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Products Liability: Methods of Pleading and Proof for the Plaintiff

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PRODUCTS LIABILITY: METHODS OF PLEADING AND PROOF FOR THE PLAINTIFF

I. INTRODUCTION

The law of products liability was for many years burdened with traditional concepts of fault and contracts. These concepts, beginning with such foundations of the common law as the old tort concept of action on the case and "privity" of contract, reinforced the now long deceased commercial principle of *caveat emptor*. Buyers were precluded from recovering unless, for example, an affirmative misrepresentation had been made,[1] or the injured party stood in a direct contractual relationship with the seller of the article.[2] Indeed, the general principles of "privity" found in such early cases as *Winterbottom* v. *Wright*[3] have survived into the twentieth century.[4]

From these early theories there has emerged a definable body of law through which the manufacturer and seller of a defective article can be reached. Three theories are now recognized: warranty, negligence and strict liability. Warranty presently consists of two forms, that of common law warranty and the warranties found in the Uniform Commercial Code. Negligence exists largely as it did decades ago, the primary concern being negligent manufacture. Of the three theories, strict liabililty is the most recent and is now found to be imposed, in most states using it, irrespective of any warranties, usually on the theory that the product is unreasonably dangerous to the user.

Although these are presently separate theories, vestiges of the past still remain in many states, while in others decisions have interchanged and cross-bred portions of these three theories. The result is that the course of development of these separate theories has been slowed if not altered altogether.[5]

This note will examine the problems of pleading and proof of

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1. Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N.E. 481 (1908).
2. Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009, 1010 (1915).
3. Winterbottom v. Wright, 10 M. & W. 109, 11 L.J. Ex. 415 (1842).
4. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225 (1937).
5. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 16.04 and 16A (Supp. 1970). This list includes those states that have, in some fashion, adopted strict liability in either warranty, tort or a combination of both.

the three theories of products liability and will suggest practical solutions to these problems in the form of pleading requirements. Suggestions for plaintiff's proof at the trial stage will also be made. The thrust of this note is largely practical, its purpose being to guide the practitioner in the commencement of a suit. Because of the general nature of such a note, it is difficult to take more than passing account of such collateral problems as defenses and choice of parties. These areas will be discussed only insofar as they affect the primary topic.

II. THE CURRENT STATE OF THE SUBSTANTIVE LAW

To recover under any of the theories of liability, the plaintiff will have the burden of alleging and proving (1) that he was injured by the product,[6] (2) that the injury was the result of a defective or unreasonably unsafe product[7] and (3) that the defect existed when the product left the control of the manufacturer.[8] To these allegations there must then be joined the allegation (and eventually, proof) of all the elements of the particular liability theory. In this last respect the products liability suit will resemble any other lawsuit. Thus, if the foundation of the suit is negligence, all the elements of actionable negligence must be pleaded along with the three basic elements mentioned above. If the suit is grounded on the theory of warranty, the plaintiff must show the existence of the warranty and its breach, plus the three basic elements. This dual concept of pleading and proof is essential to both the lawsuit itself and an understanding of the problems discussed below.

Uncertainty in pleading and proof of the products liability case results from (1) confusion in the substantive law upon which the pleadings are necessarily based and (2) the fact that the three basic elements mentioned above are necessary for a suit no matter which theory is utilized.[9] Thus the proof of these elements will apply to any liability theory. A short history of the development of the substantive law should help to explain the first source of confusion.

A. HISTORICAL DEVELOPMENT

Some of the earliest American cases of products liability were those holding that a seller of food warrants to his customers that the food is fit to eat.[10] This doctrine of "warranty" requiring a

6. W. PROSSER, LAW OF TORTS 671 (4th ed. 1971).
7. *Id.* at 672.
8. *Id.* at 672.
9. *Id.* at 671.
10. Van Bracklin v. Fonda, 12 Johns 768 (N.Y. 1815).

contractual relationship between the producer and injured user was later saddled with exceptions that did away with the requirement of privity of contract. The most important exception was that established in *Thomas* v. *Winchester*[11] and later applied to firearms and explosives. *Thomas* held that privity need not exist when the product is "inherently dangerous." Judge Cardozo's opinion in the famous case of *MacPherson* v. *Buick Motor Co.*[12] established yet another exception to the privity requirement which applied to products that created an "unreasonable risk of harm."

The 1950's saw a great extension of a strict, privity-free "warranty." The first case involved a grinding wheel which killed an employee of a subpurchaser.[13] Thereafter it was extended to cosmetics and drugs.[14] The real breakthrough came in *Henningsen* v. *Bloomfield Motors, Inc.*,[15] in which the rules of privity, reliance and disclaimer were all forsaken. A new rule was made holding the manufacturer of any product likely to be dangerously defective, to strict, privity-free "warranty" liability.

All this time the courts had been moving toward a strict liability theory within the framework of warranty. The label of "warranty" hung on until the publication of Prosser's second edition of *Torts* in which he suggested that the courts abandon the much used limitation to food and impose "strict liability outright in tort. . . ."[16]

The decision representing the most obvious shift to Prosser's viewpoint of strict liability in tort was that of *Greenman* v. *Yuba Power Products, Inc.*[17] This case involved an injury from a poorly made lathe. The defendant contended that the plaintiff failed to give notice of the defect as was then required by the Uniform Sales Act. Speaking for the court, Justice Traynor stated that the law of sales was not applicable to the situation and that the manufacturer was to be held strictly liable in tort.[18]

It can be seen from this brief history of major decisions that

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11. Thomas v. Winchester, 6 N.Y. 397 (1852).
12. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
13. Divello v. Gardner Machine Co., 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. 1951).
14. Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954).
15. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
16. W. PROSSER, LAW OF TORTS 510 (2d ed. 1955).
17. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
18. The position taken by the court in Greenman and later cases adopting the form of strict liability as found in the RESTATEMENT (SECOND) OF TORTS (1965) has not, unfortunately, been adopted by the North Dakota Supreme Court. In Christensen v. Osakis Silo Co., 424 F.2d 1301 (8th Cir. 1970), the plaintiff sought an instruction to the jury that could have included Section 402A of the RESTATEMENT (SECOND) OF TORTS (1965). The court of appeals affirmed, agreeing with the lower court that such was not the state law in North Dakota.

The current state law seems to be that privity is no longer needed in an action against a manufacturer based on implied warranty or negligence. However, a waiver of the warranty may be affected and for this reason the cases relied on by the plaintiff in *Christensen* were not based on strict liability.

the uncertainty in the substantive differences between warranty and strict liability is not totally unfounded. One theory grew from the other, each disregarding fault as a basis for liability. Further confusion resulted from the introduction of statutory warranties under the Uniform Sales Act[19] and the Uniform Commercial Code.[20] Although common law implied warranties differ materially from those under the U.C.C., this distinction has not been made clear by some of the courts that have used "warranty" terms when dealing with strict liability. "Warranty" has generally come to be identified with contracts for sale under the U.C.C. While there is nothing in Section 402A of the *Restatement (Second) of Torts* (1965) to preclude such a construction, the differences between these two warranties should be understood. Under the *Restatement (Second)* the consumer is not affected by limitations on the scope and content of the warranties, nor is he required to give notice of breach. The plaintiff's cause of action does not depend upon the validity of his contract with the seller and is not affected by disclaimers.[21] However, even the coverage under the U.C.C. has been extended to more closely approximate strict liability. The broadest alternative to section 2-318 now extends warranty remedies ". . . to any person who may reasonably be expected to use, consume, or *be affected* by the goods . . ." without the limitation that the injured party be a member of the purchaser's household or a guest.[22]

B. THE TRI-ELEMENT REQUIREMENT

The real impact of the similarities between the two theories becomes even clearer when it is remembered that the same three proof requirements apply to all three liability theories. The result is that proof of a prima facie case in warranty will often result in a prima facie case under strict liability. When the theory of the action is negligence, the same proof used in warranty and strict liability will likely constitute circumstantial evidence of sufficient weight to make a case for the jury in negligence. This is true whether the end result is reached by the doctrine of *res ipsa loquitur* or a similar theory.[23]

III. *RES IPSA LOQUITUR* AND "DEFECTIVENESS"

In products liability law there is much difference of opinion between courts as to the kind or quantum of evidence necessary to

19. UNIFORM SALES ACT §§ 12-15.
20. UNIFORM COMMERCIAL CODE §§ 2-313, 2-314, 2-315.
21. RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 356 (1965).
22. North Dakota has adopted this wording. N.D. CENT. CODE § 41-02-35 (1968).
23. W. PROSSER, LAW OF TORTS 672 (4th ed. 1971).

make out a prima facie case. The divergence of opinion centers around the degree to which the plaintiff must prove "defectiveness" of the product causing the injury. Three approaches are taken by the courts to this problem. The first and more traditional was to require direct proof of the defect through real evidence and expert testimony.[24] The second approach, taken by many courts today, is to infer a defect from the circumstantial evidence presented.[25] The inference may be accomplished by the doctrine of *res ipsa loquitur*, though some courts make the same inference but leave the method unlabeled.[26] The third approach to the proof of "defectiveness" problem is to require no proof of defect at all but only require a showing that the product did not perform as expected.[27] As proof by direct evidence is generally well understood, only inference by *res ipsa loquitur* and the "non proof" method will be covered here.

A. Proving Defectiveness by Res Ipsa Loquitur

The rule or doctrine of *res ipsa loquitur*, while applicable to negligence cases generally, is particularly well suited to products liability cases because of the difficulty of proving the existence of a defect except by the use of circumstantial evidence. Thus, when an injury from a product occurs, manufactured by a party who had "exclusive control" of the product, *res ipsa* will provide an inference that it was the manufacturer's defective product that caused the injury.[28] The confusion and resulting conflict in decisions arises when *res ipsa* is applied to theories other than negligence and to cases in which the fact situations fall outside of the requirements for the rule's application.[29]

The procedural effect of the use of *res ipsa loquitur* varies from jurisdiction to jurisdiction. The least weight given to the doctrine is that of a permissive inference of negligence. This is enough to avoid a non-suit or dismissal but not enough to entitle the plaintiff to a

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24. Scientific Supply Co. v. Zelinger, 139 Colo. 568, 341 P.2d 897 (1959).

25. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

26. State Farm Mutual Auto Ins. Co. v. Anderson-Weber Inc., 252 Iowa 1280, 110 N.W.2d 449 (1961).

27. Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

28. Pleading sufficient facts to satisfy the *res ipsa* method of proving a defect will usually satisfy the *res ipsa* requirements necessary to prove negligence. 1 L. Frumer and M. Friedman, Products Liability § 1203[9][d] (1971).

29. Prosser states these requirements to be:

(1) The accident must be a kind which ordinarily does not occur in the absence of someone's negligence.

(2) The accident must be caused by an agency or instrumentality within the control of the defendant.

(3) The accident must not have been due to any voluntary action or contribution by the plaintiff.

W. Prosser, Law of Torts 214 (4th ed. 1971).

directed verdict. The jury may accept the inference but is not compelled to do so.[30]

A presumption gives the plaintiff a greater advantage in that if the defendant does not produce sufficient evidence to the contrary, the jury must find for the plaintiff. The "burden of going forward" is on the defendant, but if he presents evidence equal to the plaintiff's, the plaintiff must lose.[31]

The greatest weight given to *res ipsa* is to put on the defendant the ultimate burden of proof. This means that the defendant is required to prove by a preponderance of the evidence that his negligence did not cause the accident.[32] It is apparent that in cases collected and classified by Prosser in *The Procedural Effect of Res Ipsa Loquitur,*[33] the majority of states are found to be heavily in favor of the permissive inference.

The theory that the plaintiff should have the lightest burden of proof was carried to something of an extreme in the recent Oregon case of *Vanek v. Kirby.*[34] In that case, the court held that the plaintiff, a passenger in the defendant's car who was injured when the car left the road, had stated a cause of action against the manufacturer for breach of an implied warranty of merchantibility. The plaintiff had alleged that "[s]aid vehicle could not be kept on said highway during its normal use as a vehicle for transportation."[35] The trial court had entered a judgment on the pleadings for the defendant and the Supreme Court reversed on appeal.

On appeal, the issue was the sufficiency of the complaint. The court found that the complaint was sufficient if it would adequately inform the defendant that the plaintiff was relying only upon the defective mechanism in the vehicle. Referring to the doctrine of *res ipsa loquitur,* though this was not a negligence case, the court found "no greater reason for imposing upon the plaintiff the necessity of proving a specific defect in the present case than for imposing upon the plaintiff in a *res ipsa* case the necessity of proving a specific act of negligence. . . ."[36] Recognizing that the defendant might have a hard time preparing a defense from the complaint, the court alluded to Oregon's liberal rules of discovery as a solution.

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30. Prosser, *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 244 (1936).
31. 4 J. WIGMORE, EVIDENCE § 2490, at 286 (3rd ed. 1940).
32. 4 J. WIGMORE, EVIDENCE § 2485, at 270 (3rd ed. 1940).
33. Prosser, *The Procedural Effect of Res Ipsa o Loquitur,* 20 MINN. L. REV. 241 (1936).
34. Vanek v. Kirby, 450 P.2d 778 (Ore. 1969).
35. *Id.* at 780.
36. *Id.* at 782.

B. *Res Ipsa Loquitur's* REQUIREMENT OF CONTROL IN PRODUCTS LIABILITY CASES

While *Vanek* may reach the outer limits of the use of *res ipsa* in pleadings, it is also a liberal decision as to the satisfaction of one of the requirements underlying the very application of the doctrine: the requirement that the defendant be in "exclusive control" of the article causing the injury. The *Vanek* case serves as an excellent example of the confusion resulting from this requirement. This requirement, which lies at the heart of the *res ipsa* doctrine, forms the biggest distinction between negligence cases in which *res ipsa* is usually applied and products liability cases.

In negligence cases, the defendant's control of the instrument makes it highly unlikely that the plaintiff could have caused his injury and more likely that it resulted from the defendant's negligence. But in products liability cases, the plaintiff is usually in control of the device that caused his injury and the defendant manufacturer is removed. Still, the spirit of the control requirement is more applicable in some products liability cases than in others. In cases involving either exploding or contaminated bottles, the plaintiff's control is negligible even though he has possession.[37] Because the product is sealed and because the plaintiff's relationship to the bottle is a passive one, there is little to suggest that the plaintiff would cause it to explode or cause a mouse to appear in the bottom.[38] The control differences are not material.[39]

The situation in *Vanek* was quite different. In that case, the injuring article was an automobile directly in the control of the plaintiff. The fact that a car leaves the road does not make it more likely than not that the movement was caused by the defendant's fault rather than the plaintiff's. Experience tells us the opposite. Thus, the primary reason for the inference does not seem to appear in cases like *Vanek*.

The "exclusive control" requirement for the use of *res ipsa* has also been somewhat relaxed in cases where it is impossible for the plaintiff to prove which of two or more defendants is responsible for the injury-producing defect. In such situations there are a growing number of decisions which permit the injured plaintiff to show (1) that he was injured in the kind of accident that does not ordinarily occur without negligence; (2) that he did not contribute to the injury; (3) that one or the other of the defendants

37. For an excellent discussion of a plaintiff's relationship to a bottle, see Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944).

38. Ritter v. Coca Cola Co. (Kenosha-Racine) Inc., 24 Wis. 2d 157, 128 N.W.2d 439 (1964).

39. *But see* 2 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 22.01[3][b] (1970).

was in control of the product at the time. The plaintiff can then join the defendants in the same suit and get the case to the jury against each defendant on the issue of negligence. In *Dement* v. *Olin-Mathisen Chemical Corporation*[40] the plaintiff was injured by the premature explosion of a dynamite charge. The components of the charge were gelatine explosive, a booster and an electrical blasting cap. The court reversed the trial court's holding that *res ipsa loquitur* could be used as a basis for recovery, saying:

> Nor is it necessary here that in order for *res ipsa* to apply one particular force must be severed out, identified and held as a matter of law to be the cause of the premature explosion. . . . Here from a physical standpoint the injury was caused by a combination of the three products. Where the consequences are so devastating and the risk to human life so great, manufacturers of products which are components designed to be used with other known products may not thus evade the responsibility to come in and explain. That is basically what the *res ipsa* doctrine requires.[41]

While the application of *res ipsa* in cases like *Vanek* and *Dement* has been called "a severe blow to the theoretical integrity of *res ipsa loquitur*"[42] and may result in the imposition of liability upon a non-negligent person, Prosser has denounced the term "exclusive control" as "misleading and pernicious."[43] He points out that there are many cases in which physical control rests with someone other than the defendant, such as his agent[44] or his lessee.[45] A better solution, says Prosser, is to abandon the term as a poor choice of words and say merely that "the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[46]

The problems of the application of the doctrine which have been discussed arise from the significance attached to the "control requirement" and from the implications attached to the English translation of the phrase, i.e., that "the thing speaks for itself." Is the importance attached to these two aspects of the doctrine of sufficient weight to justify a refusal to use the doctrine in the products liability case where the defendant has no control of the injuring instrument and in cases founded on theories other than

40. Dement v. Olin-Mathisen Chemical Corp., 282 F.2d 76 (5th Cir. 1960).
41. *Id.* at 82-83.
42. Note, *Proof of Defect in a Strict Product Liability Case,* 22 MAINE L. REV. 189 (1970).
43. Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183 (1949).
44. Waddle v. Loges, 52 Cal. App. 2d 115, 125 P.2d 914 (1942).
45. Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 377, 187 P. 767 (1919).
46. Prosser, *Res Ipsa Loquitur in California,* 37 CALIF. L. REV. 183, 201 (1949).

negligence? A short look at the history of the doctrine tells us that it is not.

When *Byrne v. Boadle*,[47] the original *res ipsa* case was tried, a question arose as to the necessity of affirmative proof of negligence by the defendant. At this time it was Baron Pollock who used the familiar Latin phrase. As many writers have pointed out, Pollock used no witchcraft to make the phrase applicable, only common sense.[48]

Nor does the "requirement" of "exclusive control" hold any mystical meaning. Indeed, the "requirement" was borrowed from Wigmore's formula which was an attempt to define and codify what he found in the cases in which the doctrine had been applied. As Wigmore put it in 1905: "Both inspection and user must have been at the time of the injury in the control of the party charged."[49]

With catch words such as those cited above, the reasoning and common sense mental processes behind *res ipsa* were reduced to the "formula" and "requirements" that most courts now apply. A strict interpretation of the doctrine will ignore the fact that the same inferences of liability in a negligence suit may apply to identical or similar fact situations in the warranty or strict liability suit. A strict interpretation of "exclusive control" will likewise limit the plaintiff and preclude his recovery under *res ipsa* in cases like *Vanek*. The plaintiff in the products liability case can only suffer from a strict interpretation of the doctrine.

C. Proof of Defectiveness Without Proof of Defect

Although they are still definitely in the minority, a line of cases has developed in which nothing more than the happening of the accident has been introduced to prove a defect.[50] The landmark decision among these cases is *Dunham v. Vaughan & Bushnell Mfg. Co.*[51] In that case the plaintiff was struck in the eye by a chip off the edge of a claw hammer. A jury verdict was returned holding both the manufacturer and the wholesaler strictly liable for the plaintiff's injury.

The decision is significant in that it is not a case where the injuring instrument can't be produced or where it is totally destroyed. In *Dunham* each party offered expert testimony and tested the hammer thoroughly *but the plaintiff was unable to produce any evidence of a defect.* In affirming, the court found that:

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47. Byrne v. Boadle, 2 H. and C. 772, 159 Eng. Rep. 299 (1863).
48. Prosser, *Res Ipsa Loquitur in California*, 37 Calif. L. Rev. 183, 185 (1949).
49. 4 J. Wigmore, Evidence § 2509 (1st ed. 1905).
50. *See* note 81 *infra*.
51. Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

> [a]lthough the definitions of the term "defect" in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.[52]

The thrust of this decision and others like it is that the plaintiff no longer has to comply with one of the three basic elements of proof required under all three liability theories. He must no longer show proof of a specific defect. He need only show that the product failed to "perform in the manner that would reasonably have been expected. . . ."[53] The jury would then be entitled to infer a defect from the happening of the accident.

IV. PLEADING THE PRODUCTS LIABILITY CASE

A. GENERAL CONSIDERATIONS

To decide what theories counsel for the plaintiff should plead or how the theories should be pleaded, the substantive law must, of course, be carefully scrutinized. Listed below are points concerning the substantive law that should be kept in mind in order to avoid confusion in the complaint.

1. *Strict liability and common law warranty may be so similar that pleading one theory will cover both*

Again, because common law warranty was the precursor to strict liability under the *Restatement (Second) of Torts* sec. 402A, there is little substantive difference. The theories are essentially the same and often nothing is gained by separate counts. In states where the *Restatement* is followed, common law warranty should be stricken from the complaint.

2. *There is a difference between common law warranty and warranties available under the U. C. C.*

These differences include the statute of limitations period, disclaimers, measure of damages, timely notice, the raising of a duty by the seller's words and conduct and reliance upon the warranty.

3. *The case law of the jurisdiction may allow the plaintiff to plead res ipsa loquitur in warranty and strict liability*

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52. *Id.* at 342, 247 N.E.2d at 403.
53. *Id.* at 344, 247 N.E.2d at 403.

Where this is allowed, the plaintiff will be able to show a defective product by pleading the general *res ipsa* requirements, though the pleading examples given below will usually satisfy even the strictest requirements for factual pleading of a defect. In using *res ipsa* in cases based on negligence, counsel should determine whether the jurisdiction allows him to plead specific acts of negligence as well as the general doctrine of *res ipsa*.[54] If permitted, it is considered better practice to plead both.[55]

4. *The plaintiff should join all relevant theories and parties*

Where the joinder rules are liberal enough, the plaintiff should join all potential grounds for recovery in a single action against all persons potentially liable. Thus, claims in negligence and strict liability against the manufacturer should be joined with claims of warranty against the seller.

5. *Defenses should be anticipated*

This is particularly true when using the negligence theory either alone or when joined with other theories, as it opens the plaintiff up to claims of contributory negligence.

Keeping in mind that the pleading requirements will vary from state to state depending upon such things as the use that can be made of *res ipsa loquitur* and the differences between warranty and strict liability, the following requirements are those that generally need to be pleaded under negligence, strict liability and warranty. Where important distinctions occur, they are noted.

B. PLEADING NEGLIGENCE

1. *Duty of care of the defendant*

The complaint must show a legal duty on the part of the defendant to exercise some sort of care toward the person injured. The duty is generally found by reasoning backward from the facts alleging the injury. The duty must then follow as a matter of law.[56] Usually a manufacturer's duty is: to exercise reasonable care in manufacturing, construction and design so that the product will be reasonably safe for the purpose or use intended;[57] to make reasonable tests and inspections to discover defects; and to warn

54. 3 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 46.02[2][c] (1970).
55. Fiedler, *Res Ipsa Loquitur in Products Liability Cases*, ABA INS., NEG., AND COMP. LAW SECTION 191, 194 (1966).
56. Southwest Coca Cola Bottling Co. v. Northern, 65 Ariz. 172, 177 P.2d 219, 221 (1947).
57. W. PROSSER, LAW OF TORTS 644 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 398 (1965).

of any dangers inherent in a perfectly made product.[58] It must also be shown that the duties were owed to the party injured and that the injury was foreseeable. In these respects the suit is like other ordinary suits in negligence.

2. *Circumstances of injury*

This allegation is used primarily to help form a sufficient factual basis from which negligence can be inferred by using *res ipsa loquitur*.

3. *Breach of duty or negligent act by the defendant*

The breach may be failure to reasonably design, construct or manufacture. A failure to warn is also a breach and makes the product "defective." It is here that the doctrine of *res ipsa loquitur* may be invoked if the plaintiff is without sufficient knowledge to allege specific acts of negligence. Whether or not a complaint sufficiently alleges negligence and the effect of the use of *res ipsa* are, of course, governed by the usual rules of pleading negligence in the particular state.

4. *Defendant's knowledge*

As defendant's lack of due care is a specific requirement of negligence, the plaintiff must likewise allege that the defendant knew or should have known that an injury would result.

5. *The product reached the plaintiff without any material change*

This requirement, called "tracing," is necessary in order to help prove lack of negligence on the part of a third party handler or carrier.[59]

6. *Existence of a defect*

Although *res ipsa* may reduce the need of alleging specific acts of negligence, the plaintiff must always show that either these acts or the negligence imputed to the defendant resulted in a defective product.

7. *Plaintiff's freedom from contributory negligence*

The general rules of pleading negligence control here as to

58. Johnson v. West Fargo Mfg. Co., 255 Minn. 19, 95 N.W.2d 497, 501 (1959).

59. In Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 159 P.2d 436 (1944), the court logically concluded that the plaintiff may show the defendant's control of the instrument only after he has shown that it reached the plaintiff without a change in condition.

whether such an allegation is a matter for the defense to plead. Generally, the plaintiff need not plead it.[60]

8. *The defective product was the proximate cause of the injury*

The allegation of proximate cause is also covered by the general rules of pleading negligence.[61]

C. PLEADING STRICT LIABILITY

1. *The defendant placed upon the market a product in a defective condition which was unreasonably dangerous to the user*

In making this allegation, it is usually sufficient if the plaintiff alleges that the defendant placed upon the market an unreasonably dangerous product, plus a description of what happened, (e.g., the bottle blew up, the steering failed, etc.). In many cases the plaintiff will not know what the specific defect was, but in most states a general allegation is sufficient for the pleading stage. It is also necessary to allege here that the product was defective when placed on the market by the defendant. While the plaintiff must always plead and prove a defect in strict liability, what constitutes an "unreasonably dangerous" product,[62] is determined only on a case by case basis. Included under this term have been cinder building blocks,[63] and paper cups.[64] Finally, it should not be alleged that the defendant should have known about the defect. A lack of due care is immaterial to a case founded on strict liability and should be confined to negligence cases.[65]

2. *The defendant was engaged in the business of selling the product*

Selling or "seller" is the language used in Section 402A. This clearly applies to manufacturers as there are sales involved with the distribution of their products to retailers. It has, in at least one case also been extended to rentals.[66]

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60. 65A C.J.S. *Negligence* § 194 (1960).
61. Pulley v. Pacific Coca Cola Bottling Co., 68 Wash. 2d 728, 415 P.2d 636 (1966).
62. Spence v. Three Rivers Builders and Masonry Supply Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).
63. Lily-Tulip Cup Corp. v. Bernstein, 181 So. 2d 641 (Fla. 1966).
64. *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Dickerson, *Products Liability: How Good Does a Product Have To Be*, 42 IND. L.J. 301 (1967).
65. *See* Pulley v. Pacific Coca Cola Bottling Co., 68 Wash. 2d 728, 415 P.2d 636 (1966).
66. Citrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); it should also be noted that this language does not exclude a third person who is not the original buyer from recovering. Comment 1 to § 402A of the RESTATEMENT

3. *When the defendant placed the product on the market, he knew or should have known that it would be used without inspection for defects*

Although this element is not required by Section 402A, it is set forth in *Greenman* v. *Yuba Power Products, Inc.*[67] This element is easily inferred from the facts in most cases.

4. *The plaintiff was using the product in a reasonably foreseeable manner*

The purpose of this requirement is clear, as use in an unforeseen manner is a good defense to strict liability. In the pleadings it should be sufficient to state how the product was being used.

5. *The defect in the product was a substantial factor in causing injury to the plaintiff*

The only caution here is that "proximate cause" should be avoided as that term usually applies to actions founded on negligence.[68]

6. *The plaintiff was a user or consumer of the product*

If the plaintiff was a user or consumer, this should be pleaded, as many jurisdictions have not yet determined whether strict liability protection extends to "innocent bystanders." A leading case holding that warranty, equated by the court to tort liability, extended to a bystander, is *Mitchell v. Miller,*[69] where a car with a defective transmission rolled from a country club parking lot and hit a a golfer. As the *Restatement (Second)* expresses no opinion as to whether Section 402A should apply in such cases,[70] counsel must be careful to ascertain the case law of the forum and include other possible theories.

7. *Injuries sustained and damages*

D. PLEADING WARRANTY

Before entering a claim in warranty, counsel must decide what advantages are to be gained over a remedy in tort. If warranty is decided upon, the question is then one of choosing between common

(SECOND) OF TORTS (1965) points out that the plaintiff may be a donee of the original purchaser.

67. Greenman v. Yuba Power Products Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

68. The distinction between causation in fact and proximate cause should be kept in mind. Proximate cause deals only with the question of whether the cause was so immediate that the defendant should be held legally responsible.

69. Mitchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 694 (1965); in this regard, *see generally* Noel, *Defective Products: Extension of Strict Liability to Bystanders,* 38 TENN. L. REV. 1 (1970).

70. RESTACEMENT (SECOND) OF TORTS § 402A, comment o Caveat (1965).

law warranty and those provided under the U.C.C. This decision is usually determined by the facts. Since common law warranty requirements would be satisfied by pleading strict liability, only those allegations necessary under the U.C.C. have been included below.

1. *Existence of a warranty*

Plaintiff should first allege the facts upon which the warranty arises (e.g., express representations of fact). He should also be sure to identify the type of warranty relied upon.

2. *Breach of warranty*

This allegation is nothing more than the traditional statement that the product was defective when it was placed on the market by the defendant.

3. *The defect in the product was the cause of the plaintiff's injury*

4. *Reliance by the plaintiff*

Although reliance on the warranty is generally no longer needed, when the warranty is an express warranty for a particular purpose the plaintiff must have relied upon the seller's skill and judgment.[71]

5. *The plaintiff is a purchaser of the product or could reasonably be expected to use it*

This allegation will depend upon which form of Section 2-318 of the Uniform Commercial Code has been adopted.

6. *Notice to the defendant of breach of warranty*[72]

7. *Injuries and damages*

V. PRACTICAL PROBLEMS OF PROVING THE PRODUCTS LIABILITY CASE

One of the distinguishing features of the products liability case is the amount of preparation for trial that counsel must undertake. The proof is usually highly technical, the stakes high, and the defendants some of the largest companies in the country. Averbach says: "[u]nless the case involves a palpable manufacturing defect one can usually expect no offer of settlement beyond nuisance value. . . . When one takes on a national manufacturer or retailer,

71. UNIFORM COMMERCIAL CODE § 2-315.
72. UNIFORM COMMERCIAL CODE § 2-607.

he must proceed upon the assumption that he is going to trial. Few cases, except the very simple ones, justify the outlay in time and money usually required."[73]

Even before the complaint is filed, counsel must take care to insure his ability to prove his case. The cardinal rule to be followed in these cases is *get possession of the defective product and keep possession of it.*[74] The advantage to the plaintiff lies in his ability to investigate the product thoroughly, knowing that a claim can be made while the defendant does not. This advantage and indeed the entire case can be lost by an ignorant client or counsel who is too accommodating. Averbach relates the case of *Givens* v. *Baton Rouge Coca-Cola Bottling Co.*[75] in which a woman had finished about half a bottle of Coke when she allegedly discovered a worm in her mouth. Her husband returned the bottle to the seller who sent it to the defendant. Expert witnesses testified at the trial that there was nothing wrong with the remainder of the product. The complaint was dismissed and that decision was upheld on appeal. The moral of the case is clear. If a decision cannot be reached between counsel as to how the defendant might examine the evidence, they should resort to a court order.[76]

It should be assumed that in every product's liability case, the advice and testimony of an expert witness will be needed. This is true not only of the trial itself, but from the very beginning of the suit. The expert is indispensible in helping counsel plan the case, in suggesting alternate theories, providing questions for depositions and, if necessary, supplying names of other experts.[77]

In using an expert witness, two problems always encountered are: (1) choosing an expert that can teach the jury and (2) schooling the expert in the ways of the law and the use of his testimony. These problems are encountered more in the use of university professors and other more scholarly experts than with highly priced specialists who are professional witnesses by trade.

The ideal expert is one who can easily explain complicated mechanical or chemical problems to the jury in a common-sense manner. An expert with glittering credentials, the teaching ability of a high school instructor and the practical knowledge and language of a mechanic is undoubtedly the best choice. As such a person probably does not exist, counsel is left with choosing an expert nearer to one type than the other. Here it should not be assumed that the creden-

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73. 3B A. AVERBACH, HANDLING ACCIDENT CASE § 65 at 233, 234 (1971).
74. *Id.* at 235.
75. Givens v. Baton Rouge Coca Cola Bottling Co., 248 La. 904, 182 So. 2d 532 (1966).
76. Fed. R. Civ. P. 34(a) provides that "[a]ny party may serve on any other party a request (1) . . . to inspect and copy, test, or sample any tangible things. . . ."
77. 3B A. AVERBACH, HANDLING ACCIDENT CASES § 68 at 242 (1971).

tials that dazzle the jury mark the best expert, particularly if the trial is in a rural area. If the expert is unable to communicate, he might as well stay in his office.

Depending upon how much court experience the expert has had, he may have to be instructed on proper trial manners. The most important thing is that the expert be made to see how unlike his own education and knowledge the jury's is. Tozer points out the difficulty of converting ". . .six retired mailmen and six bored housewives into. . . instant chemists or psychiatrists or pharmacists."[78]

Finally, counsel must insist that the witness prepare for trial; even the experienced expert's knowledge at trial should not be rusty. Counsel should subject the expert to a thorough cross examination before trial. Such a technique will sharpen the expert's use of his own knowledge and prepare him for the rigors of the actual trial.

A second method of obtaining the "expert" assistance necessary to the products liability suit is through the use of independent testing laboratories and written reports. Compared to the use of the expert witness alone, this method has two disadvantages: it is usually more expensive and the expert is not present at all the stages of the trial to advise counsel. The advantage of the independent laboratory is in the unbiased nature of the report. Consequently, it may be more advisable for counsel defending a large corporation to use this method rather than its own "in-house" experts.

Another type of proof particularly suited to the products liability case is demonstrative evidence. Because it can be used to summarize or illustrate a technical point in the expert's testimony, demonstrative evidence is a helpful teaching aid for the jury.[79] However, this evidence must be used along with and not as a substitute for the expert's testimony.

Almost every kind of demonstrative evidence has been held admissible under the right conditions. Charts, diagrams, pictures both still and moving, models and experiments are generally admissible as long as the proper foundation is laid, usually by the expert.[80] Generally, these foundations must show that:

> (1) models are constructed to scale and that they accurately represent the real item.
> (2) pictures substantially reflect the conditions existing at the accident.
> (3) experiments are conducted under conditions similar to those that existed when the accident took place.

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78. Tozer, *Preparation and Use of Technical Evidence in Products Liability Cases*, 16 DEFENSE L.J. 669 (1967).

79. 3 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 49.01 (1970).

80. *See generally* 3 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 49.02 (1970); 3 J. WIGMORE, EVIDENCE § 790 (Chadbourn Rev. 1970).

In short, demonstrative evidence must be relevant and non-prejudicial.

All forms of demonstrative evidence have their particular drawbacks, e.g., models that refuse to work in the court room and experiments that backfire. These possibilities can only be weighed against the usefulness and necessity of the presentation.

VI. PROOF OF PLAINTIFF'S ALLEGATIONS

It will be remembered that in proving the plaintiff's case, certain elements are indispensable. The elements to be proved are: (1) that the product was defective; (2) that the defect existed when the product left the manufacturer; (3) that the defect caused the plaintiff's injuries. These three elements are at the core of the products liability case and their proof is essential. Though it is usually said that these elements can be proved by either direct or circumstantial evidence, Rheingold points out that circumstantial evidence alone is used in the majority of cases.[81] He classifies this evidence into categories that will be used here. Although the methods of proof have been further classified here as to the three requirements necessary for every case, this classification is for convenience only and need not be rigidly applied. The proof methods (nature of the product, life history, happening of the accident, etc.) can be interchanged depending upon the facts of the case.

A. PROOF OF DEFECT

1. *Nature of the product*

One of the first things that plaintiff's counsel might offer in proof is the nature of the product itself. Here scientific analysis is indispensable to show what it was in the product that caused the injury. This method is particularly adapted to food and drink cases.[82] In *Benavides* v. *Stop and Shop, Inc.*[83], the Massachusetts Supreme Judicial Court entered a judgment for the seller of a soap product which was alleged to have burned the plaintiff. The court found that the plaintiff did not put into evidence either the soap used or a chemical analysis of it.

Usually, proof that there was something in the defendant's product that *might* have injured the plaintiff is insufficient. In *Olano* v. *Rex Milling Co.*[84], evidence of ground glass in horse feed was

81. Rheingold, *Proof of Defect in Product Liability Cases,* 38 TENN. L. REV. 325 (1971).
82. 2 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 21.06[3] (1970).
83. Benavides v. Stop and Shop Inc., 346 Mass. 154, 190 N.E.2d 894 (1963).
84. Olano v. Rex Milling Co., 154 So. 2d 555 (La. App. 1963).

held to be insufficient as veterinary experts did not testify that the glass had in fact caused the animal's death.

2. *Life history of the product*

A second type of evidence offered to prove the existence of a defect is the history of the product. The plaintiff in an automobile case, for example, might want to show that the car had had previous difficulties similar to the one alleged to have caused the accident. This kind of proof would be especially useful if the only occupant of the car is killed and the vehicle is totally demolished. However, a short or non-existent history can work either for or against the plaintiff, tending to prove that the product was so new that no problem could have developed or by showing a lack of opportunity to misuse or lack of intervening cause.[85]

A manufacturer may wish to show the product's history as it traveled through his plant as evidence of due care. Due care, of course, is not at issue in strict liability and warranty cases, yet it might well be asked how a manufacturer is going to prove the nonexistence of a defect except by showing how thorough his quality control is. However it is used, life history will usually have to be combined with other proof to constitute submissible proof of defect.[86]

3. *The happening of the accident*

In using the happening of the accident to prove a defect, much of what has been said concerning the use of *res ipsa* to prove a defect will apply. If the court will apply the loose interpretation of the doctrine, it might well infer a defect from a case like *Vanek*[87] or *Givens*.[88] An important line of cases does exist, however, in which nothing more than a malfunction was shown in order for the case to go to the jury.[89]

4. *Similar products and uses*

Associated closely with the life history of a product, a plaintiff may show a defect by presenting the history of other similar products. The Corvair serves as an example. Clearly, the similarity of

85. A safe history record, no matter how long, is always a helpful defense to a charge of negligent liability, as it tends to show lack of notice of the defect in the product.

86. *See* Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 377, 187 P. 767 (1919). In jurisdictions which allow the use of *res ipsa loquitur* or similar theories to prove defectiveness of the product, life history evidence would normally be more useful to a plaintiff than to a defendant.

87. *See* Vanek v. Kirby, 450 P.2d 778 (Ore. 1969).

88. *See* Givens v. Baton Rouge Coca Cola Bottling Co., 248 La. 904, 182 So.2d 532 (1966).

89. Franks v. National Dairy Products Corp., 414 F.2d 685 (5th Cir. 1969); Greco v. Bucciconi Engineering Co., 238 F. Supp. 978 (1967); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965); Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967).

the product is an issue. If a defective car came off the assembly line the same day as the plaintiff's, then so much the better.

The use of a similar product by the defense is much the same as the plaintiff's use. A safe record is relevant and admissible, on the issue of a defect.[90]

Similarity in manufacturing or handling processes may also show that a defect is built into a product or is repeatedly caused by mishandling. Rheingold[91] and other authorities[92] correctly note however, that in looking to the treatment of identical products of the same manufacturer after the injury has occurred, courts have uniformly excluded proof that the product has now been modified or improved by the defendant. Yet exceptions to this rule have developed.[93]

B. PROVING THE DEFECT EXISTED WHILE THE MANUFACTURER CONTROLLED THE PRODUCT

This offer of proof is the one needed to bind a particular party and will go toward satisfying the "exclusive control" requirement of *res ipsa loquitur*. When the evidentiary thread is so weak that no direct evidence is available, the inferences drawn from such things as the nature of the product (e.g., a sealed container) are not unlike those used in proving a defect by circumstantial evidence.

The common term applied to this phase of proof is "tracing," implying that the product must be followed through the hands of all intermediaries to assess any contribution they may have made to the product's defective condition. If investigative methods do not prove fruitful, the only course left to the plaintiff may be to commence an action and join all the intermediaries as defendants. Discovery will normally result in denials that they caused any of the defects. By a process of elimination, the only one left should be the manufacturer.

C. THE DEFECT CAUSED THE INJURIES COMPLAINED OF

1. *Elimination of other causes*

Under any theory of liability, the plaintiff must prove both types of causation after the defect has been found to exist. Though causation in fact and proximate cause are not the same thing, once the plaintiff has proved causation in fact, he has probably proved

90. Becker v .American Airlines, 200 F. Supp. 243, 246 (S.D.N.Y. 1961); *see also*, 2 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY, § 16.03 [4] [iii] (1970).

91. *See* Rheingold, *supra* note 74.

92 2 J. WIGMORE, EVIDENCE § 283 (3rd ed. 1940); C. MCCORMICK, EVIDENCE 543 (1954); 1 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 12.04 (1971).

93. Christensen v. Powell, 236 Ore. 480, 389 P.2d 456 (1964); Citrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).

proximate cause also.[94] Proximate cause is usually proved by eliminating other possible causes. This does not mean that other causes must be eliminated absolutely, but only by the weight of probabilities.[95]

In *Jakubowski* v. *Minnesota Mining and Manufacturing Co.*,[96] the plaintiff complained that he had been injured when a sanding disk manufactured by the defendant exploded in his face. The court found insufficient evidence for a jury case saying:

> While a manufacturer is liable on its warranty irrespective of negligence, nevertheless it is necessary for the plaintiff to show that the dangerous condition which he contends constitutes a breach of warranty had its genesis when the instrumentality was within the control of the manufacturer. Accordingly, in the absence of direct evidence that the product is defective because of a manufacturing flaw or inadequate design, or other evidence which would permit an inference that a dangerous condition existed prior to sale, it is necessary to negate other causes of the failure of the product for which the defendant would not be responsible, in order to make it reasonable to infer that a dangerous condition existed at the time the defendant had control.[97]

The view that injury following use is insufficient to prove proximate cause is the view of most of the state courts, though an opposite result has been reached in some food and beverage cases.[98] and some cases involving drugs and cosmetics.[99]

2. *Occurrence of other injuries*

Proof that other users of the same product have suffered injury has been viewed as indicating, but not proving, proximate cause. Likewise, proof that others have used the product and have not suffered injury does not conclusively establish absence of proximate cause.[100] Thus, proximate cause may be shown in spite of the fact that other users did not suffer an injury.[101]

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94. When proximate cause is lacking in a products liability case it will usually take the form of one of the following defenses: the purchaser knew of the defect but used the product anyway; the purchaser used the product in a way unintended by the manufacturer; the risk was not forseeable. 1 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY § 11.02, at 210.6 (1971).

95. 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 1:21 (1961).

96. Jakubowski v. Minn. Mining and Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964). Rheingold correctly notes that this case and other similar ones do not require the plaintiff to eliminate other causes in every case. It is more likely that the court will require this when the case rests entirely on circumstantial evidence.

97. *Id.* at 829.

98. Campbell v. Safeway Stores Inc., 149 A.2d 420 (Mun. Ct. App. Dist. Col. 1959).

99. Bundy v. Ey-Teb. Inc., 160 Misc. 325, 289 N.Y.S. 905 (New York City Ct. 1935).

100. Hardman v. Helene Curtis Indus. Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681, 685 (1964).

101. MacLean v. Loft Candy Stores Inc., 172 So. 367 (La. App. 1937).

It is worthwhile at this point to repeat what was said earlier about the use of these proof methods: They need not be rigidly applied. That is, all of the methods mentioned might, depending upon the particular set of facts, be used to prove a defect. In another case only two might be usable to prove a defect, with the others going to show that the defendant had control of the article when the defect was introduced. In this last respect they are interchangeable to the degree that proof can be accomplished by circumstance and inference.[102]

It should be apparent from what has been said in this section on the proof of the case that in the normal products liability case, it "is not one inference but many inferences and circumstances that must be considered. . . each to cover some necessary point of the proof."[103]

VII. CONCLUSION

It is not difficult to discern from the history of the law of products liability that the consumer is gaining an ever-increasing edge over the makers and suppliers of articles that cause him injury. The changing social and judicial attitudes that are widening the duty of the suppliers of the dangerous product through such mechanisms as strict liability, can be expected to have a number of effects on the pleading and proof of the case. As social and legal "sympathy" for the consumer grows, it can be expected that plaintiffs will find it easier to get past the pleading stages with more general allegations of defect as was seen in *Vanek*, and that plaintiffs will be able to meet their burden of proof with weaker or at least more indirect evidence. It also seems likely that as the application of strict liability continues to grow, the use of the common law warranty theory will be reduced, helping to eliminate some of the confusion in the substantive law.

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102. Greco v. Bucciconi Engineering Co., 238 F. Supp. 978, 407 F.2d 87 (1969).
103. *See* Rheingold, *supra* note 74, at 342.