



1-1-1988

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Recommended Citation

J. C. Kelso, *Brown v. Abbott Laboratories and Strict Products Liability*, 20 PAC. L. J. 1 (1988).

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***Brown v. Abbott Laboratories* and Strict Products Liability**

J. Clark Kelso*

In *Greenman v. Yuba Power Products, Inc.*¹ the Supreme Court of California helped lead the country into the wonderland of strict products liability. That court has now rendered a decision² that, by its clear explication of why strict products liability should *not* apply to prescription drugs, demonstrates with equal clarity that products liability should not be viewed as a species of strict liability. Instead, products liability should be viewed as a hybrid of negligence and warranty law. This thesis—that strict products liability is not so strict—is not particularly novel.³ Indeed, this exact observation was

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1. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

2. *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (*Abbott Laboratories*).

3. See, e.g., Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 760-61 (1983); Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983); Birnbaum, *Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Hoenig, *Product Designs and Strict Tort Liability: Is There A Better Approach*, 8 SW. U.L. REV. 109 (1976); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 850 (1973).

made at the 1962 meeting of the American Law Institute during its second consideration of Section 402A of the Second Restatement of Torts.⁴ Although the thesis is not new, the California Supreme Court's decision in *Brown v. Superior Court (Abbott Laboratories)*,⁵ makes this an appropriate time to reevaluate the place of products liability in the law of torts and to reconsider the table of contents of our torts casebooks.⁶

There are of course cases in which courts, because they *assume* that products liability is or should be strict liability, craft rules of liability that are more or less consistent with the assumption.⁷ And if strict liability could be theoretically justified by legitimate interests, these cases would be properly decided. But, as explained below, the reasons advanced to support strict liability are either overbroad or underbroad and thus provide no firm support for the conclusion that manufacturers should be strictly liable for injuries caused by their products. Moreover, a review of California law shows plainly that the attempt to excise negligence and fault concepts from products liability has been a fruitless exercise.

4. At the beginning of the 1962 ALI proceedings, Mr. William Condon, representing the Food, Drug, and Cosmetics Law Section of the New York State Bar Association, made the following critical observations:

I am here to suggest that 402A, in the judgment of our Committee and our Section, does not restate existing law. It rather announces a rule of law which we are unable to discern from the cases.

Now, all of the cases that I have been able to find and all of the cases that I have read have been cited by the Reporter in the comments here. Each of them is a case in which courts in some way or another have made inroads toward the abolition of the privity requirements in cases involving breach of implied warranty.

Now, there is no doubt that perhaps the majority of our jurisdictions have abolished or modified the privity requirement in some respects with respect to food products, other products for intimate bodily use, and in some cases for products which are not connected with bodily use at all in an intimate way.

This is quite a different thing, however, from saying that those courts have held that there is a strict court liability.

39 A.L.I. PROC. 230-31 (1963). The only reply to these observations was from Mr. Laurence Eldredge who, quite inaccurately, described what the courts had been doing as using "a dozen different devices to get this rule of *absolute liability*." Id. at 233 (emphasis added). Not even Section 402A purported to impose absolute liability, however.

5. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

6. Products liability is generally given a chapter of its own after the students have finished negligence and strict liability. That chapter usually emphasizes the development from negligence to warranty to strict liability. See, e.g., M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES xxx (4th ed. 1987); R. EPSTEIN, C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS xxxv (4th ed. 1984); P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, TORT AND ACCIDENT LAW xxv (1983); W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS xxvii (7th ed. 1982). The author believes that students would be much less confused by products liability if we would teach products liability as a special part of negligence instead of teaching it as an entirely separate field of tort law.

7. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (rejecting state-of-the-art defense primarily because products liability is strict liability).

The Supreme Court of New Jersey, reacting to criticism of its decision in *Beshada*, has now explicitly limited *Beshada* to its facts. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 388

If products liability is not strict liability, then what have we accomplished by its supposed creation as strict liability? History is likely to view the creation and development of products liability in much the same way that we now view the development of certain common law writs. When procedural or substantive limitations imposed by existing writs proved too constrictive, lawyers and courts made free use of fictions to fit a new state of facts into a pre-existing mold.⁸

Products liability has a similar pedigree: desperate attorneys and sympathetic courts, unable in a particular case to avail themselves of more traditional principles and causes of action (i.e., negligence and warranty), created a new doctrine with a new name. Along with the new name came the opportunity to change the law. Time honored limitations on other causes of action could be avoided since the new cause of action was, if nothing else, new in name.

Although the theme of this article is that products liability has been strict in name only, that should not be interpreted as a criticism of all of the new rules courts have developed by invoking the magic phrase "strict products liability." Fictions are an indispensable feature of legal development, and when a court resorts to a fiction, it often is in response to a genuinely sympathetic claim.⁹ Fictions allow growth to proceed in the context of a relatively rigid framework. The rigid framework provides stability and predictability that the practitioner in the office needs to have and provides a measure of legitimacy to the decision of an individual judge. Fictions then are the means by which that rigid framework can be modified from the inside out—modified without tearing down the whole structure.

Professor Lon Fuller described the primary motive that lay behind the introduction of a fiction as follows: "to reconcile a specific legal result with some premise or postulate."¹⁰ In the context of products

(N.J. 1984). The defendant in a failure to warn case in New Jersey is now deemed to have knowledge only of "reliable information generally available or reasonably obtainable in the industry or in the particular field involved." *Id.* at 387.

8. The classic example given by Professor Lon Fuller in his leading work on legal fictions is the common law action for trover. "The English courts were in the habit of pretending that a chattel, which might in fact have been taken from the plaintiff by force, had been *found* by the defendant. Why? In order to allow an action which otherwise would not have lain." L. FULLER, *LEGAL FICTIONS* 6 (1967).

9. See, e.g., Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871 (1986). Acknowledging that *Brown v. Board of Education*, 347 U.S. 483 (1954), moved the law a step in the right direction, Soifer further notes that *Brown's* companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), was based on a double legal fiction: "because the alternative was 'unthinkable,' the due process clause of the fifth amendment performed reverse incorporation of equal protection doctrine from the fourteenth amendment and made *Brown* applicable to the federal government." *Id.* at 878 n.24.

10. *Id.* at 51. See also Soifer, *supra* note 9, at 874-79.

liability, the unstated premise is that, as a general matter, all negligence cases should be governed by the same basic set of substantive and procedural rules. The fiction that products liability is fundamentally different from negligence permits a court to create new rules (for example, that in a products case, the *defendant* has the burden of proving that its product was reasonably designed¹¹ or that contributory negligence is no defense¹²) without violating the unstated premise. The fiction thereby makes us feel comfortable about the legitimacy of the new rules.

But the unstated premise—that every negligence or warranty case should be judged by the same rules of proof as every other negligence or warranty case—is misguided; and if we recognize that fact, the fiction that products liability is strict liability will no longer be necessary. Simply put, there is no reason why every negligence or warranty action must be governed by the same rules as every other negligence and warranty action. Indeed, courts had used modified warranty principles in products cases for over half a century before “strict” products liability was created.¹³

The intellectually difficult task is to determine which products cases should be governed by different rules and what those rules should be. The fiction that products liability is strict liability permits us to be intellectually lazy in that regard, and the price we pay for that laziness is the imposition of liability in cases where no one in the manufacturing or distribution chain is at fault. Dropping the fiction that products liability is strict liability will have the advantages of (1) fostering a return to fault-based liability and (2) allowing courts to focus on real differences between a particular products suit and other negligence or warranty actions—differences that may well justify giving the plaintiff the benefit of special rules of proof.¹⁴

11. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

12. *Lugue v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972).

13. Although the majority of courts were apparently comfortable using modified warranty principles, a few judges and leading commentators were not. They viewed certain limitations on warranty actions—such as the requirement that the buyer give notice to the seller of a breach of a warranty within a reasonable time after the buyer knew or ought to have known of the breach—as unjustifiable. Dean Prosser, in particular, lobbied long and hard to excise the word “warranty” from our products liability vocabulary. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter *The Fall of the Citadel*]; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

14. See, e.g., Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 760-61 (1983). Although the author does not fully subscribe to some of the new rules that have been created, see *infra* note 81, the primary purpose of this article is not to challenge the new rules but, rather, to make the adoption of

This article reviews the historical development of strict products liability in California. The review will make it plain that strict products liability—even in the state which made the greatest effort to distinguish products liability from negligence and warranty—is really nothing more than a modified form of negligence and warranty. The modifications concern mostly procedural matters (such as the burden of proof or availability of presumptions) or defenses (such as the availability of contributory negligence) and not the underlying theory of liability—a fault-based theory of liability. The modifications are important, of course, and even if we recognize that products liability is not premised on strict liability, those modifications can remain intact.

As scholars, we would well serve students, practitioners, courts, and the public if we were to begin debunking the notion that products liability is either strict or absolute. In addition to bringing reality back into the discussion of products liability, debunking the idea that products liability is strict or absolute may have the positive side effect of advancing and clarifying somewhat the debate over certain tort reform measures. One of the persistent drumbeats of tort reformers has been the judicial trend towards no-fault liability.¹⁵ If products liability is in fact fault-based in many jurisdictions, as the author believes it is, then this drumbeat loses much of its impact.

I. THE THEORETICAL UNDERPINNINGS OF PRODUCTS LIABILITY

The theoretical underpinnings of products liability as a distinct field of strict liability in tort have never been particularly clear. The reason is simple. None of the suggested bases for products liability firmly supports the conclusion that products liability must be strict liability as opposed to either absolute liability, negligence, or breach of warranty. As shown below, each reason for strict products liability is either overbroad or underbroad. And when the reasons for a

such new rules depend upon a more careful analysis of possible differences between a products suit and other negligence actions. An analysis that begins and ends with the statement that products liability is strict liability is insufficient.

15. See, e.g., TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30 (1986). "One of the most disturbing aspects of the current tort system is the degree to which it has moved toward no-fault liability. While this movement began in earnest over twenty years ago, it appears to have accelerated dramatically in recent years." *Id.*

particular rule are not narrowly tailored to the boundaries created by the rule itself, the tension created undermines the rule's legitimacy. A quick review of the justifications for strict liability will make this point clear and put the remainder of this Article in proper perspective.

Dean Prosser's leading article in 1965 put forward what is one of the most widely accepted explanations for strict products liability:

The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel. By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising and otherwise they do everything they can to induce that belief. The middleman is no more than a conduit, a mere mechanical device, through which the thing is to reach the ultimate user. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer, or that he used all reasonable care. It is already possible to enforce strict liability by a series of warranty actions, by the consumer against the retailer, who recovers from the distributor, and so on back to the manufacturer; but this is an expensive, time consuming and wasteful process. What is needed is a shortcut which makes any supplier in the chain liable directly to the user. The 'risk distributing' theory—the supplier should be held liable because he is in a position to insure against liability and add the cost to the price of his product—has been an almost universal favorite with the professors; but it has received little mention in the cases, and still appears to play only the part of a makeweight argument.¹⁶

Dean Prosser's explanation has been broken down into the following four rationales for products liability: (a) The difficulty of a consumer proving that a manufacturer has been negligent; (b) the public policy encouraging manufacturers to make safer products; (c) the expectations of the consumer; and (d) the public policy in favor of risk-spreading and the internalization of costs.¹⁷ Even if these rationales are accepted at their face value, none supports making

16. *The Fall of the Citadel*, *supra* note 13, at 799-800.

17. See, e.g., Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 811-13 (1983); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34-35 (1973); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 399 (1970); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965). See also R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 40 (1980).

products liability strict liability as opposed to fault-based liability or absolute liability.

A. *The Difficulty of Proving Negligence*

If it is too difficult for the consumer to prove that the manufacturer has been negligent, it is relatively easy to change the procedural rules of proof. For example, the concept of *res ipsa loquitur* could be expanded to cover some of the difficult cases in which the plaintiff cannot identify the manufacturer.¹⁸ Or, if the plaintiff can prove that a particular design caused plaintiff's injury, the burden of proof could be shifted to the defendant to prove that its design is not unreasonably dangerous.¹⁹ Or, if the plaintiff can prove that *someone* in the distribution chain was at fault, the plaintiff should be permitted to bring suit against *anyone* in the distribution chain, with the burden again on each defendant to exculpate itself.²⁰ All of these innovations can take place without strict liability.

Prosser himself expressed doubt that the claimed difficulty in proving a negligence case against the manufacturer was a substantial concern. He correctly perceived that much of the force behind the strict products liability movement was not directed at the original manufacturer, who Prosser believed would usually lose under a negligence claim in almost every case where strict products liability would apply. Instead, the target was the other participants in the distribution chain, who usually could *not* be found liable on a negligence theory because they did nothing other than distribute goods. As Prosser noted:

The manufacturer is often beyond the jurisdiction. He may even, in some cases, be unknown. If he is identified and can be sued, it is very often impossible to pin the liability upon him. Even where there is a proved defect which speaks of obvious negligence on the

18. See, e.g., *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980) (permitting plaintiffs to proceed with products liability action against five DES manufacturers who represented a substantial percentage of the market even though plaintiffs could not identify source of particular drug each plaintiff took).

19. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). But see *infra* note 81.

20. Cf. *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (shifting burden of proof to defendants when both simultaneously engaged in conduct that could have injured plaintiff and plaintiff could not prove which defendant actually caused injury); *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (employing *res ipsa loquitur* in a hospital injury case against defendants, each of whom, at one time or another, had control over plaintiff's care).

part of someone, it may still not be possible to prove that it was on the part of the maker.²¹

Because of these possible difficulties, Prosser reasoned, "[i]f the plaintiff is to recover at all, he must often look to the wholesaler, the jobber, and the retailer."²² This argument, of course, begs the essential question. The question is not whether the plaintiff should recover "at all," but whether the plaintiff should be permitted to recover from someone who was not at fault and whether the plaintiff should be permitted to recover when *no one*, not even the manufacturer, was at fault. That, after all, is the fundamental difference between strict liability and negligence. As Professor Epstein has noted, we may be permitted to distrust an argument that *A* should recover against *B* because *A* cannot recover against *C*.²³

B. Public Policy Encouraging Manufacturers to Make Safer Products

There unquestionably is a public policy encouraging manufacturers to make safer products, but that policy is not furthered by strict liability. Strict liability is imposed even if the manufacturer did nothing wrong—even if the manufacturer did everything that was reasonable to avoid the injury. Imposing liability when the manufacturer has been reasonable does little to encourage manufacturers to do a better job in the future since the whole basis of strict liability is that liability is imposed even though the manufacturer could not reasonably have done a better job. Moreover, as Prosser noted:

A skeptic may well question whether the callous manufacturer, who is unmoved by the prospect of negligence liability, plus *res ipsa loquitur*, and by the effect of any injury whatever upon the reputation of his goods, will really be stimulated by the relatively slight increase in possible liability to take additional precautions against defects which cannot be prevented by only reasonable care.²⁴

C. Consumer Expectations

Courts are legitimately concerned about protecting the expectations of consumers. But those expectations are fully protected in an action

21. *The Assault Upon the Citadel*, *supra* note 13, at 1116.

22. *Id.* at 1117.

23. R. EPSTEIN, *supra* note 17, at 62.

24. *The Assault Upon the Citadel*, *supra* note 13, at 1119.

based on breach of the implied warranty of merchantability.²⁵ In light of the death of privity in this context,²⁶ and the relaxation of other warranty rules,²⁷ strict liability as a separate theory of recovery is quite unnecessary.

D. Public Policy Favoring Risk-Spreading

Finally, if the risk-spreading rationale were fully accepted, then there would be absolute liability rather than strict liability. The idea of risk-spreading is that the cost of the product should reflect all injuries caused by the product, and the manufacturer is in the best position to insure against those losses and spread the cost of insurance to consumers. To implement this policy, it would be necessary to impose absolute liability so that the price of a product would most accurately reflect the cost to society. Yet no court has gone so far as to impose absolute liability on a manufacturer, and it is commonplace for courts and commentators to mouth the phrase "manufacturers are not insurers of their products."²⁸ So risk-spreading is, at best, only a partial justification for strict liability.

With such flimsy conceptual underpinnings, it should come as no surprise that the creation of strict products liability historically had little to do with real policy choices. Instead, the new idea of strict products liability was originally introduced by highly respected lawyers in cases where it really was not necessary, and it carried the day

25. Indeed, the Supreme Court of California has recognized that the consumer expectation text is firmly rooted in the law of warranty. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d at 429-30, 573 P.2d at 443, 143 Cal. Rptr. at 236.

26. RESTATEMENT (SECOND) OF TORTS § 402B.

27. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 61, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (holding that the plaintiff in a products liability action need not give the manufacturer notice of a breach of warranty within a reasonable time).

28. See, e.g., *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (*Abbott Laboratories*); *SDR Co. v. Federal Ins. Co.*, 196 Cal. App. 3d 1433, 242 Cal. Rptr. 534 (1987); *Collins v. Ortho Pharmaceutical Corp.*, 195 Cal. App. 3d 1539, 231 Cal. Rptr. 396 (1986); *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985); *Cavers v. Cushman Motor Sales, Inc.*, 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978); *Garcia v. Joseph Vince Co.*, 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Shepard v. Superior Court*, 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977); *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974); *Cravens, Dargan & Co. v. Pacific Indem. Co., Inc.*, 29 Cal. App. 3d 594, 105 Cal. Rptr. 607 (1972); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972); *Kalash v. Los Angeles Ladder Co.*, 28 P.2d 29 (1932), *rev'd*, 1 Cal. 2d 229, 34 P.2d 481 (1934).

largely on the reputations of its original authors. In the next section, that history is recounted.

II. THE HISTORICAL DEVELOPMENT OF PRODUCTS LIABILITY

A. *The Supreme Court of California Takes the Plunge*

The creation and development of strict products liability has been recounted so often, that it has taken on the characteristics of a good bedtime story. The main characters are the justices of the Supreme Court of California and the members of the American Law Institute. The leading figures are household names to any educated lawyer—Traynor, Prosser, Wade, Keeton. These giants in the law of torts, through their collective persuasive powers, wrought a revolution in the law of torts virtually overnight.

The doctrine first appeared in California case law in Justice Roger Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*²⁹ It then appeared as an alternative holding in *Greenman v. Yuba Power Products, Inc.*³⁰ It was subsequently adopted in modified form by the American Law Institute in Section 402A of the RESTATEMENT (SECOND) OF TORTS.³¹ It then swept the country. Shortly after *Greenman* was decided and Section 402A was adopted, Prosser confidently pronounced the game over.³²

In *Escola*, an exploding bottle case, Justice Traynor suggested in a concurring opinion that a manufacturer should be held *absolutely* liable for putting a defective product on the market if the manufacturer knew the product would be used without additional tests.³³ He explained his rationale as follows:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such

29. 24 Cal. 2d 453, 150 P.2d 436 (1944).

30. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

31. RESTATEMENT (SECOND) OF TORTS § 402A.

32. *The Fall of the Citadel*, *supra* note 13, at 804.

33. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.³⁴

Justice Traynor's absolute liability was only partially followed in *Greenman* when the Supreme Court of California, with Traynor as the author, adopted *strict* products liability. *Greenman* itself is an interesting tale. It was a disfigured case—a case that, with better lawyering, never would have reached the Supreme Court of California.

The plaintiff received a Shopsmith from his wife as a Christmas present. While using the Shopsmith as a lathe, the plaintiff was severely injured when the wood being sculpted flew out of the machine. The plaintiff brought an action against both the retailer and manufacturer for negligence and breach of warranty—the only clear bases for liability prior to the decision in *Greenman*. As to the manufacturer, the evidence would have justified either a finding of negligence or a finding that the defendant had breached certain warranties in a brochure to the plaintiff.

Unfortunately for the plaintiff, he had not given the manufacturer prompt notice of his claim. The defendant argued that the plaintiff's cause of action for breach of warranty was therefore barred by California Civil Code Section 1769 which provided, in relevant part, that there shall be no liability for breach of a warranty after the buyer has accepted the goods unless the buyer notifies the seller of the breach "within a reasonable time after the buyer knows, or ought to know of such breach."³⁵

The plaintiff's lawyer undoubtedly knew about the problem with the breach of warranty claim and knew the risk that the claim was a loser because of the delayed notice. If the jury had been given and made a *separate* finding on the negligence cause of action, the

34. *Id.* at 462, 150 P.2d at 441 (Traynor, J., concurring). Justice Traynor thus clearly recognized that, as argued above, the risk-spreading justification supports absolute liability rather than strict liability.

35. Civil Code Section 1769 has been superseded by the adoption in California of the Uniform Commercial Code. See CAL. COM. CODE §§ 2512, 2607 (West 1964).

Supreme Court of California could simply have affirmed the jury's decision since there was evidence of negligence. But the trial court did not ask the jury for a special verdict.³⁶ Instead, it requested a general verdict. As a result, it was impossible to tell whether the jury had found in favor of the plaintiff on the negligence claim or the breach of warranty claim.³⁷ California followed the rule that no judgment can be entered on a general verdict if the general verdict could have been supported by one of two theories, and only one of those theories was legally valid. Thus, if the breach of warranty claim were barred by Civil Code Section 1769, the case would have had to be reversed since there was no way to determine whether the jury had found in favor of the plaintiff on the negligence claim or the legally invalid warranty claim. The failure to secure a special verdict would have thus made a retrial mandatory.³⁸

The Supreme Court of California saw in *Greenman* a good opportunity to try out its new idea of strict liability. It would have seemed unfair to the plaintiff to compel a retrial of the case when the jury had found in the plaintiff's favor. The general verdict rule was, after all, a mere procedural detail, and the plaintiff should not be penalized for the failure to secure a separate verdict. In any event, although the notice rule may have made sense in the context of a contractual warranty, it made less sense in the context of a personal injury claim. The question then for the court was, "How can we affirm the judgment?"

The court first held—in order to give itself room, if necessary, for a hasty retreat from its alternative holding—that Civil Code Section 1769, despite its clear terms, did not apply to the case since "[a]

36. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 60, 377 P.2d 897, 899, 27 Cal. Rptr. 697, 699 (1963).

37. *Id.*

38. This procedural history has sometimes been misstated by commentators. In his leading article in 1973, for example, Professor Wade described the case as follows: "The trial court ruled that there was no evidence of negligence and submitted the case to the jury on the basis of implied warranty. It held for the plaintiff. Rather than reverse for a new trial on the negligence issue, the Supreme Court held that the recovery on the basis of implied warranty could be sustained instead on the basis of strict liability." Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 836 n.39 (1973). Professor Epstein seems to have made the same mistake in his book. R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 37 (1980).

The confusion has arisen apparently because there were two defendants in *Greenman*, the retailer and the manufacturer. There was no evidence that the retailer was negligent, and the court properly refused to submit the retailer's negligence to the jury. The jury found in favor of the retailer on the warranty claim. The jury found against the manufacturer. The manufacturer appealed the judgment against it, and the plaintiff *conditionally* appealed the judgment in favor of the retailer (that is, the plaintiff appealed if and only if the judgment against the manufacturer was reversed).

applied to personal injuries, and notice to a remote seller, [the section] becomes a booby-trap for the unwary.”³⁹ The court’s *alternative* holding was that, in any event, liability could be imposed without a showing of either negligence or breach of warranty—notwithstanding that the case had not been tried on that basis to the jury. A manufacturer could be found “strictly liable in tort.” In particular, the court noted:

To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.⁴⁰

Thus began California’s journey into strict products liability.

B. The American Law Institute Adds Its Imprimatur

At about the same time as *Greenman* was working its way up the California court system, the American Law Institute was actively considering Section 402A and its comments. Dean Prosser presented the initial draft of 402A at the Institute’s 1961 meeting. The draft provided:

One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for bodily harm thereby caused to one who consumes it even though
(a) the seller has exercised all possible care in the preparation and sale of the food, and
(b) the consumer has not bought the food from or entered into any contractual relation with the seller.⁴¹

This section restated the law as it had developed over several centuries. Defective food, no less than mislabeled poisons, was clearly an area where strict liability made some sense.⁴² But Prosser was already on record in favor of a new principle much broader than strict liability for defective food.⁴³ Prosser could also point to a few

39. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 61, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

40. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

41. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 6, 1961).

42. RESTATEMENT (SECOND) OF TORTS § 402A comment b (detailing the history of the application of strict liability to sellers of food).

43. Prosser had published his first article on products liability in 1959, two years before the presentation to the Institute. See *The Assault on the Citadel*, *supra* note 13.

cases that had already gone beyond food to cover "products for intimate bodily use, such as hair dye, cosmetics, permanent wave solutions, and the like."⁴⁴ As a result, a motion passed to include within Section 402A's scope products that involved "intimate bodily use."⁴⁵

There was also a discussion at that first session about the use of the phrases "defective condition" and "unreasonably dangerous." Professor Reed Dickerson expressed his belief that "unreasonably dangerous" was simply the best possible test for what was legally defective."⁴⁶ He asked for "an example of a product which was at the same time unreasonably dangerous but not defective" and moved to strike the word "defective."⁴⁷ Prosser reported that some members of the Council were concerned that some products, such as whiskey and cigarettes, might be viewed by a jury as "unreasonably dangerous" even though there was nothing "wrong" with the product. The word "defective" was added "to head off liability on the part of the seller of whiskey, on the part of the man who consumes it and gets delirium tremens, even though the jury might find that all whiskey is unreasonably dangerous to the consumer."⁴⁸ Professor Dickerson's motion to strike the word "defective" was defeated.⁴⁹

The Institute also discussed the problem of unavoidably unsafe products, such as prescription or experimental drugs, that, because of their importance to society, should not be held to a strict liability standard. Two motions to add an exemption for prescription drugs (one motion addressed to the black letter and one to the comments) were defeated.⁵⁰ There were two reasons for the defeat. First, Prosser believed it would be difficult to come up with language that would distinguish between the new experimental drugs, the cure which somebody will come up with, no doubt, inside of the next fifteen years which will actually cure cancer, of which there will be an enormous sale on the market and which will undoubtedly kill its

44. 38 A.L.I. PROC. 55 (1962) [hereinafter 38th ALI PROCEEDINGS]. Professor Joseph Page has recounted much of the drafting history of Section 402A. See Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 860-72 (1983).

45. 38th ALI PROCEEDINGS, *supra* note 44, at 73.

46. *Id.* at 87.

47. *Id.*

48. *Id.* at 88.

49. *Id.* at 89.

50. *Id.* at 97-98.

thousands—how do you distinguish that from a new hair dye or shaving lotion which should not be on the market?⁵¹

Second, it was pointed out that, because the draft already required that a product be both defective and unreasonably dangerous, an exemption for prescription drugs would mean that a plaintiff could not recover for injuries caused by a defective and unreasonably dangerous drug—a result described by one member of the Institute as “outrageous.”⁵²

When Dean Prosser returned to the Institute two years later, he had in his hands the Supreme Court of California’s decision in *Greenman*. With that decision as his primary authority, Dean Prosser convinced the Institute to scrap what Prosser correctly believed were artificial limitations in the prior draft of Section 402A. The revised draft was not limited to food or products for intimate bodily use. It covered all products.⁵³

The draft also contained a new comment k, concerning unavoidably unsafe products.⁵⁴ Although the Institute had been unable to agree on an exemption for prescription drugs at the 1961 session, Prosser drafted a comment to address the concerns that he and others had that the manufacturers of certain unavoidably unsafe drugs (Prosser’s favorite example was the Pasteur treatment for rabies) would be subject to strict liability. The comment was approved without significant discussion along with the rest of Section 402A.⁵⁵

51. *Id.* at 93. Prosser also argued that a black-letter exemption for all prescription drugs was inadvisable because the exemption would then depend upon the vagaries of state law. *Id.* at 95-96.

52. *Id.* at 97. This argument was not correct, of course. The fact that no liability would attach under § 402A did not mean the drug manufacturer would be exempt from a negligence action.

53. 41 A.L.I. PROC. 349-51 (1965). Section 402A presently reads as follows:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A.

54. See *infra* text accompanying note 84 (for the text of comment k).

55. See Page, *supra* note 44, at 864-72 (for an excellent discussion of the history of

C. The Difference Between Products Liability and Negligence

Because it was a new doctrine with a new name, courts quickly developed a whole new set of rules for products liability cases. Many rules were imported intact from negligence and warranty law; many other rules, however, were made up to further the perceived policies of products liability.

But courts have never been comfortable with the most fundamental question of all: what makes products liability different from negligence and warranty as a theory of tort recovery? This question is fundamental because, if products liability is really nothing more than negligence and warranty with a new name, then the many decisions that have assumed there was a difference and have crafted new rules for products liability are, in some sense, illegitimate.

The Supreme Court of California first struggled with this problem in *Cronin v. J.B.E. Olson Corp.*⁵⁶ The precise issue was whether the jury should be instructed that liability could follow only on a finding that the product was unreasonably dangerous *in addition* to being defective.⁵⁷ Section 402A provided that liability will be imposed on "[o]ne who sells any product in a defective condition *unreasonably dangerous* to the user." It thus appeared that Section 402A mandated two findings: that a product was defective and that it was also unreasonably dangerous.⁵⁸

Anyone who had participated in the ALI proceedings or who had read the proceedings knew that, as indicated above, the word "defective" was added to *limit* liability in certain cases, that the words "unreasonably dangerous" were supposed to be the central test for the application of Section 402A, and that the drafters of Section 402A intended that there would indeed be *two* findings.⁵⁹ Of course "unreasonably dangerous" sounded quite a bit like negligence. Yet in explaining Section 402A, Prosser indicated that the "unreasonably dangerous" requirement was inserted into Section 402A to prevent

comment k). See also *infra* note 85; Reingold, *Products Liability — The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947 (1964).

56. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

57. *Cronin*, 8 Cal. 3d at 128, 501 P.2d at 1158, 104 Cal. Rptr. at 438.

58. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 438 (1972).

59. See *supra* notes 46-49 and accompanying text.

products liability from becoming absolute liability; it was not intended to make products liability negligence-based.⁶⁰

The Supreme Court of California was not convinced, however. In *Cronin*, the court was concerned that "The result of the limitation, however, has not been merely to prevent the seller from becoming an insurer of his products with respect to all harm generated by their use. Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence."⁶¹ The court was also concerned that "the Restatement formulation of strict liability in practice rarely leads to a different conclusion than would have been reached under laws of negligence."⁶² The court was unwilling to accept this state of affairs. It declared that "the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, and thereby 'to insure that the costs of injuries resulting from defective products are borne by the manufacturers.'"⁶³ The court held that the plaintiff was therefore not required to prove that a product was unreasonably dangerous. Instead, the plaintiff had to prove only that the product was defective.⁶⁴

There was an element of surreality in the court's opinion in *Cronin*. The word "defective" in Section 402A was supposed to be a limitation on liability with the words "unreasonably dangerous" being the key test. *Cronin* stood Section 402A on its head, discarding "unreasonably dangerous" and instead focusing on "defective" as the only test of liability. Of course, no one really knew what it meant for a product to be "defective."⁶⁵ All we knew from the ALI proceedings was that whiskey and cigarettes were *not* defective.⁶⁶

60. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

61. *Cronin*, 8 Cal. 3d at 132, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42.

62. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442. In support of this conclusion, the court cited the following: Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 n.5 (1971); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1340-41 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965); Prosser, *The Assault on the Citadel*, 69 YALE L.J. 1099, 1119 (1960); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 323 (1966).

63. *Cronin*, 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

64. *Id.* at 135, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

65. Scholars quickly tried to fill the gap left by *Cronin* by proposing definitions of "defective" that would preserve products liability as a species of strict liability. See, e.g., Keeton, *supra* note 17 at 30; Wade, *supra* note 38, at 825.

66. The comments to section 402A are also of little help. Comment g suggests that a product is in a "defective condition" when it is "in a condition not contemplated by the ultimate consumer." Comment i then suggests that a product is "unreasonably dangerous"

Having declared in *Cronin* that products liability must avoid the "ring of negligence," the court in *Barker v. Lull Engineering Co.*⁶⁷ started the bells ringing again while simultaneously proclaiming adherence to *Cronin*. The trial judge in *Barker* had instructed the jury "that strict liability for a defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use."⁶⁸ This instruction was completely at odds with the holding in *Cronin*, and the California Supreme Court reversed the trial court in the first two paragraphs of the opinion.⁶⁹

But the court went much further in *Barker*. In extended dicta covering the remaining fifty-three paragraphs, the court tried to explain what instructions *should* be given to the jury in a products liability action. The court recognized that its decision in *Cronin* had left lower courts confused about what instructions to give to the jury. In particular, some lower courts had interpreted *Cronin* as a direction to leave the term "defect" essentially undefined for the jury. The supreme court used *Barker* to give "defect" a definition:

[W]e have concluded . . . that a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design.⁷⁰

The ordinary consumer test is taken from the Restatement itself and embodies the basic notion that consumers should be entitled to rely upon ordinary expectations in product behavior and quality. The court admitted that the test was "somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability . . . , [and] reflects the warranty heritage upon which California product liability doctrine in part rests."⁷¹ Of course it is really more than just "somewhat analogous." It is the same approach; the difference,

when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." These two tests are essentially identical, and Professor Dickerson may have been correct when he suggested at the debates over 402A that "defective condition" and "unreasonably dangerous" are really interchangeable. See *supra* text accompanying notes 46-49.

67. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

68. *Barker*, 20 Cal. 3d at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

69. *Id.*

70. *Id.* at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228.

71. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236 (citing CAL. COM. CODE § 2314 (West 1964)).

if any, is in name only. Thus, half of the *Barker* formulation is warranty-based.

The risk-benefit test—the other half of the *Barker* formulation—is of course nothing more than negligence and nothing more than Section 402A's “unreasonably dangerous” test.⁷² That can most clearly be seen by looking at the “relevant factors” that the supreme court directed juries to consider:

[A] jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.⁷³

This paragraph of course has a very familiar ring to it. Here is what Judge Learned Hand had to say in a slightly different context:

Since there are occasions when every vessel will break from her moorings, and, since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.⁷⁴

If there is any difference between *Barker's* test and Hand's test, it lies only in the fact that the *Barker* formulation nominally focuses “on the adequacy of the product itself, rather than on the manufacturer's conduct.”⁷⁵ The focus is nominal only, however, since the

72. It has also been pointed out that the consumer expectation test may not be conceptually distinct from the risk-benefit test, but may, instead, be a “different formulation” of the same test. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 794 (1983).

73. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

74. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). As Professors Calabresi and Hirschhoff noted:

Despite the courts' recognition that strict liability must be limited, they have seldom been very confident in trying to describe the limits. Indeed, their efforts at answering the questions posed in strict liability cases seem in many cases to degenerate into either meaningless semantic disputes or attempts at balancing the costs of the accident against the costs of avoiding it; yet the latter approach sounds devilishly like the very calculus of negligence, or Learned Hand's test for fault, which strict liability was meant to replace.

Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1056 (1972).

75. *Barker*, 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. Professor Keeton, among others, has proposed that the products risk-benefit test may be distinguished from a negligence balancing by focusing in the products case on the state of knowledge at the time of trial rather than the time of sale of the product (which would be the appropriate time under a negligence analysis). See, e.g., Keeton, *Products Liability and the Meaning of Defect*, *supra* note 17, at 37-38; Keeton, *Products Liability—Inadequacy of Information*, *supra* note

product exists only by virtue of the manufacturer's conduct.⁷⁶ Even though the manufacturer may have spent thousands or millions of dollars on product design and employed the best designers available, if the ultimate product fails the balancing test set forth above, then the manufacturer has negligently introduced a defective product into the stream of commerce. It has *never* been a defense to unreasonable conduct that the defendant tried very hard not to be unreasonable.⁷⁷ A good heart and a clean mind are no bar to liability for unreasonable conduct.

The inconsistency between *Cronin* and *Barker* was perfectly obvious to the Supreme Court of California. In order to avoid the catcalls of commentators, the court created—virtually out of whole cloth—a *real* difference between products liability and negligence:

Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the 'risk-benefit' standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, we conclude that once the plaintiff makes a *prima facie* showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.⁷⁸

17, at 407-08. See generally, Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, *supra* note 3, at 761-64 (reviewing Keeton's position). One clear implication of this proposal would be to make a state-of-the-art defense unavailable in a products action. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). So far, however, the California courts have not been particularly receptive to this idea and have recognized the relevance of state-of-the-art evidence. See, e.g., *Rosburg v. Minnesota Min. & Mfg. Co.*, 181 Cal. App. 3d 726, 735, 226 Cal. Rptr. 299, 305-06 (1986); *McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 203, 210, 195 Cal. Rptr. 764, 767 (1983).

76. See Powers, *supra* note 72, at 791-794.

77. *Escola* is itself a paradigm application of this principle. The manufacturer claimed that it had done all it reasonably could have done to inspect the bottle to insure that it would not explode. The court's response shows just how unnecessary strict liability is in a products case:

It is true that defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process. It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled.

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944). In other words, we can trust the jury to do the right thing.

78. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

Thus *Barker* succeeded in altering one of the most basic rules of trial procedure: that the plaintiff has the burden of proving its case. Of course, changing the burden of proof is not unprecedented. The doctrine of *res ipsa loquitur* is based on precisely such a burden shifting. What *Barker* did, however, was to employ the results of *res ipsa loquitur*—that the burden would shift to the defendant—without requiring that the traditional elements of *res ipsa loquitur* be satisfied.⁷⁹

The most fundamental requirement for the application of *res ipsa loquitur* is that the event must be of a kind that ordinarily does not occur in the absence of the defendant's negligence.⁸⁰ Because of this requirement, the doctrine could not be used generally for products cases. According to *Barker*, the burden shifts once the plaintiff shows the injury was caused by the design of the product, which means that the plaintiff need only propose some alternative design that would have avoided the accident. But no court could reasonably conclude *as a general matter* that a manufacturer is ordinarily negligent for failing to adopt whatever alternative is proposed by plaintiff's counsel. Thus, the California Supreme Court could not use *res ipsa loquitur* to shift the burden to the defendant in every products case without damaging that doctrine. What it could do, however, is indulge itself in the legal fiction that products liability is fundamentally different from negligence and, in light of that fiction, simply ignore traditional rules of proof. Without the shackles of those prior rules, the court could create a new rule, shifting the burden of proof to the defendant once the plaintiff shows the injury was caused by the product's design. And the new rule was perfectly consonant with one of the expressed purposes of products liability: "to relieve an

79. A similar burden shifting also occurs when courts employ the doctrine of negligence per se. As Professor Wade observed, "The time will probably come when courts are ready to declare that one who supplies a product which is unduly unsafe is negligent per se. Selling a product which is not duly safe is negligence within itself, and no more needs to be proved. Whether this is called negligence or strict liability is not really significant." Wade, *supra* note 38, at 850 (1973). It may not be significant to Professor Wade whether products liability is grounded in negligence or strict liability, since Professor Wade does not react to the labels alone. But the difference may well be important to courts that sometimes react simply to the fact that products liability is *supposed* to be strict liability. See, e.g., *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 198, 447 A.2d 539, 546 (1982) (rejecting state-of-the-art as a permissible defense primarily because it "is a negligence defense"); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) (rejecting "unreasonably dangerous" test because it "rings of negligence").

80. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON TORTS, § 39, at 244 (5th ed. 1984).

injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action.”⁸¹

In *Barker*, the Supreme Court of California took the first steps towards recognition that products liability was not very strict and that the doctrine was being used primarily to circumvent troublesome procedural rules. Having clearly stated a substantive test that incorporated a negligence-like balancing test and having clearly established a procedural difference between a products case and other negligence cases, the California court was prepared to take the next step—recognize *explicitly* that products liability, at least in certain design defect cases, should be negligence based.

D. The Drug Exception to Strict Products Liability

In the late 1970s and 1980s, California courts faced the DES cases. The cases raised serious concerns about the ability of the tort system to compensate injured persons in the context of mass torts. In *Sindell v. Abbott Laboratories*,⁸² the Supreme Court of California, in an opinion by Justice Mosk, gave the plaintiffs a significant victory by allowing them to go forward even though no single plaintiff was likely ever to be able to prove which defendant was liable for which injury.

The procedural victory in *Sindell* was short-lived. When the merits came before the Supreme Court again in *Brown v. Superior Court (Abbott Laboratories)*,⁸³ the plaintiffs were dealt a serious blow. The court held unanimously that the action could not go forward as a strict products liability action and that the plaintiffs would have to prove negligence on the manufacturer's part in order to recover.

81. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978). Of course *any* rule that made it easier for the plaintiff to win would be consistent with this policy, even a rule that imposed absolute liability.

It may be that there are good reasons to shift the burden of proof. But the only reasons offered by the court in *Barker* were (1) the purpose of products liability is to make the plaintiff's burden easier; and (2) the defendant's greater knowledge about the product design. The first reason simply begs the question. Why should the plaintiff's burden be easier in a products case as compared with any other type of negligence action? The second reason is at odds with reality. In the first place, the plaintiff is hardly without some power in the matter. The main purpose of pre-trial discovery is to give the plaintiff the chance to prove its case based on what the defendant knows. In the second place, the court's rationale—that the defendant is in a better position to prove its case—applies to *every* civil case in which the defendant has superior knowledge—yet we will not soon see a general rule that the defendant has the burden of proof on all matters about which the defendant has superior knowledge.

82. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

83. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

Brown would not be nearly so important if the court had simply declared without much explanation that it was going to follow comment k to Section 402A of the Restatement (Second) of Torts. Other courts had followed that easy route. But Justice Mosk, the author of *Sindell*, wrote a comprehensive and scholarly opinion—an opinion that will quickly make its way into every torts casebook.

The starting point is comment k to Section 402A:

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.⁸⁴

It is clear—and the Supreme Court of California recognized—that comment k embodies a negligence standard.⁸⁵ At the very least, then,

84. RESTATEMENT (SECOND) OF TORTS § 402A comment k.

85. *Brown*, 44 Cal. 3d at 1059, 751 P.2d at 475-76, 245 Cal. Rptr. at 417-18.

While there is some disagreement as to [comment k's] scope and meaning, there is a general consensus that, although it purports to explain the strict liability doctrine, in fact the principle it states is based on negligence. That is, comment k would impose liability on a drug manufacturer only if it failed to warn of a defect of which it either knew or should have known. This concept focuses not on a deficiency in the product—the hallmark of strict liability—but on the fault of the producer in

Brown stands for the proposition that as far as prescription drugs are concerned, strict liability is not an available theory of recovery.⁸⁶ *Brown* stands for much more however. As shown below, the court employed a negligence-like balancing of interests in concluding that strict liability did not apply. Negligence principles thus lay at the very foundation of every products case in determining whether or not strict liability should apply.

The court was very clear in *Brown* about its reasons for rejecting strict liability. Justice Mosk explained that the social value to be gained from both experimental and non-experimental drugs outweighed the risk of harm caused by side effects of those drugs. In particular, the court held that "the broader public interest in the availability of drugs at an affordable price must be considered in deciding the appropriate standard of liability for injuries resulting from their use."⁸⁷ Because of that balance, it was inappropriate to impose strict liability on prescription drug manufacturers.

Now any first year law student will recognize that Justice Mosk's analysis is nothing more than an application of Judge Hand's balancing test from *Carroll Towing*. The benefit to be gained by the manufacture of a product is balanced against the risk of injury to the user of the product. And as a result of Mosk's analysis in *Brown*, almost every lawyer defending a products case—whether or not it involves prescription drugs—will now claim that strict liability should not apply since the benefit to society created by the product outweighs the risks inherent in the product's design.⁸⁸ This argument will undoubtedly go hand-in-hand with an argument that the marketplace, rather than the court, is the best place to determine what is beneficial to society.

failing to warn of dangers inherent in the use of its product that were either known or knowable—an idea which 'rings of negligence,' in the words of *Cronin*.

Id. (citations omitted). See, Schwartz, *Unavoidably Unsafe Products*, 42 WASH. & LEE L. REV. 1139, 1141 (1985); McClellan, *Drug Induced Injury*, 25 WAYNE L. REV. 1, 2 (1975); Kidwell, *Duty to Warn*, 53 TEX. L. REV. 1375, 1377-1378 (1975); Merrill, *Compensating Drug Injuries*, 59 VA. L. REV. 1, 50 (1973).

86. *Brown*, 44 Cal. 3d at 1061, 751 P.2d at 477, 245 Cal. Rptr. at 418.

87. *Brown*, 44 Cal. 3d at 1063, 751 P.2d 478-79, 245 Cal. Rptr. at 420.

88. It should be noted that this argument is really just an application of the balancing test set forth in *Barker*, and it is therefore an argument that courts in California are already facing in design defect cases. See, e.g., *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 226 Cal. Rptr. 299 (1986). There is a significant difference, however. In *Barker*, the argument is made to the jury to prove that there is no defect; in *Brown*, the argument is made to the court to take the case entirely out of Section 402A and put it squarely back into negligence.

The responses to these arguments can also be anticipated. The argument that the marketplace should be determinative is premised, in part, on the cost of the product reflecting the cost to society; unless that cost includes the cost of injuries caused by the product, the marketplace's decision may not be correct. This reply is overbroad, of course, since it implies absolute liability rather than strict liability, and even the Supreme Court of California never adopted Justice Traynor's original suggestion of absolute liability. As already noted, cases are legion where courts have proclaimed that manufacturers are not insurers of their products.⁸⁹

The second reply—and the one Justice Mosk set forth in his opinion—is that prescription drugs are *sui generis* in the marketplace. According to Justice Mosk, prescription drug manufacturers are entitled to an exemption from strict products liability because (a) prescription drugs “may be necessary to alleviate pain and suffering or to sustain life” and (b) “harm to some users from prescription drugs is unavoidable.”⁹⁰ Justice Mosk used (a) to distinguish prescription drugs from other products such as construction machinery, lawnmowers, and perfumes—which are “used to make work easier or to provide pleasure.”⁹¹ He used (b) to distinguish prescription drugs from other life saving or pain avoiding devices, such as wheelchairs.

Justice Mosk's test—whether (a) a product saves lives or is necessary to alleviate pain and suffering and (b) is unavoidably unsafe—has several difficulties. With respect to part (a), there are many products other than prescription drugs that can easily be characterized as necessary to save lives or alleviate pain and suffering. Justice Mosk himself recognized that there are many health-related products other than drugs that may alleviate pain and suffering. His example of one such product was a wheelchair. We may add in the same category crutches or casts. But this list is readily expandable to virtually any product sold in the health-care aisle of the supermarket: heating pads, cold creams to soothe sunburn, sun tan lotion, sun glasses, creams or liquids to soothe cold sores or toothaches, athletes foot spray or powder, hemorrhoid treatments, and so on. This health-related list would also include equipment used by hospitals and doctors in the diagnosis and treatment process, including X-ray

89. See *supra* note 28 and accompanying text.

90. *Brown*, 44 Cal. 3d at 1063, 751 P.2d at 478, 245 Cal. Rptr. at 420.

91. *Id.*

machines, heart monitors, heart and lung machines, and even ambulances and air rescue helicopters.

In the second place, it is a relatively short step from health-care products to other products that improve our quality of living and, by so doing, alleviate or prevent physical pain and suffering or save lives. In their own way, the inventions of commercially available electricity, the light bulb, the refrigerator, the automobile, and the telephone have each contributed to the reduction of sickness and to the saving of lives, perhaps much more directly and on a much grander scale than the creation of certain drugs.

Moreover, it is not at all clear why products that provide pleasure (using Justice Mosk's word) should be treated differently than products that reduce pain and suffering. Our world would surely be a most dreary and insufferable place without those pleasure producing products. Those products fill a genuine need in society, just as life-saving drugs fill a genuine need. Can a court really say that the invention of the Pasteur treatment for rabies is of greater good to society than the invention of the telephone or automobile?

Finally, it is a cause for concern when a legal doctrine such as strict products liability gives equal treatment to life-saving drugs and such things as cigarettes and whiskey, especially when the underlying rationale for the treatment is the same: society is generally aware that these products may be dangerous. The fact is, however, that every product carries with it the potential for harm, and society is generally aware that the potential for harm exists in every product. We should therefore be treating all products alike rather than trying to distinguish before the fact the good or acceptably dangerous products (that get special treatment) from all other products (that get no special treatment).

As for part (b) of Mosk's test (that prescription drugs are unavoidably unsafe), in another portion of the opinion, Justice Mosk explains precisely why the unavoidably unsafe test is unsatisfactory. In *Kearl v. Lederle Laboratories*,⁹² the court of appeals had proposed that comment k be adopted only for "unavoidably unsafe" prescription drugs as opposed to all prescription drugs. That limitation would have been consistent with Prosser's view. In *Brown*, the supreme court held that this modified form of comment k was unacceptable.⁹³ Justice Mosk acknowledged:

92. 172 Cal. App. 3d 812, 218 Cal. Rptr. 453 (1985).

93. *Brown*, 44 Cal. 3d at 1066-69, 751 P.2d at 481-82, 245 Cal. Rptr. at 423-24.

It seems unjust to grant the same protection from liability to those who gave us thalidomide as to the producers of penicillin. If some method could be devised to confine the benefit of the comment k negligence standard to those drugs that have proved useful to mankind while denying the privilege to those that are clearly harmful, it would deserve serious consideration. But we know of no means by which this can be accomplished without substantially impairing the public interest in the development and marketing of new drugs, because the harm to this interest arises in the very process of attempting to make the distinction.⁹⁴

In other words, if a court were allowed after the fact to determine that a product was *not* unavoidably unsafe and that the product was therefore subject to strict liability, that would undermine the result reached in part (a) of Mosk's test—that the benefit to the public of manufacturing the product outweighs the risk. The supreme court thus rejected *Kearl*'s distinction between unsafe prescription drugs and unavoidably unsafe prescription drugs because such a distinction is inconsistent with the policy determination made in part (a) of Mosk's test.

That precise tension exists, however, between part (a) of Mosk's test and part (b) of Mosk's test. Part (b) of his test—that “harm to some users from prescription drugs is unavoidable”—is nothing more than the “unavoidably unsafe” distinction suggested by the *Kearl* court. Following Mosk's own rejection of *Kearl*, part (b) should be rejected. If a determination is first made that the development and marketing of a product is so important to society that its development outweighs the injuries it causes, then a finding that a product is avoidably unsafe would undermine the first determination that the benefits of the product outweigh the harm.

Dean Prosser recognized more than 25 years ago that any attempt to distinguish between drugs and other products was fraught with peril. When ALI first considered the topic of prescription drugs and Section 402A in 1961, Dean Prosser made the following observations *against* the inclusion of the concept embodied in comment k:

My problem—and please understand me, that I am in sympathy with you, sir—is: How do you distinguish between the new experimental drugs, the cure which somebody will come up with, no doubt, inside of the next fifteen years which will actually cure cancer, of which there will be an enormous sale on the market and

94. *Id.* at 1067, 751 P.2d at 481, 245 Cal. Rptr. at 423.

which will undoubtedly kill its thousands—how do you distinguish that from a new hair dye or shaving lotion which should not be on the market?

You may remember some years ago—and I am sure you do—the depilatories, the surplus hair removers, which were put on the market. Somebody had discovered that thallium acetate would remove hair, which it will. It will also blind the patient and drive him crazy, and several other things.

Now, I think today that any court would hold that anybody that put that stuff on the market assumed the responsibility, and in the hair remover case you would have no trouble applying the rule of this case. Give me language which will take care of your perfectly decent medical experiment with new drugs in order to save human life which will not include the thallium acetate hair remover.⁹⁵

Prosser was right. There is no elegant way to distinguish between prescription drugs, all drugs, and other products such as "hair dye and shaving lotion." And as Prosser also noted, there is no easy way to distinguish between food and items for intimate bodily use, which the original draft of Section 402A covered, and products generally, which the final draft covered. In fact, the overnight expansion of products liability from food to all products itself suggests that no elegant distinction can be drawn.

III. CONCLUSION

Following the logic of the above, the next step should be to apply the risk-benefit analysis of *Brown* to all products liability cases. We would then have come full circle. Products liability would have been created initially as something distinct from negligence and warranty but would have ended up being recognized as the same as negligence and warranty. Only the troublesome procedural rules would have changed. This would be a wise step in the author's opinion. We should guard against the temptation to force products liability to be something different from negligence and warranty simply to justify applying different rules to a products liability action than to any other negligence or warranty action.

It seems likely, however, that that next logical step will not be taken anytime soon. Courts have been more comfortable indulging

95. 38th ALI PROCEEDINGS, *supra* note 44, at 93-94. See also *Smith v. Denholm & McKay Co.*, 288 Mass. 234, 192 N.E. 631 (1934) (the hair remover case apparently referred to by Prosser).

in the fiction that products liability is not negligence than facing the reality that the rules of the game were being changed in spite of the fundamental similarity between a negligence action and a products action.

Eventually, however, some courageous court will take the fateful step of pronouncing strict products liability to be a dead letter. As Professor Wade declared fifteen years ago, "At that time we would have a single cause of action which combines the desirable attributes of the three types of action that are now available."⁹⁶ And the world of torts will keep spinning, because that court would also declare that the innovations wrought by the creation of strict products liability are well justified and so firmly rooted in the law that they cannot be excised.

96. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 850 (1973). See also Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983).

