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Rethinking the Policies of Strict Products Liability

David G. Owen*

I. INTRODUCTION

Evolving rapidly over the last twenty years, modern products liability law may be seen as having passed through two stages of development, divisible roughly into the past two decades. Stage I began in 1960 with *Henningsen v. Bloomfield Motors, Inc.*,¹ New Jersey's bold assertion of strict manufacturer responsibility in warranty to remote consumers. In 1963, Judge Traynor in California shifted the inquiry from warranty to tort law in *Greenman v. Yuba Power Products, Inc.*,² and the development was certified by the American Law Institute with its publication of section 402A of the *Restatement (Second) of Torts* in 1965.³ The second half of the 1960s witnessed an avalanche of courts adopting the principle of strict liability in tort for the sale of defective products. Stage I, then, was the period of adoption of the doctrine by the courts. The scholarship of the period, led by Dean Prosser's two articles, *The Assault Upon the Citadel*⁴ and *The Fall of the Citadel*,⁵ was dominated by efforts to justify the new doctrine and to explain its relationship to its sister contract law's parallel warranties that had been so suddenly displaced in the new law of products liability.⁶

Stage II, which took place during the 1970s, was a period of expansion and definition of the doctrine. During this decade strict tort spread not only geographically⁷ but also beyond the sale of new chattels by manufacturers to other defendants and transactions.

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The author is grateful for comments made on an earlier draft by his colleagues, Nathan Crystal and Pat Hubbard.

1. 32 N.J. 358, 161 A.2d 69 (1960).

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

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

4. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

5. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

6. See, e.g., Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966). Other important articles of this genre are cited in P. KEETON, D. OWEN & J. MONTGOMERY, *CASES AND MATERIALS ON PRODUCTS LIABILITY AND SAFETY* 196 nn.2 & 3 (1980) [hereinafter cited as *PRODUCTS LIABILITY*].

7. Citations to adopting cases and statutes are collected in 1 PROD. LIAB. REP. (CCH) ¶¶ 4060-65.

This was also the age of definition, when the courts and commentators began the arduous task of examining the nature of the beast they had so enthusiastically endorsed in the preceding decade. They began to address the fact that they had meant by "strict" liability something less than absolute responsibility for any accident, but that describing just where "strict tort" properly stopped short of pure insurance was a frustrating task filled with quagmires at every turn. They began to deal with the difficult questions involved in achieving a proper mix of responsibility between product builders and product users. They began to inquire into the proper relationship between the overlapping compensation schemes of products liability and workers' compensation. They began to appreciate the inadequacy of even the words they had chosen to describe the strict tort doctrine, "defective" and "unreasonably dangerous," and to realize the need to give juries better guidance than these words conveyed. Stage II, then, was characterized by the extension of the doctrine, by an inquiry into its essential nature, and by a search for its proper limits.

The single most influential piece of guiding scholarship in this period was Dean Wade's insightful article, *On the Nature of Strict Tort Liability for Products*, published in 1973.⁸ It was in this article that Dean Wade refined his "seven factors" to which the courts have turned so often in struggling with the most perplexing issues in recent years.⁹ The decade was also marked by the appearance of two other significant pieces of scholarship which reflected a growing sentiment that the limits to appropriate manufacturer liability had been exceeded in certain areas—Professor Henderson's 1973 article on *Judicial Review of Manufacturers' Conscious Design Choices*¹⁰

8. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973).

9. These factors were as follows:

- (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
- (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 837-38. For an earlier statement of these factors, see Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

10. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The*

and the study and *Final Report* of the Federal Interagency Task Force on Product Liability under the leadership of Professor Schwartz.¹¹

As the 1980s open their doors, the question is—where from here? Yet rather than asking for a teleological prediction of where the law of products liability will head in the 1980s, perhaps the more responsible inquiry is—where *should* it be in 1990, and in the year 2000? So to pose the question gives hint of the problem inherent in supplying any answer: the system of applicable rules can hardly be expected to move forward in acceptable fashion, until we know toward which social goals it *should* be heading. Yet very little attention has been devoted so far to the development of an underlying, normative philosophy of where the law in this area should be heading.¹² The task then, for the 1980s at least, and perhaps for the 1990s as well, will be to develop an express system of social values and goals upon which a developing set of principles and rules of products liability law may begin to build. Mushy notions of consumer welfarism which dominated much of the thinking of the 1960s, and which spawned a hasty and large scale reconstitution of this entire field of law within a very few years, must give way to deliberate analysis of the relevant political values that can support a principled system of goals and rules. It is in fact largely to this lack of principle and to the ad hoc and intuitive way in which this area of the law has developed that much of the current confusion over appropriate “tests” and “theories” of defectiveness can be traced.

Stage III in the evolution of products liability law, therefore, should be the time for doing what usually comes late in the com-

Limits of Adjudication, 73 COLUM. L. REV. 1531 (1973).

11. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1977). There have, of course, been many other valuable contributions to the scholarship, which are too numerous to cite.

12. The principal economic work in this field has been done by Guido Calabresi. See, e.g., Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972). But much more consideration must be given to the fundamental values advanced and sacrificed by economic models. See G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). Professor Posner also has made a useful start in *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979). Pat Hubbard has well advanced the state of normative analysis underlying consumer expectations in *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978) [hereinafter cited as Hubbard, *Expectations*], and *Efficiency, Expectation, and Justice: A Jurisprudential Analysis of the Concept of Unreasonably Dangerous Product Defect*, 28 S.C. L. REV. 587 (1977) [hereinafter cited as Hubbard, *Efficiency*]. Many relevant insights are found in P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (2d ed. 1975); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

mon-law process:¹³ to develop a system of fundamental social values and goals to be protected and advanced by the law in this area. Broadly stated, an appropriate balance between individual liberty and social welfare needs to be struck within a fair and workable adjudicatory system. Once a jurisprudential basis of this type has been set, we may then begin to develop a consistent set of principles tailored to this area of the law. It will then be possible to construct one or more "tests" or rules of liability (and defense) which are firmly rooted in the values of society. As a principled system of products liability law thus develops, it would be most surprising if the great bulk of the current doctrinal problems did not drop quickly by the wayside.

Probably the best place to begin in laying the foundations in this area of law is to reexamine critically the infrastructure of "policies" said to support the movement to strict liability in tort. Those planks which do not withstand close scrutiny will be discarded, and those that do will be retained for use in the rebuilding of a sound jurisprudential foundation and the legal superstructure to follow. This Article will attempt only the first task—it will critique the conventional "policies" said to support the principal hallmark of modern products liability law, strict liability in tort. Although much of the scholarly commentary has moved beyond this point, the following catalogue¹⁴ of rationales behind strict products liability still fairly describes the policies variously drawn upon by the courts:

- (1) Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.
- (2) Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be "consumed" in order to function in modern society.
- (3) Sellers are often in a better position than consumers to identify the potential product risks, to determine the acceptable levels of such risks, and to confine the risks within those levels.
- (4) A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of the manufacturing or marketing process, yet the

13. The California Supreme Court, in *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 428-29, 143 Cal. Rptr. 225, 234-35, 573 P.2d 443, 453 (1978), adverted to this experiential nature of the common-law process as a possibly disingenuous attempt to explain away its having left the area so adrift in its earlier decision in *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

14. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809-10 (1976).

difficulties of discovering and proving this negligence are often practically insurmountable.

(5) Negligence liability is generally insufficient to induce manufacturers to market adequately safe products.

(6) Sellers almost invariably are in a better position than consumers to absorb or spread the costs of product accidents.

(7) The costs of injuries flowing from typical risks inherent in products can fairly be put upon the enterprises marketing the products as a cost of their doing business, thus assuring that these enterprises will fully "pay their way" in the society from which they derive their profits.

Part II of this Article will examine several recent attempts to draw upon these accepted policies for assistance in addressing some of the difficult issues of (1) defining "defectiveness," and (2) determining how far the boundaries of strict liability should be extended past sales of new chattels by manufacturers. Part III will present a critical reexamination of the existing policies and will demonstrate that much of the current doctrinal confusion springs from the logical inadequacy of the existing policies which itself derives from the lack of a reasoned foundation of political values beneath this area of law. The overall purpose of this Article is to penetrate into the traditional morass of policy arguments in products liability law, to strip away those rationales which cannot withstand the light, and to identify the ways in which the existing policies have intuitively pointed in the right directions.

II. APPLICATIONS OF THE CONVENTIONAL POLICIES

Whether faced with the central perplexity of defining defectiveness for design cases or with a boundary question at the periphery of products liability law of whether to extend its principles to include some new type of defendant or transaction, the courts have a pressing need for a reasoned articulation of the social policies deemed relevant to resolving such questions. Without this type of foundational guidance, a court is left with only hollow rules, to apply mechanically or by intuition. A review of recent cases shows an attempt by some of this nation's most respected courts to be guided by appropriate public policy considerations, and the problems they have faced.

A. *The Central Question: The Notion of Defectiveness*

(1) The Judicial Experience

Three state supreme courts, each of which has had considerable experience in addressing products liability questions, have recently reconsidered the central notion of defectiveness in design de-

fect cases: Pennsylvania, in *Azzarello v. Black Brothers Co.*;¹⁵ New Jersey, in *Suter v. San Angelo Foundry & Machine Co.*;¹⁶ and California, in *Barker v. Lull Engineering Co.*¹⁷ The issue before each of the courts was the same: what is the proper definition of defectiveness for a jury instruction in a case involving personal injuries attributable in part to a product's design? Each case was brought by an employee injured at work in connection with the use of an industrial machine manufactured by the defendant. Each of the three courts had previously attempted to define defective design in some manner that had proved unsatisfactory.¹⁸ Each of the courts turned to social policy and tried again, generating three new (and different) rule definitions for design defect cases.

Addressing the purported inadequacy of the "unreasonably dangerous" phrase for use in jury instructions, the Pennsylvania Supreme Court in *Azzarello* demonstrated its appreciation of the need to look to social policy to resolve the central issues in products liability law:

Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warning of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.¹⁹

After demonstrating such a keen sensitivity to the broad issue, the remainder of the court's analysis is disappointing. Apparently, only once does the court address itself to just what the relevant policies might be:

The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business. In an era of giant corporate structures, utilizing the national media to sell their wares, the original concern for an emerging manufacturing industry has given way to the view that it is now the consumer who must be protected.²⁰

Since it presupposes the defectiveness of the product, this single statement of public policy begs the question of what criteria are

15. 480 Pa. 547, 391 A.2d 1020 (1978).

16. 81 N.J. 150, 406 A.2d 140 (1979).

17. 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

18. Pennsylvania, in *Berkebile v. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); New Jersey, in *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 386 A.2d 816 (1978); and California, in *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

19. 480 Pa. at 558, 391 A.2d at 1026.

20. *Id.* at 553, 391 A.2d at 1023-24.

appropriate for judging *how* a product should be determined defective or not defective. Apart from that, and apart from some glaring logical weaknesses in the rationales upon which it does rely,²¹ the court nowhere explicitly connects the test of liability chosen—"unsafe for the intended use"²²—to even the weak policies that it does set forth. While the court may be credited with at least attempting to discern and apply principles of public policy, one may question whether this type of purported justification of a key doctrine is any better than no justification at all. It certainly did very little to help clarify the meaning of defectiveness and its proper standards of measure.

Adopting a related test of "whether the product was reasonably fit, suitable and safe for its intended or foreseeable purposes,"²³ the New Jersey court in *Suter* succumbed to a similar temptation to jump without explanation from a statement of general social policy to a rule definition. It did acknowledge, even more thoroughly and eloquently than the *Azzarello* court, the important role of public policy in judicial decisionmaking:

[I]t is the function of the court to decide whether the manufacturer has the duty and obligation imposed by the strict liability principle. As in tort law generally, determination of existence of a duty depends upon a balancing of the nature of the risk, the public interest and the relationship of the parties. . . . The question is ultimately one of public policy, the answer being dependent upon a consideration of all relevant factors to decide what is fair and just. . . . Dean Green has summarized the duty-risk approach in the following manner:

The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie the law. These policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties and other considerations relative to the environment out of which the case arose. . . .²⁴

As a beginning point for analysis, this is an exceptionally sound statement of the important role of the relevant social policy considerations generally at stake in most litigation. Reiterating several of the policy arguments it had first advanced in *Henningsen v. Bloomfield Motors, Inc.*²⁵ and *Santor v. A. & M. Karagheusian, Inc.*,²⁶ the court noted further that "[i]mplicit in the product's

21. For discussion of these weaknesses, see Section III *infra*.

22. 480 Pa. at 559 & n.12, 391 A.2d at 1027 & n.12.

23. 81 N.J. at —, 406 A.2d at 153.

24. *Id.* at 151 (quoting Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 45 (1962)).

25. 32 N.J. 358, 161 A.2d 69 (1960).

26. 44 N.J. 52, 207 A.2d 305 (1965).

presence on the market is the representation that it will safely perform the functions for which it was constructed."²⁷ It also restated the related arguments concerning the inability of consumers to discover many defects through inspection and the commensurate dependence of the public on the skill, care, and reputation of manufacturers.²⁸ Apparently guided by these considerations, the court concluded that consumer expectations are improperly frustrated when a product fails to perform its ordinary functions: "Thus, if one purchased a bicycle whose brakes did not hold because of an improper design, the manufacturer's responsibility would be clear without more. The product would not satisfy the reasonable expectations of the purchaser."²⁹ Finally, the court threw in a Calabresian "cheapest-cost-avoider" rationale³⁰ as well:

Strict liability in a sense is but an attempt to minimize costs of accidents and to consider who should bear those costs. See the discussion in Calabresi & Hirschoff, "Toward a Test for Strict Liability in Torts," 81 *Yale L. J.* 1055 (1972), in which the authors suggest that the strict liability issue is to decide which party is the "cheapest cost avoider" or who is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. . . . Using this approach, it is obvious that the manufacturer rather than the factory employee is "in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment."³¹

The *Suter* decision is much better than most for raising many of the pertinent social goals that must be considered by a court seeking to restructure a legal principle or to apply an existing one to a new context. Yet it is difficult not to be dismayed by the court's apparent failure to recognize that certain of its listed policies were substantially identical to (or merely contextual refinements of) other such policies and that some might actually run at cross purposes to others. Is not, for example, Calabresi's cheapest-cost-avoider test—which seeks to optimize accident costs for society—in fact a refinement of Green's more general policy of promoting the general economic good? And is not a policy that seeks to protect consumer expectations a reflection of a moral decision (in the Greenian sense) to accord a measure of rights or liberty to consumers that in some contexts might cut against the goal of promoting the economic good of the group? If these two social goals are both deserving of protection and promotion by the legal order, how

27. 81 N.J. at —, 406 A.2d at 149.

28. *Id.*

29. 81 N.J. at —, 406 A.2d at 150.

30. See note 12 *supra*.

31. 81 N.J. at —, 406 A.2d at 151-52.

should they be fit together in a structure that optimally promotes them in combination even when they come into conflict? Nowhere were these crucial issues addressed by the court.

Perhaps the most frustrating aspect of *Suter* is that it represents one of the most sincere efforts by a court to discern and apply the relevant social policies to the product defectiveness issue. That it fell so far short of the mark in applying a coherent set of goals tailored to the context shows how very far we have to go, in the products liability area at least, to achieve principled decisions that express and apply a sound system of social objectives. The *Suter* court's efforts in this direction, however, as immature as they may be, are still to be commended and should be emulated by other courts. The movement, at least, is in the right direction.

Barker, the last design defectiveness opinion to be discussed, is not as bold as *Suter* in reaching deep in a search for fundamental social values. It demonstrates nonetheless a technically sound and structurally well-developed attempt to bring two or three key social objectives of products liability law to bear on the redefinition of "defective" design.³² The first essential policy perceived by the court was the protection of ordinary consumer expectations of safety, generated in part by the implied representation from a product's presence on the market that it will "safely do the jobs for which it was built."³³ The second major policy articulated was the discouragement of cost-ineffective products from reaching the market at all. A related but subordinate policy, supported by shifting the burden of proof to the defendant to prove the cost-effectiveness of the chosen design, was "to relieve an injured plaintiff of the onerous evidentiary burdens inherent" in proving the product's cost-ineffectiveness and the defendant's negligence in marketing it in such a condition.³⁴

The following two-pronged test of liability offered by the *Barker* court should in fact serve to promote these different objectives:

[A] product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2)

32. Helpful analyses of *Barker* include Henderson, *Renewed Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979); Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435 (1979).

33. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963), *quoted in Barker*, 20 Cal. 3d at 430, 143 Cal. Rptr. at 236, 573 P.2d at 454.

34. 20 Cal. 3d at 431, 143 Cal. Rptr. at 237, 573 P.2d at 455.

the plaintiff proves that the product's design proximately caused [his] injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.³⁵

The strength of the *Barker* test lies in its recognition of the fundamental legitimacy of two of the principal values in the law of torts—(1) the protection of the individuality of persons, by according formal respect for their fairly developed expectations of product safety, and (2) the promotion of economic efficiency, by according respect for the communal interest in discouraging waste of our finite resources.

Despite this very significant strength, however, other courts may be well advised to hesitate before adopting the *Barker* test. First, the nature and extent of the two interests need to be more thoroughly examined. On the risk-benefit prong, for example, does a liability test of this type in fact promote economic efficiency? Even if the test itself does not perfectly optimize accident levels, it may nevertheless have value as a symbolic reaffirmation of the public policy favoring decisions consistent with the economic welfare of the group. On the other hand, should inefficient marketing decisions always be "punished" by the liability rules, even if the defendant may as a result face bankruptcy—with substantial economic waste (and lost jobs) a possible result? If monetary values must be placed on statistically certain injuries and deaths, perhaps society will not permit risk-benefit analysis on the view that it is a morally unacceptable method of determining how much safety is enough. On the expectations prong, whose expectations are to be chosen as the standard for measurement, and why? Second, the priority relationship between the interests represented by the two prongs needs much further consideration. When the two interests conflict, does an optimal mix of social policies argue always for shifting the loss to sellers—regardless of the context—as called for by the rule? If not, which interests should give way in different contexts? Apart from many such fundamental questions raised by the value scheme advanced by the *Barker* test, it may be that other important values are sacrificed—perhaps excessively—in the process. Is the rule, for example, administrable by the courts? Is the test so vague that the goals of certainty and predictability of legal consequences suffer too much? Finally, regardless of its theoretical desirability, does the new test *appear* to stack the cards so heavily and unfairly in favor of consumers at the expense of manufacturers that the latter group will lose too much confidence in and respect

35. *Id.* at 426-27, 143 Cal. Rptr. at 234, 573 P.2d at 452 (emphasis omitted).

for law? If the *Barker* court cannot fairly have been expected to address these fundamental questions of social policy, as it probably cannot, they are nevertheless the types of questions of policy that should be asked and answered by other courts, by legislatures, and by commentators in the 1980s.

(2) The Model Uniform Product Liability Act

In its recently promulgated Model Act³⁶ the Commerce Department addressed itself to the problem of defining defectiveness³⁷ that has so plagued the courts. Like the courts, the drafters of the Act turned somewhat to accepted notions of public policy.³⁸ While the choices made in the Model Act show a higher level of awareness than most courts have shown of the practical and doctrinal issues bearing on the question, and while the listed criteria said to lie behind such choices show a sophisticated appreciation of certain social goals, the analytical commentary is disappointing in its failure to explain just how the listed policies bear on the specific doctrinal choices made.³⁹

For purposes of defining "defect," the Act divides products liability cases in two—(1) manufacturing flaw cases, for which a deviation-from-the-norm "strict" form of liability is proposed;⁴⁰ and (2) design and warnings cases, for which a risk-benefit "negligence" form of liability is proposed.⁴¹ Our inquiry here then is two-fold—first, an analysis of the policy arguments advanced by the drafters to support the application of a deviation-from-the-norm test to production errors, but not to design and warnings errors, and second, an analysis of the policies offered to support the risk-benefit test of defectiveness for use in the latter two types of cases.

(a) Application of a "Strict" Basis of Liability Only to Manufacturing Cases

The first policy said to justify a "strict" deviation-from-the-norm test in production flaw cases alone is the "degree of predictability with regard to these defective products that is not found with respect to products that are defective in design or to failure to warn," and the commensurately improved insurability of such

36. UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714 (1979) [hereinafter cited as U.P.L.A. or MODEL ACT].

37. *Id.* § 104.

38. *See id.*, Criteria for the Act, reprinted in 44 Fed. Reg. 62,714-15.

39. *See id.* § 104, Analysis, reprinted in 44 Fed. Reg. 62,721-26.

40. *Id.* § 104(A).

41. *Id.* § 104(B), (C).

risks.⁴² This assumption, however, is open to question. Due to real-world technological and economic constraints, manufacturers routinely build a certain amount of risk into the design and production quality control processes alike.⁴³ An automobile manufacturer, for example, may be as able to predict the likelihood of fire injuries from the location of a fuel tank close to the rear of an automobile⁴⁴ as it is able to predict the likelihood of fire injuries resulting from seams improperly welded to such tanks. So, to the extent that such risks are planned—that is, deliberately built into the design or production processes—they appear to be more or less equally predictable. And if such risks are not preplanned, no good reason appears as to why either type should be more predictable than the other. One may ask why it should be easier to predict that an assembly line worker on some particular day may drop his guard for some reason and interact with a product in a risk-creating way (as by failing to complete a weld) than that a tired consumer may someday grow careless and slam on his brakes without checking his rearview mirror to see another motorist close behind. It is true that the potential losses may be much larger from failing to predict risky consumer-product design interactions than from risky worker-product production flaw interactions, but only because the whole product line is infected in the former case. Large runs of products can be turned out with dangerous flaws, however, before a dull press, mis-set automatic drill, or batch of defective components is discovered. Thus, the degree of predictability of dangers would not appear to be a legitimating basis for distinguishing production from design defects.

The second basis for the production versus design distinction is said to be that “consumers have a right to expect that products are free from construction defects.”⁴⁵ To state that a construction error is a “defect”—and that consumers have a “right” to expect that such errors will not occur—entirely begs the question whether the manufacturer or consumer should properly bear the risk of losses from such errors. That an assembly line deviation from some intended design configuration looks more like a true mistake and happens more nearly to approximate what most people mean by

42. See *id.* § 104, Analysis, reprinted in 44 Fed. Reg. 62,722.

43. See generally Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

44. The explicit premarketing risk benefit studies of the rear impact dangers in the fuel systems of the Ford Pintos is a case in point. Ford's risk-benefit analysis is set forth in PRODUCTS LIABILITY, *supra* note 6, at 490.

45. U.P.L.A., *supra* note 36, Analysis, reprinted in 44 Fed. Reg. 62,722. See also text accompanying notes 84-86 *infra*.

the word "defective" also lends little support to the analysis. As for the mistake argument, one may question why the consumer would expect to be compensated on a no-fault basis by a manufacturer who only mistakenly (and, by hypothesis, non-negligently) created the risk but not by one who deliberately designed a risk into the product. Moreover, as was developed above, although production flaws may look more like real "mistakes," they are often designed into the production process through deliberate resource allocation decisions on quality control.

If one looks to what expectations of safety consumers actually have and to which type of "defect" more likely violates those expectations, no basis for a distinction appears. As for obvious hazards, the consumer in either type of case knows of the risk and hence will have some expectation of injury if his interaction with the hazard goes awry. Whether the danger is from a metal burr close to the product's handle, or from the location of the handle close to a whirling blade, the consumer's surprise from an injury will in both cases be same: only that something went wrong in his interaction with the obviously hazardous product, as he knew it might. The stage in the design-production process when the hazard entered the product will probably be quite irrelevant to the consumer's attitude toward the open hazard. If anything, the consumer may be even more conscious of an obvious flaw in manufacture—and hence less surprised at a subsequent injury therefrom—than from an obvious but clearly planned danger in design. If the danger is hidden, the injury would seem to be equally unexpected regardless of the hazard's source or nature. Finally, from a more abstract perspective of social psychology, it may be that the typical consumer knows full well that of the thousands of cars spewed out by Detroit on a daily basis many hundred at least will house production errors of various types and levels of danger. Such a consumer may buy a car with a real (if unconscious) appreciation of the risk that this may be his statistical "turn" to get the car with the nut left off the steering column bolt. It thus may be that consumer expectations are no more violated in cases of production flaws than in those involving design inadequacies.

Despite the weaknesses, however, in the Commerce Department's "right to expect" rationale for applying a "strict" basis of liability to product flaw cases alone, there may in fact be some legitimizing basis for the distinction. Perhaps the explanation lies in the consumer's expectation that arises after the steering has failed and the car has proceeded into a tree: an expectation about who should fairly be held responsible for the resulting losses. On this

point, most consumers (and many manufacturers) would probably agree—the manufacturer should pay. And this intuitively seems to be the correct result. Yet why in principle consumers should be permitted to expect to be compensated by the manufacturer for injuries from production errors is difficult to determine.

Perhaps the explanation lies in the availability of a standard for determining liability that is easy to see and apply—the product deviated from the manufacturer's own specifications, and from this perspective the danger admittedly was a mistake. Perhaps, too, the answer lies in the community's notions of commercial fairness, requiring some equivalence of a sound product for a fair price paid. Although to use such general expectations of what is thought to be an appropriate legal standard of responsibility for product malfunctions also begs the question of what that legal standard ought to be, such expectations give empirical validity to the concept. Still, the logic of this type of inductive—one is tempted to say bootstrap—legitimation of a rule holding manufacturers "strictly" liable for hazards created by production but not design decisions (or inadvertencies) is not entirely satisfying. Even if this is the type of justification meant by the Commerce Department's "right to expect" rationale, some other questions of importance are left unanswered. Why, for example, should such expectations prevail over the public's desire to prevent the waste of resources? Under this rule, car purchasers would be taxed in essence in two increments: the first to pay for this type of forced self-insurance against injury, and the second to pay for the economically wasteful method of administering the insurance scheme. One may question whether the typical person would want to be forced in this way to purchase first-party accident insurance from a car manufacturer, coerced by the legal rule to spend excessive monies on improving quality control, rather than from a private insurance company, which is institutionally better suited to administering efficient insurance programs? The principal question not addressed, then, is why economic efficiency should be subordinated to perceived consumer expectations in cases of flaws in manufacture but not in design or warnings cases. Before such a major decision receives further sanction by the courts or legislatures, the public should be given further explanation of the social policy choices reflected by the decision.

(b) Adoption of a Risk-Benefit Standard in Design and Warnings Cases

The Commerce Department's application of a risk-benefit test to design and warnings cases is said to be based on the fact that

many courts already apply risk-benefit analysis to such cases, and on the difficulty courts have experienced in otherwise defining design and warnings defects in a workable manner. The goal here is said to be the offer of predictable guidance for juries who must decide where short of absolute responsibility a manufacturer's design and warnings duties should fall.⁴⁶ Such explanations surely have a ring of empirical validity, but one may ask for greater principle in social policy.

One such policy may be to avoid the apparent unfairness of a legal standard that is vague and unpredictable. Another policy that may be promoted is economic prudence if, as a result of the rule, manufacturers seek to adjust their resources to an optimal balance of risks and benefits. But the efficiency of this type of classic risk-benefit analysis is subject to question, and the adoption of such a test implicitly denies another social imperative: the promotion of conflicting individual rights.

At an elemental level, the risk-benefit test of liability is starkly utilitarian in principle. Whether a particular design decision was cost-effective (that is, its benefits outweighed its risks) is determined by inquiring whether the decision to opt for the design chosen—to forego a safer alternative design—was on balance more productive of social gain (through cost-savings and increased product usefulness to all consumers) than loss (through accident costs to the plaintiff and other consumers injured by the incremental danger left in). Thus, once it is determined that the net economic result of the decision benefited the group as a whole, the matter often is concluded: there is no further inquiry into the possibility that the minority of injured consumers chosen to be sacrificed for the common economic good perhaps ought to be accorded a legal right to compensation. Perhaps, for example, those few persons burned by exploding gas tanks of Ford Pintos hit at low speeds from the rear ought to have certain rights independent of the possible cost-effectiveness to society at large in not building more safety into all Pintos at a cost of \$11 per car.⁴⁷ The correlative risk-benefit duty to *warn* consumers of hidden dangers, of course, would help to satisfy such rights in some of these cases. But why must such rights have to be absolute at all, to call for total common-law compensation—or none at all? Since the Model Act adopts a comparative approach to damages reduction in accomodating the respective roles of consumer conduct and product condition in accident causa-

46. See generally *id.* at 62,722-24.

47. For the complete quantified analysis, see PRODUCTS LIABILITY, *supra* note 6, at 490.

tion,⁴⁸ is the Act not schizophrenic in providing total compensation for slightly cost-ineffective decisions but none at all for those that are only slightly cost-effective? In addition to the many pitfalls and hidden assumptions in risk-benefit analysis, which have been developed elsewhere at great length,⁴⁹ the application of a risk-benefit method of analysis may itself be wrought with many of the same problems of vagueness and unpredictability that this test was chosen to reduce. Most importantly, however, the selection of such a standard involves significant and as yet unresolved questions of social policy, as discussed above.

B. *The Boundary Questions: How Far Strict Liability?*

Assuming that strict liability in principle or application is broader than mere negligence, the courts must then decide how far the doctrine should extend to nontraditional defendants and transactions. Stated otherwise, apart from manufacturer sales of new chattels, to whom and to what should this higher level of responsibility apply? The inquiry here will focus on a selected group of recent decisions in which the courts have turned to the conventional policies in order to decide whether the boundaries should be extended and the harsher standard applied to new defendants and transactions.

(1) Used Goods

*Tillman v. Vance Equipment Co.*⁵⁰ was a strict tort action against a used equipment dealer for injuries plaintiff suffered from a crane bought used by his employer from the defendant. While plaintiff was greasing the gears of the crane, his hand was drawn into them and injured. Liability was predicated on the user's inability to grease the gears without removing the protective gear covering and on the absence of a warning of the danger. Before the Supreme Court of Oregon was the correctness of the trial court's judgment for the defendant on a ruling that the seller of used goods may not be held strictly liable in tort for defects in the goods that originated with the manufacturer.

To aid its analysis, the court examined the applicability to the used product context of the policies it had previously identified: "[C]ompensation (ability to spread the risk), satisfaction of the reasonable expectations of the purchaser or user (implied represen-

48. See MODEL ACT, *supra* note 36, §§ 111-112, reprinted in 44 Fed. Reg. 62,734-39.

49. See generally PRODUCTS LIABILITY, *supra* note 6, at 481-91.

50. 286 Or. 747, 596 P.2d 1299 (1979).

tational aspect), and over-all risk reduction (the impetus to manufacture a better product). . . .⁵¹ The court gave short shrift to the compensation-risk-spreading rationale:

While dealers in used goods are, as a class, capable like other businesses of providing for the compensation of injured parties and the allocation of the cost of injuries caused by the products they sell, we are not convinced that the other two considerations . . . justify imposing strict liability on sellers of used goods generally.⁵²

This was so, thought the court, even if a consumer injured by a defective product might thereby go uncompensated, because of statutes of limitations or the increasing difficulty of locating a solvent manufacturer over the passage of time: “[A]lthough the provision of an adequate remedy for persons injured by defective products has been the major impetus to the development of strict product liability, it cannot provide the sole justification for imposing liability without fault on a particular class of defendants.”⁵³ Nor do consumers typically expect, in the absence of an express agreement, that a dealer in used goods will be more than merely a transferor of a used product from the seller to the buyer.⁵⁴ As for the risk reduction argument, the court reasoned that dealers in used goods have little ability to induce manufacturers to improve product safety since, unlike retailers of new products, new product sellers are outside the chain of distribution on which the manufacturer depends for the sale of its goods.⁵⁵

One is left with a firm conviction that the *Tillman* court reached a sound result and did so in a principled manner by resting its decision squarely on a set of previously adopted public policies. *Tillman* is in fact one of the very best products liability decisions in this regard. On its facts, however, *Tillman* was an easy case, involving a design danger that was open to view and that the dealer neither had created nor could have reduced in any practicable way. Thus, liability could logically have been sustained only on some theory of “compensation” or risk distribution—theories the court summarily rejected. While the court was very probably correct in rejecting these goals,⁵⁶ one may wonder why the court accords such slight respect to one of its three expressed rationales for an important legal doctrine.

51. 596 P.2d at 1303 (quoting *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 460, 533 P.2d 316, 321 (1975)).

52. 596 P.2d at 1303.

53. *Id.* at 1304.

54. *Id.* at 1303-04.

55. *Id.* at 1304.

56. See section III A *infra*.

Clearly, the focal point of the court's decision was the implied representation-consumer expectations rationale. Most certainly, a consumer's expectations of safety are generally much lower for used products than for new ones. Moreover, since a principal reason for purchasing a product used rather than new is to save money, it is doubtful that such buyers would want to pay a surcharge for a forced purchase of accident insurance, especially not for accidents resulting from obvious design hazards. Yet if the issue were framed in terms of a used car dealer's responsibility to test or inspect the brake shoes or the steering linkage, it is not so clear just what a typical consumer's safety expectations might be.⁵⁷ Nor does the court explain why in principle it takes the position that the buyer's actual safety expectations are not to be protected if they are higher than the norm.⁵⁸ Surely, if consumer expectations are to be the measure for boundary determinations, a much more careful justification is in order.

The court's disposition of the third rationale—risk reduction—is also disappointing. Dealers in used goods do not, in fact, have much ability to apply economic sanctions to manufacturers and thereby induce a higher level of design safety. Compared to consumers, however, they often are far better able to control the risk. It may thus make good economic sense to apply an efficiency-inducing legal doctrine to such cases. In the used car situation described above, for example, it may be a sound economic decision to encourage used car dealers to perform routine safety tests on those parts of the brakes and steering systems that are subject to wear and that may not have received proper maintenance.

Thus, although the *Tillman* court demonstrated a sensitive and skillful application of social policy to a boundary question of first impression, some weaknesses remained in its decision. In part this was due to the fact that the case before it was an easy one, and this may naturally have led to certain assertions that were overbroad. The principal problem, however, lay in the weakness of the tools of social policy with which the court had to work—weaknesses which will be developed further below.⁵⁹ While the *Tillman* court perhaps could be faulted for blindly applying to the facts the inadequate tools of social policy it had before it rather than undertaking to reconsider them, the press on judicial time in a case that was easy under the court's accepted rationales may serve as an ade-

57. See *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (Super. Ct. Law Div. 1975) (discussing this situation).

58. 596 P.2d at 1304 n.5.

59. See section III *infra*.

quate explanation. As soon as possible, however, the Oregon Court—which has to date produced the most impressive set of well-reasoned products liability decisions in the nation—should turn its good offices to a reconsideration of the roots of social goals beneath this area of the law.

(2) X-Rays (as Electricity)

In *Dubin v. Michael Reese Hospital and Medical Center*,⁶⁰ an intermediate appellate court in Illinois ruled that X-rays are “products” for purposes of strict liability in tort. The plaintiffs, who had developed malignancies from X-ray treatments administered by the defendant hospital, were thus permitted to maintain strict tort actions against the hospital. The X-rays were alleged to be defective because no warning was given “that the product is a carcinogen which generates and causes lesions, tumors, and other cellular abnormalities in human beings.”⁶¹ Although the court skillfully addressed at length the doctrinal issues of whether X-rays are a “product” and whether their transmittal to the plaintiffs involved a “sale” or “service,” the issue here is the adequacy of the court’s attempt to use policy reasons to answer the boundary questions before it.

The court summarized the relevant factors:

[T]o satisfy the public policy reasons underlying the concept of strict liability in tort, we must also find that the “product” is something that may endanger human life and health; something whose intended use has been solicited and thought to be safe and suitable; and something that has reaped a profit for those placing it in the stream of commerce. Finally, we must consider the defendant’s ability to distribute the risk of injury by passing the loss onto the public, and the injured party’s difficulty in proving that the source of his injury was the defendant’s negligence.⁶²

Since X-rays are a form of electricity,⁶³ the court decided—perhaps too lightly—to shift the analysis to the general electricity context. The court appeared most impressed by the fact that power companies “reap a profit” by placing their product in the stream of commerce,⁶⁴ and that they can “distribute the risk of injury by passing the loss onto the public in the form of increased rates.” It further “noted” the “disparity in the parties’ positions and bargaining power for its supply.”⁶⁵ This was the extent of the court’s policy

60. 74 Ill. App. 3d 932, 393 N.E.2d 588 (1979).

61. *Id.* at 934, 393 N.E.2d at 590.

62. *Id.* at 939, 393 N.E.2d at 593.

63. *Id.*

64. *Id.* at 942, 393 N.E.2d at 595.

65. *Id.*

analysis leading it to conclude that a strict tort claim against the hospital could be sustained.

None of these policies advances the ball very far. Of course X-rays are dangerous to health under some conditions, or the plaintiffs would not have been before the court. It is not at all so clear that the hospital can be charged with having induced expectations of safety by merchandizing the "product" in typical Madison Avenue fashion. And what, in a free enterprise society, can fairly be the relevance of the fact that a profit was "reaped" by the sale of the product, apart from showing that the defendant added some form of value (and perhaps danger) to the product in its distribution?⁶⁶ The defendant could indeed spread the loss—not to the public at large, but to other patients and indirectly to the donors of the charitable institution. But one may question the soundness of a social policy that requires all patients to pay an additional fee, on top of already enormous medical costs, in order to guarantee some other patient that he will suffer no adverse side-effects from a treatment that does invisible and unknown things to the body. Nor does the difficulty-to-prove-negligence rationale apply to the present case, since the hospital's failure to warn of such a material risk clearly would have been negligent had the hospital known of the risk, and clearly not negligent if it had not. Finally, the inequality-of-bargaining-power argument seems to go to the fairness of requiring the hospital to act responsibly in controlling the risk. In this case, that means no more than giving the patients all information the hospital should have had concerning the material risks of the treatment and its alternatives; these principles apply with as much force in negligence as under strict liability in tort.

The court, it seems, wasted much good effort in pages of analysis on fine doctrinal points of what are "products" and what are "services." Nor did its look to policy help the analysis. The examination of the boundary question at issue would have been much improved had the court gone directly to the social values implicated or to reasoned principles resting thereupon. Here, one probably need look no further than the informed consent policy of protecting autonomy—of according legal support to the individual's need for information held by the other concerning material risks to the individual.⁶⁷ If the risk was unknown to the profession at the time, there could hardly be a fair claim of right to such unknown information. Moreover, if the risks were unknown, it may be as-

66. The caption of the case indicates that the defendant was in any event a not-for-profit organization in the instant case.

67. See PRODUCTS LIABILITY, *supra* note 6, at 294.

sumed that first-party medical insurance would be a more efficient and fairer means of distributing the risk than requiring other patients—or the hospital's liability insurance carrier—to pay the loss after the fact.

(3) Installers and Repairers

*Johnson v. William C. Ellis & Sons Iron Works, Inc.*⁶⁸ involved the question whether strict liability in tort properly applies to the installer and repairer of a product. While working as a "headtucker" on a cotton bale compressor, plaintiff's deceased was injured when his head was caught and crunched between a moving and a stationary part of the machine. Plaintiff sued the company, which thirteen years before had moved the compressor from another location to where it was at the time of the injury, and which had in the process reassembled and repaired the machine at the new location. The plaintiff claimed that the defendant had had a duty to install guards at the pinch points or to give warning of their danger.

In considering whether principles of strict liability should apply to installers or repairers who fail to remedy or to warn of pre-existing defects discovered in their work, the court recited the usual litany of policies underlying strict manufacturer liability: the powerlessness of consumers to protect themselves compared to manufacturers, the seller's ability to spread the risk, and consumer expectations of safety.⁶⁹ Obliquely addressing the first and last of these rationales, the court remarked as follows:

In some cases an installer or repairer might be in a better position than the consumer of a product to detect dangerous defects in a product, but in many cases such a contractor would not have the knowledge necessary to recognize such defects or the opportunity to detect them in the course of furnishing services. Imposing a duty to discover and warn of dangers would require them more fully to examine the products they service, and to pass on the cost of this additional service not ordered by the consumer.⁷⁰

That this explanation appears so sound may again reflect the fact that this was an easy case—the danger was open and obvious, and the installer-repairer neither created nor aggravated the risk. Other cases, however, will pose more difficult questions, which will require a closer analysis of the relevant policies. For example, the danger discovered in the course of the repair or installation may present a substantial risk of serious injury or death yet may be

68. 604 F.2d 950 (5th Cir. 1979).

69. *Id.* at 955-56.

70. *Id.* at 956.

completely hidden and unknown to the owner. Perhaps the discovery of such important information, coupled with a significant service relationship between the parties, should create a duty on the installer-repairer to use this powerful resource to the benefit of the owner through warning of the danger. Whatever rights perspective is applied to such a case—Shapoian power⁷¹ or consumer expectations—the imposition of a duty to warn in this situation case would appear fairly to accommodate the parties' respective rights. Contrary to the court's implication, the imposition of such a duty would also appear to promote economic efficiency, at least if the obligation to warn were limited to hidden and material hazards of which the installer or repairer actually becomes aware, since the defendant in such a situation would appear to be in the best position to evaluate and reduce the risk cheaply.⁷² Any resulting increases in accident prevention costs by over-cautious technicians would probably be far offset by accident costs averted by the warnings. Still, one may wonder whether in such a context a court should expend its efforts on the doctrinal issue of whether the "strict" tort doctrine should be held to apply, since evolving concepts of negligence responsibility may well embrace an identical duty to warn.

(4) Trademark Licensors

In *Connelly v. Uniroyal, Inc.*,⁷³ the issue was whether to extend the strict tort doctrine to trademark licensors. Plaintiff was injured when a tire on his automobile failed. Defendant Uniroyal had not manufactured the tire, but had granted the manufacturer a license to use the Uniroyal name. Reversing the intermediate appellate court, the Supreme Court of Illinois ruled that Uniroyal should be subject to strict liability in tort, although as merely a trademark licensor it had not been a link in the chain of distribution:

A licensor is an integral part of the marketing enterprise, and its participation in the profits reaped by placing a defective product in the stream of commerce . . . presents the same public policy reasons for the applicability of strict liability which supported the imposition of such liability on wholesalers, retailers and lessors.⁷⁴

None of these types of defendants—wholesalers, retailers, or lessors—typically has much control over the creation of product risks. In the trademark context, on the other hand, the application of

71. See M. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY* (1977).

72. This result follows from Calabresi's cheapest cost avoider test. See note 12 *supra*.

73. 75 Ill. 2d 393, 389 N.E.2d 155 (1979), *rev'g* 55 Ill. App. 3d 530, 370 N.E.2d 1189 (1977).

74. 75 Ill. 2d at 411, 389 N.E.2d at 163.

a consumer expectations rationale seems particularly appropriate since the licensor intends full well to induce consumer reliance on its goodwill through the express communication of the idea that the product is that of the trademark licensor. If there be no real intent to trick consumers into believing that the product was made by the licensor itself, the licensor must intend at least to convey the thought that the licensor had some control over major decisions in the design or manufacture of the product. Under such circumstances, when the licensor in effect tells the public that it made the product (or otherwise had control over key risks), the licensor should very probably be held accountable for defects within the actual manufacturer's control—at least where plaintiff can link his injury causally to reliance on the trade name.⁷⁵ Intentionally induced expectations of this type, engendered by express representations of manufacturer identity, would appear deserving of protection. This may have been the essential message in the court's otherwise hollow "profit reaping" rationale.

III. THE POLICIES RECONSIDERED

The judicial struggle to apply a principled basis of decision to both the central and boundary questions in products liability litigation is thus seen to reflect the inadequacies of the existing policy tools with which they have to work. That courts may often reach intuitively correct results does not therefore reflect the usefulness of the conventional set of policies but instead can more fairly be said to occur in spite of the analytical fog such policy statements create. This Article will proceed to examine each of the traditional policies to expose further their shortcomings and to see what guidance they may in fact supply.⁷⁶

A. *Compensation, Loss Shifting, and Loss Spreading*

Sanctioned by generations of repetition in the law reports and journals, these three purported "goals" of tort law were embraced enthusiastically by courts and commentators seeking to justify the development of strict products liability. It is often heard that a central purpose of strict liability is to "compensate" the accident

75. The proof in *Connelly* indicated that the plaintiff did not see the "Uniroyal" trademark on the tires at the time of purchase. See 55 Ill. App. 3d at 538, 370 N.E.2d at 1195.

76. Professor Richard Epstein has provided a useful critique of several of the conventional policies in *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643 (1978).

Much of the following subsection was taken from Owen, *Rethinking Accident Law Goals—Compensation, Loss Shifting, Loss Spreading*, 3 INS., NEGLIGENCE & WORKMEN'S COMP. REP. 1, 1-4 (S.C. Bar 1979).

victim, to "shift the loss" (or risk)⁷⁷ from the person who suffered it to the one who caused it, or to "spread the loss" (or risk) among others on whom it will fall less heavily. As variants of the same misconception, each of these three stock phrases is in need of the closest scrutiny.

Each of these concepts begins with the premise that the economic burden of an accident should for some reason be shifted away from the person on whom it falls, and to somebody else. A threshold danger with such a premise is that it presumptively sets in motion, without some independent showing of good cause, the intrusive and expensive machinery of governmental adjudication. Holmes may well have been right a century ago in arguing for an opposite approach.⁷⁸ These "rationales," moreover, are mostly bootstrap explanations for an end result; they do indeed explain the *consequence* of a judgment requiring the defendant to pay the claimant for his loss, but they provide little guidance for deciding whether a defendant fairly should be made to pay for someone else's loss in the first place. The result, of course, of finding for the plaintiff under any rule of civil liability—whether in contract, property, tort, or antitrust—is usually to compensate the claimant and thus to shift his loss to the defendant who in turn will almost always somehow "spread" at least some of it among other people. So, while explanatory of an end result, the loss-shifting group of rationales do little to assist in making or justifying a decision to achieve that result. As decisional tools, all three rationales thus suffer incurably from being one-directional—they argue only that payment should be made. If it be assumed that about one-half the time the defendant should not in principle be made to pay,⁷⁹ reliance on the loss-shifting rationales will thus be as likely to produce a wrong result as one that is correct. They therefore suffer as a group from structural inadequacy as decisional tools.

The risk-shifting goals do reflect certain values. At one level, the principal value advanced by shifting a loss away from an injured person, thus helping him regain his economic feet, is compassion. Yet losses shifted away from injured persons must necessarily be shifted onto other persons who may well deserve compassion, too.

77. There is, of course, a temporal difference between the notions of "risk" and "loss." Risk connotes a potential for a future loss, whereas loss represents the fruition of a risk. While for some purposes this difference in perspective may be significant, in the present analysis the two will be treated as simply different windows on the same world.

78. See O. HOLMES, *THE COMMON LAW* 94-96 (1881).

79. Some studies indicate that defendants win about half of all products liability cases; other studies put the figure higher. See *PRODUCTS LIABILITY*, *supra* note 6, at 28.

If the resource pot were big enough, it surely would be monstrous to deny economic rehabilitation to any person suffering an accidental loss, whether from product accident, earthquake, flood, automobile collision, or any other calamity. Indeed, the sooner this nation can truly afford a total system of compensation and rehabilitation for all victims of all accidents, as New Zealand put in place a few years ago, and all *disease* victims as well, the better off we all will be. The costs of such compensation plans are enormous, however, and we would do well to reflect upon just how much of our collective resources are at stake. There simply is, unhappily, no great accident pit into which losses may be thrown and from which resources may be retrieved.

With a bit of help from the Arabs, we have passed in about a decade from a general perception that our economy would soon be able to produce enough to satisfy the basic wants of almost all our citizens to a realization of the very limited nature of many of our important resources. Until some dramatic breakthrough occurs in energy technology, which may not be within this century or even in our lifetimes, we may in fact be facing a reality of decreasing resources—of fewer and fewer goods to go around. When faced squarely with the question, many persons in such a world might want to rethink the value of compassion as a basis for allocating scarce resources. One might well doubt whether a principle that shifts all the losses of product accidents to manufacturers, and thus which serves to deplete the resources of the producers and employers, is well suited to the economic realities of the 1980s. It may be, to the contrary, that what is really needed in times of increasing scarcity are principles that give stimulus rather than disincentive to those who are in a position to make new discoveries and to increase productivity. Compassion, then, though a value to respect, may well compete with other important social goals.

At a fundamental level, the “compassionate” loss shifting rationale masks somewhat a scheme of “social engineering” or “distributive justice,” the principal feature of which is wealth equalization—the shifting of wealth from rich to poor. This is disturbing for several reasons. First, one may question whether the judicial arm of government ought to be permitted to use the arguably fortuitous occasion of a product accident to achieve a kind of “taking” of a person’s wealth because he has more of it than does the plaintiff. An accident may be a legitimate occasion for decisions of distributive justice if there are other good reasons for forcing a wealth transfer as well, but the question whether the relative wealth of the parties *alone* should determine accident compensation decisions is

a fundamental one of social policy that should be made⁸⁰ in the open through the collective legislative will of the people. If such questions of "taxation" policy for some reason must be made by courts, they should at least make clear the stakes at issue and the choices made.

Still another problem with the compassionate wealth equalization rationale is the assumption that the loss is shifted away from some "real" person to a mere institutional company.⁸¹ Since business entities are thought to promote the general public good in this country by providing goods and services desired by the people, a bias against institutional defendants may not make much sense. Such entities, moreover, are made up of real people, too—from the shareholders, who are at bottom almost always "small" investors, to employees and creditors. Ultimately, through more expensive, fewer, or less useful products, the public whom such entities exist to serve are the ones to whom at least part of the loss is passed. To say that the consuming public is thereby only paying for another cost involved in making the product again begs the question of on whom the loss should fairly fall.

"Spreading the loss" to many such persons does in fact relieve uninsured accident victims of a sudden, crushing economic blow that may tear apart the fabric of the victim's life. Compassion for such persons might indeed be chosen by the public, especially if forced to choose through some kind of Rawlsian "veil of ignorance."⁸² When constructing at the start the basic social compact, a rational person might well be risk-averse and so might choose to "chip in" a bit of wealth to insure himself and his neighbors against the risk of losing all. But America in the 1980s has come far indeed from such a primal stage. Today, most persons are insured under private plans against accidental losses, at least for the expenses of health care that may result.⁸³ Free medical care on a welfare basis is often available for those who are not so covered, and a variety of private and public wage-continuation plans help to take some of the economic sting out of accidental injuries. For the large proportion of product accidents that occur in the workplace, work-

80. Epstein, *supra* note 76, at 659-61; G. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 802-05. *But see* England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 8 J. LEGAL STUD. 27, 68 (1979); Powers, *Book Review* 50 TEX. L. REV. 523, 536 (1979).

81. *See generally* Hubbard, *Expectations*, *supra* note 12.

82. *See* J. RAWLS, *A THEORY OF JUSTICE* § 24 (1971).

83. Statistics from the mid-1970s indicate that about 80% of the population presently has private hospital insurance, and that the figure is growing. U.S. DEP'T OF COMMERCE, 1977 STATISTICAL ABSTRACT OF THE UNITED STATES, tables 141 & 142.

ers' compensation helps at least to some extent. Since the very *raison d'être* of such compensation plans is to insure against such losses, they are probably more efficiently administered than are accident insurance "plans" imposed judicially on product manufacturers.⁸⁴ Nor may it be fair (or efficient) to penalize the prudent consumer who insures himself through health and wage insurance plans by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors. The risk shifting rationales may thus be misguided in the premises on which they rest.

Compensation and risk shifting should very probably be abandoned altogether as "rationales" of social policy for products liability decisionmaking. Such arguments are "structurally" inadequate as decisional tools, since they point in one direction only—toward liability. They mask social value judgments of the highest order that may well be better left to formal legislation. Moreover, the hidden values themselves rest on premises that grow shaky with analysis. Although loss spreading is a more justifiable social goal than the other two, it too suffers from many of the same weaknesses and thus should be turned to as a policy guide only with studied care. When the loss-shift clouds have cleared away, the difficult choices of social policy will appear more clearly, and principal decisionmaking should be enhanced.

B. Implied Representations of Safety and Consumer Expectations

It is often heard that sellers impliedly represent the safety of their products by placing them on the market. This implied representation in turn serves to raise in consumers some expectation of product safety.⁸⁵ While this argument has some real merit, it also has some inherent limitations that need to be examined. Although this rationale does not generally suffer from the same structural weakness as the loss shifting rationales—one-directionality—it does contain another structural deficiency as a decisional tool, vagueness.

The first problem that must be resolved is the selection of an

84. While manufacturers are often more efficient risk-insurers than are product users, as when the manufacturer stands in the best position to appreciate and adjust the risk, this perspective is probably better viewed through the prism of risk control discussed in section III E *infra*.

85. This view is most elegantly set forth by Marshall Shapo in *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

appropriate population whose safety expectations will serve as the decisional touchstone. The community generally, from which juries are selected, is probably too broad a population in that it may not reflect the special needs, education, and experience of users of the product. If the class of probable product users is selected, one must then decide whether to base the standard on their *actual* expectations or their *fair* expectations. The latter standard is depleted of much of its apparent power once it is seen that the determination of what expectations are "fair" potentially loads the analysis with whatever other goals or values are held by the decisionmaker. And if the *actual* expectations of consumers are turned to as the standard, other problems appear. For example, if consumer expectations prove to be unrealistically high, an inefficiently high level of safety will be encouraged by the standard—to the economic detriment of all. Moreover, with any group standard, the principle of autonomy (thought to lie behind the expectations test) suffers since the individual life plans of a minority of consumers are still subordinated to some standard of the group. Finally, if the injured plaintiff's own expectations are selected as the standard, the risk of inefficiency—and also unfairness to most consumers, who are asked to pay higher prices because of the idiosyncratic attitudes of a minority of safety absolutists—is increased considerably. In fact, when reduced to the plaintiff's own expectations, the standard's weakness shifts from vagueness to one-directionality, since consumers usually do not plan to injure themselves with products and hence rarely expect such injuries to result.

A problem of principle also lurks within the expectations rationale. If this rationale is chosen, is it to take precedence over the economic good of the group when the two conflict? The resolution of this question deserves considered analysis far beyond what can be given here, but the choice is one that must be addressed.⁸⁶ This important choice, which might best be made contextually rather than on general principles, at least should be squarely faced and made in the open.⁸⁷

Despite these shortcomings in the representation-expectations policy, it contains within it some goals and values that should undoubtedly be promoted and protected. When it places a new product on the market, a seller usually does intend to convey an impression to potential purchasers that it is free from hidden hazards. If the seller takes any further steps to induce the confidence of pur-

86. See Hubbard, *Expectations*, *supra* note 12.

87. Other problems with an expectations test are examined elsewhere. See, e.g., Klemme, *supra* note 12; Schwartz, *supra* note 32.

chasers in the product's integrity, as by making express assertions, it would seem quite just to hold the seller to the truth of those assertions. Moreover, the protection of consumer expectations does generally support the important value of autonomy: if persons are protected against unexpected calamity, at least in the sense of being compensated if it occurs, they can better go about ordering their lives as they individually see fit. By according their expectations such protection, the law forces manufacturers to look at consumers as persons worthy of respect.

Yet goals in addition to economic efficiency sometimes cut the other way. From whatever population the expectations standard is derived, it affords to manufacturers little guidance in structuring their affairs. While consumers under such a standard may safely order their affairs, free from worry of economic loss, producers will have very little idea of what is expected of them and accordingly little idea of how they may arrange their own conduct and resources to avoid financial calamity. Nor does a "real" versus "institutional" person argument assist too much in view of the conclusions reached above.⁸⁸

In summary, while consumer expectations should clearly be accorded significant respect in products liability law, we are far from understanding just how this objective may best be made to fit within a scheme that also accords respect to other goals of fairness and to the economic interests of the group.

C. Deterrence

Many courts have expressed the view that the threat of strict liability will deter the marketing of defective products. This rationale suffers from a variety of problems. First, it too is one-directional and hence deficient as a decisional tool. This feature, however, probably should not completely impair its usefulness in making boundary decisions since such decisions often assume the "badness" of the product and inquire only into what types of persons should be discouraged from supplying what types of products. But in helping to decide the central defectiveness question—what type and degree of residual danger makes a product "bad"—the one-directional feature of the deterrence rationale deprives it of any use whatsoever. Since the deterrence rationale cannot itself distinguish products that are "good" from those that are "bad," its use in making such decisions will tend to discourage the sale of all products of any significant potential danger. Such a policy,

88. See text accompanying note 81 *supra*.

promoting inefficiency, ill serves the needs of a free enterprise nation.

If implicit in the deterrence rationale is the notion of deterrence *to a point*, then this rationale would simply mask the other policy choices that must be faced in fixing that point. This would only produce a circular trip back to the ultimate question of defectiveness, of deciding how much safety is enough. For this purpose, the deterrence rationale would lend nothing to the analysis and only serves to cloud the issue.

D. Manufacturer's Probable Negligence

Some courts have assumed that injuries caused by the interaction of men and machines are usually the result of some negligent act or omission on the part of the manufacturer at some stage of the design, production, or marketing process. One glaring weakness in this assumption is that it denies the major role that consumers play in putting products to unfair use. Most accidents involving products may in fact more fairly be attributable to improper use than to the product's own condition.⁸⁹ Admittedly, the question of just what is the proper measure of manufacturer responsibility for anticipating and guarding against risky consumer use cannot so easily be put aside; but that accidents frequently may be traced in some large part to product abuse—use that unduly tests the product's limits—should still influence our willingness to assume that manufacturers are usually to blame for product accidents.

Once consumer (and third party) abuse is excluded from the picture, it may more firmly be assumed that any given product accident was principally due to some condition in the product. Yet, if we can fairly postulate that manufacturers may reasonably decide to leave some danger in their products, then accidents that happen when risk erupts into certainty are not necessarily reflective of the builder's *fault*. An injured claimant may as well be viewed as one of the statistically unlucky few, who was to be injured by dangers reasonably left in the product, than as a victim of some negligent act. The central question of defectiveness will still remain and a probable negligence rationale will only bias the results.

There is another issue that must here be raised: whether negligence is in fact a different thing from liability in "strict" tort. If both involve a balance of foreseeable risks against the benefits of a

89. Consider the following observation of John Byington, Chairman of the Consumer Product Safety Commission: "[O]ver 2/3 of all injuries related to consumer products have nothing to do with the design or the performance of the product. They relate to the misuse or abuse of the product." TRIAL MAGAZINE, Feb. 1978, at 25.

chosen safety level, as many courts have held in design and warnings cases, then a policy that imposes "strict" liability on a manufacturer *because* it probably was "negligent" is completely tautological. This is not of course a problem if "strict" liability is defined by other measures, as by the violation of consumer expectations or by true *cost*-ineffectiveness (which imputes full knowledge to the seller of all injuries that do in fact occur). On balance, the probable manufacturer negligence rationale appears to be of little value in resolving issues of substantive products liability law and serves to inject a convoluted doctrinal issue into a debate that should be focused at a much deeper analytical level.

There may be value, however, in the probable negligence rationale in a procedural, evidentiary sense. To the extent that this rationale is based on the superior knowledge manufacturers often have concerning product risks, a notion examined further in the next section, it may make sense in certain contexts to shift to the manufacturer evidentiary burdens normally falling on the plaintiff.⁹⁰ Yet, apart from guidance on this single procedural point, the implications of which are beyond the present analysis,⁹¹ the probable negligence rationale brings little light to bear on the difficult issues in products liability.

E. Risk Control

One of the principal reasons for the development of strict manufacturer liability was the developing complexity of product dangers. Lurking within the shiny machines of modern technology, often hidden from physical view and beyond the skill of consumers to discover or their ability to understand, are a multiplicity of hazards. From carcinogens in food additives to abstract mechanical relationships between ball bearings inside a whirling drill, many dangers of modern products are far beyond the ken of persons who must face scores of such dangers on a daily basis. Gone is the age of bargaining at the local fair for a leather saddle by a buyer who could effectively examine it to see what defects it had and who could accordingly negotiate a better price or otherwise protect himself. Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell. Yet, that manufacturers have superior knowledge of many product hazards does not mean

90. This approach was taken by the *Barker* court. 20 Cal. 3d at 431, 143 Cal. Rptr. at 237, 573 P.2d at 455.

91. See generally Schwartz, *supra* note 32.

they necessarily have better control over those particular risks that do in fact eventuate into harm. As discussed above, such is the case of exaggerated (perhaps "unforeseeable") consumer and third party abuse. When the product's capabilities are stretched too far, as when a car is taken over a rocky stream bed at great speed, the consumer is the best informed and in the best position to act upon most of the resulting risks. The rationale of risk control thus may help to identify where the loss should fairly lie: the loss should often follow risk control.

This rationale for liability is especially helpful for several different reasons. First, it seems intuitively fair, since liability is placed on the one who could have but did not avert the accident. In this respect, it seems fairer than a truly "strict" basis of liability that by hypothesis fixes liability on the manufacturer regardless of his efforts to control the risk. It thus protects at least the expectations of both consumers and manufacturers in the fairness of the legal rules. It may also embrace from a different perspective some of the values advanced by Professor Shapo's concept of the responsible use of power.⁹² Perhaps for these reasons, this rationale has been explicitly turned to by the courts in many cases.⁹³ Finally, a best-risk-controller standard may best protect against economic waste. Such a standard appears little different from Professor Calabresi's "cheapest cost avoider" economic model that he advances as the most efficient test of liability.⁹⁴ A best-risk-controller rationale, therefore, has much to commend it for products liability decisions.

As helpful as it is in advancing the analysis, however, the risk control rationale contains many assumptions and choices that need to be examined. One assumption held by some is that the standard used alone will promote efficiency. For a variety of reasons beyond the scope of this Article, this like most pristine economic models may not work in practice as well as in the thoughts of man.⁹⁵ The model weakens further in the boundary cases, in which other values, such as the protection of certain expectations, loom larger as the proper goals. Yet even here the rationale may point helpfully in the right intuitive direction. Retailers, for example, although

92. See M. SHAPO, *supra* note 71.

93. See, e.g., *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979), discussed at note 68 *supra*.

94. See note 12 *supra*.

95. For a discussion of the limits of efficiency models in the products liability context, and for citation to the general literature critical of economic analysis, see Hubbard, *Efficiency*, *supra* note 12, at 604-18.

broadly considered subject to strict tort liability,⁹⁶ seem unfairly covered by the doctrine when the defect was concealed from view and the manufacturer is solvent and within the jurisdiction of the court. Applied to such a case, the risk control rationale would hold the manufacturer liable but not the retailer. It would shield the retailer in such a case, however, even if the manufacturer could not be reached, and here a respect for consumer commercial expectations of an implied equivalence between price and quality—including safety—may be thought a better guide.

This last example raises an important issue that simply is not addressed (at least not explicitly) within the risk control rationale—the problem of allocating priorities between the values within the rationale and other interests raised by other values. This issue principally involves the push and shove between efficiency and “rights” deserving of protection, which may arise from expectations of product safety or from views of fairness in the rules of law. Such issues of priority may well best be determined on a contextual basis, and each such analysis will itself deserve detailed thought. For now it is sufficient to recognize that the rationale of risk control appears to have much potential for helping reach the “right” results in products liability cases, but that other values will need to inform such decisions as well.

F. Cost-Internalization

It is sometimes said that products liability rules should serve to force manufacturers to “internalize” the costs of product accidents, in the same way that they must account for costs of capital, materials, and labor. This “cost of business” rationale is deficient in several ways. If the thought is the narrow one that the manufacturer should internalize the *excessive* risks its products have, then this policy totally avoids the central question of how much safety is enough (and, conversely, how much danger is too much). If excessive is then defined as cost-ineffective, we return again to the economic efficiency and related value issues discussed above.⁹⁷

If the thought behind this policy is that manufacturers should indeed absorb the costs of all those accidents that are not the “fault” of product users or third persons (perhaps defined in terms of unforeseeable abuse), then the result is one of nearly absolute responsibility, bounded otherwise only by the notion of cause in fact. While one’s initial tendency is to reject summarily such a very

96. *E.g.*, *Mead v. Warner Pruyn Div.*, 57 A.D.2d 340, 394 N.Y.S.2d 483 (1977).

97. *See* section III A *supra*.

strict causation approach to products liability, as has apparently Richard Epstein,⁹⁸ the thought may need much more analysis. At an early date, Professor Cowan pointed to the deliberate nature of many if not most decisions concerning product safety.⁹⁹ Managers routinely decide how much risk to leave in the product's design, in the production and quality assurance process, and in the package of safety information carried with the product. To the extent that accidents from manufacturer-created conditions are not the result of deliberate choices but result instead from oversight, such failures may fairly be charged to manufacturers on more traditional grounds of fault. This would appear to exhaust the possibilities, since unforeseeable misadventure from external sources was excluded by hypothesis from the scope of liability. "Ultra-strict" liability of this kind may thus amount to little more than liability for intentionally or negligently inflicted harm. From another perspective, it may reduce essentially to something like the best-risk-controller economic standard described above.¹⁰⁰ Under any form of "ultra-strict" liability, one would very probably have to exclude from coverage losses attributable to serious consumer abuse not only on grounds of economic sense but also to treat fairly the careful consumers who do apply a rule of reason to curtail their personal liberties for the common economic weal. Such an exclusion would also seem required to eliminate the apparent unfairness of forcing manufacturers to internalize consumer "madness" in putting products to unpredictably dangerous use.

The cost-internalization rationale thus contains the germs of a theory of "ultra-strict" liability that may deserve some further study. The concept is close to that of risk control, and thus to Calabresi's cheapest-cost-avoider test as well. While only embryonic, some of these combined ideas appear to shed at least potential light upon important issues in this field of law.

IV. CONCLUSION

That courts and commentators have been struggling long with a variety of difficult issues concerning the nature and proper reach of products liability doctrine is known to all familiar with the field. The thesis of this Article has been that a principal cause of such

98. The rejection of such an approach is implicit in Epstein, *supra* note 76. Compare to this Professor Epstein's own general model, from which he studiously excludes the more difficult products liability issues. See Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973).

99. See Cowan, *supra* note 43.

100. See section III E *supra*.

problems has been the failure of courts and commentators to develop and articulate a considered platform of fundamental political value choices applicable to this area of law. Only after such a jurisprudential foundation is set can a coherent and principled system of guiding standards and specific rules be built above.

It was seen that "compensation" and "risk shifting" should be banned from the lexicon of accepted social policies. The "risk spreading" rationale should not be used unless a court is willing to justify its use of the judicial forum to redistribute wealth from rich to poor on the arguably fortuitous happenstance of product accidents. The extent to which a defendant in a products case deliberately induces the creation of consumer expectations (or even does so only indirectly in marketing products that look to be safe and sound) implicates the consumer's interest in fairly mapping out his plan of life. The law should accord substantial respect to this interest. While deterrence may properly be considered in making boundary decisions when defectiveness is not an issue, it may not be brought to bear appropriately on the central issue of defectiveness itself. The probable negligence of manufacturers may be discarded as a substantive rationale but may help inform the decision whether sometimes to shift an evidentiary burden. The risk controller rationale was seen to be particularly useful and often to point in the right direction. The policy of forcing manufacturers to internalize product risks from one perspective offers little help, yet it offers from another hill an "ultra-strict" view of liability that should help illuminate problems along some paths that appear to run close to those of risk control.

Much of the traditional analytical baggage and many of the stock words and phrases attaching to the conventional policies of products liability law need to be discarded. Yet a rigorous critique of such policies reveals that some point in directions that seem right by intuition and by tentative application of some rough perceptions of the relevant principles. The difficult resolution of questions involving the proper accommodation of the relevant goals and values in different contexts still lies ahead. In the search for principle in this branch of the law, only the surface has been scratched. Now that some of the analytical obstacles have begun to be dismantled, however, the construction of a principled system of products liability law may more confidently proceed.

