

3-1-1981

Used Products and Strict Liability: A Practical Approach to a Complex Problem

Steven J. Christiansen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Torts Commons](#)

Recommended Citation

Steven J. Christiansen, *Used Products and Strict Liability: A Practical Approach to a Complex Problem*, 1981 BYU L. Rev. 154 (1981).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1981/iss1/17>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Used Products and Strict Liability: A Practical Approach to a Complex Problem

I. INTRODUCTION

From early times common-law judges have been concerned about the liability of those who manufacture and sell products to the public.¹ In 1916, Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*² revolutionized the field of products liability. The decision imposed liability on the manufacturer of a product which was "reasonably certain to place life and limb in peril" despite the absence of privity between the injured consumer and the manufacturer.³ Since *MacPherson*, courts have tended to move away from the older and sometimes more troublesome theories of negligence and warranty and have imposed strict liability on manufacturers, wholesalers, and retailers.⁴ In the past decade, proponents of the theory have argued, with varying success, that strict liability should be imposed in new areas of consumer protection: leasing,⁵ services,⁶ and sales of used products.⁷

This Comment will address the application of strict liability to sellers of used products, a developing area of the law in which courts have reached conflicting and often confusing results. Two early cases, *Peterson v. Lou Bachrodt Chevrolet Co.*⁸ and *Turner v. International Harvester Co.*,⁹ examined the public policies underlying strict liability and its application to the sellers of used goods. The *Turner* Court concluded that the sellers should

1. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). See also RESTATEMENT (SECOND) OF TORTS § 402A, Comment b (1965).

2. 217 N.Y. 382, 111 N.E. 1050, 175 N.Y.S. app. 382 (1916).

3. *Id.* at 389, 111 N.E. at 1053, 175 N.Y.S. app. at 389.

4. See, e.g., *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 654-57 (4th ed. 1971).

5. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

6. *Raritan Trucking Corp. v. Aero Commander, Inc.*, 458 F.2d 1106 (3d Cir. 1972); *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969). See also Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661.

7. *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975). See also Annot., 53 A.L.R.3d 337 (1973).

8. 61 Ill. 2d 17, 329 N.E.2d 785 (1975).

9. 133 N.J. Super. 277, 336 A.2d 62 (1975).

be held strictly liable; the *Peterson* court, that they should not.¹⁰ To further confuse the matter, some courts appeared to reason that the possible application of strict liability to sellers of used products was a "yes or no," "black or white" question.¹¹ Some made no substantial analyses of the policy considerations.¹² To make matters worse, the treatise writers, along with the draftsmen of the *Uniform Product Liability Law*, offered no concrete solutions to the problem of whether to extend strict liability to sellers of used products.¹³

There are probably two major reasons for the confusion in this area of the law: (1) The courts often disagree on what public policies support the imposition of strict liability upon sellers of used products;¹⁴ and (2) unlike sellers of new products, who through indemnification can pass back losses to the entities responsible, sellers of used goods will face difficulty in obtaining indemnification or may be denied indemnification altogether. It is therefore difficult to determine what legal burdens the class of sellers of used products can and should bear.¹⁵

Imposing strict liability on sellers of used products presents

10. For discussions of these cases, see Metzger, *Products Liability and the Seller of Used Goods*, 15 AM. BUS. L.J. 159 (1977); Comment, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805 (1979); Note, *Strict Liability Not Applicable to Used Car Dealers Absent Actual Creation of Defect*, 25 DE PAUL L. REV. 574 (1976); Note, *Strict Products Liability for Used Car Dealers*, 63 KY. L.J. 826 (1975); Note, *Seller of Used Product with Safety Defect May be Held Strictly Liable in Tort for Personal Injuries*, 7 RUT.-CAM. L.J. 405 (1976); Note, *Turner v. International Harvester Company: Strictly Speaking, Can Section 402A Be Extended to Hold Used Car Dealers Liable in Tort?*, 21 S.D.L. REV. 468 (1976); Note, *Strict Liability is Imposed on the Sellers of a Defective Used Product*, 8 ST. MARY'S L.J. 196 (1976); Note, *Strict Liability in Tort Applied to Seller of Used Automobile*, 42 TENN. L. REV. 426 (1975); Note, *Dealer-Seller of Used Car Held Strictly Liable in Tort Under Section 402A*, 10 TULSA L.J. 709 (1975).

11. See, e.g., *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill. 2d 17, 329 N.E.2d 785 (1975); *Lewis v. E.F. Moore, Inc.*, 87 Montgomery County L. Rpts. 379, 42 Pa. D. & C.2d 614 (1967).

12. See, e.g., *Lewis v. E.F. Moore, Inc.*, 87 Montgomery County L. Rpts. 379, 42 Pa. D. & C.2d 614 (1967); *McLain v. Hodge*, 474 S.W.2d 772 (Tex. Civ. App. 1971). But see *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill. 2d 17, 329 N.E.2d 785 (1975); *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975).

13. 44 Fed. Reg. 62,714, 62,718 (1979); 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16A[4][b][iv] (1980 & Supp. 1980); W. KIMBLE & R. LESHER, *PRODUCTS LIABILITY* § 64 (1979).

14. See the five opinions of the seven members of the Oregon Supreme Court in *Markle v. Mulholland's, Inc.*, 265 Or. 259, 509 P.2d 529 (1973). See also *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App. 1975).

15. See *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill. 2d 17, 20-21, 329 N.E.2d 785, 787 (1975).

the overall question of whether to create an essentially new cause of action. Manufacturers and sellers of new products are presently held liable only for design and manufacturing defects, while sellers of used products may also be held strictly liable for some defects that arise after the products leave the original distribution chain.¹⁶ Two recent cases have suggested a partial solution to this complex problem. When injuries from used products are caused by design and manufacturing defects, these cases call for a *conditional* imposition of strict liability to be applied only when there is a special relationship between the seller of used goods and the manufacturer or when the used-products seller makes representations that make him an insurer of the product.¹⁷ However, these cases do not solve the problem of liability of sellers of used goods for defects which arise after the product has left the original chain of distribution. One court has addressed the latter problem and suggested limiting liability for these subsequently occurring defects to "safety defects," or defects in those parts of the used products ordinarily expected to receive regular maintenance and replacement.¹⁸

This Comment suggests that these two developing lines of argument be combined, and that in light of public policy considerations, strict liability should be imposed on sellers of used products as follows:

1. Enterprise liability should be and is the major policy underlying strict products liability and in general justifies imposing strict liability on sellers of used products.

2. In the case of design and manufacturing defects, enterprise liability does not justify imposing unconditional strict products liability on sellers of used products since manufacturers are already required to insure all of society against accidents resulting from such defects. Therefore, in the case of sellers of used products, strict products liability should be imposed for design and manufacturing defects only when there is a special relationship between the seller of used goods and the manufacturer or when the used-products seller makes representations which

16. *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 290, 336 A.2d 62, 69 (1975); *Hovenden v. Tenbush*, 529 S.W.2d 302, 306 (Tex. Civ. App. 1975).

17. *Tillman v. Vance Equip. Co.*, 286 Or. 747, 757, 596 P.2d 1299, 1304 (1979); *Tauber-Arons Auctioneers Co. v. Superior Court*, 101 Cal. App. 3d 268, 282, 161 Cal. Rptr. 789, 797 (1980).

18. *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 290, 336 A.2d 62, 69 (1975). See also *Peterson v. Lou Bachrodt Chevrolet Co.*, 61 Ill. 2d 17, 329 N.E.2d 785 (1976) (Goldenhersh, J., dissenting).

make him an insurer of the product.

3. Where defects arise after the products leave the original chain of distribution, the seller of used goods should be liable for them only when they existed at the time of sale and the injury was caused by a "safety defect."

II. DEFINITIONS

Throughout this Comment, the term *seller* or *dealer* will refer to an individual or organization that is engaged in the business of selling either new or used products.¹⁹ The term *defect* will refer to an unreasonably dangerous condition not contemplated by the ultimate consumer of the product.²⁰ The term *safety defect* will refer to a defect that arises after a product has left the original distribution chain and occurs in a part of the product which a consumer should reasonably expect to have been regularly maintained or replaced. A safety defect can occur only in a part vital to the safe operation of the product which must be regularly maintained or replaced to avoid injury to the consumer and innocent third parties.

III. OVERVIEW OF PUBLIC POLICY AND STRICT LIABILITY

This Comment will briefly discuss the various policies underlying strict products liability²¹ and then apply them to explain why and to what extent strict products liability should be imposed on sellers of used products. Legal scholars have formulated a number of policy justifications for strict products liability,²² including enterprise liability, risk spreading or distribution, deterrence or safety incentives, representation theory or implied representation, and compensation of the victim.

Enterprise liability. An enterprise engaged in selling prod-

19. RESTATEMENT (SECOND) OF TORTS § 402A (1)(a), & Comment f (1965).

20. RESTATEMENT (SECOND) OF TORTS § 402A, Comments g & i (1965).

21. See *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1974); *Tillman v. Vance Equip. Co.*, 286 Or. 747, 596 P.2d 1299 (1979); *Markle v. Mulholland's, Inc.*, 265 Or. 259, 509 P.2d 529 (1973). See also RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

22. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1189 (1976); Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 92-94; Comment, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805 (1979). See also RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

ucts will introduce certain injuries or costs associated with those products into society. The enterprise therefore should be required to reflect in its prices the costs of the injuries those products may cause to consumers. These costs will generally be reflected in the enterprise's insurance premium payments.²³ Products that cause more injuries will have higher insurance premiums and higher prices. The increased price of such products will encourage consumers to purchase safer products with lower prices.²⁴

Risk spreading or distribution. As a general rule, those who are in the business of selling products are in a better position than individual buyers to spread the costs of compensating for injuries (i.e., insurance costs) and therefore should be required to spread these costs among their entire clientele.²⁵

Deterrence or safety incentive. Placing strict liability for design and manufacturing defects on the manufacturer and those in the original chain of distribution will create a strong incentive among retailers and manufacturers, all of whom may be held liable, to discourage the manufacture of defective products and to encourage the manufacture of safer, trouble-free products.²⁶

Implied representation. By placing a new product on the market, the retailer and manufacturer impliedly represent that the product is safe if used in a normal and non-abusive manner. If the product falls short of the implied representation, the seller or manufacturer should be held strictly liable to the injured consumer or user.²⁷

23. Calabresi, *supra* note 22, at 499-501; Whitford, *supra* note 22, at 92-94.

24. Calabresi, *supra* note 22, at 502, 514; Comment, *Sales of Defective Used Products: Should Strict Liability Apply?*, *supra* note 22, at 811-13.

25. See *Tillman v. Vance Equip. Co.*, 286 Or. at 753-54, 596 P.2d at 1303. See also *Smith, Frolic and Detour*, 23 COLUM. L. REV. 444, 456-60 (1923).

26. Justice Schaefer stated in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969), "The strict liability of a retailer arises from his integral role in the overall producing and marketing enterprise and affords an *additional incentive to safety*." *Id.* at 344, 247 N.E.2d at 404 (emphasis added). Justice Traynor in *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), also noted, "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." *Id.* at 262, 391 P.2d at 171-72, 37 Cal. Rptr. at 899.

27. Discussing this representational theory, Professor Leon Green wrote, "For a long while, reliance upon warranties and the duty of care has given only nominal protection to the injured consumer. Why not simply say to sellers:

From this day we shall take you at your word. If your products

Compensation of the victim. An injured victim should be able to obtain compensation as easily as possible. Because strict liability requires no proof of negligence, it simplifies the victim's burden and facilitates his recovery.²⁸

IV. ANALYSIS

A. *Strict Liability for Design or Manufacturing Defects*

In light of the public policies outlined, this Comment concludes that the imposition of strict liability on sellers of used products is justified in limited circumstances. The discussion that follows will first consider the imposition of strict liability on sellers of used goods when design or manufacturing defects are present and then will treat the imposition of strict liability on sellers of used products when defects arise after the product leaves the original distribution chain.

Enterprise liability. A number of courts have taken the position that enterprise liability should be and is the foremost public policy mandating the imposition of strict liability on manufacturers and retailers for design and manufacturing defects. However, in the case of sellers of used products, enterprise liability should not be the sole basis for imposing strict liability. To require sellers of used goods to purchase insurance and reflect in their prices the "costs" of design and manufacturing defects will cause an "overstating" of those costs.²⁹ That is, under present strict liability case law, manufacturers and retailers maintain insurance to compensate society for design and manufacturing defects that cause injuries. Sellers of used goods should not be required to carry "overlapping" insurance to cover the same defects and the same injuries. If such "overlapping" insurance is forced on the used-products industry, both sellers and consumers will be required to spend more money than is actually needed to protect society against design and manufacturing defects. The resulting higher prices will lower demand in

in their normal use injure the consumer because of their dangerously defective condition or because you have neither adequately warned the consumer of the danger of their consumption nor directed him how they should be used, the risk is yours.

Green, *supra* note 22, at 1191.

28. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

29. For a discussion of "overstated costs" and enterprise liability, see Calabresi, *supra* note 22, at 543-44.

the used-products industry and may create hardships for consumers, who will be forced to pay more for used products.

Fairness considerations also militate against the use of enterprise liability as the sole justification for imposing strict liability on used-products sellers for design and manufacturing defects. In general, "fault" has no place in pure enterprise liability.³⁰ At the same time, however, enterprise liability should not be used to impose an unnecessary burden on a used-goods seller when the injured consumer has a viable cause of action against the manufacturer himself. In struggling with this problem of fault, the Oregon Supreme Court in *Tillman v. Vance Equipment Co.*³¹ imposed strict liability only conditionally. In *Tillman*, the Oregon Supreme Court held that a seller of used products would be held liable for design defects only if (1) the seller, by making representations to the buyer, became an insurer of the product's safety, or (2) the seller was in a special position with the manufacturer, such as a franchised seller of new and used automobiles. In *Tauber-Arons Auctioneers Co. v. Superior Court*,³² Justice Potter of the Second District California Court of Appeal discussed the *Tillman* decision:

The rule stated in *Tillman* is consistent with the policy underlying the doctrine of strict liability as developed in this state and most recently announced by our Supreme Court [in *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970)]. In holding the volume lessor of tank trucks strictly liable for defects in the equipment provided therewith, the [California Supreme] court stated that "the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them." [citations omitted]. The [California Supreme] court did not, however, abandon all other considerations. In particular, it affirmed the continued vitality of the requirement that the imposition of liability "works no injustice to the defendants."³³

Because imposing strict liability on the sellers of used goods solely on the basis of enterprise liability may be wasteful and unjust, the courts must look to other policy considerations in de-

30. *Id.* at 500.

31. 286 Or. 747, 596 P.2d 1299 (1979).

32. 101 Cal. App. 3d 268, 161 Cal. Rptr. 789 (1980).

33. *Id.* at 283, 161 Cal. Rptr. at 798 (emphasis added).

ciding under what conditions strict liability should be imposed on sellers of used goods for design and manufacturing defects.³⁴

Risk spreading or distribution. It is undoubtedly true that, as a class, sellers of used products are capable of spreading the costs of injuries or insurance.³⁵ However, even though a used-products seller can spread the risks or costs of injuries his products may cause, risk spreading should not be used as a justification for imposing strict products liability on a used-products seller for the same reason that enterprise liability is not a valid justification—it results in wasteful, “overlapping” insurance costs. This is so because imposition of strict liability on sellers of new products already provides the mechanism for insuring society against design and manufacturing defects.

Deterrence or safety incentive. Since sellers of used products do not manufacture new products and often operate independently from the manufacturer, imposing strict liability upon them will not create greater incentives to *manufacture* non-de-

34. Critics may argue that this approach is unjust as to some injured consumers because they will have no direct action against a defunct corporation and thus will have no remedy. However, as a matter of general corporate law, there are five situations in which an acquiring or surviving corporation will assume the liabilities of a “target” or purchased corporation: (1) In a statutory merger, (2) in a de facto merger, (3) when fraud is present, (4) when the surviving corporation expressly or impliedly agrees to assume the liabilities of the purchased corporation, and (5) when the surviving corporation and the purchased corporation are owned and operated by the same people, who merely continue the business. Thus, even though the corporation which manufactured the defective product is no longer in business, it is likely that the victim will still have a cause of action against an existing corporation.

35. See 286 Or. at 754, 596 P.2d at 1303. There will be cases, however, when some used-products sellers, because of the small size of their businesses, may not be able to effectively “spread the risks.” A small business engaged in selling used products may remain competitive and attractive to consumers only because it sells products cheaply. It is possible, therefore, that by requiring a small business to “spread the risks” or costs of an accident (through increased insurance premium costs), a court may be requiring the sole proprietor or small businessman to bear the costs himself. C. Robert Morris, Jr. expressed this concern in Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 584-85 (1961):

The entrepreneur theory also attempts to gain credence by invoking the concept of commutative justice. Though the entrepreneur himself is relatively blameless, his enterprise entails a certain amount of risk, and it is proper to place the burden of this risk upon him in the first instance, because he can pass it on to his customers. . . .

. . . [But] it is probable that customers will not suffer the entire burden of enterprise liability. Prices, after all, are determined by the interaction of supply and demand. If demand remains stable, an industry cannot raise its prices without also decreasing its sales.

fective products.³⁶ However, where the used-products sellers are in a special relationship with the manufacturers, imposing strict liability on them will create an incentive to produce safer products similar to the incentive created when retailers of new goods are held strictly liable. Thus, where the used-products seller sells both new and used products of the manufacturer and is able to impose leverage on the manufacturer through a contractual or legal right of indemnification, the used-products seller should be held strictly liable for design and manufacturing defects.³⁷

Implied representation. The theory of implied representation is generally inapplicable to the sales of used goods. Used-goods dealers seldom represent that used products will conform to any particular safety levels.³⁸ However, sellers of used goods occasionally make oral or written representations that give rise to expectations on the part of consumers that the products sold are as safe as similar new products. In those cases, the sellers have made assurances which should make them liable as insurers of their products, not on the basis of implied representations,

36. In *Tillman v. Vance Equip. Co.*, 286 Or. 747, 596 P.2d 1299 (1979), the Oregon Supreme Court noted:

As to the risk-reduction aspect of strict products liability, the position of the used-goods dealer is normally entirely outside the original chain of distribution of the product. As a consequence, we conclude, any risk reduction which would be accomplished by imposing strict liability on the dealer in used goods would not be significant enough to justify our taking that step. The dealer in used goods generally has no direct relationship with either manufacturers or distributors. Thus, there is no ready channel of communication by which the dealer and the manufacturer can exchange information about possible dangerous defects in particular product lines or about actual and potential liability claims.

Id. at 756, 596 P.2d at 1304.

37. See W. KIMBLE & R. LESHER, *supra* note 13, § 275, at 309 where the rule of indemnification in strict products liability is set forth:

[T]he general rule is that indemnification is proper in such a case. This is permitted because of the policy of the law that seeks to place final responsibility in such instances upon the party who was initially responsible for placing the defective product into the stream of commerce—the party at the beginning of the chain of distribution; usually the manufacturer. In accordance with this reasoning, it has been held that not only may a retailer obtain indemnification from the manufacturer of a defective product, but the manufacturer of a finished product is entitled to indemnity from the manufacturer of a component part that was defective at the time it was received and installed as part of the finished product [footnotes omitted].

See also *Texaco, Inc., v. McGrew Lumber Co.*, 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).

38. See 286 Or. at 753-56, 596 P.2d at 1303-04.

but on the basis of explicit guarantees.³⁹

Compensation of the victim. Strict liability makes it somewhat easier for victims to obtain compensation. As a result, the need to compensate victims should prompt the courts to impose strict liability whenever it is justified in light of the above discussed public policies. Compensation, however, should not be the foremost policy justifying strict liability. This would lead to absolute liability.

In summary, to impose strict liability on a seller of used products when design or manufacturing defects are present, the plaintiff bears the burden of showing:

1. That the product was defective, *i.e.*, unreasonably dangerous when sold to him because of a design or manufacturing defect; and,
2. That the seller of used products is in a special relationship with the manufacturer, or,
3. That the seller represented to the consumer that he would insure the safety of the product or that the product was free of defects for normal use purposes.

In defense the defendant may rebut any of the plaintiff's allegations and may bring forth the usual defenses of assump-

39. In *Tillman*, the Supreme Court of Oregon enumerated what kinds of representations might give rise to liability:

Those [used-products] markets, generally speaking, operate on the apparent understanding that the seller, even though he is in the business of selling such goods, makes no particular representation about their quality simply by offering them for sale. If a buyer wants some assurance of quality, he typically either bargains for it in the specific transaction or seeks out a dealer who routinely offers it (by, for example, providing a guarantee, limiting his stock of goods to those of a particular quality, advertising that his used goods are specially selected, or in some other fashion).

Id. at 755, 596 P.2d at 1303.

In *Tauber-Arons*, the Second District California Court of Appeals discussed liability arising from representation:

As regards defects created by the original manufacturer, *Tillman* states a sound rule limiting liability of dealers in used equipment. Under the rule as stated, a Cadillac dealer who promotes the sale of new Cadillacs by offering "near new trade-ins" which are represented as "specially selected" may incur liability in respect of an original design defect in a car which he did not originally sell, both as a participant in the enterprise that created consumer demand and by generating "the kind of expectations of safety that the courts have held are justifiably created by the introduction of a new product into the stream of commerce." (*Id.*, 596 P.2d at 1304.) The ordinary used products dealer, however, will not be strictly liable for such defects created by the manufacturer.

101 Cal. App. 3d at 282, 161 Cal. Rptr. at 797.

tion of the risk and misuse of the product.⁴⁰

B. *Strict Liability and Safety Defects*

Courts do not always make clear what policies underlie the imposition of strict liability in individual cases. However, it appears that based on Comment c of section 402A of the Restatement (Second) of Torts, many courts have recognized enterprise liability as the foremost policy justifying the imposition of strict products liability on sales of used products.⁴¹

40. This Comment relies on the *Tillman* and *Tauber-Arons* cases in advocating a conditional imposition of strict liability. However, these cases are not the only authority advocating a conditional imposition. See also Fischer, *Products Liability—Functionally Imposed Strict Liability*, 32 OKLA. L. REV. 93 (1979); Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974). Professor Fischer has written the following:

A preferred approach is for the judge to decide as a matter of law whether a given case is an appropriate one for strict liability. In making this decision, he should systematically analyze all factors bearing on the question of whether the policies of risk spreading and deterrence can be advanced by the imposition of liability without unduly inhibiting industry from continuing to supply useful products.

Fischer, *Products Liability—Functionally Imposed Strict Liability*, 32 OKLA. L. REV. 93, 114 (1979).

Professor Fischer suggests that the following factors be considered:

I. Risk Spreading

- A. From the point of view of consumer.
 - 1. Ability of consumer to bear loss.
 - 2. Feasibility and effectiveness of self-protective measures.
 - a. Knowledge of risk.
 - b. Ability to control danger.
 - c. Feasibility of deciding against use of product.
- B. From the point of view of manufacturer.
 - 1. Knowledge of risk.
 - 2. Accuracy of prediction of losses.
 - 3. Size of losses.
 - 4. Availability of insurance.
 - 5. Ability of manufacturer to self-insure.
 - 6. Effect of increased prices on industry.
 - 7. Public necessity for the product.
 - 8. Deterrent effect on the development of new products.

II. Safety Incentive

- A. Likelihood of future product improvement.
- B. Existence of additional precautions that can presently be taken.
- C. Availability of safer substitutes.

Id. at 114-15.

41. One court described its imposition of strict liability on the seller of used bricks as being consistent with the Restatement: "These comments were before the courts which have adopted Sec. 402A, and there is no reason for assuming that these courts were unaware of the fact that comment c clearly adopts the theory of enterprise liability as the basis for the rule." *Hovenden v. Tenbush*, 529 S.W.2d 302, 310 (Tex. Civ. App.

Although the imposition of strict liability and its consequent insurance costs on the seller of used goods may "overstate" the costs to society of design and manufacturing defects, this is not the case with defects that arise after the product has left the original distribution chain. Manufacturers are ultimately responsible for design and manufacturing defects; they do not insure against nor are they responsible for defects that arise after the product has left the original chain of distribution. Enterprise liability therefore demands that used-products sellers be held strictly liable for safety defects in order to protect both buyers and unrelated third parties who may be injured by them.⁴²

Although sellers of used products must be held strictly liable for safety defects, there are limitations to this liability. The condition in the used product causing the injury for which the plaintiff sues must in fact be a defect rather than mere wear.⁴³ A defect is a condition in the product that presents unreasonable danger that would not be contemplated by the ordinary consumer.⁴⁴ Restatement (Second) of Torts Section 402A bases strict products liability on defects which are unreasonably dangerous. Some states have abandoned the unreasonably dangerous requirement, but even in those states a defect is nonetheless determined in terms of the consumer's reasonable expectation.⁴⁵ Thus, it appears to be appropriate to hold used products sellers

1975). See also *Turner v. International Harvester Co.*, 133 N.J. Super. at 284, 336 A.2d at 69.

42. See *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 61 (1975); *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App. 1975).

Even where there are no implied representations between sellers and buyers of used products, public policy favors eliminating safety defects from used products because they may harm unrelated third parties. See, e.g., *Cornelius v. Bay Motors Inc.*, 258 Or. 564, 484 P.2d 299 (1971), where an unrelated third party was "rear-ended" and injured when the brakes on a used vehicle purchased that same day failed to stop the car. See also *Turner v. International Harvester Co.*, 133 N.J. Super. at 290-93, 336 A.2d at 69-71.

43. One commentator concluded, "Since the ordinary consumer should reasonably expect that a product will have a finite life, strict liability will not be imposed where the defect arises simply because the product has worn out." W. KIMBLE & R. LESHNER, *supra* note 13, at 113. See also Annot., 53 A.L.R.3d 337, 340 (1973).

44. RESTATEMENT (SECOND) OF TORTS § 402A, Comments g & i (1965).

45. In *Tauber-Arons Auctioneers Co. v. Superior Court*, 101 Cal. App.3d 268, 161 Cal. Rptr. 789 (1980), the test of a defective product in California was set forth: "The 'unreasonably dangerous' test has been rejected in California as a necessary factor. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal. 3d 121, 135, 104 Cal. Rptr. 433, 501 P.2d 1153.) However, failure to satisfy 'ordinary consumer' expectations is still a basis for strict liability under California law. (*Barker v. Lull Engineering Co.* (1978) 20 Cal. 3d 413, 435, 143 Cal. Rptr. 225, 573 P.2d 443.)" *Id.* at 279 n.1, 161 Cal. Rptr. at 795 n. 1.

strictly liable for safety defects, *i.e.*, defects arising out of parts ordinarily expected to be regularly maintained and replaced.⁴⁶

In addition to the safety-defect limitation on the used-products seller's strict liability, the defect causing the injury must exist at the time the product was sold. Defects arising after the product is sold should not give rise to strict liability.⁴⁷ Determining when the defect arises should be a question of fact. However, defects in used products may be of two types: presently existing defects and developing defects.⁴⁸ When presently existing defects are found in a used product, the seller will be held strictly liable on proof of that fact. However, when the product is dangerous as a result of a developing defect, the trier of fact must determine whether a reasonable person would have had the product serviced or repaired before the time when the injury occurred. Since strict liability is limited to safety defects, which may occur only in those parts ordinarily expected to be regularly maintained or replaced, a reasonable man test seems appropriate in deciding whether the plaintiff should have had the part serviced himself before it developed into the defect that resulted in his injury.

46. See *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975):

Justifiable expectations for safety run to ordinary parts expected to receive regular maintenance and replacement, *e.g.*, brake shoes and linings, steering linkage, exhaust system, etc. On the other hand, surface dents, rust or metal fatigue resulting from mere old age would be defects the risk of which a buyer reasonably may be expected to absorb without undue threat to the public at large.

Id. at 290, 336 A.2d at 69.

Safety defects may be further defined as something so vital to the safe operation of the product that it is expected that the used-products seller will check it thoroughly before he sells it to the consumer. On a used car, for example, such safety defects would probably include no more than the exhaust system, steering and suspension systems (including tires), and the brake system. See also *W. KIMBLE & R. LESHER*, *supra* note 13, at 113; Annot., *supra* note 7, at 340.

47. See *RESTATEMENT (SECOND) OF TORTS* § 402A(2)(b) (1965).

48. An example of a presently existing defect may be seen in *McLain v. Hodge*, 474 S.W.2d 772 (Tex. Civ. App. 1971), where the plaintiff purchased a used gun with a defective ejector which caused a cartridge to explode in his face. An example of a developing defect may be seen in *Cornelius v. Bay Motors Inc.*, 258 Or. 564, 484 P.2d 299 (1971), where the "cups" in the master cylinder of a used car's brake system were in the process of deteriorating. The day before the car was purchased, the brake system operated safely; on the day of the sale the brakes failed, causing a rear-end collision. For an example of a successful defense based on the post-purchase occurrence of the defect, see *Grady v. Kenny Ross Chevrolet Co.*, 332 F. Supp. 689 (W.D. Pa. 1971), where the exhaust system was determined to have become defective only after the sale, resulting in no liability for the seller.

The underlying reasons for a sale of a particular used product may also limit a used-product seller's liability. Where the product is sold with the implicit understanding that it is virtually or completely worn out or in a dangerous condition and that the buyer will have to invest additional time and money in the product in order to make it safe or functional, strict liability should not be imposed. This situation or limitation will most often arise in the sale of antiques.⁴⁹ Even with non-antiques, when a seller gives explicit and adequate warnings of the inherent dangers in the product and of the way to use the product to avoid injury, and these warnings are ignored, strict liability will not be imposed.⁵⁰

When a plaintiff is injured by a safety defect, the plaintiff may hold the seller of used goods strictly liable by establishing the following:

1. That the product was defective, *i.e.*, in a condition unreasonably dangerous when sold to him, based upon the reasonable expectations of an ordinary consumer (safety defect);

49. Commenting on this facet of the problem, the court in *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (1975), stated the following:

Looking at the used automobile situation, one can readily envision an antique car buff or "hot rod" enthusiast purchasing a car which is defective in many respects and where the relationship between the buyer and seller is such that both reasonably expect that all aspects of the automobile will be separately appraised and all defects corrected by the purchaser. In this connection see *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 62, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1963 Sup. Ct.), in which Justice Traynor stated that a manufacturer "is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."

Id. at 292, 336 A.2d at 71 (emphasis in original).

50. Note the specific warnings and the denial of strict liability to sellers of used products in *Rix v. Reeves*, 23 Ariz. App. 243, 532 P.2d 185 (1975), and *Pridgett v. Jackson Iron & Metal Co.*, 253 So.2d 837 (Miss. 1971).

As a matter of procedural convenience for the plaintiff, when something can be classified as a design or manufacturing defect *and* as a safety defect, the plaintiff should be allowed to join as joint tortfeasors both the manufacturer and the used-goods seller. This situation might arise, for example, when the original brake shoes on a used automobile wear out prematurely and an accident occurs. Since brakes fall within the classification of a safety defect, the used-products seller should have inspected them. At the same time, however, it is likely that the materials used by the manufacturer of the brakes were substandard, thus constituting a defect in the brake design. Even if there is no special relationship between the used-products seller and the manufacturer, the plaintiff should be able to sue both as joint tortfeasors. However, if the defect is clearly not a safety defect, then the plaintiff's only possible cause of action would be against the manufacturer. For some helpful background in this area, see L. FRUMER & M. FRIEDMAN, *supra* note 13, at § 16A(4)(b)(i) and W. KIMBLE & R. LESHER, *supra* note 13, at § 54.

and,

2. That the defect caused injury to the plaintiff before a reasonable man would have had the part replaced or serviced.

The defendant may establish any one of the following as a defense:

1. That no safety defect existed, *i.e.*, that the injury was a result of wear in parts that a reasonable consumer should not expect to have been regularly maintained or replaced;
2. That the defect arose after the sale, not before;
3. That the basis of the bargain or essence of the agreement was that the plaintiff would invest his own time and money in the product to make it safe; or
4. That the defendant gave an adequate and explicit warning which the plaintiff disregarded.

Steven J. Christiansen