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Strict Products Liability for Used Car Dealers

Marjorie Jones Reeder
University of Kentucky

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The imposition of strict liability upon manufacturers for injuries caused by defective products has become a widely ac-
cepted precept of products liability law. A number of juris-
dictions have extended the strict liability doctrine to include re-
tailers of defective goods. Given this trend toward expansion
of the doctrine, it is not surprising that the issue of whether the
strict products liability doctrine is applicable to used car deal-
ers has arisen. This issue presents some difficult questions con-
cerning the remedies available to the buyer. Is he “stuck” if the
car fails to meet his expectations and causes injury to himself
or others, or can the buyer reasonably expect the used car
dealer to assume the responsibility incurred by placing the
defective product on the market?

The Appellate Court of Illinois recently grappled with
these questions in Peterson v. Lou Backrodt Chevrolet Co. The
case arose from an accident in which one child was killed and
another was seriously injured when they were struck by an
automobile whose brakes had failed. The automobile involved
had been purchased shortly before the accident from the defen-
dant, a used car dealer. The plaintiff sought recovery on a strict
liability theory, alleging that the car’s braking system had been
defective at the time the automobile left the used car dealer’s
control. Following dismissal of two counts of the plaintiff’s
complaint for failure to state a cause of action, the plaintiff

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1 The concept of manufacturer’s strict liability despite the plaintiff’s lack of priv-
ity and his failure to give timely notice of the breach has been recognized in 28 states.
See, e.g., Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 27 Cal. Rptr. 697 (1962);
Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Dealers Transp. Co. v. Battery
Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Codling v. Paglia, 288 N.E.2d 622, 345

2 The strict liability concept has been extended to include retailers in 13 states.
See, e.g., Vandermark v. Ford Motor Co., 391 P.2d 168, 37 Cal. Rptr. 896 (1964);
Sweeney v. Matthews, 236 N.E.2d 439 (Ill. 1966); Rogers v. Karem, 405 S.W.2d 741
(Ky. 1966); Coca-Cola Bot. Co. v. Hobart, 423 S.W.2d 118 (Tex. 1968).


4 The issue of whether bystanders should benefit from the application of § 402A
of the Restatement (Second) of Torts was also presented in Peterson but is not ad-
dressed in this comment. To date there have been seven jurisdictions which have
extended strict tort liability to bystanders who are innocently injured. See Sills v.
Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Caruth v. Mariani, 463 P.2d
appealed to the Appellate Court of Illinois, which reversed and remanded, holding that the doctrine of strict liability was applicable to sellers of used automobiles.

The Peterson decision represents the first case in which the strict liability doctrine has been applied to sellers of used products. Consumers in other jurisdictions will undoubtedly utilize the decision to seek extension of strict liability to sellers of used goods, particularly sellers of used automobiles. Thus, Peterson serves as a frame of reference for analysis of this problem in Kentucky as well as other jurisdictions. This comment will first examine the arguments in support of extension of strict liability to used car dealers. Consideration will then be given to the closely related theories of implied warranty of fitness and implied warranty of merchantability. Finally, attention will be focused upon the prospects for application of strict liability to sellers of used goods in Kentucky.

I. THE SETTING: Greenman, Section 402A of the Restatement, and the "Chain of Distribution"

The concept of strict products liability grounded purely in tort is relatively new. It was first enunciated in 1962 by the California Supreme Court in the case of Greenman v. Yuba Power Products, Inc. Greenman was injured when a combination power tool, a gift from his wife, malfunctioned, causing a piece of wood to strike the plaintiff on the head, inflicting serious injuries. Approximately ten and one-half months later, Greenman gave the retailer and manufacturer written notice of the claimed breaches of warranties. In the ensuing action against the tool manufacturer, the prevailing contractual theory of manufacturer's liability posed two seemingly insurmountable barriers to Greenman's recovery. This theory re-


quired that the plaintiff comply with all contractual procedures regarding notice of breach and that the plaintiff be in privity with the manufacturer. Greenman had failed to comply with the notice requirements of California's Uniform Sales Act. More important, however, was the fact that Greenman was not in privity with the tool manufacturer. As the donee of a gift, he was neither a contracting party nor a successor in interest to the legal rights of a contracting party; and a long line of California decisions had firmly refused to extend the "warranty without privity" exception beyond cases involving adulterated foods.

Justice Traynor overcame these obstacles by declaring that this was a case of strict liability in tort and that, therefore, the plaintiff was not bound by the limitations of the contractual warranty theory. Balancing the privity and notice requirements against the demands of public safety, Justice Traynor concluded that, because the privity rule functioned more often as a device to defeat meritorious claims than as a valid limitation on liability, it should be abandoned. He reasoned that public safety required that anyone supplying human beings with potentially hazardous products should be held to the highest degree of care.

The concept of strict products liability in tort was adopted by the Restatement (Second) of Torts in 1965. Based upon the public safety rationale espoused by Justice Traynor in

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6 BLACK'S LAW DICTIONARY 1361 (rev. 4th ed. 1968).
8 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701:
   Although in these cases strict liability has usually been based on the theory of an express warranty running from the manufacturer to the plaintiff . . . the recognition that the liability is not assumed by agreement but imposed by law . . . make[s] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Compare, Note, 50 N.C.L. REV. 697 (1972).
9 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01.
Greenman,\textsuperscript{11} the Restatement clarified the products liability doctrine and explained its elements. Any user or consumer of a product may rely upon this doctrine without regard to privity or the care exercised by the defendant. The plaintiff must prove, however, that 1) the seller is engaged in the business of selling the product, 2) the product was in fact defective, 3) the defect existed at the time the product left the hands of the seller, 4) the defect made the product unreasonably dangerous, and 5) the defect was the proximate cause of the injury.\textsuperscript{12}

Illinois accepted the strict liability doctrine in 1965 in the case of Suvada v. White Motor Co.\textsuperscript{3} In this case Suvada, who had been held liable in a tort action resulting from an accident involving his truck, sought indemnity from the truck manufacturer for the judgment he had paid in the prior suit. The Appellate Court of Illinois concluded that Suvada could recover under the strict liability theory if he could prove the elements specified by the Restatement. The following year the Illinois court extended the strict liability doctrine to retailers, and possibly wholesalers, in Sweeney v. Matthews.\textsuperscript{4}

II. THE PETERTON DECISION AND ITS RATIONALE

As a result of the decision in Peterson v. Lou Backrodt Chevrolet Co.,\textsuperscript{15} Illinois has become the first jurisdiction to apply the doctrine of strict liability in tort to sellers of used articles. Before considering the rationale of this decision, however, a brief statement of its facts will be useful.

In June of 1971 Cornelius Spradlin purchased a used 1965 Chevrolet from Lou Backrodt Chevrolet Co. Less than four months later the automobile struck Maradean and Mark Peterson, two small children who were walking on the side of the road. Maradean was killed instantly and Mark suffered inter-

\textsuperscript{11} RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965) states:
The basis for the rule [of strict liability] is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

\textsuperscript{12} RESTATEMENT (SECOND) OF TORTS § 402A (1965).

\textsuperscript{13} 210 N.E.2d 182 (Ill. App. 1965).


\textsuperscript{15} 307 N.E.2d 729 (Ill. App. 1974).
nal injuries. John Elder, the driver of the vehicle at the time of the accident, stated that the children stepped into the path of the car and that his attempt to avoid them by applying the brakes was futile. The evidence showed that the brakes failed due to specified defects in the braking system.

The defendant insisted that because he had informed the buyer that the car was used, it was understood that the vehicle had been subjected to "use and wear," thus relieving him of liability. The Appellate Court of Illinois found otherwise, emphasizing that a used car dealer "... is mistaken in equating, as a matter of law, use and wear with a defect in the used car making the vehicle unreasonably dangerous." The court, quoting from Dunham v. Vaughan & Busnell Manufacturing Co., stated: "Although 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."

Based upon this reasoning, it is obvious that the Illinois court viewed its decision as merely the logical extension of the strict liability doctrine adopted in Suvada v. White Motor Co. and Sweeney v. Matthews. The court simply held that anyone in the chain of distribution, whether a manufacturer, retailer, wholesaler, or a seller of used products, should be held strictly liable for any and all defective products he places into the stream of commerce. Three reasons were cited by the Peterson court to support this extension of the doctrine: 1) the dealer deterrence principle, 2) the insurance doctrine, and 3) the consumer reliance argument.

A. The Dealer Deterrence Principle

The dealer deterrence principle is based on the premise that increased potential liability will affect the behavior of dealers. The position taken by the Peterson court is that a used

16 Id. at 732.
18 307 N.E.2d at 732.
car dealer threatened with strict liability for any injury-causing
defect in the cars he sells will exert the utmost care in inspect-
ing and preparing his automobiles for sale, and that this addi-
tional care by the dealer will promote the policy of insuring
that only safe automobiles are placed on the public highways.

The viability of this principle is a subject of much contro-
versy. Proponents of the theory contend that the abolition of
the privity and notice defenses through strict liability and the
resulting increased vulnerability of dealers to adverse judg-
ments will be sufficient motivation to effect the desired change
in the standard of care. Opponents of the principle find two
basic weaknesses in this argument. First, a dealer may often
fail to correct a defect due to an error in judgment concerning
the existence of the defect rather than negligent inspection. It
is agreed that such errors cannot be deterred by any means.
Second, it is asserted that no type of deterrence will serve to
increase the degree of care exercised by dealers. The opponents
of the principle argue that dealers have long been subject to
contractual liability and that such liability has not increased
the standard of care. Therefore, it seems unlikely that the
imposition of strict liability will have the desired effect of in-
creasing the degree of care exercised by dealers.

B. The Insurance Doctrine

The insurance doctrine is basically a justification for im-
posing the burden of strict products liability upon used car
dealers. The theory is that the dealer will be able to obtain an
insurance policy to cover his losses attributable to strict liabil-
ity, thus reducing the financial hardship imposed on the
dealer. This system would provide two levels of cost spreading
and most effectively accomplish the strict liability objective of
loss reallocation. The dealer would distribute the cost of the

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21 307 N.E.2d at 732. See also Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W.2d 828 (Tex. 1942); RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965).
22 Keeton, Products Liability—Some Observations About Allocation of Risks, 64 MICH. L. REV., 1329, 1333 (1966); Prosser, The Assault Upon the Citadel (Strict Liabil-
ity to the Consumer), 69 YALE L.J. 1099 (1960).
23 Keeton, supra note 22, at 1333; Prosser, supra note 22, at 1122.
25 Id. at 651.
insurance premiums through the sale price of his used automobiles and the insurance company would reflect the damages it paid on behalf of the dealer in the amount of the policy premiums.\textsuperscript{26}

The protection of dealers provided by the insurance doctrine satisfies the demands of public policy. The dealer would be insulated by the insurance company from the payment of damages so disproportionate to the size of his operation that he would be forced out of business. In addition, the consumer would be guaranteed at least a minimal fund from which damages could be recovered. It must be noted, however, that the success of the insurance doctrine rests entirely on the predilection of dealers to avail themselves of insurance protection. The doctrine loses all meaning if the dealers are unwilling to obtain the necessary coverage.

C. \textit{The Consumer Reliance Argument}

The consumer reliance argument rests upon the premise that the seller of used automobiles possesses a better bargaining position than the consumer and that the imposition of strict liability is warranted if the consumer detrimentally relies upon the representations of the seller.\textsuperscript{27} To sustain this argument, the validity of the premise must be examined.

The superiority of the used car dealer's position is based on both his extended opportunity to inspect the vehicle and his superior expertise. It is obvious that the dealer has the best opportunity to inspect the car. If the dealer maintains the vehicle in his possession for a sufficient period of time to place a value on it, he must necessarily have sufficient time to ascertain the condition of the vehicle.\textsuperscript{28} In contrast, the consumer will, in most instances, have the opportunity for only an "on-lot" inspection under the supervision of the dealer. The supe-

\textsuperscript{26} The amount of the premiums would probably be linked directly to the conduct of each dealer because the insurance policies involved would probably be a blanket coverage for each dealer rather than a group coverage for an association of dealers. This assumption is based upon the general opposition of the states to group liability insurance. Such insurance is viewed as a device for granting preferred groups price concessions which are not actuarily justified and result in unfairly discriminatory rates. See generally P. Keeton, Basic Text on Insurance Law 62-64 (1971).


\textsuperscript{28} Armour v. Haskins, 276 S.W.2d 580 (Ky. 1955).
rior expertise of the dealer is derived from his continued dealing with used automobiles through his participation in the business. "The operator of the . . . business must be regarded as possessing expertise with respect to the service, life, and fitness of his vehicles for use. That expertise ought to put him in a better position than [the buyer] to detect or to anticipate . . . defects . . . in his vehicles . . . ." In comparison, the consumer's knowledge of automobiles is limited by the relative uniqueness, to the buyer, of the transaction.

Given the dealer's superior expertise and opportunity to inspect, the consumer is virtually forced to rely upon the dealer's representations. Such reliance makes the consumer especially vulnerable to the misrepresentation of defects by the dealer. It is this vulnerability which the advocates of the consumer reliance argument assert as the justification for the imposition of strict liability.

Adversaries of this argument allege that the imposition of strict liability would place an unjust burden upon the dealer. Many defects are not detectable through the normal means of inspection; and it is unreasonable and totally impractical to expect a dealer to disassemble each automobile before sale. Strict liability should, therefore, be imposed only in those instances in which the dealer failed to act in good faith during the sales transaction.

III. IMPLIED WARRANTY: AN ALTERNATIVE TO STRICT LIABILITY

An alternative to strict products liability, and indeed the

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29 Cintron v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 778 (N.J. 1965). Although this case involved rental dealers rather than used car dealers, the rationale is applicable to all commercial transactions.
30 Restatement (Second) of Torts § 402A, comment f (1965) and cases thereafter cited in Appendix.
31 Although it denounced unduly burdensome standards of inspection, the Kentucky Court of Appeals in Gaidry Motors, Inc. v. Grannon, 268 S.W.2d 627 (Ky. 1953), held that there is a duty upon used car dealers to inspect the automobiles they sell. The Court stated that it was not too harsh a rule to require used car dealers to use reasonable care before resale to locate defects which the customer often cannot discover until it is too late. In support of this view the Court noted such factors as: 1) the greater likelihood of mechanical defects in older cars than in new ones; 2) the fairly rapid turnover of ownership of used cars; 3) the fact that the majority of old cars are sold through used car dealers; 4) the fact that the dealer has greater opportunity to discover defects. See also Annot., 6 A.L.R.3d 12, 43 (1966).
32 Armour v. Haskins, 275 S.W.2d 580 (Ky. 1955).
traditional approach, is the contractual theory of implied warranty. The two most important of these warranties are the implied warranty of merchantability, which requires that a particular product perform as well as that type of product performs under normal circumstances, and the implied warranty of fitness for a particular purpose, which requires that the

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32 The concepts of implied warranty of fitness and implied warranty of merchantability first appeared in the nineteenth century. Initially confined to use in unwholesome food cases, the concepts were gradually extended to articles for intimate bodily use, such as hair dyes and soaps. Having made this extension, the courts then extended the warranty to all products. See Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966), cert. denied, 386 U.S. 1036 (1967); Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962), modified, 320 F.2d 130 (3d Cir. 1963); Brown v. Chrysler Corp., 143 S.E.2d 575 (Ga. 1965); Wood v. Hub Motor Co., 137 S.E.2d 674 (Ga. 1964); Lafayette Hvy. Equip. Sales & Serv., Inc. v. Dixie Truck and Equip. Serv., Inc., 179 So. 2d 479 (La. 1965); Citrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769 (N.J. 1965); Hall Furniture Co. v. Crane Breed Mfg. Co., 85 S.E. 35 (N.C. 1915); Bouchet v. Oregon Motor Car Co., 152 P. 888 (Ore. 1915). See also 77 C.J.S. Sales §§ 324, 325, 330 and cases therein cited; Annot., 22 A.L.R.3d 1387 (1968).

34 UNIFORM COMMERCIAL CODE § 2-314: Implied Warranty: Merchantability; Usage of Trade:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of facts made on the container or label if any.

See also Jaeger, Warranties of Merchantability and Fitness for Use: Recent Developments, 16 RUTGERS L. REV. 493 (1962); Prosser, The Implied Warranty of Merchantable Quality, 27 MINN. L. REV. 117 (1943).

35 UNIFORM COMMERCIAL CODE § 2-315 states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.
product meet the particular need of the buyer as that need was 
communicated to the seller. Although the Peterson court predi-
cated recovery upon strict liability and failed to mention im-
plied warranty as a possible basis for recovery, the two ap-
proaches are so closely related that a discussion of implied 

warranty is in order.

Under the English warranty doctrine, the plaintiff had to 
show privity between himself and the seller before any recovery 
would be allowed.\textsuperscript{37} Privity was shown by proving that the 
plaintiff was either a contracting party or a successor in inter-
est possessing the same legal rights in the contract or property 
as a contracting party.\textsuperscript{38} Initially, the requirement of privity 
was equally prevalent in the United States, but the rule has 
been gradually eroded.\textsuperscript{39} Although the privity requirement is 
still important in implied warranty cases, the public policy of 
recent years has emphasized protection of the consumer not-
withstanding the absence of privity. As a result, the privity 
requirement has been largely eliminated in food and cosmetics 
cases,\textsuperscript{40} as well as a number of automobile cases.\textsuperscript{41} The land-

\textsuperscript{36} See Dickerson, The ABC's of Product Liability—With a Close Look at Section 
402A and the Code, 36 Tenn. L. Rev. 439, 442 (1969):

What is not so clear is how the tort liability envisaged by [Section 402A of 
the Restatement (Second) of Torts] differs, if at all, from the tort liability 
flowing from a breach of implied warranty.

The substantive differences, if any, are less significant than the differ-
ences in language would seem to suggest. The implied warranty of merchant-
ability is couched in terms of a standard of quality that the seller is expected 
to meet. In safety terms, this means that the product must not injure the 
consumer. Section 402A, on the other hand, tells us that the seller will be 
liable if his product is unreasonably dangerous as a result of being defective. 
Because the standard of compliance with the safety aspects of merchantabil-
ity is the exact converse of the standard of noncompliance envisaged by 
Section 402A, there appears to be no significant difference in the two stan-
dards of safety. Each creates a general obligation of quality and each creates 
it with reference to a sale of personal property. Both are said to carry the 
flavor of tort.

\textsuperscript{37} Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). See W. Prosser, Law 

\textsuperscript{38} See Dickerson, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. 
Rev. 791 (1966); Prosser, The Assault Upon the Citadel (Strict Liability to the 

\textsuperscript{39} Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). See W. Prosser, Law 

\textsuperscript{40} See, e.g., Escola v. Coca-Cola Bot. Co., 150 P.2d 436 (Cal. 1944); Klein v.
mark decision of Henningsen v. Bloomfield Motors, Inc.\(^2\) enunciated the principle that the purchaser of an automobile may proceed against the manufacturer or seller under implied warranty without regard to the presence or absence of privity. In Henningsen both the dealer and the manufacturer were held liable to the purchaser under an implied warranty of safety when the purchaser’s wife was injured.

Whether the privity requirement has been incorporated into the Uniform Commercial Code is debatable. The courts are well divided on the issue. Although some jurisdictions have held that the implied warranties are confined to the buyer of a product,\(^3\) there is ample authority to the contrary.\(^4\) Given the Henningsen stance on privity, a collateral issue ripe for resolution is whether the implied warranties are applicable to buyers of used products. The U.C.C. does not explicitly state that the § 2-314 warranty of merchantability\(^5\) and the § 2-315 warranty of fitness\(^6\) apply to sales of second-hand goods. However, Comment 3 to § 2-314 implies that although the warranty is applicable to used goods, it would not be the same as the warranty of merchantability for new goods.\(^7\)

No case has held a used car dealer liable on the theory of breach of implied warranty; however, some courts have indicated in dicta that they would so hold.\(^8\) Such a holding would

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Duchess Sandwich Co., 93 P.2d 799 (Cal. 1939).


\(^3\) 161 A.2d 69, 84 (N.J. 1960). The exact wording of the holding was as follows: Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new auto in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.


\(^6\) See note 34 supra.

\(^7\) See note 35 supra.

\(^8\) Comment 3 states in part: “A contract for the sale of second hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description.”

be in accord with the views of various commentators who contend that it is reasonable for the purchaser of a used car to expect that it should be suitable to drive without fear of imminent peril. 49

IV. STRICT LIABILITY FOR SELLERS OF USED PRODUCTS IN KENTUCKY

The prospects for application of the strict liability doctrine to sellers of used products in Kentucky are at best uncertain. Because the Court of Appeals has not addressed the issue, any prediction concerning this extension of strict liability must be based upon an analysis of the Court's past approach to the doctrine. However, as exemplified by two recent cases dealing with strict liability in the contexts of defective design and bystander recovery, the Court's approach has been less than consistent, making prognostication even more difficult.

In Jones v. Hutchinson Manufacturing Co. 50 the Court declined to impose strict liability upon the manufacturer of a deficiently designed product. The case involved a five-year-old girl who had been injured by a grain auger when she inexplicably released the chain which connected the sides of the truck in which she was riding and slid through a trap door in the rear of the truck onto the auger. The plaintiff sued the manufacturer and retailer on negligence and strict liability theories, alleging that the equipment had been deficiently designed. Evidence was introduced to show that the auger could be designed in such a manner as to prevent the injury. The Court of Appeals, although ostensibly deciding the case on the basis of strict liability, reverted to the traditional negligence tests for its decision. 51 Noting that this was the first Kentucky case of


50 502 S.W.2d 66 (Ky. 1973).

51 Id. at 69: "There are, in addition, two particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence. One of these involves the design of the product . . . ." (quoting Prosser on Torts at 644). For an analysis of the Court's construction of the law on
alleged deficient product design since the adoption of the strict liability doctrine in *Dealers Transport Co. v. Battery Distributing Co.*, the Court stated that, in cases involving deficient design, "... the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned." The Court’s refusal to extend the application of the strict liability doctrine to manufacturers of products which are defective because deficiently designed seems to indicate a restrictive attitude toward the doctrine, which would make its extension to sellers of used products unlikely.

In marked contrast to *Jones*, however, is the Court’s subsequent decision in *Embs v. Pepsi-Cola Bottling Co.* The plaintiff in this case was a woman who was severely cut by flying glass from a soft drink bottle which exploded. At the time of the accident she was shopping in a market and, under the circumstances, was not a consumer of the product, but merely a bystander. The trial court directed a verdict for the defendants on the ground that strict liability does not extend beyond users and consumers of products to bystanders. The Court of Appeals, addressing the issue of bystander recovery under strict liability for the first time, reversed and held: "The protections of Section 402A of the Restatement of Torts 2d extend to bystanders whose injury from the defective product is reasonably foreseeable."

Although the *Jones* and *Embs* cases are not in direct conflict, they do appear to evince differing approaches and attitudes toward the doctrine of strict liability. In both cases the Court was defining the scope of the doctrine, yet in *Embs* it

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52 402 S.W.2d 441 (Ky. 1965).

502 S.W.2d at 69-70. See also Garrison v. Rohm & Hass Co., 492 F.2d 346 (6th Cir. 1974). The Sixth Circuit, citing *Jones*, interpreted the Kentucky law concerning strict liability for defective design as based on two principles: (1) liability will be imposed only for failure to exercise reasonable care in the design, and (2) the manufacturer is not an insurer that the product is incapable of producing injury.

54 C.A. No. 12,236 (Ky., May 23, 1975).

55 The ruling by the trial court was in accord with the late Judge Swinford’s interpretation of Kentucky law in Davidson v. Leadingham, 294 F. Supp. 155 (E.D. Ky. 1968).

54 C.A. No. 12,236 at 7.
chose to expand the doctrine, while in *Jones* the Court reverted to a negligence standard of liability for design deficiencies. On the other hand, there are some important distinctions between the two cases which could account, at least in part, for their apparent inconsistency. First, in *Embs* the Court observed that virtually "no jurisdiction which has adopted strict tort liability has rejected the bystanders claim."57 However, as the *Jones* opinion notes, there has been no such unanimity concerning the manufacturer's duty with regard to design. In addition, *Embs* extends the scope of the doctrine to an additional class of plaintiffs, whereas in *Jones* the Court declined to impose strict liability on another class of products and defendants. Despite these distinctions, there is an element of inconsistency in the Court's approach in these cases which is difficult to reconcile.

Nevertheless, analysis of the *Embs* decision reveals significant similarities between the Court's reasoning and the theories advanced in the *Peterson* case. In *Embs* the Court stated:

> Our expressed public policy will be furthered if we minimize the risk of personal injury and property damage by charging the costs of injuries against the manufacturer who can procure liability insurance and distribute its expense among the public as a cost of doing business; and since the risk of harm from defective products exists for mere bystanders and passersby as well as for the purchaser or user, there is no substantial reason for protecting one class of persons and not the other. The same policy requires us to maximize protection for the injured third party and promote the public interest in discouraging the marketing of products having defects that are a menace to the public by imposing strict liability upon retailers and wholesalers in the distributive chain responsible for marketing the defective product which injures the bystander. The imposition of strict liability places no unreasonable burden upon sellers because they can adjust the cost of insurance protection among themselves in the course of their continuing business relationship.58

In the language quoted above, and throughout the *Embs* opinion, there are elements of both the insurance and dealer deter-

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57 Id. at 5.
58 Id. at 5-6.
rence theories which the Illinois court relied upon in *Peterson*. Consequently, the *Embs* decision, standing alone, allows the conclusion that the Kentucky Court of Appeals would be pre-disposed to apply strict liability to sellers of used automobiles or other goods.

As noted, however, the prospects for the imposition of strict liability upon sellers of used products in Kentucky remain uncertain. Although the *Embs* decision indicates a rather liberal approach to defining the scope of strict liability, thereby increasing the possibility that Kentucky will eventually follow Illinois in imposing strict liability on dealers of used products, the *Jones* opinion and the attitude which it reflects must also be accounted for. In the final analysis, of course, the Court of Appeals must define the scope of the strict liability doctrine by determining whether public policy would best be served by imposing strict liability on all sellers in the chain of distribution, including those who sell used products, or by drawing the line at the retailer and refusing to extend strict liability to the dealer in used goods.

*Marjorie Jones Reeder*