra* note 10, at 171. One commentator has suggested that the manufacturer would still be liable on the theory that there has been "successive" rather than "simultaneous" injuries and the manufacturer's negligence has been exclusively responsible for the second injury. Katz, *supra* note 94, at 873.

ate, contributory negligence might not apply, providing the plaintiff can establish that the defect was a proximate cause of the injuries. Thus, in one case a manufacturer was held liable in warranty for head injuries sustained from a jagged seam in the roof, although the injuries would not have been sustained if the car had not overturned as a result of plaintiff's negligence.<sup>135</sup>

The other situation in which the defenses of contributory negligence and assumption of risk might be raised concerns the plaintiff who continues to drive his vehicle after learning, or after he should have learned, of the existence of a defect which later causes injury. It is generally assumed that in strict liability in tort, continued use of the vehicle despite knowledge of the defect is a defense but failure to discover a defect that should have been detected is not.<sup>136</sup> Prosser says that the cases apply the same rule to warranty actions,<sup>137</sup> although under the Uniform Commercial Code a good argument can be made for the defense of negligent failure to discover a defect that was readily discoverable.<sup>138</sup> In negligence actions, on the other hand, it is often assumed both defenses are available.<sup>139</sup> Nevertheless, the cases in my sample suggest that in fact these defenses are rarely raised and almost never successful in negligence actions. I discovered no case in which the court ruled for the manufacturer on the grounds of contributory negligence or assumption of risk. In one case an appellate court, reversing a directed verdict for the manufacturer in trial court, held that consideration of such defenses were for the jury, even though the plaintiff readily admitted operating her automobile while aware of the alleged defect.<sup>140</sup> In numerous other cases litigated in negligence, these defenses were not even discussed although the report reveals that the plaintiff admitted knowledge of the defect prior to the accident.<sup>141</sup> Thus, the limitations on the defenses of contribu-

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<sup>135</sup> *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939).

<sup>136</sup> RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n* (1965); Speidel, *supra* note 9, at 832-33.

<sup>137</sup> Prosser, *supra* note 2, at 838-40.

<sup>138</sup> See UNIFORM COMMERCIAL CODE § 2-715, Comment 5.

<sup>139</sup> Comment, *supra* note 14, at 1368-69.

<sup>140</sup> *Denna v. Chrysler Corp.*, 1 Ohio App. 2d 582, 206 N.E.2d 221 (1964). The court also held that plaintiff had a cause of action against the dealer for negligence in failing to repair the defect when it was first called to his attention. Several other courts have upheld a similar cause of action, which represents of course a rather significant extension of the *MacPherson* doctrine. *General Motors Corp. v. Jenkins*, 114 Ga. App. 873, 152 S.E.2d 796 (1966); *Blinn v. Allied-Ford Corp.*, 24 App. Div. 2d 755, 264 N.Y.S.2d 1 (1965); *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App. 1965). *Jenkins* went further and also held that the dealer's failure to repair absolved the manufacturer of any liability for injuries caused by the defect.

<sup>141</sup> *E.g.*, *Cordle v. Renault, Inc.*, 361 F.2d 332 (6th Cir. 1966); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (1960); *Price v. Ashby's, Inc.*, 11 Utah 2d 54, 354 P.2d 1064 (1960).

tory negligence and assumption of risk under strict liability theories may offer only theoretical advantages to plaintiffs in personal injury cases.

The various differences between strict liability<sup>142</sup> and negligence which I have discussed do not appear to have affected the disposition or the strategy in the vast majority of the cases I have examined. As indicated previously, in three cases a negligence claim was barred because of failure to offer sufficient evidence of negligence, and presumably in those cases a strict liability theory would have been more successful.<sup>143</sup> There were 11 other cases in which the reported opinion does not indicate that plaintiff relied on a negligence theory. Of these 11, two cases concerned demurrers to counts in the complaint alleging liability in warranty. In both, it is entirely possible that plaintiff also included negligence counts.<sup>144</sup> In two other cases, both connected with the same incident, the plaintiff solely relied on an express warranty in advertising that the windshield would push out upon impact.<sup>145</sup> It was probably necessary for plaintiff to rely on an express warranty since the failure of the windshield to push out would not likely be considered a defect under any tort or implied warranty theory. Another case was originally litigated exclusively in warranty but the plaintiff later amended his complaint to include a negligence count.<sup>146</sup> One opinion suggests, although hardly clearly, that plaintiff may have exclusively relied on strict liability because of an inability to prove negligence.<sup>147</sup> And in another case the plaintiff actually sued in negligence but the trial court, although submitting the case to the jury on the warranty counts, directed a verdict on the negligence count for a reason that is unknown since the plaintiff did not appeal that action.<sup>148</sup> In the remaining four cases the

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<sup>142</sup> There are, of course, various doctrinal differences between the different strict liability theories. The principal differences relate to the disclaimer defense, which is more likely successful against a warranty cause of action, and the requirement that a seller be notified of any breach of warranty within a reasonable time of its discovery. See notes 40-43 *supra* and the accompanying text. Most of the other differences are not likely to affect the disposition of many automobile cases. See generally the authorities cited in note 40 *supra*.

<sup>143</sup> *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961); *Woolley v. Uebelhor*, 239 Md. 318, 211 A.2d 302 (1965); *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (1960). In the *Pabon* case, the court in fact did hold the manufacturer liable on an implied warranty theory.

<sup>144</sup> *Johnson v. General Motors Corp.*, 243 F. Supp. 694 (E.D. Tenn. 1965); *Monaco v. Chrysler Sales Corp.*, 191 F. Supp. 648 (S.D.N.Y. 1961).

<sup>145</sup> *Funk v. Kaiser-Frazer Sales Corp.*, 23 App. Div. 2d 771, 258 N.Y.S.2d 553 (2d Dep't 1965); *Funk v. Kaiser-Frazer Corp.*, 15 App. Div. 2d 548, 222 N.Y.S.2d 711 (2d Dep't 1961).

<sup>146</sup> *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961).

<sup>147</sup> *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964).

<sup>148</sup> *Cordle v. Renault, Inc.*, 361 F.2d 332 (6th Cir. 1966). I have not categorized this case as having been litigated in negligence because the negligence theory was abandoned on appeal.

opinions do not reveal why the plaintiff failed to sue in negligence, nor do they reveal any particular barrier to a negligence action.<sup>149</sup>

To summarize, then, the evidence indicates that where personal injury is involved the contemporary law of automobile products liability both in the formal and the informal processes is that of strict liability. It is usually strict liability going by the name of negligence based on *MacPherson*, *Henningsen* and the other recent cases championing strict liability theories explicitly state what courts apparently have been doing implicitly for some time. No doubt there are some practical advantages in stating explicitly what is being done. And no doubt as time passes, more and more cases will be litigated and won in the name of strict liability. By and large, however, they will be cases which could have been litigated and won in *MacPherson* based negligence. The revolution in products liability law heralded by the commentators is simply not very revolutionary. Associated with *Henningsen* and the growth of strict liability has been an increase in the number of cases and an apparent lessening in the quantum of proof necessary to establish a defect. Whether these changes would have occurred without *Henningsen et al.* is unknowable. But certainly nothing in the available negligence doctrines would have prevented the developments.

Moreover, the dominance of the negligence theory in the litigated cases explains in large part the insignificant role played by the disclaimer of liability clause in personal injury suits. Attorneys for neither plaintiffs nor the manufacturers believe that the disclaimer has any applicability to a negligence theory. Indeed, the legal staffs of the manufacturers told me they believed the disclaimer deserved no role in personal injury suits under any theory. Although strongly defending the disclaimer as a bar to suits for rescission of the sale or for diminution of the vehicle's value due to defects, the manufacturers expressed the belief that the parties to the sale did not think that the ordinary rules of liability for personal injury were being affected by their contract. Thus, the manufacturers justify their failure to argue in court for a literal application of the disclaimer on the ground that it should not be so applied. The cases indicate the courts share their belief. The two personal injury actions which upheld the disclaimer must be viewed as aberrations. One, a West Virginia decision which is largely discredited, interpreted the disclaimer as barring a claim even in negligence, although the court clearly was impressed by the injustice of the result.<sup>150</sup> In the other case, the court re-

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<sup>149</sup> *Willis v. Chrysler Corp.*, 264 F. Supp. 1010 (S.D. Tex. 1967); *Haley v. Merit Chevrolet, Inc.*, 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966); *Shramek v. General Motors Corp., Chevrolet Motor Div.*, 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966); *Moyer v. Ford Motor Co.*, 205 Pa. Super. 384, 209 A.2d 43 (1965).

<sup>150</sup> *Williams v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964). Two years earlier in a case involving a truck the same court upheld the

lied on the limitation of remedies clause to bar a count against the dealer based on breach of the express warranty to repair defective workmanship. The court prevented an attack on the limitation of remedies clause on the ground that plaintiff had failed to raise the attack in the trial court. Moreover, the court permitted suit against the dealer on the theory of negligence in failing to repair the vehicle.<sup>151</sup>

Although, as I discussed earlier, the Uniform Commercial Code would seem to govern the validity of the disclaimer clause today, the Code did not affect the disposition of any of the personal injury cases. In many of the cases studied, of course, the cause of action arose before the Code became effective in the relevant jurisdiction. This explanation does not apply to all the cases, however. Rather it seems that just as, and perhaps because, the parties to these disputes assume that the disclaimer has no relevance, they also assume the Code has no role to play. Nor is it likely that this situation will change in the future. The manufacturers are quite familiar with the provisions of the Code and the arguments in support of the disclaimer that could be made under that statute.<sup>152</sup> Yet, as indicated, to date they have not availed themselves of those arguments.

#### *B. Property Damage to the Vehicle Resulting from an Accident*

In 13 of the cases I have examined the plaintiff sought recovery for damage to his car resulting from an accident allegedly caused by a defect.<sup>153</sup> Ten of these cases involved fires that totally destroyed the cars. The other three involved total or partial destruction of the vehicles as the result of collisions.<sup>154</sup> The following table indicates that the disposition of these cases is in many ways similar to the disposition of personal injury lawsuits.

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disclaimer against a claim in implied warranty. *Payne v. Valley Motor Sales, Inc.*, 146 W. Va. 1063, 124 S.E.2d 622 (1962).

<sup>151</sup> *Ford Motor Co. v. Puskar*, 394 S.W.2d 1 (Tex. Civ. App. 1965). The ground of decision that is stated in the text was first advanced by the court on rehearing.

<sup>152</sup> Thus, they have carefully drafted the disclaimer paragraph to comply with the provisions of the UCC. See note 61 *supra*.

<sup>153</sup> Logically damage to vehicles other than the defective vehicle that results from an accident might be included in this category. There were, however, no cases in my collection in which the plaintiff was seeking compensation for such damage.

<sup>154</sup> One interesting feature of these cases is that frequently the real party in interest is the plaintiff's insurance company, since most persons carry collision or comprehensive insurance on new cars. Few persons insure themselves for personal injury, and consequently insurance companies were rarely involved in the previous category of cases.

TABLE 2

## Treatment of Disclaimers by Courts in Property Damage Lawsuits

Substantive Theory	TOTAL	Disclaimer Not Mentioned	Disclaimer Mentioned But Circumvented	Disclaimer Upheld
Negligence	6	6	0	0
Implied warranty	8	5	3	0
Express warranty	5	2	2	1
Strict liability in tort	1	1	0	0
Miscellaneous	0	0	0	0

The table suggests that strict liability theories were relied on exclusively by a considerably greater percentage of the plaintiffs in these cases (7 out of 13) than in the personal injury cases. No very satisfactory explanation exists for this difference. All of the cases in which no negligence theory was mentioned in the reported opinion were decided in 1963 or before. One of the seven cases litigated exclusively on a strict liability theory involved a demurrer to a warranty cause of action, and it is possible that the plaintiff had also included a negligence count.<sup>155</sup> The other cases arose in such circumstances that it seems probable, given the failure of the reported opinion to mention the theory, that a negligence cause of action was not alleged. In two of those cases, doctrinal differences between strict liability and negligence theories may explain the plaintiffs' failure to advance a negligence cause of action. Thus, in one case the plaintiff sued only the dealer, against whom it is often difficult to prove the negligence element.<sup>156</sup> The other case was decided against the plaintiff on the ground of assumption of risk; the circumstances suggest a possible reluctance by the plaintiff to rely on negligence because of the arguably greater susceptibility of that theory to an assumption of risk defense.<sup>157</sup> There is no apparent explanation for the plaintiffs' failure to litigate the remaining cases in negligence,<sup>158</sup> but it certainly seems unlikely that difficulty in proving negligence, assuming defectiveness and causation, induced the plaintiffs not to

<sup>155</sup> *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. App. 1962).

<sup>156</sup> *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961).

<sup>157</sup> *Nationwide Mut. Ins. Co. v. Don Allen Chevrolet Co.*, 253 N.C. 243, 116 S.E.2d 780 (1960). The plaintiff had continued to operate the automobile after noticing the alleged defect in the fuel and electrical systems. Another reason the plaintiff may have avoided a negligence theory is that the suit was only brought against the dealer.

<sup>158</sup> *Rose v. Chrysler Motors Corp.*, 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *New Amsterdam Cas. Co. v. Gray, Wallace & Ford Motor Co.*, 253 N.C. 60, 116 S.E.2d 146 (1960); *Willman v. American Motor Sales Co.*, 44 Erie Co. Legal J. 51 (Pa. C.P. 1961).



advance a negligence cause of action. In none of the cases litigated on a negligence theory was the adequacy of the proof of defendant's negligence even mentioned in the reported opinion. Nor did the manufacturers' legal staffs or the private attorneys I contacted who handled a case in this category report that the sufficiency of the proof of negligence was a significant issue.

As in the personal injury cases, regardless of the theory of liability advanced, by far the most significant issue in cases in this category was the quantum of proof of defectiveness and causation necessary to reach the jury. In 8 of the 13 cases, the sufficiency of the evidence was at least one of the significant issues raised on appeal. And that issue seems to involve principally the same question it did in the personal injury cases—whether plaintiff must introduce concrete evidence of a specific defect. Thus, in a recent Louisiana case, the plaintiff had owned his car only 10 days and had driven it 380 miles when it was consumed by fire. Plaintiff offered no specific theory about the cause of the fire; instead, he argued that a defect could be inferred from the mere occurrence of a fire so early in the life of the car. The manufacturer introduced expert testimony to the effect that in 75 or 80 percent of the cars that catch fire the causes are other than defective manufacture. The court found plaintiff's proof insufficient; it emphasized plaintiff's failure to exclude the many possible causes of the fire not attributable to the manufacturer.<sup>159</sup> Somewhat in contrast is a recent California case concerning another car which was destroyed by fire shortly after purchase. The only expert who examined the damaged car was employed by the manufacturer and testified that, although the fire could have resulted from a defect in the wiring, it was more likely to have been caused by plaintiff's abuse of the car. Relying on the newness of the car, and the slight evidence of a defect, the court applied *res ipsa loquitur* and upheld plaintiff's cause of action in negligence.<sup>160</sup> It does not take a very clever lawyer to distinguish these two cases, but they do serve to illustrate the nature of the issue concerning the quantum of proof needed to get to the jury.

My interviews with the manufacturers confirmed that the principal issue in both the informal and the formal settlement of dis-

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<sup>159</sup> *Eversmeyer v. Chrysler Corp.*, 250 La. —, 192 So. 2d 845 (1966). The expert identified use of improper fuel, foreign particles in the fuel, and an oily dip-stick wiping cloth left in the vicinity of the manifold as among the possible causes of an unexplained fire in a new automobile.

<sup>160</sup> *Gherna v. Ford Motor Co.*, 55 Cal. Rptr. 94 (Ct. App. 1966). The alleged abuse consisted of racing the motor for 30 seconds while the transmission was in gear, thereby causing the transmission oil to boil over and spill on the hot manifold. In addition to finding a negligence cause of action on the theory that defective wiring caused the fire, the court found a possible negligence action in defendant's failure to warn of the possible consequences of racing the engine for 30 seconds while in gear. The court also found causes of action in strict liability in tort and for breach of implied and express warranties.

putes in this category is the sufficiency of proof of defectiveness and causation. As with personal injury, if the manufacturer is convinced that a defect caused the fire or the collision which damaged the vehicle it will settle the claim.<sup>161</sup> The manufacturers stated, however, that it is very difficult to determine the cause of a fire in an automobile. Before they paid a claim, they indicated that in fire cases they insisted on rather definite proof that the fire was caused by a defect. If a purchaser comes to a dealer's service shop asking for free repair of damage caused by an accident, the dealer is instructed not to make any alteration on the car and to notify the factory immediately. The factory will then send a representative to examine the car for possible defects. Thus, again as in personal injury situations, the manufacturers very much want the opportunity to examine the vehicle so that they can build a defense on the facts.

Table 2 shows that in not one case was the disclaimer clause even discussed in connection with a negligence theory. My interviews with the manufacturers and the responses to my letters to attorneys indicate that just as with personal injury cases, nobody believes that the disclaimer of liability or limitation of remedies clauses apply in a negligence suit.<sup>162</sup> On the other hand, there is a markedly higher incidence of cases discussing the disclaimer clause in connection with a warranty theory than there were in the personal injury category. The small number of cases in this category may render this observation insignificant. At least there does not appear to be any other explanation. None of the cases circumventing the disclaimer were decided in a manner that invited further testing of the disclaimer's efficacy. The one case actually barring a warranty theory also fails to invite extensive reliance on the disclaimer by defendants in these cases.<sup>163</sup> In that case the

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<sup>161</sup> Administratively, the manufacturers handle these disputes somewhat differently. The manufacturers generally carry some type of products liability insurance to cover damage other than that to the defective vehicle. In the personal injury suits, therefore, the insurance carrier must be contacted about the defense, although the manufacturer retains control over policy decisions in the defense. Damage to the vehicle itself is not covered by products liability insurance, however, so the manufacturer handles the defense alone. I was not able to detect that this administrative difference affected dispute settlement in these two categories of injury.

<sup>162</sup> One pre-*Henningsen* case concerning a bus, *Shafer v. Reo Motors*, 108 F. Supp. 659 (W.D. Pa. 1952), upheld the disclaimer in a fire case against a claim of negligence. Another, *Hall v. Everett Motors, Inc.*, 340 Mass. 430, 165 N.E.2d 107 (1960), upheld the disclaimer against warranty theories. These cases, plus *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961), led one commentator to conclude the disclaimer and the limitation of remedies clauses were regularly upheld in fire cases. Comment, *The Contractual Aspects of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1460 (1960). Such is obviously not the case, however. Of the 13 cases in this category of my collection, the plaintiff got to the jury in all but five.

<sup>163</sup> *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961).

plaintiff exclusively relied on breach of the express written warranty (which at that time covered defects for the first 90 days or 4,000 miles) as a theory of recovery. In upholding the clause limiting the remedies under the express warranty to repair or replacement, the court made it quite clear that they were not applying the disclaimer of liability paragraph and even suggested that if plaintiff had sued in implied warranty the court might have held the disclaimer invalid.<sup>164</sup>

### C. One Defective Part Damages Others

In this category fall those instances in which one part of the automobile malfunctions because of a manufacturing defect and as a result causes damage to other parts not defective in manufacture. For example, a radiator might develop a leak because of a manufacturing defect, eventually causing the engine to overheat and burn out. Read literally, the express written warranty would not cover all of the damage, since it provides only for repair or replacement of parts defective in manufacture; thus, in my example the radiator would be covered by the warranty but the engine would not be. This category of damage is very similar to the previous category—perhaps conceptually indistinguishable from fire damage—and is separately treated here only because dispute settlement is almost exclusively informal.

There are no reported cases involving this type of damage.<sup>165</sup> The most relevant case is a California decision, *Rose v. Chrysler Motors Corporation*,<sup>166</sup> a fire case categorized in the previous section. In overruling a defense based on the disclaimer the court

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<sup>164</sup> Two of the other cases which discuss and invalidate the disclaimer were decided in California. In *Rose v. Chrysler Motors Corp.*, 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963), the court found the manufacturer liable, under the express warranty against defective parts, for consequential damages to other parts on grounds discussed in notes 166-67 *infra* and accompanying text. The other decision, *Gherna v. Ford Motor Co.*, 55 Cal. Rptr. 94 (Ct. App. 1966), placed great reliance on the *Rose* and *Henningsen* decisions. A third case explicitly invalidating the disclaimer as against public policy, citing *Henningsen*, is *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961). The other case which discusses the disclaimer was decided in Pennsylvania and invalidated the disclaimer under UNIFORM COMMERCIAL CODE § 2-316(2) (1952 version). *Willman v. American Motor Sales Co.*, 44 Erie Co. Legal J. 51 (Pa. C.P. 1961).

<sup>165</sup> My interviews with the manufacturers' legal staffs indicate that there are some lawsuits for monetary damages to compensate for repairs made in this situation. Apparently few of these lawsuits reach the appellate courts, where they would be reported. Sometimes the automobile will be so badly damaged that in a lawsuit the plaintiff will seek rescission and return of the purchase price. In other cases, the plaintiff may ask for the diminution in the automobile's value, which presumably would be roughly equivalent to the cost of repair. In both of these instances, the lawsuit would be placed in the next category.

<sup>166</sup> 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963).

cited a purported course of dealing between the dealer and purchaser that all parts damaged by a defective part will be repaired under the express warranty. The course of dealing was held to constitute either a binding interpretation of the disclaimer as inapplicable to the situation at hand or a binding waiver or amendment of the disclaimer. Whether there was actually such a course of dealing in that case,<sup>167</sup> my interviews with the manufacturers and the service managers of several Wisconsin dealerships indicate that such courses of dealing usually exist. It is the regular practice of manufacturers and dealers to repair or replace all parts if the damage was proximately caused by a part defective in manufacture. The manufacturers' attitude seems to be that the warranty covers this category of damage. Indeed, the manufacturers do not furnish their dealers any special instructions regarding this type of repair. Unless the repairs involve a replacement of a major part, such as the engine block or transmission, the dealer is ordinarily permitted to repair the entire damage without first obtaining approval from the factory. And with regard to replacement of major items, the dealers are usually required to obtain advance approval regardless of the cause of damage.

The principal issue that arises in the informal settlement of these disputes is one of causation, or perhaps more accurately one of contributory negligence and assumption of risk. Frequently the manufacturer or the dealer believes that the additional parts were damaged because the owner did not take proper precautions once the part defective in manufacture began malfunctioning. They often refuse to repair in these situations, taking the position that the damage to the additional parts was caused by the owner's misuse or abuse of the vehicle and not by the part defective in manufacture. For example, one manufacturer told me of an owner who was traveling when his water pump malfunctioned, thereby causing the fan belt to break which in turn caused damage to the radiator. The damage occurred in a small town and the owner did not wish to stay there to await repairs. So he drove on to what he deemed to be a more convenient stopping place. While driving there, the engine burned out. At the time of my interview with the manufacturer's legal staff, the owner's claim for free repair of all the damage was still pending in the informal processes. The manufacturer was taking the position that it was quite willing to pay for repair of the water pump, fan belt, and radiator; but that it was not responsible for the engine, which they argued was dam-

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<sup>167</sup> So far as can be determined from the reported opinion in the *Rose* case, the dealer agreed only to diagnose the difficulties in plaintiff's car, not to repair them. As an alternative ground for overruling the disclaimer (actually the clause limiting the remedies available for breach of the express warranty), the court held that the dealer had breached the express warranty by inadequately repairing the original defects when requested to do so prior to the fire.

aged as a result of the owner's neglect in continuing to drive his car after the initial malfunctioning.

#### D. Rescission and Diminution in Value

In this category I have placed 19 cases in which the plaintiff, because his new automobile is somewhat imperfect, seeks either to rescind the sale and obtain return of his purchase price or to collect in money damages the difference in value between his imperfect automobile and a "perfect" automobile. Theoretically, there is a significant difference between an action for rescission and an action for the diminution of an automobile's value attributable to a defect. Rescission is supposedly available only if the breach of warranty is material.<sup>168</sup> Nevertheless, I have not distinguished between these two remedies, both because each remedy is requested in essentially the same situation—that is, when the owner is unwilling or unable to obtain satisfactory repairs under the express warranty—and because, so far as I have been able to determine, there is no difference in the manner in which these two claims are in fact adjudicated.<sup>169</sup> The plaintiffs seeking these remedies

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<sup>168</sup> See RESTATEMENT OF CONTRACTS §§ 275, 317, 347 (1932); 5 A. CORBIN, CONTRACTS § 1104 (1964).

<sup>169</sup> There were 9 cases in which the plaintiff sought monetary damages for diminution in value. In 3 of those cases the plaintiff obtained recovery, in 4 he was denied recovery, and in the remaining 2 the reported opinion does not indicate the final disposition of the lawsuit. The comparable figures for cases in which the plaintiff sought the remedy of rescission are 3 cases won, 6 cases lost, and 1 final disposition unknown. There does not appear to be a significant difference between the two types of claims in the frequency with which the disclaimer is mentioned in the reported opinion. The cases also fail to indicate that if the defects are not especially serious, a plaintiff seeking diminution in value is more likely to win recovery than a plaintiff seeking rescission although doctrinally that is the result one would expect. See note 173 *infra*. Finally, the legal staffs of the manufacturers tend to view claims for rescission and diminution in value as raising essentially the same questions.

It is possible, of course, that claims for diminution in value are brought more often in cases where the defects in the car are not too serious. Presumably a purchaser who believed his vehicle was so defective that he desired never to operate it again would not be satisfied with recovery of the diminution in value, since he would then be put to the trouble of selling his damaged car in order to recover full compensation. On the other hand, it should not always be assumed that the car owned by a plaintiff seeking rescission is so defective that it cannot be safely operated again. For example, a purchaser might seek rescission simply because he wants to be relieved of the obligation of continuing to make installment payments on the purchase price. See note 213 *infra* and accompanying text. In any event, as indicated above, even if there is some difference in the seriousness of the defects in cars owned by plaintiffs seeking rescission and in cars owned by plaintiffs seeking diminution in value, there is no indication that difference has affected dispute settlement.

There are two cases in my collection in which the court denied a claim for rescission on the ground that diminution in value was the appropriate remedy. In neither case, however, was rescission clearly denied because

may not be seeking consequential damages in that often everything wrong with the vehicle will have originated in its manufacture. Still, the plaintiffs are seeking remedies purportedly excluded by the written warranty, since all implied warranties are disclaimed and the remedy for breach of the express warranty is limited to repair or replacement of defective parts. The following table suggests that the pattern of formal settlement of these disputes is somewhat different than the pattern in the categories heretofore examined.

TABLE 3

Treatment of Disclaimers by Courts in Lawsuits for  
Rescission or Diminution in Value

Substantive Theory	TOTAL	Disclaimer Not Mentioned	Disclaimer Mentioned But Circumvented	Disclaimer Upheld
Negligence	1	1	0	0
Implied warranty	14	3	6	5
Express warranty	9	5	2	2
Strict liability in tort	0	0	0	0
Miscellaneous	0	0	0	0

The first surprising observation from this table is the disappearance of negligence and strict liability in tort as significant theories of recovery. My exclusion of truck and tractor cases may have biased the data somewhat in this regard. There have recently been two such cases, both rather peculiarly reasoned, which uphold recovery of this type of damage in tort.<sup>170</sup> Nevertheless, tort theories are clearly utilized infrequently in these cases. Indeed, in the one automobile case in my collection which was litigated in tort, while affirming plaintiff's cause of action in express warranty,<sup>171</sup> the court held that damages for diminution in value could not be recovered in negligence.

The second observation to be drawn from this table concerns the greater and more successful use of the disclaimer as a defense in

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the alleged defects were not serious enough. In *Fox v. R. D. McKay Motor Co.*, 188 Kan. 756, 366 P.2d 297 (1961), the court simply stated that diminution in value was the proper measure of damages for breach of the express warranty, without any particular reference to the seriousness of the defects in the plaintiff's vehicle. The other case reasoned that since the manufacturer had not been a party to the contract of sale, the buyer could not obtain rescission of the sale against it but only damages for diminution in value. *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966).

<sup>170</sup> *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Ford Motor Co. v. Lonon*, 218 Tenn. —, 398 S.W.2d 240 (1966).

<sup>171</sup> *Inglis v. American Motors Corp.*, 30 Ohio Op. 2d 181, 197 N.E.2d 921 (1964).

these cases. The disclaimer was asserted as a defense to over half the liability theories advanced. To some extent the increase is accounted for by the greater proportion of cases litigated in warranty. Even in the warranty cases, however, the disclaimer is more often advanced as a defense. Corresponding with the increased use of the disclaimer as a defense is an apparent decreased importance of the defectiveness issues. In only three of the 19 cases did the reported opinion reveal a serious issue concerning the existence of defects, or at least of enough defects to entitle plaintiff to this type of recovery.<sup>172</sup> Technical issues, such as privity and the effect of the disclaimer, were raised much more frequently in these cases than in cases in the other categories.

Further analysis of the cases in this category revealed that in every case in which the opinion definitely reports that the plaintiff obtained a recovery, the opinion also suggests that the plaintiff had purchased a particularly troublesome automobile. Typically, the plaintiff either had made several unsuccessful attempts to obtain a repair of a particular defective part or had experienced such a continuous series of defects that the vehicle might justly be called a "lemon."<sup>173</sup> Admittedly the plaintiff did not prevail in every case in which the opinion suggests he had these difficulties.<sup>174</sup> It also is true, however, that in many, although not all, of the cases in which the reported opinion definitely shows the plaintiff lost, the opinion suggests that the plaintiff had not afforded the dealer or manufacturer a realistic opportunity to repair the defects.<sup>175</sup> The decision of a lower Pennsylvania court is a good example.<sup>176</sup> After the plaintiff had driven his car about 1,000

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<sup>172</sup> *Paton v. Buick Motor Div., General Motors Corp.*, 401 S.W.2d 446 (Mo. 1966); *Sarnecki v. Al Johns Pontiac*, 56 Luz. Leg. Reg. Rep. 293, 3 U.C.C. Rep. 1121 (Pa. C.P., Luzerne County 1966); *Holz v. Coates Motor Co.*, 206 Va. 894, 147 S.E.2d 152 (1966).

<sup>173</sup> This finding is true for both rescission and diminution cases. Plaintiffs won recovery in the following cases. *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E.2d 892 (1961) (rescission); *Fox v. R. D. McKay Motor Co.*, 188 Kan. 756, 366 P.2d 297 (1961) (diminution); *Stevens v. Daigle & Hinson Rambler, Inc.*, 153 So. 2d 511 (La. App. 1963) (rescission); *Miller v. Andy Burger Motors, Inc.*, 370 S.W.2d 654 (Mo. App. 1963) (diminution); *Sarnecki v. Al Johns Pontiac*, 56 Luz. Leg. Reg. Rep. 293, 3 U.C.C. Rep. 1121 (Pa. C.P. Luzerne County 1966) (rescission); *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 129 S.E.2d 323 (1963) (diminution).

<sup>174</sup> *Lilley v. Manning Motor Co.*, 262 N.C. 468, 137 S.E.2d 847 (1964) (diminution); *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966).

<sup>175</sup> Louisiana, a civil law jurisdiction, may represent an exception to this generalization. A long line of cases seems to have established the right of the buyer to rescind the sale despite the dealer's prompt and successful efforts to repair any defects. *See, e.g., Falk v. Luke Motor Co.*, 237 La. 982, 112 So. 2d 683 (1959); *Roby Motors Co. v. Harrison*, 19 La. App. 659, 139 So. 686 (2d Cir. 1932); *Crawford v. Abbott Auto. Co.*, 157 La. 59, 101 So. 871 (1924).

<sup>176</sup> *Bafile v. Remchow*, 58 Schuylkill Legal Record 108 (Pa. C.P. 1960).

miles and had twice experienced transmission difficulties, the dealer agreed to install a totally new transmission. When plaintiff was notified that his car was repaired, he announced he would not accept the vehicle and that he had decided to rescind the sale. The court, relying on the disclaimer, dismissed the subsequent lawsuit. Thus, the cases suggest the tentative hypothesis—tentative because of the recognized propensity of judges to state the facts in a manner which lends support to the result they reach—that the remedies of rescission and money damages for the diminution in value are more likely to be available if the remedy under the express warranty of repair or replacement of defective parts has proved to be unsatisfactory.

There is an even greater reluctance to afford the remedies discussed in this category in the informal dispute settling processes than has been observed in the cases. All manufacturers have a general policy of never giving a purchaser a new automobile or any remedy other than free repair if his car proves defective. The policy is based on the manufacturer's concept of "parts interchangeability." Parts interchangeability is essentially what makes assembly line production possible. The concept provides that an automobile is only a sum of its parts and that it should be possible to take any number of operational vehicles of the same model, interchange their parts, and have all of them continue to operate perfectly. In conformity with this concept, the manufacturers take the position that if a given automobile is operating imperfectly, it is always possible to correct the difficulty by replacing the defective parts. If several unsuccessful attempts have been made to repair the car, the manufacturers believe the difficulty must be improper diagnosis. If the owner complains enough to attract its attention, a manufacturer will have a factory representative assist in proper diagnosis. The manufacturer will be most reluctant, however, to offer the owner a new car or to admit that the vehicle cannot be repaired. Indeed, so far as I have been able to determine, the manufacturers will not even offer a new car where it is likely that in the long run such action would cost less than continued attempts to repair.<sup>177</sup>

Despite their concept of parts interchangeability, the manufacturers do very occasionally offer a purchaser a new automobile for public relations purposes. For example, if a regular and frequent purchaser of Chevrolets should happen to receive a car with many defects, General Motors might offer the purchaser a new Chevrolet as a means of preserving his goodwill. While still maintaining that the car could be repaired, General Motors would

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<sup>177</sup> The manufacturers reimburse the dealers for repairs made under the express warranty. Although reimbursement is at a rate somewhat less than that which a dealer would charge a paying customer for the same work, it would still cost a manufacturer considerably more to have most parts of a car replaced than it would to produce a new car on the assembly line.



recognize that customers can be seriously inconvenienced by the need to obtain many repairs. Moreover, many customers do not fully understand the concept of parts interchangeability and consequently may completely lose confidence in a particular car which proves unusually troublesome. On the other hand, if the purchaser who received that same car was a price shopper, and it was likely he would purchase Chevrolets in the future only if a Chevrolet dealer underbid a Ford dealer, then General Motors, or any other manufacturer in a similar situation, would be less inclined to offer a new car. Little is gained by cultivating the goodwill of such a customer.<sup>178</sup> A new vehicle will also never be offered if the purchaser has not afforded the manufacturer what it considers to be a reasonable opportunity to repair any defects. In this limited sense, then, the informal dispute settlements follow the pattern observed in the reported cases.

Another situation in which the manufacturers sometimes offer a purchaser a new car concerns the automobile which in the manufacturer's view is not defective at all but which they admit does not perform as well as most other cars. This automobile is an inevitable result of the parts interchangeability concept and the assembly line process. Each part going into an automobile is manufactured to specifications which permit certain deviations from the norm, known as maximum tolerances. By the laws of probability certain automobiles will contain a large number of maximum tolerance parts. Such automobiles will often have certain unusual characteristics which disturb more "particular" owners; for example there might be a slight grinding noise in the rear end, annoying but otherwise harmless. In my interviews, the manufacturers identified consumer complaints about these automobiles as among their most troubling warranty problems. Usually a manufacturer will make some attempt to correct the disturbing characteristic; but if it cannot be corrected easily and inexpensively, no further remedy ordinarily will be offered. Upon occasion, however, a new car, hopefully containing fewer maximum tolerance parts, will be offered to a valued customer to preserve his goodwill.

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<sup>178</sup> Of course, motives other than the benefits to be obtained from goodwill can enter into the decision to offer a new car. I was told of one case in which a purchaser had received one of the first 1967 Ford Thunderbirds to come off the assembly line. When it proved to have many defects, the manufacturer offered the purchaser a new Thunderbird free of charge. Then the manufacturer had the defective car tested so that the results could be used to increase quality control on the assembly line.

Finally, one cannot overlook the case of Mr. Moskovits, a General Motors stockholder, who at the 1964 shareholder's meeting distributed a letter from a vice president of General Motors offering to refund his car's purchase price and finance charges "in a final endeavor to maintain your goodwill as a Chevrolet customer and to forestall any further disturbance of my household by your phone calls and mail to my wife at home." *Wall Street Journal*, May 25, 1964, at 2, col. 3-4.

Because it is the dealer who knows best the value of a particular customer's goodwill, the manufacturers leave it to the dealer to initiate consideration of offering a new car and often extensively rely on their judgment. My interviews with several dealers in southern Wisconsin revealed that some dealers believe the manufacturers are more inclined to offer a new automobile to a customer of a dealer who has good relations with the factory. Thus, this remedy may be used to preserve the goodwill of a dealer as well as a customer.

More common than offering a disgruntled customer a new vehicle free of charge is a practice of offering him an especially good price if he will trade in his unsatisfactory car and buy a new car of the same make. Again, this remedy is more likely to be available to a customer whose goodwill is deemed worth preserving. Sometimes it represents a compromise settlement with a particularly vexatious customer. Typically, this remedy will be afforded by a dealer without any financial assistance from the manufacturer. On some occasions the manufacturer will give the dealer a few hundred dollars to facilitate the offer of a good bargain to the customer. It should be emphasized, however, that even this remedy is rarely extended; typically the dealer and manufacturer will insist that the car can be repaired and offer nothing more than continual attempts at repair.

There are many more cases in this category which discussed the disclaimer than in any other category. Two of them even discussed the validity of the disclaimer in terms of the provisions in the Uniform Commercial Code.<sup>179</sup> As discussed above, to the extent there is any pattern in these cases the decision whether to enforce the disclaimer has seemed to depend more on the plaintiff's success in obtaining repairs on his car than on any other factor. The cases discussing but circumventing the disclaimer generally have held either that the disclaimer had not been sufficiently brought home to the buyer to become part of their contract,<sup>180</sup> or that for some unfathomable reason there was nothing inconsistent between the disclaimer and the existence of an implied warranty for the breach of which the plaintiff could invoke the traditional remedies of rescission or reimbursement for the diminution in value.<sup>181</sup>

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<sup>179</sup> *Sarnecki v. Al Johns Pontiac*, 56 Luz. Leg. Reg. Rep. 293, 3 U.C.C. Rep. 1121 (Pa. C.P., Luzerne County 1966); *Bafile v. Remchow*, 58 Schuylkill Legal Record 108 (Pa. C.P. 1960) (1952 version of the UCC).

<sup>180</sup> *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E.2d 892 (1961); *Stevens v. Daigle & Hinson Rambler, Inc.*, 153 So. 2d 511 (La. App. 1963); *Miller v. Andy Burger Motors, Inc.*, 370 S.W.2d 654 (Mo. App. 1963). Cf. *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 129 S.E.2d 323 (1963).

<sup>181</sup> *Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963).

*E. Miscellaneous Damages*

Into this category fall many types of damage which are generally sufficiently low in dollar value that there is little reported litigation concerning them. In those cases in which miscellaneous damage is sought, the plaintiff usually also asserts a larger claim for another type of damage. In one case plaintiff successfully sued for the cost of towing his car to a dealer for repairs which were made free of charge under the warranty.<sup>182</sup> This decision is basically consistent with informal practices. If a customer's car breaks down so that it cannot be safely operated and it is later determined that the customer is entitled to free repairs under the warranty, the manufacturers have an unannounced policy of reimbursing for towing expenses to the nearest authorized dealer. Reimbursement will usually be made, however, only if the charges are not covered by the owner's insurance.<sup>183</sup> Because this policy is unannounced, it is probable that many owners do not receive reimbursement because they do not think of requesting it and the dealer does not suggest the possibility. Since dealers are likely to be more inclined to suggest the possibility of reimbursement to a customer whose patronage they particularly value, towing may be another instance in which considerations of goodwill help determine the remedies afforded consumers.

Most of the remaining types of damage fall under the general heading of commercial loss. Such loss could include the cost of renting a replacement vehicle while repairs are in progress or, if no replacement vehicle is obtained, the losses attributable to the vehicle's inactivity.<sup>184</sup> Another example would be damage to personal property kept in the vehicle. For example, a salesman's business records might be damaged by water admitted through a leaky roof or trunk. There are not many claims advanced by new automobile buyers for this type of loss. (Because trucks and tractors are more often purchased for commercial purposes, it may be that claims are advanced more often in connection with repairs of that type of vehicle).<sup>185</sup> When claims are made, the manufacturers generally refuse to honor them. There is an occasional case in which, for reasons of goodwill, they reach a compromise settle-

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<sup>182</sup> *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E.2d 892 (1961).

<sup>183</sup> Often, of course, the insurance company will attempt to subrogate itself to the insured's claim against the manufacturer. Frequently, in these instances, the manufacturer will reach a compromise settlement with the insurance company.

<sup>184</sup> In one case the plaintiff sued in warranty for damages for loss of use of his vehicle and for inconvenience. The court held that inconvenience was not compensable damage for breach of contract. It recognized the possibility of recovery for loss of use but held that plaintiff had not proved his damages. *Fox v. R. D. McKay Motor Co.*, 188 Kan. 756, 366 P.2d 297 (1961).

<sup>185</sup> See note 66 *supra*.

ment. The manufacturers appear to be more inclined to reach such a settlement in a case where repairs have been delayed because of a parts shortage. Dealers tend to be a bit more liberal in that they will often provide a customer with a car free of charge or at very low rates while his automobile is being repaired.

#### IV. EVALUATION

The available evidence indicates that for many categories of damage strict liability is the rule of automobile products liability. It is strict liability that is generally enforced in the informal dispute settling processes; when enforced by courts, it is generally masked under the name of negligence. For types of damage not governed by strict liability—principally claims for rescission or diminution in value, and for commercial loss—the predominant rule is no liability. Proof of actual negligence in the manufacture of an automobile is a significant barrier to recovery in the settlement of only a very few types of claims. What can be said about the propriety of these rules of automobile products liability?

##### A. *In Terms of Notice*

I have summarized the many arguments advanced in the current dispute over strict products liability. Almost everyone seems to agree that liability should be strict if the manufacturer has not attempted to disclaim it. If the manufacturer uses a disclaimer, many commentators argue that liability should be strict anyway, at least for personal injury and property damage resulting from an accident. They base their arguments on various perceptions about how the world does or should work. Other commentators advance the more limited position that courts should insist only that notice of any disclaimer be given to purchasers before disclaimers are allowed to avoid strict liability and perhaps even negligence liability.<sup>186</sup> To these commentators, the observed pattern of dispute settlement would be considered justifiable if purchasers are given or receive little notice about the disclaimer of liability for personal injury and property damage to the vehicle, and yet are given or receive considerable notice about the unavailability of remedies for other types of consequential damage.

In discussing notice of provisions in an adhesion contract involving a consumer, it is useful to distinguish between notice given by the dominant party and notice received by the adhering party. In the case of the automobile disclaimer clause, notice given consists of all attempts by the manufacturers to provide the purchaser with an awareness of the disclaimer and its meaning. Thus, it includes not only the contractual provision itself, but also advertisements and other literature provided the purchaser, and any

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<sup>186</sup> See generally notes 50-57 *supra* and accompanying text.

verbal explanations made by the selling dealer. Notice received is the knowledge of the disclaimer actually absorbed by the purchaser. Notice may be received from many sources, many of them having little relation to the manufacturers' attempts to give notice. Thus, a purchaser may believe that an automobile manufacturer has no duty to compensate for personal injury and still may be unaware of the existence of the disclaimer clause.

One type of notice giving is, of course, the printed disclaimer itself. The last paragraph of each manufacturer's express written warranty contains a general disclaimer of all warranties and obligations except the express warranty. In order to comply with a section of the Uniform Commercial Code, the language of the disclaimers tends to be legalistic and makes specific mention of the implied warranties of merchantability and fitness.<sup>187</sup> The same section of the Code requires the manufacturers to distinguish certain parts of the disclaimer paragraph from the balance of the written warranty by using type which is larger, bolder, or of a different style.<sup>188</sup> To disclaim fully all possible liability for consequential damages, it is necessary for the manufacturers not only to include their disclaimer clauses but also to limit the remedies available for breach of the express warranty to repair or replacement of defective parts, since without such limitation all ordinary remedies for breach of express warranty would be available to a purchaser. The Code imposes no explicit requirements on the form of a limitation of remedies clause, and accordingly the manufacturers print their limitation clauses in the same type as the body of the warranty and usually place them in the middle of a paragraph.<sup>189</sup> The entire warranty, including the disclaiming provisions, is placed in a booklet given a purchaser at the time his

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<sup>187</sup> UNIFORM COMMERCIAL CODE § 2-316 (2). See the discussion of this section in note 61 *supra*.

<sup>188</sup> Section 2-316 (2) requires written disclaimers of the implied warranties of merchantability and fitness to be "conspicuous." Section 1-201 (10) defines "conspicuous" in the following manner: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

The manufacturers comply with the conspicuous requirement in differing ways. General Motors Corporation prints the entire disclaimer paragraph in italic type which is larger than the print used in the body of the warranty. Ford Motor Company places certain key words in the disclaimer paragraph, such as "warranty of merchantability and fitness," in type that is larger than the type used in the body of the warranty but is the same style of type as is used in the rest of the warranty. Chrysler Corporation prints the entire disclaimer paragraph in type that is bolder than, but otherwise identical to, the type used in the body of the warranty.

<sup>189</sup> Section 2-719, discussed in note 61 *supra*, renders certain limitations on remedies unenforceable but it says nothing about the form of such limitations. Of course, § 2-302 might be interpreted to require that such limitations be made in a form reasonably designed to give notice to the consumer. See note 62 *supra*.

automobile is delivered. The booklet mostly contains information about the operation of the car and its servicing requirements. One or two pages are devoted to the printing of the warranty itself and a few additional pages to an explanation of the warranty. Nothing is stated in this explanation about the meaning of the disclaimer, the manufacturer's responsibility for consequential damage, or the usual unavailability of a replacement vehicle in the event the automobile proves to be grossly defective. The limitation of remedies clause is explained in the sense that the purchaser is instructed to return his car to the dealer in the case of defect, but it is not specially stated that repair is the only remedy.

Other than in this booklet little notice about the exclusionary clauses is given by the manufacturers. Often the disclaimer paragraph is reproduced on the sales order form signed by the purchaser at the time he obligates himself to buy the car, usually several days before the vehicle is actually delivered. Interviews with automobile salesmen indicate that the meaning of this provision on the order form is never explained unless the purchaser asks, which very rarely happens.<sup>190</sup> Although, at the urging of the manufacturers, many dealers explain the provisions of the warranty at the time of delivery, this explanation principally concerns matters such as the servicing required to maintain the warranty's effectiveness and rarely touches on the disclaimer or limitation of remedies clause. Nor does the manufacturer's advertising generally mention the disclaimer.<sup>191</sup> Because of requirements imposed by the Federal Trade Commission, the advertisements of the express warranty do state that defective parts will be repaired or replaced by an authorized dealer, but the exclusivity of that remedy is not emphasized.<sup>192</sup> The manufacturers state that they do not advertise the disclaimer or emphasize the exclusivity of the repair or replacement remedy because that would be "negative selling."

A further measure of notice giving, and a measure of the amount of notice about the disclaimer received by purchasers, has been ob-

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<sup>190</sup> As in the previous section, no particular person or company will be identified as the source of information obtained in interviews. Frequently the information was given with the understanding that the source would not be identified.

<sup>191</sup> Occasionally an advertisement will reproduce the entire express warranty, including disclaimer, but the reproduction is in small print and no particular emphasis is given to it. An example of such an advertisement can be found in the *Wall Street Journal*, Sept. 5, 1966, § 2, at 16.

<sup>192</sup> Although the FTC's advisory opinions are confidential, it is well known in the industry that the FTC has been in contact with the manufacturers concerning the advertisements of their warranties. The FTC has principally been concerned that the manufacturers' advertising include explanation of the servicing required to maintain the warranty's effectiveness. See *AUTOMOTIVE NEWS*, June 20, 1966, at 6; FTC Advisory Opinion Digest No. 63 (June 22, 1966). See generally *FTC, GUIDES AGAINST DECEPTIVE ADVERTISING OF GUARANTEES* (April 26, 1960).

tained in a survey I have conducted of a sample of recent new car purchasers in southern Wisconsin.<sup>103</sup> The sample consisted of 329 persons, of whom 286 were actually interviewed.<sup>104</sup> The sample was drawn from lists of persons who purchased a new Ford, Chevrolet, or Plymouth automobile and registered it with the Wisconsin Department of Motor Vehicles between December 15, 1966, and January 31, 1967.<sup>105</sup> The sample was stratified so that purchasers of

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<sup>103</sup> The survey was conducted by the University of Wisconsin Survey Research Laboratory, whose trained staff advised and assisted in the selection of the sample, preparation of the questionnaire, and the coding and analysis of the results. The Survey Research Laboratory maintains a staff of trained interviewers throughout Wisconsin. It was these interviewers who actually administered the questionnaire to each respondent. All questions were asked orally with the interviewer recording the respondent's answer.

Most of the questions asked in the survey were designed to obtain information relevant to my study of the administration of the express warranty. These results will be reported in a subsequent article. I will report here only those results relevant to the subject of this article.

<sup>104</sup> The resulting response rate of 87% is generally considered good. Of course, the nonresponses represent error in any attempt to use the results of the survey to estimate the characteristics of the entire population of new car buyers. The magnitude of this error cannot be estimated precisely. Cf. Birnbaum & Sirken, *Bias Due to Non-Availability in Sampling Surveys*, 45 J. AM. STATISTICAL ASS'N 98 (1950). Consequently, when in the subsequent text estimates are made about the characteristics of the population of Wisconsin car purchasers, it would be more accurate to state that the estimates pertain to that part of the population who will respond to surveys of this type.

The nonresponses were distributed approximately equally among purchasers of the various makes and from the various locales sampled. There were nonresponse ratios of about 20%, however, among Plymouth owners residing in Milwaukee and Chevrolet owners residing in medium sized cities. For an explanation of how the sample was stratified, see the subsequent text discussion.

Of the total of 43 nonresponses, 25 were located but refused to be interviewed. Most of the balance of the nonresponses could not be located and were not interviewed for that reason.

<sup>105</sup> Ford, Chevrolet, and Plymouth automobiles were defined as any vehicle classified under that make by the Wisconsin Department of Motor Vehicles. The Department classifies many different models under each make. Thus, a "Mustang" is classified as a Ford, and an "Impala" is classified as a Chevrolet. Consequently, within each make are included many different types of automobiles which differ substantially in style and price. It is to be expected, therefore, that the purchasers of each make will vary in many of their characteristics. These three makes were chosen nevertheless because they are manufactured by different manufacturers and because the models classified under each make are roughly comparable in price to models classified under the other makes. Furthermore, given the limitations I put on the period in which eligible respondents could register their car, it was necessary to include all models of Plymouth in the sample if enough respondents were to be found for that stratum. Consequently, to maintain comparability it was necessary to include all models of Ford and Chevrolet also. For many purposes it would have been desirable to include in the sample owners of automobiles manufactured by American Motors Corporation. The limited size of the sample, however,

each of these three makes were equally represented. The sample was also stratified according to locale of the purchaser. One third of the purchasers of each make was selected from the city of Milwaukee, the only city in Wisconsin with a population greater than 500,000. Another third was selected from Wisconsin cities not located in the Milwaukee metropolitan area having a population between 60,000 and 500,000. Four cities fell in this classification: Madison, Green Bay, Racine, and Kenosha. The final third of the purchasers was selected from an arbitrarily picked group of eleven Wisconsin counties having no municipality with a population greater than 15,000.<sup>196</sup> Because the rural sample was selected arbitrarily and not randomly, it is not statistically provable that it is representative of all rural areas in Wisconsin. Nevertheless, the counties selected are scattered geographically throughout the state and hence it seems reasonable to assume that the

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meant that inclusion of such owners would have disproportionately increased the sampling error.

Before a sample was drawn from the registration lists, I deleted the names of all owners who had business names. Such owners were identified on an ad hoc basis, usually because the owner's name ended with "Co." or "Inc." The purpose of this exclusion was to restrict the sample as far as possible to persons purchasing automobiles for personal use. I felt that the differences between purchasers for personal and business use were likely to be great. Furthermore, given the limited size of the sample, it was not advisable to measure both those differences and the many other hypothesized differences—such as differences between purchasers of different makes and purchasers residing in different locales—that I desired to measure. Limited resources prevented use of a more accurate method of excluding purchasers for business uses, and accordingly it must be assumed a limited number of such purchasers were included in the sample.

The person actually interviewed was not necessarily the person listed as the registered owner by the Wisconsin Department of Motor Vehicles. The interviewers were instructed to determine which person had handled "most of the business details" in selecting and buying the car. That person, who usually was also the registered owner, became the final respondent. This procedure was adopted because I felt that the person who handled most of the business details would be the person to whom most of the dealer's attempts to give notice about the express warranty would be directed and who would therefore likely have received the greatest amount of notice about the warranty.

Most of the interviews were conducted in the last two weeks of April 1967 and the first week of May 1967. Since in most instances the date of delivery of the automobile to the purchaser and the date of registration with the Wisconsin Department of Motor Vehicles differed by less than one week, most respondents had possessed their automobiles from three to five months at the time they were interviewed. In a few instances, however, the automobile was delivered as much as several months before it was registered, and in those cases the respondents possessed their vehicles for a much longer period.

<sup>196</sup> The counties that were selected were rural counties (as defined in the text) in which the University of Wisconsin Survey Research Laboratory had interviewers located and in which, therefore, it would not be unduly expensive to interview respondents. These counties were Columbia, Dodge, Grant, Calumet, Oconto, Polk, Price, Sauk, Trempealeau, Washington, and Waupaca.



sample drawn from them is generally representative of rural purchasers of each make. Moreover, because the sample was stratified so that actually nine separate samples were drawn (Milwaukee Chevrolet, Milwaukee Plymouth, Medium sized city Ford, Rural Chevrolet, and the like), with many parts of Wisconsin's car buying population left out completely, it is not statistically exact to generalize to all Wisconsin automobile purchasers or even to all purchasers of the makes sampled. Nevertheless, from time to time I will present data for the entire sample as if they were representative of the population, since the various subsamples seem sufficiently representative of the total car buying population to make the data for the entire sample interesting and in some instances probably descriptive of the state's population.<sup>197</sup> For the same reasons I will from time to time report data for all purchasers of a particular make or residing in a particular locale.

Midway through the interview each respondent was shown a copy of the warranty reprinted in the booklet he received at delivery and his attention was drawn to the disclaimer paragraph. He was asked if anyone at the dealership had explained this paragraph to him. Less than 10 percent of all the respondents replied that it had been.<sup>198</sup> The respondents were then requested to study the disclaimer paragraph and after a short interval were asked what they understood it to mean. This question was designed to determine whether a typical consumer would understand the import of the disclaimer, which is written largely in legal terminology, even if it were called to his attention and studied by him. Less than one half of the respondents reported a generally accurate conception of the disclaimer's meaning.<sup>199</sup> Even these

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<sup>197</sup> It would, of course, be even more inaccurate to consider the sample as representative of car purchasers in the country as a whole, since Wisconsin automobile purchasers differ in many respects from purchasers elsewhere. For example, Plymouths are purchased by a smaller percentage of Wisconsin automobile owners than by automobile owners generally. Whereas in 1966 Plymouth ranked fourth nationally in new car sales by domestic manufacturers, in Wisconsin Plymouth only ranked eighth. 1967 *AUTOMOTIVE NEWS ALMANAC* 25, 37. This difference is largely accounted for by the disproportionate share of the Wisconsin new car market captured by American Motors Corporation, which has located its only assembly plant in the state. *Id.*

<sup>198</sup> About 80% definitely stated that the disclaimer had not been explained to them. The remaining 10% could not remember whether or not it had been explained to them. There were no statistically significant differences in the response to this question between purchasers of different makes or residing in different locales.

Of the respondents who remembered having the disclaimer paragraph explained to them, 70% stated it had been explained by the salesman. Approximately 40% of these respondents indicated the disclaimer was explained before they agreed to purchase the car. The remainder said it was explained at the time of delivery.

<sup>199</sup> The coders were instructed to categorize as indicating a generally

respondents did not necessarily comprehend the precise meaning of the disclaimer, but they indicated a general awareness that the disclaimer meant the manufacturer was avoiding all liability not explicitly assumed. About 25 percent of the respondents flatly stated that they did not know what the disclaimer meant. A frequent misconception of the disclaimer's meaning (held by 15 percent of the respondents) was that it meant that verbal promises by the salesmen were unenforceable.<sup>200</sup>

Thus, the survey verifies the conclusion derived from the interviews with dealers and manufacturers that only minimal efforts are made to give new car purchasers notice of the disclaimer. It can be argued that the notice given through the wording and printing of the disclaimer and limitation of remedies clauses is sufficient to satisfy the limited requirements of the Uniform Commercial Code. But certainly the manufacturers could do more. Nor does there appear to be any substantial difference in the amount of notice given about the unavailability of the remedies' compensation for consequential injury and of rescission. Consequently the manufacturers' markedly different reactions to claims for these remedies cannot be justified on the ground of amount of notice given.

To measure the amount of notice received, the respondents in my survey were presented with two hypothetical fact situations.<sup>201</sup>

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accurate conception of the disclaimer's meaning:

Any answer suggesting that the manufacturer and/or dealer are liable only for what is promised in the warranty (i.e., repairing or replacing defective parts and/or faulty workmanship). Thus, the manufacturer or dealer is liable only under the conditions in the warranty, or that the manufacturer or dealer avoids (disclaims, etc.) all implied warranties and other obligations not stated in the warranty.

<sup>200</sup> Chrysler Corporation includes a statement about the nonenforceability of oral promises in its disclaimer paragraph. Responses attaching such a meaning to the disclaimer were not concentrated among Plymouth owners, however.

The conclusion that the automobile disclaimer as presently written is incomprehensible to a large number of consumers was validated by another survey. At the beginning of the 1966-1967 school year, incoming first year students to the Wisconsin Law School were asked to complete a short questionnaire concerning various aspects of automobile warranties. Most of the students were provided a copy of some automobile warranty including disclaimer. All were presented with a fact situation in which a hypothetical person suffered personal injuries as a result of a defect-caused accident and then asked if there should be recovery against the manufacturer. Of the responding students who had been provided a copy of a warranty, only approximately 50% indicated some awareness of the meaning of the disclaimer in their answers. These respondents, although not yet legally trained, must be considered more legally aware than the typical consumer.

<sup>201</sup> These questions were asked in the interview before the respondents were shown a copy of the disclaimer paragraph. Consequently, the responses to these questions should reflect the knowledge of the disclaimer's meaning possessed before the interviews commenced.

The first fact situation consisted of a typical accident which they were told to assume was caused by a defective steering mechanism. The respondents were then asked if the warranty covered four different types of expense: (1) approximately 800 dollars for repair of the damaged vehicle, (2) cost of renting a substitute car while the damaged vehicle is being repaired, (3) medical expenses resulting from a broken leg hypothetically incurred in the accident, and (4) loss of income resulting from the broken leg. The second fact situation hypothesized a purchaser of a new car who immediately experienced a series of mechanical difficulties, many of them quite serious. The purchaser "took the car back to the dealer for repairs, but it seemed that as soon as one part was fixed, something else went wrong, and this went on for some time." The respondent was asked whether in this situation he would expect the manufacturer or dealer to offer the purchaser another new car without charge. The observed pattern of dispute settlement would tend to be justified if largely affirmative responses were received to the questions about reimbursement for the costs of repair, medical expenses, and loss of income and largely negative responses received to the questions about reimbursement for the cost of renting a substitute vehicle and the replacement of the continually defective car.

Table 4 shows the percentage of the total sample who responded affirmatively to each of the five questions. Most of the balance of the sample responded negatively but to each question some responded "don't know" or "depends."

TABLE 4

## Customer's Expectations of Recovery in Hypothetical Situations

Type of Recovery	Affirmative Responses (in percent)
Cost of repair	79.4
Cost of renting	45.1
Medical expenses	33.9
Loss of income	30.4
Replacement of car	52.1
Number of Respondents	286

Since for some of these questions significant differences were observed in the responses of purchasers of different makes and residing in different locales,<sup>202</sup> the percentages reported in Table 4

<sup>202</sup> For example, the percentage of respondents anticipating recovery of medical expenses correlated significantly with the make of car purchased. If the responses of all purchasers of a particular make, regardless of place of residence, are combined, and tabulated with the answers to the question about recovery of medical expense,  $X^2$  (2 d.f.) = 12.25,  $p < .005$ . Chi-Square ( $X^2$ ) is a measure of the dependence of two variables, here the percentage expecting recovery of medical expenses and the make of car purchased.

cannot be considered descriptive of the population of all new car buyers. Table 4 is significant, however, in that it suggests a substantial portion of the new car buyer population expects recovery of all types of damage about which I inquired. Moreover, the rather marked difference between the percentage of respondents expecting reimbursement of repair costs (about 80 percent) and the percentage expecting recovery in the other situations (between 30 and 50 percent) appears to be statistically significant. A difference of similar magnitude was observed in all nine subsamples.<sup>203</sup> Similarly, there may be significance in the substantial difference between the percentage of affirmative responses received to the questions concerning reimbursement for the rent of a substitute car and replacement of the continually defective vehicle on the one hand, and to the questions concerning reimbursement for medical expenses and loss of income on the other. In all but three of the nine subsamples a higher affirmative response was received to each of the first set of questions than was received to either of the

Probability less than .005 ( $p < .005$ ) means that the probability is less than five parts in a thousand that a value for  $X^2$  greater than 12.25 would be obtained if there were no dependency between the two variables (i.e., the null hypothesis). This probability strongly suggests that the high value of  $X^2$  indicated above did not result from chance but rather because there is some dependency between the two variables (i.e., the null hypothesis is rejected). See generally R. STEEL & J. TORRIE, PRINCIPLES AND PROCEDURES OF STATISTICS 31-43, 305-31, 346-51 (1960).

I have not been able to explain this finding of dependency. The explanation probably lies in differences in the characteristics of purchasers of different makes. Thus, in my sample there were substantial differences in the mean family income of purchasers of different makes. The mean family income of Ford purchasers was \$12,800, of Chevrolet purchasers, \$9,400, and of Plymouth purchasers, \$8,800. This progression did not correlate directly or inversely with the percentage of respondents expecting recovery of medical expenses, however. The percentage of Chevrolet purchasers expecting recovery was 46%, of Ford purchasers 29%, and of Plymouth purchasers 26%.

A similar significant correlation was observed between purchasers expecting recovery of medical expenses and place of residence. If the responses of all purchasers living in the same type of locale are combined, regardless of make of car purchased,  $X^2$  (2 d.f.) = 6.37,  $p < .05$ . Again, I have discovered no definite explanation for the observed dependency between these variables, although the results are consistent with a hypothesis that urban dwellers are more litigation minded.

All the calculations reported in this footnote were made at a time at which only 279 interviews, rather than the total of 286, were coded. This difference does not affect the validity of the substantive observations.

<sup>203</sup> The following table shows the percentage of affirmative responses received to these questions for each of the nine subsamples:

Type of Recovery	Milwaukee			Medium Sized Cities			Rural Areas		
	Chev.	Ford	Plym.	Chev.	Ford	Plym.	Chev.	Ford	Plym.
Cost of repair	91.2	78.1	86.2	89.7	75.8	71.9	81.8	71.9	68.8
Cost of renting	44.1	40.6	34.5	48.3	48.5	43.8	57.6	53.1	34.4
Medical expenses	50.0	37.5	34.5	55.2	27.3	28.1	36.4	21.9	15.6
Loss of income	41.2	43.8	34.5	34.5	24.2	25.0	30.3	21.9	18.8
Replacement of car	50.0	65.6	55.2	48.3	42.4	59.4	45.5	53.1	50.0

second set of questions.<sup>204</sup>

In connection with three of the questions described above—namely those pertaining to the cost of repair, medical expenses, and replacement of the continually defective car—the respondents were asked why they did or did not expect recovery. The responses provide a partial explanation for the differences in the percentage of affirmative responses to each question. Nearly all persons expecting recovery of the costs of repair or medical expenses gave as their reason that the defect in the steering mechanism caused the damage and therefore the damage should be covered by the warranty and the manufacturer should be held responsible. Of those persons not expecting recovery of medical expenses, by far the greatest percentage responded that warranties just cover cars and not people. Less than five percent of the respondents to the questions about cost of repair and medical expenses offered as a reason for not expecting recovery that the warranty applies just to parts defective in manufacture and accordingly only the steering mechanism and no other parts or type of damage would be covered by the warranty. Nearly all the respondents expecting replacement of a continually defective car gave as their reason a belief—which did not appear to be based on an interpretation of the warranty—that when you buy a new car, you expect one which works. The largest percentage of those responding negatively to this question indicated they held some notion that the warranty just covers repair or replacement of defective parts and not replacement of the whole vehicle. Another substantial percentage believed that neither the manufacturer nor the dealer would ever replace the whole car, although that belief did not appear to be based on an interpretation of the warranty.

It is difficult, therefore, to justify all aspects of the present pattern of automobile products liability dispute settlement by reference to notice given or received. Strict liability for the costs of repairing a vehicle damaged in a defect caused accident can prob-

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<sup>204</sup> See note 203 *supra*. It should be noted that in the question pertaining to the replacement of a grossly defective car, the respondents were asked if they would "expect the dealer or manufacturer to give you a new car." The question, therefore, made no particular reference to the warranty. In the questions pertaining to other types of recovery, the respondents were asked if they expected the warranty to cover the damages. This difference in the questions makes the responses obtained not completely comparable. There is reason to believe, however, that the difference in the questions did not cause a variance of great magnitude in the responses obtained. Respondents who did not expect recovery under the warranty for the cost of renting a substitute car or for loss of income were asked whether they believed the dealer or manufacturer should reimburse them for either expense and, if so, whether they thought the dealer or manufacturer would provide compensation. In each instance less than ten percent of all the respondents answered that they did not believe the warranty covered the expense but that they nevertheless believed the dealer or manufacturer would provide compensation.

ably be justified at a theoretical level on the ground of notice, since the manufacturers make little effort to give notice of their disclaimer of this liability and almost all consumers expect recovery. For other types of damage, however, although the manufacturers continue to give little notice about their exculpatory clauses, a substantial percentage of new car purchasers do not expect recovery. Indeed, on the basis of notice received the strongest case against recovery could be made with regard to claims for personal injury. Yet strict liability is clearly the rule applied to such claims, and it is precisely such claims that most commentators and courts think present the strongest case for overruling the disclaimer. Certainly none of my data about notice justifies the different approach that is in fact taken to claims for most types of consequential damage on the one hand and for commercial loss and rescission on the other.

It is also difficult to determine what my observations concerning notice indicate should be the pattern of dispute settlement. Commentators who emphasize notice as a prerequisite to enforceability have not usually distinguished between notice given or received, nor have they indicated how much notice of an exculpatory clause should be required. In a recent study of the provision contained on the back of credit cards requiring notice to the issuer before a credit card user is excused from liability for charges made on a lost or stolen card, Macaulay discovered a pattern of little notice giving about the provision by the issuers yet a great deal of notice received by consumers—a pattern similar in many ways to the one discovered here. Macaulay argued that in this situation the exculpatory provision should be disregarded, because, if the issuers made a bona fide effort to give notice, perhaps even a greater percentage of consumers would receive notice.<sup>205</sup> After all, receiving notice is vital to a credit card user if he is to take the affirmative action required to protect himself in the event of a lost or stolen card.

There is a certain attractiveness to applying Macaulay's argument to automobile disclaimers.<sup>206</sup> Requiring more notice giving by the automobile manufacturers could hardly cause harm. It might even induce the manufacturers to modify some of the harsher aspects of their exculpatory clauses to avoid the necessity of negative advertising. On this theory, therefore, it might be said

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<sup>205</sup> Macaulay, *supra* note 52, at 1099-1106.

<sup>206</sup> It might be appealing to some persons to distinguish Macaulay's credit cards from automobiles on the ground that the former are luxuries and the latter necessities. It is difficult to justify such a distinction, at least if one restricts himself to considering the liability of manufacturers for defects in *new* automobiles. In 1966, the median household income of new car buyers was \$10,990, and the average household income was \$14,621. MARKET RESEARCH DIVISION, ADVERTISING DEPARTMENT, U.S. NEWS & WORLD REPORT, *THE BUYERS OF NEW AUTOMOBILES 1962-1966*, at 10 (1966).

that courts are acting properly in ignoring the disclaimer in those situations in which they do, and that the courts should be even bolder and overrule the disclaimer when it is advanced against claims for rescission and commercial loss.

On the other hand, it is not clear that if the manufacturers do give more notice, then the disclaimer should be enforced as it literally reads. Commentators who support enforcement of disclaimers if there is notice generally argue that with notice the buyer can take action to protect his interests. If the existence of notice is determined by measuring the notice given by the manufacturers, however, this argument assumes that notice given will be received by buyers and that it is possible for the buyer to take action to protect his interests. Postponing temporarily consideration of the question whether increased notice giving results in more notice being received by new car purchasers, there is not much purchasers can do to protect themselves. They cannot shop for a better bargain, since all manufacturers have essentially the same disclaimer; nor, obviously, can they negotiate the terms of the disclaimer with the dealer. Admittedly a consumer can purchase insurance which will minimize many, although not all, of the risks the disclaimer imposes upon him. He can further protect himself by arranging more safety checks for his car. Still, it is questionable whether notice received will induce such responses by most persons. One recent commentator has argued, although without supporting data, that informational regulation—that is, regulation promoting notice giving to the consumer—is an ineffective means of consumer protection because most consumers simply will not take the affirmative action necessary to protect their interests.<sup>207</sup> Unfortunately, I do not have data indicating how many consumers would be more likely to purchase insurance or to inspect their car more frequently if they received more notice about the disclaimer. Probably some consumers would respond in that manner, but it is certainly possible that a significant percentage would not be affected by notice.

Most importantly, however, it is not at all clear that even if manufacturers were induced to give more notice, more notice would be received by consumers. Although it is admittedly a self-serving statement, the manufacturers and dealers interviewed stated that one reason they did not attempt to convey notice of the disclaimer, while they do attempt to give notice about many of the other provisions of the warranty, is that the buyer is simply not very interested in learning about such matters. The buyer, it is said, is much more interested in looking at and driving

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<sup>207</sup> Comment, *Consumer Legislation and The Poor*, 76 YALE L.J. 745 (1967). The author devotes most of his argument to the responses of the poor, but he does assert the same principle holds true for the affluent. *Id.* at 767.

his new car. Data from my survey tend to support this view. Buyers who stated that the disclaimer paragraph had been explained to them at the time of purchase did not provide a statistically significant, higher incidence of answers correctly applying the literal meaning of the disclaimer in their responses to the questions designed to measure notice received.<sup>208</sup> This data suggests, therefore, that there is no significant correlation between notice giving in the form of verbal explanation at the time of purchase and notice received. This conclusion must be a qualified one, however, since asking the respondents whether they remember the meaning of the disclaimer paragraph being explained to them is not necessarily an accurate way of determining to whom the disclaimer paragraph was in fact explained. The survey did show that given a brief opportunity to study the disclaimer paragraph, nearly one-half of the purchasers were able to absorb at least some idea of what the disclaimer meant.<sup>209</sup> Thus, many consumers must have the ability to receive notice about the disclaimer even as it is now written, although outside the context of a survey they do not have the inclination.

In sum, therefore, even if the manufacturers give more notice of the disclaimer, it is unlikely that many purchasers will receive any more notice, although perhaps they are capable of doing so. This finding raises the interesting and perhaps unresolvable question whether, assuming the policy biases of those commentators who emphasize notice and are unwilling to impose strict liability irrespective of disclaimers, the manufacturers should be held liable even if they subsequently change their practices and give a large amount of notice about the disclaimer because new car buyers will not receive this notice. Probably the manufacturers should be liable if they have not given notice in a manner which is most likely to be received by purchasers. If that condition is met, it can be strongly argued that the disclaimer should be enforced, for to rule otherwise would impose a strict liability on the manufacturers that could not be disclaimed, which is presumed to be a rejected policy goal. On the other hand, enforcing the disclaimer in such a situation has the effect of prescribing a code of conduct for buyers—namely, receiving the notice and taking action to protect their interests—that most buyers cannot be expected to meet. Such action comes very close to imposing strict liability without choice on the majority of buyers, or at least without choice that they can realistically be expected to exercise, and presumably the policy assumptions reject that goal as well.

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<sup>208</sup> Neither was there a significant correlation between explanation of the disclaimer at time of purchase and the ability to interpret the disclaimer correctly when it was shown to the respondent during the interview.

<sup>209</sup> See note 199 *supra* and accompanying text.



### B. *In Terms of Substantive Policies*

Most contemporary commentators argue that products liability disputes should be decided on the basis of substantive policy considerations, irrespective of the existence of notice about the disclaimer. Accordingly, the question arises whether the observed pattern of automobile products liability dispute settlement can be justified in terms of the substantive policy arguments advanced by these commentators. The validity of many of their arguments could be tested with empirical data.<sup>210</sup> Thus, data could theoretically be collected to determine whether it is more efficient to spread the losses resulting from defects by imposing strict liability or by relying on private insurance purchased by individuals. Similarly, it should be possible to empirically determine whether strict liability has induced greater efforts towards safety in manufacturing. In both instances, however, it would be a monumental task to collect the relevant data and I have not attempted it.

It is nevertheless possible to offer some substantive analysis of the observed pattern of dispute settlement. The discovery of the marked difference in approach to claims for personal injury and property damage resulting from an accident on the one hand and claims for commercial loss, rescission, or diminution in value on the other suggests that the validity of the disclaimer, and the existence of strict liability, need not be determined identically for all types of damage. It will be recalled that Justice Traynor has suggested they should not. He has argued that the doctrine of strict liability in tort should be limited essentially to claims for personal injury and property damage resulting from an accident. Most of the other types of damage, including rescission and presumably commercial loss, he would leave to the intricacies of sales law, which have been "articulated to govern economic relations between suppliers and consumers of goods."<sup>211</sup> Since Justice Traynor believes disclaimers "are immaterial" to the existence of strict liability in tort, the inference is that he believes disclaimers are one of the intricacies of sales law "articulated to govern" disputes not governed by his tort theory.

Much can be said in favor of not imposing strict liability on the manufacturers for claims for rescission or diminution in value. A considerable majority of new automobiles are sold with some defect, usually minor, which manifests itself after delivery and which ordinarily is repaired by an authorized dealer at no cost to the purchaser.<sup>212</sup> If the manufacturers, at the purchaser's option,

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<sup>210</sup> For an enumeration and discussion of the arguments advanced by the strict liability advocates, see notes 32-36 *supra* and accompanying text.

<sup>211</sup> See note 45 *supra* and accompanying text.

<sup>212</sup> Thus 169 of the 286 persons interviewed in my survey (59%) reported that they had had some trouble with their car, although in the usual case they had possessed the car only three to five months at the time

were required to replace the entire car, refund the purchase price, or pay for the diminution in the value of the unrepaired vehicle, even though repair or replacement of the defective part would be a fully satisfactory remedy to a reasonable consumer, the express warranty would be a considerably more expensive undertaking for the manufacturers than it already is. Moreover, the stability of many of their sales would also be jeopardized. One is reminded of the comment of one court which upheld the disclaimer against a claim for rescission in a case where the purchaser had rejected the dealer's offer to repair the defect.

It is our opinion that an automobile dealer would be subjected to innumerable rescinded contracts where the purchaser got into financial difficulty and was unable to meet his installment payment if he were permitted to rescind his contract on an implied warranty of merchantability or fitness for a particular purpose.<sup>213</sup>

Furthermore, application of strict liability principles so as to allow a purchaser to sue for rescission or diminution in value everytime a defect appears would be inconsistent with the policies of enterprise liability and loss spreading. Most purchasers will surely avail themselves of the remedy of repair or replacement, where that remedy is adequate, whether or not they are entitled to rescind the sale. Consequently, those few purchasers who insist on the more expensive remedy of rescission or diminution in value will be requesting special treatment and in effect will require the manufacturers to charge more for their products in order to provide for an expense which will potentially benefit only a few of the purchasers.<sup>214</sup> If the manufacturers are to effectively

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of the interview. Consumers Union has had even more unfortunate experiences with its test cars. See *Quality Control, Warranties and a Crisis in Confidence*, 30 CONSUMER REPORTS 173, 175 (1965). Of the 169 respondents reporting some trouble in my survey, 45 indicated they had been unable to obtain a free repair under the warranty. Many of these respondents indicated either that the dealer would not correct the trouble or that he had been unsuccessful in his attempts to correct it. Apparently many of such troubles were minor, for in many instances the respondent did not pursue the matter further nor even have the trouble corrected at his own expense.

<sup>213</sup> *Bafile v. Remchow*, 58 Schuylkill Legal Record 108, 119 (Pa. C.P. 1960).

<sup>214</sup> This argument assumes that a manufacturer could repair the vehicle at a cost less than the damages it would have to pay for the diminution in value. If the damages for diminution in value would be roughly equivalent to cost of repairing the vehicle at commercial prices, as seems probable, the assumption is true since the manufacturer pays a dealer less for warranty work than the dealer would charge a paying customer for the same work. See note 177 *supra*.

For a discussion of the many problems involved in applying enterprise liability theory to ensure that those persons who benefit from a particular activity share equally the costs of that activity, see Calabresi, *supra* note 32; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-19 (1961).

avoid the possibility that a purchaser will insist on rescission rather than permitting repair, however, they probably need to disclaim implied warranties, or at least limit the remedies for their breach as they do for breach of the express warranty. Otherwise purchasers would probably have available all the remedies afforded an ordinary buyer victimized by a defect in the purchased product.

A somewhat different situation may be presented by the purchaser who has afforded the manufacturer and dealer extensive opportunity to repair or replace the defective parts but the opportunity has not been seized or several efforts to repair or replace have failed. In that situation the promised remedy of repair or replacement has proved not to be a satisfactory substitute for the remedies of rescission and monetary damages for diminution in value. Literal enforcement of the exculpatory clauses in the automobile warranty would defeat the purchaser's expectations of receiving a working vehicle. Even if the manufacturers are correct in asserting with regard to these cases that the car can theoretically still be repaired, it must be remembered that it is certainly not consistent with a purchaser's expectations to require him to leave his vehicle in a service shop for repeated and extensive periods of time. Furthermore, permitting resort to the remedies of rescission and monetary damages for diminution in value in these cases would be at least partly consistent with principles of enterprise liability. The risk that a defect will not be repaired quickly under the express warranty is borne by nearly all purchasers. Arguably many purchasers, although probably not all, would claim rescission or monetary damages for diminution in value in such situations. At least more purchasers would be likely to request those remedies where repair is not an entirely satisfactory remedy than where repair is fully satisfactory. Consistent with the thesis that rescission and recovery of diminution in value should be allowed where the manufacturers and dealers have not repaired a defective part promptly, it will be recalled that the rescission and diminution cases in my collection of reported decisions could be roughly categorized into cases in which the plaintiff had afforded the dealer an extensive opportunity to repair and won, and cases in which an opportunity had not been afforded and the plaintiff lost.<sup>215</sup>

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<sup>215</sup> See notes 173-76 *supra* and accompanying text.

Prosser seems to argue that damages for "loss of bargain," by which he apparently means damages owing because the product is not of the warranted quality, should be recoverable only against the dealer and not against the manufacturer. As one basis of his argument, Prosser assumes that the amount of damages for "loss of bargain" are calculated by taking the difference between the value of the automobile as received and the price paid for it. Since the price is matter negotiated between dealer and purchaser, it seems inappropriate to make the manufacturer liable. Prosser, *supra* note 2, at 822-23. The difficulty with this contention is that damages

There is a doctrinal argument, which relies on the general effectiveness of the disclaimer of implied warranties in all cases but does not require selective enforcement of the clause limiting the remedies available for breach of the express warranty, that justifies restriction of the remedy of rescission to situations in which repair or replacement of defective parts has not been made promptly under the express warranty. It is usually said that rescission is available as a remedy for a seller's breach of warranty only if the breach is "material,"<sup>216</sup> or "substantially impairs" the value of the bargain to the buyer.<sup>217</sup> In the ordinary sale of goods situation, whether a particular breach of warranty is material would depend largely on the extent to which the defect in the goods prevents the purchaser from using the goods in the usual way. Applied in this orthodox manner to the sale of an automobile and assuming the limitation of remedies clause was considered unenforceable, this approach would mean that rescission would be available to the purchaser whenever a defect was serious enough to impair normal operation of the vehicle. It is much more realistic, however, to view the manufacturer's express warranty as a promise to repair or replace defective parts rather than as a warranty with a limitation of the remedies available upon breach. Such a high percentage of new cars require some repair early in their life that it is totally unrealistic to say that the manufacturers promise their products will not contain defects.<sup>218</sup> Certainly the manufacturers themselves view the express warranty as a promise to

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for delivering inferior goods, assuming rescission is not requested or allowed, are usually calculated by taking the difference between their value as received and the value they would have had if they had been as warranted. The price does not enter into the computation except insofar as it is evidence of the value the goods would have had if they had been as warranted. See, e.g., UNIFORM COMMERCIAL CODE § 714 (2). It is important that the usual rule be maintained, for otherwise a purchaser who negotiated a favorable price would sacrifice that gain whenever there was a breach of warranty.

The other basis of Prosser's argument is that the determination that there should be any damages at all depends on what has been promised about the quality of the goods, and the dealer may make representations about quality that are independent from and different than the manufacturer's representations. Prosser, *supra* note 2, at 823. While certainly the dealer may make his own representations, that does not seem to be a persuasive reason for relieving the manufacturer from liability for breaching its own representations contained in the express warranty.

It may be that Prosser means to confine his argument to the denial of recovery of "loss of bargain" damages on a strict liability in tort theory. So limited, there may be more basis for the argument. See Traynor's opinion in *Seeley v. White Motor Co.*, 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965). That limited argument would not necessarily affect the contentions I have made in the text, however, since the recovery I advocate could be based on a theory of breach of the express warranty.

<sup>216</sup> RESTATEMENT OF CONTRACTS §§ 275, 317, 347 (1932).

<sup>217</sup> UNIFORM COMMERCIAL CODE § 2-608.

<sup>218</sup> See note 212 *supra*.

repair defects rather than a promise that there will be no defects. If the express new car warranty is viewed as a promise to repair or replace defective parts, then it can be said that there is no breach of promise, and certainly no material breach, until the dealer demonstrates his inability or unwillingness to repair a defect. This view of the nature of express warranty also supports restriction of claims for money damages for diminution in value to cases in which repair or replacement has proved not to be an adequate remedy.<sup>219</sup>

The most difficult rescission claim to evaluate substantively is the one in which a purchaser complains of the automobile which admittedly performs not as well as most other cars but which according to the manufacturer's plans and specifications is not defective at all. This automobile contains a large number of maximum tolerance parts and is one of those inevitable products of the assembly line process that I described earlier.<sup>220</sup> The manufacturers admit this situation presents one of their most troubling warranty problems but ordinarily they will offer no remedy other than some attempts to correct the disturbing characteristic if the attempts can be made easily and inexpensively. Whether rescission, or extensive replacement of maximum tolerance parts, should be afforded in these situations depends, doctrinally, not on whether principles of strict liability are accepted, but rather on whether the vehicle should be considered defective. The manufacturers have presumably decided that a car with certain tolerances can perform satisfactorily and is not defective. As with the other cases in which the defect, which may even have caused personal injuries, is alleged to be in the design of the automobile, it is disputable whether the courts, with their rather limited knowledge of automotive engineering, should closely oversee that decision.<sup>221</sup>

A substantive justification can be offered for the general inability of purchasers to recover damages for commercial loss. These losses typically consist of the cost of renting a substitute vehicle while repairs are in process or damage to valuable property stored

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<sup>219</sup> Consistent with this doctrinal argument, it will be recalled that I could observe no greater propensity by courts to award damages for diminution in value instead of rescission in cases in which the defects were minor. Most courts seem to apply the same test in determining when to award either remedy. See note 166 *supra* and accompanying text.

<sup>220</sup> See text at p. 138 *supra*.

<sup>221</sup> See notes 94-99 *supra* and accompanying text.

One difference between disputes concerning the maximum tolerance car and disputes in which it is claimed that personal injuries were caused by a defective design is that the latter disputes will likely be decided in the future with reference to the new Auto Safety Law. See note 99 *supra*. Since rescission claims arising out of annoyances caused by maximum tolerance parts usually do not involve safety considerations, however, they cannot be resolved in that manner. Consequently that problem is likely to continue to be troublesome for some time.

in the car. They are not the type of loss which all consumers are as likely to incur. Thus, most car owners, although inconvenienced, can arrange to be without their car for the time it takes to obtain repairs. To impose strict liability for commercial loss expecting the manufacturer to reflect the cost in higher prices, would therefore tax the purchasers not likely to incur such losses for the benefit of those who do. In other words, principles of enterprise liability and loss spreading, the most substantial justifications for the imposition of strict liability, do not apply to this situation; commercial loss may be a situation in which the cost should not be attributed to the activity of automobile manufacturing but rather to the activity of the purchaser which caused him to suffer commercial loss in a situation in which other purchasers would not.<sup>222</sup>

The objections to strict liability for commercial loss and for most rescission claims does not necessarily apply to the types of damage for which strict liability is the rule in the automobile industry. Personal injury, and damage to the vehicle resulting from a defect-caused accident, are losses which by and large every car owner is equally likely to incur. Admittedly, some purchasers drive their cars more than others, and drive them in situations exposing them to greater risk of serious injury in the event a defect exists. But at least the difference in exposure to risk between purchasers is not as marked in these cases as in the commercial loss cases.<sup>223</sup> Merely concluding that strict liability would in fact distribute the costs among persons all of whom assume roughly equivalent risks does not, of course, dispose of all the arguments that can rationally be advanced against strict liability. The manufacturers themselves do not offer serious objection to strict liability in these cases, however. If enterprise liability theorists are at all correct, therefore, the manufacturers are already including in the price of new cars the costs of a strict liability system. Consequently, to deny a particular plaintiff recovery despite proof of a defect and causation—for example, by upholding

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<sup>222</sup> Another commentator has argued for a similar result on the basis of the relative availability of insurance against commercial loss. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

An exception to this general conclusion might be drawn in cases in which a purchaser's automobile has been inoperative for an extensive period of time due to a shortage of replacement parts. It may be that most purchasers, or at least more of them, could not arrange to be without a vehicle for an extended period of time and would be required to rent a substitute vehicle. Thus, the risk that commercial loss will be incurred because of a shortage of replacement parts may be a risk shared somewhat equally by all purchasers.

<sup>223</sup> For example, a purchaser who drives his car principally on Los Angeles freeways presumably takes a greater risk of serious injury in the event of a defect than does a purchaser who drives his car principally in a small town having a maximum speed limit of 25 miles per hour.

the disclaimer—would be to refuse to recognize the “insurance” coverage for which the plaintiff has already paid. In this sense, one can say that today strict liability should be applied to personal injury and property damage cases.

#### V. SOME OBSERVATIONS AND CONCLUSIONS

This study has only focused on automobile products liability and thus my observations may not be totally applicable to disputes involving other products. Nevertheless, it seems clear that at least with regard to automobiles much of the current controversy about the application of strict liability and the validity of the disclaimer simply is not terribly relevant. Strict liability which cannot be disclaimed, although mostly known by its pseudonym negligence, is the rule for most types of damage, and those situations where it is not are not the situations with which most commentators have been concerned.<sup>224</sup> I do not mean to suggest that the existence of strict liability is never litigated in automobile cases; it obviously is. Often, however, such litigation involves simply a demurrer to a strict liability count in a complaint which also contains a negligence count.<sup>225</sup> In those cases in which the plaintiff wins a verdict solely on a strict liability theory, there is reason to believe he usually could have won on a negligence theory also.<sup>226</sup> The recent overt changes in many states from negligence to strict liability as a theory of recovery has been a change in name only which has had no substantial impact on the formal or informal settlement of disputes.

The evidence I have collected does not reveal how automobile products liability disputes were resolved in the past. If any inference can safely be drawn from the reported cases, however, it would seem that at one time principles were applied other than strict liability which could not be disclaimed. The change to strict liability probably occurred gradually through a continuing relaxation of the requirements for proving negligence and without full recognition that any change was being made. Exactly when and why the change was made cannot be determined. In the courts

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<sup>224</sup> The many writings about whether strict liability should be in tort or in contract, see note 40 *supra*, do not seem specially relevant either. The principal difference between the two theories is said to be the applicability of the disclaimer. Yet the disclaimer is not typically applied to any suit regardless of theory. The other difference noted by the commentators is the requirement of notice to the manufacturer of a breach of warranty. I have discovered no case in which plaintiff lost for failure to give notice.

<sup>225</sup> *E.g.*, *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. App. 1962).

<sup>226</sup> *Henningsen* itself may have been such a case. The plaintiffs had appealed the trial court's directed verdict on the negligence count, but the New Jersey Supreme Court found it unnecessary to rule on that appeal in view of its affirmance of the verdict based on breach of warranty. See text following note 23 *supra*.

the change probably occurred because in a somewhat unconscious way judges began perceiving the arguments for enterprise liability now being advanced explicitly by legal scholars and recognized their particular applicability to automobiles as those machines came to dominate American life.

Perhaps the most interesting aspect of the change to a principle of strict liability which cannot be disclaimed has been the apparently complete acceptance of that principle by the manufacturers and the application of it in the informal dispute settling processes. Indeed, the acceptance of strict liability principles appears to have occurred in the informal system even before the formal system explicitly recognized such principles. It is important to reflect on the reasons for this change in the informal settlement of disputes. Legal scholars too often assume that the formal and informal dispute settling systems are governed by similar rules. The evidence to the contrary is too strong to permit further indulgence in that assumption.<sup>227</sup> It is necessary now to determine what factors influence informal dispute settlement if we are to understand and be able to affect the disposition of justice. After all, the informal systems handle a much larger "caseload" than the formal systems.

The data I have collected do not fully explain the reasons for the development of the present pattern of informal dispute settlement. Nevertheless, it is somewhat logical to assume that the formal dispute settling system has had a substantial impact on the informal system. In automobile products liability disputes the antagonists do not have that desire to maintain a continuing relationship which so strongly mitigates against resort to the courts for solution of most disputes between businessmen.<sup>228</sup> Other than the costs and delays of litigation, there is little to dissuade an injured purchaser from bringing suit, and the threat he will do so must influence the manufacturers to avoid their own litigation expenses, and the resulting adverse publicity, by offering in settlement substantially what could be won in court. Thus, the manufacturers' attitude towards the settling of claims probably reflects a realization on their part that, if litigated, a particular dispute, in fact if not in theory, would be decided according to strict liability principles and without deference to the disclaimer. In this regard, it is interesting to note that the one instance in which the manufacturers do freely assert the disclaimer as a bar to liability—that is, against claims for rescission or diminution in value—the amount in controversy is usually sufficiently small that most consumers will not indulge in the luxury of litigation.<sup>229</sup>

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<sup>227</sup> See authorities cited in note 4 *supra*.

<sup>228</sup> See Macaulay, *supra* note 4.

<sup>229</sup> The legal staffs of the manufacturers assured me that at any given time there were many fewer actions pending for rescission or diminution in value than for personal injury or property damage resulting from an accident. This pattern is also reflected in the number of reported opinions concerning each type of damage. See Appendix.



It is difficult, however, to attribute the manufacturer's attitude toward the informal settlement of products liability disputes completely to recognition of the probable outcome of litigation. Even today not every court has explicitly accepted strict liability in personal injury disputes. If the manufacturer were to take a tough attitude towards such claims and advance all possible defenses, they would probably convince a number of potential claimants either not to sue at all or to compromise their claims for relatively small amounts. It seems probable, therefore, that influences other than the formal legal systems have contributed to the manufacturers' attitude and the resulting dispute settlement pattern in the informal system. Although their explanation would not be very satisfactory to an economic determinist, the manufacturers simply state that like other human beings they have recognized the justice of a strict liability system and therefore have adopted it, as is illustrated by their radical extension of the coverage under the express warranty. There may be some truth to this statement but it is probably not the whole explanation. Fear of adverse publicity and loss of goodwill, a nonlegal sanction, has no doubt had its effect on the manufacturers. Fear of future reactions by Congress, state legislatures, and the courts against a "tough" attitude (a threat of a legal response) has no doubt also helped frame the manufacturers' current attitudes, particularly towards personal injury claims. Thus, a combination of legal and nonlegal responses, or the threat thereof, have probably shaped the content of the present informal system for settling products liability disputes, with the formal dispute settling mechanisms exerting more influence than they do on many informal systems.

One response by the manufacturers which the formal legal system has failed to induce is a change in the literal reading of the disclaimer clause; if enforced as it now reads, it would bar claims for all types of damages discussed in this article. It is difficult to know why the manufacturers have maintained the disclaimer with substantially the same content. Some years ago Fuller noted that companies which include rather harsh terms in their adhesion contracts often adopt a much more liberal policy in settling claims. The purpose of including the clauses, according to Fuller, is to permit the company to avoid the risk of having claims determined by a jury. The harsh clause is designed to entitle the company to a judgment as a matter of law in all or most court cases. In practice, however, the company decides whether to honor the claim out of court on the basis of its own determination of the factual issues which would have been determinative in court if the harsh clause did not exist.<sup>230</sup> There is one important difference between

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<sup>230</sup> L. FULLER & R. BRAUCHER, BASIC CONTRACT LAW 308 (1964). Fuller gives as an example of this type of clause the clause included in many small value life insurance policies by which the insured warrants his "sound health." In fact, Fuller reports, the companies settle claims on the basis

the automobile disclaimer and Fuller's model, however. To maintain the exclusivity of its own decision making processes it is essential for a company using Fuller's scheme to defend the legality of its clause vigorously and successfully whenever it is challenged in court. The automobile manufacturers rarely defend the disclaimer's legality, and when they do, they are typically unsuccessful. Thus, it is more accurate to characterize the disclaimer clause as one intended to apply to certain types of disputes—principally claims for rescission or diminution in value—but drafted so broadly as to purport to apply to many other types of disputes, such as claims for personal injuries. One can seriously question the manufacturer's strategy in drafting the disclaimer clause more broadly than necessary, because that strategy invites inquiry about the clause's validity on an all or nothing basis. One cannot escape the feeling that the disclaimer would fare better in rescission cases if the manufacturers limited the clause to those situations in which they intend to apply it. At least the evidence clearly shows that the manufacturers cannot now expect to use the disclaimer in the manner in which Fuller suggests other harsh standardized clauses are used. Nor is there any reason to believe they will be able to in the future.

Although it is the principal thesis of this article that most of the current legal writings about products liability are not very relevant to automobiles, this is not to say that there are not significant problems deserving the attention of legal scholars. They are just different problems. There is the previously discussed problem of determining when the remedies of rescission and money damages for diminution in value should be available to purchasers whose vehicles do not perform to their expectations.<sup>231</sup> At least two other problems deserve mention. The first relates to proof of the existence of a defect. There are actually two quite different aspects to this problem. When the alleged defect is not in the actual construction of the vehicle but its design, serious questions are raised concerning the extent to which the manufacturers need to incorporate safety considerations in its design at the cost of other considerations, such as expense or style, and whether courts should review those decisions. I have discussed this problem briefly.<sup>232</sup> And to be accurate, I should point out that other commentators have focused on this problem with regard to automobiles as well as

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of whether they believe the insured was fraudulent in asserting his sound health. In court, however, the companies vigorously defend the "sound health" clause as written so as to prevent the fraud issue from going to the jury.

Macaulay recently suggested the provision on most credit cards imposing liability on the holder for purchases made with a lost or stolen card until the company receives notice of the loss or theft may serve a similar function. *Supra* note 52, at 1083-84.

<sup>231</sup> See notes 212-21 *supra* and accompanying text.

<sup>232</sup> See notes 94-99 *supra* and accompanying text.

other products.<sup>233</sup>

A more frequently litigated problem, which has gone largely unrecognized in the legal journals, concerns the standard for determining the proof needed to get to the jury when the alleged defect is in the manufacture of a presumably properly designed automobile. In many cases the only proof of defect and causation offered by the plaintiff is the testimony of an expert who has not examined the damaged vehicle but who on the basis of plaintiff's description of the accident concludes that a manufacturing defect is at least a probable cause. Often the expert will have an opinion about the specific part which was defective but sometimes, as in *Henningsen*, he can conclude only that "something went wrong."<sup>234</sup> From the plaintiff's point of view, it may be necessary to rely on such evidence. After an accident the automobile may be so damaged that it is difficult to determine whether a particular part was damaged as a result of the accident or was defective before the accident and may have been a cause thereof.<sup>235</sup> Moreover, by the time the possibility of litigation occurs to plaintiff, his automobile may have been sold or repaired so that whatever possibility originally existed to determine the cause of the accident is no longer present. Finally, it is somewhat expensive to hire automotive experts to examine a car. On the other hand, the manufacturers emphasized in my interviews that in many cases an automotive expert can determine whether a defect was caused by an accident or whether it existed beforehand. Studies have indicated that most accidents are not caused by automobile defects, even accidents in which there is no other readily evident explanation.<sup>236</sup> Consequently, circumstantial evidence cannot be considered a completely reliable determinant of the cause of an accident; clearly specific evidence of a pre-existing defect revealed in an examination of the damaged vehicle by an automotive expert would be much more reliable. Moreover, circumstantial evidence of a defect usually rests on the plaintiff's account of how the accident happened. The automobile manufacturers have an understandable reluctance to rely on the personal accounts of the driver concerning the events leading up to the accident. As counsel for the manufacturer in one personal injury case stated in a letter to me:

I do not mean to suggest that [plaintiffs in products liability cases] intentionally will falsify the facts, although, of course, such falsification does occur on occasion. However, it is a trait of human nature for everyone to discount his own culpability in a situation in which fault has a bearing, to the point where he may really convince himself of his own innocent conduct and of the delinquent conduct of

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<sup>233</sup> *E.g.*, Traynor, *supra* note 9; Keeton, *supra* note 99.

<sup>234</sup> *See generally* notes 101-14 *supra* and accompanying text.

<sup>235</sup> *See* C. GILLAM, *supra* note 10, at 110-14.

<sup>236</sup> *See* note 109 *supra*.

the other actor, when the case gets around to the time of trial. This tendency tends to balance out when the plaintiff and defendants are present to testify as to their individual conduct . . . . Frequently, however, the product is not available after the accident for expert examination, or the accident itself may have produced such severe damage to the product that an expert examination is no longer feasible . . . . In the latter type situation, there is no affirmative way that a defendant can establish its freedom from responsibility. Its liability may turn completely upon the credibility of the testimony given by the injured plaintiff.

In addition to discussing standards of proof, legal scholars might propose means for improving the processes of fact collection and fact determination. The manufacturers' greatest concern in a products liability case today is that they will be unable to examine the damaged vehicle. I am not technically qualified to evaluate the manufacturers' assertion that in most cases an examination will determine whether the probable cause of the accident was a defect. In a strict liability system, however, the crucial issues in any lawsuit will be the existence of a defect and causation.<sup>237</sup> In the interests of fairness the manufacturers should be afforded an opportunity to prepare a defense on the facts. Consequently it would be desirable to develop legal rules that at least in most cases would insure the manufacturers an opportunity to examine the damaged vehicle. One possibility might be to apply to all theories of liability, including negligence, a requirement similar to the traditional condition on warranty recovery that the plaintiff notify the manufacturer of the breach of warranty within a reasonable time after discovery. This requirement has been attacked by legal commentators as a trap for the consumer who is unaware of the notice requirement and who therefore loses his cause of action.<sup>238</sup>

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<sup>237</sup> I recognize that there has been much discussion about providing compensation to victims of automobile accidents regardless of the cause of the accident. *E.g.*, W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS* (1965); L. GREEN, *TRAFIC VICTIMS: TORT LAW AND INSURANCE* (1958); Parker, *Compensation for Accidents on the Road*, 18 *CURRENT LEGAL PROBLEMS* 1 (1965). It might even be possible to administer an automobile compensation plan through the manufacturers by imposing liability on them for all injuries resulting from automobile accidents. I learned in a discussion with Professor Hellner, Faculty of Law, University of Stockholm, that the manufacturer of the Volvo automobile offers a warranty to Swedish purchasers that in effect constitutes comprehensive and collision insurance—Volvo will repair any damage to the car for a given period of time regardless of the cause of damage. I have assumed in this article, however, that it has not yet been decided to administer an automobile compensation plan through the manufacturers, and that consequently before liability is imposed on the manufacturers it must still be determined that the cause of injury was a manufacturing defect.

<sup>238</sup> See notes 42-43 *supra* and accompanying text. On the other hand, a liberally administered notice requirement has been defended on the

It should be possible, however, to administer a notice rule with sufficient liberality to protect the plaintiff until he does learn of the requirement, usually when he sees a lawyer. Indeed, comment 4 to section 2-607 of the Uniform Commercial Code—the section which requires notice of a breach of warranty—suggests just such an approach in cases involving a consumer. To be sure, there will be cases in which the consumer has had his vehicle repaired or has sold it before learning of the notice requirement, and in those cases notice would not facilitate an examination by the manufacturer. In the usual case, however, the manufacturer would be able to examine the automobile well before the initiation of the lawsuit. Accordingly, under a notice rule it might be more justifiable to permit the plaintiff to base his case solely on circumstantial evidence of a defect and causation. If an examination suggests the nonexistence of a manufacturing defect or some other cause of the accident, the manufacturer can introduce that evidence in defense. In those cases in which an examination has not proved feasible or has not revealed any definite evidence, circumstantial evidence would seem to be the best available evidence, and a verdict based thereon can be justified for that reason.

The advent of strict liability also raises a question about the wisdom of continuing to have the jury be the principal decision maker in automobile products liability lawsuits. Juries are obviously poorly equipped to determine the technical factual issues raised by a claim that a manufacturing defect caused an accident.<sup>239</sup> Of course, juries are often required to decide issues they know little about, and no doubt the system has its advantages, but in other areas in which liability without fault has been imposed, administrative agencies have been created to decide the factual issues.<sup>240</sup> The strongest justification for the jury—that it is best equipped to determine “factual” questions necessitating value judgments, such as the determination of negligence—has been largely removed by the change to strict liability. Thus, there may be justification for importing the administrative agency into the area of products liability.

A second problem needing thought and discussion by legal scholars concerns the defenses of contributory negligence and assumption of risk. As noted earlier, there is doubt whether these de-

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ground of the manufacturers' need to correct the assembly line process to prevent recurrence of the defect and to recall already manufactured products which might contain similar defects. See Kessler, *supra* note 14, at 905-06.

<sup>239</sup> Thus, parties to the personal injury suits involving the 1960-1963 Chevrolet Corvair resorted to calling famous racing drivers as witnesses to testify about their views of the vehicle's handling characteristics. *New York Times*, Aug. 11, 1965, at 21, col. 2.

<sup>240</sup> An obvious example is the administration of workmen compensation laws by administrative agencies. See generally C. AUERBACH, L. GARRISON, W. HURST, & S. MERMIN, *THE LEGAL PROCESS* (1961).

fenses play a significant role in personal injury litigation, for rarely are they discussed in the reported opinions,<sup>241</sup> but there is no doubt that they are important in the informal dispute settling processes, particularly when the claim is that one defective part caused damage to others.<sup>242</sup> The principal problem is one of defining the scope of the defense. Strict liability theorists usually advocate that negligent failure to discover a defect should not be a valid defense in a products liability suit. Their argument is that this defense is one of contributory negligence and since negligence is no longer the basis of liability, contributory negligence should also be irrelevant.<sup>243</sup> It is nevertheless possible to uphold the validity of a contributory negligence defense on the basis of enterprise liability theory. If the manufacturer is charged with losses caused by a defect which a purchaser should have discovered and then taken appropriate precautions to avert any injury, all purchasers, by paying higher prices for their automobiles, will be forced in effect to pay for losses which only the careless minority might possibly incur. In other words, all purchasers do not bear equally the risk of injury caused in part by their own contributory negligence. Nevertheless, it may be justifiable to disallow the defense of contributory negligence because of the difficulty of determining when a purchaser should have discovered a defect. The population varies so greatly in their knowledge of the mechanical workings of cars that it is almost impossible to define what defects a reasonable and prudent man would discover.

Commentators generally concede, however, that continued use of the vehicle despite actual knowledge of the defect is a valid defense even under strict liability theories.<sup>244</sup> In this instance, it is usually said, the defense is assumption of risk and therefore it is not dependent on negligence being the basis of liability. Yet, clearly, knowledge of a defect should not be a defense in every case. How many of us have continued to operate our cars knowing there was some mechanical problem? Tort scholars who have dealt with this problem agree that usually there must be appreciation of the extent of the risk created by the defect as well as knowledge of its existence.<sup>245</sup> The difficulty, however, is to define how much appreciation is sufficient to establish a defense and whether the appreciation must be actual or can be presumed if a reasonable man would have realized it. The variance in people's knowledge of auto mechanics makes these problems especially relevant to automobile products liability. For example, how many car owners know that if the water pump fails, continued operation of the vehicle will probably destroy the engine? The manufacturers will usu-

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<sup>241</sup> See notes 136-41 *supra* and accompanying text.

<sup>242</sup> See text following note 167 *supra*.

<sup>243</sup> *E.g.*, Prosser, *supra* note 2, at 838-40.

<sup>244</sup> *Id.*

<sup>245</sup> *E.g.*, Keeton, *Assumption of Risk in Products Liability Cases*, 22 *LA. L. REV.* 122, 141-44 (1961).

ally take the position that an owner should appreciate the risk in continued operation of a car without a functioning water pump, and consequently they will resist any such claim in the informal dispute settling systems.<sup>246</sup> As commentators we might disapprove of the assumption of risk defense in this situation on the ground that it too closely resembles the defense of contributory negligence which we have already rejected. Nevertheless, there remains the problem posed by the owner who was aware of some risk in continuing to operate his vehicle without a water pump but did not realize the risk was so great as to threaten his engine. Finally, further complications in defining the scope of the assumption of risk defense are presented when a fully appreciated defect manifests itself in circumstances which especially tempt the owner to assume the risk of continued operation of his vehicle. For example, the water pump may have become defective while the owner was on a business trip and desired to drive a few miles further in order to keep an appointment. The *Restatement of Torts* provides that the defense of assumption of risk is inapplicable if the defendant "has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm."<sup>247</sup> This proposition is reasonable in the abstract but it does little to solve the concrete problems likely to arise in specific automobile products liability disputes. Indeed all the above problems have their analogues in other areas of the law, and commentators have dealt with them in the abstract.<sup>248</sup> What is needed now is discussion in the specific context of the problems likely to arise in the area of automobile products liability.

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<sup>246</sup> One manufacturer told me of a similar case in which an oil pressure gauge became inoperative but the local dealer did not have a replacement gauge in stock. While waiting for a new part to arrive, the owner continued operating his car. A leak developed in his oil pan when he drove over a rough road, but, unaware of the leak because of the lack of an oil pressure gauge, the owner continued driving with the result that he destroyed his engine. The manufacturer was resisting settlement of the owner's claim for a new engine and anticipated an eventual lawsuit. It was their belief that the owner should have avoided driving on rough roads when he knew his oil pressure gauge was not operative.

<sup>247</sup> RESTATEMENT OF TORTS § 893 (1932).

<sup>248</sup> See Keeton, *supra* note 245, and authorities cited therein. It should be noted that enterprise liability theory can be applied to these problems, although such application does not always bring easy answers. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

## APPENDIX

Listed below are the cases used in Tables 1, 2, and 3. The cases all involve new automobiles and were decided after *Henningsen* but before May 1, 1967. The cases are organized according to the major categories used in this article. In some instances, cases were placed into two categories, in which event they are listed twice below. Within each category they are organized by year of decision.

### I. PERSONAL INJURY

McKinney v. Frodsham, 57 Wash. 2d 126, 356 P.2d 100 (1960); Price v. Ashby's, Inc., 11 Utah 2d 54, 354 P.2d 1064 (1960); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960); Levitt v. Ford Motor Co., 28 Misc. 2d 599, 215 N.Y.S.2d 677 (Sup. Ct. 1961); Funk v. Kaiser-Frazer Sales Corp., 15 App. Div. 2d 548, 222 N.Y.S.2d 711 (2d Dep't 1961); Monaco v. Chrysler Sales Corp., 191 F. Supp. 648 (S.D.N.Y. 1961); Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961); Beasley v. Ford Motor Co., 237 S.C. 506, 117 S.E.2d 863 (1961); Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961); Grant v. Malkerson Sales, Inc., 259 Minn. 419, 108 N.W.2d 347 (1961); General Motors Co. v. Grant, 263 Minn. 107, 116 N.W.2d 181 (1962); Samaha v. Southern Rambler Sales, Inc., 146 So. 2d 29 (La. Ct. App. 1962); Muncy v. General Motors Corp., 357 S.W.2d 430 (Tex. Civ. App. 1962); Wright v. General Motors Corp., 158 So. 2d 309 (La. Ct. App. 1963); Wheat v. New Orleans & N.E. R.R., 153 So. 2d 543 (La. Ct. App. 1963); Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963); Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962), *aff'd in part* 320 F.2d 130 (3d Cir. 1963); Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963); Kahn v. Chrysler Corp., 221 F. Supp. 677 (S.D. Tex. 1963); Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963); Standard Motor Co. v. Blood, 380 S.W.2d 651 (Tex. Civ. App. 1964); Denna v. Chrysler Corp., 1 Ohio App. 2d 582, 206 N.E.2d 221 (1964); Tomle v. New York Cent. R.R., 234 F. Supp. 101 (N.D. Ohio 1964); Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Wood v. Hub Motor Co., 110 Ga. App. 101, 137 S.E.2d 674 (1964); Funk v. Kaiser-Frazer Sales Corp., 23 App. Div. 2d 771, 258 N.Y.S.2d 553 (2d Dep't 1965); Moyer v. Ford Motor Co., 205 Pa. Super. 384, 209 A.2d 43 (1965); Blinn v. Allied-Ford Corp., 24 App. Div. 2d 755, 264 N.Y.S.2d 1 (1st Dep't 1965); Johnson v. General Motors Corp., 243 F. Supp. 694 (E.D. Tenn. 1965); Ford Motor Co. v. Puskar, 394 S.W.2d 1 (Tex. Civ. App. 1965); Woolley v. Uebelhor, 239 Md. 318, 211 A.2d 302 (1965); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966); General Motors Corp. v. Muncy,



367 F.2d 493 (5th Cir. 1966); *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966); *Cordle v. Renault, Inc.*, 361 F.2d 332 (6th Cir. 1966); *Rogers v. Ford Motor Co.*, 191 So. 2d 713 (La. Ct. App. 1966); *Williams v. Ford Motor Co.*, 411 S.W.2d 443 (Mo. Ct. App. 1966); *General Motors Corp. v. Jenkins*, 114 Ga. App. 873, 152 S.E.2d 796 (1966); *Shramek v. General Motors Corp.*, 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966); *Drummond v. General Motors Corp.*, 35 U.S.L.W. 2119 (Cal. Super. Ct. 1966); *Willis v. Chrysler Corp.*, 264 F. Supp. 1010 (S.D. Tex. 1967).

## II. PROPERTY DAMAGE TO THE VEHICLE RESULTING FROM AN ACCIDENT

*Nationwide Mut. Ins. Co. v. Don Allen Chevrolet Co.*, 253 N.C. 243, 116 S.E.2d 780 (1960); *New Amsterdam Cas. Co. v. Gray*, 253 N.C. 60, 116 S.E.2d 146 (1960); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Norway v. Root*, 58 Wash. 2d 96, 361 P.2d 162 (1961); *Willman v. American Motor Sales Co.*, 44 Erie Co. Legal J. 51 (Pa. C.P. 1961); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. App. 1962); *Smith v. New Orleans & N.E. RR.*, 153 So. 2d 533 (La. Ct. App. 1963); *Rose v. Chrysler Motors Corp.*, 212 Cal. App. 2d 755, 28 Cal. Rptr. 185 (1963); *Simpson v. Logan Motor Co.*, 192 A.2d 122 (D.C. Mun. App. 1963); *Congressional Ins. Co. v. Ford Motor Co.*, 198 A.2d 918 (D.C. Mun. App. 1964); *Ford Motor Co. v. Grimes*, 408 S.W.2d 313 (Tex. Civ. App. 1966); *Eversmeyer v. Chrysler Corp.*, 192 So. 2d 845 (La. Ct. App. 1966); *Ghera v. Ford Motor Co.*, 55 Cal. Rptr. 94 (Ct. App. 1966).

## III. RESCISSION AND DIMINUTION IN VALUE

*Bafle v. Remchow*, 58 Schuylkill Legal Record 108 (Pa. C.P. 1960); *Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E.2d 892 (1961); *Fox v. R. D. McKay Motor Co.*, 188 Kan. 756, 366 P.2d 297 (1961); *Rozen v. Chrysler Corp.*, 142 So. 2d 735 (Fla. Ct. App. 1962); *Smith v. Platt Motors, Inc.*, 137 So. 2d 239 (Fla. Ct. App. 1962); *Knecht v. Universal Motor Co.*, 113 N.W.2d 688 (N.D. 1962); *Miller v. Andy Burger Motors, Inc.*, 370 S.W.2d 654 (Mo. Ct. App. 1963); *Durant v. Palmetto Chevrolet Co.*, 241 S.C. 508, 129 S.E.2d 323 (1963); *Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963); *Stevens v. Daigle & Hinson Rambler, Inc.*, 153 So. 2d 511 (La. Ct. App. 1963); *DeGrendele Motors, Inc. v. Reeder*, 382 S.W.2d 431 (Mo. Ct. App. 1964); *Lilley v. Manning Motor Co.*, 262 N.C. 48, 137 S.E.2d 847 (1964); *Kyker v. General Motors Corp.*, 214 Tenn. 521, 381 S.W.2d 884 (1964); *Inglis v. American Motors Corp.*, 30 Ohio Op. 2d 181, 197 N.E.2d 921 (1964); *Holz v. Coates Motor Co.*, 206 Va. 894, 147 S.E.2d 152 (1966); *Paton v. Buick Motor Div., General Motors Corp.*, 401 S.W.2d 446 (Mo. 1966); *General Motors Corp. v. Earnest*, 279 Ala. 299, 184 So. 2d 811 (1966); *Sarnecki v. Al Johns Pontiac*, 56 Luz. Leg. Reg. Rep. 293, 3 U.C.C. Rep.

1121 (Pa. C.P., Luzerne County 1966); *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967).

#### IV. MISCELLANEOUS

*Appleman v. Fabert Motors, Inc.*, 30 Ill. App. 2d 424, 174 N.E.2d 892 (1961); *Fox v. R.D. McKay Motor Co.*, 188 Kan. 756, 366 P.2d 297 (1961); *Paton v. Buick Motor Div., General Motors Corp.*, 401 S.W.2d 446 (Mo. 1966).

#### V. CASES NOT CATEGORIZED FOR VARIOUS REASONS

*United States v. Lobb*, 192 F. Supp. 461 (W.D. Ky. 1961); *Capital Auto. Co. v. Shinall*, 103 Ga. App. 695, 120 S.E.2d 351 (1961); *McDonald v. Chrysler Motors Corp.*, 27 F.R.D. 442 (W.D. Pa. 1961); *Monahan v. Ford Motor Co.*, 231 N.Y.S.2d 187 (Sup. Ct. 1962); *Tackling v. Chrysler Corp.*, 77 N.J. Super. 12, 185 A.2d 238 (1962); *Geist v. Rolls Royce Ltd.*, 18 App. Div. 2d 631, 235 N.Y.S.2d 382 (1962); *Hardee v. Gordon Thompson Chevrolet, Inc.*, 154 So. 2d 174 (Fla. Ct. App. 1963); *Brown v. Chrysler Corp.*, 112 Ga. App. 22, 143 S.E.2d 575 (1965); *Friedman v. Ford Motor Co.*, 179 So. 2d 371 (Fla. Ct. App. 1965); *Cappa v. Steve Aloi-Ford, Inc.*, 51 Misc. 2d 161, 272 N.Y.S.2d 874 (Sup. Ct. 1966); *Hughes v. Kaiser Jeep Corp.*, 40 F.R.D. 89 (D. S.C. 1966).