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A TRIBUTE TO THE IMAGINATIVE CREATIVITY OF ROGER TRAYNOR

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IT is fitting that this products liability issue of the *Hofstra Law Review* is dedicated to Roger Traynor. He is one of the great judges and among the great legal thinkers of our time. He has made contributions to many subjects, but the ones I know best are those in the field of torts and here some of the most notable have dealt with products liability.

In this fast-moving area Roger Traynor has been a leader, often ahead of his time. I remember well his landmark concurring opinion in *Escola* v. *Coca Cola Bottling Company*,[1] decided in 1944. The holding of the court extended *res ipsa loquitur* to the case of an exploding bottle. Justice Traynor agreed, but would have gone further: "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[2] There follows one of the best and clearest arguments for this position that has ever been written. No one who reads it for the first time today can capture the excitement my generation of lawyers felt on reading it. Its result, its reasoning, and many of its passages soon became a familiar part of the legal literature because of Roger Traynor's insights and gift for lucid and pungent expression. Today's reader is likely to react a little like the man who was disappointed in Shakespeare because that worthy author used so many trite sayings with which the reader had been brought up.

By the time Justice Traynor wrote the opinion in *Greenman* v. *Yuba Power Products, Inc.*,[3] the law of products liability had

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1. 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944).
2. *Id.*
3. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

come a long way—in the direction forecast by him in *Escola*. The manufacturer's strict liability to the injured consumer had begun to gain recognition on a wide front, but its traditional vehicle was warranty. Now the law of warranty was the product of commercial transactions and it had become more or less assimilated into the law of contract. Not surprisingly, therefore, warranty law was beset with conditions and limitations which made sense in a commercial context, but which were quite out of place among rules for the protection and compensation of those who were hurt physically by defective products. With pragmatic common sense some courts recognized this and found means of getting around the most troublesome warranty limitations, but this took an astuteness and a willingness to manipulate legal doctrine which other courts lacked or from which they shied away. A few commentators[4] urged a clean break with warranty and a frank recognition of strict liability in tort.

The decision in *Greenman* was the first full judicial acceptance of this notion; appropriately, it came from the judge who had urged it in dictum twenty years before. Since *Greenman*, strict liability in tort has been widely acclaimed by courts and commentators. It is embodied in the *Restatement (Second) of Torts*.[5] It does not, however, solve all problems. No one contends for instance that the publisher of a book is liable for the death of a person who trips over it at the head of an unlighted flight of stairs and breaks his neck in the fall. There is no liability unless the product is in some way defective or *unreasonably* dangerous. The *Restatement* dealt with this problem, but Justice Traynor was not altogether satisfied with its proposals and gave perhaps the best and most thoughtful treatment of the subject in a lecture at the seventy-fifth anniversary program of the University of Tennessee College of Law in 1965.[6] Here the problems of serum hepatitis, of allergies, of drugs, of cigarettes, and of the effect of warnings are all perceptively analyzed. The *Restatement's* "unavoida-

4. Dean Prosser was the leader among them. *See* Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 97, 98 (4th ed. 1971). *Cf.* 2 F. HARPER & F. JAMES, LAW OF TORTS §§ 28.15-28.22 (1956) (in which this author also perceived but "through a glass, darkly").

5. RESTATEMENT (SECOND) OF TORTS § 402A and Comments and Illustrations. *See also id.* Appendix.

6. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). Justice Traynor's disenchantment with the *Restatement's* "unreasonable danger" requirement was apparently rectified by the California Supreme Court subsequent to his retirement from the Bench. *See* Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

bly unsafe products" concept[7] comes in for its share of criticism: "If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm."[8] And we are cautioned against accepting the *Restatement's* overuse of assumption of risk:[9] "Emphasis on generic qualities, or what the *Restatement* views as commonly contemplated characteristics, should not afford a basis for charging the consumer with assumption of the risk of the harm some products cause. Were a consumer deemed to assume all commonly known risks, we would come full circle round to the problems generated by the disclaimer of warranty in implied warranty cases."[10]

Not all of Justice Traynor's views on products liability have favored its expansion. The mark of a great judge in times of transition is what Robert Keeton has felicitously called creative continuity.[11] The best common law tradition stresses continuity even in making change, and this calls for discrimination. In *Greenman*, the inappropriateness of applying commercial warranty law to the problem of physical injuries from defective products was clearly seen, but that did not lead Justice Traynor to pull warranty out by the roots, so to speak. In *Seely v. White Motor Co.*,[12] he recognized that"[a]lthough the rules governing warranties complicated resolution of the problems of personal injuries, there is no reason to conclude that they do not meet the 'needs of commercial transactions.' "[13]

"A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, fairly be charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."[14] If this were not so, Justice Traynor pointed out, the "manufacturer would be liable for damages of unknown and unlimited scope,"[15] since he

7. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment *k*.

8. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, *supra* note 6, at 368.

9. For criticism of this overuse *see* James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

10. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, *supra* note 6, at 371.

11. R. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

12. 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

13. *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

14. *Id.* at 17-18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

15. *Id.* at 17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23.

may not limit his strict liability in tort.

In the *Seely* opinion Justice Traynor discriminates nicely between the roles legal doctrines are called upon to play in different factual contexts; this is the antithesis of mechanical jurisprudence. The opinion also shows a fine appreciation of the distinction between the proper roles of court and legislature. When these qualities are combined with imaginative creativity as they are in Roger Traynor, the result is excellence.