

Symposium on Commercial Law

Strict Liability in Tort Imposed Upon an Entire Industry

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NOTES

STRICT LIABILITY IN TORT IMPOSED UPON AN ENTIRE INDUSTRY

INTRODUCTION

A consumer must often buy products from competitive markets. When merchandising his products, however, a manufacturer first considers the appearance of his product, its performance and sometimes its potential obsolescence; safety to the consumer "might be called the low man on the merchandising totem pole."¹ The cost of product-related injuries *might* exceed \$5.5 billion annually in the United States²— and at least part of the problem lies with voluntary safety standards adopted by an industry. There are "instances where an industry's notion of a standard . . . [seems] to be whatever . . . [is] a little better than shoddy."³ When the consumer is injured by a defective product, he should be given the most adequate compensation that American industry can provide. What form can this protection take? Consider the following problems which illustrate the plight of the consumer.

Mr. Bartelli was injured when a ladder he purchased from a hardware store collapsed. The ladder, manufactured by the Acme Ladder Manufacturing Company, was most likely defective when manufactured; the suspected defect probably caused the ladder to collapse and injure Mr. Bartelli. Nevertheless, Mr. Bartelli's claim was stated in terms of negligence. At trial, a booklet of industry standards (probably defective) was introduced by the manufacturer as evidence of the standard of care required in the manufacture of ladders. The Acme Ladder Manufacturing Company proved that it had complied with these standards, and hence, no negligence was found and Mr. Bartelli was denied recovery.⁴

Consumers Union, a major product investigation body, has indicated that something is amiss in the standards of production

1. *Hearing on Product Safety Before the Senate Committee on Commerce*, 91st Cong., 2d Sess., ser. 91-82, at 4 (1970).

2. *Id.* at 5.

3. *Id.* at 6.

4. These facts are adapted from the case of *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 629, 453 P.2d 619 (1969).

adopted by every member of the automobile industry. Commenting on the frequency of defects discovered among models tested in 1963, it stated:

In anything as complicated as a car, pure chance will play a part in the presence or absence of troubles. But something more than chance is at work when 32 out of 32 cars chosen at random for testing show troubles of one kind or another in the first few thousand miles.⁵

Consumers Union continued its criticism of the automobile manufacturing industry:

In 1964 things were slightly better; two or three of the 35 cars purchased for testing didn't develop troubles at least in the first 3000 miles. This year [1965] it looks as though things are back to normal again—that is, all fouled up—in the output of Detroit.⁶

These two instances suggest an emerging problem in the field of products liability, *viz.*, the potential liability of an entire industry when a consumer or user is injured by a defective product manufactured by the industry. The application of strict liability in tort is rapidly expanding and the time may come when the doctrine should be imposed on an entire industry. This note will examine the expanding concepts of strict liability presently imposed upon a supplier of goods and the possible future application of such concepts to an entire industry. For the purposes of this note, the term "entire industry" will be used to denote a group of manufacturers who produce a similar product. The following section will briefly trace the growth of products liability which has culminated in the development of strict liability in tort.

THE DEVELOPMENT OF PRODUCTS LIABILITY

Negligence

Products liability, as we know it today, began its development in the 19th century, at which time recovery was based upon negligence. Recovery under the existing negligence law was generally limited by the requirement of privity;⁷ however, an exception to the

5. *The Rising Cost of Repairs: Two Looks at the Record*, 28 CONSUMER REP. 464, 468 (1963).

6. *Quality Control, Warranties, and a Crisis in Confidence*, 30 CONSUMER REP. 175 (1965).

7. W. PROSSER, LAW OF TORTS § 96 (4th ed. 1971).

requirement of privity was made for "inherently dangerous items."⁸ Under this exception, a plaintiff could recover by showing that he was injured while using a dangerous product that had been negligently manufactured.⁹ In time such law became impossible to apply—by 1908 a loaded gun, a defective gun, defective hair wash, scaffolds, a defective coffee urn, mislabeled poison and a defective aerated bottle were deemed dangerous items,¹⁰ while a defective balance wheel for a circular saw, a bursting lamp, a defective carriage and a defective boiler were deemed nondangerous.¹¹ Finally this exception to the privity requirement swallowed the rule;¹² the manufacturer who placed a product on the market assumed responsibility to the consumer for foreseeable harm if the former had failed to exercise proper care in the manufacture of his product.¹³ Judge Cardozo, in *MacPherson v. Buick Motor Co.*,¹⁴ was the first to abolish the requirement of privity; immediately thereafter, the decision was accepted and applied throughout the United States.¹⁵

A manufacturer's negligence had often been found by a jury through the application of *res ipsa loquitur*;¹⁶ however, numerous injuries from defective products have been recorded in situations where the manufacturer was not negligent. In such cases the injured plaintiffs have been either denied recovery, or if more fortunate, granted recovery upon a rather tenuous finding of negligence. In a concurring opinion, Judge Traynor cut through the fiction and proposed that strict liability be imposed openly,¹⁷ basing his opinion upon a public policy that would force manufacturers to take steps to reduce hazards to life and health. This policy would be implemented by the imposition of strict liability in tort upon a manufacturer of a defective product when that product, because of its defect, caused injury to a user or consumer.¹⁸

8. *Id.*

9. *Id.*

10. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 18 (13th ed. 1970).

11. *Id.*

12. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

13. *Id.*

14. 217 N.Y. 382, 111 N.E. 1050 (1916).

15. W. PROSSER, LAW OF TORTS § 96 (4th ed. 1971).

16. See 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY §§ 2:117-2:120 (1961); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114-15 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 842 (1966).

17. *Escola v. Coca Cola Co. of Fresno*, 24 Cal. App. 2d 453, —, 150 P.2d 436, 439 (1944) (separate opinion).

18. [I]t should now be recognized that a manufacturer incurs an absolute

Warranty

Paralleling the development of negligence as a basis for recovery in products liability cases was that of warranty. Liability based upon warranty was supposed to make the manufacturer an insurer of the safety of his product in spite of his exercise of all reasonable care.¹⁹ Such an action, of course, required privity of contract; however, courts resorted to ingenious (and fictitious) reasoning in order to satisfy this requirement.²⁰ The fictions which proved the most convincing were (1) that the warranty "ran with the goods," and (2) that the warranty was made directly to the consumer.²¹ Nevertheless, it was apparent that liability was in fact grounded in tort although expressed in contract.²² In an article written in 1960, Prosser listed nine conceptual difficulties present when warranty law is used for consumer protection: (1) there is no real contract between the plaintiff and defendant; (2) not all injuries are within the purview of damages for breach of contract (*e.g.*, wrongful death); (3) a plaintiff rarely relies upon a warranty of the seller (although such is traditionally required by the law of contracts); (4) the provisions of the Uniform Sales Act and the Uniform Commercial Code allow recovery only for a plaintiff who is a "buyer" (or in the case of the Uniform Commercial Code, a member of the buyer's family, household or guest); (5) under the Uniform Sales Act a warranty of fitness arose only if the buyer relied upon the seller's skill and made his purposes known to him; (6) many injured consumers are unaware that most statutes require prompt notice of breach of warranty by the buyer to the seller; (7) under the Uniform Sales Act, if a buyer rescinded a sale, he could not bring an action for breach of

liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, . . . 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. . . .

. . . If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

Id. at ____, 150 P.2d at 440-41 (separate opinion).

19. W. PROSSER, *LAW OF TORTS* § 97 (4th ed. 1971).

20. See, *e.g.*, Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957), wherein 29 ways that the courts have "found" the requisite privity are discussed.

21. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

22. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 842 (1966).

warranty; (8) a warranty is subject to a disclaimer by a seller; and (9) even if a warranty runs with the goods, it can protect only the person who holds title.²³

In his decision in *Greenman v. Yuba Power Products, Inc.*,²⁴ Judge Traynor cut through the fictions of sales warranties by imposing upon a seller strict liability for the sale of a defective lathe. The effect of this decision was widespread—many courts adopted the grounds of strict liability in tort as the proper basis of recovery.²⁵

Strict Liability in Tort: Restatement Position

In 1965, the *Restatement (Second) of Torts*²⁶ adopted guidelines for the imposition of strict liability in tort upon the seller of a product causing physical harm to a user or consumer:

§ 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

23. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127-34 (1960). See also Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1330-33 (1966).

24. 59 Cal. App. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Judge Traynor noted:

Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

. . . The purpose of . . . [strict] liability is to insure 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. Sales warranties serve this purpose fitfully at best. "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."

Id. at ___, 377 P.2d at 901, 27 Cal. Rptr. at 701 [citations omitted].

25. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 391, 804 (1966).

26. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT II and referred to as *Restatement II*].

(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.²⁷

In consideration of the widening imposition of strict liability in tort, these guidelines will be considered as the norm and extensions from that norm will be examined.

Past Extensions of Strict Liability in Tort

Strict liability in tort has been imposed upon parties who do not literally fall within the rule set down by the *Restatement II*, i.e., some defendants have not been "sellers." Two extensions of the nonseller category will be examined. Consider the marketing process to be a vertical line; a product has its origin at a point at the top of the line and ultimately reaches the consumer or user at the bottom of the line. Between these two points the product may be manufactured, assembled, wholesaled, leased, retailed and so forth. The manufacturer appears on the line at its midpoint. Strict liability in tort may (or may not) then be imposed on parties who appear (1) *downward* from this point or (2) *upward* from this point. (Note that a further extension of strict liability in tort could be *outward*. The courts' treatment of this extension is dealt with in the footnote.)²⁸

27. RESTATEMENT II § 402A. Note that an "unreasonably dangerous condition" is difficult to define. Perhaps the Illinois Supreme Court came closest when it said that "those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function." *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 342, 247 N.E.2d 401, 403 (1969). See also Noel, *Manufacturer's Negligence of Design or Directions for Use of Product*, 71 YALE L.J. 816, 819 (1972); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). Therefore, it will be assumed that a defective product is in fact "unreasonably dangerous to the user or consumer" in all situations throughout the remainder of this note.

28. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 724, 101 Cal. Rptr. 314, 322-23 (2d Dist. Ct. App. 1972), refers to the upward and downward directions in a marketing chain.

A third extension of strict liability in tort might be considered to be *outward* strict

Downward strict liability in tort is liability which is imposed upon a defendant who is himself the manufacturer or who is in the marketing chain of a product already produced by a manufacturer. Note that the rule of the *Restatement II* is one of downward strict liability, i.e., it applies only to sellers.²⁹ Courts have extensively expanded downward strict liability from this norm by finding sellers,³⁰ builders and vendors,³¹ lessors,³² licensors³³ and the vendor of a hybrid sales-service³⁴ strictly liable. Plaintiffs who were not the ultimate users or consumers have also been awarded damages in strict liability.³⁵ Although *Restatement II* advises against imposition of strict liability when a product is "unavoidably unsafe,"³⁶ damages have nonetheless been awarded in such situations.³⁷

liability, which would be imposed on a party who is not in the vertical marketing chain of a product for some reason. To date, no plaintiff has been granted recovery based on strict liability in tort from a party who appears outside of the vertical marketing chain of a product; this, however, does not mean that no plaintiff has ever sought recovery from such a defendant.

In *Hanberry v. Hearst Corporation*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (4th Dist. Ct. App. 1969), the defendant Hearst was the publisher of *Good Housekeeping* magazine and issued the "Good Housekeeping's Consumers' Guaranty Seal" to products which it believed to be satisfactory. Plaintiff was injured through the use of a product so endorsed. The court held that an action in negligent misrepresentation could be stated against Hearst but that the issue of strict liability in tort was not before the court. In *Hempstead v. General Fire Extinguisher Corporation*, 269 F. Supp. 109 (D. Del. 1967), plaintiff was injured when a fire extinguisher manufactured by General Fire Extinguisher Corporation and endorsed by Underwriter's Laboratories, Inc. exploded. The court held that an action could be stated against Underwriter's for negligence in approving the design of the fire extinguisher manufactured by General; an action in strict liability was disallowed.

To impose strict liability in tort upon a defendant outside of the marketing chain of a product would, of course, make him an indemnitor of the seller of the defective good. See notes 78-85 *infra* and accompanying text.

29. *RESTATEMENT II* §§ 402A, comment *f* at 350-51.

30. *Vandermark v. Ford Motor Co.*, 61 Cal. App. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); see also *RESTATEMENT II* § 402A, comment *a* at 348.

31. *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. (1st Dist. Ct. App. 1969); *Schipper v. Levit & Sons, Inc.*, 44 N.J. 70, 207 A.2d 319 (1965).

32. *Bachner v. Pearson*, 479 P.2d 319 (Alas. 1970); *Price v. Shell Oil Co.*, 2 Cal. App. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); *McCaffin v. Bayshore Equipment Rental Co.*, 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1st Dist. Ct. App. 1969); *Stewart v. Budget Rent-a-Car Corp.*, 52 Haw. 71, 470 P.2d 240 (1970).

33. *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1st Dist. Ct. App. 1970).

34. *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969).

35. *White v. Jeffrey Galion, Inc.*, 326 F. Supp. 751 (E.D. Ill. 1971); *Elmore v. American Motors Corp.*, 70 Cal. App. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); *Johnson v. Standard Brands Paint Co.*, 274 Cal. App. 3d 331, 79 Cal. Rptr. 194 (4th Dist. Ct. App. 1969); *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. New Haven County 1965).

36. *RESTATEMENT II* § 402A, comment *k* at 353-54.

37. It is generally agreed that there is no way to detect the presence of serum hepatitis

Upward strict liability is imposed upon a defendant whose product is ultimately incorporated into a finished product by another manufacturer, or upon a defendant who serves some necessary function in the production of an item. Courts have imposed strict liability upon such defendants even though this liability is not suggested by the *Restatement II*.³⁸ Some examples are presented below.

Strict liability in tort has been extended upward to the manufacturer of a component part, as in the case of *Suvada v. White Motor Co.*³⁹ The plaintiff therein purchased a used tractor from the defendant who had installed a brake system manufactured by Bendix-Westinghouse Automotive Air Brake Company (which was also named as defendant in the case). The brake system failed, causing a collision with a bus; passengers on the bus were injured and the tractor and bus were damaged. The plaintiff incurred the costs of repairing his tractor, repairing the bus and settling personal injury claims brought by injured passengers. In holding Bendix liable for these costs, the court said:

It appears that White did not make any change in the brake system manufactured by Bendix but merely installed it into the tractor unit. Under these circumstances we see no reason why Bendix should not come within the rule of strict liability.⁴⁰

This is an example of upward strict liability in tort imposed upon a defendant who *placed into the stream of commerce a defective product* which was ultimately incorporated into a finished product.

*Kasel v. Remington Arms Co.*⁴¹ illustrates upward strict liability imposed upon a trademark licensor or franchisor.⁴² In that case, plaintiff was injured when his gun exploded because of an excessive charge of power in a shotgun shell. The shell had been manufactured by Cartuchos Deportivos De Mexico, S.A. (CDM), which was

in blood. In *Reilly v. King County Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (Ct. App., Div. 1 1971), the litigants stipulated that detecting the disease-producing agent in the blood is presently impossible. Nevertheless, the court held the defendant strictly liable because the producer was deemed to be more able to sustain the loss than the injured individual. In *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1971), the court pointed out that comment *k* pertains only to products which are not defective. Infected blood is defective and hence defendant was held strictly liable.

38. See *RESTATEMENT II* § 402A, Comment on Caveat *q*.

39. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

40. *Id.* at 625, 210 N.E.2d at 188.

41. 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (2d Dist. Ct. App. 1972).

42. See Note, *Tort Liability of Trademark Licensors*, 55 IOWA L. REV. 693 (1969).

the licensed manufacturer of Remington shotgun shells in Mexico; CDM's packages were marketed under Remington's name.⁴³ Reversing a jury verdict for the defendant, the California court of appeals held Remington strictly liable, indicating that strict liability should be imposed "upon the *overall producing and marketing enterprise* responsible for placing such products in the stream of commerce,"⁴⁴ regardless of the defendant's lack of control over the cause of the defect. The court found that Remington's involvement in the enterprise was sufficient to make the company an integral part of the entire business process which placed the defective shell in the stream of commerce. This is an example of upward strict liability imposed upon a defendant who had *served a function* (i.e., licensed another to manufacture shells with its trademark) in the manufacture of the ultimate injury-producing device.

It has been indicated that strict liability might even be imposed upon an entire industry through its trade association. *Hall v. E.I. Du Pont De Nemours & Co.*⁴⁵ was a consolidation of two cases.⁴⁶ Each case arose as the result of injuries to the plaintiff children caused by the premature detonation of blasting caps. Defendants filed a motion to dismiss; in *Chance*, this motion was denied, while in *Hall*, the motion was granted. Each case is considered separately below.

Chance involved an action for damages against six manufacturers of blasting caps and the Institute of Makers of Explosives (IME). Plaintiffs sought to establish joint liability among the defendants. Each plaintiff child had come into the possession of a dynamite blasting cap which had no warning attached to it and which was easily detonated by the child. The key allegations of the complaint were that the explosions had destroyed any evidence as to the ident-

43. CDM had entered into three contracts with Remington: a trademark license agreement, a contract for the sale of technical information and a technical services contract. The trademark license agreement allowed CDM to put the Remington name on shells for a royalty of 0.5 percent of all of CDM's net sales. The sale of technical information contract involved the sale of scientific processes for the sum of \$100,000. The technical services contract gave Remington a 1.5 percent royalty on all net sales in exchange for expert personnel and assistance in production and marketing of the shells. Remington also owned 40 percent of the common stock of CDM and had four of its officials on CDM's board of directors.

44. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 724, 101 Cal. Rptr. 314, 322 (2d Dist. Ct. App. 1972) (emphasis added).

45. 345 F. Supp. 353 (E.D.N.Y. 1972).

46. *Chance v. E.I. Du Pont De Nemours & Co., Inc.* and *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

ity of the manufacturer of the cap and that the labeling and design practices of the industry had prevented a warning of the dangers of blasting caps. These labeling and design practices were the result of conscious agreement and industry-wide cooperation among the defendants.

The court considered both negligence and strict liability theories of recovery, and held that a claim could be stated against the defendants under either theory.⁴⁷ This is an example of the possible imposition of upward strict liability upon a defendant who has *served a function* in order that the ultimate product might be produced in the manner that it was; here, that function was the setting of standards which precluded a warning on individual blasting caps.

The *Hall* case was a consolidation of three cases in which the allegations of the complaint identified the manufacturers of the injury-producing caps—two of the plaintiffs were injured by Hercules caps and the other was injured by a Du Pont cap. The IME was originally named as a defendant, but was dropped on plaintiffs' motion in order to preserve diversity jurisdiction.⁴⁸ Each of the three claims was brought against both Hercules and Du Pont and each sought joint liability. The court, however, would not allow joint liability in such a situation; it was considered to be an unnecessary burden on the defendant who had not produced the injury-causing cap and an undue burden on the court.⁴⁹

Strict Liability in Tort: Conclusions

From the foregoing discussion two conclusions can be drawn as to the imposition of strict liability in tort upon a defendant when a plaintiff has suffered injury or property damage from the use of a defective product. First, liability will be imposed upon a defendant who *provides* the product to the user or consumer. Second, liability will be imposed upon a defendant who *causes the product to be in a defective condition* or *who serves a function* in the production of a product.⁵⁰

47. *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353, 368 (E.D.N.Y. 1972).

48. *Id.* at 382.

49. *Id.* at 383.

50. It should be noted that not all jurisdictions have accepted strict liability in tort as a grounds for recovery for an injury caused by a product sold in a defective condition to the user or consumer; hence, the conclusions stated would be totally without basis in those states. See, e.g., *Moore v. Douglas Aircraft Co.*, ____ Del. ____, 282 A.2d 625 (1971); *Stovall & Co. v. Tate*, 124 Ga. App. 605, 184 S.E.2d 834 (1971).

These conclusions serve as the basis for the discussion which follows. The possible imposition of strict liability in tort upon an entire industry will now be considered.

INDUSTRY-WIDE STRICT LIABILITY IN TORT AND ITS JUSTIFICATION

In justifying industry-wide strict liability in tort, three considerations are important: (1) the element of control wielded by an industry over the nature of the final product; (2) the industry's ability to spread the risk of injuries which result from defects to an even greater extent than a single manufacturer; and (3) the court's willingness to expand the concept of enterprise liability.

Control of the Cause of the Defect

The strict liability rule of the *Restatement II* is one applicable basically to sellers. It has been demonstrated, however, that courts are also willing to impose strict liability upon those who, although not sellers, exercise a degree of control over the final product.⁵¹ There may be times when an entire industry controls some of the features that a product finally assumes; such acts of control might justifiably expose the entire industry to strict liability in tort.

Control may be effectuated by an industry's imposition or adoption of standards. While it is considered rare for a group of manufacturers to adopt an all-pervasive code,⁵² the cases do suggest that a good number of industries exist in which members adopt certain standards, such as standards of production and safety.⁵³ This suggests that the place where precautions should be taken is within the entire industry itself. The types of defective standards

51. See, e.g., *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (2d Dist. Ct. App. 1972).

52. See Krum & Greenhill, *The Extent of Industry Self-Regulation Through Trade Association Codes of Ethics*, 17 ANTITRUST BULL. 379, 386 (1972), wherein the authors indicate that only a few trade associations have so much as a code of ethics; most of the associations that do have such a code do not enforce it.

53. An example of this is indicated by the number of negligence cases in which industry custom is sought to be used as a defense to the court's finding of a higher standard of care required of a manufacturer. See W. PROSSER, *LAW OF TORTS* § 33 (4th ed. 1971) and cases collected therein. See also *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 629, 453 P.2d 619 (1969), holding that an industry-wide standard was an acceptable standard of care largely because of the degree of research that went into establishing the standards and the number of groups outside the industry who participated in setting the industry-wide standards.

that may be adopted by an industry are varied, e.g., design or testing standards,⁵⁴ or defective labeling and warning practices.⁵⁵

Defective industry-wide standards suggest that it is the entire industry which has *caused a product to be in a defective condition*. When an injury is caused by the presence of such defective standards, it is not the individual manufacturer acting alone who is solely responsible for the injury, but rather the entire industry. Hence, if an industry does impose or adopt standards, it should exercise precautions to make sure they are not defective.

To illustrate, consider the first example, i.e., the case of the defective ladder. The Acme Ladder Manufacturing Company produced its product in compliance with defective industry-wide standards; an injury resulted which was caused by the defective standards. The manufacturer had not acted alone in determining the final nature of his product—his individual actions were not the sole reason for the presence of the defect. Accountability for the presence of the defect lay within the entire industry which had established defective standards; thus, strict liability might justifiably be imposed upon the entire industry. If liability were imposed upon the entire industry, it would stem from the *control* that the industry exercised over its members' products.

In *Chance*,⁵⁶ strict liability might be imposed upon an entire

54. Cases holding that defective design justifies imposition of strict liability in tort: *Runnings v. Ford Motor Co.*, 461 F.2d 1145 (9th Cir. 1972) (involving defectively designed placement of a radiator cap; court applied Washington law); *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964) (involving defectively designed overhead guard on a fork lift; court applied New York law); *Haragan v. Union Oil Co.*, 312 F. Supp. 1392 (D. Alas. 1970) (involving defectively designed gas detection system; court applied Alaska law); *Wagner v. Coronet Hotel*, 10 Ariz. App. 296, 458 P.2d 390 (Ct. App., Div. 1 1969) (involving defectively designed bath mat); *Thomas v. General Motors Corp.*, 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (4th Dist. Ct. App. 1970) (involving defectively designed washing machine); *Ginniss v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970) (involving defectively designed automatic door); *Garcia v. Sky Climber, Inc.*, 470 S.W.2d 261 (Tex. Civ. App., 1st Dist. 1971) (involving defectively designed wire rope); *Pizza Inn, Inc. v. Tiffany*, 454 S.W.2d 420 (Tex. Civ. App., Waco 1970) (involving defectively designed dough-rolling machine).

55. Cases holding that defective labeling and warning practices justify imposition of strict liability in tort: *Alman Brothers Farms & Feed Mill, Inc. v. Diamond Laboratories, Inc.*, 437 F.2d 1295 (5th Cir. 1971) (involving inadequate warnings about the possible dangers of an animal vaccine; court applied Mississippi law); *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970) (involving inadequate warning about the dangers of baseball sunglasses; court applied Indiana law); *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (3d Dist. Ct. App. 1965) (involving inadequate warning about dangers of dynamite fuses). See also RESTATEMENT II § 402A, comment j at 353, indicating that a product may be rendered unreasonably dangerous without adequate directions or warnings on the container.

56. *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

industry primarily because evidence of the identity of the specific injury-causing blasting caps was destroyed. In *Hall*,⁵⁷ strict tort liability could not be imposed because the manufacturers of the specific injury-causing blasting caps were identified and because plaintiffs failed to state their claim against the entire industry.⁵⁸ The limitation of *Chance*—i.e., that the manufacturer of the particular defective injury-causing product cannot be identified—breaks down in light of the foregoing discussion; if liability is to be imposed on those who cause a defect to be present, it should be done irrespective of whether the manufacturer of the defective injury-producing device can be ascertained.

Ability to Spread the Risk

A favorite argument for imposing strict liability upon the seller of a defective product is the ability of the manufacturer to distribute the risk among the public at large.⁵⁹ Note that this argument applies even if the party held liable exercises no control over the presence of the defect; this is demonstrated by courts which have held retailers, lessors and licensors strictly liable.⁶⁰ Certainly these parties have little control over the presence of a defect. The manufacturer should afford protection to the purchasing public since the manufacturer is in the best position to provide such protection⁶¹ by passing the price of such protection on to the public at large.⁶² This is obviously a social policy which requires those who can best foresee and absorb the costs of injuries to do so.⁶³ Although not expressed

57. *Id.*

58. *Id.*

59. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

60. See notes 30, 32-33 *supra* and accompanying text.

61. See *Escola v. Coca Cola Co. of Fresno*, 24 Cal. App. 2d 453, —, 150 P.2d 436, 440-41 (1944) (separate opinion).

62. Leeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 856 (1963); Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965).

63. Dean Pound once denounced this as a piece of "authoritarian law," and a major step in the direction of socialism. Assuming that we are not nowadays disposed to flee shrieking in terror from the prospect of a spot of socialism in our law when the public interest demands it, the question remains whether our courts, our legislators, and a public sentiment in general, are yet ready to adopt so sweeping a legal philosophy, and to impose so heavy a burden abruptly and all at once upon all producers. Thus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead.

in so many words in the cases, this social policy appears to be accepted by most⁶⁴ and is, of course, implemented by imposition of strict liability in tort.⁶⁵

From these statements of policy, it is but a short step to the justification of industry-wide liability based upon a greater ability to spread the risk of injuries caused by defective products. Of course, for this justification to apply to an entire industry, every member must be found to manufacture defective products. If one manufacturer is able to spread the risks of injury resulting from a consumer's use of a defective product which he created, then the entire industry is in a better position to spread the risks of injuries resulting from the use of its defective products. There are more "deep pockets" in an entire industry than in the trousers of the individual manufacturer. The entire industry is also in a superior position to broaden the base of those who must ultimately pay—*i.e.*, the consumers.⁶⁶ In this way, the base of protection is extended to every consumer who purchases an identical product from a member of the industry. Although this smells of socialism, such extension of liability is an even fairer distribution of risks than is now possible when strict liability is imposed upon a single manufacturer.

Enterprise Liability—Stream of Commerce Approach to Strict Liability in Tort

Imposition of strict liability in tort has been justified on the basis of enterprise liability.⁶⁷ Originally, enterprise liability was imposed upon a seller for placing into the stream of commerce a defective product which he knew would be used without inspection for defects and which caused injury or property damage.⁶⁸ This

Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960). Note that this was published in 1960 and it would appear that the law has moved a little faster than Dean Prosser had anticipated.

64. See *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353, 368-69 (E.D. N.Y. 1972).

65. See Myers, *The "Deep Pocket" Rule Revisited*, 19 FOOD DRUG COSMETIC L.J. 562 (1964); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

66. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966).

67. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. App. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). See also RESTATEMENT II § 402A, comment c at 349-50.

68. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. App. 2d 57, —, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962).

position of strict liability originally applied only to sellers of goods,⁶⁹ but as has been indicated,⁷⁰ has expanded beyond such a boundary. Enterprise liability now entails the stream of commerce approach to strict liability. The stream of commerce approach presently allows for parties other than the seller to be held strictly liable. The scope of enterprise liability has expanded⁷¹ to the point where redefinition of such a concept in terms of the stream of commerce approach to strict liability is advisable:

[U]nder the stream-of-commerce approach to strict liability *no precise legal relationship . . . of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship . . . with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability.*⁷²

69. As *Restatement II* indicates:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

RESTATEMENT II § 402A, comment c at 349-50.

70. See notes 30-37, 39, 41, and 45 *supra* and accompanying text.

71. See, e.g., Note, *The Expanding Scope of Enterprise Liability*, 69 COL. L. REV. 1084 (1969).

72. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314, 323 (2d Dist. Ct. App. 1972) (emphasis added). In light of this redefinition, the court went on to suggest that the holding in *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (4th Dist. Ct. App. 1969), (see note 28 *supra*) which denied a claim in strict liability in tort against a product endorser might need reevaluation:

The rationale of *Hanberry* may warrant reevaluation. . . . Where it can be established that defendant by its avowed testing was the responsible inducement for the purchase by plaintiff, we see no reason to hold that defendant was not a necessary instrument in the stream of commerce.

Two possible extensions of this expanded concept of enterprise liability will be considered. The first involves an entire industry which produces products with a common defect, and the second involves an entire industry that produces products without a common defect.

Enterprise Liability for Common Defects

Members of an entire industry who produce products with similar defects can be fitted easily into this broadened definition of enterprise liability. Consider again the case of the Acme Ladder Manufacturing Company along with Acme's relationship to other members of its industry.⁷³ All members produced ladders in compliance with industry-wide standards. The standards were defective but it was only Acme Ladder Manufacturing Company's ladder which caused injury. By applying the expanded definition of enterprise liability, every member could be held strictly liable. Although each member has no precise legal relationship to the member of the industry who produced the defective product which ultimately injured the consumer, each participated in the industry for his own personal profit. He also benefitted from the expertise of an entire industry which set certain standards of production which all members believed to be adequate. By exploiting this expertise, all members of the industry were able to put more of their resources to work in other areas. At the same time, other members of the industry benefitted from Acme's presence through the contributions that it made. Because the stream of commerce approach to strict liability does not call for precise legal relationships but only for a participatory connection resulting in personal profit or other benefit, the entire industry should be held strictly liable for Mr. Bartelli's injury.

Kasel v. Remington Arms Co., *supra* at 726-27, 101 Cal. Rptr. at 324. The participatory connection for personal profit or other benefit is further demonstrated in NATIONAL COMMISSION ON PRODUCT SAFETY REP.: SUMMARY OF FINDINGS AND RECOMMENDATIONS (1970):

The measure of voluntary consumer protection provided by the certification programs of independent laboratories is substantial, but is theoretically flawed by the laboratory's economic dependence on the goodwill of the manufacturer even if the laboratory is nonprofit.

The protection afforded by various seals of approval is no better than the technical competence, product-testing protocols, and independence of the certifier. When an industry association awards the seal, or when it is awarded in return for paid advertising, the seal may convey a deceptive implication of third-party independence. Consumers appear to attribute to such endorsements a significance beyond their specific meaning.

Id. at 2.

73. See notes 4-5 *supra* and accompanying text.

A second example involves the transfusion of defective blood.⁷⁴ It will be assumed that no method exists for the detection of serum hepatitis in blood; it can also be assumed that some means for this detection will one day be found. When the means for detecting the presence of the virus do become available, it is highly probable that the fruits of research leading to this detection will at once become available to every hospital and blood bank in the land. Hence, although no seller of blood can yet detect the presence of serum hepatitis in his product, he may one day benefit from the presence of another seller who discovers the method of detecting the presence of serum hepatitis.⁷⁵ No seller of blood has any definable legal relationship with other sellers of blood; nonetheless, the seller is engaged in an enterprise in which he may derive benefit from another's presence. When a consumer is made ill by a transfusion of defective blood, the stream of commerce approach to strict liability calls for the imposition of strict liability in tort upon the entire industry.

Note that, so far, the expanded stream of commerce approach to strict liability reaches the same results as would be reached under the "control of defect" and "risk spreading" justifications of strict liability being imposed upon an entire industry. But a much more difficult problem exists when applying enterprise liability to an industry which produces products without a common defect.

Enterprise Liability in the Absence of Common Defects

For the purposes of this section, it is assumed that no member of an industry has a precise legal relationship with any other member. However, it is not inconceivable that each member can derive some benefit from the presence of others like him. This is especially so when the industry has a trade association which gathers information that is utilized by each member of the industry. It is also true when the industry produces a product for which there is an elastic demand and advertising is carried on by members of the industry.⁷⁶

74. See note 37 *supra*. Whether the law in those cases will become universal law is left to conjecture at this point.

75. Very likely, it will not be a "seller" at all who discovers the method of determining the presence of serum hepatitis in blood. Nevertheless, some sellers undoubtedly underwrite research in this direction.

76. N. BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 436-37 (1942). It is conjectured here that there is a relatively elastic demand at this time for smaller, economical cars. Certainly American manufacturers derived some benefit from the favorable reception of foreign imports in this country; indeed, the American manufacturers soon followed with their own models.

Industry-wide strict liability in tort can be justified in several ways in such cases. A few justifications will be offered here. First, the argument of risk-spreading may be applied effectively in this situation. The entire industry is in a better position to spread the risk of injuries resulting from defective products than is the single manufacturer—there are more deep pockets in an entire industry than the pockets of a single manufacturer. Also, there may be cases in which the manufacturer of a defective injury-causing device is insolvent or defunct; obviously, no recovery can be had from such a manufacturer. A question of social policy then arises: as between an injured consumer or user and an entire industry, who should be required to pay? In light of the deeper pockets of the entire industry and its superior risk-spreading ability, the industry might justifiably be held liable.

It should be observed that a participatory connection with another enterprise for some personal profit or other benefit could be found in almost any industry; in many instances, however, this connection would be tenuous at best. Herein lies a primary weakness in enterprise liability imposed upon an entire industry in the absence of a common defect. This weakness could be overcome by placing upon the claimant a high burden of proof in showing such a participatory connection for personal profit or other benefit. For example, a rebuttable presumption could arise in favor of the industry that no such connection exists in the absence of a common defect. This presumption would not arise when the manufacturer of the defective injury-causing device is insolvent for the policy reason already noted.

A further limitation could be imposed upon industry-wide strict liability in absence of a common defect: that limitation might be based on the enterprise's negligence. If a single manufacturer produces a product with a defect through his own negligence, he should not be permitted to call upon other members of the industry to pay for the consequences of his fault. But note that an action against an entire industry for an injury caused by the presence of a defect which is not common to the products of all members of the industry would place the burden of proving negligence upon those most able to bear it, *i.e.*, the other members of the industry. If these suggestions were adopted there would be far fewer fictitious resorts to *res ipsa loquitur*, for fellow members of an industry are those best qualified to prove the existence of negligence.

It might be contended that industry-wide liability in the absence of a common defect would create an attitude on the part of industry members which would result in the lowering of industry-wide standards of care in production. Arguably, this would occur because an industry member would be held liable even if it were not his defective product which produced injury; thus, there would be no incentive for him to keep his standards of production high. Such an argument is countered by the equally plausible possibility that an entire industry which is held liable for an injury caused by the defective product of one of its members would bring pressure upon the delinquent manufacturer to improve his product. It is also countered by the defense of negligence which could be made available to other members of the industry; by establishing negligence as the proper grounds of recovery, the nonnegligent members of the industry would be absolved of all liability.

As an example, consider the second factual situation which began this note, *i.e.*, the low standards of the automobile industry.⁷⁷ Suppose that a defect in one car causes an injury or property damage and that an action is brought against the entire industry. Should the manufacturer of the injury-causing or property-damaging car be defunct or insolvent, the entire industry would contribute to the damages recoverable by the injured plaintiff in strict liability. In all other cases, the claimant (either the injured consumer or the industry) would be required to rebut the presumption that no participatory connection among members of the industry exists for personal profit or other benefit. Also, as indicated above, those manufacturers who produce automobiles without a similar defect could be permitted to raise and prove the existence of negligence on the part of the particular manufacturer of the injury-producing automobile.

Applications of Strict Liability Imposed Upon an Entire Industry

It is well and good to expound on the theories of strict liability in tort which may be applicable to an entire industry as well as to the individual manufacturer, but such theories are of little use to the typical plaintiff who need go no farther than his immediate seller to state his claim. If he sufficiently pleads his case, he will usually be granted recovery from his immediate seller. Nonetheless,

77. See notes 4-5 *supra* and accompanying text.

there are two possibilities of industry-wide liability which might be considered.

First, there is the case similar to *Chance* where the plaintiff simply cannot identify the manufacturer or the seller of the defective product which caused his injury. However, such cases do not abound in number and hence the benefits of industry-wide liability would be reaped by very few.

The second and much more plausible application of strict liability imposed upon an entire industry would occur when the individual manufacturer brings a cross-claim against his own industry seeking indemnity. Two theories of indemnity will be examined and then applied to an entire industry.⁷⁸ The first theory will be based on the element of control and the second theory will be based on expanded enterprise liability.

The first theory is that of primary and secondary responsibility.⁷⁹ Although the one held liable to an injured plaintiff may be the manufacturer of the defective product, his liability should be secondary to the entity which *caused* the defect to be present.⁸⁰ Hence, if the entire industry has caused a defect to be present which ultimately produces injury or property damage to a user or consumer through imposed or adopted defective standards, the entire industry should be the entity which bears primary responsibility for that injury or property damage.⁸¹ To illustrate, consider the case of the Acme Ladder Manufacturing Company again. In an action brought against the company by Mr. Bartelli, assume that the Acme Ladder Manufacturing Company is held strictly liable. This liability should only be secondary to the liability of the entity which caused the defect to be present in the first place—in this case, the entire industry because it adopted defective standards. Thus, primary liability should fall upon the entire ladder manufacturing industry.

78. W. PROSSER, *LAW OF TORTS* § 51, at 313 (4th ed. 1971):

[I]t is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. . . . Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct.

79. See W. PROSSER, *LAW OF TORTS* § 51 (4th ed. 1971).

80. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 24 (1965).

81. See *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (1970).

The second theory is one which is implied from the expanded concepts of enterprise liability. Recall that under expanded enterprise liability, no precise legal relationship is necessary for the imposition of strict liability in tort; instead, a participatory connection for personal profit or other benefit must be shown.⁸² Hence, in an effort to meet the justifications of strict tort liability more effectively, the defendant-manufacturer should be permitted to cross-claim against his entire industry. Of course, he would have to prove the other members' participatory connection with his own enterprise for their own personal profit or other benefit. The defense of negligence would then be available to other members of the industry. The community certainly should recognize a certain sense of justice in allowing a manufacturer to seek indemnity from his entire industry⁸³ in certain instances, as when an entire industry turns out defective products.⁸⁴

CONCLUSION

The imposition of strict liability in tort has expanded upward and downward from the guidelines laid down by the *Restatement II*. The policies allowing such expansion should call for the imposition of strict liability in tort upon an entire industry under the theories of control of the defect, risk spreading and expanded enterprise liability. Perhaps the most feasible way of imposing strict liability in tort upon an entire industry is to allow a manufacturer to seek indemnity from his own industry. This is a far more adequate means of compensating the injured consumer and might serve as an added inducement to industries to keep the cost of product-related injuries from ever exceeding \$5.5 billion annually.

82. *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314, 325 (2d Dist. Ct. App. 1972); see notes 67-72 *supra* and accompanying text.

83. See note 78 *supra*.

84. The possibility of such liability being imposed might even induce entire industries to form "consumer protection funds." Such funds could be administered in a manner similar to the airline industry's strike funds. Each member would contribute to the fund and damages awarded to injured consumers from strict liability actions would come from this fund.

