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Strict Products Liability: The Implied Warranty of Safety, and Negligence with Hindsight, as Tests of Defect

(A Conceptual Framework for the Practicing Lawyer)

Gerald J. Adler*

It has been thirty years since Justice Roger Traynor, concurring in *Escola v. Coca Cola Bottling Co.*, first enunciated the rule and rationale of strict products liability. Almost twenty years elapsed before his brethren joined him in *Greenman v. Yuba Power Products, Inc.* to make strict liability the rule, at least for personal injuries to consumers which are caused by defective products. Understanding the concept of a defective product, applying and defining its limits, remain major problems, however, despite all that has occurred in the decade that has now passed since *Greenman*. It is the thesis of this article that the guidelines are now sufficiently clear and are ready for better definition and easier application. We shall attempt to do so.

Subsequent to Chief Justice Traynor's recent retirement, the California Supreme Court, in the landmark decision of *Cronin v. J.B.E. Olson Corp.* gave some guidance, but unfortunately not enough. That case stands generally for two major propositions: first, the plaintiff need only show that a product was defective, not that it was unreasonably dangerous; second, that "crashworthiness" bears strongly on the concept of defect. Those propositions, while extremely important, do not, of themselves, tell lawyers and judges enough to help them with the determination of when liability should flow from a product-caused injury.

There are, however, three other propositions in the case that, when properly understood, do give the necessary guidance. First, the court made clear that which has long been settled by courts and commentators: strict liability is neither absolute liability nor insurance; not all harms which flow from the use of a product are compensable. Second, while refusing to specifically define de-

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* B.S., Cornell University; J.D., The University of Houston; LL.M. (in International Law) New York University; LL.M., Columbia University. Formerly Acting Professor of Law, now Lecturer in Law at the University of California at Davis, and affiliated with the Sacramento firm of Crow, Lytle, Schleh & Gilwee.

3. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
4. See id. at 132-33, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42.
fect, the court did pick up the *Escola* terminology of Justice Traynor, that an "implied warranty of safety of the product" attends the sale. Finally, it clearly followed Justice Traynor's view, as put forth in *Escola*, that strict products liability cases had to be purged of negligence proof and, of their negligence complexion. In refusing to define "defect", the court recognized "the difficulties inherent in giving content to the defectiveness standard," but simply noted, by reference to an article by Justice Traynor, that "there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty law." It is possible, of course, that the court was at that point saying to bench and bar that they should simply choose which among the "cluster of useful precedents" would be appropriate for the particular case. Such an intent, however, does little for the judge or lawyer who requires a more precise standard with which to evaluate a case or guide a jury. It is also possible that the court was unwilling to forge still another definition when it was that day rejecting the unreasonably dangerous test generally used to determine defect. Finally, it is possible that the court felt that it had given sufficient guidance in the opinion itself with its "implied warranty of safety" terminology. This observer of the California products liability scene believes that the last is the most likely explanation; that the guideposts are there; and without the necessity of further defining defect, the key to resolution of future cases has been provided.

The problem, quite simply, is to understand how strict liability differs from insurance, whether an implied warranty of safety is a useful test of defect, and whether we can move from negligence to strict liability while stopping short of insurance.

I. STRICT PRODUCTS LIABILITY RATIONALE

Justice Traynor's initial language in *Escola* of "absolute liability" became "strict liability" when, some twenty years later, he wrote the *Greenman* opinion, but the idea that persisted was...
that liability would follow when an article placed on the market by a manufacturer, who knows that it is to be used without inspection, “proves to have a defect that causes injury to a human being.”” Warranty rules were rejected, but implied in the product’s presence on the market “was a representation that it would safely do the jobs for which it was built.” Proof of negligent conduct was not necessary, but the reduction of “hazards to life and health inherent in defective products that reach the market” was the first of many reasons used by Justice Traynor to support liability. The proof was removed, but the deterrent to recurrent injury-generators remained.

The economic justification, which has come to be known as enterprise liability, was to assure that manufacturers bear the cost of injuries resulting from their defective products, distributing the risk of injury to the public as a cost of doing business. Such a justification is, however, far more than a mere economic modification; it is a means of social control by which one necessarily conditions the efforts of manufacturers and others against whom enterprise liability is applicable. He who created the danger, and who has the better capacity and expertise to control it, is thus encouraged toward the protection of human health and life by safety in design and production, lest his product become uneconomic and uncompetitive by virtue of increased costs.

Public policy and economics were reinforced by the proposition that the consumer is lulled by advertising and marketing devices into accepting products on faith. Thus the basis was laid

for use of an implied representation, akin to an express warranty via advertising, that the product is suitable and safe for the intended use. One jurisdiction, Oregon, bothered by the logical extension of enterprise liability beyond the products field, slowly but surely over the past decade has come to focus on that aspect: the tacit representation that a product poses no unreasonable danger when put to the use for which it was manufactured is both a test of defect and a limitation on absolute liability.

Despite occasional similar doubts, enterprise liability, without much emphasis on the representation, has come to be accepted as the means by which risks are transferred to and among sellers as a matter of legal policy. We have, as a result, reached a point of forcing insurance on all those engaged in bringing the product to the consumer; insurance does not bring liability which would otherwise exist, but it does make it reasonable to impose that liability. There remains some lingering doubt perhaps about all this in light of modern long-arm jurisdictional statutes which allow the injured consumer to reach manufacturers directly, but there is apparently no turning back on that ground. There may also be doubts about the insurability of all the risks of injury from defective products. The resolution of this problem, however, has to be in either a reevaluation of the need for the product at all, or a redefinition of the risks against which we are requiring insurance.


The risk is definable in a number of ways. One general way is to focus on the type of injury and the person injured. It seems clear enough that the original emphasis for Justice Traynor was on injury to the life or limb of the consumer. Extended by his opinion in *Seely v. White Motor Co.*, to physical injury to property, but not to economic loss alone, the emphasis remains on the consumer versus the commercial relationship. Warranty and misrepresentation law remain available for the solely economic or commercial loss, reflecting the hierarchy of values into which modern judicial systems generally seem to place, in descending order of importance, the protection of person, property, and pocketbook. Certainly in tort law, which has long been reluctant to move, even with negligence, into the area of economic loss alone absent intent or representation, the reluctance and hesitation is not surprising when liability without fault is the issue and the economic and social horizons are still unclear.

Another way to define the risk is in terms of the type of defect which is compensable under strict liability theory. It is that issue to which we now turn. We do so bearing in mind the rationale we have been discussing, because from that we should be able to better understand what Justice Traynor described in *Escola* as a product which "proves to have a defect," traceable "to the product as it reached the market."

II. *Defect and the Warranty of Safety*

A. Defective When?

1. *As It Reached the Market*

To the extent that the rationale for strict liability is grounded in control of a product, and that control stops when the product reaches the market, it is appropriate to use that point to judge defect. Contract-type actions utilizing warranty theory thus might point to the time of manufacture, sale, or distribution, especially when statutes of limitation are at issue. When contract actions become implied warranty actions for consequential damages to person or property, such reasoning has led New York to the indefensible result of a cause of action, within its implied warranty-strict liability rationale, being barred before injury oc-

22. For the contrary view, supportable perhaps in logic and the disparities of bargaining position, see the dissent of Justice Peters in *Seely v. White Motor Co.*, *id* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.
Among other things wrong with such a result is that it ignores the proposition that a warranty runs for a particular period of time, perhaps a rental period, or more generally, the period of a product's intended or reasonably foreseeable use. When implied warranty and strict liability come together to be applied to a defect in a product, it should be apparent that the breach of the implied warranty of safety, to which Justice Traynor and the California Supreme Court have addressed themselves, takes place when the product proves unsafe during the period of intended or reasonably foreseeable use. To the extent that the periods of intended and reasonably foreseeable use differ, with the latter being longer, it would seem that the implied warranty of safety is also extended, unless appropriately limited by the manufacturer and brought home to the user.

Thus the manufacturer, who is held to the standard of an expert, knowing of reasonably foreseeable use for a particular period of time, breaches the implied warranty of safety, made when the product was marketed, if the product, when being used as intended or as is reasonably foreseeable, proves unsafe and the injury is attributable to the product.

2. Defective At Time of Injury

Justice Traynor's language, we recall, referred to a product that "proves to have a defect that causes injury to a human being." Assuming the product to be unchanged, the defect had to be there since being marketed, but it did not become apparent until injury. If the liability does not attach until injury, the manufacturer's responsibility for the product thus continues, perhaps only constructively, until injury.

This proposition, which dovetails nicely with the warranty for a particular period of time, goes beyond the manufacturer's usual control of the product in the period from marketing to injury. It defines injury as the point at which the implied warranty of safety is breached, as the point just prior to which the manufacturer still can avoid breach, and as the point at which the manufacturer must avoid breach or be held responsible for the consequences. The injury must still be traceable to the prod-

uct as marketed, but the condition subsequent to liability occurs only with injury. At the very least this must mean that the concept is not static, but must change with time.26

3. Defective At Time of Trial

Unlike the implied warranty of safety, strict liability goes beyond control and point of injury. The rationale is directed beyond conduct. The focus is on the product, a product which probably remains on the market subsequent to the particular injury. The particular product and others like it may still be on the market at the time of trial. Since one of the goals of strict products liability is to eliminate recurrent risk-generators, without requiring proof of fault, the concept of defect must retain the capacity of movement in time so that judgment of the product comes at judgment-time—at the time of trial.

This suggestion is not new. We have at times even in the law of negligence and proximate cause judged conduct with the benefit of hindsight.27 If we do the same here, as has been suggested by commentators for some time,28 we do not reach insurance or absolute liability. We simply ask with the benefit of hindsight: knowing that the product did in fact prove unsafe under given circumstances, would it be reasonable to now manufacture or market the product in the same way?28.1 In other words, at the time of trial we would apply the usual negligence test looking forward, knowing however, that which may have been unknown or unknowable at the time the product was marketed. Strict liability so applied would thus avoid both the requirement of proving fault and the burden of insurance, appropriately meeting the goals and rationale identified as appropriate for products which prove to be unsafe. The concept would be understandable to a

26. For the implied acceptance of time of injury as the point for judging a product's defectiveness, see Ault v. International Harvester Co., 10 Cal. 3d 337, 515 P.2d 313, 110 Cal. Rptr. 369 (1973).


jury concerned with consumer product safety and would also be consistent with the social engineering and control aspects implicit in strict products liability.

B. Proof of Defect

1. Shifting the Burden

Whether or not one accepts the proposition that the defect which existed in the product when it reached the market is judged at that time—the time of injury or the time of trial—it is still necessary, under current theory, to prove that the product was defective. The element of defect differentiates strict liability from insurance concepts or absolute liability since mere use of the product and injury therefrom does not automatically bring liability. Use of the product in the intended or reasonably foreseeable manner with consequent injury caused by a defect would, however, cause liability to be imposed. The issue then would be a combined one of defect and of cause. Cause, factual and legal, is required, but the product in question is not condemned as defective unless, when viewed with hindsight from the breach of the implied warranty of safety or from trial, it is defectively designed, manufactured, or marketed.

Recall that a major purpose of Cronin and of all strict products liability theory is to relieve the plaintiff of proof of negligence. With that as a beginning, it is appropriate to talk about relieving the plaintiff of anything other than showing an injury when using the product in the intended manner. If a product is intended to be used in a given way, if it is so used and it malfunctions, fails, or otherwise causes injury during that use, it seems clear that a breach of the implied warranty of safety has occurred.

There are cases which have permitted the use of circumstantial evidence on the issues of defect and cause. Other cases permit the establishment of a defective condition from a malfunction alone. Another way of putting it, and perfectly consistent with the implied warranty of safety thesis, is that a product is defective when it causes injury due to a failure of the product to perform in the manner reasonably to be expected in light of the


product's nature and intended function.\textsuperscript{31} After this is shown, the next step would be to put the burden on the defendant to negate defect in somewhat of a \textit{res ipsa loquitur} fashion, and for the same reason, that is, more probably than not the product producing injury was defectively manufactured or designed.\textsuperscript{32}

2. \textit{Legacies of Implied Warranty}

Because implied warranty is so intertwined with strict liability, is applied by its terms in some jurisdictions in lieu of strict liability, and in others is used alternatively sometimes at the choice of plaintiff and sometimes dictated by the type of injury, it is important to understand the common law and statutory history of implied warranty as it relates to consumer injuries and damages.

Anglo-American courts have long utilized the idea that a consumer product, known by the manufacturer or the seller to be used for specific purposes, must be fit and proper for the purpose and use for which it is designed and intended.\textsuperscript{33} That idea has its current statutory counterpart in the implied warranty of fitness for a particular purpose.\textsuperscript{34} Without regard to representation, the plaintiff can recover for breach of an implied warranty when a product, which is not fit for the particular purpose, causes personal injury or property damage; such a product is defective.\textsuperscript{35} The product may also be defective when it turns out to be not of "merchantable quality."\textsuperscript{36} A product is not of merchantable quality when it is not suitable for the ordinary purpose for which such products are used.\textsuperscript{37} Thus, breach occurs with failure, but the warranties differ, in that fitness relates to \textit{intended} purpose while merchantability relates to \textit{ordinary} purposes.

Although often intertwined in the cases, there is a distinction between the two warranties: fitness, when the purpose is known and there is reliance on the seller, is a much more exacting stan-


\textsuperscript{32} For discussion of the approach, see Jakubowski \textit{v. Minnesota Mining \& Mfg. Co.}, 42 N.J. 177, 199 A.2d 826, 832 (1964) (Weintraub, C.J., dissenting).

\textsuperscript{33} See, \textit{e.g.}, Brown \textit{v. Edgington}, 133 Eng. Rep. 751 (C.P. 1841); \textit{but see} White \textit{v. Oakes}, 88 Me. 367, 34 A.2d 175 (1896).

\textsuperscript{34} \textit{Compare} \textit{Uniform Commercial Code} \textsection{} 2-315.


\textsuperscript{36} \textit{Id.} at 922. \textit{But cf.} Traynor, \textit{supra} \textsection{} 6.1, at 367-71 (noting \textit{Uniform Commercial Code} \textsection{} 2-314 but criticising deviation from the norm as a test of a defective product).

\textsuperscript{37} \textit{Uniform Commercial Code} \textsection{} 2-314(c).
standard than that of merchantability, in which the expectations of the buyer are restricted to the ordinary purposes for which such goods are used. That distinction is a useful one from which to proceed to examine the implied warranty of safety.

3. **Safety or Reasonable Safety?**

Bread baked with a pin in it is unsafe and defective because it is intended to be eaten. \(^{38}\) Brake fluid which is designed to bring a vehicle to a halt under normal driving conditions is defective when it fails in its intended purpose. \(^{39}\) Whether or not the bread or brake fluid falls within the warranties of fitness for a particular purpose or of merchantable quality is not relevant. The important point is the failure in the use for which the product is designed or intended, and the assumption by the buyer that the product would not be unsafe when put to that use. As Justice Traynor put it in his article, the key is "unexpected danger."\(^{39,1}\)

The manufacturer is charged as an expert with guaranteeing the safety of its product; "... he must know it [the product] is fit, or take the consequences, if it proves destructive."\(^{40}\) The test then, is one of absolute safety when the product is used as designed and intended, whether we speak of human consumption\(^{41}\) or of operation on the public highway.\(^{42}\) Failure of a product when so used is equivalent to a breach of the warranty of fitness for a particular purpose. Such a breach, when it results in injury to a human being or physical injury to property, is also a breach of the warranty of safety. This warranty is absolute, and breach brings liability.

When a product brings injury while being put to its ordinary but not necessarily intended use, or is put to a reasonably foreseeable use in a reasonably foreseeable environment, it becomes appropriate to rethink this implied warranty of absolute safety. It seems clear that any product may cause or aggravate or at least not prevent injury under some circumstances.\(^{43}\) Since it would be

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\(^{39,1}\) Traynor, supra n.6.1, at 370. Justice Traynor emphasizes, however, that knowledge of generic dangers does not necessarily make a product nondefective so as to eliminate manufacturer liability. See id. at 370-71.


undersirable to transfer to the enterprise all risks of loss from the use of a product, the implied warranty of safety for reasonably foreseeable, although not intended, use should become one of reasonable safety.

An example from the automotive design crashworthiness area will help put the concept into focus. In the Cronin case, the injury was caused when a hasp, which was part of a locking device designed to keep bread trays from moving forward into the driver's compartment of a bread delivery truck, failed to prevent such movement after a collision. Because the failure was in the function for which the hasp was intended and designed, the breach was of the warranty of absolute safety. Similarly, in Engberg v. Ford Motor Company,\textsuperscript{43.1} the breaking of a seat belt during a crash was a failure in the intended and designed use of the seat belt. In neither case was the crash the intended purpose of the vehicle, but in both cases the liability is, in our terms, absolute.

On the other hand, when a vehicle becomes involved in a crash, and injury results because of a design which was not what it might have been, the test cannot be absolute safety. In Badorek v. General Motors Corp.,\textsuperscript{43.2} for example, injuries to the vehicle occupants were caused or enhanced by the design and construction of the gas tank. After a rear-end collision, the tank ruptured, allowing flaming gasoline to escape into the passenger compartment. The court, which was concerned with strict liability, cited negligence authority and conceded that neither a crash-proof car nor a car that "would have to look or drive like a Sherman Tank" was expected or required.\textsuperscript{43.3} The warranty was breached, but in our terms it was a warranty of reasonable safety, tested by negligence with hindsight, since neither the gas tank nor the car was intended or designed for crashes. Crashes are, however, clearly foreseeable.

The time for making the judgment as to the breach of the warranty of reasonable safety would still be the time of trial knowing the circumstances of use and the danger in fact. The test remains that of negligence with hindsight. A fact issue may well

\textsuperscript{43.1} 205 N.W. 2d 104 (S.D. 1973).
\textsuperscript{43.2} 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (Dist. Ct. App. 1970) (opinion vacated by grant of hearing by California Supreme Court and not citable in California; case remanded and settled).
\textsuperscript{43.3} Id. at 920, 90 Cal. Rptr. at 316-17, citing Evans v. General Motors Corp., 359 F.2d 822, 827 n. 2 (?7th Cir. 1966) (dissenting opinion), quoting N. Y. Times, March 8, 1966 at 36M. See also Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).
arise as to whether a particular use was intended or simply reasonably foreseeable. When this is at issue, an objective standard should be applied in order to preclude unreasonably strained extensions or limitations of intended use put forth by either plaintiff or defendant. If the use was intended, the jury's role would be to determine only causation and damages. If the use was not intended but was reasonably foreseeable, the additional test of negligence with hindsight would have to be inserted prior to a determination of liability. If the injury-causing use was neither intended nor reasonably foreseeable, the product would simply not be defective.

The solution proposed is perfectly consistent with all that has transpired in strict products liability through Cronin and its crashworthiness doctrine. The manufacturer should reasonably foresee highway crashes; his duty is to make the vehicle reasonably, but not absolutely, safe under such circumstances. There is simply no escaping the proposition that safety is a compromise which becomes reasonable to recognize when product injury comes in a foreseeable, but unintended manner, incident, or use. When, however, the product will not "safely do the jobs for which it was built," then the test becomes that of absolute safety. The warranty of safety is thus given content in terms of absoluteness or reasonableness dependent upon the circumstances of use and of injury.

C. Remnants of Negligence

The Cronin court would have us purge negligence from the proof in a strict liability case. The court does so by eliminating the Restatement doctrine of unreasonable danger. When that goes, the objective ordinary consumer test goes with it, because that is one way of defining the unreasonably dangerous product.\textsuperscript{47} As we have seen with intended use, however, objectivity

\textsuperscript{47} A RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965) states the test: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." See discussion in Heaton v. Ford Motor Co., 248 Ore. 487, 435 P.2d 806 (1967).
must remain to some extent if strict liability is not to become insurance. Elimination of the "unreasonably dangerous" concept, as a necessary jury finding, is the Cronin method of eliminating the "negligence complexion" from the issue of defect.\(^2\) The focus can then appropriately be on the product, rather than on the conduct of the defendant who has designed, manufactured, or marketed the product. The plaintiff's case, purged of negligence, then goes forward simply on the Escola-Greenman-Cronin implied warranty of safety rationale.

Yet, as we shall see, the Restatement abounds in negligence language. The cases affirm that proof of defective design also proves negligence.\(^8\) Commentators make the same point.\(^9\) The best of products liability lawyers say the same thing even today.\(^5\) In the context of defectively designed products, judges fear a flood of litigation and worry about effects on the industry.\(^6\) Horrendous results are foreseen unless a no-fault system of limited compensation is introduced.\(^5\)

Several points must be made about these fears and comments. Trial lawyers see strict products liability cases as technical cases, in which a verdict of liability becomes more doubtful and damages become potentially much lower than a similar case in which negligence, as we usually understand it, can be proved. The answer to that, it would seem, is to argue the rationale of strict liability to the jury, at least in those jurisdictions in which attorneys may discuss the law in argument. Trial lawyers also view no-fault with deemphasis on general damages as unwise, unfair, perhaps unconstitutional, and certainly not in the interest of the consumer. They see no-fault as the inevitable end of unlimited strict liability. They are probably right; therefore, the answer would seem to be to adopt the strict but limited liability we have been outlining.
Limitations on strict liability are easily handled for design problems, but with the time for judging the product and alternatives moved to the time of trial. Failure to warn cases would be similarly analyzed. Nor would there seem to be any reason to treat drugs differently.

It is in the drug area that most cases and commentators see problems. Negligence reigns supreme. The utility of drugs seems to outweigh the occasional misfortune to the unusually hypersensitive or allergic individual. Strict liability and negligence are seen here as virtually identical. Yet the lesson of Escola is that "however intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one" against which the manufacturer is best situated to afford protection. Negligence then is not the issue, and this is beginning to be recognized in the blood transfusion cases. Since the use is intended, liability follows when harm results. It is irrelevant under this analysis that the particular user who suffers adverse effects from the product is a member of a miniscule group or is even the only one who suffers the result. This may well have a social engineering effect and increase the safety of the product, but regardless of that effect the risk is shared. It is quite possible that some drugs may be condemned by this analysis, but more probably the risk is simply absorbed as part of the cost of doing business in accordance with the Escola rationale. When the risk becomes great enough the product may indeed be withdrawn from the market. It is submitted that this is the expected and desired effect of the strict products liability theory which we have been discussing.

53. But see Restatement (Second) of Torts § 402A, Comment j (1965).
54. See id. Comment k.
58.1. The same point is made by Justice Traynor as it relates both to blood and drugs. See Traynor, supra n. 6.1 at 365-68.
60. For application of the negligence with hindsight test to drugs, see Keeton, Products Liability-Drugs and Cosmetics, 25 Vand. L. Rev. 131 (1972).
61. For such an effect on the cigarette industry, see White, Strict Liability of Cigarette Manufacturers and Assumption of Risk, 29 La. L. Rev. 589, 592-94 (1969).
IV. LIMITATION OF LIABILITY FOR BREACH OF THE WARRANTY OF SAFETY

A. Proximate Cause

1. Cause in Fact

There can be no argument with the proposition that as a matter of fact, the product must cause the injury in order for liability to flow. If an airplane fails after flying into cyclonic winds which would down any plane, or an automobile wheel breaks after it has left the road and gone down a steep incline, the product failure is factually not related to a defect. Such a proposition is almost self-evident, but it should never be forgotten by the trial lawyer.

2. Extent and Manner of Injury

Two concepts should be borne in mind when an injury occurs in an unexpected way. It is black-letter Restatement law that "if the actor's conduct is a substantial factor in bringing about harm to another [that is, if cause in fact exists], the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Liability will only be excused when to the court, "after the event and looking back from the harm," it appears "highly extraordinary that [the conduct] should have brought about the harm." This negligence with hindsight test for proximate cause may be usefully transferred to focus on the product. Since the warranty of safety is absolute in the product's intended use, the egg-shelled-skull or hypersensitive plaintiff is protected, and the hindsight test is only necessary when we speak of unintended but reasonably foreseeable uses. The court would thus initially control the cases which go to jury. The unexpectable event, harm, or manner in which the harm occurs does not preclude liability, and the jury will judge the product as does the court initially, that is, "after the event and looking back from the harm." The burgeoning crashworthy cases, for example, become manageable with such treatment, as do all design, failure to warn, and drug cases.

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64. RESTATEMENT (SECOND) OF TORTS § 435(1) (1965).
65. Id. § 435(2).
3. To Whom Injury Occurs

The person whose use of the product is not intended, but who is injured through the intended use of the product, is entitled to the same protection of absolute safety guaranteed to the user. Those who are injured by the product in its normal environment are also entitled to the same protection. But those whose injuries come as a result of a product failure or fault in the course of the reasonably foreseeable but unintended use of the product should be remitted to the warranty of reasonable safety with the benefit of hindsight. The user's conduct may affect the injured party's recovery, but only insofar as it may add a tortfeasor—joint if the product fails the test of reasonable safety or sole if the product passes the test but the user's conduct falls below the standard of reasonable care. If such cases were treated otherwise, the social engineering aspects of the strict products liability rationale would be unnecessarily ignored when as a matter of fact, law, and policy the product has failed the appropriate tests.

Once again the distinction comes into focus with the automobile cases. In Codling v. Paglia, defendant Paglia's four-month old car crossed into the path of plaintiff Codling's car as a result of steering difficulty. A finding of causally related defect would properly result in the liability of the manufacturer toward Codling. In addition, a negligent response to the situation by Paglia would give Codling joint tortfeasors against whom to proceed. Codling would be entitled to the warranty of absolute safety from the manufacturer.

On the other hand, if the Paglia car's steering difficulty was traceable to its having struck an unusually large rock shortly before, the manufacturer's warranty might only be that of reasonable safety. If the rock were larger than the steering apparatus was designed to withstand, although the driving use was intended, the manufacturer's liability would be judged by the negli-
gence with hindsight test. If the driver were negligent in continuing to drive after hitting the rock, responsibility would be shared.

4. **When Injury Occurs**

Passage of time is a relevant issue as it relates to the period of intended use during which the warranty of safety remains alive. If a manufacturer intends to limit the warranty, as he might for instance for the number of hours use an aircraft engine is intended to have before overhaul or replacement, it becomes incumbent on the manufacturer to make that limitation on the warranty clear.

Should there be no express limitation, the passage of time becomes relevant on the issue of cause. But if the product is being used in the intended manner at the time of injury, proof of the absence of proximate cause should be shifted to the defendant. Consistent with all that has gone before, if the use is not intended, the passage of time would become merely another factor in the assurance of reasonable safety of the product at the time of trial, an issue for both court and jury, and to a large degree a matter of “common sense” and “fair judgment.”

5. **Third-Part Conduct**

In discussing the problems of nonusers we have referred to the conduct of the user, suggesting that it will not insulate the manufacturer of a product which fails either the test of absolute or reasonable safety. The problems become somewhat more difficult when third-party conduct intervenes subsequent to marketing but prior to failure. There is, however, one major hallmark to guide us.

The inability of the manufacturer in *Vandermark v. Ford Motor Company,* to shield itself from liability because of the negligence of the dealer was no aberration limited to the automobile business. It was simply an extension of the settled proposition of law that when a reasonably foreseeable third-party act is

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one of the hazards which make an actor negligent, "such an act
whether innocent, negligent, intentionally tortious, or criminal
does not prevent the actor from being liable for harm caused
thereby." The test, when applied to strict products liability, is
the same, except that the focus is on a defective product, defined
in terms of safety or reasonable safety at the time of the intended
use or at trial respectively. Some examples will help explain the
concept.

The prescription of an unsafe drug by a negligent physician,
aware of the drug's dangers but induced by the manufacturer to
prescribe it, will not cut off the liability of the manufacturer when
the drug is consumed by a patient in the intended dosage. Failure
of an employer to correct a discovered problem or to install
an available or proffered safety device should not insulate the
manufacturer of the machine when an employee is injured using
the machine as intended. The negligent failure of independent
installers to attach specified safety devices should not insulate
the manufacturer of the product when it fails while being used for
the purpose intended. The negligent use of a product unsafe for
its intended use does not cut off liability to a person suffering
detriment as the result of injury to the user. In all of these cases
the negligent third-party conduct is within the ambit of risk
which flows from the marketing of an unsafe product put to its
intended use.

Comparison to a product involved in an injury-causing inci-
dent, but not when being used in the intended manner or the
normal environment will highlight the difference. A bathinette
exposed to a household fire which increases the danger of the
fire, toxic fumes in the aftermath of airplane crashes and fires,

45, 56 (1973) citing Vesely v. Sager, 5 Cal. 3d 153, 163-64, 486 P.2d 151, 158, 95 Cal. Rptr.
623, 630, quoting RESTATEMENT (SECOND) OF TORTS § 449 (1965); cf. Bolm v. Triumph
each case the defect is 'a substantial factor in bringing about [the] injury or damages,'
what possible justification is there for disallowing a claim against the manufacturer whose
defective product results in injury after a foreseeable intervening cause?"

74. See Stevens v. Parke Davis & Co., 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45
(1973).

(1973); Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968); Bexiga v.

76. But see State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), cert. denied
386 U.S. 912 (1967).


78. See Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954), cert. denied,
and increased burning and smoke from polyurethane insulation in walls exposed to fire, are all within the risk of the product defect, regardless of the conduct which caused the fire in the first instance. Liability for the enhanced injury falls on the original manufacturer, perhaps as a joint tortfeasor. On the other hand, use by nonexperts of a product obviously designed for experts, as with the theft and flight of an aircraft by one unqualified to fly it, or an intentional act not within the risk created by the use of the product, or a sufficient passage of time combined with intervening negligent acts, will cut off liability since these risks are not within the ambit of a reasonably safe product even when viewed with the benefit of hindsight.

B. Conduct of the Plaintiff

1. Contributory Fault

In the context of that which has gone before, especially the lessons of continued liability for a product which is unsafe-in-fact despite subsequent conduct of a negligent character, we now turn to the contributory fault of the injured plaintiff. The conventional learning has been that contributory negligence will not bar recovery in actions which sound in warranty or strict liability. That learning is, however, not without challenge. Recently, perhaps on the theory that a breach of warranty is a wrongful act, the New York Court of Appeals, in Codling v. Paglia, without citing legal authority or policy justification, simply announced that what it terms “contributory fault” is a defense under its implied warranty theory for personal injury. Its application goes so far as cutting off liability to a bystander when a third party’s faulty conduct has intervened.


Besides being impressed with the advocacy that brought the Court of Appeals to such a conclusion, one must wonder whether the court was attempting to nudge the New York State Legislature into the adoption of a comparative fault system, which many thought the court itself was about to adopt.\footnote{Id. at 345, 298 N.E.2d at 630, 345 N.Y.S.2d at 472 (Jasen, J., concurring).} Whatever motivating force for the holding, it was apparently not the risk-duty doctrine so ably enunciated by the great Chief Judge Cardozo of that court,\footnote{See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).} or the lessons of the Restatement to which we have been referring and which relate intervening conduct, risk, and proximate cause.

If failure of the user to act reasonably so as to discover a defect, or to act reasonably under the circumstances once defect has evidenced itself, is not foreseeable, with foresight or with hindsight, and thus not within the ambit of risk of the defect, one cannot argue with the court. The problem very simply is that the court did not, at least in its opinion, address the issue. A breach of a duty implied in law, whether the duty of reasonable conduct or the duty to produce a safe or reasonably safe product, is simply not necessarily cut off by conduct within the risk of the breach of duty. The conclusion would apparently follow from the court's opinion, that a driver, faced with a product-caused problem, who objectively acts unreasonably under the circumstances, not only cannot recover against the defendant who manufactured and marketed the product and put him into the particularly difficult position, but neither can a bystander injured as a result. One is tempted to conclude that the policy support for such a position was omitted from the opinion because it is in fact non-existent, given a rationale of strict liability in tort or New York's implied warranty equivalent. If there are circumstances when failure to discover a problem or failure to act reasonably to avoid catastrophe after a defect has evidenced itself are not within the risk of a defect, the court's conclusion would be correct. Otherwise, it must be defended on other grounds. The New York court is simply too good a court to reach such a conclusion without a policy to justify it. Let us hypothesize.

There have been and are many anachronisms in our law. One such relates to the proposition that contributory negligence on the part of the plaintiff will bar recovery when the defendant is at fault, but will not bar recovery when the defendant is liable although fault need not be demonstrated, for example, when a
warranty is breached or a product is found defective. At a time when legislatures and courts are moving toward the adoption of a comparative negligence system, it would seem appropriate to reexamine the proposition that a plaintiff who is at fault can recover without penalty from a defendant without fault. The term contributory fault, adopted in lieu of contributory negligence, becomes adaptable to a system of comparative fault far more broadly than a system of comparative negligence alone in a tort system which includes implied warranty and strict liability, which are, if you will, wrongs without fault. Societal goals are furthered, however, by deterring conduct which is faulty, in addition to deterring recurrent risk-generating products.

In the context of a product-injured user at fault, the result would be a reduced recovery, rather than the all-or-nothing treatment of contributory negligence as a bar to recovery. When a product has, however, turned out to be unsafe in fact, and thus defective, but the user is also at fault and, as a result, another person is injured, the conclusion should be not that there is a bar to recovery against the manufacturer, but that the manufacturer and the user should be treated as joint tortfeasors. Such treatment would retain both consistency and reason in accord with tort law in general and products liability law in particular.

2. Unprotected Misuse

The issue of misuse, sometimes treated as abnormal use bearing on the question of defect, and sometimes as a proximate cause issue, is usually a jury question, and remains so with the approach we have been suggesting. If the use is grossly careless, although initially within the ambit of intended use, the jury might not find the actual injury-causing use to have been intended. There would thus be no breach of the implied warranty of absolute safety. If a misuse is, however, reasonably foreseeable as judged at the time of trial, it would remain a jury issue as to whether the product’s warranty of reasonable safety has been breached. That is, recognizing the misuse, the issue would be whether a reasonable manufacturer would still make and market the product in the same way. If not, there is a breach. Finally, if there has been a breach of the warranty of reasonable safety, misuse by the user should reduce the injured user’s damages, utilizing the comparative fault system previously put forth.

88. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A, Comment h.
89. See Keeton, Product Liability and the Automobile, 9 FORUM 1, 10-11 (1973).
Breach and misuse would make available to an injured third party, joint tortfeasors against whom to proceed; no breach of the warranty of safety but misuse would still present the injured party with a defendant—the user.

3. Assumption of the Risk

There is little to say about assumption of the risk that has not been said by the California Supreme Court in *Luque v. McLean*,90 the companion case to *Cronin*. It is extremely important, however, to bear in mind that the essence of true assumption of the risk, even of a patent risk, is a voluntary and unreasonable encounter with the specifically known risk. A plaintiff who does so assume the risk is usually said to have relieved the defendant’s duty toward him.91 If any of the elements are missing, that is, the assumption is not truly voluntary, the risk taken is reasonable, or the specific danger is not recognized and borne in mind at time of injury, there is no assumption of risk.

The fact that a risk is patent or obvious should not, contrary to the recently reaffirmed position of the New York Court of Appeals,91.1 operate as a bar to a finding of defectiveness. Since a major thrust of strict products liability theory has been the elimination of recurrent risk-generating products, patent and obvious risk generators should not automatically be exempted from liability. It may well be that a particular user will be barred by true assumption of the risk, but the utilization of an objective patent-latent standard as a bar to recovery returns us rapidly to the ordinary consumer test of an unreasonably dangerous product. Such objective standards simply reverberate with negligence. California has discarded negligence standards and strict liability actions without making insurers out of defendants. New York could easily do the same, within its warranty rationale.

Thus a user of a product who recognizes the danger in a product, but who is induced or required to use the particular product and is injured either while in a state of inadvertent, careless, or normal use while using the product as it is intended to be used, would not have assumed the risk whether the risk is patent or latent. The warranty of safety would have been breached, and the user's fault is, at most, a reason to reduce

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90. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
recovery. The bystander's treatment is apparent; he has not assumed the risk and will have either one or two tortfeasors against whom to proceed, consistent with our previous discussion.

One other point might appropriately be made at this time. If the rationale of strict products liability concerning the elimination of recurrent risk-generators is valid, not even true assumption of the risk should be a defense. If it remains a complete defense, the result would be that which the California Supreme Court decried in *Pike v. Frank M. Hough Co.*:92 the more patently dangerous the product appears to the user, the less likely will recovery be because the more probable will be the awareness of the specific risk. Although issues of voluntariness and unreasonableness would remain, the odds would be substantially tipped in the defendant's favor. The answer would appear to be to simply treat assumption of the risk as another aspect of comparative fault, that is, at the very most as a partial defense.

C. State of the Art

It has been said that because a product is defective or not at the time of manufacture, design, and marketing, it must be judged at that time.93 This is perfectly appropriate when the issue is negligence. When the issue, however, becomes strict liability, the emphasis should shift. We may be talking about a manufacturing defect not avoidable because of the state of the art at the time,94 but more likely the issue will be one of design.

One way to handle either problem is to impose a continuing duty on the manufacturer to improve his product and treat his response to the duty akin to negligence in the post-marketing period prior to injury.95 Another way is to treat state of the art as a consideration, but not as a conclusive defense in itself.96 Still another is to recognize that the state of the art is generally a result of industry priorities. Research and development funds for safety purposes compete with other demands. If the product is judged by the state of the art as it exists or could reasonably exist at the time of trial, and the product is no longer made and marketed in

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the same way, or should not be, the product is defective. All the events bearing on that issue would be admissible, including product changes subsequent to injury. Since the safety of the product, not fault, is the issue, compensation should follow, but it would not be exacerbated by the passions of a determination of fault. Products would continue to be improved, control would be exercised over the product throughout the period of its intended or reasonably foreseeable life span, and the risk of injury would be reduced or spread, which is, after all, where we started this discussion.

CONCLUSION

When this article was initially being prepared it was entitled “Strict Liability: Fault or No-Fault and What Limits?” The tentative conclusion was that we should properly be talking about a limited no-fault system, expunging all elements of negligence, as suggested in Cronin. The conclusion remains the same, but the method by which the conclusion has been reached differs from the original approach.

Between planning and fulfillment of this article, Dean Page Keeton of the University of Texas and Dean John Wade of Vanderbilt University have made the point that the Cronin case has simply added to the uncertainty surrounding the meaning of defect, leaving lawyers, judges, juries, and appellate courts in a state of confusion until some content is given to the concept of “defect.”97 This teacher and trial lawyer has attempted to give some content to the concept, generally picking up the approach that both deans have long championed.98 The attempt herein has been conceptual, and is in need of substantial refinement. Broad areas of law and policy have been addressed which must be brought down eventually to the level of instructions to a jury. Even if the approach is consistent and workable, there is a long way to go. If the approach is wrong, many of us will continue to seek the light at the end of the tunnel we call “defect” and hopefully reach it before too many more years elapse.

98. See note 28 supra.