

THE MODERN IRONY OF CIVIL LAW: A MEMOIR OF STRICT PRODUCTS LIABILITY IN THE UNITED STATES

GEORGE L. PRIEST*

Modern civil law faces an extraordinary irony. Today, in the United States, civil law is in crisis. It is increasingly acknowledged that the crisis stems from the expansion of civil liability since the mid-1960s following the adoption in the U.S. of strict liability for product defects. The irony is that, just at the time that the devastating implications of the strict liability approach are becoming clear in the U.S., the European community has decided to impose strict products liability upon its member states.¹

As Europe expands standards of civil liability, the United States, in response to the crisis, is engaged in massive retrenchment of civil liability. Since 1985, the legislatures of 39 of the 50 states have enacted some version of "tort reform" legislation.² The most significant of these statutes is the 1987 New Jersey products liability act, which sharply halts the expansion of manufacturer liability in a state which had inspired and had led the post-1960s trend.³ Of even greater significance, within past months, the California Supreme Court, which in 1963 first introduced the concept of strict products

* John M. Olin Professor of Law and Economics, and Director, Program in Civil Liability, Yale Law School. I am grateful to Robert Pushaw, whose parallel work on this subject has been very helpful. I am also grateful to Daniel Friedmann and to participants at a Symposium on Products Liability, Tel Aviv, Israel for comments and suggestions.

1. Directive of the Council of the European Communities (25 July 1985). Note that Israel adopted strict products liability in 1980. Defective Products (Liability) Law 5740-1980, *S.H.* 5740, 86; 34 *L.S.I.* 92. See generally, Daniel More, *Products Liability: Israel* (1987).

2. This legislation is reviewed in Priest, "The Current Insurance Crisis and Modern Tort Law," 96 *Yale L.J.* 1521 (1987) [hereinafter cited as Priest, Insurance Crisis].

3. New Jersey Statutes Annotated, 2A: 58C-1 *et seq.* (1987), discussed *infra* text accompanying notes 108-119.

liability,⁴ has itself recanted the strict liability approach. In *Brown v. Superior Court (Abbott Laboratories)*,⁵ the California Supreme Court concluded that manufacturers of pharmaceuticals should be liable according to a standard no more rigorous than negligence because of the disastrous effects of strict products liability on the availability of drugs to consumers.

This paper explores the crisis in the United States, the relationship of the crisis to the concept of strict products liability, and the modern U.S. retrenchment. There are many implications of the U.S. experience for the future of products liability law in Europe and in other nations, such as Israel, that have adopted strict products liability.⁶ Part I describes the civil law crisis in the United States. Part II reviews the history of strict products liability to attempt to explain what it is about the doctrine that has caused the crisis. It looks in particular at the original intent of the Founders of strict products liability to show how strict liability has departed from the original view in ways that have generated the current crisis in the U.S. Finally, Part III describes in more detail the counterrevolution of U.S. law and its implications for Europe and Israel.

I. The Current U.S. Crisis and Its Sources

In the United States, between the late months of 1984 and the early months of 1987, reports began to accumulate of unusual changes in particular commercial casualty insurance lines. Most prominent were announcements of extraordinary increases in yearly insurance premiums, increases of 60 or 100 or, in some instances, 1500 percent. For a small number of entities — daycare centers, some municipalities, nurse-midwives, as examples — insurers refused to offer coverage at any premium. Where insurance remained available, insurers drastically reduced the terms of basic insurance policy coverage. Insurance deductibles were doubled (for example, for the Kennestone Hospital, Marietta, Georgia, from \$1 to \$2 million⁷) and

4. *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963). See also *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436 (1944) (Traynor, J., concurring).

5. *Brown v. Superior Court (Abbott Laboratories)*, 245 Cal. Rptr. 412 (1988).

6. *Supra* note 1.

7. "Sorry, Your Policy is Cancelled," *Time*, March 24, 1986 at 19.

redoubled (for the City of Baton Rouge, from \$100,000 to \$500,000⁸). At the same time, required coinsurance proportions were increased. Levels of aggregate insurance coverage were lowered dramatically (for example, for the City of Hartford, from \$31 million to \$4 million⁹). In addition, insurers excluded new specific activities and liabilities from coverage altogether (for example, pollution claims and employment discrimination claims from municipality policies;¹⁰ claims related to mergers and acquisitions from Directors' and Officers' policies¹¹). In these same lines of commercial coverage, insurers substituted a claims-made for an occurrence policy.¹²

These insurance changes generated, in turn, drastic responses from product manufacturers and service providers. Prices were increased generally to offset increased premiums. Firms and entities denied insurance coverage were forced to curtail operations. Jails were closed and police patrols suspended until municipal mutual insurance programs were arranged.¹³ Many cities and park authorities removed slides and swing sets from public parks.¹⁴ Schools removed diving boards from swimming pools.¹⁵ A 1988 survey of manufacturers revealed that 47 percent had withdrawn products from markets for liability reasons.¹⁶

In the months since 1987, the crisis has appeared to subside. But the price increases from liability insurance premiums remain largely intact. Those products and services withdrawn from markets remain withdrawn. The 1988 survey of manufacturers also showed that 39 percent had decided against introducing new products and 25 percent had discontinued new product research.¹⁷ Although many cities have been able to restore essential services by forming mutual insurance groups, the mutual insurance form only postpones the effects of increased liability, rather than curing them.¹⁸

8. *Bus. Ins.*, July 8, 1985 at 1. In addition, the carrier increased the premium from \$116,000 to \$1.2 million for the same amount of coverage.

9. "Sorry, Your Policy is Cancelled," *supra* note 7.

10. *Bus. Ins.*, July 1, 1985 at 12.

11. Wyatt Corp., 1985 Directors' and Officers' Liability Insurance Survey 21-24.

12. *Wall St. J.*, Nov. 20, 1985 at 33, col. 4.

13. "Sorry, Your Policy Is Cancelled," *supra* note 7 at 17-18; *N.Y. Times*, Mar. 4, 1986, at A26, col. 1 (editorial).

14. "Sorry, Your Policy is Cancelled," *supra* note 7 at 24.

15. Governor's Advisory Commission on Liability Insurance, *Insuring Our Future* (New York City Schools) (1986) 15, 24 [hereinafter cited *Cuomo Commission*].

16. E. Patrick McGuire, *The Impact of Product Liability* at 20, Table 30 (Conf. Bd. 1988).

17. *Ibid.*

18. *See* Priest, *Insurance Crisis*, *supra* note 2 at 1578-82.

These events represent a genuine crisis. The wholesale withdrawal of products and the termination of product research certainly does not benefit society. Moreover, the various insurance events are evidence of the withdrawal of the insurance industry from the business of insurance. The decline in insurance is obvious with respect to those lines for which commercial coverage was refused altogether — such as midwife and daycare coverage — as well as for those sets of specific claims now excluded from coverage — such as pollution claims against municipalities. The other changes in insurance coverage, however, each add to the reduction in the total financial resources available for insuring injuries. When deductibles and coinsurance are increased and aggregate coverage reduced, the insured and the insured's potential victims bear more of the risk of future losses themselves. Similarly, adoption of the claims-made policy cuts off coverage of losses that occur during the policy period but become manifest only after its expiration. The claims-made policy, thus, shifts the risks of latent injury or disease to the insured and to the insured's victims.

No one can contest that reductions in insurance coverage are harmful. All humane societies want to maximize the availability of insurance, especially for personal injury. Since 1984, however, the insurance capacity available to U.S. citizens for injuries related to corporate activities has diminished dramatically.

Very recently, several insurers and reinsurers have been brought into court on government claims that various coverage changes violate the antitrust laws (Senator Howard L. Metzenbaum has called it “the antitrust conspiracy of the century”). The charges, however, are largely implausible: if these various forms of insurance coverage could have been offered at a profit, then their withdrawal would have reduced insurer profit opportunities, hardly the ambition of a profit-maximizing cartel. On the other hand, if these forms of coverage could not have been offered at a profit, then their withdrawal is no different than the more widespread withdrawals of products and services made unprofitable by expanding liability.

There are very strong reasons to believe that the expansion in civil liability in the United States has been the source of the crisis. First, the manufacturing and service industries most seriously affected by the changes in insurance coverage are exactly those that have been most seriously affected by changes in tort liability. Since the adoption of strict products liability in 1963, tort liability has been expanded generally with respect to manufacturing and service industries, both by the extension of affirmative duties and the

restriction of available defenses.¹⁹ This expansion of liability has created long tails of liability exposure for corporate defendants that they never faced in earlier years.

There is a second important reason, however, to attribute the crisis to the expansion of liability, rather than to more particular characteristics of the commercial insurance industry. In the United States, large numbers of entities, including manufacturers and governmental bodies, do not purchase commercial liability insurance, but instead self-insure. In 1985, these entities suffered the same problems as the commercially insured. The self-insured City of New York, for example, removed diving boards from public schools.²⁰ Self-insured manufacturers increased product prices because of higher liability exposures. A more particular survey of *Fortune 500* manufacturers, those whose size and self-insurance capacity make them least vulnerable to vagaries of commercial insurance markets, showed that 25 percent had removed products from markets for liability reasons.²¹

There is an important question, however, as to what it is about the expansion of liability pursuant to the adoption of strict products liability that has generated a crisis. Indeed, the diagnosis of the source of the crisis is crucial, both to efforts to improve the law in the United States and to the impending elaboration of the strict products liability principle in Europe and in Israel.

The next Part addresses that question by returning to the history of the adoption of strict products liability in the United States to examine what the Founders of strict liability intended to achieve and how the subsequent development of strict liability has deviated from those intentions.

II. Strict Products Liability: The Original Intent

The development of tort law in the United States since the mid-1960s raises a mystery. There is little doubt that since the 1960s a revolution in tort law has occurred. A simple comparison of tort law decisions today and tort

19. *See generally*, Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," 14 *J. Legal Stud.* 461 (1986) [hereinafter cited as Priest, Invention].

20. Cuomo Commission at 15, 24.

21. N. Weber, *Product Liability: The Corporate Response* (Conf. Bd. 1987) 4-7.

law decisions 25 years ago confirms the revolution.²² What remains mysterious, however, is the means by which this revolution occurred. The source of the revolution is very clearly tied to the adoption of strict products liability in Section 402A of the *Restatement of Torts (Second)* by the American Law Institute (ALI) in 1963, and its subsequent acceptance by virtually all of the individual state supreme courts. Puzzling, however, is that a revolution in law would be introduced by the very conservative American Law Institute and then implemented by a set of supreme court justices who were probably the most conservative members of the legal community of the time. There is little return to revolution for members of the judiciary. Moreover, law-making by the American Law Institute, as the term for its projects — “Restatement” — suggests, has seldom aspired to the radical overturn of civil jurisprudence.

This Part attempts to resolve the puzzle. It attempts to describe how the adoption of Section 402A simultaneously could be consistent with the conservatism both of the American Law Institute and the American state judiciary, and yet set the stage for the radical revolution in tort law that followed. It argues that the Founders of Section 402A did not fully appreciate the distinction that has become the centerpiece of modern products liability law between manufacturing defects, design defects, and defective warnings. Section 402A was to represent only a limited change in the law because the Founders intended its strict liability standard, with minor exceptions, to apply *only* to what we now call manufacturing defect cases.

In this view, the vast expansion of modern law occurred as courts went beyond Section 402A to apply strict products liability concepts to design and warning defect cases in the years following 1965. Since the Founders had not anticipated these applications, the interpretive guideposts in Section 402A’s Comments proved, in many instances, unhelpful and in important other instances, misleading. These Comments contributed substantially to the expansion of liability, but in a way largely unintended by the Founders. Indeed, the vast expansion of modern tort law since 1965 based upon Section 402A is, at heart, inconsistent with the intent of its Founders. It is this inconsistency that has generated the current U.S. crisis.

22. See, for example, Priest, “Products Liability Law and the Accident Rate,” in *Liability Perspectives and Policy* (1988) at 184 for a comparison of pre-and post-revolution case law.

A. Product Defect Law in the 1950s and Why the Founders Objected to It

Section 402A was designed to correct deficiencies in the rights of action available to consumers suffering personal injury as a consequence of defective products. Prior to 1965, consumer rights of recovery were defined by warranty law and, to a substantially lesser extent, by negligence law. There were significant differences in rights of recovery across the jurisdictions. In all jurisdictions, however, a consumer could recover if in privity of contract and if the injury could be attributed to a breach of an express warranty or of the implied warranty of merchantability.²³

Typically, these legal requirements limited injured consumers to suits against retailers under the implied warranty of merchantability. Consumer suits against manufacturers were constrained either because the consumer was not in privity with the manufacturer or because the manufacturer's express warranty (the existence of which was typically sufficient to create privity) explicitly excluded coverage of consequential personal injury damages. The privity requirement was easily satisfied in suits against retailers, but, of course, only by those injured consumers who had actually purchased the product. Retailers, however, seldom extend express warranties. Thus, against retailers, it was typically necessary for consumers to invoke the implied warranty of merchantability. The implied warranty allowed recovery, quite routinely, because a product causing personal injury was easily seen to violate the requirement that it be "fit for the ordinary purposes for which such goods are used."²⁴

Even when these legal requirements were satisfied, however, it was necessary for the consumer to have given notice to the seller of the breach of contract within a reasonable time and to have carefully elected among available contract remedies. Generally, any complaint to the seller would satisfy the notice requirement, although many courts refused to regard a lawsuit as adequate notice; that is, it was necessary for the consumer to have made some intermediate communication with the defendant-seller prior to suit.²⁵ In addition, to recover damages for personal injury, the plaintiff-consumer must have complied with Section 69 of the Uniform Sales Act requiring election of remedies. Section 69 was designed to prevent duplicative

23. Uniform Sales Act, Sections 12, 15.

24. Uniform Sales Act, Section 15(2).

25. This requirement was retained in the Uniform Commercial Code and only relaxed by judicial decision in the mid-1970s.

recoveries in more complex contractual contexts. It was drafted to require complainants to elect from among remedies that rescinded the contract, returning the victim to the position occupied prior to the contract; remedies that affirmed the contract, seeking specific performance; or remedies that affirmed the contract, seeking damages for unfulfilled performance. Thus, Section 69 limited a consumer to *either* return of the product price (rescission of the contract), replacement of the product (specific contract performance), or consequential damages for contract breach.²⁶ As a consequence, in concept, if the injured consumer upon complaint had been given money back or had been given a new, non-damaged model of the product, or was found to have “elected” either of these remedies in the initial complaint, he or she was barred from any recovery for personal injury regardless of seriousness of injury.

These legal provisions defined the easy cases for consumer recovery. There were other grounds that could be pursued where warranty law was unavailable. Many jurisdictions, for example, allowed recovery in contract law against manufacturers based upon representations in manufacturer product advertisements.²⁷ Here, again, the notice and election requirements needed to be satisfied. Moreover, there remained substantial difficulties in obtaining a recovery on this legal theory because it was necessary for consumers to prove that they had relied on the advertisement for the product purchase and because the typical manufacturer advertisement was seldom more specific than the assurance presumed by the implied warranty of merchantability.²⁸

Many other jurisdictions also allowed consumer recovery against manufacturers on negligence grounds. The negligence theory was not generally available because of the privity of contract bar. Many jurisdictions permitted negligence actions despite the absence of privity, however, in specific types of cases, most commonly where the product could be defined as “imminently dangerous,”²⁹ or in cases involving spoiled foodstuffs. Some courts had extended the foodstuff exception to products loosely described as “products for intimate bodily use.” In fact, this description was contrived by

26. Of course, unless such damages were excluded by warranty.

27. See *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. 2d 409 (1932); *reh. den.*, 15 P. 2d 1118 (1932).

28. *Baxter, ibid.*, for example, was an exception because the advertisement specifically stated that an automobile windshield glass, which subsequently shattered, was shatterproof.

29. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

academics pressing for the extension of the rule.³⁰ The actual case law was a hodge-podge of idiosyncratic exceptions for hair-dyes, scalp treatments, skin formulas and the like, and some pharmaceuticals.³¹ “Intimate bodily use” was a plausible fact-based link among these cases and, of course, was suggestive of the food cases in which bodily intimacy was a literal description of the problem. Some courts also had extended negligence liability through expansion of the *res ipsa loquitur* doctrine,³² although there remained substantial evidentiary limitations to consumer success employing *res ipsa*.

The simple desire of the Founders was to ease consumer recovery in cases of personal injury suffered from products which obviously had been mismanufactured. The concern of the important figures in the *Restatement* process — Prosser, Page Keeton, Malone, Noel, and some others — was a set of cases, not insignificant in number, in which consumers deserved automatic recovery for personal injury. For these cases, the warranty defenses of privity, notice, and election of remedies, as well as the reliance requirement for the advertising theory and the various limitations on negligence recovery, were all inapposite and counterproductive.

The cases for which the Founders believed consumers deserved automatic recovery are what we now call manufacturing or production defect cases in which the injury to the consumer was caused by a deviation from the manufacturer’s own standards of production or quality control. We shall see in a moment that the *Restatement* and its Comments make sole reference to manufacturing defect cases. But there is abundant evidence of the Founders’ focus on manufacturing defects both in their contemporaneous writings explicating and justifying Section 402A and in their writings of the preceding decade as they argued that the limited treatment of manufacturing defect cases by warranty and negligence law needed to be changed.

The history of the progression of successive drafts of Section 402A through the *Restatement* process is well-known.³³ The drafts attached strict liability³⁴ to, respectively, “food for human consumption” (1961 draft); “food for

30. See William L. Prosser, *Handbook on the Law of Torts*, 1941, 1955 editions.

31. For a review of the case law, see Priest, *Invention*, *supra* note 19.

32. See California, in particular, reviewed in Harry Kalven, Jr., “Torts: The Quest for Appropriate Standards,” 53 *Calif. L. Rev.* 189 (1965).

33. See Priest, *Invention*; Herbert W. Titus, “*Restatement (Second) of Torts* Section 402A and the Uniform Commercial Code,” 22 *Stan. L. Rev.* 713, 756 (1970).

34. Liability though “the seller has exercised all possible care.” See Tent. Drafts No. 6 (1961); No. 7 (1962); and No. 10 (1964).

human consumption or other products for intimate bodily use” (1962 draft); and “any product” (1964, final draft); where such products are both “defective and unreasonably dangerous.”³⁵ The task of the Founders was to explain why application of the strict liability standard turned on the defective character of the product³⁶ and what the term “defect” was to mean.

Prosser’s important article “Assault upon the Citadel” in 1960 presented the outline of the approach.³⁷ According to Prosser, the defect requirement simply introduced into law what had become the factual prerequisite for all negligence trials involving product injuries. In a negligence trial, Prosser asserted, the plaintiff must prove two points: first, “that his injury has been caused by a defect in the product”; second, “that the defect existed when the product left the hands of the defendant.”³⁸ The strict liability standard that Prosser was proposing only acknowledged more explicitly what was a reality at trial. As a consequence, Prosser believed, the standard of strict liability for product defects introduced very little change in the law. Indeed, Prosser claimed that strict defect liability was essentially the equivalent of negligence: “an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not.”³⁹ As we shall see, the principal difference Prosser sought to achieve through strict liability was the defeat of the various warranty defenses described above.

Throughout his writings, Prosser simply presumed that the definition of “defect” was uncontroversial; he never discussed the concept at any length.⁴⁰ His subordinates, however, thought it necessary to explicate the concept. Page Keeton, in a series of overlapping articles written during the progression of *Restatement* drafts, explained what the defect requirement was meant to achieve. According to Keeton,⁴¹ there are fundamentally two types of product

35. See sources cited *supra* note 33.

36. As we shall see, and as is well-known, the “unreasonably dangerous” requirement was meant to limit the extent of strict liability.

37. William L. Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer),” 69 *Yale L.J.* 1099 (1960).

38. *Ibid.* at 1114.

39. *Ibid.*

40. *But see* text accompanying notes 78–80, *infra*, where Prosser’s interpretation of “defect” can be inferred from the examples that he chose in the Comments to Section 402A.

41. Keeton’s most extensive substantive discussion of the defect requirement appeared in 1963: Page Keeton, “Products Liability — Liability Without Fault and the Requirement of a Defect,” 41 *Tex. L.Rev.* 855 (1963), following two earlier articles, the first praising

defects. The first is where the plaintiff's injury results from an "ingredient or condition of the product" of which the manufacturer was unaware at the time of sale. "In this situation, the product was different from products of like kind. There was a miscarriage in the manufacturing process or something deleterious in the product" (citing spoiled foodstuff cases).⁴² Defects of this nature, of course, are now known as manufacturing defects.

The second fundamental category, according to Keeton, consists of defects which the manufacturer knows about at the time of sale. Keeton, however, is not referring to what we now call design defects. Keeton describes cigarettes or cosmetics or pharmaceuticals as examples of this second category — products known to contain ingredients that will harm some set of consumers, but whose harmful ingredients cannot be eliminated. Here Keeton is referring to what have come to be known as unavoidably unsafe products. Keeton presents as examples, drugs or cosmetics that are safe and effective for most users, but harmful to some small set with allergies or particular sensitivities to some of the product's ingredients.⁴³

According to Keeton, strict liability is only appropriate for the first category of defects (manufacturing defects).⁴⁴ Keeton's discussion of the second defect category (unavoidably unsafe products) consists of a review of the cigarette litigation showing that there had been no cases in which cigarette manufacturers had been held liable — to him, for good reason: the risks of cigarette use were as well-known to the user as to the manufacturer. Keeton does cite some cosmetic cases in which manufacturers had been held liable for allergic reactions, but only where "an appreciable number," as opposed to a small minority, of consumers had suffered the reaction.⁴⁵ Cases involving defects of this nature, Keeton concludes, must be governed by a negligence or fault standard. The number of individuals affected was a measure of the manufacturer's fault. The issue in such cases was whether the number of individuals adversely affected by the product was sufficient to

the expansion of the implied warranties: "Products Liability — Current Developments," 40 *Tex. L. Rev.* 193 (1961); the second, urging the shift from proof of negligence to the simpler proof of defect: "Products Liability — Proof of the Manufacturer's Negligence," 49 *Virg. L. Rev.* 666 (1963).

42. Keeton, "Products Liability — Liability Without Fault and the Requirement of a Defect," *ibid.* at 859.

43. *Ibid.* at 859–72.

44. *Ibid.* at 859–63.

45. *Ibid.* at 863–72.

regard the product as “unreasonably dangerous,” the second of Section 402A’s requirements.⁴⁶

Of the Advisers of the *Restatement* project, Keeton’s was the most explicit discussion of Section 402A’s defect requirement. It is very clear from his approach that the Founders’ conception of the defect standard was far different than that prevailing today. At that time there was no thought of strict liability for design defects. Indeed, Keeton in 1963 did not recognize design defects as a separate defect category.

This should not suggest that the problem of design-related product injuries was unknown to scholars of the time. Rather, from my research, it was the unanimous view that design problems should be governed by the negligence standard. Fleming James’ 1955 survey of products liability, though tentatively suggesting movement toward strict liability, discussed design questions solely in terms of negligence.⁴⁷ More significantly, Dix Noel, who concentrated his work in the field on the design problem, wrote three articles between 1962 and 1966 on product design and in each presumed that the negligence standard was the most appropriate way of considering the design issue.

Noel’s 1962 article in the *Yale Law Journal* was published at the midpoint of the *Restatement* process.⁴⁸ Noel distinguishes four types of design failures that could lead to consumer injury: concealed dangers (giving as an example, an aluminum lounge chair with a hinge that amputates a consumer’s finger); the failure to provide available safety devices; defective composition, for example in the choice of materials for an alloy; and, later, failure to provide adequate warnings or instructions.⁴⁹ According to Noel, the legal question appropriate for each of these design categories is whether the design made the product unreasonably dangerous. The court must look to the knowledge of the manufacturer at the time of production, the alternative design methods available, and the quantum of danger, all considerations traditional to negligence.

At the end of the article, Noel reviews the potential application to design cases of Section 402A’s strict liability standard — then proposed only for

46. *Ibid.* at 870.

47. Fleming James, Jr., “Products Liability,” 34 *Tex. L. Rev.* 44, 192 (1955). Compare, especially, pages 50–55 and 66–68.

48. Dix W. Noel, “Manufacturer’s Negligence of Design or Directions for Use of a Product,” 71 *Yale L.J.* 816 (1962).

49. *Ibid.*

defectively prepared food.⁵⁰ What he sees are largely problems. He sarcastically asks whether the strict liability standard could be invoked against cigarette manufacturers for defective cigarette design. The tone of the rhetorical question is so incredulous that the question is not worth an answer.⁵¹ He then puts an example of an airplane, designed by the best experts available, that after deployment develops unsuspected tensions which cause a wing to be torn off. He presumes that a simplistic reading of the *Restatement's* strict liability standard could regard the plane's design as defective and unreasonably dangerous. But, again, he is incredulous of the result, arguing "it is not clear that passengers in such a plane... should reasonably expect that it will be free even from flaws not yet discovered by any of the leading experts in the field."⁵² Noel questions whether strict liability is a useful way of resolving design defect cases, concluding that negligence principles including contributory negligence — though at odds with the strict liability approach — must continue to be dominant.⁵³

Despite the extension in fact of strict liability in succeeding years — to products for intimate bodily use and then to all products — Noel continued to insist on negligence as the standard appropriate for design-related injuries. In a 1965 article in an important *Southwestern Law Journal* symposium on products liability, Noel again describes strict liability as applicable solely to manufacturing defect cases.⁵⁴ Even later in 1966, after the successful adoption of Section 402A, Noel again presumes the negligence standard controls design problems.⁵⁵

Noel's presumption that strict liability applies only to manufacturing defects and not to design-related defects was not unique. Each of the central

50. *Ibid.* at 877.

51. *Ibid.*

52. *Ibid.* Noel adds offhandedly that "perhaps liability in this situation would be a useful means of spreading the loss." But Noel doubts the utility of even the loss-spreading policy: "that holding might unduly discourage the development of useful new products." *Ibid.*

53. *Ibid.* at 877–78. There is a hint in Noel's article of criticism of strict liability on any terms and resentment of the *Restatement* group. Noel was not an Adviser to the *Restatement* on Section 402A.

54. Dix W. Noel, "Recent Trends in Manufacturers' Negligence as to Design, Instruction or Warnings," 19 *Southwestern L.J.* 43, 44 (1964). Note that this is the same Symposium at which Wade, also concluding that strict liability applies only to manufacturing defects, presents his first articulation of the risk-utility test appropriate for design defects. See *infra*, text accompanying notes 91–95.

55. Dix W. Noel, "Manufacturers' Liability for Negligence," 33 *Tenn. L. Rev.* 444 (1966).

figures of the *Restatement* project seems to have shared this view. John Wade, for example, whose work in later years would become influential in the design defect field, at the origin of Section 402A defined “defect” as manufacturing defect. In the 1965 *Southwestern* symposium, whose papers were presented just prior to the ALI’s final adoption of Section 402A, Wade describes the defect requirement in terms identical to those of Page Keeton, discussed above.⁵⁶ A defect under Section 402A, according to Wade, is “a mistake in the manufacturing process, for example, the product was adulterated or one of its parts was broken or weakened or not properly attached...”⁵⁷ Strict liability can be defended, Wade argues, because for products of this nature, “there is no need of proving fault in [the manufacturer’s] letting it come to be in that condition.”⁵⁸

Like Keeton, Wade believes that more difficult problems arise where the product does not deviate from the manufacturer’s specifications or quality standards, but still proves to be dangerous — that is, where the product is unavoidably dangerous or incorporates a dangerous design. Again, to Wade, the question in these cases is whether the product is “unreasonably” dangerous. Wade concedes that the term “defect” could be defined to embrace such cases.⁵⁹ But he claims that the effort to do so is likely to prove misleading.⁶⁰ The issue according to Wade is centrally one of the manufacturer’s conduct: did the manufacturer act reasonably in putting the product on the market? “This, it would seem, is another way of posing the question of whether the product is reasonably safe or not. And it may well be the most useful way of presenting it.”⁶¹ Wade directly responds to the allegation that strict liability in cases of this nature has no meaning independent of negligence. “It may be argued that this is simply a test of negligence. Exactly.”⁶²

Roger Traynor also shared the view that strict liability in Section 402A was only applicable to manufacturing defects. Traynor’s opinion on this issue has been misunderstood, in part because the first legitimate strict liability case, *Greenman v. Yuba Power Prods., Inc.*⁶³ would be classified

56. John W. Wade, “Strict Tort Liability of Manufacturers,” 19 *Southwestern L.J.* 5 (1965).

57. *Ibid.* at 14.

58. *Ibid.*

59. *Ibid.* at 15 and at n. 53.

60. *Ibid.*

61. *Ibid.* at 15.

62. *Ibid.* at 15.

63. *Supra* note 4.

today as a design defect case and, in part, because Traynor was one of the first to seriously consider the difficult questions involved in extending strict liability to design defect cases, as I shall discuss below. But there is no doubt that Traynor was thinking of manufacturing defect cases when he articulated the strict liability approach. In his famous 1965 article, "The Ways and Meanings of Defective Products in Strict Liability,"⁶⁴ Traynor defines a "defective product" as one which fails to match average product quality or one which deviates from the product norm.⁶⁵

It is clear that Traynor has manufacturing defects in mind here. Traynor continues in the article to discuss problems with the "deviation from the norm" standard. What are the problems? According to Traynor, the deviation from the norm standard is *overly* inclusive; it goes too far.⁶⁶ Again, as with Keeton and Wade, Traynor is concerned that the defect rule might be applied to unavoidably unsafe products, such as blood or pharmaceuticals. Traynor does not suggest how he would approach such products: his article was meant to be provoking; he presents a series of difficult problems, but provides no answers to them. (Of course, he was a sitting judge at the time.) But it is clear that he does not regard simple strict liability for defective products as an answer. Strict liability is an answer only to the less complex question raised by manufacturing defects. And interestingly, Traynor describes *Greenman* as a manufacturing defect case.⁶⁷

In retrospect, the Founders' commitment to strict liability for only manufacturing and not for design defect cases should not be surprising. Recall the importance to the Founders of the food cases as precedents for the application of strict liability. The food cases, of course, are quintessential examples of manufacturing defect cases. The issue in the food cases is whether there is some unexpected and harmful ingredient that was mistakenly introduced into the food product or whether the processor's quality control efforts failed to detect spoilage. There is never an issue of defective recipe. Strict liability for food cases has nothing to do with design.

64. Roger J. Traynor, "The Ways and Meanings of Defective Products in Strict Liability," 32 *Tenn. L. Rev.* 363 (1965).

65. *Ibid.* at 367.

66. *Ibid.* at 367-68.

67. *Ibid.* at 367. Note that Traynor's description of *Greenman* has been ignored in the expansion of strict liability. *Greenman* itself refers to the application of strict liability for defects "in manufacture or design." 377 P. 2d 897, 898 (1963). Even Traynor did not address this discrepancy in description, again in my view, because none of the Founders at the time had focussed clearly on design problems as "defects."

If the ambition of the Founders was no more than strict liability for manufacturing defects, it becomes easier to see the nature of the Founders' objections to existing warranty and negligence law. It is also easier to comprehend why the Founders thought it was perfectly appropriate to accomplish the change in the law by the *Restatement* process, rather than through more comprehensive and democratically legitimate legislation.

The Founders objected to the warranty and tort law limitations on consumer recoveries because, in the context of manufacturing defect cases, each of the limitations seemed to operate as a legal technicality, without purpose and indifferent to the underlying merits of the claim. The arguments raised here are now familiar. Where a product because of mismanufacture has injured someone, why should it matter whether the injured person had or had not personally paid the money for the product to become in privity of contract with the seller?⁶⁸ As long as statutes of limitations had not run, why should it matter whether the consumer had delivered some intermediate notice of breach?⁶⁹ The potential injustice from the operation of the election of remedies section was obvious. The most telling example was one in which the consumer had received in reimbursement a new product or return of the purchase price, but had suffered serious personal injury and was barred from recovery by the election requirement.

The limitations on the other grounds of recovery were no better. Again, where a manufacturing defect had injured a consumer, why should the victim be forced to parse the manufacturer's advertising copy and, in addition, prove that he or she had specifically relied on the advertisement in purchasing the product?⁷⁰ Similarly, why distinguish between "imminently dangerous" products and others, where the product deviated from the manufacturer's own standards?⁷¹

Where the source of the injury is a deviation from the manufacturer's own manufacturing and design standards, the various limitations on consumer recovery are very difficult to defend. They operate solely as legal technicalities, defeating the just expectations of every party to the transaction. If the manufacturer itself must concede that the product was defective and caused injury, how can one justify invocation of the privity

68. James, "Products Liability," 34 *Tex. L. Rev.* 192, 193 (1955).

69. *Ibid.* at 206.

70. *Ibid.* at 196.

71. *Ibid.* at 227.

defense, or the notice of breach defense, or the election of remedies defense? Why should only manufacturers of foodstuffs and hair-dyes bear special responsibilities?⁷²

The various defenses can be easily justified in other contract and tort contexts. In the context of manufacturing defects, however, these defenses cannot be justified by even the most basic concepts of contract and tort law. The privity of contract rule, for example, makes good sense in contexts involving explicit negotiation over contractual responsibilities at the various stages of transfer from manufacture to sale of the finished product.⁷³ But there is surely no explicit negotiation in the context of the typical consumer purchase.⁷⁴ Similarly, the requirement that the complaining party notify of a claim of contract breach is a useful rule both in contexts of continuing contractual performance over time and where it is possible for the performing party to mitigate loss from the breach by cure or otherwise. But, again, where a consumer suffers personal injury from a manufacturing defect, the independent notice requirement has no function whatsoever. The advertising reliance requirement and the various limitations of negligence recovery make just as little sense for manufacturing defect cases.

It should be emphasized that these objections to the various defenses of consumer recovery were not at the time related to concerns about the empirical dimension of the problem. The election requirement of Section 69, for example, may have influenced pleadings, but there was never an empirical demonstration that the Section had been strictly interpreted to substantially defeat consumer recoveries. Similarly, the notice requirement seems egregious on paper in manufacturing defect cases. But it is difficult to find cases in which it was actually invoked to prevent consumer recovery. The reliance requirement regarding advertising and the various limitations on negligence recovery were, perhaps, more significant. But none of the Founders ever believed that the problem of consumer product injuries was a significant one for society. In contrast to automobile or workplace injuries,

72. See Fleming James, Jr., "General Products — Should Manufacturers be Liable without Negligence?" 24 *Tenn. L. Rev.* 923 (1957).

73. *Winterbottom v. Wright* is a perfect example: the legal obligations of the postmaster, the employee and the manufacturer had all been negotiated separately. For a further discussion, see Epstein, "Products Liability as an Insurance Market," 14 *J. Legal Studies* 645 (1984).

74. This, of course, was the point made vividly (in my view, too vividly) in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

consumer product-related injuries represented a relatively minor field. Correcting and revising the law for the field constituted a technical improvement in the law, rather than an important advance in social justice.

The intent of the Founders, thus, was largely to clean up an area of law where the more general rules of contract and tort did not quite fit. Changing the grounds for recovery for injuries caused by manufacturing defects was a reform that could command — as it did — widespread support. The reform generated little objection and no principled objection.⁷⁵ Indeed, because the *Restatement* project sought no more than to correct a set of technical flaws in the law, it could be implemented directly by lawyers. There was no need to consult with the interest groups affected,⁷⁶ whether manufacturers or consumers, or to seek legislative authorization for the change.

B. What the Founders Achieved: Section 402A and its Comments

Section 402A and its Comments make very clear that the strict liability standard was to apply chiefly to manufacturing defects.⁷⁷ The text of the Comments strongly supports that interpretation. More significantly, in the many illustrations of how strict liability was to be applied, there is not a single clear example of application of strict liability to design defects. There are many additional passages which, concededly, are susceptible to more expansive interpretations of strict liability. Indeed, it is the open-ended character of these passages that has led to the vast expansion of modern law.

Section 402A attaches strict liability to anyone who sells a product “in a defective condition unreasonably dangerous” to user or consumer. The operative definitions of the “defective condition” and “unreasonably dangerous” requirements in the Comments mirror the analysis of the scholarly writings of Prosser, Keeton and Wade, described above.

The concept “defective condition” is defined in Comment g affirmatively, and in Comment h negatively. Comment g provides that a “defective condition” is one “not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” This definition is not sufficiently specific

75. Manufacturing interests never seriously objected to the change in the law.

76. At the 1962 Meetings of the American Law Institute, the members entertained a statement by the pharmaceutical industry regarding strict liability for drugs, but without serious discussion. There were no industry presentations the next year when the Institute considered extending the strict liability standard to all products.

77. The Comments also refer tangentially to a manufacturer’s obligation to provide warnings. See *infra*, text accompanying notes 86–87.

to distinguish between manufacturing and design defects, a vagueness of substantial subsequent importance, as we shall see below.⁷⁸ Comment h provides that a “product is not in defective condition when it is safe for normal handling and consumption,” again ambiguous as between manufacturing and design defects.

A fuller description in Comment h, however, provides more detail as to the meaning of defective condition. According to Comment h, the defective condition of a product “may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way the product is prepared or packed.” The reference to the “quantity” of an ingredient may possibly be interpreted to incorporate a product whose design is defective because of excessive ingredient levels. Other than this vague reference, however, the description can only be read to refer to manufacturing defects.

The unreasonably dangerous standard is defined in Comment i. The Comment makes quite clear — as is well-known — that the unreasonably dangerous requirement was meant to serve as a limitation on liability when a product might cause harm, but the consumer was fully aware of the product’s harm-causing potential, such as in the familiar cases of tobacco and alcohol. The conceptual basis for the Comment was the distinction between manufacturing defects and unavoidably dangerous products, discussed extensively by Keeton and Wade, as described above.⁷⁹ The Comment, following Keeton and Wade, states directly that strict liability was not meant to apply to this category of defects.

The remainder of the Comments consist of elaborations of the history of strict liability, its scope in terms of potential defendants and plaintiffs, defenses, extensions and limitations. None of the other Comments directly addresses the defect requirement. But the Comments together provide the strongest evidence of the exclusive focus of the Founders on strict liability for manufacturing defects. The Comments present 54 separate examples (or sets of examples) of the types of cases to which the strict liability standard was meant to apply. Six of the 54 examples are unclear as to the character of the defect, most commonly because the example’s point is to illustrate that the scope of strict liability extends both to users and bystanders and against

78. See *infra*, text accompanying notes 96–97.

79. See *supra*, text accompanying notes 41–46.

all levels of sellers. Of the remaining 48 examples, 11 illustrate unavoidably unsafe products, exempted from strict liability. Thirty-seven examples remain: five represent exceptions which prove that strict liability applies to manufacturing defects; and the remaining 32 are each applications of strict liability in manufacturing defect contexts. The strongest evidence that the Founders focussed exclusively on strict liability for manufacturing defects is that they did not present a single example in the Comments of an alternative strict liability application.⁸⁰

The unanimity of approach of the examples demonstrates again the narrow focus of the Founders. It is clear that the Founders chiefly intended strict liability to apply to manufacturing defect cases. This implication is only bolstered by an earlier finding that the 40 cases that Prosser cited in the Appendix to Section 402A to support his claim that the various state courts were increasingly adopting strict liability were themselves each manufacturing defects cases.⁸¹ The novelty of the cases to Prosser was, most frequently, their relaxation of the privity of contract rule.

The Comments to Section 402A assume a new meaning when read from the manufacturing defect prospect. Comment n, addressing contributory negligence, for example, has always been difficult to understand and justify. Comment n provides that, since the liability of Section 402A is not based upon a seller's negligence, the consumer's contributory negligence will not generally be relevant.

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

80. I discuss the Founders' approach toward warnings, *infra* text accompanying notes 86–87.

81. Priest, Invention, *supra* note 19 at 514–516. I now include *Greenman v. Yuba Power Prods., Inc.*, given my new reading of Justice Traynor's interpretation of the case. See *supra*, text accompanying note 67.

The denial of traditional contributory negligence in Comment n has had two principal effects. First, it has inspired subsequent judicial efforts to define a legal regime for strict liability that is distinctively different than the negligence regime.⁸² Secondly, it has supported specific judicial rulings denying the relevance of consumer contributory actions in a wide range of products liability contexts.⁸³

The denial of contributory negligence is peculiar, however, because the strongest modern defense of strict liability has insisted on the vitality of the contributory negligence defense. In recent years, a group of lawyer-economists, led by Professors Shavell and Landes and Judge Posner, have trumpeted the economic efficiency of modern strict liability.⁸⁴ The efficiency claim, however, requires not only that contributory negligence be an available defense, but more centrally, that the consumer's contributory negligence be the effective basis for determining liability.⁸⁵

Comment n's approach to contributory negligence, however, becomes plausible once it is recalled that the Founders had meant strict liability chiefly to apply to manufacturing defect cases. In the context of a manufacturing defect, the ability of the consumer to contribute to the occurrence of the injury is very constrained. If the consumer is unaware of the defect inherent in the product, there is no range for contributory negligence. As directed by the Comment, only where the consumer has become aware of the defect, yet voluntarily proceeds to use the product, does the concept of contributory negligence have a place. As long as strict liability is applied only in manufacturing defect contexts, the denial of contributory negligence makes perfect sense, including perfect economic sense.

Section 402A's Comment j dealing with warnings and instructions has also seemed peculiar. Comment j provides that, in some cases, sellers can be required to give warnings or instructions as to product use. Comment j has

82. I discuss and criticize this different regime in Priest, "Products Liability Law and the Accident Rate," *supra* note 22 at 184 and Priest, "Modern Tort Law and Its Reform," 22 *Valparaiso University L. R.* 1 (1987).

83. See, e.g., *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163 (1972) and *McCown v. Int'l Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975) (both holding that contributory negligence is not an available defense in strict liability actions).

84. Steven Shavell, "Strict Liability versus Negligence," 9 *J. Legal Stud.* 1 (1980). Landes & Posner, "A Positive Economic Analysis of Products Liability," 14 *J. Legal Stud.* 535 (1985).

85. See discussion of this point in Priest, "Products Liability Law and its Effect on the Accident Rate," *supra* note 22.

been the source of the extraordinary explosion of defective warning law in the years following Section 402A's adoption.⁸⁶ Yet the illustrations to Comment j all are examples of Keeton's and Wade's second category of defects, unavoidably dangerous products, such as products to which some set of consumers is allergic or drugs for which some set of consumers is particularly susceptible.

Viewed from the perspective of the Keeton and Wade writings on this subject, Comment j represented a small step toward addressing consumer losses which otherwise were denied under the Founders' strict liability approach. According to Comment j, though generally free from liability without negligence, a manufacturer knowing that there exists some set of consumers particularly susceptible is required to provide a warning reporting the product's ingredients.

As the writings of Keeton and Wade make clear, however, the warning requirement placed upon manufacturers was meant to be modest. And Comment j closes with a paragraph that, in retrospect, emphasizes how modest that burden was to have been, but that in the subsequent elaboration of strict liability has been the source of a vast expansion in warning liability. Comment j reads: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

In years subsequent to the adoption of Section 402A, this paragraph has been interpreted by courts to eliminate the necessity on the part of consumers to prove causation: that the absence of a product warning in fact caused the injury suffered by the consumer.⁸⁷ Its original meaning, however, is entirely different. The writings of Keeton and Wade and Noel, from which the warning requirement derived, show that, far from a source of expanded liability, the paragraph was intended to constrain the manufacturer's warning duties. The paragraph was meant to qualify the warning obligation to the bare provision of the warning in some form. The intent of the paragraph was to suggest that the manufacturer was not to be made liable if the consumer failed to read the warning. Nor was it necessary for the manufacturer to devise ways to ensure that the reader would see and appreciate the warning's

86. For a review of this case law, see Priest, *Invention*, *supra* note 19 at 523–525.

87. See, e.g., *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974).

contents. As long as a warning existed in some form, the manufacturer's duties were discharged.

C. Strict Liability Led Astray

As is well-known, neither strict products liability nor the extension of the strict liability approach in other legal areas has followed the course the Founders intended. Strict products liability has not been limited to manufacturing defect cases. And the broader influence of the strict liability idea extends far beyond the limited contexts of defensible automatic recovery that the Founders envisioned.

As the Founders expected, the application of strict liability to manufacturing defect cases signalled no revolution. Prosser had suggested only one case of a hundred would be decided differently; of manufacturing defect cases, he was probably accurate. It was very quickly perceived, however, that the product defect problem was more complicated than originally thought. Roger Traynor's 1965 article, discussed above, was suggestive of some of the problems.⁸⁸ Although the principal point of the article was the reaffirmation of strict liability for manufacturing defects, Traynor probes the problem of dangerous design. He is clearly not prepared to advocate strict liability in the design context, but he is uneasy with the lack of an obvious analytical approach.

At roughly the same time, Ralph Nader began his attack on design problems in American automobiles. In a 1965 article, Nader argued that legal liability should serve as a deterrent against harm-causing manufacturer design.⁸⁹ It is an important index of the times, however, that the liability Nader was recommending for these cases was negligence liability. Two years later, however, Nader focussed his views. In a 1967 article with Joseph Page, Nader strongly criticized the "deviation-from-the-norm" defect standard that Justice Traynor had recommended in 1965, urging the application of strict liability to design-related injuries.⁹⁰

At about the same time, John Wade began to appreciate the product design issue.⁹¹ Wade initially insisted upon retaining the strict liability

88. Traynor, *supra* note 64.

89. Ralph Nader, "Automobile Design: Evidence Catching Up With the Law," 42 *Den. L. Center J.* 32 (1965).

90. Ralph Nader & Joseph A. Page, "Automobile Design and the Judicial Process," 55 *Calif. L. Rev.* 645 (1967).

91. Wade, "Strict Tort Liability of Manufacturers," 19 *Southwestern L.J.* 5 (1965).

standard for manufacturing defects alone.⁹² With respect to other forms of defects, like design defects, Wade began to devise a way to apply the negligence standard. Wade built from Sections 291–293 of the 1934 *Restatement of Torts*. These Sections had been the source of Learned Hand's famous *Carroll Towing* decision in which Hand proposed a form of cost-benefit analysis for the determination of negligence.⁹³

Wade attempted to adapt the cost-benefit approach for the determination of negligent product design. He proposed seven factors relevant to the evaluation of a manufacturer's design negligence. Regrettably, Wade did not follow the *Restatement* approach with much care. The *Restatement* Sections had clearly indicated that the cost-benefit calculus was to be conducted against alternative available actions that the defendant might have taken. If Wade had appreciated this point, his cost-benefit test — which he deemed “balancing the utility of the risk against the magnitude of the risk”⁹⁴ — the elements of his approach would have focussed closely on alternative designs available to the manufacturer. Wade, more broadly, incorporated elements that included the utility of the product as a whole against the product risk. Some years later, he modified his risk-utility test to also incorporate insurance considerations in what has now become the dominant standard for evaluation of design defects.⁹⁵

The efforts to define a sensible strict liability standard for the design-related injury problem proved exceptionally difficult. Many courts, especially in the early years following adoption of the *Restatement*, drew upon the references in Comments g and i to consumer expectations of product dangers. The consumer expectation language had been inserted in the Comments to reinforce the contributory negligence-assumption of risk proposition of Comment n: that the only manufacturer defense to strict liability (again, given the expected manufacturing defect context) was the consumer's voluntary decision to use the product though aware of the defect. Extended as a standard of design defects, the consumer expectation language vastly increased manufacturer liability, since it was a standard virtually without

92. *Ibid.*

93. *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947).

94. *Supra* note 91 at 17.

95. John W. Wade, “On The Nature of Strict Tort Liability for Products,” 44 *Miss L.J.* 825, 837–38 (1973). Wade's new set of factors continued to number seven, because he combined two of the previous factors dealing with consumer awareness of injuries.

content.⁹⁶ Wade's risk-utility test also proved to lack specific content. The various factors are redundant and suggestive that any fact related to the product is relevant for resolution of the design question.

Except for manufacturing defect cases, then, the legacy of the *Restatement* and its Comments was uncertainty. The Comments were read generally to deny the relevance of manufacturer defenses. They were read to expand, rather than to constrain, manufacturer liability for defective warnings. They provided no definitive guidance as to sensible standards for design defects.

It was at this point that the broader intellectual currents of risk distribution and cost internalization began to influence the direction of the law. As I have shown elsewhere, the evolution of standards in both design and warning cases has been strongly directed by the concepts of risk distribution and cost internalization.⁹⁷ The direction of this influence has been toward absolute liability. The Founders stated with great emphasis that the strict liability standard that they were proposing stopped far short of absolute liability. Understood in context, I believe that the Founders meant what they said. The Founders failed to understand, however, that the *Restatement* Section and the Comments that they drafted were not sufficiently specific to constrain the influence of the ideas of risk distribution and cost internalization that had dominated the legal landscape for the preceding thirty years.

III. The Implications of the *Restatement* Experience

A. *The Expansion of U.S. Liability and the European Parallel*

The extraordinary expansion of civil liability in the United States has not derived from the doctrinal adoption of the standard of strict products liability itself, but from acceptance of the premises underlying strict liability. Although the Founders of strict liability had narrow objectives, their broader justification of strict products liability dictated its expansion. Strict products liability is based upon two central presuppositions.⁹⁸ First, manufacturers or other corporate injurers are in a better position than victims to prevent

96. The employment of the standard is described in Priest, "The Disappearance of the Consumer from Modern Products Liability Law," in *The Frontier of Research in the Consumer Interest* (1988) 771, and Priest, "Products Liability Law and the Accident Rate," *supra* note 22 at 184.

97. Priest, *Invention*, *supra* note 19.

98. *Greenman v. Yuba Power Prods., Inc.*, *supra* note 4.

injuries; thus, strict defendant liability will create incentives to reduce the accident rate. Second, accidents that cannot be prevented can only be insured against. It was believed that corporate injurers are also in a relatively better position than victims to purchase insurance for unpreventable injuries. Tort liability will provide victims a form of compensation insurance whose premiums can be passed along in the product or service price.

Together, these two premises of strict liability account for almost all important civil law decisions in the United States over the last two decades. Not limited to the products field, these premises have come to influence all of U.S. civil law and now serve as the interpretive basis even for responsibility based on negligence.⁹⁹ U.S. civil law is largely common law. The expansion of civil liability since the mid-1960s has consisted of the aggregation of thousands of individual judicial decisions based upon these premises, each plausible in the context of the individual case, but with increasing cumulative effect on U.S. product and service sectors.

To understand the current crisis in U.S. civil law, it is important to recognize that these two premises lead inexorably toward absolute injurer liability. The reason is clear. If it is accepted — as it must be — that the principal effects of a legal rule are to create incentives to prevent accidents and to provide insurance for accidents that cannot be prevented; and if it is believed that manufacturers and other corporate defendants are *always* in the better position both to prevent accidents and to insure for them; then it follows that corporate defendants ought always to be liable. The expansion of civil law toward absolute liability is a direct implication of the acceptance of the premises of strict liability in a context in which the controlling legal rule provides little guidance as to its interpretation.

There is an important implication of the U.S. experience for the future of strict products liability in Europe and in Israel. The doctrinal formulations of strict liability for defective products both in the Directive of the Council of the European Communities and in the Israeli Defective Products (Liability) Law¹⁰⁰ are as loose and open-ended as the original formulation in Section 402A of the U.S. *Restatement*. The European Directive provides in Article 6 that “A product is defective when it does not provide the safety which a person is entitled to expect...”¹⁰¹ The Israeli statute provides in Section 3 (a)

99. See Priest, *supra* note 1.

100. *Supra* note 1.

101. *Supra* note 1.

that “A product is defective if (1) it is likely to cause personal damage owing to a defect therein...”¹⁰²

These definitions of “defect” provide even less guidance to judges than the interpretive Comments to Section 402A. As described above,¹⁰³ Section 402A initially proposed reference to consumer expectations for the definition of when a product causing injury was to be regarded as defective. Over the years, the consumer expectations test for a defective product has been generally supplanted by the risk-utility test because court after court has discovered the consumer expectations standard to be largely unhelpful. At one extreme, since no consumer actually expects to be injured, the consumer expectation test can stand for absolute manufacturer liability. Yet, if courts, resistant to absolute liability, attempt to determine the content of consumer expectations, in particular in cases involving complicated products, they have found that consumers have no detailed expectations on which the court might rely.¹⁰⁴

In this respect the European and Israeli definitions of defect are equally unhelpful. The European standard refers not even to definable consumer expectations, for which some evidence might be introduced, but rather to the safety a person “is entitled to expect.” The Israeli standard, almost circularly, defines a product as defective if it “is likely to cause personal damage.” If in an individual case, the standard is applied to the generic product, the court is left with some judgment of that level of probability sufficient to generate strict liability; on the other hand, if the standard is applied — as an American court sensitive to the existence of manufacturing defects would apply it — to the specific item used by the consumer, then the standard implies absolute liability since the particular item that caused the damage generating the lawsuit was surely “likely” to cause damage.

Like the *Restatement* in the U.S., both the European and Israeli standards will require substantial interpretation by courts. What is the level of safety a consumer is “entitled to expect”? How likely must an injury be for a product to be regarded as defective? It is with these questions of interpretation that the similarity of the U.S. and the European and Israeli positions becomes

102. More, *supra* note 1.

103. See *supra*, text accompanying note 77.

104. For further discussion, see Priest, “The Disappearance of the Consumer From Modern Products Liability Law” in *The Frontier of Research in the Consumer Interest*, *supra* note 96 at 771.

most clear. As in the United States, European and Israeli judges will be compelled to determine the policies that lie beneath the strict liability standard in order to make sense of the vague statutory prescriptions. If these judges accept the underlying premises of U.S. strict liability — that manufacturer liability will best control the accident rate and provide compensation to victims — the U.S. civil law experience is likely to be replicated.

B. The Counterrevolution of U.S. Civil Law

Within the past two years, there has occurred the beginnings of a counter-revolution in civil law in the United States. Largely in response to the recent crisis, and the resultant awareness that there are limits to the extent to which a common law system can provide comprehensive accident insurance in all areas of American life, both legislatures and courts have begun to roll back the expansion of liability and to reconsider new premises on which to base civil law.

As mentioned earlier, since 1985, legislatures of 39 of the 50 states have enacted some version of “tort reform” legislation.¹⁰⁵ Most commonly, these statutes are modest in ambition, though they are notable, at the least, as an expression of legislative dissatisfaction with the judicial trend. Many statutes provide specific immunities or standards of limited responsibility for municipalities, non-profit organizations, boards of directors and other groups particularly hard-hit by the crisis. Many statutes penalize frivolous litigation and place limits on punitive damages. Some statutes, significantly, place maxima on pain and suffering damages and abrogate the rule of joint and several liability. In some instances, state courts have held these statutes to violate state constitutional rights,¹⁰⁶ although in most cases courts have approved them.¹⁰⁷

There have been two recent developments, however, of extraordinary significance to the counterrevolution in civil law. Within the last year, there has been a major reorientation of civil law in both New Jersey and California, the two states which, prior to the recent crisis, had inspired and led the expansion of liability among the various states.

105. This legislation is reviewed in Priest, *Insurance Crisis*, *supra* note 2.

106. See *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987).

107. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P. 2d 665, 211 Cal. Rptr. 368 (1985) *cert. denied*, 474 U.S. 892 (1985).

In 1987, the New Jersey legislature enacted a comprehensive products liability statute which sharply alters manufacturer liability. New Jersey, of course, had been a leader in the development of modern products liability law from its earliest beginnings. It was the New Jersey Supreme Court in 1960, in the seminal case *Henningsen v. Bloomfield Motors, Inc.*,¹⁰⁸ that definitively rejected principles of contract and warranty law for the resolution of product defect cases. And in subsequent years, the New Jersey Supreme Court continued this role of judicial leadership through influential decisions such as *Suter v. San Angelo Foundry & Machine Co.*,¹⁰⁹ *Beshada v. Johns-Manville*,¹¹⁰ and *O'Brien v. Muskin Corp.*,¹¹¹ all of which expanded the strict liability concept.

The recent New Jersey products liability statute, however, terminates this line of judicial development. The statute incorporates three important doctrinal innovations. First, the statute introduces a substantially restricted standard for design defects. The statute provides that a manufacturer is not liable unless there was a "practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product."¹¹²

This provision appears similar to what has become known as the "state-of-the-art defense," but it is different in important ways. The state-of-the-art defense is a doctrine such as that in the 1985 Directive of the Council of the European Communities, Article 7 (e), providing that the producer shall not be liable if he proves "that the state of scientific and technical knowledge at the time when he put the product into use was not such as to enable the existence of the defect to be discovered."¹¹³

108. 32 N.J. 358, 161 A. 2d 69 (1960).

109. 81 N.J. 150, 406 A. 2d 140 (1979) (holding defendant liable under comparative negligence despite plaintiff's contributory negligence). *See also Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 298 A.2d 281 (1972) (holding manufacturer's design negligence to outweigh plaintiff's contributory negligence).

110. 90 N.J. 191, 447 A. 2d 539 (1982) (denying state-of-the-art defense in failure to warn case on deterrence and risk-spreading grounds).

111. 94 N.J. 169, 463 A. 2d 298 (1983) (holding product (four-foot deep pool) can be unreasonably dangerous *per se* based on risk-utility analysis).

112. New Jersey Statutes Annotated, 2A: 58C-3.A. (1) (1987). The statute, however, also provides an exception to this provision: where the product "is egregiously unsafe or ultra-hazardous"; where the "ordinary user or consumer cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the consumer"; and the product "has little or no usefulness." N.J.S.A. 2A: 58C-3.B. (1987).

113. *But see* Article 15.1. (B), which empowers member states to derogate this defense.

The difference between this defense and the New Jersey standard is that the factual basis for the defense is knowledge while the factual basis for the New Jersey standard is a practically feasible alternative design. In the United States, "knowledge" has been imputed to manufacturers based upon simple references or intimations in the scientific or technical literature. Courts have not required that "knowledge" of potential harm represent clearly established or accepted propositions, but rather simply notice that a particular harm or effect may result from product use. In contrast, the requirement of the New Jersey statute that the existence of a practically feasible alternative design be established¹¹⁴ is likely to substantially restrict manufacturer design liability.

The second innovation of the New Jersey products liability statute is a rigorous stiffening of the requirements for establishing punitive damages. In recent years in the United States, there have been great increases in punitive damages awards. Almost all U.S. products liability claims filed today include a punitive damages count, based upon the plaintiff's hope that a jury might be incensed enough by the defendant's actions to award a large punitive amount. The New Jersey statute now requires that the trial of the punitive damages court be conducted separately from the trial on basic liability. This provision will keep some evidence of a manufacturer's alleged indifference to safety from influencing a jury's decision on basic liability. The statute also provides that a plaintiff can only recover punitive damages if it is established that the harm suffered resulted from the defendant's "actual malice" or "wanton and willful disregard" of consumer safety, defining "actual malice" as "intentional wrongdoing in the sense of an evil-minded act."¹¹⁵

The third feature of the New Jersey statute is its enactment into law of Comments i and k of the *Restatement (Second) of Torts* Section 402A exempting from liability harms that derive from an "inherent characteristic" of a product known to an ordinary consumer, and harms caused by "unavoidably unsafe" aspects of products.¹¹⁶ Prior to the statute, the New Jersey courts had not ruled clearly on the applicability of these exceptions to strict products liability. The exceptions are of particular importance in a

114. Whether the plaintiff or defendant bears the burden of proof under the New Jersey standard is quite unclear.

115. N.J.S.A. 2A: 58C-5 (1987).

116. N.J.S.A. 2A: 58C-3.A. (2) & (3) (1987). Note that the statute excepts from the "inherent characteristic" rule industrial machinery and equipment whose dangers "can feasibly be eliminated without impairing the usefulness of the product." N.J.S.A. 2A: 58C-3.A. (2) (1987).

growing number of suits against cigarette manufacturers,¹¹⁷ distillers, and handgun manufacturers, and in continuous litigation against pharmaceuticals with respect to the harmful side-effects of drugs. Pharmaceutical manufacturers are insulated in many other ways by the statute which establishes a presumption of adequacy of warnings approved by the U.S. Food & Drug Administration (FDA)¹¹⁸ and precludes punitive damages where drugs are FDA approved.¹¹⁹

The second development in the counterrevolution in U.S. civil law is even more significant because it comes from the California Supreme Court, the leading state appellate court in the United States. In a decision announced in April 1988, the Court held that claims regarding defective products against pharmaceutical manufacturers would henceforth be judged, not according to a standard of strict liability, but according to negligence.

This is a decision of extraordinary importance. It represents a retreat from strict products liability by a court, not a legislature. Legislative actions in the United States embody the law, but they are often suspect as representing the influence of political interests rather than defensible principle. Thus, the New Jersey statute, while of significant impact, is attributed by many to the political force of manufacturers and insurers, its principal proponents and beneficiaries.

The decision by the California Supreme Court, in contrast, cannot have been affected by such narrow political interests. More importantly, it is a decision by the very judicial body that first initiated strict products liability in 1963 in *Greenman v. Yuba Power Prods Inc.*,¹²⁰ and that (along with the New Jersey Supreme Court) has most extensively developed the strict liability concept. For example, the most widely accepted definition of the standard for strict design defect liability is that announced by the California Supreme Court in *Barker v. Lull Eng'g Co.*¹²¹ Similarly, the California Supreme

117. Indeed, a New Jersey federal court has recently ruled that the New Jersey statute precludes suit against cigarette manufacturers on a design defect claim. The Court, however, allowed the suit to continue on misrepresentation grounds, upon which the plaintiff subsequently recovered a small damage award, the first against cigarette manufacturers in the United States. *Cippilone v. Liggett and Meyers*, U.S. District Court, New Jersey (1988).

118. N.J.S.A. 2A: 58C-4.

119. N.J.S.A.2A: 58C-5.C. (1987), unless the drug manufacturer had withheld or misrepresented information to the FDA.

120. *Supra* note 4.

121. 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225 (1978) (two-pronged test:

Court has been responsible for innovative extensions of strict products liability, such as the market share doctrine in *Sindell v. Abbott Laboratories*.¹²²

The recent decision of the Court, *Brown v. Superior Court (Abbott Laboratories)*,¹²³ resolves questions left open in *Sindell*. The underlying suit is a class action involving claims by daughters of mothers who were given the generic drug DES to prevent miscarriage. The class of daughters claims that DES was defective because it caused them to suffer cervical cancers. In *Sindell*, the California Supreme Court ruled that, in the context of a generic product like DES, an injured victim need not identify the precise manufacturing source of the drug causing the injury,¹²⁴ but could recover and apportion damages according to the manufacturers' respective market shares. The issues in *Brown* involved whether, under market share liability, the basic standard should be strict liability or negligence (there was conflicting authority among the intermediate California appellate courts) and also whether the doctrine of joint and several liability should be applied to charge a single manufacturer with the entire judgment.¹²⁵

The Court ruled against the claimants on both issues. The Court held that pharmaceutical manufacturers can only be held liable for defects of which they had been aware or should have been aware, a standard it characterized as equivalent to negligence.¹²⁶ And it held that charging manufacturers for harms attributable to other producers under the doctrine of joint and several liability was fundamentally unfair.¹²⁷

product defective if violates reasonable consumer expectations or if it fails risk-utility test).

122. 26 Cal. 3d 588, 607 P. 2d 924, 163 Cal. Rptr. 132 (1980) (creating "market share" liability against manufacturers of generic drugs), *cert. denied*, 449 U.S. 912 (1980).

123. 245 Cal. Rptr. 412 (1988).

124. The drug had been taken by the mothers of the claimants. Factual identification of the source was extremely difficult, both because of the passage of time and because the generic drug had often been packaged by pharmacists, so that the mothers themselves had no information as to the precise manufacturer.

125. *Supra* note 2.

126. Note this is very similar to the state-of-the-art defense discussed above. The court invoked Comment k of the *Restatement (Second)*, Section 402A as the basis for the standard. Note also that the court explicitly rejected the consumer expectations standard of *Barker v. Lull Eng'g Co.* as inappropriate to prescription drug cases. 245 Cal. Rptr. at 419.

127. The Court explicitly recognized that this ruling places losses attributable to insolvent or absent manufacturers on the injured parties, rather than on the negligent manufacturers remaining in the case.

The Court expressly constrained the application of its ruling to prescription drugs. It is clear in its discussion of this point, however, that the recent product and service withdrawals as a consequence of the U.S. liability crisis had importantly influenced its approach. The Court was adopting the negligence standard, it stated, "because of the public interest in the development, availability and reasonable price of drugs... The possibility that the cost of insurance and of defending against lawsuits will diminish the availability and increase the price of pharmaceuticals," the Court added, "is far from theoretical." The Court listed several examples of specific drugs and vaccines that had been withdrawn from product markets for liability reasons in recent years. According to the Court, these product withdrawals, "from the public's standpoint ... are unfortunate consequences ... It is not unreasonable to conclude ... that the imposition of a harsher test for liability [than negligence] would not further the public interest in the development and availability of these important products."¹²⁸

Pharmaceuticals are important products in any society. Because they implicate health and longevity, their withdrawal from the market displays the effect of expanding liability with special sharpness. But if, as accepted by the California Supreme Court, the measure of the effectiveness of a liability rule is its effect on consumer welfare, then one cannot distinguish in principle the unavailability of pharmaceuticals from the unavailability of other products that consumers believe will improve their lives.

The crisis in U.S. civil law since 1985 has witnessed the withdrawal for liability reasons, not simply of pharmaceuticals, but of large numbers of products and services. The ambition of strict products liability is to remove from the market only those products that are excessively risky. But it is hard to believe that, suddenly in 1986, 47 percent of U.S. manufacturers discovered products to be excessively risky.

The California Supreme Court in *Brown* and the New Jersey legislature in its products liability statute have begun the reanalysis of the premises of strict products liability. It will be important to observe whether Israel and the European Community adopting strict products liability now, 25 years after the United States, will accept the original premises of strict liability which have led the U.S. into crisis, or will accept the counterrevolution.

128. 245 Cal. Rptr. at 418, 420-21.

