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stages of pregnancy, then this experience would be a strong empirical basis for establishing a maternity leave policy. If no problems arose, then no leave policy would be necessary.

Notwithstanding what Title VII or the equal protection clause might require, the best approach to maternity leave problems is that expressed by a Mooresville, North Carolina, junior high school principal: "Why should I lose a good teacher just because she's pregnant?"[102]

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Products Liability—Liability of the Bailor for Hire for Personal Injuries Caused by Defective Goods

One of the advantages enjoyed by the modern consumer is the ability to rent almost any item he desires. The rental business is rapidly and ever-increasingly becoming a major feature of the American economy. Not only can the consumer "let Hertz put him in the driver's seat" of a new automobile, he can rent wheel chairs, ladders, lawn mowers, golf carts, and a myriad of other products.

The legal relationship created by the rental of a chattel has been called a bailment for hire,[1] a lease,[2] and a bailment for mutual benefit.[3] The transaction differs from a sale in that although the bailee has possession of the goods, title remains in the bailor and the bailee is obliged to surrender possession to the bailor at the end of the bailment term. Although some courts seem to categorize longer and more formal arrangements as leases rather than as bailments,[4] the legal consequences

[102]Charlotte Observer, Sept. 28, 1972, at 20A, col. 1.

[1]*E.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 450, 212 A.2d 769, 777-78 (1965); UNIFORM COMMERCIAL CODE § 2-313, Comment 2 (1962 Official Text) [hereinafter cited as UCC]; Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 655 (1957). *But see* BLACK'S LAW DICTIONARY 179 (rev. 4th ed. 1968).

[2]*E.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 456, 212 A.2d 769, 781 (1965). *But see* BLACK'S LAW DICTIONARY 1035 (rev. 4th ed. 1968) which recognizes only leases of real property.

[3]*E.g.*, Global Tank Trailer Sales v. Textilana-Nease, Inc., 209 Kan. 314, 496 P.2d 1292 (1972); Brown v. Hudson, 50 Tenn. App. 658, 667, 363 S.W.2d 505, 509 (1962); BLACK'S LAW DICTIONARY 179 (rev. 4th ed. 1968).

[4]*Compare* W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970) *with* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 450, 212 A.2d 769, 777-78 (1965).

of these characterizations do not differ, so all types of rental arrangements will be treated similarly in this comment.

All too frequently, rented chattels prove to be defective for reasons of faulty manufacturing or failure by the bailor to keep the goods in a safe condition. When these defects cause personal injuries, the legal system must determine an equitable compensation for the injured party. Sometimes the cause of justice is served best by shifting the loss to the bailor, and at other times, by leaving the loss on the bailee.[5] In North Carolina, as in most states, the liability of the bailor has been measured by the negligence doctrine.[6] A few states have also recognized a common-law implied warranty arising from the transaction.[7] More recently, some courts have found an implied warranty by using the sales article of the Uniform Commercial Code as a source of law to be applied to the lease and bailment in both commercial and personal injury litigation.[8] Another recent trend is the application of theories of strict liability in tort to bailments.[9] This comment will examine the application of these three theories of liability—negligence, warranty, and strict liability in tort—to the bailment for hire and will analyze them in an attempt to discover whether any one of the theories is more advantageous to either the plaintiff or society.

NEGLIGENCE

In a bailment for hire the law imposes on the bailor the duty to exercise the care of a reasonable man of ordinary prudence to see that the goods do no harm to the bailee.[10] Although the bailor is not an insurer of the safety and quality of goods rented, he will be held liable for personal injuries to the bailee or third persons proximately resulting from the defective condition of the rented chattel if he was aware of the defective condition or by reasonable care and inspection could have discovered it.[11] In most states a breach of this duty of reasonable care

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[5]*See* Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886 (1967).

[6]*See* text following note 9 *infra*.

[7]*See* text following note 33 *infra*.

[8]*See* text following note 48 *infra*.

[9]*See* text following note 80 *infra*.

[10]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 104, at 677 (4th ed. 1971) [hereinafter cited as PROSSER]. The duty of a gratuitous bailor is discussed in note 33 *infra*.

[11]Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 505, 73 S.E.2d 4, 5 (1952); Brown v. Hudson, 50 Tenn. App. 658, 667-68, 363 S.W.2d 505, 509 (1962); PROSSER § 104, at 676-77.

gives rise to a negligence action.[12] In a few states, however, this same duty to use reasonable care to inspect the chattel for defects is erroneously called an implied warranty of fitness.[13]

A recent North Carolina case illustrates the bailor's duty to warn of known defects.[14] The plaintiff was injured after the brakes on his rented golf car failed to hold, and the cart rolled backward down a steep hill and overturned. Testimony of the golf course professional established that although he knew that the cart's brakes could not prevent the cart from rolling backwards, he did not consider this unusual and therefore did not warn the plaintiff.[15] The court held this to be actionable negligence because knowledge of the defective condition, even though its significance is not appreciated by the bailor, imposes a duty on the bailor to warn the bailee.[16] Once the defect has been disclosed to the bailee, however, the bailor is relieved of any responsibility.[17] Similarly, there is no duty to warn the bailee if the defect should be obvious to the user.[18]

Apart from the duty to warn of known defects, the bailor must use reasonable care to discover any defects which make the chattel unsafe to the bailee.[19] Although the standard is only that of reasonable care, where the nature of the chattel rented, as in the case of an automobile, makes it more likely that defects will lead to serious injury, more than a casual inspection is required.[20] However, the plaintiff must be able to

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[12]PROSSER § 104, at 676.

[13]Global Tank Trailer Sales v. Textilana-Nease, Inc., 209 Kan. 314, 496 P.2d 1292 (1972). *See also* Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 485, 164 S.E.2d 318, 324 (1968), which discusses GA. CODE ANN. § 12-204 (1936) requiring the bailor to "warrant" that the chattel bailed is free from any secret defects rendering it unsuitable for the purpose for which it was hired. The duty required of the bailor is not that imposed by a true implied warranty, but is only that of use of ordinary care to ascertain the presence of hidden defects. England v. United States, 405 F.2d 862, 863 (5th Cir. 1968).

[14]Roberts v. William N. & Kate B. Reynolds Memorial Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

[15]*See id.* at 55, 187 S.E.2d at 724.

[16]*Id.* at 59, 187 S.E.2d at 727; PROSSER § 104, at 676.

[17]Brown v. Hudson, 50 Tenn. App. 658, 669, 363 S.W.2d 505, 509 (1962); PROSSER § 104, at 677.

[18]Bradshaw v. Blystone Equip. Co., 79 Nev. 441, 386 P.2d 396 (1963) (no duty to warn of the danger of an open universal joint of a rented posthole digger); Villanueva v. Nowlin, 77 N.M. 174, 420 P.2d 764 (1966).

[19]Authorities cited note 11 *supra*.

[20]PROSSER § 95, at 633.

prove that the defect which caused his injury could have been discovered by reasonable inspection at the time of rental.[21]

The burden of proof is great in a negligence case of this type. The plaintiff must be able to show by a preponderance of the evidence that the proximate cause of his injury was the bailor's negligence.[22] It is normally no problem to establish that the defect was the proximate cause of the accident and the injury, but to connect the defect with the bailor in such a way as to show a breach of duty is frequently difficult.[23] Although direct evidence can be used to show the bailor's negligence,[24] the bailee usually must rely upon the doctrine of *res ipsa loquitur*.[25] If the plaintiff can show that the circumstances of the occurrence that produced the injury permit a reasonable inference that the bailor was negligent, he can avoid a directed verdict and get his case to the jury.[26]

Although the doctrine of *res ipsa loquitur* normally requires that the instrumentality causing the injury be in the exclusive control of the defendant,[27] under the majority rule the exclusive-control requirement does not bar use of the doctrine in a bailment case.[28] Once the bailee introduces evidence showing that the chattel was not improperly handled or used and that the time of his possession was short enough that it was not probable that the defect arose during his possession, he should be permitted to invoke the doctrine.[29] The use of *res ipsa loquitur* in bailment cases in North Carolina is severely circumscribed, however, by strict adherence to the doctrine of exclusive control.[30] The North Carolina Supreme Court has rejected use of *res ipsa loquitur* to show the

[21]Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 505, 73 S.E.2d 4, 5-6 (1952); Stephens v. Southern Oil Co., 259 N.C. 456, 459, 131 S.E.2d 39, 42 (1963) (violation of safety statute held to operate to hold owner liable only where he has been negligent in failing to keep brakes in functional condition).

[22]Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 505, 73 S.E.2d 4, 5 (1952); PROSSER § 103, at 672.

[23]*See* PROSSER § 103, at 672-73.

[24]*See* Roberts v. William N. & Kate B. Reynolds Memorial Park, 281 N.C. 48, 187 S.E.2d 721 (1972) (plaintiff was able to establish by defendant's testimony that defendant had knowledge of the defect).

[25]PROSSER § 103, at 672. *See generally* Byrd, *Proof of Negligence in North Carolina: Part I. Res Ipsa Loquitur*, 48 N.C.L. REV. 452 (1970) [hereinafter cited as Byrd].

[26]Byrd 452, 454-55.

[27]*Id.* at 466.

[28]*See* PROSSER § 39, at 220-21.

[29]*See* Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 183, 199 A.2d 826, 829 (1964); Byrd 467.

[30]*See generally* Byrd 466-70.

bailor's negligence in several automobile brake-failure cases,[31] including one in which the bailee had driven the car only forty-five minutes and five and one-half miles before the brakes failed.[32] The court's objection to its use in this instance apparently was the feeling that any defect that would have been discoverable by inspection would have manifested itself almost immediately. When the duty of reasonable inspection is thus discharged by the mechanic's observation that the brakes stopped the car when he brought it out for the bailee, that duty appears to have merged into the duty to warn of defects known by the bailor to exist. Such a restrictive approach to the use of *res ipsa loquitur* prevents recovery except where the plaintiff can prove knowledge by the bailor of the defect and, in effect, changes the substantive law on the duty owed by the bailor for hire. Thus because of the debilitating restrictions on the use of *res ipsa loquitur* in North Carolina, the duty owed in the bailment for hire in many cases is no greater than in a gratuitous bailment.[33]

IMPLIED WARRANTY

As the common law of sales developed, sellers of goods were bound not only by their express warranties, but also by warranties implied by law.[34] The law has placed on the seller the obligation to guarantee the quality and safe condition of the goods.[35] This obligation has not been restricted to sellers, however, for a few courts have recognized that a common law bailment for hire also gives rise to the same implied warranties of quality on the part of the bailor.[36] The first American deci-

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[31]Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967); Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 73 S.E.2d 4 (1952).

[32]*Compare* Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 73 S.E.2d 4 (1952), *with* M. Dietz & Sons v. Miller, 43 N.J. Super. 334, 339, 128 A.2d 719, 720 (1957) (brake failure only 50 miles after repair allows inference of negligence).

One possible alternative for the plaintiff in the brake failure case is to use violation of a safety statute (N.C. GEN. STAT. § 20-124 (1965)) to make out a per se case of negligence. Although the bailor would be allowed to escape liability if he could convince the jury that the defect was not discoverable upon proper inspection, the case would at least get to the jury. *See* Stephens v. Southern Oil Co., 259 N.C. 456, 460-61, 131 S.E.2d 39, 42-43 (1963).

[33]The gratuitous bailor is under the duty only to warn the bailee of defects in the chattel of which he has knowledge; he is under no duty to inspect. Miller v. Hand Ford Sales, Inc., 216 Ore. 567, 570-71, 340 P.2d 181, 183 (1959); PROSSER § 95, at 634, § 104, at 677.

[34]PROSSER § 95, at 636.

[35]*Id.*

[36]*Id.* at 638.

sion which recognized the implied warranty in a bailment for hire was the New York case of *Hoisting Engine Sales Co. v. Hart.*[37] This decision, based on English common law precedent, held that when the bailor knows, or should know, of the purpose for which the chattel is rented, there arises an implied warranty that the chattel is " 'as fit and suitable for that purpose as reasonable care and skill can make it.' "[38] Cases such as *Hoisting*, which involved the implied warranty of fitness for a particular purpose,[39] normally arise in a commercial context and rarely involve personal injuries.[40]

The other major implied warranty of quality is a warranty that the goods are of merchantable quality—that is, that the goods are of a quality acceptable without objection in the trade and that they are "fit for the ordinary purposes for which such goods are used."[41] This is the implied warranty that is normally involved in bailment cases in which the bailee is seeking damages for personal injuries caused by the defective rented goods.

Those courts finding a common law implied warranty of quality applicable to the bailment for hire rarely have disclosed any reasons why such transactions should be treated like sales for this purpose. *Hoisting* merely stated that such warranties were implied in bailments at common law,[42] and many cases since then which have found a common law warranty have relied entirely on *Hoisting*.[43] Several of the more recent cases, however, have attempted to explain why implied warranties should be held to exist in bailments by showing the analogy of such a transaction to the sale of chattels.

Several courts have noted that in most rental situations the bailee relies on the competence and expertise of the bailor to a greater extent than a buyer relies on the seller.[44] For most commodities there are fewer

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[37]237 N.Y. 30, 142 N.E. 342 (1923).

[38]*Id.* at 37, 142 N.E. at 344.

[39]*See* UCC § 2-315; PROSSER § 95, at 636. *See generally* Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219.

[40]For a sales case where personal injuries did result from breach of an implied warranty of fitness for a particular purpose, see Stonebrink v. Highland Motors, Inc., 171 Ore. 415, 137 P.2d 986 (1943).

[41]UCC § 2-314; *see* 1 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 227 (rev. ed. 1948); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

[42]237 N.Y. at 37, 142 N.E.at 344.

[43]*E.g.*, Hatten Mach. Co. v. Bruch, 59 Wash. 2d 757, 761, 370 P.2d 600, 602 (1962).

[44]W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 446, 456, 212 A.2d 769, 777, 781 (1965).

potential bailors than sellers. Moreover, the bailee will spend less time comparing goods than he would were he considering a purchase, which often may be a considerable investment.[45] In both types of transactions the merchant, whether seller or bailor, is in a much better position than the consumer to know and control the condition of the chattel transferred.[46] It has also been recognized that the bailor, as well as the seller, is better able to sustain or distribute as a cost of doing business the expense of insuring against personal injuries caused by defective goods.[47] One court summed up a discussion of these issues by saying that "[p]ublic policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases."[48]

Now that almost every American jurisdiction has enacted the Uniform Commercial Code, sales of goods by merchants give rise to implied warranties of quality unless an effective disclaimer is made.[49] Article two, a comprehensive act dealing with sales of goods, contains the provisions governing sales warranties. Although almost all commentators agree that article two was intended to be, and by express language is, limited to transactions involving the sale of goods,[50] it is playing an ever-increasing role in shaping the law of bailment.

Commentators have frequently urged that article two be used in non-sales cases by way of analogy.[51] Professor Nordstrom, a leading

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[45]W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970).

[46]Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 446, 455, 212 A.2d 769, 775, 780 (1965).

[47]W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 446, 212 A.2d 769, 775 (1965).

[48]W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970).

[49]UCC §§ 2-313 to -315.

[50]C. BUNN, H. SNEAD & R. SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE § 2.4A, at 30 (1964); R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 21, at 41 (1970); Minish, *The Uniform Commercial Code in Minnesota: Articles 2 and 6—Sales and Bulk Transfers*, 50 MINN. L. REV. 103, 104 (1965).

UCC § 2-102, the scope section of article 2, says: "Unless the context otherwise requires, this Article applies to transactions in goods . . . ." However, the warranty sections of the article, UCC §§ 2-312 to -318, are worded to cover only sales.

[51]1 W. WILLIER & F. HART, FORMS & PROCEDURES UNDER THE UNIFORM COMMERCIAL CODE ¶ 12.02, at 1-64 (1971); Farnsworth, *supra* note 1; Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447, 453 (1971); Comment, *The Extention of Warranty Protection to Lease Transactions*, 10 B.C. IND. & COM. L. REV. 127 (1968); Comment, *Application of Article 2 of the Uniform Commercial Code to Leases*, 1969 WASH. U.L.Q. 90.

> Four ways may be conceived of in which courts in such a legal system as ours might

commentator on the law of sales, thinks that the judicial approach in non-sales cases should be to "search for the reasons why the legislature thought that warranties should be attached to a sale, and determine whether similar reasons exist for implying a warranty in the non-sales transaction. If it finds the reasons to be similar, the Code ought to be used to shape the rights and duties of the parties to the non-sales transaction."[52] The commentators are not all agreed, however, on exactly how the Uniform Commercial Code should be used once the analogy has been drawn.

One commentator advocated the position that all chattel leases analogous to sales should be governed directly by applicable sections of article two.[53] The recent Arkansas case of *Sawyer v. Pioneer Leasing Corp.*,[54] although not involving a personal injury,[55] best illustrates the juducial use of this approach. In that case the lessor of an ice machine was suing the lessee for failure to make the monthly payments. The lessee said that since the machine did not operate efficiently in cold weather, the lessor had breached the implied warranty of fitness. The lessor maintained that since the lease contained a disclaimer of warranties the lessee had no defense on breach of warranty grounds.[56] The court held that section 2-316(2) of the Uniform Commercial Code was "appl-

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deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same general subject. . . . But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.

Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908).

[52]R. NORDSTROM, *supra* note 50, § 21, at 43-44.

[53]Murray, *supra* note 51, at 453. This is not to be confused with a determination that a transaction, although called a lease by the parties involved, is really a conditional sales contract, with title passing to the "lessee" upon payment of an additional nominal sum at the end of the rental period.

[54]244 Ark. 943, 428 S.W.2d 46 (1968).

[55]Debbis v. Hertz Corp., 269 F. Supp. 671 (D. Md. 1967), is an example of the use of the Code in a personal injury case. The court seemed to assume that the Code created implied warranties in a bailment for hire, but refused to let the administratrix in the wrongful death action sue for breach of warranty because of lack of privity.

[56]"No warranties or representations regarding the items herein leased of their condition, quality or suitability, or their freedom from latent defects, have been made . . . ." 244 Ark. at 944, 428 S.W.2d at 47-48.

icable to leases where the provisions of the lease are analogous to a sale."[57] Since the disclaimer did not comply with the section 2-316(2) requirement that to exclude the implied warranty of fitness any written disclaimer must be conspicuous, the disclaimer was held ineffective.[58] A dissenting opinion argued for application of common-law implied warranties under which the disclaimer would have been equally effective. The dissent noted that many sections of the Code are clearly not applicable to leases and that it would be difficult to determine when lease provisions made the rental transaction analogous to a sale.[59] Although these arguments have some validity, even the dissenting opinion missed the real point. As Maryland's highest court recognized when it held that the Code warranty provisions are clearly limited to sales of goods, "if the draftsmen had intended the sections to apply to leases of goods as well as to sales, they should have said so."[60] This position is strengthened by the Official Comment to section 2-313 of the Code, which states:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties . . . . may arise in other appropriate circumstances such as in the case of bailments for hire . . . . Beyond that, the matter is left to the case law with the intention that the *policies* of this Act may offer useful guidance in dealing with further cases as they arise.[61]

A rejection of the direct application of article two does not mean, therefore, that no use can be made of the Code in bailment transactions. Passage of the Uniform Commercial Code is an expression of legislative intent to which the judiciary should look for guidance. It is at least arguable that the policies of article two, rather than the specific provisions, should be applied to the legal relations of consumers and businesses in those non-sales transactions analogous to sales. This approach should prove extremely effective with the Uniform Commercial Code, for the draftsmen have disclosed the policies of the Code in certain

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[57]*Id.* at 957, 428 S.W.2d at 54.

[58]*Id.* at 958, 428 S.W.2d at 54.

[59]*Id.* at 959, 428 S.W.2d at 55 (Fogleman, J., dissenting). Justice Fogleman thought that sections 2-701 to -725 could not be applied to leases without problems arising. *See* KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315, 326-27 (W.D. Ark. 1971) (UCC §§ 2-714(2), -715 used to compute damages for breach of implied warranties in a lease).

[60]Bona v. Graefe, 264 Md. 69, 73, 285 A.2d 607, 609 (1972).

[61]UCC § 2-313, Comment 2 (emphasis added).

broadly phrased sections of the statute itself[62] and in the Official Comments to the Act.[63]

> The fact that parties to a non-sales transaction have not met the letter of the sales provisions of the UCC should not give courts cause to declare the agreement a nullity if the parties have conducted their business in a manner which serves the policies as well. Certainly an extension of common law based on an expression of legislative intent is preferable to inclusion by judicial legislation.[64]

This application of the Code might best be explained by the use of several examples. Section 2-314 says that implied warranties apply only to "merchants," as defined in section 2-104(1). These sections taken together disclose the Code policy that only those persons whose business it is to supply goods of the type sold or leased should be bound by implied warranties of quality. The same test could be used in regard to bailment cases to determine those transactions where implied warranties arise. If the bailor tried to disclaim implied warranties of merchantability, this method of using the Code would dictate looking to the disclaimer section only to discover the legislative policy behind that provision. Therefore in deciding the disclaimer issue, the court should only ask whether the Code policy of insuring that the buyer was aware of the disclaimer and its effect had been satisfied in the bailment case, not whether the writing mentioned the word "merchantability," as is required by the section in sales cases.[65]

The recent case of *Baker v. City of Seattle*[66] is a rare example of this type of judicial reasoning. The plaintiff was injured in an accident when the brakes on his rented golf cart failed. The disclaimer which the bailor offered in defense to the warranty action had been hidden in the middle of the one long paragraph of the rental agreement in the same size print as in the rest of the agreement.[67] Citing sections 2-316(2) and 2-719(1) and (3), the court stated:

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[62]*E.g.*, UCC § 2-302.

[63]*E.g.*, UCC §§ 2-318, Comment 2; UCC § 2-719, Comment 1. The importance of the Official Comments will vary among state courts, for not all states adopted them.

[64]Comment, 1969 WASH. U.L.Q., *supra* note 51, at 96. *See also* Bona v. Graefe, 264 Md. 69, 74, 285 A.2d 607, 609 (1972), which expresses much the same attitude, but goes even further in refusing to apply the Code by analogy.

[65]UCC § 2-316(2).

[66]79 Wash. 2d 198, 484 P.2d 405 (1971).

[67]*Id.* at 199, 484 P.2d at 405-06.

> The legislature of this state has announced a public policy with regard to disclaimers of liability in commercial transactions by enacting the Uniform Commercial Code . . . . To allow the bailor to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable.[68]

This approach would appear to be preferable to direct application of article two of the Uniform Commercial Code because the provisions were not designed to govern rental transactions.

Once the existence of the implied warranties of quality in a bailment for hire have been established, under the common law or by analogy to the Uniform Commercial Code, the bailee must prove that there has been a breach of the implied warranty. Specifically, the bailee must prove (1) that he was injured, (2) that the injury occurred because the rented chattel was defective or unreasonably unsafe, and (3) that the defect existed when the chattel left the hands of the bailor.[69] In other words, "breach of warranty gives rise to strict liability, which does not depend upon any knowledge of defects on the part of the seller or bailor, or any negligence."[70] An action based on breach of implied warranty simply removes from the case the question of negligence and with it any evidence of due care on the part of the bailor.

The bailor, under this form of strict liability, is normally held to warrant that as of the time the goods leave his control they contain no defects.[71] There is one case, however, that has held that the implied warranties of quality extend to insure against any defects that may arise at any time during the rental period.[72] The holding is apparently based on the premise that since the bailor is making a profit on the rental of the chattel over the entire span of the rental period, he should bear any losses caused by a defect in the goods. Although the bailor has the ability to restrict the rental period to insure that the goods are not in use beyond their normal useful lives, he could not always withdraw goods from inventory before defects manifested themselves. Adoption of this measure of liability practically ensures the injured bailee of

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[68]*Id.* at 201-02, 484 P.2d at 407.

[69]PROSSER § 103, at 671-72; *see* R. NORDSTROM, *supra* note 50, § 63, at 199.

[70]PROSSER § 95, at 636.

[71]*See id.* § 103, at 671-72.

[72]Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 450-51, 212 A.2d 769, 778-79 (1965). Although the lease required the bailor to keep the trucks in good repair, the court was explicit in stating that its holding was in no way based on that clause in the contract of rental.

recovery, for he need only prove that the defective condition of the bailed chattel caused his injury.[73]

For historical reasons, the modern action for breach of warranty contains both tort and contract elements.[74] The contractual requirement of privity, which limits the warranty to the parties to the contract, has caused two distinct types of problems. One is the question of horizontal privity: Can the injured bystander recover from the bailor on the implied warranty given to the bailee?[75] The other is the question of vertical privity: Can the bailee sue the manufacturer directly? Although some courts have allowed buyers to maintain direct actions against the manufacturer of defective goods for breach of warranty,[76] normally the wasteful procedure of a series of warranty actions is necessary to reach the manufacturer when he is at fault.[77] Even greater problems for the injured bailee, however, are the requirement of notice[78] and disclaimers of liability by the bailor.[79] These contract elements function as a defense for the bailor or seller and can prevent recovery by the injured consumer. Although these rules of warranty are efficient and equitable in commercial settings, they tend to frustrate rational and fair compensation for personal injury.[80]

STRICT LIABILITY IN TORT

In 1960, recognizing the problems inherent in the use of implied warranties in consumer personal injury actions, Dean Prosser advocated a rule of strict liability for personal injuries caused by consumer goods.

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[73]*Id.* at 461, 212 A.2d at 784 (dissenting opinion). Justice Hall dissented on this very issue. He thought that liability should be restricted to defects existing at the time of the rental.

This same rule has been adopted by statute in Louisiana. *See* Celestin v. Employers Mut. Liab. Ins. Co., 387 F.2d 539, 540 (5th Cir. 1968), where LA. CIV. CODE ANN. art. 2695 (West 1952) is discussed.

[74]PROSSER § 95, at 634-35; 1 S. WILLISTON, *supra* note 41, § 197. Since implied warranties arise by operation of law, they are usually viewed as tort in nature, while the elements of privity, notice and disclaimer are contractual in nature.

[75]*See* text following note 155 *infra.*

[76]*See* R. NORDSTROM, *supra* note 50, § 91, at 284; PROSSER § 97, at 653-54.

[77]Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799 (1966). Although the Code does not provide for direct actions against the manufacturer, UCC § 2-607(5) does allow the retailer to "vouch-in" his seller in order to settle common issues of fact in one action.

[78]*See* text accompanying notes 126-30 *infra.*

[79]*See* text accompanying notes 131-47 *infra.*

[80]Seely v. White Motor Co., 63 Cal. 2d 9, 16, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965) (Traynor, C.J.).

He recommended abandoning the rules of contract and the term "warranty" in favor of the "familiar" concept of strict liability in tort.[81] In 1963 the California Supreme Court applied the doctrine to manufacturers,[82] and since that time over two-thirds of the jurisdictions have adopted the theory for use against retailers, wholesalers, and manufacturers in products liability cases.[83] This judicial trend was given further impetus in 1965 when the American Law Institute included the doctrine as section 402A in the *Restatement (Second) of the Law of Torts* as a basis of liability for sellers of defective and unreasonably dangerous goods.[84]

With some states already holding bailors liable for breach of implied warranty, it was inevitable that courts would extend strict liability in tort to bailors also. In 1965 the Supreme Court of New Jersey in *Cintrone v. Hertz Truck Leasing & Rental Service*,[85] in what is admittedly dictum, approved application of the theory to a bailment for hire.[86] Since that time, California,[87] Hawaii,[88] Alaska,[89] and New Mexico[90] have expressly held that strict liability in tort applies to the bailor of rented chattels as well as to the retail seller and manufacturer.[91] In

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[81]Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

[82]Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[83]PROSSER § 98, at 657-58. For a more detailed listing of cases *see* Prosser, *supra* note 77, at 794-98.

[84]RESTATEMENT (SECOND) OF TORTS § 402A (1965):

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

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

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

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[85]45 N.J. 434, 212 A.2d 769 (1965).

[86]*Id.* at 452, 457, 212 A.2d at 778-79, 781.

[87]Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

[88]Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970).

[89]Bachner v. Pearson, 479 P.2d 319 (Alas. 1970).

[90]Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972).

[91]*Contra*, Speyer, Inc. v. Humble Oil & Ref. Co., 275 F. Supp. 861 (W.D. Pa. 1967), *aff'd*,

comparing the bailor for hire, or lessor, with the retailer, these courts have said that they see no substantial distinction between the seller and the non-seller, such as the bailor for hire, because each places the goods in the stream of commerce knowing that they will be used without inspection for defects.[92]

The courts have been unanimous in restricting application of the strict liability in tort doctrine to "commercial lessors"[93] or "mass lessors."[94] This is in accord with comment *f* of section 402A, which says that strict liability in tort is applicable only to sales by those in the business of supplying goods as opposed to non-commercial, isolated sales by non-merchants.[95] The rationale for applying strict liability in tort only to mass sellers and lessors is in part the special responsibility for the safety of consumers assumed by those who supply products as a business and the forced reliance of those who purchase.[96] All courts that have applied the doctrine have placed great importance on the idea that the merchant represents the chattel as safe for use by placing it in the stream of commerce and that the consumer uses it in reliance on this implicit representation.[97]

The main reason for holding the manufacturer and the commercial seller, as well as the commercial bailor, to this liability is the concept of "enterprise liability" or risk distribution.[98] Although these terms are normally treated as describing a unitary concept, they are really separate concepts. Enterprise liability is based on the "principle that each activity is accountable for the distinctive risks it creates" and should bear the cost of compensating for harm resulting from fruition of that risk.[99] Although "risk distribution" has several meanings, most courts

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403 F.2d 766 (3d Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969) (federal court refused to apply strict liability in tort to a lessor largely because of the wording of § 402A).

[92]Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 182 (1970); Bachner v. Pearson, 479 P.2d 319, 328 (Alas. 1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 456, 212 A.2d 769, 781 (1965).

[93]Bachner v. Pearson, 479 P.2d 319, 328 (Alas. 1970).

[94]Conroy v. 10 Brewster Ave. Corp., 97 N.J. Super. 75, 82, 234 A.2d 415, 418-19 (1967).

[95]RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* at 350-51 (1965).

[96]*Id. See also* Katz v. Slade, 460 S.W.2d 608 (Mo. 1970), where the Missouri court added its own requirement that the "mass lessor" be engaged in a profit-making business organized for economic gain, in holding that a municipally-owned, non-profit golf course was not a "mass lessor" of golf carts.

[97]*E.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 456, 212 A.2d 769, 781 (1965); Prosser, *supra* note 77, at 799.

[98]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

[99]Keeton, *supra* note 5, at 895.

use it both to recognize economic realities resulting from adoption of strict liability in tort and to justify imposing the cost of compensating for injuries on the bailor, retailer, or manufacturer.[100]

The retailer who is sued by the injured buyer for injuries caused by defective goods will rarely have to absorb the ultimate loss, for he will often have an action against both the wholesaler and the manufacturer. Although the manufacturer may have to absorb some of the cost of compensating for injuries, perhaps with liability insurance, the cost will largely be passed along to the consumer in the form of higher prices.[101] The bailor who purchases defective goods that cause physical injuries will, like the retailer, have a cause of action against his supplier or the manufacturer if he is sued. But the bailor who rents chattels with defects attributable to the use of the goods in his business has no cause of action against his supplier. Therefore, although many courts have compared the bailor to the retailer, the liability of the bailor for hire bears closer resemblance to that of a manufacturer. An understanding of this greater exposure to liability is essential to analysis of the effect of those cases imposing strict tort liability on the bailor for hire.

Of the five courts applying strict liability in tort to the bailor, one holds him responsible for all defects that cause injuries during the course of the bailment,[102] three apparently hold him responsible only for injuries caused by defects existing when the goods leave his hands,[103] and one limits his responsibility to injuries caused by those defective goods that were defective when he purchased them.[104]

When the New Mexico court held that the bailor is subject to strict liability in tort,[105] the court expressly adopted the reasoning of the con-

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[100]RESTATEMENT (SECOND) OF TORTS § 402A, comment *c*, at 349-50 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-01 (1961).

[101]Calabresi says that three meanings are attributable to "risk distribution": (1) spreading all losses, as broadly as possible; (2) the "deep pocket" theory, or making those most able to pay bear the losses; and (3) "enterprise liability." Calabresi, *supra* note 100, at 499.

Because of these various meanings attributable to risk distribution, it might be better for courts to use the term "enterprise liability" if that is the reason for imposing liability. One federal court refused to impose strict liability in a maritime products liability case because it equated strict liability with the deep pocket theory—that of a giant central insurer who absorbs all losses. *See* Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 301 F. Supp. 513, 524 (S.D.N.Y.), *aff'd*, 413 F.2d 428 (2d Cir. 1969).

[102]Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

[103]Bachner v. Pearson, 479 P.2d 319 (Alas. 1970); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970).

[104]Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972).

[105]*Id.*

curring opinion in *Lechuga, Inc. v. Montgomery*,[106] an Arizona lower appellate court case. Although the issue on appeal in *Lechuga* was whether strict liability would be extended to lessors of chattels, the court never reached that issue, but disposed of the case on the ground that the plaintiff had failed to satisfy the standard of proof necessary for strict liability in tort.[107] However, one judge discussed the issue extensively in a concurring opinion. He concluded that since the doctrine was designed to reach only "the ultimate culprit, the manufacturer" for a defect attributable either to design or to manufacture, the lessor should be strictly liable only for those defects attributable to the manufacturer.[108] The basis for this conclusion was the statement in *Vandermark v. Ford Motor Co.*[109] that the retailer should be held liable so that he could act as a conduit through which liability could flow to reach the manufacturer.[110] The concurring opinion said that in all other cases the bailor's duty should be measured by the law of negligence.[111]

Therefore, in New Mexico, the liability of a lessor of chattels is measured by different legal doctrines, depending upon when the defect arose.[112] Regardless of whether this holding reflects a correct interpretation of *Vandermark*, this restrictive New Mexico position should not be followed. The same reasons exist for holding the bailor liable for defects arising from the use of the goods in his business as exist for holding the manufacturer liable for the manufacture of defective and unreasonably dangerous goods. Therefore it is a logical and consistent extension of the theory to apply it to all defects arising while the product is in the control either of the manufacturer or of the bailor.

In contrast to the New Mexico application of the doctrine, the Hawaii case of *Stewart v. Budget Rent-A-Car Corp.*[113] makes it clear that the bailor for hire is subject to strict liability for physical injury caused by all defects in the chattel at the time it left his control. In that case the court noted that although the bailor could only win on his cross-claim against the manufacturer if the jury found that the defect was not caused by any failure on his part to maintain the car properly, his duty

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[106]12 Ariz. App. 32, 467 P.2d 256 (1970).
[107]*Id.* at 36, 467 P.2d at 260.
[108]*Id.* at 38, 467 P.2d at 262 (Jacobson, J., concurring).
[109]61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
[110]*Id.* at 262-63, 319 P.2d at 171-72, 37 Cal. Rptr. at 899-900.
[111]*See* Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256 (1970).
[112]Stang v. Hertz Corp., 83 N.M. 730, 735, 497 P.2d 732, 737 (1972).
[113]52 Hawaii 71, 470 P.2d 240 (1970).

for all defects is to be measured by strict liability in tort.[114] This also appears to be the way the doctrine has been applied by both the California[115] and the Alaska courts.[116]

The most far-reaching duty is that envisioned by the New Jersey Supreme Court in *Cintrone v. Hertz Truck Leasing & Rental Service*.[117] Although the exact holding of the court was that an implied warranty of fitness continues for the entire rental period,[118] the court seems to say that the bailor's liability would extend over the same period of time under strict liability in tort.[119] If the court would indeed apply this principle to strict liability in tort, and it would seem anomalous if it did not, this application of the doctrine would be much more extensive than that of any other state.

Although the New Jersey application of strict liability in tort might at first appear to place a much greater liability on a bailor than on a manufacturer, it is entirely consistent with the policy behind strict liability. Any physical injury caused by a defect arising while the product is in the bailee's use, if not caused by improper or abnormal use, is a risk attributable to the bailor's business. Although the bailor will be liable for almost all physical injuries caused by defective goods, he is not left entirely at the mercy of the normal deterioration of his rental goods. The bailor still has some measure of control over how great a risk he is willing to take, for he has the ability to withdraw the goods from the stream of commerce any time he thinks they are approaching the limits of safe performance,[120] something neither the retailer nor the manufacturer can do. The bailor will simply have to balance the compensation to be received against the risk that a dangerous defect will arise while the product is in use. As the age of each rental item increases, its risk factor, and therefore the cost of liability insurance, increases. When the cost of insurance becomes high enough to cut the profit margin at the highest acceptable rental price to zero, the item will be removed from the bailor's inventory of rental goods. Although this process appears to be difficult and time-consuming, it is no different from the procedure a

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[114]*Id.* at 78-79, 470 P.2d at 245.

[115]*See* Price v. Shell Oil Co., 2 Cal. 3d 245, 254-56, 466 P.2d 722, 728-29, 85 Cal. Rptr. 178, 184-85 (1970).

[116]*See* Bachner v. Pearson, 479 P.2d 319, 328 (Alas. 1970).

[117]45 N.J. 434, 212 A.2d 769 (1965).

[118]*Id.* at 450, 212 A.2d at 778.

[119]*Id.* at 456, 212 A.2d at 781.

[120]*Id.* at 455, 212 A.2d at 780.

manufacturer must undertake to balance the cost of quality control against the cost of insuring against personal injury liability.[121]

Just as application of strict liability in tort to the manufacturer should result in the production of safer products, so should New Jersey's application to the bailor result in safer goods available for rent.[122] Although the bailor who is liable only for defects present when he rents the chattel will have a similar risk-cost analysis to make, he need not screen rental items nearly as carefully as the bailor who is liable for all defects. For one thing, the difficulty of proving that the defect was present when rented will prevent recovery on some claims. Secondly, in longer leases the bailor need not worry about defects that might arise in the future. It is only when the bailor is responsible for all defects that maximum protection for the safety of the public will be achieved.

While strict liability in tort discards both vertical privity and negligence, the fact that the injury occurred during the term of the bailment does not prove the bailee's case. The elements of the case are the same as for breach of warranty. In order to recover against either the bailor or the manufacturer, the bailee must prove that his injuries were caused by the defective product and, under the majority rule, that the defect existed or was inchoate when it left the hands of the defendant.[123] Although *res ipsa loquitur* is not applicable, the plaintiff is permitted to prove that the defect existed when it left the defendant's control by circumstantial evidence alone.[124] The negligence of the bailor is not an issue, and evidence establishing his degree of care is not even relevant.[125] In short, the bailor is not held liable because his conduct has deviated from any norm but because public policy demands that he pay for losses attributable to risks created by his business activities.

DEFENSES OF THE BAILOR

Requirement of Notice. In order to preserve his remedies for breach of warranty, the buyer of goods must give timely notice of the

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[121]Morris, *Negligence in Tort Law—With Emphasis on Automobile Accidents and Unsound Products*, 53 VA. L. REV. 899, 908-09 (1967).

[122]*Id.*

[123]Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 75, 470 P.2d 240, 243 (1970); RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* at 351 (1965).

[124]Reader v. General Motors Corp., 107 Ariz. 149, 154-55, 483 P.2d 1388, 1393 (1971) (en banc); Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 76-77, 470 P.2d 240, 244 (1970).

[125]Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970). The bailee, of course, must show reasonable use of the chattel.

breach.[126] The requirement for notice of breach is necessary in commercial transactions between merchants, for it encourages cure of nonconforming tender and normal settlement of other minor conflicts through negotiation.[127]

Although the same policy reasons for notice are not present in instances of personal injury caused by defective goods, failure to meet this requirement has occasionally barred recovery for personal injury on breach of warranty theory in sales cases.[128] A few courts, realizing that the reasons for timely notice are not present in the personal-injury action, have refused to allow use of the notice requirement as a defense against the claims of injured consumers.[129]

Because public policy is clearly recognized as the basis of strict liability in tort, which therefore arises by operation of law and not by reason of fault, the useless requirement of notice of breach of warranty is held to be totally inapplicable.[130] Thus, in actions based on negligence or strict liability in tort, the only "notice" requirements are those inherent in the statute of limitations.

Disclaimers and Indemnity Clauses. Rental agreements frequently contain either disclaimers of warranties or indemnity clauses. At common law[131] and under the Uniform Commercial Code, implied warranties, being viewed as a matter of contract, can be excluded by express language.[132] Because bailors are not always aware of the Code requirements, the bailee may have slightly greater protection in those states that use the Code to shape the law of bailment.[133] In addition to this protection, section 2-719(3) operates to prevent the bailor from limiting the damages available for breach of warranty resulting in personal injury. When the goods are "consumer goods," a term defined by

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[126]UCC § 2-607.

[127]*Id.*, Comment 4.

[128]Annot., 6 A.L.R. 3d 1371, 1374 (1966); *see* UCC § 2-607, Comment 5.

[129]Annot., 6 A.L.R. 3d 1371, 1376-79 (1966). UCC § 2-607, Comment 4, notes that although the injured consumer must notify the seller of the breach within a reasonable time, that requirement is to be construed liberally so as "not to deprive a good faith consumer of his remedy."

[130]Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

[131]Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 959, 428 S.W.2d 46, 55 (1968) (dissenting opinion).

[132]UCC §§ 2-316(2)-(3).

[133]*E.g.*, Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 959, 428 S.W.2d 46, 55 (1968) (dissenting opinion).

the Code,[134] the limitation is deemed "prima facie unconscionable" and the court can refuse to enforce it.[135] As the Official Comments make clear, however, the bailor can still disclaim all warranties and thus escape liability.[136]

The ability to disclaim warranties would not be possible under the doctrine of strict liability in tort.[137] Although there are some early cases upholding disclaimers,[138] normally where the defect causes personal injury the disclaimer has been held void as against public policy: the bailor is not allowed to define the scope of his own responsibility since that liability is one imposed by operation of law, not by contract.[139] It would appear that in a state using the Uniform Commercial Code to determine the bailor's duty a similar result could be achieved in some circumstances by holding the disclaimer unconscionable as a matter of public policy.[140] Since concepts of what is unconscionable vary widely, however, use of this doctrine would not achieve a result of the same compass as is achieved by strict liability in tort.

Although the bailor cannot escape strict liability by way of disclaimer, apparently he can escape it by means of an indemnity clause.[141] In *Price v. Shell Oil Co.*,[142] the California Supreme Court said by way of dictum that an indemnity clause specifically covering a strict liability

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[134]"Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes . . . ." UCC § 9-109.

[135]UCC §§ 2-719(3), -302. For a discussion of the meaning of "prima facie" in this provision, see Moye, *Exclusion and Modification of Warranty Under the U.C.C.—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 DENVER L.J. 579, 623 (1969); Note, *Contract Draftsmanship Under Article Two of the Uniform Commercial Code*, 112 U. PA. L. REV. 564, 598-99 (1964).

[136]UCC §§ 2-316, Comment 3, 2-719, Comment 3. *But cf.* Note, 112 U. PA. L. REV., *supra* note 135, at 598, where it is asserted that the pressures of competition generally prevent merchants from withdrawing all warranty protection.

[137]Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964); RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 355-56 (1965).

[138]*See* Prosser, *supra* note 77, at 833.

[139]Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

[140]Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971) (an inconspicuous disclaimer was held to be unconscionable). *See also* Comment, *The Application of the Doctrine of Unconscionability to Warranties: A Move Toward Strict Liability Within the U.C.C.*, 38 FORDHAM L. REV. 73 (1969).

[141]"I . . . do hereby exonerate, indemnify and save harmless the company from all claims and liabilities to all parties for damage or loss to any person, persons or property in any way arising out of or during the use of said equipment." Weik v. Ace Rents, Inc., 249 Iowa 510, 512, 87 N.W.2d 314, 316 (1958).

[142]2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

in tort claim for defective products would be upheld.[143] Since that case involved a commercial lease of equipment and not consumer goods, it is possible that the court would hold an indemnity clause, particularly an inconspicuous one in a consumer-directed rental agreement, to be unconscionable.[144] The indemnity clause is also upheld in both negligence[145] and implied warranty cases.[146] The reason commonly given is that the public policy of freedom of contract is best served by enforcing such provisions.[147] Even in these cases, however, there is the possibility that a court would accept the argument for unconscionability under appropriate circumstances.

Contributory Fault. Two of the most common defenses in a negligence action are contributory negligence and assumption of the risk.[148] Although the distinction between the two is not vital in a negligence action against the bailor since both are held to bar recovery,[149] in actions based on warranty and strict liability in tort the difference is very important. Because courts have not always properly distinguished assumption of the risk from contributory negligence,[150] some confusion has arisen in this area of the law. When the bailee has negligently failed to discover the defect in the product or to guard against the possibility of its existence, his conduct is not a bar to an action for breach of warranty[151] or in strict liability in tort.[152] On the other hand, when the bailee's conduct consists in voluntarily proceeding to encounter a known risk created by the defective goods, his conduct is best described as assumption of

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[143]*Id.* at 256-58, 466 P.2d at 729-31, 85 Cal. Rptr. at 185-87.

[144]*See* UCC § 2-302.

[145]Weik v. Ace Rents, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958).

[146]Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1969).

[147]Weik v. Ace Rents, Inc., 249 Iowa 510, 514, 87 N.W.2d 314, 317 (1958). *See also* Celestin v. Employers Mut. Liab. Ins. Co., 387 F.2d 539 (5th Cir. 1968).

[148]PROSSER § 65, at 416; Annot., 82 A.L.R.2d 1218 (1962).

[149]PROSSER § 68, at 441.

[150]*See* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 459, 212 A.2d 769, 782-83 (1965).

[151]Prosser, *supra* note 77, at 838.

[152]Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 472-73, 251 A.2d 278, 283 (1969); RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965).

Sometimes this conduct, even though characterized as contributory negligence by the court, is held to be irrelevant because of the nature of the cause of action. *Id.*; Prosser, *supra* note 77, at 838.

Upon analysis, however, it does not appear that this conduct fails to measure up to the applicable standard of the reasonable man of ordinary prudence under like circumstances. RESTATEMENT (SECOND) OF TORTS § 464 (1965). Since the bailee's recovery in warranty and strict liability in tort is based on the imputed reasonable reliance on the representation of safety, failure to inspect for defects should be recognized as simply not negligent under the circumstances.

risk.[153] It is this conduct that bars recovery either in an action for breach of implied warranty[154] or in strict liability in tort.[155]

LIABILITY FOR INJURIES TO THIRD PERSONS

As might be expected, the large majority of cases in which the bailor for hire has been sued by a third person have involved leases of automobiles. When the bailor's duty is measured by the standards of negligence, he will be liable for his negligence to anyone who may reasonably be expected to be in the vicinity of probable use of the product.[156] Thus, those protected under this doctrine include not only foreseeable guests of the bailee[157] but other members of the public as well.[158] Injured third persons do not recover because of any obligation imposed by the contract of bailment itself but because of the general obligation imposed by law upon individuals to refrain from actions having foreseeable injurious consequences.[159]

Since an action for breach of warranty is normally viewed as a contract action, only those in privity, (that is, those with whom the bailor had contractual relations) may recover on the warranty.[160] Although some courts also allow those third persons who use the chattel to recover on a common law implied warranty for personal injuries,[161] those injured bystanders who were not using the chattel have normally been denied recovery.[162] In those states which would apply the Uniform Commercial Code in one manner or another to the bailment for hire, some injured third persons could possibly recover under section 2-318, which extends protection to certain third party beneficiaries of the

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[153]RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 356 (1965); Prosser, *supra* note 77, at 839; Annot., 13 A.L.R.3d 1057, 1100-03 (1967).

[154]Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 459, 212 A.2d 769, 782-83 (1965); Prosser, *supra* note 77, at 838-40.

[155]Bachner v. Pearson, 479 P.2d 319, 329-30 (Alas. 1970).

[156]Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 73 S.E.2d 4 (1952); RESTATEMENT (SECOND) OF TORTS § 395 (1965); PROSSER § 100.

[157]Penton v. Favors, 262 Ala. 262, 78 So. 2d 278 (1955); Mitchell v. Lonergan, 285 Mass. 266, 189 N.E. 39 (1934).

[158]Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 504-05, 73 S.E.2d 4, 5 (1952).

[159]Vaughn v. Millington Motor Co., 160 Tenn. 197, 201, 22 S.W.2d 226, 227 (1929).

[160]PROSSER § 93, at 622, § 95, at 635.

[161]*See* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 455, 212 A.2d 769, 781 (1965) (employees can recover). *But cf.* Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960).

[162]Alexander Funeral Home, Inc. v. Pride, 261 N.C. 723, 136 S.E.2d 120 (1964) (absence of privity prevented owner of building damaged in automobile accident from recovering from the seller for breach of warranty).

warranty.[163] Of the three alternative versions of this section, most states have adopted the most restrictive one, under which recovery would be limited to members of the family or household of the bailee and guests in his home, and then only if "it is reasonable to expect that such persons may use, consume or be affected by the goods."[164]

Although there are no reported cases in which a bailor has been held strictly liable in tort for injuries to an "innocent bystander," it is clear from cases applying strict tort liability to sellers that the pedestrian hit by the leased automobile should be able to recover from the bailor.[165] Recovery is based in these cases not on the representation of safety that some courts have stressed[166] but on the public policy to afford maximum protection for public safety and on the concept of enterprise liability.[167] One early decision stated that "foreseeability or reasonable anticipation of injury from the defect" is the test of coverage.[168] Although such a test would be consistent with historical tort doctrines, and would not bar recovery in many cases, it is not consistent with the enterprise liability theory, so it would be better simply to allow recovery by all those whose injuries were caused by any normal use of the defective goods.[169]

Thus, unless the person injured as a result of defective goods is in privity with the bailor or falls within the exceptions normally applicable to users, his choice of legal theories is limited to strict liability in tort and negligence and, therefore, in most jurisdictions to negligence.

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[163]UCC § 2-318.

[164]Although Alternatives B and C of UCC § 2-318 extend protection to a much larger class of beneficiaries, very few states have adopted either. *See* UCC § 2-318, Comment 3 (1972 Official Text).

[165]Elmore v. American Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 88-89, 75 Cal. Rptr. 652, 656-57 (1969). All states adopting strict liability in tort have extended recovery to bystanders when presented with that issue. Caruth v. Mariani, 11 Ariz. App. 188, 190, 463 P.2d 83, 85 (1970) (listing of cases). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, comment *o* at 356-57 (1965) (Institute expresses no opinion on whether bystanders are covered by this section).

[166]*See* Prosser, *supra* note 77, at 819-20; RESTATEMENT (SECOND) OF TORTS § 402A, comment *o* at 356-57 (1965).

[167]Elmore v. American Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 88-89, 75 Cal. Rptr. 652, 656-57 (1969).

[168]Mitchell v. Miller, 26 Conn. Supp. 142, ____, 214 A.2d 694, 698 (1965). *See also* Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][d] (1970).

[169]Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 935 (1964); *see generally* R. NORDSTROM, *supra* note 50, §§ 81-83.

ACCRUAL OF CAUSE OF ACTION AND STATUTE OF LIMITATIONS

Because there are different legal theories underlying the three doctrines of bailor liability, the applicable statutes of limitations begin to run at different points in time. " 'In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises . . . .' "[170] For a tort suit based on negligence, both the negligent act or omission and the resultant injury must have occurred to constitute a cause of action.[171] Therefore, when the bailor's liability is based on negligence, the applicable statute of limitations starts to run when the physical injuries caused by the defective chattel are sustained.[172]

A recent amendment to North Carolina's accrual-of-action statute provides that a cause of action for personal injury accrues when the injury is discovered or reasonably ought to have been discovered, provided that the period not exceed ten years after the last act of the defendant.[173] This amendment is not applicable to causes of action governed by the Uniform Commercial Code, however.[174] Although the ten-year limit could prevent recovery by a buyer, it seems unlikely that it will affect the bailee in many instances. A cause of action for breach of implied warranty accrues when the breach occurs—that is, when tender of delivery is made—under both the common law rule[175] and the Code.[176] Knowledge or lack thereof of the defect, and thus of the breach, on the part of the bailee is immaterial.[177] Although the bailee could possibly not discover the defect until after the statute of limitations had run, most consumer leases and bailments are short enough that this should rarely be a problem.[178] If courts apply the Code to bailments for

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[170]Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962).

[171]Hooper v. Carr Lumber Co., 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939).

[172]N.C. GEN. STAT. § 1-52(5) (Supp. 1971) provides a three-year statute of limitations for personal injury actions.

[173]N.C. GEN. STAT. § 1-15(b) (Supp. 1971).

[174]*Id.*

[175]1 S. WILLISTON, *supra* note 41, § 212a.

[176]"[W]here a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." UCC § 2-725(2).

[177]*Id.*

[178]Manufacturers' equipment leases, frequently running for periods longer than ten years, could prove to be the exception.

[179]Sinka v. Northern Commercial Co., 491 P.2d 116, 119 (Alas. 1971); Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970) (use UCC statute of limitations for all breach

hire, they might be expected to use the section 2-725 four-year statute of limitations,[179] but this might not be the case. A federal district court, applying Virginia law, concluded that the state courts would use the two-year statute of limitations for personal injuries, running from the date of injury, in breach of warranty actions rather than the statute of limitations in Code section 2-725.[180] This same result has also been reached in the New Jersey state courts.[181]

For tort actions based on strict liability, courts are split on the questions of which statute of limitations applies and when the cause of action accrues. There is really only one issue that determines the answer to both questions: Is a strict liability action an extension of the implied warranty action, or is it simply a tort action? A New York appeals court has held that strict tort liability is really only a warranty action extended to members of the public.[182] Therefore the applicable statute of limitations is that for warranty actions and begins to run when the breach occurs.[183] Other courts, viewing strict liability in tort as a tort action, have held that the applicable statute of limitations is that used for general tort actions.[184] Although not explicitly so held, it would be consistent with this rule for the cause of action to accrue when the injury occurred or was discovered.

Although the bailee's cause of action is not likely to be barred before he suffers physical injuries, because the possible causes of action accrue at different times, close attention must be paid to ensure that the suit is filed in time to preserve all possible theories of recovery.

COMPARISONS AND CONCLUSIONS

Of the three theories of liability that have been held applicable to a bailment for hire, which one is the most advantageous for the plaintiff? Recovery under any of the legal doctrines requires that the plaintiff be

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of warranty actions, regardless of whether for personal injury or injury to property); *see* Gardiner v. Philadelphia Gas Works, 413 Pa. 2d 415, 197 A.2d 612 (1964).

[180]Tyler v. R.R. Street & Co., 322 F. Supp. 541 (E.D. Va. 1971) (based on an earlier Virginia case dealing with the pre-Code contract statute of limitations).

[181]Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

[182]Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct. 1967), *aff'd mem.*, 29 App. Div. 2d 918, 290 N.Y.S.2d 186 (1968), *aff'd*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

[183]*Id.* at ____, 291 N.Y.S.2d at 96.

[184]Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967); Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970).

able to show the causal relationship between the defect and his physical injuries. In negligence, the plaintiff frequently encounters problems in attempting to show that a reasonable inspection would have disclosed the defect. Even when the use of *res ipsa loquitur* is not restricted as it is in North Carolina, recovery can be denied when the bailor's expert shows that the defect was not of a type discoverable by reasonable inspection or when the bailor establishes the use of acceptable inspection procedures. Discoverability by reasonable inspection is irrelevant under the other doctrines. The major element of the case in both implied warranty and strict tort liability—that the defect was present when the chattel left the bailor's possession—is also implicit in the negligence action. Although proof is easier in theory since the issue of discoverability by reasonable inspection has been eliminated, the plaintiff will ordinarily have to rely on circumstantial evidence to be able to prove his case.[185] From the standpoint of proof, therefore, strict liability in tort and implied warranty are both more advantageous measures of liability for the plaintiff than is negligence.

Proof of the breach of duty, no matter how that duty is defined, is not the only relevant consideration. As noted earlier,[186] the bailor has defenses to prevent recovery. In a negligence action, the bailor can avoid liability if the bailee has been contributorily negligent. Although this defense is not available if the bailee is able to sue for breach of an implied warranty of quality, failure to give timely notice and the presence of a disclaimer of warranties in the rental agreement can prevent recovery.

The bailee who is fortunate enough to have a strict tort liability action is not subject to the contributory negligence defense, to the requirement of timely notice or, most importantly, to disclaimers of liability. For the bailee, the public policy of invalidating disclaimers makes strict liability much more advantageous than even an action for breach of implied warranties. For the injured bystander, strict liability in tort presents the greatest chance of recovery not only because of ease of proof but also because of abolition of the privity requirement. It is not surprising that strict liability in tort offers the injured plaintiff the most advantages. It is a modern theory of liability designed to give the consumer with physical injuries caused by defective products the maximum

[185] *See* text following note 123 *supra*.

[186] *See* text accompanying notes 126-55 *supra*.

opportunity for recovery. It has the advantages of negligence and implied warranty actions with none of the disadvantages.

Strict liability in tort may offer the greatest opportunity for recovery, but it is not always available even in those states that recognize the doctrine. Only bailors who are in the business of supplying chattels for a consideration are subject to this theory of liability.[187] And in addition, in one state, strict liability in tort applies only to those defects present when the goods are purchased rather than when they are rented, a limitation that has the frequent effect of restricting the bailee to the law of negligence.[188] This application of strict liability, although similar to its use in retail sales, is really a rejection of the doctrine as applied to bailors. A large number of defects in bailment chattels will be attributable directly to their use in the business, not to their manufacture. Under the majority rule, however, even these defects are covered.

Even though strict liability in tort facilitates recovery for physical injury and is therefore the most advantageous theory for plaintiffs, the more important question is under what circumstances should the loss of those injured by defective goods be shifted to the bailor? Which theory of liability offers *society* the most advantages?

Professor Keeton, comparing negligence and strict liability, has noted that the best justification for using the negligence principle is its social acceptance as a fair and just system of liability.[189] A system of strict liability based on the enterprise entity theory, on the other hand, can be justified on grounds of fairness and the economic incentive it provides to increase the safety of products.[190] It seems fair to ascribe the loss to a business activity when harm to another can be identified with a risk created by that activity, whether created negligently or not. Not only are all losses attributable to the bailor's business shifted to the business, but the increased duty of responsibility should encourage the bailor to pay closer attention to the condition of his rental items by reducing the economic incentives to rent chattels approaching the end of their useful lives.[191] The bailor may suffer a slight decrease in revenues under this form of liability, but he can largely pass the cost along in increased rental prices.[192] Thus the rental price itself will include an

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[187]*See* text accompanying notes 93-97 *supra*.

[188]Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972).

[189]Keeton, *supra* note 5, at 887.

[190]*Id.* at 895.

[191]*See* Morris, *supra* note 121, at 909.

[192]Higher prices may decrease the volume of business, and encourage purchase of some items, but may be only marginally important.

insurance component. Although one may question whether the bailee should bear the cost of protection for the innocent bystander, the conclusion is inescapable that initially at least part of this cost will be passed along to the consumer-bailee. However, if the increase in the rental price of consumer goods causes a decrease in the volume of rentals, this cost may well be one the bailor will absorb as he lowers prices to regain lost business. The end result for society will be safer products available for rent or sale and increased financial resources available to a greater number of accident victims. In exchange, the rental prices for chattels will be increased.

Although North Carolina has not yet joined those states recognizing strict liability in tort for products liability cases, there has been some indication that the court might accept the theory if squarely presented. In *Corprew v. Chemical Corp.*[193] the North Carolina Supreme Court abandoned the privity requirement in negligence actions against the manufacturer of defective products. The language used by the court is especially interesting, for it could easily have come from a case holding the manufacturer subject to strict liability in tort.

> By placing its goods upon the market, the manufacturer represents to the public that they are suitable and safe for use . . . . The manufacturer has invited and solicited the use of its product, and when it leads to disaster it should not be permitted to avoid the responsibility by saying that it made no contract with the consumer. *The manufacturer should be held liable because it is in a position to insure against liability and add the cost to the product.*[194]

Although the theory of liability discussed in this passage is negligence, the court clearly indicated that it accepts the enterprise entity theory, the usual basis for imposing strict liability in tort.

Nonetheless, even if North Carolina were to adopt strict liability in tort for use in bailment for hire cases, the bailee's chances for recovery might not be substantially increased in all cases. In several North Carolina bailment cases decided under the negligence theory of liability, the plaintiff has not been able to prove his case because of a restrictive application of *res ipsa loquitur*.[195] The court has been unwilling to infer

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[193]271 N.C. 485, 157 S.E.2d 98 (1967).

[194]*Id.* at 491, 157 S.E.2d at 102 (emphasis added). *Compare id. with* Prosser, *supra* note 77, at 799, *and* Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

[195]*See* text following note 24 *supra.*

from the brief time a leased car had been in the hands of the bailee tha the defect had been present when the car left the bailor's possession.[19] The inferences at the core of the *res ipsa loquitur* doctrine are the sam as those permitting use of circumstantial evidence in strict liability ac tions.[197] If the North Carolina court should restrict the use of circum stantial evidence in strict liability cases as they have restricted use o *res ipsa loquitur* in negligence actions, adoption of strict liability in tor would mean only that when the plaintiff needs circumstantial evidenc to prove his case, he would lose in strict liability rather than in negli gence. In this manner the substantive duty imposed by strict liability ir tort might be rewritten by the restrictive proof requirements much a the substantive duty of the bailor in negligence actions has been rewrit ten.[198] The bailor in effect would be liable only for those defects th plaintiff could prove the bailor has knowledge of or could prove th existence of by expert testimony. There is some evidence, however, t indicate that the North Carolina Supreme Court might be willing to re examine prior decisions that unduly restrict the use of *res ipsa loquitu* and to change its approach to the use of circumstantial evidence ir general.[199] Even with the restricted position of circumstantial evidence the plaintiff-bailee would still have a greater chance of recovery thar under negligence. The bailor would be precluded from escaping liabilit by showing care on his part in inspection of the chattel, or by use o any of the defenses barred by strict liability.

Strict liability in tort has been widely and often enthusiastically adopted for use in products liability cases. This theory of liability ap pears to be the most advantageous liability system for our moderr economy. It should be applied to the bailor for hire as well as to th manufacturer, wholesaler, and retailer. Specifically, the best approac seems to be that taken by the New Jersey courts.[200] Although holdin the bailor responsible for all defects arising during the course of th bailment is alien to the historical measures of liability, it is a logica application of the enterprise entity theory of liability and should provid the greatest impetus toward keeping unsafe products out of the strean of commerce.

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[196]*See* text following note 30 *supra.*
[197]Prosser, *supra* note 77, at 841.
[198]*See* text following note 26 *supra.*
[199]Byrd, *supra* note 25, at 478-80.
[200]*See* text following note 116 *supra.*