Chief Justice Traynor and Strict Tort Liability for Products

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There are many men of law who have played a significant part in the remarkable and uncommon development of the common law of a manufacturer's liability for injury to a consumer—from no liability at all, to liability for negligence (liability based on fault), to strict liability (liability without fault). Any listing of those who have played a most prominent part would have to include Lord Abinger,¹ Chief Baron of the Court of Exchequer; Benjamin N. Cardozo,² of the New York Court of Appeals; John J. Francis,³ of the New Jersey Supreme Court; William L. Prosser,⁴ of the University of California; and Roger J. Traynor, of the California Supreme Court.

There would be debate as to which one of these five was most important in the development of the law, but if one considers the current state of the law in this country, then Justice Traynor's contribution may well prevail. It certainly warrants the action of the editors of the Hofstra Law Review in dedicating this issue on products liability to him.

Justice Traynor's contribution consists essentially of opinions in four cases, plus one article. They are as follows: *Escola v. Coca Cola Bottling Co. of Fresno,*⁵ which held that the doctrine of *res ipsa loquitur* applied to an exploding soft-drink bottle and justified a jury verdict for the plaintiff. Justice Traynor concurred.

¹ For his opinion in Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), which was the origin of the no-liability rule.
⁴ For his work as Reporter of the Restatement (Second) of Torts in establishing §§ 402A and 402B; and for his other writings—especially, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L. J. 1099 (1960); and *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. J. 781 (1966).
⁵ 24 Cal. 2d 453, 150 P.2d 436 (1944).
in the result and urged that the basis of the holding be that the "manufacturer incurs an absolute liability";\(^6\) \textit{Greenman v. Yuba Power Products, Inc.},\(^7\) which held, unanimously, that strict liability in tort applied to an injury caused by a defective product — a "shopsmith," a combination power tool; \textit{Vandermark v. Ford Motor Co.},\(^8\) which held (1) that the strict tort liability for the manufacturer set forth in \textit{Greenman} applied also to the retailer and (2) that the manufacturer's duty to the consumer to see that the product was free from dangerous defects could not be delegated to its authorized dealer; and \textit{Seely v. White Motor Co.},\(^9\) which held that although a purchaser of a truck had no action in strict tort liability against the manufacturer for economic loss caused by the failure of the particular truck to be up to standard, he might successfully maintain an action if the manufacturer had made an express warranty which was breached. An article in the \textit{Tennessee Law Review} explored \textit{The Ways and Meanings of Defective Products and Strict Liability}.\(^10\) It now remains to discuss the significance of each of these contributions and to comment upon their total effect.

\section*{II}

The concurring opinion in \textit{Escola} was not a pronouncement of the law that is; it was an argument for the law that should be. Written to advocate a point of view, it presented a remarkably persuasive argument for the frank adoption of strict tort liability of a manufacturer for defective products. It was clear, inclusive, and well organized.

The arguments may be divided into two types — the policy arguments and the arguments for a more accurate and realistic legal analysis. They are worth recapitulating. I set them forth in abbreviated, almost outline, form, without the enumeration of all of the steps (and illustrations) of the legal reasoning, and with a slightly different arrangement.

(1) \textit{The policy arguments}. These may be divided according

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\(^7\) 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

\(^8\) 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 886 (1964).

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

to whether they are directed at the consumer or the manufacturer.

(a) One who incurs injury from a defective product is “unprepared to meet its consequences.” The injury may have produced an “overwhelming misfortune” to him, and it may have been “needless.” He cannot bear these consequences; he needs compensation. In addition, he “has been lulled” by “advertising and marketing devices” to drop his “erstwhile vigilance.” After the injury, he is in no position to prove negligence on the part of the manufacturer.

(b) The manufacturer, on the other hand, can insure against the risk of injury and see that it is “distributed among the public as a cost of doing business.” The manufacturer should be effectively deterred from placing dangerously defective products on the market, and imposing strict liability is the best deterrent. Besides, the responsible manufacturer presently seeks to justify the faith of the public in his product by setting “increasingly high standards of inspection” and showing “a readiness to make good on defective products by way of replacements and refunds.”

The conclusion: Against the risk of injury from products, there should be general and constant protection, and the manufacturer is best situated to afford that protection. It is in the public interest to place the responsibility for the injury on him.

(2) The arguments as to legal reasoning and accurate analysis. These have to do with three other legal devices for placing the responsibility on the manufacturer, and their inadequacy or circuitous character when compared with forthright adoption of strict liability in tort.

(a) Res ipsa loquitur. This does not always work to impose the liability on the manufacturer. When it does, the jury has often found negligence when it was not actually present, and this is strict liability. “It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.”

12. Id.
13. Id.
14. Id. at 467, 150 P.2d at 443.
15. Id.
16. Id.
17. Id. at 462, 150 P.2d at 441.
18. Id. at 467, 150 P.2d at 443.
19. Id.
20. Id. at 463, 150 P.2d at 441.
(b) Negligence per se. In the pure-food statutes, the legislature establishes the public policy of the state in imposing criminal liability without proof of fault. While the civil liability which the court imposes as a result is called negligence per se it should accurately be designated as strict liability in tort. And while the legislative declaration of criminal liability without fault is confined to food products, "[i]t is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally."21

(c) Warranty liability. (i) A retailer, "even though not equipped to test a product, is under an absolute liability to his customer,"22 for a warranty imposed by public policy. It is not necessarily a contractual warranty. The courts allow him to recoup his losses by means of the warranty running to him from the wholesaler or manufacturer (or by indemnity). This procedure "is needlessly circuitous and engenders wasteful litigation,"23 and a direct action should be allowed. (ii) The manufacturer is held by law to a warranty of safety, too. As in negligence, the obligation should run to the person whose injury from the condition of the product is most easily foreseeable, not solely to the dealer.24 In the food cases, the courts have resorted to "various fictions to rationalize the extension of the manufacturer's warranty to the consumer . . . ."25 These fictions "are not necessary to fix the manufacturer's liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer,"26 and based according to historical justification "on the law of torts . . . as a strict liability."27 And there is no reason to differentiate dangers to life and health from other types of products from those involved in food products.

Q. E. D.: The established and recognized public interest calls for compensation by a manufacturer of a dangerous product to an injured party for the injuries incurred from the product, and the most forthright and accurate legal analysis to explain this result is that of strict products liability in tort. Yet the case presented was that of a vox in desertis clamans for many years, being of academic interest to scholars and a few maverick judges. The

21. Id. at 464, 150 P.2d at 441.
22. Id.
23. Id. at 464, 150 P.2d at 442.
25. Id. at 465, 150 P.2d at 442.
26. Id. at 466, 150 P.2d at 442-43.
27. Id., 150 P.2d at 443.
seed had been planted, however, and it gradually started to germinate.

Eighteen years after Escola, Justice Traynor was able to carry a unanimous court in Greenman and to pronounce as the law a rule of strict products liability which was in almost exactly the same words he used in Escola. In Greenman he stated what he thought the law ought to be: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 28

In the period between the two cases, two significant developments had taken place. First, there had been many more cases imposing liability on the manufacturer on the tort theory of warranty — both as to foodstuffs and as to other types of products. Second, § 402A of the Restatement (Second) of Torts had been tentatively approved by the American Law Institute, adopting the Traynor theory of strict liability in tort, but limiting its application to foodstuffs. (Subsequently the section was to be amended to expand the application, first, to products "for intimate bodily use," and later, as a result of Greenman and its progeny, to "any product." 29

Greenman, joined soon by § 402A in its present form, produced a rapid judicial revolution. It was the first unequivocal court decision adopting both the rule and the theory of strict liability in torts for products. And it has been followed by state after state, to the point that today, only twelve years later, the jurisdictions which have not adopted the strict liability theory are insignificant in number. Greenman has been cited by the state courts in almost three-fourths of the states and by the federal courts in several more states. The transition to the strict liability rule has not only been complete, it has also taken place in an unprecedentedly short time. As Dean Prosser put it, using Judge Cardozo's metaphor, in the area of products liability, the citadel

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Justice Traynor was a member of the Torts Advisory Committee and of the Council of the Institute, and he participated in the preparation of these sections, while his opinions in Escola and Greenman influenced their development. For a similar cross-fertilization of judicial decision and Restatement development in the First Restatement, see Prosser, Palsgraf Revisited, in W. Prosser, Selected Topics on the Law of Torts, 191, 196-99 (1954).
of privity has fallen, and the assault has moved on to other battle-
ments.

The last two products cases decided by Justice Traynor pro-
vided for additions to or restrictions on the strict liability rule
espoused in Escola and pronounced in Greenman. They were sig-
nificant and important holdings, but they did not create the same
stir or produce as extensive a following.

Vandermark held that the strict tort liability applied also to
the retailer, thus making both tort and contract remedies avail-
able when there is privity. It also held that the manufacturer’s
duty to see that its product is “delivered to the ultimate pur-
chaser free from dangerous defects”\(^\text{30}\) is not delegable. Thus the
manufacturer could not escape liability by tracing the defect to
a component part supplied by another, and he cannot escape
liability in this case on the ground that the dangerous defect was
either produced or not eliminated by one of its authorized dealers.
The application of the concept of nondelegable duty to negligence
is more commonplace; its application to strict liability is newer.
The case involved the Ford Motor Company and one of its author-
ized dealers. Application of the principle to an ordinary manufac-
turer and an ordinary retailer who handles many products seems
doubtful, and even as applied to an “authorized dealer” it has
probably gone further than most courts would presently go. But
the concept of nondelegable duty is a favorite of Justice Traynor,
and has been used by him in other respects.\(^\text{31}\) It has a similarity
to strict liability as a means of placing the ultimate responsibility
on the party who can bear it and pass it on to the public.

Seely, the fourth case, put a restriction on the scope of the
manufacturer’s strict liability in tort. If the product was not dan-
gerous in the sense that it jeopardized person or property, but
instead was defective in the sense that it was not up to standard
and did not perform as it should, Chief Justice Traynor explained
that strict tort liability did not apply to the “commercial loss
suffered by the plaintiff.”\(^\text{32}\) Justice Peters dissented strongly from
this view, contending that the existence of tort liability does not
depend on the nature of the damage incurred, and that it applies
to “economic loss” as well as to physical damage. Peters is par-
tially right, as Traynor would surely agree, in saying that tort


\(^{31}\) See, e.g., Maloney v. Rath, 69 Cal. 2d 442, 445 P.2d 513, 71 Cal. Rptr. 897 (1968);

\(^{32}\) 63 Cal. 2d 9, 17, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965).
liability may exist for economic loss. A person injured by a dangerous product may lose wages and thus incur economic loss for which he can recover. But this is not the real point. The difference is not the nature of the damages but the nature of the action. The question must be whether this is an action based on a tort concept or a contract concept. If there had been no sales contract and the truck had been given to Seely, he would still have had a tort action against the White Motor Co. if the truck had had a dangerous defect which caused a physical injury to him, since White's putting the dangerous truck out where the risk might be consummated was a tort. But if the truck was constantly stalling or obtained only two miles to the gallon, Seely would have no action against White on the ground that the truck was not a good one. There was no tort. Similarly, if the dangerous truck had injured Thompson, a passenger or a bystander, a tort action might lie. But, if the stalling truck had failed to carry Thompson or his goods to a location on time because of the stalling defect, Thompson would have no tort action against White. When the plaintiff is suing solely because the product was not up to the expected standard, and he did not receive what he contracted for, then the essence of his action is contract, not tort. This is more than simply a question of legal theory which the court may be free to modify. It is a matter of the statutory provisions of the Uniform Commercial Code, which govern even the judges in contract actions based on sales contracts. Thus, it would seem that Traynor is correct and Peters is wrong. The cases are divided, and it is not yet certain which view will become the majority.

There was another part to Chief Justice Traynor's opinion in the Seely case. Though he held that an action of strict tort liability would not lie against the White Motor Company, he found that White had made an express warranty to Seely as purchaser. For breach of this express warranty, he held, an action might lie. The nature of this action is not made clear in the opinion. Apparently, it is an action on the express warranty itself (in contract?), as a warranty made directly to the ultimate purchaser by the manufacturer. The Second Restatement, in § 402B, calls this a misrepresentation — a tort, even though the misrepresentation may be innocent. Section 402B is confined to physical injury, but the idea could be applied — as tort actions of deceit and misrepresentations usually are — to loss of expected gain. At least one

case has so applied, but the majority has spoken in terms of an express warranty. A fifth case should be mentioned here to round out the portrayal. This is the case of Elmore v. American Motors Corp., decided in 1969. The opinion was written by Justice Peters, but Chief Justice Traynor and the rest of the court concurred. This case held that a car manufacturer's strict liability in tort extends to a bystander. "If anything, bystanders should be entitled to greater protection than the customer or user where injury to bystanders from the defect is reasonably foreseeable." This holding, which proves that the liability is in tort, and therefore not under the UCC is now becoming the majority rule.

III

It remains to offer a brief evaluation of Chief Justice Traynor's contribution to products liability. He is clearly entitled to full credit for the doctrine of strict tort liability for products. He had offered the theory in 1944, a fully-worked-out presentation, long before others had conceived of it. He wrote the opinion in Greenman v. Yuba Power Products, Inc., in 1963, the first case to base its holding expressly on the strict liability theory. Just as Escola was the seminal opinion, Greenman is the landmark decision. It created a new tort, established a new theory, and became the starting point for legal analysis and further developments in the general area.

A single sentence in Greenman sets forth the principle of strict liability in a categoric form, and it is the part of the opinion which is usually quoted as the formula to use in solving particular problems as they arise. This means that it needs to be quoted for a second time in this paper. It reads: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." A supplementary sentence from the opinion, also frequently quoted, covers much the same ground: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a

35. See id.
37. Id. at 62, 451 P.2d at 90, 75 Cal. Rptr. at 657.
39. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.”

Without setting out the answer for all types of factual situations, these quotations refer, directly or indirectly, to most of the problems which subsequent experience has indicated are likely to arise in the application of strict liability for products. Thus, they treat the problems of (1) what parties are liable, (2) what parties can recover, (3) when there is causation (factual or legal), (4) what damages are recoverable, and (5) what the effect is of plaintiff’s participation in producing his injury.

Only the last two of these problems were treated in any detail in the formula, with a test being offered for their solution. Both are the subject of a phrase; both phrases refer to the presence of a “defect.” We are told that the type of product for which the liability will be imposed is one which has a defect, and that plaintiff’s conduct does not bar recovery when he is not aware of the defect and was not expected to inspect for defects.

Both phrases were in the statement which appeared in 1944, in Escola, and they were repeated in Greenman. They were part of a sentence espousing strict liability in tort as a new idea. But in speaking in terms of a defect, it seems to me, they carried over some language from the contract cases involving breach of warranty. When does one have an action for breach of warranty in a sales contract? When the article is not up to standard, when it does not comply with contractual expectations, whether they are express or implied; in other words, when it is defective. When does the user not have a contractual cause of action even though the article is defective? When he buys it “as is.” To maintain an action, he must not have been “aware of the defect” or have purchased it regardless of defects.

These meanings of course, were not what Justice Traynor intended. But they were connotations which are easily attached. The “galloping truck” in Seely, for example, was defective. If a different term had been used, the split in the court regarding “economic loss” might not have developed.

“Defect” as a test has other defects of its own. It implies that something went wrong in the manufacturing process so that the product does not have the condition it was intended to have. But suppose that it was in exactly the condition intended. There we have to speak of a “design defect.” Or suppose that it needs a

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40. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
41. See Uniform Commercial Code § 2-316(3)(a).
warning or instructions to be used safely. Is it defective in this regard also?

What is needed here is an expression posed in tort language rather than contract (sales) language. The idea would not be changed; the change would be in the way in which it is expressed. And this is exactly what the Supreme Court of California held in regard to the effect of plaintiff's conduct in the recent case of Luque v. McLean. This case takes away the contract language in the Greenman quotations, and substitutes the tort language of contributory negligence and assumption of risk. Contributory negligence does not bar a recovery based on strict liability; assumption of risk, defined as "voluntarily and unreasonably proceeding to encounter a known danger," does. Procedure and burden of proof on these issues in tort actions are well understood, and the uncertainties are dispelled.

Unfortunately, the companion case of Cronin v. J. B. E. Olson Corp. did not take advantage of the same opportunity to substitute an appropriate tort expression for the word "defective" as the test for determining when the product is subject to strict liability. Instead of referring to the defective condition of the product, the test should refer to the unsafe condition of the product and the danger which it creates to person or property. The Restatement uses the expression "unreasonably dangerous"; other terms include "not duly safe" or "unsafe." These expressions not only carry the tort connotation but also apply more naturally to the design and warning problems.

Justice Traynor, I am sure, has fully appreciated this. In Seely, he spoke of liability "for physical injuries caused by defects by requiring his goods to match a standard of safety, defined in terms of conditions that create unreasonable risks of harm." In

42. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
43. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
44. I have recently discussed all of this at some length in Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825 (1973).
45. When is a design "defective"? To be meaningful, the answer has to be in terms of risk, of safety or of danger. Thus, in Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970), a "design defect" case, the court held that a paydozer could be "defective," even though "faultlessly made," and treated the question as one as to whether it was "unreasonably dangerous," spoke of the creation of an "unreasonable risk," and held that the absence of safety devices or safety warnings could make the product "defective." Surely this holding and its implications have not been changed by the later decision in Cronin, supra note 43, that the only test now is whether the product was defective, not whether it was unreasonably dangerous.
46. 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).
his article in the *Tennessee Law Review*, he treated at length the meaning of “defective products,” frequently speaking in terms of dangers and risks. And he concluded that no single definition of the term has proved adequate but that there is now a cluster of useful precedents which can aid the court to reach proper decisions.47 “Defect” then comes to be a term of art, having a particular and special meaning of its own, and it is sometimes described as a “legal defect.”48

Please understand me. I have no desire to detract from Justice Traynor’s surpassing achievement. I am merely quibbling over a minor semantic detail. And I offer the quibble only as a footnote. To realize the significance of Justice Traynor’s accomplishment one has only to imagine what the present state of the law would have been if there had been no Traynor opinions. The mounting trend toward extending the manufacturer’s liability beyond the ordinary law of negligence would clearly have continued. Probably it would have centered on extensions of warranty law, with emphasis on its tort origins and attributes. But there would probably have been constantly recurring conflict with the *Uniform Commercial Code* and its restrictions on the commercial actions, and the state of the law, nation-wide, would have been much more muddled.

Chief Justice Traynor’s contribution to this area of the law, therefore, has been to give sharp stimulation to an incipient trend, and then, when the trend attained adequate support, to provide an authoritative theory and explanation for the resulting state of the law. Is this not the classic way for a great judge to function?

Will the strict liability of the manufacturer extend to other defendants and other fields? It has shown a mushrooming quality. Quickly expanding to retailers and wholesalers, it is now moving on to other suppliers, such as lessors and bailors, and builders of houses in quantity, and, perhaps, to users of products in rendering services to others.49

Will the strict liability concept go even beyond the supplier

47. Traynor, *supra* note 10, at 373.
48. But even assuming that we come to recognize “defective” as a term of art, with a meaning of its own, which can be applicable to bad designs or missing warnings, this has to be known to the persons using it. The instruction sanctioned in the *Cronin* case, *supra* note 43, offers no spelling out of the meaning of “defective.” This obviously must be rectified if the jury is to act intelligently. And when it is, ideas like risk, and danger and safety will come in through the back door.
field? Justice Traynor has written, "The cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing." He has indicated orally that he expects other fields of negligence law to be invaded by it and perhaps supplanted by it. One can see this happening with utilities. And it seems that landowner's liability may be a field ripe for inroads. What strict liability did for products was to eliminate the need of proving negligence in letting the product become unsafe, or in failing to discover and correct the condition. The same type of approach is available regarding the condition of premises.

But strict liability is less likely to expand to professional negligence. And it would always have trouble in automobile traffic cases. The difficulty is that in automobile collisions both parties are engaged in the same type of activity. What is gained by having each strictly liable to the other? "No-fault insurance" offers a completely different approach—that of first-party, or loss, insurance, which substitutes for negligence liability and provides compensation to the injured party from his own insurance company. Strict liability and first-party insurance as a means of providing compensation to an injured party are in competition with each other, but both are opposed to the fault principle, as embodied in negligence law. There are those who think that all accidental injuries will eventually be covered by a form of social insurance. Justice Traynor is acutely aware of all of these potentialities as he indicates in his law review article.

IV

I cannot let this opportunity pass to offer a personal tribute to Roger Traynor. My association with him has been primarily in connection with work on the Restatement of Torts, and on the Council of the American Law Institute. In both places he has

50. Traynor, supra note 10, at 376.

51. Perhaps a start is made in the recent case of State v. Tennison, 496 S.W.2d 219 (Tex. Civ. App. 1973), in which the court imputed "constructive notice" of the condition of premises.

52. This apparently explains the holdings in Maloney v. Rath, 69 Cal.2d 442, 445 P.2d 513, 71 Cal. Rptr. 897 (1968); and Clark v. Dziabas, 69 Cal. 2d 449, 445 P.2d 517, 71 Cal. Rptr. 901 (1968), involving automobile collisions. A brake statute could have been construed to impose strict liability, but Chief Justice Traynor declined to construe it in this fashion because of the difficulty of working out in detail the way in which a new rule of strict liability would work between the parties both driving automobiles. But the concept of nondelegable duty was used effectively in the two cases.

53. See Traynor, supra note 10, at 376.
spoken seldom, but what he had to say was always important and always listened to carefully. He went to the core—the essence—of every problem, and he was forthright in his comments.

I have written here of his contributions in one particular area of the law. There have been other contributions, just as important, in other parts of tort law. The cumulative total of his judicial contributions to the law in general is awesome. His public services outside the bench and the classroom in their scope and importance make him a model to set before law students.

It is a privilege to be acquainted with him, and it is inspiring to be associated with him.