Tulsa Law Review

Volume 24 | Issue 1

Fall 1988

Strict Liability in Tort for Builder-Vendors of Homes

Blaine G. Frizzell

STRICT LIABILITY IN TORT FOR BUILDER-VENDORS OF HOMES

I. INTRODUCTION

Since the 1960's, courts and legislatures have exercised great liberty in expanding the liability of manufacturers.[1] Prodded by trends in judicial decisions, legislatures began using the Restatement (Second) of Torts § 402A[2] as a model to draft laws which allowed claims against manufacturers of products without the traditional common law burden of proving

1. *See generally* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-104A (5th ed. 1984); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter Prosser, *The Fall*] (In this article, Prosser describes the rapid expansion of the theory of strict liability in tort and the downfall of the long-standing privity doctrine. Prosser cites Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), as the landmark case which marked the beginning of the end for the privity requirement.); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *The Assault*] (In this article, Prosser outlines the history of strict liability from the early 1900's, when Judge Cardozo crushed the requirement of privity, to the date of the article. So many exceptions in the traditional theory had been recognized that the theory was practically non-existent in the context of many products.); 3 AM. L. PROD. LIAB. 3D (LCP BW) §§ 38:1-38:24 (1987) (This publication examines real estate defects and the various legal theories which an injured party may use to recover damages.); Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987); Chan, *The Builder's Burden of Defective Construction—Part I*, 13 COLO. LAW. 2021 (1984) [hereinafter Chan, *Part I*]; Chan, *The Builder's Burden of Defective Construction—Part II*, 13 COLO. LAW. 2234 (1984) [hereinafter Chan, *Part II*] (This article explores the liability of developers of commercial real estate and differentiates between the "sophisticated" commercial buyer and the average residential home buyer. Based upon this distinction, the author states that caveat emptor should apply to the sophisticated buyer who is on equal footing with the builder.); Hiner, *Strict Liability and the Building Industry*, 8 J. PROD. LIAB. 373 (1985) (This article sketches the history of products liability law and critically examines the holding of Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), which applies strict liability in tort to the building industry. The author concludes that the inherent differences between buildings and products preclude the application of strict liability in tort to real estate.); Walker, *The Expanding Applicability of Strict Liability Principles: How is a 'Product' Defined*, 22 TORT & INS. L. J. 1 (1986); Note, *Liability of Builder-Vendor: Blagg v. Fred Hunt Co.*, 35 ARK. L. REV. 654 (1982); Note, *Strict Tort Liability to The Builder Vendor of Homes: Schipper and Beyond*, 10 OHIO N.U.L. REV. 103 (1983) (This note discusses the applicability of Restatement (Second) of Torts § 402A to the real estate context.); Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670 (1982); 63 AM. JUR. 2D *Products Liability* §§ 528-77 (1984); Annotation, *Liability of Builder or Subcontractor for Insufficiency of Building Resulting from Latent Defects in Materials Used*, 61 A.L.R. 3D 792 (1975) (This article discusses the development of the law in relation to builders' liability when, through no fault of the builder, latently defective materials are used in the construction of a building.).

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section provides:

> 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

negligence. Since those early decisions and enactments, liability has continued to expand beyond what was envisioned by the writers of § 402A, eventually encompassing defendants who clearly should not be exposed to this strict liability.[3]

One type of defendant who should not be exposed to strict liability is the builder-vendor of residential homes—not because these defendants are not prone to error, but because traditional tort and contract theories are sufficient tools for plaintiffs to recover for legitimate harm. Applying strict liability to defects in homes would provide a powerful weapon for some plaintiffs with dubious claims.[4] In addition, this application would preclude defendants from asserting several defenses.[5] Protecting consumers from potentially dangerous products and placing the cost of injuries on the makers of the products were the purposes for which the theory of strict liability in tort was developed,[6] but the doctrine's expansion to include residential real estate surpasses the logical boundaries within which the doctrine was meant to be contained.[7]

---

the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

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

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

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

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

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

Id.

3. Prosser, *The Fall, supra* note 1. Writing about the decision in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), Prosser states:

> The citadel fell. The method of storming it was not unlike that of Cardozo in *MacPherson v. Buick Motor Co.* long since, where the negligence exception as to 'inherently' or 'imminently' dangerous products was expanded to swallow up the rules as to all products. Now the special rule as to food and drink was expanded to engulf the rest.

Prosser, *The Fall, supra* note 1, at 793 (citations omitted). In addition, Prosser states that "[w]hat has followed has been the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." *Id.* at 793-94 (citations omitted).

4. *See* Milam v. Midland Corp., 282 Ark. 15, 665 S.W.2d 284 (1984) (where the plaintiff alleged the real estate developer was strictly liable for the plaintiff's motorcycle accident injury because the development had a street with a curve that was too sharp).

5. *See* 63 AM. JUR. 2D *Products Liability* § 528 (1984) (Defenses which the defendant may not use in a strict liability in tort cause of action are: 1) lack of privity, 2) lack of notice to the defendant of breach of warranty, 3) lack of reliance on a warranty, and 4) disclaimer of implied warranties).

6. *See* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 75 (5th ed. 1984); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) ("Even if there is no negligence, however, 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.").

7. For a discussion of related topics, see Note, *Landlord-Tenant: Landlord's Strict Liability For Personal Injury Arising From Latent Defects In Premises, Becker v. IRM Corp., 38 Cal. 3d 454,*

II. DEVELOPMENT OF STRICT LIABILITY IN TORT

The development of strict liability in tort has been a five stage process which began in the middle of the nineteenth century. The first stage of the theory's development lasted over 70 years, the second stage lasted nearly 30 years, the third stage lasted 18 years, the fourth stage was a mere flicker in time, and the fifth stage of rapid, overreaching expansion has dominated the last 20 years. This expansion has far exceeded the scope envisioned by the originators of the theory, and today, strict liability plays a dominant role in the decisions of virtually every business venture.

A. *Stage One: Quasi-Caveat Emptor*

The first stage in the development of strict liability began in 1842 with the case of *Winterbottom v. Wright*,[8] an English decision which displayed a rigid application of the requirement of privity.[9] In *Winterbottom*, the plaintiff, a mail coach driver employed by the Postmaster General, was injured when a wheel of the mail coach he was driving collapsed due to disrepair.[10] The defendant was a manufacturer-repairer of coaches who had contracted with the Postmaster General to keep all of the mail coaches in good, safe, working condition.[11] The plaintiff's claim for damages was denied because he had no privity of contract with the defendant. Only the plaintiff's employer, the Postmaster General, had a cause of action against the defendant because the Postmaster General was a party to the contract.[12]

Winterbottom represented the state of legal theory at the time. The doctrine of caveat emptor (let the buyer beware) could only be defeated if the injured party had entered into a contract with the defendant which

698 P.2d 116, 213 Cal. Rptr. 213 (1985), 1986 ARIZ. ST. L.J. 561; Note, *Becker v. IRM Corporation: Strict Liability in Tort for Residential Landlords*, 16 GOLDEN GATE U.L. REV. 349 (1986); Note, *A Bird in the Hand: California Imposes Strict Liability on Landlords in Becker v. IRM Corp.*, 20 LOY. L.A.L. REV. 323 (1987); Note, *Let the Landlord Beware: California Imposes Strict Liability on Lessors of Rental Housing*, 51 MO. L. REV. 899 (1986); Note, *Landlord-Tenant: Becker v. IRM Corporation: Will Strict Liability Reach Oklahoma?*, 39 OKLA. L. REV. 304 (1986); Comment, *Oklahoma's Statute of Repose Limiting the Liability of Architects and Engineers for Negligence: A Potential Nightmare*, 22 TULSA L.J. 85 (1986); Note, *Elden v. Simmons: The Standard of Reasonableness Prevails—Implied Warranties of New Home Construction Do Not 'Necessarily' Terminate on Resale in Oklahoma*, 17 TULSA L.J. 753 (1982).

8. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
9. R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 10-15 (1980).
10. 10 M. & W. 109, 109, 152 Eng. Rep. 402, 402-03 (Ex. 1842).
11. *Id.* at 115, 152 Eng. Rep. at 405.
12. *Id.* at 116, 152 Eng. Rep. at 405.

covered the injury involved.[13] This theory was designed to protect suppliers of products from economic ruin. Also implicit in the theory was the idea that consumers had a duty to inspect products to find any defects.[14]

In the late eighteen hundreds, courts began to recognize exceptions to the strict requirement of privity, allowing third parties to collect damages without having privity in certain situations. As stated by the court in *Huset v. J. I. Case Threshing Machine Co.*,[15] the first exception dealt with a manufacturer's negligence in dealing with products, such as drugs, that are imminently dangerous to human life.[16] Another exception was found in cases where an owner's act of negligence caused a third party to be injured by a defective product.[17] A third exception arose in relation to products deemed "imminently dangerous."[18] The various contexts in which strict liability was found included nuisance, workmen's compensation, respondeat superior, dangerous animals, escaping substances, and ultra-hazardous activities.[19] Thus, the first stage in the life of strict liability in tort began with a sometimes harsh privity requirement and ended when that requirement became so riddled with exceptions that the next step was almost expected.[20]

B. *Stage Two: Overturning the Privity Requirement*

The strict privity requirement set forth in *Winterbottom* came to an abrupt halt in 1916 with the decision of *MacPherson v. Buick Motor Co.*[21] The defendant automobile manufacturer had sold an automobile to a retailer who subsequently resold it to the plaintiff.[22] The plaintiff was injured when one of the wheels collapsed while he was driving the car.[23] The manufacturer argued that the plaintiff's claim must fail because no

13. For a discussion of the doctrine of caveat emptor, see Comment, *The Case Against Strict Liability Protection for New Home Buyers in Ohio*, 14 AKRON L. REV. 103 (1980).

14. *See* Chan, *Part I*, *supra* note 1 (The author discusses the role of caveat emptor where buyer and seller are on an equal footing as in a transaction involving a commercial real estate purchase.).

15. 120 F. 865 (8th Cir. 1903).

16. *Id.* at 870.

17. *Id.* at 870-71.

18. *Id.* at 871.

19. In addition to these contexts, the use of products liability was expanding to include a great new assortment of items. *See* Prosser, *The Fall*, *supra* note 1, at 805-14; Prosser, *The Assault*, *supra* note 1, at 1110-14.

20. Hiner, *supra* note 1, at 375-76.

21. 217 N.Y. 382, 111 N.E. 1050 (1916).

22. *Id.* at —, 111 N.E. at 1051.

23. *Id.*

contract between the two parties existed.[24] In a famous opinion, Judge Cardozo boldly abrogated the privity requirement,[25] reasoning that the defendant clearly knew that its automobiles would be used by persons other than the initial buyer, the retailer.[26] Furthermore, Cardozo went on to hold that the automobile was an "imminently dangerous" product and upheld the plaintiff's right to sue the defendant manufacturer, even though there was no contract guaranteeing such rights.[27]

Although the elimination of the privity requirement was a substantial factor in the development of strict liability in tort, it may not have been the most important one. The most influential factor in the development of strict liability did not happen in any court of law; it happened in the marketplace.[28] The rapid growth of industry in America in the late nineteenth and early twentieth century led to changes not only in the products produced and the manufacturing processes used, but to changes in the consumer as well. The variety and number of mass produced products owned by consumers grew rapidly, and the consumer's knowledge and expertise in appraising these products dropped at an equally rapid pace.[29] In this setting, legal reformers like Justice Traynor of the California Supreme Court formulated new theories of liability for manufacturers of products.[30]

During the first half of the twentieth century, no theory of strict liability in tort existed. With the privity requirement gone,[31] however, plaintiffs could proceed with a "products liability" of sorts by proving a negligent act or omission by a defendant manufacturer.[32] This tool for injured plaintiffs seemed to be inadequate, though, when advanced

24. *Id.*

25. *Id.* at —, 111 N.E. at 1053.

26. *Id.*

27. *Id.*

28. 63 AM. JUR. 2D *Products Liability* § 529 (1984); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, —, 150 P.2d 436, 443 (1944) ("As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.").

29. *Escola*, 24 Cal. 2d at —, 150 P.2d at 443.

30. *Id.*

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

32. Hiner, *supra* note 1, at 374-75. Hiner states:

> As negligence became the prevailing theory of tort law, attempts to impose strict liability were looked on with disfavor by the courts. However, even when negligence was in its heyday, strict liability survived in some areas under the guise of exceptions to the negligence rule. As a result, in the mid-nineteenth century, defendants were being held strictly liable in tort for blasting, for injuries inflicted by animals kept on their property, and for the torts of their servants.

Id. (citations omitted).

against a large corporate manufacturing company. Thus, the legal reformers did some manufacturing of their own. Much the same way that exceptions had riddled the privity requirement, new theories emerged for the plaintiff's arsenal, such as negligence per se, negligence based on res ipsa loquitur, breach of an implied or express warranty, and various creative means to circumvent the warranty defenses traditionally advanced by defendants.[33] These innovative tort theories eventually led to the creation of the ultimate plaintiffs' weapon: strict liability in tort.

C. *Stage Three: The Genesis of Strict Liability in Tort*

Justice Traynor is credited with first espousing "pure" strict liability in tort by discarding all of the various "half-hearted" tort theories (used to supplement the traditional negligence cause of action) and drafting a clear, direct, easy-to-apply doctrine.[34] This theory was introduced in Traynor's concurring opinion in the 1944 decision, *Escola v. Coca Cola Bottling Co.*[35]

Escola involved a plaintiff waitress who picked up a bottle of Coca-Cola from a case which had just been delivered to the restaurant.[36] The bottle burst in the plaintiff's hand, inflicting deep cuts.[37] The majority opinion upheld the plaintiff's right to proceed against the defendant manufacturer on the grounds of res ipsa loquitur.[38] Under this doctrine, negligence can be inferred, thus shifting the burden of proof. This shift depends upon the plaintiff's showing that the "defendant had exclusive control of the thing causing the injury and that the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant."[39] Although the defendant did not literally have exclusive control over the bottle at the time of the accident, the court broadened the rule to hold that the defendant's exclusive control need not be at

33. *Id.* Hiner states:

> In contrast to the prevailing requirement of a showing of negligence, the courts at the turn of the century began to protect a class of injured plaintiffs who were unable to make out a successful case in negligence. Adoption of such devices as res ipsa loquitur and abolition of the privity defense lowered the hurdles for plaintiffs with tort causes of action, but the courts held to the requirement that fault on the part of the defendant be proven. Later, contract remedies were also expanded: the concept of implied warranties was stretched to the point that contractual privity was no longer required.

Id. at 375-76. (citations omitted).

34. Bieman, *supra* note 1 at 114.

35. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

36. *Id.* at —, 150 P.2d at 437.

37. *Id.* at —, 150 P.2d at 438.

38. *Id.* at —, 150 P.2d at 440.

39. *Id.* at —, 150 P.2d at 438. *See also* Hiner, *supra* note 1, at 375 n.12. The author explains

the time of the accident, but only at the time that the negligence occurred.[40]

Justice Traynor agreed with the result that the plaintiff's cause of action should be allowed, but he did not espouse the rationale of the majority.[41] Traynor began his discussion by stating a concise rule of law: "In my opinion it should now be recognized that a manufacturer incurs an absolute 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."[42]

First, Traynor explained that the doctrine should be applied regardless of privity or negligence.[43] The rationale for this theory is that liability should be administered in a way to encourage manufacturers to make their products as safe as possible. This encouragement allegedly evolves from making manufacturers responsible for consequences arising from the reasonable use of those products.[44] Without such liability, the loss will be placed on the injured party, who is generally less able to shoulder such a burden.[45] On the other hand, a manufacturer who is forced to compensate those injured from the reasonable use of its product can spread the loss by including a premium on the price of the product.[46]

---

that the burden of showing negligence normally rests upon the plaintiff but that res ipsa loquitur shifts that burden:

> If the plaintiff can prove that the accident which caused the injury is one that normally would not have occurred without negligence, the presumption arises that it was the negligence of the defendant who controlled the instrumentality of the accident that caused the injury. Thus, after the plaintiff proves that the accident occurred and caused his injury, the burden then shifts to the defendant to prove he was not negligent. W. L. PROSSER, LAW OF TORTS § 39 (4th ed. 1971). Treadwell v. Whittier, 80 Cal. 574, 582-83, 22 P. 266, 266-69 (1889) (the fact of elevator falling establishes presumption of negligence); Byrne v. Boadle, 2 H. & C. 722 (Exch. 1863) (the fact of barrel falling from loft is prima facie evidence of negligence).

Hiner, *supra* note 1, at 375 n.12.

40. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 438 (1944) (Traynor, J., concurring).

41. *Id.* at —, 150 P.2d at 440.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 462, 150 P.2d at 441. *See also* Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972), which questions whether strict liability in tort deters manufacturers from producing defective goods. The authors assert that strict liability should only be imposed on the "cheapest cost avoider." Placing liability on the party who is determined by the trier of fact to be in the best position to make a cost-benefit analysis between accident costs and accident avoidance costs would reduce the cost of accidents. *But see* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973). This article maintains that under a negligence standard, potential victims have more incentive to decrease accident costs than they would have under strict liability. Posner argues that imposition of strict liability does not create an incentive to invest in research to produce safer goods, but merely shifts the incentive from the potential victim to the manufacturer.

46. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 441 (1944).

Therefore, the manufacturer is "self-insuring" by setting price increases which are ultimately absorbed by the public.[47] Traynor, seeing this liability applicable to certain types of dangerous and potentially dangerous products, desired to impose liability on manufacturers solely because they are responsible for having placed the product on the market.[48]

Another purpose for strict liability, as pointed out by Justice Traynor, is that an injured party is not in a strong "position to refute such evidence [of a manufacturing defect] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."[49] Traynor later explained that with the change in the nature of the marketplace (the industrial revolution) and the change in the level of knowledge of the average consumer, there has come a change in the "close relationship between the producer and consumer."[50] The increased complexity of manufacturing processes, the decline in consumer expertise in being able to investigate product quality, and the efforts of manufacturers to bolster consumer confidence through marketing were the changes in the marketplace observed by Traynor.[51]

A third rationale is that the strict liability in tort doctrine will provide plaintiffs with a direct, short-cut method of recovery. This is helpful not only in reducing a plaintiff's litigation expenses, but also in making more efficient use of court time.[52]

Justice Traynor's final and most important point concerned the rescission of a privity of contract requirement. Traynor pointed out that in the modern marketplace consumers purchase many products without the inconvenience of separately contracting for each item.[53] Using food products as an example, Traynor stated that "the right of a consumer injured by unwholesome food does not depend upon the intricacies of the law of sales and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy."[54] For these reasons, Justice Traynor concluded that the waitress injured in *Escola* should not have to rely on res ipsa loquitur, as the majority opinion held,

47. *Id.*
48. *Id.*
49. *Id.* at —, 150 P.2d at 443.
50. *Id.*
51. *Id.* Justice Traynor described the system of recovery after *MacPherson* as a circuitous system which "engenders wasteful litigation." Traynor suggested that, if the injured party's action could be based directly on the manufacturer's warranty, much of the waste would be curtailed. *Id.* at —, 150 P.2d at 442.
52. *Id.*
53. *Id.*
54. *Id.* (citations omitted).

but should be allowed to recover under a theory of strict liability.[55]

D. *Stage Four: The Doctrine Comes of Age*

In 1962, Justice Traynor wrote another opinion, this time for the majority and for nothing less than what he had asked for in *Escola*. In *Greenman v. Yuba Power Products, Inc.*,[56] the plaintiff received a woodworking power tool as a gift from his wife, who had purchased the tool from the defendant retailer.[57] After the plaintiff was injured by a piece of wood hurled from the machine under normal operating conditions,[58] the plaintiff sued both the retailer and the manufacturer. A trial court decision in favor of the plaintiff was affirmed in Justice Traynor's now famous opinion which reflects the concept he espoused in *Escola*.[59]

A second significant event in this fourth stage was the publication of the Restatement (Second) of Torts in 1965.[60] Restatements traditionally adopt the law as affected by the latest trends, and the drafters of this Restatement adopted Traynor's concept of strict liability in tort.[61] This short turn of events in stage four resulted in the coming of age of the theory of strict liability in tort.

E. *Stage Five: A Good Concept Outgrows Its Logical Boundaries*

The theory of strict liability in tort was conceived as a method of achieving social justice by combatting the dangerous side-effects of the industrial revolution. Therefore, "enterprise liability" was imposed on defendant manufacturers based on the assumption that their intentional profit-making activity exposed consumers to a risk that should be shouldered by the enterprise itself.[62] The "modern consumer," unsophisticated in the ways of mass production, now had a short-cut to recovering for injuries sustained as a result of using a dangerous or defective

55. *Id.* at —, 150 P.2d at 440.
56. 27 Cal. Rptr. 697, 377 P.2d 897 (1962).
57. *Id.* at 698, 377 P.2d at 898.
58. *Id.*
59. *Id.* at 701, 377 P.2d at 901.
60. *See supra* note 2.
61. *Id.* The Restatement (Second) of Torts § 402A and subsequent case holdings differ significantly in their statement of the rule of law. In both *Escola* and *Greenman*, Justice Traynor was careful to include a qualification to the rule, "[t]he manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 444 (1944) (Traynor, J., concurring).
62. *See* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 75 (5th ed. 1984); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, —, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) ("Even if there is no negligence, however, public policy demands that responsibility be fixed

product. Public policy and fairness dictated that these special consumers should no longer have the burden of proving negligence, fraud, or the existence of an implied warranty. Thus, a less complicated method of recovery developed.[63]

The expansion of the doctrine of strict liability in tort after the theory's acceptance,[64] however, seems to have given courts the power to decide to which industries the heightened liability will apply. Although strict liability in tort has been praised for making manufacturers of dangerous products more cautious, it has also been criticized for inhibiting the development of new products.[65] Thus, a court decision addressing the applicability of strict liability in tort to a new industry may decide its ultimate success or failure. The authority to so decide an industry's fate is considered by some to be legislative.[66]

Many industries have been directly affected by the imposition of strict liability as advanced by purchasers of their products. Strict liability, as it relates to drug manufacturers, has evoked commentary about the doctrine's inhibitive effect on the development of new drugs.[67] In addition, strict liability in tort has been extended to persons traditionally thought of as providers of services rather than products. "Dram shop" owners, sellers of intoxicating liquor, have been held strictly liable for injuries caused by an intoxicated patron.[68] Hospitals and blood banks have been held strictly liable for transfusing blood which caused injury to a patient.[69] The mechanical and administrative services provided by a hospital may also result in strict liability.[70]

Finally, although the plaintiff must still prove the existence of a defect, the definition of "defect" has undergone expansion. Traditional definitions of "defective design" were based on the fitness of the product as

wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.").

63. *See* Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670, 671-76 (1982).

64. For an overview of the speed and completeness which the theory of strict liability swept through jurisdictions of the United States, see Bieman, *supra* note 1 (traces the history of products liability law and provides an exhaustive account of the status of the doctrine in every state of the union).

65. Walker, *supra* note 1, at 2; *see* Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

66. Walker, *supra* note 1, at 2.

67. *Id.* at 8.

68. W. KEETON, PROSSER AND KEETON ON TORTS § 81 (5th ed. 1984).

69. Faucheaux v. Alton Ochsner, 470 So. 2d 878 (La. 1985). *See also* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965) (In this 1965 article, Traynor explained that the definition of "product" had not yet encompassed blood.).

70. Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065 (E.D. Wis. 1973).

originally designed. New theories require manufacturers to design products to protect consumers from reasonably foreseeable misuse of the product.[71] Thus, the concept of design defect has been altered to require foresight on the part of the manufacturer.[72] All of these expansions on the application of strict liability in tort are outside of the area originally envisioned by Justice Traynor and the other original supporters of strict liability in tort.

III. ELEMENTS OF STRICT LIABILITY IN TORT

The theory of strict liability in tort is not the same as absolute liability.[73] As stated by the court in *Helene Curtis Industries, Inc. v. Pruitt*,[74] just because a manufacturer is exposed to strict liability "does not . . . mean that the maker is liable for any harm to anybody under any circumstances."[75]

The following elements must be proven for recovery under strict liability in tort:[76] (1) There must be the sale of a product. (2) The product must be sold by a seller engaged in the business of selling such a product. (3) The product must be in a defective condition. (4) The defective condition must render the product unreasonably dangerous to the user or consumer or to the user or consumer's property. (5) The product must reach the consumer without substantial change in the condition in which it was sold. (6) The product must cause physical harm to the user or consumer or to the user or consumer's property.[77]

No proof of negligence or privity is required under this doctrine. The heaviest burden for the plaintiff, therefore, is proving a defective condition. This element is discussed in the Restatement (Second) of Torts comment (g) of § 402A. Comment (g) generally states that there are three basic types of defects: manufacturing defects, design defects, and the failure to adequately warn the consumer of potential danger.[78]

71. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 76-77 (1980).
72. *Id.*
73. 2 AM. L. PROD. LIAB. 3D (LCP BW) § 16:5 (1987).
74. 385 F.2d 841 (1967), *cert. denied*, 391 U.S. 913 (1968).
75. *Id.* at 849.
76. Bieman, *supra* note 1, at 114. To these basic tests, various courts have added requirements such as: That the plaintiff was unaware of the claimed defect; That the defendant knew, or in the exercise of reasonable care should have known, that the particular product would be used without inspection for defects; The usefulness and desirability of the product; The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive; and any other factor or factors the jury may believe may reasonably bear on the issue. *Id.*
77. 2 AM. L. PROD. LIAB. 3D (LCP BW) § 16:42 (1987).
78. Bieman, *supra* note 1, at 114.

Strict liability in tort also bars the defendant from asserting many traditional defenses. Prohibited defenses include lack of privity, lack of notice to the defendant of breach of warranty, disclaimer, and lack of reliance on a warranty.[79]

While a defective condition still must be proven, strict liability in tort has provided consumers with a pernicious means to proceed against manufacturers. Plaintiffs proceeding under strict liability in tort can advance without proving privity or negligence, while defendants are forced to protect themselves half-armed, because certain defenses are proscribed. Due to the "plaintiff-oriented" nature of strict liability in tort, the imposition of the theory on any particular class of defendants must be carefully scrutinized.

IV. STRICT LIABILITY AND REAL ESTATE

As previously discussed, the past twenty years have seen a rapid expansion of the doctrine of strict liability into areas far beyond its initially intended boundaries. One area where the doctrine has been overextended is real estate, and the state of the doctrine's development has resulted in some courts holding strict liability applicable to real estate and some courts holding to the contrary.

A. *Courts Holding That Strict Liability in Tort Applies to Real Estate*

Probably the most famous decision in this context is from a 1965 case, *Schipper v. Levitt & Sons, Inc.*[80] In *Schipper*, the infant son of the lessee of a home was seriously scalded by hot water from a bathroom

79. *See generally* Gutierrez v. Superior Court, 243 Cal. App. 2d 710, —, 52 Cal. Rptr. 592, 604 (1966) (The court decided that contract and implied warranties were not applicable to the cause of action based on strict liability in tort.); Rossignol v. Danbury School of Aeronautics, 154 Conn. 549, —, 227 A.2d 418, 424 (1967) (The court decided that the privity of contract requirement was not applicable to a cause of action in strict liability in tort. The court also decided that the plaintiff need not prove any reliance on the defendant's assertions as required by portions of the Uniform Commercial Code.); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, —, 207 A.2d 305, 312 (1965) (It is not assertions or promotions of the vendor which make the defendant liable under strict liability in tort, but merely the fact that the defendant's product appears in the market and produces an injury.); Dart Equipment Corp. v. Mack Trucks, Inc., 9 Cal. App. 3d 837, —, 88 Cal. Rptr. 670, 677-78 (1970) (This court found that strict liability in tort cannot be limited by contract.); RESTATEMENT (SECOND) OF TORTS § 402A comment m (This comment explains that the liability imposed by this doctrine is based purely on tort warranty rather than contract warranty. Therefore, the theory is not dependent upon contract rules and defenses.).

80. 44 N.J. 70, 207 A.2d 314 (1965). This case has been cited in many other cases and has been the subject of much analysis. *See* Note, *Strict Tort Liability to The Builder Vendor of Homes: Schipper and Beyond?*, 10 OHIO N.U.L. REV. 103 (1983) (This note explains that strict liability was initially applicable to food, then amended to include products connected to "intimate bodily use," and finally amended to include "any product." The author explains that in *Schipper*, the New

faucet. The home was built by the defendant developer.[81] The defendant was a mass developer of homes, and the lessor had purchased the home after having seen a model home.[82] A homeowner's guide given to the lessor explained that the hot water was unusually hot in order to provide sufficient heat for the heated tile floor in the home.[83] The guide instructed that the cold water faucet should always be turned on before the hot water faucet.[84] Soon after moving into the home, the lessees realized that the water was extremely hot.[85] Before the situation could be corrected, the lessee's infant son was badly scalded.[86]

The court in *Schipper* first considered the plaintiff's cause of action based on negligence.[87] Despite the lessee's knowledge of the hot water, the court found the defendant negligent because a readily available and relatively inexpensive cure for the hot water problem was admittedly rejected by the defendant.[88] In reaching the conclusion that a builder-vendor of homes could be held liable for negligence, the *Schipper* court cited a number of cases which held that there is "no valid reason for any distinction between real and personal property so far as the principle of liability is concerned."[89]

The next cause of action considered by the *Schipper* court was based on strict liability in tort.[90] The court began by analogizing mass-produced homes to automobiles.[91] From this point, the court applied case law supporting strict liability for personal property.[92] This leap in analysis was justified by the court in its assertion that, in the face of change, the judiciary has a duty to keep "its common law principles abreast of the times."[93] Continuing its analogy of automobiles to homes, the court stated that buyers of mass-produced homes are as unable to protect

Jersey court extended the doctrine beyond the plain meaning of the words to include homes.). *See also* Hiner, *supra* note 1, at 373.

81. *Schipper*, 44 N.J. at —, 207 A.2d at 317.

82. *Id.* at —, 207 A.2d at 316.

83. *Id.* at —, 207 A.2d at 317. The water temperature in the house was 190 degrees Fahrenheit. Normal hot water temperature is 140 degrees. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at —, 207 A.2d at 320.

88. *Id.* at —, 207 A.2d at 318. The excessively hot water problem could have been fixed by the installation of a "mixing valve." *Id.* at —, 207 A.2d at 324.

89. *Id.* at —, 207 A.2d at 322.

90. *Id.* at —, 207 A.2d at 324.

91. *Id.*

92. *Id.*

93. *Id.* at —, 207 A.2d at 325.

themselves in deeds as purchasers of automobiles are with bills of sale.[94] The court concluded by holding that the injured plaintiff could proceed against the defendant based on theories of both negligence and strict liability in tort.[95]

Seven years after *Schipper*, the Washington State Court of Appeals extended strict liability to builder-vendors in *Gay v. Cornwall*.[96] In *Gay*, the owner of a home under construction sold the property to the plaintiff, who became the first occupant of the home upon completion of construction.[97] After moving into the home, the plaintiff began to discover defects.[98] The roof leaked profusely.[99] The chimney also leaked, which caused damage to the electrical system.[100] A sewer pipe broke, causing sewage to back up under the house.[101] The plaintiff also experienced trouble with vents, the furnace, and external paint.[102] The Washington court imposed strict liability on the builder-vendor based on an earlier Washington Supreme Court decision.[103] Although the earlier decision was predicated on a contractual implied warranty, the *Gay* court further expanded the liability of builder-vendors to strict liability in tort.[104] With only a brief explanation, the *Gay* court stated that the fall of the privity requirement led to strict liability for builder-vendors.[105]

This leap from one extreme to the other disregards an expansive middle ground of alternative remedies.[106] Nine years after *Gay* the Washington legislature adopted the Tort Reform Act of 1981 which provides for statutory liability for builder-vendors of defective mass produced homes.[107]

In 1981, the Supreme Court of Arkansas held that a house is a "product" within the language of Arkansas' statutory products liability law.[108] In *Blagg v. Fred Hunt Co.*,[109] the plaintiff purchased a home built

94. *Id.* at —, 207 A.2d at 326.
95. *Id.* at —, 207 A.2d at 328.
96. 6 Wash. App. 595, —, 494 P.2d 1371, 1373 (1972).
97. *Id.* at —, 494 P.2d at 1372.
98. *Id.*
99. *Id.*
100. *Id.* at —, 494 P.2d at 1372-73.
101. *Id.* at —, 494 P.2d at 1373.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See* notes 147-63 *infra* and accompanying text.
107. WASH. REV. CODE § 7.72.010(1)(a) (1981).
108. Blagg v. Fred Hunt Co., 612 S.W.2d 321, 322 (Ark. 1981) (citing ARK. CODE ANN. § 4-86-102 (1987)). *See generally* Walker, *Strict Liability*, *supra* note 1, at 1 (explores the extent to which courts have expanded the definition of "product").

by the defendant builder.[110] The plaintiffs were not the first owners of the home; however, the initial purchasers only owned the home for nine months before selling it to the plaintiffs.[111] After moving into the home, the plaintiffs noticed that the carpet in the house emitted a strong odor of formaldehyde.[112]

The *Blagg* court first considered the extension of warranties beyond the initial purchaser and found no reason why builder-vendors should escape liability to subsequent purchasers of real estate.[113] This liability remains intact "for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale."[114]

Next, the court considered the definition of the word "product" within the statutory language of the Arkansas strict liability statute.[115] Citing *Schipper*, the Arkansas Supreme Court summarily concluded that houses were "products."[116] The *Blagg* court gave more consideration to the issue of whether strict liability in tort could be imposed when the plaintiff has suffered purely economic losses. Economic loss is loss affiliated with damage to the defective product itself[117] as opposed to personal injury or property damage caused by a defective product.[118] On this issue, the *Blagg* court adopted the New Jersey Supreme Court's view that purely economic loss can be recovered under strict liability in tort.[119]

B. *Courts Holding That Strict Liability in Tort Does Not Apply to Real Estate*

The Oregon Supreme Court decided a case in 1977 which demonstrates a more cautious approach to the imposition of strict liability in tort for builder-vendors.[120] In *Chandler v. Bunick*,[121] the court declined

109. 612 S.W.2d 321 (Ark. 1981). *See also* Note, *Liability of Builder-Vendor: Blagg v. Fred Hunt Co.*, 35 ARK. L. REV. 654 (1982).
110. *Blagg*, 612 S.W.2d at 322.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. ARK. STAT. ANN. § 85-2-318.2 (Supp. 1979). This statute, as cited in *Blagg*, has been recodified as ARK. CODE ANN. 4-86-102 (1987).
116. *Blagg*, 612 S.W.2d at 324.
117. Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 513 A.2d 951 (1986), *overruled on other grounds*, Lempke v. Dagenais, No. 87-006 (N.H. Aug. 8, 1988) (1988 WL 92565 (N.H.)).
118. *Id.* at —, 513 A.2d at 952.
119. *Blagg*, 612 S.W.2d at 323-24 (citing Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)).
120. Chandler v. Bunick, 279 Or. 353, 569 P.2d 1037 (1977).

to impose strict liability in tort on builders. The defendant in *Chandler*, was a builder who constructed a house for the plaintiffs.[122] Soon after moving into the home, the plaintiffs realized that an inadequate septic system had been installed by the defendant, causing sewage to back up into the house.[123] Further, the plaintiffs learned that the defendant knew that the septic system was not adequate to gain the approval of county officials.[124]

The *Chandler* court's holding was confined to situations involving custom-built homes as opposed to mass produced homes.[125] Under the court's rationale, however, a very important characteristic of strict liability in tort was expressed. The court stated that strict liability is only imposed in "response to some demonstrated public need where traditional legal theories have been found inadequate to the task."[126] The court ultimately held that the plaintiff could not recover under strict liability because alternative contract remedies were available.[127]

In a case decided the same year as *Chandler*, the Illinois Supreme Court rejected the holding of the New Jersey Supreme Court in *Schipper*.[128] In *Chapman v. Lily Cache Builders, Inc.*,[129] the plaintiffs had purchased a house built by the defendant contractor under a contract between the two parties.[130] The plaintiffs' minor daughter was injured after falling on a staircase defectively built by the defendants.[131] The plaintiffs sought recovery under strict liability in tort.[132] Although Illinois did not recognize strict liability in tort for builder-vendors, the plaintiff pointed to the trend in other jurisdictions supporting such liability.[133] Declining to adopt the concept, the *Chapman* court noted that there were "apparent" differences between manufacturers of goods and builders of homes.[134]

Another decision declining to apply strict liability in tort to a home

121. *Id.* at —, 569 P.2d at 1039.
122. *Id.* at —, 569 P.2d at 1038.
123. *Id.*
124. *Id.*
125. *Id.* at —, 569 P.2d at 1039.
126. *Id.*
127. *Id.* at —, 569 P.2d at 1040.
128. Chapman v. Lily Cache Builders, Inc., 48 Ill. App. 3d 919, 362 N.E.2d 811 (1977).
129. *Id.* at —, 362 N.E.2d at 811.
130. *Id.* at —, 362 N.E.2d at 812.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at —, 362 N.E.2d at 813.

builder was given in *Wright v. Creative Corp.*[135] In *Wright*, a five-year-old boy ran into a sliding glass door installed in the home by the defendant developer.[136] The glass door shattered, cutting the child.[137] The plaintiffs alleged that the defendant was strictly liable for installing a defective glass door.[138] The *Wright* court rejected the plaintiffs' suggestion to follow the trend set in *Schipper*[139] and reasoned that the rationale for strict liability in tort was not applicable even to mass producers of homes.[140] As the court pointed out, "[a] builder cannot easily limit his liability by express warranties and disclaimers, and it is easier to trace a defect to a builder than to a manufacturer as there is more opportunity to make a meaningful inspection of a structure on real property."[141] The court concluded by stating that a cause of action in negligence was adequate for the plaintiff.[142]

Unlike the decisions in *Blagg* and *Schipper*, several jurisdictions have denied the imposition of strict liability in tort for builders when the damage caused by the defect is characterized as economic loss. In *Ellis v. Robert C. Morris, Inc.*,[143] the court denied the imposition of strict liability in tort on a builder who installed defective siding because only economic losses were involved.[144] The court's rationale for its holding was that a plaintiff's recovery of economic losses is best handled by contract theories.[145] In an additional blow to the plaintiff's cause of action in strict liability, the *Ellis* court stated that strict liability in tort was not applicable to builder-vendors because a buyer does not have a high "degree of difficulty proving negligence on the part of the builder."[146]

V. AVAILABILITY OF ALTERNATIVE REMEDIES

Although the courts are split in determining whether strict liability in tort should be applied to real estate, the rationale behind denying applicability is most compelling. In light of the rationale for the inception

135. 498 P.2d 1179 (Colo. App. 1972).
136. *Id.* at 1180.
137. *Id.*
138. *Id.*
139. *Id.* at 1182.
140. *Id.*
141. *Id.* at 1182-83 (citing Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1972)).
142. *Wright*, 498 P.2d at 1183.
143. 128 N.H. 358, 513 A.2d 951 (1986), *overruled on other grounds*, Lempke v. Dagenais, No. 87-006 (N.H. Aug. 8, 1988) (1988 WL 92565 (N.H.)).
144. *Id.* at —, 513 A.2d at 954.
145. *Id.* at —, 513 A.2d at 955.
146. *Id.* at —, 513 A.2d at 953.

of strict liability and the availability of alternative remedies, strict liability in tort should not be imposed on builder-vendors.

Negligence can be differentiated from strict liability in tort, because in a negligence action the plaintiff must prove the existence of a duty on the builder-vendor and a breach of that duty. Generally, the duty will be to build the house using ordinary care, as measured by community standards for builders under similar circumstances.[147] In other words, strict liability in tort is based on the nature of the product, while negligence is based upon the conduct of the defendant. The burden of proving negligence on the part of a builder is not unreasonable where there is a legitimate defect.

A cause of action for defects in construction may also be predicated on negligence per se.[148] A builder's liability under negligence per se evolves from a violation of a law, such as a provision of a building code.[149] In *Stephens v. Sterns*,[150] the Idaho Supreme Court held that negligence per se can arise out of a violation of an ordinance as well as from a violation of a statute.[151] In *Stephens*, the court held that the plaintiff, who owned a house built by the defendant, could bring a cause of action based on negligence per se where the defendant had failed to provide a handrail on a staircase, as required by the local building code.[152] The State of Connecticut has taken a different approach. Connecticut statutorily extends an implied warranty to the purchaser of a new home that the builder has complied with the local building code.[153]

The implied contractual warranty is another possible remedy—one which is frequently confused with strict liability in tort.[154] As applied by many courts, implied warranties are based both in contract and in tort.[155] Generally, an implied warranty with regard to residential real estate guarantees that a home will be "reasonably suitable for its intended use, and not merely habitable."[156] While perfection is not required, a builder will be held to a standard of workmanship based on the average level of

147. Williams v. Runion, 173 Ga. App. 54, 325 S.E. 2d 441 (1967).

148. *See* Stephens v. Stearns, 106 Idaho 249, 678 P.2d 41 (1984).

149. *Id.* at —, 678 P.2d at 48.

150. *Id.* at —, 678 P.2d at 41.

151. *Id.* at —, 678 P.2d at 49.

152. *Id.*

153. *See* CONN. GEN. STAT. ANN. § 47-121 (West 1986). *See also* Fava v. Arrigoni, 35 Conn. Supp. 177, 402 A.2d 356 (1979).

154. *See* Hiner, *supra* note 1, at 397.

155. *Id.*

156. 3 AM. L. PROD. LIAB. 3D (LCP BW) § 38:7 (1987).

skill and intelligence possessed by other builders.[157] Subsequent purchasers of homes may not be able to assert a cause of action based on implied warranty, though, because most jurisdictions require privity of contract.[158]

Finally, a buyer may recover against a builder by establishing fraud or misrepresentation on the part of the builder. The Restatement (Second) of Torts § 353 specifically provides for liability for vendors who conceal or fail to disclose a condition which poses an unreasonable risk to the vendee.[159] However, liability predicated on § 353 dissolves when a vendee has discovered the dangerous condition and has had a reasonable opportunity to take precautions.[160]

Contrary to the statement of the court in *Gay v. Cornwall*,[161] the plaintiff's choices are not limited to caveat emptor or strict liability in tort. Several effective alternative remedies exist. The existence of these alternative remedies necessarily precludes the application of strict liability in tort. As stated in *Chandler*, "[o]rdinarily, the imposition of strict liability is the response to some demonstrated public need where the traditional legal theories have been found inadequate to the task."[162] Home buyers have numerous adequate remedies at their disposal to recover for meritorious claims against builders.[163]

VI. CONCLUSION

The doctrine of strict liability in tort has proven to be a good tool for consumers who were oppressed for many years by the theory of caveat emptor. Strict liability in tort, however, has been extended far beyond its logical boundaries. Because adequate alternative remedies exist in the real estate context, strict liability in tort should not be applied in this area as a weapon with which to attack builder-vendors who are not within the class of defendants for whom the doctrine was originally created.

Blaine G. Frizzell

157. *Id.*
158. Hiner, *supra* note 1, at 398-99.
159. RESTATEMENT (SECOND) OF TORTS § 353 (1965).
160. 3 AM. L. PROD. LIAB. 3D (LCP BW) § 38:17 (1987).
161. 6 Wash. App. 595, —, 494 P.2d 1371, 1373 (1972).
162. Chandler v. Bunick, 279 Or. 353, —, 569 P.2d 1037, 1039 (1977).
163. *See* Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 513 A.2d 951, 953 (1986).