

1987

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Recommended Citation

David G. Owen, *Musings on Modern Products Liability Law: A Foreward*, 17 Seton Hall L. Rev. 505 (1987).

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MUSINGS ON MODERN PRODUCTS LIABILITY LAW: A FOREWORD

David G. Owen*

I.

Modern products liability law was born in 1960 with the decision in *Henningsen v. Bloomfield Motors, Inc.*¹ The New Jersey Supreme Court there held that manufacturers should be strictly liable, in warranty, to persons injured by defective products, regardless of the absence of contractual privity between the victim and the manufacturer, and despite the manufacturer's efforts to avoid responsibility for personal injuries by contractual disclaimers and limitations. This basic principle of "strict" manufacturer responsibility was followed, with a change of nomenclature from "warranty" to "tort," by the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*² and by the American Law Institute in Section 402A of the Second Restatement of Torts.³ Thus began the expansive development of strict products liability law. Throughout the decades of the 1960s and 1970s, the principles of strict products liability in tort spread like wildfire throughout the nation.⁴

One might have thought, at the inception of strict manufacturer liability in the early 1960s, that the law in this area—and at the very least, the meaning of the word "strict"—would have been worked out and settled down a quarter of a century later. But it has not. We have not decided what we mean, or even what we want to mean, by the phrase "strict liability." Thus, there remains much confusion in products liability law and, accordingly, much ground that needs further tilling in law journal symposia such as this.

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¹ 32 N.J. 358, 161 A.2d 69 (1960).

² 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

³ Section 402A of the Second Restatement of Torts was adopted in 1964 and published in 1965.

⁴ See, e.g., Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 681-82 (1980); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461, 518 (1985).

II.

Each article in this symposium adds helpful illumination to the perplexities of products liability law. The piece by Judge Dreier examines the defendant identification problem in cases of generic or homogeneous substances such as DES.⁵ Borrowing from the alternative liability and market share approaches of *Summers v. Tice*⁶ and *Sindell v. Abbott Laboratories*,⁷ Judge Dreier favors shifting the burden of proof on identification to defendants in such cases.⁸ The difficulties in attempting to distinguish "strict" liability from negligence in design and warnings cases are highlighted in Mr. Bromberg's essay.⁹ Mr. Burke's exhaustive article on the medical and legal aspects of the DPT vaccine, and the controversy surrounding the risks and benefits of the pertussis portion of the vaccine, is surely one of the most instructive expositions on a medical products liability topic ever published.¹⁰ In Mr. Edell's perceptive article on the application of risk-benefit principles to unavoidably unsafe products, the author nimbly examines the interrelationship of these two difficult issues.¹¹ The essay of Messrs. Epstein and Klein addresses the difficult problem of controlling abuses in expert testimony.¹² The symposium concludes with some helpful thoughts by Professor Schwartz,¹³ who has been at the center of federal products liability reform for a decade,¹⁴ and who argues cogently for a federal, legislative solution to some of the central issues in this area. Together, the pieces of this symposium substantially contribute to the development of the law of products liability.

⁵ Dreier, *Identification of the Defendant/Manufacturer in Generic Product Cases: Issues and Questions*, 17 SETON HALL L. REV. 513 (1987).

⁶ 33 Cal.2d 80, 199 P.2d 1 (1948).

⁷ 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

⁸ Dreier, *supra* note 5, at 523-25.

⁹ Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526 (1987).

¹⁰ Burke, *DPT Vaccine Controversy: An Assessment of the Liabilities of Manufacturers and Administering Physicians under Several Legal Theories*, 17 SETON HALL L. REV. 541 (1987).

¹¹ Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 SETON HALL L. REV. 623 (1987).

¹² Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656 (1987).

¹³ Schwartz, *Conclusion*, 17 SETON HALL L. REV. 677 (1987).

¹⁴ Professor Schwartz directed the work of the Federal Interagency Task Force in Product Liability, culminating in the publication in 1979 of the Draft Uniform Product Liability Law, 44 Fed. Reg. 2996 (1979), and the final Model Uniform Product Liability Act, 44 Fed. Reg. 62, 714 (1979).

III.

It is axiomatic, of course, that the very process of rational thought requires classification. Things and concepts must be grouped together for purposes of comparing and distinguishing other classifications of objects and ideas. So it is with legal reasoning, where rules are developed and defined for use in certain contexts, but not in others. So also is this true in products liability law, where the doctrines of warranty, negligence, and "strict" liability in tort are variously held to apply sometimes, but not others, to manufacturing flaw, design defect, and inadequate warnings cases.

Indeed, products liability law as a separate discipline owes its very existence to successful efforts to distinguish the manufacturer-consumer relationship from the ordinary commercial relationships of business transactions, where the principles of commercial warranty law ordinarily work quite well, and from the many diverse relationships of the law of torts, where the principles of negligence law have generally sufficed over the years.¹⁵ The essential premise of *Henningsen, Greenman*, and 402A was that a fundamentally new legal classification was needed to accomplish two basic objectives: (1) to create a more responsive and more efficient compensation system for persons injured by defective products, and (2) to reduce the toll of product accidents by further encouraging manufacturers to eliminate product hazards in the engineering, quality control, and marketing departments at the factory.¹⁶ And so was invented the law of strict liability in tort.

Many of the problems in products liability law today stem from difficulties with the basic premise that an entirely new theory of law, "strict tort liability," would better achieve the two basic goals than more modest changes in the law of negligence and in the law of warranty. One might well conclude, for example, that certain inadequacies of negligence law could have been re-

¹⁵ Other than the small pockets of substantive tort law concerned with intentional torts and strict liability for such limited activities as conducting ultrahazardous activities or keeping wild animals.

¹⁶ For simplicity, I have collapsed the conventional policies advanced over the years to support strict products liability in tort into the two conventional rationales. There are others that do not correspond closely with either of these two goals, notably, the representational and manufacturer power rationales, and the protection of individual autonomy. For a listing of the traditional objectives, see Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L.REV. 803, 809-10 (1976). For critiques of the conventional goals, see *infra* note 23.

dressed by replacing the contributory negligence defense, and possibly assumption of risk, with comparative fault. That is, of course, what has happened in the meantime.¹⁷ Moreover, a plaintiff's difficulties with proof of negligence might well have been assisted by a liberal use of the doctrines of *res ipsa loquitur* and negligence per se, and by shifting the burden of proof in certain situations from the plaintiff to the defendant. Many changes of this type have also been wrought in negligence law, both in and out of the products liability context, over the last couple of decades.¹⁸ The principal problems of warranty law in this context, as perceived by the courts and commentators of the early 1960s, were the obstacles of privity, disclaimers (and limitations), and notice.¹⁹ Although personal injury claims today still fit uncomfortably in warranty law, the Uniform Commercial Code²⁰ and the Magnuson-Moss Warranty Federal Trade Commission Improvement Act²¹ have helped the plaintiff surmount—not completely, but substantially—all three obstacles.

Thus, the most fundamental classification problem of strict tort products liability law is whether it should exist as a separate legal theory at all. Simply stated, one may fairly question whether the theory of strict liability in tort, with all its sub-doctrine, might better have been left uninvented. The most pertinent present inquiry may be whether strict liability in tort was originally extended too broadly over the entire field of products liability and whether it should now be prudently restricted to contexts more carefully defined.

A related aspect of this problem involves a closer considera-

¹⁷ See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d ed. 1986); W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 67 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

¹⁸ See generally *PROSSER & KEETON*, *supra* note 17, chapters 5, 6, 7, and 17.

¹⁹ See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960); *RESTATEMENT (SECOND) OF TORTS* § 402A comment m (1965).

²⁰ See U.C.C. §§ 2-316 (disclaimers), 2-318 (privity), 2-607 (notice), and 2-719 (limitations). Although these sections to some extent allow the use of disclaimers and limitations, and require privity and notice of breach, they are generally ameliorative of the pre-Code rules (except, notably, in New Jersey, which enacted the U.C.C. the year after *Henningsen* was decided). Moreover, judicial decisions interpreting the Code, particularly §§ 2-318 (privity) and 2-607 (notice), have often provided liberal protection for consumers suffering personal injury, as opposed to commercial plaintiffs suffering economic loss.

²¹ 15 U.S.C. 2301-12 (1975). For regulations under the Act, see Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. 701.1 to .4 (1987). Section 108 of the Act, 15 U.S.C. 2308, restricts the ability of suppliers of certain consumer products to disclaim implied warranties.

tion of the two broad goals sought to be achieved by the doctrine of strict liability in tort: compensation and safety.²² While there is hardly room in a preface of this type even to sketch the outlines of a proper critique of these original rationales, it should be noted that both the commentators and the courts have grown increasingly uncomfortable with the traditional objectives of modern products liability law. Probably the most devastating scholarly critique of the conventional goals is the powerful historical study recently published by Professor Priest.²³ Professor Priest's penetrating inquiry into the origins of modern products liability theory lays bare certain frailties in the underlying theories of risk distribution and manufacturer abuse of power.

In the judicial forum, the recent experience of the New Jersey Supreme Court has been the most dramatic, as well as the most instructive, judicial consideration—and reconsideration—of the goals and doctrines of modern products liability law. *Beshada v. Johns-Manville Products Corporation*,²⁴ decided in 1982, was perhaps the most forthright application of truly “strict” principles of manufacturer liability for the explicit purpose of advancing the conventional compensation (insurance, or “risk spreading”) and safety (deterrence, or “accident avoidance”) goals of modern products liability law. The context for examining the question of how strict “strict” liability should be could not have been worse, for one can hardly imagine a less plausible claim of unforeseeability of risk than Johns-Manville and other asbestos manufacturers asserting that lung disease from asbestos exposure was “unknowable” before the 1960s.²⁵ Nevertheless, an undivided New Jersey Supreme Court in *Beshada* eloquently affirmed its dedication to true strict liability and held that a manufacturer had a duty to warn of “unknowable” risks.²⁶

A scant two years later, in *Feldman v. Lederle Laboratories*,²⁷ the

²² See *supra* note 16.

²³ See Priest, *supra* note 4. See also Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919 (1981); Owen, *supra* note 4; A. Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEG. STUD. 689 (1985).

²⁴ 90 N.J. 191, 447 A.2d 539 (1982).

²⁵ Many sources have indicated that Johns-Manville in fact knew, at least in general terms, of the risk of asbestos-induced lung disease from the 1930s. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984); *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

²⁶ *Beshada*, 90 N.J. at 202-09, 447 A.2d at 545-49.

²⁷ 97 N.J. 429, 479 A.2d 374 (1984).

New Jersey Supreme Court had to recant this holding, and implicitly its rationales, hook, line and sinker. All but overruling *Beshada*, the court (unanimous again) retreated from its strict definition of strict liability, and adopted essentially a negligence formulation.²⁸ The *Feldman* court was forthright in its admission of error in the *Beshada* reasoning and was scrupulous in its reformulation of "strict" liability in negligence terms. Surely it would have been too much to expect of any court, already having so completely reversed its position within such a short period of time, to have taken the final step and explicitly repudiated the doctrine of "strict" liability in warnings cases.

The *Feldman* decision may have found a comfortable location between strict tort and conventional negligence doctrine, at least for warnings cases. In essence, the decision holds that a manufacturer has a duty to take all reasonable steps to warn users of material risks in its product of which the manufacturer reasonably should be aware.²⁹ This duty, of course, is identical to the manufacturer's duty in negligence. Yet, for better or worse, the *Feldman* court shifted to the manufacturer the burden of proof on the last element of liability, whether the manufacturer reasonably should have been aware of the risk.³⁰ Clearly there would be less confusion (and certainly more intellectual honesty) if courts would simply admit that negligence—not "strict" liability—is the proper doctrinal basis for an inadequate warnings claim.³¹ As this Foreword goes to press, the Supreme Court of California has issued an important opinion doing precisely this in the context of prescription pharmaceuticals.³²

IV.

Strict liability was a bold experiment that seemed to flow inexorably from the social insurance and other consumer-oriented premises of the 1960s.³³ The experience of the last quarter of a century, however, has demonstrated that the law of torts is an

²⁸ *Id.* at 449-58, 479 A.2d at 384-89.

²⁹ *Id.*

³⁰ *Id.* at 456, 479 A.2d at 388. This aspect of *Feldman* was overruled by the legislature in a products liability reform act, § 2 of S. 2805, approved by the Governor on July 22, 1987.

³¹ This has been suggested by commentators for at least a decade. See generally 2 Interagency Task Force on Product Liability, U.S. Dep't of Commerce, Product Liability: Legal Study 67-68 (1977); Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

³² *Brown v. Superior Court*, No. S.F. 25059 (Calif. Mar. 31, 1988).

³³ See generally Owen, *The Intellectual Development of Modern Products Liability Law: A*

awkward, inefficient and often unfair insurance system for distributing the costs of accidents.³⁴ Moreover, the supposed deterrent effect of tort law generally, and products liability law in particular, has come under increasing scholarly and empirical scrutiny.³⁵ This is not to say that the risk distribution and deterrence objectives that support modern products liability law are wrong in concept, or fail entirely in operation, for they are surely noble in purpose and work in practice sometimes to some extent. It is to say, however, that these social goals probably failed to support the move in doctrine from negligence to "strict" liability, at least in warnings cases, when there was never any acceptable method for defining strict liability other than in negligence terms. Moreover, if negligence (and warranty) doctrine had been reengineered (as with shifts in burdens of proof, adjustments to defenses, rejection of disclaimers, etc.)³⁶ with as much enthusiasm as was applied to the development of strict liability in tort, the law might well have promoted its compensation and deterrence objectives at least as successfully, and avoided the confusion and embarrassment of calling a pig a mule.

The development of the modern "strict" era of products liability law, despite the fact that it overreached itself quite far, has produced much good. It has made it clear that manufacturers are strictly accountable for manufacturing flaws, the principal products liability context in which true "strict" liability is plainly appropriate.³⁷ While the same result could have been quite easily achieved in warranty, and with somewhat more difficulty under principles of *res ipsa loquitur*, the doctrine of strict liability in tort is tailor-made (and was originally largely conceived) for just this type of case. Moreover, invalidation of both disclaimers and the contributory negligence bar were vitally important developments in the law of products liability. Finally, and perhaps most importantly, the explosive creation of "strict" tort liability resulted in a massive consciousness-raising throughout society of manufacturer accountability for product safety. It may well be that just such a radical and dramatic alteration of legal doctrine was a necessary catalyst to accomplish such a broad-based change in social

Comment on Priest's View of the Cathedral's Foundations, 14 J. LEG. STUD. 529, 532-33 (1985).

³⁴ See generally Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985).

³⁵ See e.g., *id.* at 559-91.

³⁶ See *supra* notes 17-19 and accompanying text.

³⁷ Another may be express misrepresentation, addressed under current doctrine in U.C.C. § 2-313 and RESTATEMENT (SECOND) OF TORTS § 402B.

and legal attitudes toward product safety—even if in the long run the chosen doctrine proved “wrong” in some respects. Our society has no doubt been well served by the increased safety consciousness of engineers and marketing managers, generated in no small part by the doctrine of strict products liability in tort.

V.

The articles in this symposium, with one exception,³⁸ do not challenge the fundamental premise of whether strict liability is a good idea. This is an awesome issue, and one that courts and commentators have only recently begun to question openly in any substantial measure. Yet it is a question of central importance to the entire field of products liability, as Professor Schwartz makes clear in his conclusion. The sooner that the foundations of products liability law are finally and firmly put in place, the sooner that the superstructure of secondary doctrine can be built with confidence. Yet, regardless of whether, when, and how the foundations of this area of the law are finally set, the courts will have to resolve a large variety of other important problems as they develop. The articles in this symposium should assist the bench and bar in understanding a host of significant issues in this challenging area of the law.

³⁸ Bromberg, *supra* note 9.