International Corner

Product Liability Law: From Negligence to Strict Liability in the US

Jerry Kirkpatrick

Summary

This article traces the twentieth-century shift in product liability law from negligence theory to strict liability and analyzes the philosophical ideas underlying and causing the shift. The author argues and concludes that the shift is part of the 150-year cultural trend away from philosophical individualism to philosophical collectivism, specifically of the egalitarian, not Marxian, form.

Introduction

The context of this paper is the product liability crisis and its effects on marketing. The crisis itself is old news and its extent, rate of growth, and even its existence are vigorously disputed by plaintiffs and defendants. Indeed, the actions in recent years of federal and state courts to curb damages, insurance premiums and class-action lawsuits speak to the lessening of the crisis.[1] Nonetheless, the quest for deep pockets in other states and jurisdictions continues in earnest and insurance premiums climb. The cause of the product liability crisis is generally understood to be the changed law of torts that has moved from a conception of liability based on morally culpable negligence, or fault, to one based on "strict liability", or "no-fault". What has not been understood is the role of philosophical principles in shaping the opinions of law professors and judges in the evolution of product liability law.

The present article seeks to identify the underlying philosophical principles that have motivated the shift from fault to no-fault liability. Because philosophical ideas stand behind and cause cultural, legal and institutional change, knowing the causes of a trend, such as the principles underlying the increased number of product liability lawsuits, is like discovering the design plans of a large, complex machine. The plans describe where every part is located and explain what the machine will do next; they allow the designer to modify the machine or completely redesign it. Knowing the philosophical causes of the current product liability trend will enable marketers to predict future actions that may be taken against them and provide a frame of reference from which to seek corrective action against what they may perceive to be injustices. Similarly, knowing the philosophical causes of the trend will enable public policymakers to better formulate appropriate responses to both the trend itself and to the marketers' reactions to it.

This article reviews the shift in legal theory from negligence to strict liability and evaluates the process and result in terms of broad philosophical, especially epistemological and ethical, fundamentals. As the shift occurred primarily in the first three quarters of the twentieth century, the paper focuses principally on that time period.

The Meaning of Product Liability

Product liability is the doctrine of tort law that defines the conditions under which sellers of defective products are responsible for injuries or damages caused by their products. Tort law defines the obligations that individuals and institutions hold toward one another, not by virtue of the explicit, mutual consent that arises from a written or oral contract, but by virtue of the implicit obligations that arise from living in a free society that respects individual rights. Tort law provides recompense to parties harmed by the violation of these implicit obligations. Product liability, therefore, defines the seller's implicit obligations toward anyone who may be harmed by the seller's defective product.

There are two kinds of defect that give rise to product liability cases. The manufacturing defect is the failure of a single product or part of a product to perform its intended function. An exploding soft drink bottle, for example, is defectively manufactured because such behaviour is a deviation from the norm of the other bottles in the product line that have been manufactured correctly and consequently do not explode. The design defect is a failure in the essential idea or design of the product that leads to injury. If the exploding soft drink bottle were designed defectively—for instance, the material out of which the bottle is made is too weak to withstand the carbonation of the soft drink when capped—then all such bottles in the product line would have the tendency to explode. The only way to remove such a defect in design is to cancel the entire product line, recall all such products from the market, and replace the line with a newly designed model. Alleged design defects are the major source of today's product liability crisis.

Early Development: Privity, Warranty, Negligence

Product liability did not originate as a tort obligation. Prior to the late nineteenth century, claims for injury or damages resulting from a defective product were settled through contract law. Sellers of products were responsible only to persons with whom they had "privity", which is a relationship between persons who have a mutual legal interest in a specific right or property. What gives them this mutual interest is a contract, either written or oral. In practical terms, this meant that manufacturers were responsible only to their immediate buyers; if the buyer sells the product to a third party, who is then injured by the defective

[1] Orey, Michael, "How Business Trounced the Trial Lawyers", *Business Week*, 8 January (2007), 44-50.

International Corner

product, the privity doctrine forbids recovery by the third party.

To help the plaintiff establish privity, the courts allowed arguments based on the law of warranty. A warranty is a written or oral statement, made by the manufacturer or seller of a product, to assure the purchaser that the quality of the product meets certain standards. An express warranty is a contract; therefore, privity would exist between buyer and seller, even if the buyer is the third or fourth party to the transaction. If manufacturers do not stand behind their promises in the warranty, they may be sued for breach of contract. Even without an express warranty, the courts have ruled, products carry with them to all users—much like a covenant that runs with the land—an implied warranty of fitness and merchantability. An implied warranty says that a product must be fit and safe for its intended use; a defective product violates this implied warranty. Thus, the obligation of implied warranty extends to all users, not just to those who have an explicit contract, or privity, with the manufacturer.

Throughout the nineteenth century, the law of negligence slowly evolved. Negligence is a lapse of attention—a lowered focus of the mind—that causes one to fail to exercise the due care of a reasonable person. Tort law holds that every citizen—by virtue of living in a free society that respects individual rights—has the implicit obligation to maintain the full attention and focus of a reasonable person in situations that involve other people. Those other people have the right not just to be free of criminally inflicted harm but also to be free of carelessly inflicted harm. The individual, under negligence theory, has the right to recover damages from the person who carelessly inflicts the harm.

To help the plaintiff establish negligence in product liability cases, the courts allowed arguments based on the doctrine of *res ipsa loquitor*, which means literally "the thing speaks for itself", or the existence of a defect implies the existence of negligence. Plaintiffs are allowed to infer such negligence because they do not have access to company records or the internal operations of a company that would demonstrate the presence or absence of negligence. It is up to the defendant, the courts have said, to demonstrate that it has exercised due care in the manufacture of its product.[2]

Privity, warranty and negligence. These are the three legal doctrines that constituted product liability law at the beginning of the twentieth century. One by one, they have all fallen into disrepute, only to be replaced by the modern theory of strict liability. The question at issue is how has the change to no-fault liability taken place and what were the philosophical doctrines that motivated the change?

The Rise of Strict Liability

The first doctrine to fall was privity, followed in short order by warranty; on ethical grounds, both doctrines were said to be unfair to the injured victims. Negligence theory, on the other hand, continues to this day to be well-respected by legal scholars and judges. Indeed, the shift to strict liability has been achieved largely in the name of negligence theory, by redefining it. Only in the last thirty or so years have some courts been willing to dispense with negligence theory altogether.

The Fall of Privity

The privity doctrine fell in 1916 in *MacPherson v. Buick Motor Company*.[3] In this case, MacPherson purchased a car from a retail dealer. While driving the car one day, the wooden spokes in a front wheel collapsed. MacPherson was injured in the ensuing accident, so he sued the manufacturer.

The defence argued that MacPherson did not have privity with Buick Motor Co., but with the dealer. The court, deciding for MacPherson, held that when a negligently made, defective product constitutes an inherent danger to its user and when the manufacturer could have foreseen that such a product would be used by someone other than the immediate buyer, then the manufacturer is liable for injury and damages. For example, a mislabelled poison that causes injury because of the mislabelling, as in *Thomas v. Winchester*,[4] is an inherently dangerous product; the negligence of this act, said the court, demands compensation to the victim, regardless of the lack of privity. So also with the *MacPherson* case, the court held that a defective wheel turned an automobile into an inherently dangerous product and the resulting, foreseeable harm demanded compensation to MacPherson.

The effect of the *MacPherson* decision was to replace privity with negligence as a criterion for deciding product liability cases. The court's reasoning to reject privity, along with its imprecisely formulated conception of negligence, planted the seeds of strict liability; it did this by emphasizing inherent danger, foreseeability, and the notion that "the victim must be compensated" as guidelines for decision making. With the latter guideline, primacy of the victim became the moral standard by which subsequent cases would be decided.

The Fall of Warranty

In the late 1950s, a man named Henningsen bought a new car. One day his wife was driving the car when it went out of control and crashed. Henningsen's wife was injured, so she sued the dealer and the manufacturer.[5]

Mrs. Henningsen had privity with neither the dealer nor the manufacturer, but that was not an issue here, said the court, because privity was no longer a valid doctrine. Mrs. Henningsen claimed that the steering mechanism failed, but the front end of the car was so demolished that the cause of the accident could not be

[2] Coccia, Michael A., John W. Dondanville, and Thomas R. Nelson, *Product Liability: Trends and Implications* (New York: American Management Association, Inc., 1970).
[3] *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916).
[4] *Thomas v. Winchester*, 6 N. Y. 397 (1852).
[5] *Henningsen v. Bloomfield Motors Company, Inc.*, 32 N. J. 358 (1960).

International Corner

determined. Mr. Henningsen had signed an express warranty when he purchased the car, essentially disclaiming the manufacturer's responsibility for defective parts. The court struck this down as "inimical to the public good". It upheld, however, that the manufacturer had an implied warranty of fitness that says the automobile must perform as intended. The court held both the dealer and manufacturer liable, claiming that "the burden of losses consequent upon use of defective articles [must be] borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur".

In striking down express warranties—i.e., written contracts—and upholding the notion of an implied warranty, the court established the collectivist standard of the "public good". While attempting to defend negligence theory—"losses must be borne by those in a position to control the danger"—the court also assumed the fundamental premise of strict liability, namely that the "victim must be compensated" regardless of cause or fault. This introduced the ethical notion of mercy, and its related political manifestation known as distributive justice, into product liability law.

In *Greenman v. Yuba Power Products*,[6] all appeals to the law of warranty were dismissed. In this case, Greenman purchased a power tool called the Shopsmith from a retail dealer. While Greenman was using the Shopsmith, a block of wood that the tool was holding flew out and struck Greenman in the head, seriously injuring him. Greenman sued both the dealer and the manufacturer, Yuba Power Products. He sued first to claim breach of warranty because Yuba's sales brochure described the Shopsmith as "rugged" and second to claim negligent design because the set screws used to hold the wood in place were inadequate. The court, however, stated that although Greenman could win his case on grounds of breach of warranty and negligent design, he actually needed to claim no more than strict liability; for, according to California Justice Traynor, a major proponent of strict liability theory:

> 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 ... . A manufacturer is strictly liable in tort when an article he places on the market, knowing that it will be used without inspection, proves to have a defect that causes injury to a human being.[7]

Strict liability requires that the plaintiff prove only two things: that injury was caused by a defect in a product and that the defect existed in the product when it left the factory; privity, warranty—and negligence—all may be omitted from consideration. The purpose of strict liability, said Justice Traynor, is to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves". Thus, the victim has been compensated and the defendant's costs of compensation are treated merely as costs of doing business.

Over time, a contradiction in the law of warranty emerged in court opinions—express warranty seemingly rooted in contract law and implied warranty in tort. This contradiction led legal scholar William L. Prosser to declare warranty "a freak hybrid born of the illicit intercourse of tort and contract".[8] Prosser's condemnation, at least of the implied warranty, does seem justified, for a rational conception of tort law as implicit obligation makes the concept of implied warranty unnecessary. Originally, warranty was a concept of tort law, "a form of misrepresentation, in the nature of deceit, and not at all clearly distinguished from it",[9] but the courts of the early twentieth century tried to establish warranty as an implied contract running with the goods, like the covenant that runs with the land. This confusion over the nature of warranty has led recent courts to reject the concept altogether as a means of dealing with product liability cases.[10] At the same time, however, the courts also threw out negligence theory when it dispensed with the confused law of warranty.

The Fall of Negligence

Strict product liability is the view that manufacturers or sellers of a defective product, whether negligent or not, are responsible to compensate victims injured by their products. The fact that someone was injured by a manufacturer's defective product gives that person a claim to damages against the manufacturer. "Even if there is no negligence, however," as Justice Traynor put it in a 1944 case, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[11]

In certain cases, the plaintiff does not have to prove that the defect originated with the manufacturer. "Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another," said Justice Traynor in *Vandermark v. Ford Motor Company*.[12] Nor can the manufacturer escape liability when a defect occurs in assembly or adjustment of the product by the manufacturer's appointed distributor or dealer, as was the issue in the *Vandermark* case. Justice Traynor continued:

> These [strict liability] rules focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties.[13]

[6] *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963).
[7] Ibid.
[8] Prosser, William L., "The Assault upon the Citadel (Strict Liability to the Consumer)", 69 *Yale Law Journal* 1026 (1960).
[9] Prosser, William L., John W. Wade, and Victor E. Schwartz, *Cases and Materials on Torts*, (6th edn, 1976), 742.
[10] Prosser, William L., "The Fall of the Citadel (Strict Liability to the Consumer)", 50 *Minnesota Law Review* 791 (1966), 800-801.
[11] *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453 (1944).
[12] *Vandermark v. Ford Motor Company*, 37 Cal. Rptr. 896 (1964).
[13] *Ibid.*

International Corner

In the *Vandermark* case, the plaintiff was injured when his car skidded out of control, caused by a defective master brake cylinder, and crashed. The damage to the car was too extensive to determine whether or not the defect was created by the dealer or the manufacturer. Defendant Ford pointed out that the car had passed through two other dealers before it was sold to Maywood Bell, the dealer who sold the car to Vandermark. Ford also pointed out that Maywood Bell had removed the power steering unit before selling the car to Vandermark. Hence, Ford argued that the dealer may have been negligent and caused the defective master cylinder. The court, however, countered that:

> Since Ford, as the manufacturer of the completed product cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do.[14]

Thus, the dealer *in fact* may have caused the defect, but *in law*—strict liability law—the manufacturer caused it. Negligence, at this point, was no longer an issue before the court and, epistemologically, the abandonment of causality in determining justice was complete.

Negligence and the Design Defect

By the nature of case-developed law, new theories are not accepted in every jurisdiction at once. This certainly was the situation involving design defects, where negligence theory, at least on the surface, continued to dominate for many years. What actually was happening, however, was a gradual change in the meaning of negligence by broadening it in case after case, until finally the older understanding of negligence was removed completely.

The seeds for strict liability were planted early and it was only a matter of time before the design-defect cases would adopt the no-fault theory. By 1965, the Second Restatement of Torts, § 402A, had already stated the strict liability view: the seller of an unreasonably dangerous product, said the Restatement, that causes physical harm is liable even though he "has exercised all possible care in the preparation and sale of his product ...".[15] Noel and Phillips comment:

> The Restatement itself does not have the force of law. It is a summary by the American Law Institute of the way in which the law has been or should be applied. The Institute is a body of prominent judges, lawyers, and professors whose recommendations and conclusions carry considerable weight with courts and legislatures ... .[16]

Since the Restatement does not carry the force of law, negligence theory continued to be upheld in some quarters, as it did in design-defect cases.

Negligence in Design

When applied to design-defect cases under product liability law, negligence means that manufacturers fail to maintain the full attention and focus required to exercise reasonable care in the design of their products. Such care requires that users not be harmed by unexpected or hidden dangers through normal use of the products. If an injured plaintiff can demonstrate that this danger was not obvious to a reasonable user, that the danger was present in the product when it left the manufacturer, and that the product was used in a normal manner as intended by the manufacturer, then the *res ipsa loquitur* doctrine allows the plaintiff to infer negligence on the part of the manufacturer. Users need not prove that manufacturers failed to exercise reasonable care, but they may support their cases with expert testimony that the products could have been designed otherwise at the time of their manufacture. Design defect, therefore, means that a product could have and ought to have been designed differently to prevent an unreasonable danger during the product's normal use.

Manufacturers, on the other hand, may defend their cases by demonstrating that they exercised reasonable care. Manufacturers may cite the state of the art, especially as discussed in trade magazines and scientific journals relating to the trade, such that the hidden dangers were not known at the time of manufacture. (If known, but not preventable, the reasonable manufacturer must give adequate warning, which is called the "duty to warn".) The magazines and journals must be cited because that is where the state of the art is presented for all to read, though this becomes problematic when competitors, for marketing reasons, keep new discoveries to themselves. Manufacturers also may defend their cases by demonstrating that the dangers in fact were obvious, such as the danger of using an axe or a knife, or that the products were used in a manner not normally intended. This defence is called "contributory negligence", where plaintiffs could have and ought to have known that the danger existed and was obvious or that they used the products in a manner not intended. If plaintiffs know about the danger, but nevertheless continue to use the products, then they have "assumed the risk" which, under negligence theory, is also a defence for manufacturers.

The Foreseeability Doctrine

In *McCormack v. Hankscraft Co.*,[17] strict liability surfaces under the guise of negligence. Mrs. McCormack purchased a Hankscraft vaporizer for use in her children's bedroom. On the evening of 20 November 1960, Mrs. McCormack put the vaporizer as usual on a kitchen-type step stool, about four feet from the foot of her daughter Andrea's bed. She filled the vaporizer with water, as instructed. At about 2.30 a.m. she heard a scream from Andrea's bedroom and found that Andrea, while trying to go into the bathroom, had tipped over the vaporizer and spilled the hot water on her, giving her severe burns. The McCormacks sued the manufacturer, Hankscraft Co., for defective design because the plastic cover lacked the safety feature of

[14] *Ibid.*

[15] *Restatement of the Law* (2d: Torts 2d. 1965), vol. 2, Ï 402A, 348.

[16] Noel, Dix W. and Jerry J. Phillips, *Products Liability in Nutshell* (St. Paul MN: West Publishing Co., 1974), 72.

[17] *McCormack v. Hankscraft Co.*, 154 N. W. 2d 488 (1967).

International Corner

not fitting tightly onto the jar containing the hot water; the looseness of this lid, said the plaintiff, allowed the water to come pouring out when Andrea tipped over the vaporizer.

On the surface this does not seem to be a case of defective design, since the plastic cover was designed to be loose in order to prevent a dangerous buildup of steam in the jar containing the hot water. Besides, the use of a vaporizer in a child's bedroom, especially when resting on a step stool, would *ipso facto* seem to be an obvious danger. However, the plaintiff produced expert testimony that threads on the plastic cover would have enabled it to be screwed securely into the top of the jar containing the hot water, while small holes drilled into the top of the cover would have prevented the dangerous buildup of steam. Also, the plaintiff testified that she did not know the water in the jar (as opposed to the water in the heating unit) reached scalding temperatures. Hence, a simple design change, available at the time of manufacture of the vaporizer, would have prevented this hidden danger from becoming a dreadful accident. The court thus decided for the plaintiff on grounds of negligent design, but it also stated that a strict liability doctrine would have upheld the verdict.

Two comments may be made about this case. First, widening the meaning of negligence has affected the meaning of contributory negligence. Under traditional negligence theory, Mrs. McCormack would have been guilty of failing to discover and keep vigilant over the obviously dangerous condition of putting a vaporizer in a child's bedroom (especially since she testified to using a "glove" or "mitt" to remove the vaporizer lid to protect her hand against the hot steam). Contributory negligence is the failure to discover and take precaution against an obvious danger. If the danger is not obvious, contributory negligence cannot be charged or used as a defence. Such is the effect of confusing terminology used in design-defect cases.

The second comment about the *McCormack* case concerns its reliance on expert testimony. Expert testimony, under traditional negligence theory, requires the objective evidence of conclusive trade and scientific journal articles that a hidden danger was known and could have been designed against at the time of the product's manufacture. The experts in this case, however, testified simply that the vaporizer could have been designed otherwise, regardless of the obviousness of the danger. Not only must manufacturers today design against foreseeable normal and abnormal uses of their products, but also they must design against obvious dangers, lest some expert testify that the product could have been designed differently. Omitting the obviousness of the danger (or turning it into a hidden danger) has the effect of turning a design defect into whatever an expert says could have been different. This arbitrariness of definition has philosophical implications.

In *Mickle v. Blackmon*,[18] a white plastic knob attached to the gearshift lever of a thirteen-year-old Ford automobile crumbled on impact in a collision; the plaintiff, impaled on the lever, was permanently paralyzed. She sued the driver of the car and Ford Motor Co., the latter for defective design of the gearshift knob. The plaintiff argued that the danger was not obvious to the user, but could have been foreseen by Ford Motor Co. as a danger inherent in the normal use of an automobile; expert testimony offered that a different material for the plastic knob would have prevented its crumbling.

The defendant relied on a previous case, claiming abnormal use as the cause of the accident and injuries, which held that the "the intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur".[19] The *Mickle* court, however, relied on a later case to sustain its judgment against Ford for failure to foresee a danger in normal use. That later case, involving General Motors stated:

> We think the "intended use" construction urged by General Motors is much too narrow and unrealistic. Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury—producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, all are foreseeable.[20]

Automobile collisions today, said the court, occur so frequently that they must be counted as "normal use" when the manufacturer is considering its design. A failure to design for safety against collisions, therefore, is negligence. Hence, the *Mickle* court decided against Ford.

Under traditional negligence theory, it is important to note, the *Mickle* case probably would have been thrown out on at least two counts: (1) the automobile was thirteen years old and thus past the age a reasonable person would expect a car to remain free from hidden dangers, unless examined by an intervening agent, namely, a qualified mechanic; and (2) collisions between automobiles are abnormal and unintended uses of the product. Under the traditional negligence theory, negligence in design would have occurred only if, say, the gearshift knob exploded into an acidic powder when grasped by normal gear shifting pressure. Such a danger, if it could have been discovered and designed against at the time of manufacture, would then be cause for a suit based on design negligence.

The Duty to Warn

Traditional negligence theory holds that misuse of a

[18] *Mickle v. Blackmon*, 166 S. E. 2d 173 (1969).
[19] *Evans v. General Motors Corp.*, 359 F. 2d 822 (7th Cir. 1966).
[20] *Larsen v. General Motors Corp.*, 391 F. 2d 495 (8th Cir. 1968).

International Corner

product or use not intended by the manufacturer is not grounds for legal action. In fact, it is the manufacturer's defence of contributory negligence.

In *Simpson Timber Co. v. Parks*,[21] however, some new twists were inserted. In this case, doors are bundled, several together with cardboard packaging. The cardboard, however, covers a hole cut out of the doors for windows. With several doors packaged together, a deep well is formed, but the well is hidden by the cardboard. The lettering printed on the cardboard says "Fine Doors". A longshoreman, carrying a sack of flour, walked on a bundle of doors and fell through the cardboard into the hole. He sued the manufacturer for damages caused by his resulting injury; he claimed a failure of the duty to warn.

The court, deciding for the defendant, held that the peculiar use of the doors by the longshoreman was not intended, anticipated, or known by the manufacturer. Hence, the defendant incurred no duty to warn. The dissenting opinion, on the other hand, held that other exporters in the Portland, Oregon area, where Simpson was located, knew of the longshoreman practice of using cargo as a floor while loading the hold of a ship. For that reason, then, the dissent held that the manufacturer ought to have known the use of merchandise by longshoremen. Consequently, the danger was foreseeable and should have been warned against. The case was appealed to the United States Supreme Court, reversing the lower court in a one sentence opinion; the Supreme Court decided for the plaintiff on grounds that the unintended use or misuse of the product was nevertheless foreseeable. Therefore, Simpson Timber Co. was liable in negligence.[22]

Under traditional negligence theory, *Simpson* would probably be a case of contributory negligence. Doors are not intended to be used as floors. The longshoremen, therefore, by failing to check beneath the cardboard packaging, assume the risk of using the doors as a floor. By injecting the foreseeability doctrine, however, the court eliminated the defence of contributory negligence and, in effect, turned the abnormal use of a product into normal use. In this manner, as in other design-defect cases, the guise of negligence theory is maintained, when in fact the meaning of the doctrine has changed.

Although this case was not decided on strict liability grounds, legal scholars think it ought to have been. At least one writer advocates the "spread the risk philosophy", because, he says, the manufacturer can add the cost of compensating the injured party to his normal expense of doing business.[23]

Seeking Deep Pockets and the Dilemma of No-Fault Liability

In *Goldberg v. Kollsman Instrument Corp.*,[24] a dilemma was created when fault was not considered. In this case, an American Airlines plane crashed at La Guardia Airport, caused by a defective altimeter. The administrator of a deceased passenger sued Kollsman Instrument, manufacturer and supplier of the altimeter, Lockheed Aircraft, manufacturer and assembler of the aeroplane, and American Airlines. The issue before the Court of Appeals of New York was not negligence or whether any of the three defendants should pay damages, but *who* should pay. The majority opinion of the court claimed that an implied warranty of fitness held the manufacturer responsible. "However," said the majority opinion, "for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." Thus the majority opinion held Lockheed, not Kollsman, responsible.

The dissenting opinion looked at the issue differently:

> Inherently in the question of strict products or enterprise liability is the question of the proper enterprise on which to fasten it. Here the majority have imposed this burden on the assembler of the finished product, Lockheed. The principle of selection stated is that the injured passenger needs no more protection... . The purpose of such liability is not to regulate conduct with a view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service.[25]

Since there was no issue of negligence here, the defective altimeter held no legal significance. It was the enterprise most strategically placed to distribute the risks, said the minority opinion, that should pay. Hence, the dissenting justices decided against American Airlines; Kollsman, the manufacturer of the defective altimeter, was excused.

In other words, strict liability, which focuses only on compensating the victim, rather than on determining fault, can in multi-defendant cases relieve the true culprit of responsibility and at the same time have no guidelines by which to assign responsibility to the remaining defendants. The majority opinion in the *Goldberg* case assigned responsibility to Lockheed because it was the company that put the product on the market; that, however, sounds like an assignment of fault, which rests on negligence, claiming that Lockheed failed to exercise due care. The minority opinion, on the other hand, assigned responsibility to American Airlines because it was the company best able to distribute the risk and pay the damages. The dilemma, therefore, of strict liability is that it cannot

[21] *Simpson Timber Co. v. Parks*, 369 F. 2nd 324 (9th Cir. 1966).
[22] *Parks v. Simpson Timber Co.*, 388 U. S. 459, 18 L. Ed. 2nd 1319 (1967).
[23] "Torts: Duty of a Manufacturer to Discover Unforeseeable Common Uses of His Product", 66 *Columbia Law Review* 1190 (1966).
[24] *Goldberg v. Kollsman Instrument Corp.*, 12 N. Y. 2d 432 (1963).
[25] *Ibid.*

International Corner

assign responsibility in multi-defendant cases without either collapsing to negligence liability on the one hand or collapsing to a no-fault compensation system on the other.

Taking this dilemma by the horns, Harvard Law School Professor Robert E. Keeton says that the court in the *Goldberg* case should have decided against all three defendants, then let them sort out the damages among themselves, either through contracts or claims for indemnity or contribution. According to Professor Keeton, if a person has been hurt by a defective product, then that person must be compensated in the most efficient possible manner. If deciding against three defendants is the best way to insure payment to the plaintiff, then the decision must be that. Little harm is done, since the companies involved simply pass their expense on to the consumer at large as an increase in prices. The essential point of strict liability theory is that the injured consumer has been compensated; that is all that matters.[26] Not to be outdone, though, University of Illinois Law Professor Jeffrey O'Connell endorses Keeton's ideas and goes beyond them by proposing no-fault insurance for all tort liabilities, including product liability.[27] That would then end the problem of who should be held responsible in strict product liability cases.

In *Gelsumino v. E. W. Bliss Company*,[28] confusing attempts to cloak strict liability under the language of negligence were given up and strict liability emerged the clearly dominant theory. In this case the plaintiff slipped on oil in the factory in which he was working. As he fell, he stepped on a foot pedal that runs the punch press he operated. Trying the catch himself, his hand got caught under the die just as his foot activated the foot pedal. He lost three fingers and suffered other injuries to his wrist and shoulder. He sued the manufacturer of the punch press, Bliss, and the manufacturer of the foot pedal, the Allen-Bradley Company, for failing to design a safety feature for the foot pedal to prevent such accidents from occurring.

The defendants held that the foot pedal was not unreasonably dangerous because it conformed to the state of the art at the time of its manufacture. But the court cited a serum hepatitis case in which that disease was contracted through blood transfusions. This case held that, even though the defendant hospital had exercised all due care and found serum hepatitis scientifically undiscoverable through blood transfusions at the time of the patient's hospital stay, the defendant hospital nevertheless was liable. Such a defence, said the court, "would be to emasculate the [strict liability] doctrine and in a very real sense would signal a return to a negligence theory".[29] For this reason the *Gelsumino* court held the defendant's state of the art defence irrelevant on grounds of strict liability.

Gelsumino made the meaning of strict liability clear. The danger of working at a punch press is obvious. Slipping and falling is an abnormal use of the product. A strong case of contributory negligence could be made against the factory owner; oil on the floor is a working condition a reasonable employee does not expect. But the employer is exempt from liability through Workman's Compensation, a no-fault insurance in which all employers must participate. Nevertheless, the injured party, according to strict liability, must be compensated and the one most able must pay.

The Philosophical Roots of Product Liability Law

Underlying the shift in legal theory from negligence to strict liability, especially in the adoption of such terminology as "the victim must be compensated", "the public good" and "equitable distribution of losses", it is possible to identify the philosophical underpinnings of this movement. The trend reveals a gradual change over much of the twentieth century from a philosophy of individualism to one of collectivism, specifically an egalitarian type of collectivism.

Liability law first had to release itself from the rigidity of contract law and the privity doctrine, arguing that innocent third parties who are harmed by the negligence of manufacturers and sellers should be compensated regardless of their lack of privity. This gave rise, on the one hand, to the confused and tortured law of warranty and, at the same time, the negligence doctrine.

Negligence theory rests on the foundation of philosophical individualism, whereas the strict liability theory rest on philosophical collectivism. Individualism holds that every human being is a separate and distinct individual, an autonomous entity that possesses the capacity to reason and think. As a being possessing the capacity to reason and think, every individual must choose to exercise that capacity. That is, thinking is not automatic—human beings have the free will to refuse to think. But thinking is required for human survival. Unlike animals, humans cannot survive without thinking about what is required for their survival; on the basis of thought, humans must act to secure their means of survival. Since thinking is not automatic, however, humans can choose not to think—they can lower their focus and become inattentive to whatever they are doing. In other words, humans can become negligent in thought, which in turn means they can become negligent in action.[30] Negligence law holds human beings responsible for their actions by holding them responsible for keeping their minds in sharp focus. Negligence law says that humans must choose to exercise their thinking capacities at all times; if they do not, they will be responsible for damages and injury caused to another person by their careless actions or their failure to exercise "reasonable care".

The responsibility for thinking and acting reasonably, though, applies to everyone, not just to manufacturers and sellers of products, according to negligence

[26] Keeton, Robert E., *Venturing To Do Justice: Reforming Private Law* (Cambridge, MA: Harvard University Press, 1969).
[27] O'Connell, Jeffrey, "Why Not No-Fault Product Liability?" *Harvard Business Review*, November-December (1975).
[28] *Gelsumino v. E. W. Bliss Company*, 295 N. E. 2d 110 (Ill. App. 1973).
[29] *Cunningham v. MacNeal Memorial Hospital*, 266 N. E. 897 (1970).
[30] Rand, Ayn, *Capitalism: The Unknown Ideal* (New York, New American Library, 1966), 8-10.

International Corner

theory. It also applies to users of products, who have the obligation to exercise their capacities to reason and thus avoid unreasonable behaviour that may contribute to their injuries. Negligence theory, resting on philosophical individualism, holds every individual responsible for his or her own actions and, as consequence, charges each individual with the implicit obligation of exercising reasonable care when manufacturing, selling or consuming products. As corollary, no individual is responsible for harm caused by conditions outside of his or her control; if a manufacturer has exercised all possible care in producing a product, yet the product causes harm, the manufacturer is not liable under negligence theory. The human being, as an autonomous, self-responsible entity, cannot expect another human to be liable for something he or she did not cause; such an expectation would be tantamount to expecting a stranger to pay the hospital bill of a person struck by lightning. Each individual, says negligence theory, is responsible for his or her own actions, and only his or her own actions.

The strict liability doctrine, on the other hand, which has now supplanted negligence theory,[31] rests on the philosophy of collectivism. Collectivism does not believe that every human being is a distinct, autonomous individual, but rather is part of a greater whole—the collective, group or society. Humans are not self-thinking, self-responsible beings, according to collectivism, but are like cogs on a wheel, or cells in a body. Each individual is an integral part of greater and more important whole and cannot exist and has no purpose or function when separated from the whole, as a cog is valueless when removed from a wheel and a cell dies when removed from a body. Consequently, the actions of humans are determined and dictated by each individual's relationship to the whole, just as the cog on a wheel has the specific role to play in keeping the wheel running and the cell in the body has the function of keeping the body alive. Each individual, according to collectivism, exists for the sake of the collective. The individual possesses no rights, only those privileges the collective decides to grant him or her. The individual's function is to serve society and keep it running smoothly, just as the cell keeps the body running smoothly.

According to the Marxist version of collectivism, diseased cells, or individuals who refuse to help society run smoothly, must be cut out and destroyed, lest such disobedient elements destroy the whole. The strict liability doctrine, however, rests on a different form of collectivism: egalitarianism. This view says that the diseased cells or unruly individuals must be helped by those not diseased or unruly. The healthy, the innocent and the productive must help the unhealthy, the guilty and the unproductive. Egalitarianism seeks to level society down so that no one stands above anyone else. The levelling process entails pulling down the healthy and productive and raising up the unhealthy and unproductive. The strict liability doctrine is doing this at present by expecting the companies most able to pay damages to injured parties, regardless of fault. Strict liability is a secularization of Christian mercy.

The advocacy of no-fault insurance for all tort liabilities is the best example of egalitarian collectivism. The arguments for no-fault insurance are usually made on pragmatic grounds, namely that the court system takes too long and prosecution becomes too complex for the layperson to figure out; hence a simple system of no-fault insurance is needed to relieve victims of this burden. However, underneath the no-fault rhetoric lies the view that the helpless victim (the diseased cell) must be compensated by those most able to pay (the healthy cells). All discussion of responsibility is thrown out of no-fault debates, which implies that neither party has the freedom to think and act on his or her own, as under the negligence doctrine. No-fault views individuals as an integral part of a greater whole who acquire their health and functioning powers from the purpose and permission of the whole.

Only slightly less radical than no-fault is the proposal of an administrative regulatory agency to control and decide product liability disputes. This view concedes that product liability disputes are hopelessly complex—too complicated with engineering terminology and other complexities for a judge or jury to comprehend. Thus, on the premise that the victim must be compensated, the regulatory agency will sort out the complexities of who should pay—not on the basis of who is responsible, but rather on the basis of who is most able to pay.[32]

The "complexities" of product liability disputes, however, are not inherent in negligence theory; they are the result of attempts by courts to retain the guise of negligence theory, while at the same time to make decisions on the basis of strict liability. The "complexities" are various states of confusion between the negligence and strict liability doctrines plus legal delays and entanglements caused by the obstinate refusal of manufacturers to have to pay for damages not caused by them and the equally obstinate refusal of plaintiff lawyers to walk away empty handed. Under traditional negligence theory, where the manufacturer is responsible only for injuries caused by unobvious dangers and normal uses of the product, many cases tried today would not—or should not—even make it to court. Instead, the courts are quite sympathetic to the "helpless" victim and the redistributive aims of the strict liability doctrine. But because of the strong tradition of common-law negligence theory, the courts hesitate to announce boldly the abandonment of negligence. They simply have painstakingly—through "complexities", epistemological confusions and obfuscations—redefined the concept to include obvious dangers and abnormal uses of a product, now called the "foreseeability doctrine", as conditions under which a manufacturer is liable.

Conclusion

This article has argued that the change in legal theory from negligence to strict liability derives from a shift

[31] Morgan, Fred. W. and Karl A. Boedecker, "A Historical View of Strict Liability for Product-Related Injuries", *Journal of Macromarketing* (spring 1996) 103-117.

[32] Noel and Phillips, *Products Liability in a Nutshell*, 157-58.

International Corner

in philosophy from individualism to collectivism. This change in philosophy underlying the law, though, should not be too surprising, as the change merely reflects the wider cultural change that has gone on for the past 150 or so years. That this article and its author have had a underlying motivation in conducting the research is not to be denied, as Hollander, Keep, and Dickinson have stated, "[A]ny appraisal of public policy must necessarily be value laden, depending on one's perspective".[33] The thesis of the article is perhaps not a popular one, but it must be emphasized that the author is not arguing for or against either theory; he is merely arguing for the underlying philosophical causes of the changes that have occurred, and that public policy makers should consider alternative viewpoints in their deliberations that go beyond the conventional wisdom with which they are familiar. Deciding for or against individualism or collectivism is a debate that will continue for many years to come and arguments for and against each will have to be delayed for another time.

[33] Hollander, Stanley C., William W. Keep, and Roger Dickinson, "Marketing Public Policy and the Evolving Role of Marketing Academics: A Historical Perspective", *Journal of Public Policy and Marketing* (18:2 1999) 265-269, at 268.