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Judicial Experimentation with a Strict Products Liability Rule: A Comparison of the Law in the United Kingdom, Louisiana and United States' Common Law Jurisdictions

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I. INTRODUCTION

Since the mid-nineteenth century, products liability law has undergone significant modifications. The applicable doctrine has oscillated between contract and tort theories; fault and no-fault liability schemes have competed for predominance. Despite attempts to create an internationally accepted liability norm, different legal systems continue to espouse differing perceptions of the liability formula in the products area. In addition, even in jurisdictions in which courts adhere to identical liability theories, there is disagreement as to the application and implications of the same standard. This article attempts to set the shifting doctrinal character of products liability analysis into a comparative perspective principally between common law and civil law systems.

It is the perceived wisdom that the United States' *Restatement (Second) of Torts* Section 402A and the jurisprudence which preceded and accompanied it represents the most advanced view of strict products liability. This common law approach contrasts sharply with the current English doctrinal position on products lia-

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bility. The dichotomy exists in part because of differing concepts of the role of fault in the imposition of legal liability and differing social welfare structures. The English view, however, may be modified in the near future. Efforts are being undertaken by the European Economic Community to harmonize the law of Member States by incorporating a strict standard of products liability in the law of all Member States in order to foster a fair trading position among the European partners. Some European jurisdictions already have adopted a strict products liability rule in their national law. France, for example, has employed both contractual and delictual liability notions to elaborate a no-fault approach. In addition, both the Council of Europe's Convention on Products Liability (signed by Austria, Belgium, France, and Luxembourg) and the unimplemented EEC Draft Directive on Products Liability advance a no-fault standard of liability which significantly varies from the American standard.

The international stature of the problem has, to some extent, diverted attention from the experimentation with products liability rules in United States jurisdictions. For example, the decisional law in Louisiana, a jurisdiction which merges systemic and substantive features of the common law and civil law traditions in a *sui generis* fashion, has evidenced certain doctrinal trends which bespeak a unique application of traditional civilian concepts and a distinctly advanced variation on the already liberal American position. After assessing English and American law, this article attempts to integrate and evaluate Louisiana jurisprudence on products liability to ascertain whether the Louisiana experimentation sheds new light on the policy dilemma that is embedded in the ongoing products liability debate.

A. Creative Jurisprudence and the Law of Torts: A Preliminary Background to Decision-Making in the Products Liability Area

A cursory reading of judicial opinions tends to confirm the view that judicial rulings are chiefly the product of the logical operation of doctrinal rules objectively and impartially applied by value-free tribunals. It is at least the lay view that the adjudicatory process is founded upon a quasi-scientific methodology which leads to highly technical determinations which escape the wisdom of the common and uninitiated mind. The outcome of cases not only is

mandated by logical deductions, but also is consecrated by the historical evolution of the applicable rules. August magistrates do little more than engage in the mechanistic process of finding the appropriate rule and, with the help of logic, tailor it to the particular facts of the case. Such is the view, admittedly exaggerated, of the judicial decision-making process which was current in France throughout most of the nineteenth century and which can be said to be shared by the twentieth century public in both common law and civil law jurisdictions. Under this perception, the resolution of disputes by the judicial system is a remote and detached process; automated priests of logic simply interpose indisputable and irrevocable insights into the daily life of litigants.

A more informed and studied assessment of judicial decisions reveals that the explicit doctrinal substance of the opinions masks their more subdued political character—that these seemingly objective and impartial determinations are replete with social policy undercurrents. Judges are concerned not only with maintaining the doctrinal purity and historical integrity of legal rules, but also with the social and political impact of their rulings. Despite its undeniable commitment to rigorous logical analysis, the process of judicial decision-making is more akin to art than science. It is intrinsically subjective, relying ultimately upon a process of value judgments.

Judges are appointed and courts are maintained to dispense justice within the setting of the practical circumstances of allegedly wrongful conduct and injury. Rendering justice demands that facts and documentation be assessed in light of a larger and perhaps more theoretical framework. The resolution of an individual case should not only be equitable, but should also serve the goal of maintaining an orderly society. It is not too much of an exaggeration to state that even the most apparently trivial personal injury case involves not only the pitting of interests of one individual against those of another, but also incorporating those competing claims—one for protection and vindication, the other for freedom of action and justification—into a wider social perspective which affects the very *raison d'être* of the human community and civilization. In a word, the rendering of justice through the courts is, first and foremost, a social and political process centering upon compromise, or at least a value judgment as to what is in the best interest of society. The courts play an integral part in deciding what interests society will promote, what choices it will make between competing needs, and what solutions it will adopt to multi-faceted problems.

The task of the courts is tantamount, in some respects, to the artist's quest to capture through his art form the quintessence of the physical and spiritual reality that is outside of and resistant to his artistic perspective. Judges must invent or use existing legal concepts and rules to create solutions to dilemmas posed by antagonistic individual interests. In reaching their determinations and in order to have these determinations accepted by society—to preserve, in effect, their power base and institutional credibility—judges appeal to and articulate their purported accommodation in terms of the "immutable" logic of time-honored rules. In applying these rules and deploying these familiar notions, the courts possess the not inconsiderable discretion of modifying and moulding rules—interpreting them both in relation to the specific factual pattern of the given case and, more particularly, in reference to the policy dimension that is implicit in the dispute.

The process of reaching an accommodation between competing individual and social interests transcends the objectively quantifiable aspect of legal doctrine. Ultimately, judicial determinations reflect an established consensus between members of society and their leaders as to what justice should be on a specific issue in light of the particular circumstances. In the law of torts, this consensus is expressed in terms of a liability question: upon which actor does one impose liability and upon what basis does one justify the imposition of liability for a given conduct?

In the most simple historical terms, the law of torts has undergone significant modifications in regard to the basic justification and rationale given for the imposition of legal liability upon would-be tortfeasors. Although the concept of legal wrong was rarely, if ever, equated in legal doctrine with the notion of moral fault, throughout most of the nineteenth century the courts, for both practical and theoretical reasons, were loath to impose liability without a finding of fault—fault being a concept anchored in the notion of blameworthy conduct. During this period, the plaintiff in a tort action was required to establish that the defendant's conduct had fallen below a reasonable community standard of due care. In accordance with the then reigning ideas of *laissez-faire* individualism, the scope of liability was seen in fairly restrictive terms; liability would be imposed only upon an actor who had engaged in a clearly culpable act. Both English and American decisional law reflected this firm commitment to fault-based liability.

The advent of a highly technological society brought not only the demise of the *laissez-faire* ethic, but also a corresponding change in the legal concepts used to assess the liability issue. The law of torts ceased to be a vehicle for the imposition of sanctions primarily for reprehensible conduct and came to be seen as a body of law designed to compensate accident victims for their injuries—to place the cost of accidents upon those parties who were best able to bear the financial burden. The determination of whether liability should be imposed upon an actor depended upon the courts' perception of social engineering considerations—upon their assessment of the role of the insurance factor in litigation and their willingness to effectuate transfers of wealth among the litigants almost without reference to a fault notion.

This modification of tort analysis, emphasizing the compensatory as opposed to the punitive function of tort law, originated through a reinterpretation of the concepts used to assess legal liability in tort law. The notion of proximate causation or legal cause gave the courts a wider, if not an almost unlimited, discretion to find a solvent defendant who, despite what appeared to be the reasonable quality of his conduct and its remoteness to the occurrence, was in the best position to bear the financial responsibility for an accident. The courts also interpreted the requirements for the application of the doctrine of *res ipsa loquitur* in such a flexible manner as to shift an impossiblle burden of proof from the plaintiff to the defendant, making him liable without proof of actual fault on his part. Finally, the courts articulated the concept of strict liability thereby consecrating the evolution from fault-based liability. The principle of strict liability which at first was applied to inherently dangerous activities was extended gradually to manufactured products.

B. Arguments Against Strict Products Liability[1]

There are a number of arguments which can be invoked against extending the principle of strict liability to products litigation. Although the link between morality and law is a continuing enigma and source of controversy, it can be argued that a no-fault rule con-

1. For the arguments elaborated in this section, the author has relied upon Law Commission for England & Wales, *Liability for Defective Products* (Working Paper No. 64), 7 LAW COMM'N WORKING PAPERS 33-37 (1974) [hereinafter cited as LAW COMM'N No. 64]. The substance of these arguments has been reformulated to concord with the format of the present article. This general acknowledgement eliminates any need to include further references.

stitutes an inadequate moral basis upon which to impose legal liability. Also, the imposition of a strict legal standard might discourage manufacturers from developing new products since no element of foreseeability or actual care would limit the scope of their liability. The cost of insurance, if it is available at all, might be astronomical; society, as a consequence, would either be deprived of industrial innovations or pay a substantial price for new consumer goods. In addition, it can be argued that the evidentiary problems to which a negligence analysis can give rise may not be as great as they initially appear. While the state of technological knowledge is sophisticated, it is available in one form or another to competent legal counsel, and proof of the existence of a defect does raise a strong presumption that the manufacturer failed to exercise reasonable care. Presumably, the application of a strict liability principle in the products liability context would lead to an increase in claims—some of which might be spurious—and, consequently, to higher insurance rates. Under a strict liability regime, manufacturers might not only have less incentive to maintain strict quality controls, but also smaller manufacturers might be threatened with financial disaster.

C. Support for the Strict Liability Rule[2]

The taking into account of social policy considerations in judicial determinations inevitably involves a compromise between competing alternatives. The ultimate choice between these alternatives is justified if it promotes the greater social good in light of the current evolution of society. With this reasoning in mind, it seems the scale of persuasiveness falls in favor of adopting a strict liability rule in products litigation. Such an analytic framework would provide that an injured plaintiff would be compensated by the manufacturer for his injuries resulting from a defect in the manufacturer's product upon proof of the existence of a defect in the product and proof that the defect caused the injury. The plaintiff would not be required to prove that the defect was attributable to the negligence of the manufacturer. The elimination of any reference to a negligence factor and the concomitant imposition upon manufacturers of a duty to guarantee that their products are free of harmful defects is supported by a number of factors.

For example, given the representations manufacturers have

2. *See id.* at 29-33.

made to the public about their products and the profits they stand to derive from the sale of the products, manufacturers have a moral obligation to guarantee that their products contain no dangerous defects. Here, the notion of morally justifiable legal liability and the need to articulate a decisional law which provides for viable social policy judgments seem to merge. No matter how careful the manufacturing process, defects are inevitable in the context of mass production. Although both the manufacturer and the consumer derive benefits from this type of market, it seems that the manufacturer is in the better position to assume the risk of the inevitable defect and to account for it in their prices as they would any other business cost. Manufacturers are better able and have a greater incentive to insure themselves against such a risk than the individual consumer-victim. Moreover, it seems that this type of liability should be directed at the manufacturer rather than the retailer since the former bears primary, if not total, responsibility for the quality of the products that are sold to the public. Financial considerations and economy of litigation also militate in favor of this position.

Finally, it seems unjust and excessive to require that a plaintiff injured as a result of a defect in a product prove not only that a defect exists and bears a causal relation to his injury, but also that the defect arose as a result of negligence on the part of the manufacturer. Such a burden of proof not only can be regarded as fundamentally unfair, tipping the balance of justice in favor of manufacturers, but also it may be a difficult, if not an impossible, burden for the plaintiff to effectively discharge. The plaintiff is a stranger, in most cases, to the manufacturing process and would have to locate the source of unreasonable conduct in perhaps a complex enterprise. Simply reversing the burden of proof may not be sufficient; it might make liability determinations too dependent upon arbitrary and inconsistent interpretations of what constitutes reasonable manufacturing conduct. In some cases, general and somewhat perfunctory proof of reasonable care might be sufficient, while in other cases the courts might impose a more stringent and perhaps unbending concept of the legal duty that must be satisfied. Moreover, under the latter theory, the standard becomes one of strict liability in all but name.

A fairly plausible deterrent argument exists which lends some support to the application of a strict liability rule in products litigation. It is conceivable that the imposition of a strict legal duty would lead to a higher standard of quality control in manufacturing

processes, eliminating at least token measures and perhaps some errors that appear to be inevitable. Control standards are likely to be increased and maintained because the price for not doing so, when a strict liability rule applies, is clear and unavoidable. In some instances, the manufacturer may find it more cost efficient to permit defects rather than improve the quality of his plant or operation. The consequences of such a business judgment should be borne by the manufacturer and not the consumer.

II. THE AMERICAN EXAMPLE[3]

During the nineteenth century, American courts, following the English example, applied the privity-of-contract rule: injured plaintiffs could not bring an action against a manufacturer for the injuries they suffered as a result of a defect in a product unless they had been in a contractual relationship with the defendant.[4] The reverence paid by the courts to the celebrated maxim "no privity, no liability" abated once the courts began to perceive that the need to protect developing industries from consumer claims no longer was so important. In the early twentieth century, courts began to voice an apparent general consensus that gave priority to the claims of injured consumers against the large, profit-making, and sometimes ruthless manufacturer.[5]

When the public, for example, became aware of the fact that food manufacturers often adulterated their products and sometimes made them patently unsafe, courts created an exception to the privity rule in litigation dealing with food products.[6] This exception soon became the rule for all products litigation. The basis for a cause of action and a theory of liability was found, not in contract, but in tort doctrine.[7] In the famous case, *MacPherson v. Buick Motor Co.*,[8] Justice Cardozo stated that, while only exceptions could be made to the requirement of privity under contract law, these exceptions were the rule in tort: tort law provides that all persons, including manufacturers of products, owe a duty of reasonable care to

3. For a discussion of products liability in the United States, see generally D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY (2d ed. 1981).

4. *See id.* at 94-98.

5. *Id.*

6. *Id.* at 97-98.

7. *Id.*

8. 217 N.Y. 382, 111 N.E. 1050 (1916).

others.[9] According to Cardozo's reasoning in *MacPherson*, the existence of a defect in a product constituted a breach of the duty not to subject others to an unreasonable risk of harm: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[10] Under the *MacPherson* rule, parties injured as a result of a defect in a product but who lacked a relationship of privity with the manufacturer could sue the manufacturer in tort under a negligence theory. The manufacturer, however, still could exculpate himself by establishing that he had not been negligent in the manufacture of the product.

Despite the advances achieved by the *MacPherson* opinion, the use of a negligence-based doctrine soon was called into question. Some courts began to voice the belief that products cases should be decided upon the basis of a strict liability rule. Justice Traynor's seminal concurring opinion in *Escola v. Coca-Cola Bottling Co.*[11] is illustrative. There, the plaintiff, a waitress, brought an action against the defendant for injuries arising from the explosion of a Coca-Cola bottle in her hand. In the trial court proceeding, the plaintiff invoked and successfully argued a *res ipsa loquitur* theory.[12] Although the California Supreme Court upheld the lower court decision,[13] Justice Traynor, in his concurring opinion, argued that the result, although justified, should have been reached upon the basis of another legal theory which eliminated any reference to a negligence standard:

> I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. 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 it is to be used without inspection, proves to have a defect that causes injury to human beings. . . .
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> 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.[14]

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9. *Id.* at 388, 111 N.E. at 1052.
10. *Id.* at 389, 111 N.E. at 1053.
11. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).
12. *Id.* at 461, 150 P.2d at 440.
13. *Id.*
14. *Id.* at 461-62, 150 P.2d at 440 (citations omitted). *See also* Traynor, *The Ways and*

The application of the traditional negligence analysis in this context was also challenged, this time by an entire court, in the landmark case of *Henningsen v. Bloomfield Motors, Inc.*[15] There, a car accident allegedly occurred as a result of a defective steering wheel. Inferring from the record that the statement of the facts was true, the Supreme Court of New Jersey declared that a new car carried with it an implied warranty by the manufacturer that it was reasonably suitable for use.[16] Presumably, such a warranty arose from the representations that the manufacturer made to the public. The implied warranty did not have a contractual nature, but arose as a result of the manufacturer's placing the car on the market. It extended, in the court's view, not only to the buyer of the car and his family, but also to other people who were in the car with the owner's consent. A defect in the car constituted a breach of the implied warranty.[17]

The implied warranty rule established by the *Henningsen* court arose as the result of the application of tort law principles and not the rules of contract law. By making representations to the public as to the quality of the product and placing the product on the market, the manufacturer was under a duty not to deceive the public or expose it to an unreasonable risk of harm. When an injured plaintiff established a causal link between the defect and his injury, the court ruled that the warranty had been breached.[18] In articulating its reasoning, the *Henningsen* court never referred to a negligence standard or a *res ipsa loquitur* presumption of negligence. Proof of a mechanical failure in a new car and of a causal relationship was sufficient to establish a breach of warranty, and liability. In effect, the implied warranty in tort imposed a strict legal duty upon the manufacturer to provide the public with products that were free of defects.[19]

These refinements, challenges, and additions to the *MacPherson* rule culminated in the celebrated opinion in *Greenman v. Yuba*

Means of Defective Products and Strict Liability, 32 TENN. L. REV. 363 (1965). The classic essay on this subject is Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). The companion piece to this essay is Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

15. 32 N.J. 358, 161 A.2d 69 (1960).

16. *Id.* at 368, 161 A.2d at 76.

17. *Id.*

18. *Id.* at 372, 161 A.2d at 79-80.

19. *Id.* at 369, 161 A.2d at 77. *See generally supra*, note 3 and authorities cited therein.

Power Products.[20] There, the plaintiff was injured when a piece of wood flew out of a power tool he was using. In his action against the manufacturer, the plaintiff alleged that the accident occurred as a result of the defective design and construction of the tool.[21] The proceedings below resulted in a judgment for the plaintiff. On appeal, Justice Traynor, writing for the majority, held that the jury verdict for the plaintiff could be upheld upon the basis both of breach of warranty theory and negligence—the two theories invoked by the plaintiff in his original claim.[22] More significantly, however, Justice Traynor added that the same verdict could be upheld upon the basis of a strict liability rule in tort:

> Although in these cases [involving food and other products] 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 agreement but imposed 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 contract warranties but by the law of strict liability in tort.[23]

The *Greenman* reasoning was incorporated into section 402A of the *Restatement (Second) of Torts*.[24] Section 402A holds manufacturers liable for products "in a defective condition unreasonably dangerous to the user or consumer" even when those manufacturers have "exercised all possible care in the preparation and sale of . . . [their] product[s]."[25] The American theory of products liability also includes the notion of enterprise liability under which all parties involved in the marketing process can be held liable to any consumer, user, or bystander injured by the defective product. The courts justify enterprise liability by reasoning that injured plaintiffs should have the best possible and most convenient remedy at their disposal against the party in the best position to provide them with compensation.[26]

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20. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

21. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

22. *Id.* at 62-63, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01.

23. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

24. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT]. *See* NOEL & PHILLIPS, *supra* note 3, at 34-37.

25. RESTATEMENT, *supra* note 24, at § 402A(1), (2)(a).

26. *See* Gibson, *Products Liability in the United States and England: The Differences and Why*, 3 ANGLO-AM. L. REV. 493, 497-98 (1978).

Despite these advances, problems remain and the very notion of strict liability for products appears to be contested by some United States' courts. Although improved in theory, the position of the "powerless consumer"[27] still may be quite precarious. For instance, the 402A standard of strict products liability contains the curious phrase "unreasonably dangerous."[28] Under a literal reading of the section, it is not sufficient that the plaintiff establish defectiveness plus causation; in addition, he must establish that the defectiveness was "unreasonably dangerous." Despite the disclaimer that "all possible care" will not exculpate the manufacturer of a product, a commingling of negligence and strict liability notions appears to take place in the language of section 402A. Some have argued that the "unreasonably dangerous" clause would prevent the courts from imposing liability upon sugar manufacturers for the injury that their product caused to a diabetic.[29] Such reasoning sheds no light upon the function of the clause in articulating a strict liability rule; it is specious, in fact, since the sugar could not be considered defective in the first place. In such a case, the injury arises not from the faulty condition of the product, but rather from the diabetic's physical condition and her own carelessness.

The "unreasonably dangerous" clause in section 402A has created confusion and contributed inconsistency and unpredictability in judicial opinions.[30] As previously mentioned, one wonders whether there are two or three elements to establishing an action in strict products liability: defectiveness plus causation, or defectiveness which is unreasonably dangerous plus causation. In light of this fundamental ambiguity, one also could ask whether the purpose of the law is to create a special type of liability rule for products which is neither negligence nor strict liability—a *sui generis* rule. Does the *Restatement* propose a standard of liability which occupies an intermediary position between negligence and strict liability, requiring proof of fault be found in the creation of an undue risk of harm through mass production of consumer goods in society? Such a formulation, however, appears estranged from the *Greenman* gravamen and from the 402A disclaimer that due care will not suffice as

27. *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1973).

28. RESTATEMENT, *supra* note 24, at § 402A comment *i*.

29. *See* NOEL & PHILLIPS, *supra* note 3, at 415. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

30. *See* NOEL & PHILLIPS, *supra* note 3, at 407-12.

an effective defense. Public policy considerations underlying the strict rule would require the imposition of liability every time a consumer or user of a product is harmed by a defect in a product, no matter how careful and prudent a manufacturer may have been. Such a determination is a question of social policy engineering and economic considerations, and should not be confused with moral blameworthiness which is associated with findings of legal fault. The "unreasonably dangerous" clause disrupts the unbending direction and logic of the strict liability rule.

Arguably then, the decisional law and the *Restatement* have established a new liability formula, one which disregards considerations of negligence and adopts a no-fault base. A survey of products liability litigation, however, clearly indicates that some courts have looked upon this no-fault formula with some circumspection and have manipulated it so as to reintegrate, albeit implicitly, a fault component into the determination.[31] Under the applicable doctrine, proof of defectiveness occupies the center of attention; by making this a difficult task, the courts have effectively reintroduced a reasonable conduct standard into the no-fault standard. This is especially true with regard to design defects.[32] For some courts, the transfer of wealth between litigants cannot take place without there being an unreasonable deviation from a socially accepted norm, even under a strict liability rationale. Only that which is unreasonable will amount to actionable defectiveness under this reasoning.

Other attempts have been made to place limitations upon the plaintiff-consumer's ability to recover under a strict products liability rule. The most celebrated attempt involved the measure of damages and is illustrated by the *Seely-Santor* debate.[33] In essence, the question centers upon whether an action in strict tort liability should enable the plaintiff to recover for economic loss as well as personal injury damages. Such a fusion of remedies would discount almost totally any distinction between a cause of action in tort and one based upon contractual remedies following the Uniform Commercial Code's implied and express warranty theories (the latter theory usually requiring some form of privity in order for the warranties to apply). Although the allowance of economic loss under a tort action

31. *See* NOEL & PHILLIPS, *supra* note 3, at 475-83.

32. *Id.* at 358-61.

33. Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *See also* NOEL & PHILLIPS, *supra* note 3, at 293-308.

would substantially eliminate the doctrinal technicalities which could hamper an injured consumer, the courts are divided as to whether such an infringement on the integrity of legal concepts is warranted even in the name of the "powerless consumer."

While problems still attend the evolution of American products liability law, significant steps have been taken to enhance the position of consumers and to place the financial burden for accidents resulting from the use of products upon manufacturers. The notion of market-share liability, which emerged in the recent California case of *Sindell v. Abbott Laboratories*,[34] illustrates not only that products liability doctrine remains a frontier area of legal innovation, but also that the public policy mandate of consumer protection still governs, to some extent, in products litigation. Indeed, the central inquiry in American jurisprudence centers upon whether attempts at imposing restraints will gain the upper hand over the full implications of a strict products liability rule.

III. The English Experience

The English law of products liability certainly has not progressed with the same momentum and force as its American counterpart. Although the privity barrier has been overcome, strict liability does not apply in English products liability litigation—at least not expressly. To reach liability determinations, English courts invoke a negligence analysis and hold manufacturers to a standard of reasonable conduct. It has been suggested that the difference in doctrinal approach between these two common law jurisdictions can be accounted for by the fact that English and American judges have markedly differing attitudes toward judicial decision-making.[35] Unlike their American counterparts, English judges are more reluctant to assert a policy-making role, which the application of a strict liability rule in the products context unequivocally would lead to if it were announced by a court.[36]

It has been suggested that the reserved posture of the English courts can be attributed to several factors. First, the absence of a written and generally worded constitution has precluded the development of a strong tradition of judicial decision-making present in the American model. Second and relatedly, in some areas of litiga-

34. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).
35. *See* Gibson, *supra* note 26, at 516-22.
36. *See id.*

tion, English courts appear to prefer a loosely-defined body of legal doctrine, regarding it sufficient to provide protection to the parties involved, i.e., the individual consumer need not be granted any special legal remedy against the manufacturer. Third, by their intellectual training, English judges tend to view the law and its evolution through the prism of analytical philosophy. The tenets of sociological jurisprudence and legal pragmatism, a strong tradition in the United States, has only had a limited impact in England by comparison. Finally, the greater diversity of jurisdictions gives United States courts more independence and flexibility, thereby promoting innovation in the articulation of legal doctrine.[37]

Despite its reticence, it seems that the English judiciary will not be able to avoid the influence of a more creative vision of judicial decision-making. Tort litigation is a propitious area in which to deploy this intrinsic capacity of the courts to accommodate legal doctrine with the changing character of society. There the courts constantly are called upon to devise solutions to emerging social problems and to achieve a compromise between competing social interests.

A. Background to Possible Reform

From 1973 to 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury (known as the Pearson Commission) undertook a comprehensive examination of the law governing personal injury claims.[38] Its term of reference directed it in relevant part

> [t]o consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person . . . through the manufacture, supply or use of goods or services . . . having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise.[39]

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37. *See id.*

38. *See* ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, CMD. 7054I (1978) [hereinafter cited as ROYAL COMMISSION]; LAW COMM'N No. 64, *supra* note 1, at 1. *See also* Mountstephen, *Compensation for Personal Injury: The Royal Commission's Report*, 122 SOLIC. J. 241 (1978). *See generally* Marsh, *Products Liability in the Light of the Recommendations of the Law Commission and the Pearson Commission*, 3 J. PROD. LIAB. 173 (1979).

39. *See* LAW COMM'N No. 64, *supra* note 1, at 2.

In the products liability area, the creation of the Commission was designed to respond, at least implicitly, to a number of domestic and international developments.[40] First, there was an increasing concern, both domestically and internationally, about consumer

40. In Chapter 22 of its report, the Commission stated:

1195 Products liability must be considered in the context of public concern to protect the interests of the consumer. The recent growth of pressure groups and other organisations representing those interests is a world wide phenomenon. Much of this activity is concerned with the need to minimise the risk of death or personal injury caused by defective products.

1196 Recent years have seen a parallel growth of interest in products liability itself. Again this is international; and indeed the subject has international dimensions. The manufacture of components, the assembly of the finished product, the purchase of the product and the injury itself—these could all take place in different countries with different legal provisions. The Standing Conference on Private International Law at the Hague produced in 1973 a Convention designed to establish greater uniformity in deciding which country's laws should be applicable in such circumstances. As to what those laws should be, international deliberations have included discussions by the United Nations Commission on International Trade Law, and a spate of conferences.

1197 Two international documents bear directly on our remit. The first is the Council of Europe's 'Convention on Products Liability in regard to Personal Injury and Death', known as the 'Strasbourg Convention'. This Convention was opened for signature by member states in January 1977. It has been signed by Austria, Belgium, France and Luxembourg. . . . The second of these documents is a draft EEC Directive, on which we understand that the Economic and Social Committee and the European Assembly are expected to report shortly to the EEC Commission. . . .

1198 The Strasbourg Convention is confined to personal injury and death. The draft EEC Directive covers damage to personal property. Both envisage the imposition of strict liability on the producer. Either accession to the one or the issue of the other would mean substantial changes in the negligence based system of tort liability which applies to producers in the United Kingdom at present. We are not alone in this respect. For example, neither the Netherlands nor the Federal Republic of Germany have a regime of strict liability in tort for products.

The Law Commissions' Report

1199 In November 1971, the Lord Chancellor asked the Law Commission, and the Lord Advocate asked the Scottish Law Commission, 'to consider whether the existing law governing compensation for personal injury, damage to property or any other loss caused by defective products is adequate, and to recommend what improvements, if any, in the law are needed to ensure that additional remedies are provided and against whom such remedies should be available'. Our own subsequent terms of reference with respect to products liability overlapped with theirs. There were nevertheless important differences. The Law Commissions were asked to consider 'damage to property or any other loss', as well as personal injury, whereas our own terms of reference excluded property damage. On the other hand, the Law Commissions saw themselves as limited to considering change within the framework of tort and contract law, whereas we were not thus confined.

1200 We have benefited from these concurrent deliberations in three respects. First, our own consideration of the issues was assisted by the publication in 1975 of the Law Commissions' joint working paper (Law Commission Working Paper No. 64; Scottish Law Commission Memorandum No. 20). Secondly, the Commissions were good enough to send us copies of the comments they received on that working paper, provided that the contributor concerned had no objection. Thirdly, we have been able to take account of the Commissions' final report . . . in the course of drafting our own. We have thought it right to explain our own views

protection and safety. One of the objectives of the Commission was to reconsider legal liability theories so as to minimize the risk of death and personal injury resulting from defective products.[41] Second, the recommendations of the Commission corresponded to the goal of unifying and harmonizing European law in major substantive areas.[42] While the Strasbourg Convention[43] to some extent and the recent EEC Draft Directive[44] advocate the adoption of strict liability in the products area, English products liability theory is still based upon the concept of negligence. The Commission recommendations would align English law with proposals contained in the EEC Draft Directive.[45]

The Royal Commission's recommendations on products liability have yet to be adopted and have generated some controversy.[46] While a number of EEC jurisdictions have adopted or are moving toward adopting a strict liability rule in the products liability area,[47]

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and emphasise those considerations which carried the greatest weight with us; but the working paper and the report have made our job easier.

ROYAL COMMISSION, *supra* note 38, at §§ 1195-1200.

41. *See id.* at § 1196.

42. *See id.* at §§ 1197-1198. On these last two points, see also H. TEBBENS, INTERNATIONAL PRODUCTS LIABILITY 2-14, 142-60 (1979); Orban, *Products Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 342-43 (1978).

43. European Convention on Products Liability in Regard to Personal Injury and Death, Jan. 27, 1977, 1977 Europ. T.S. No. 91, *reprinted in* 16 I.L.M. 7 (1977). For a discussion of the substance of the convention, see Hanotiau, *The Council of Europe Convention on Products Liability*, 8 GA. J. INT'L & COMP. L. 325 (1978).

44. Proposal for a Council Directive relating to the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, 19 OFFICIAL J. EUR. COMMUNITY 9 (1976).

45. *See* LAW COMM'N No. 64, *supra* note 1, at 23-44. *See also* Mountstephen, *supra* note 38, at 241-42.

46. *See* HOUSE OF LORDS SELECT COMM. ON EUROPEAN COMMUNITIES, LIABILITY FOR DEFECTIVE PRODUCTS, 50th Report, §§ 56-57, at XIX-XX (1980). The Lords expressed skepticism about the idea of adopting a uniform European strict liability standard in the products area:

> The Committee points out that, while the Directive is in course of negotiation, it will be impossible for any Member State to ratify the Convention, since during that time it cannot be known whether the two documents will be compatible; that negotiations will take several years; and that consequently the result of the proposal for a Director must be to cause a long delay in the introduction of a régime of strict liability for products.

Id.

The Committee concludes its report in this vein: "The Committee considers that the amended draft Directive raises important matters of policy and principle and they recommend this Report to the House for Debate." *Id.*

47. *See, e.g.*, Orban, *supra* note 42, at 342-44, 346-58. *See generally* ASSOCIATION EUROPÉENE: ÉTUDES JURIDIQUES ET FISCALES, PRODUCT LIABILITY IN EUROPE (1975)

English courts have relied upon a more traditional tort formula in making liability determinations in this type of litigation. Although contemporary judicial opinions raise some questions as to what the traditional doctrine means in actual litigation, the landmark decision in this area, rendered to lessen the inequities arising from the application of the privity rule in contracts law, has sanctioned the use of a negligence formula to make liability determinations. The landmark decision and its progeny, however, have given rise to some acute doctrinal problems: What constitutes reasonable conduct? Who should bear the burden of proof? How stringent an evidentiary burden should be imposed?

B. Contractual Remedies

Under English law,[48] a party who is injured as a result of a defect in a product has a number of remedial options in seeking compensation for his injury.[49] The injured party may invoke a contractual theory of liability and bring an action against the other party for breach of contract.[50] In English law, the contractual remedies available under the common law in the products liability context have been supplemented and defined precisely by statute. The Sale of Goods Act of 1979 provides that a sales contract contains an implied term of merchantable quality regarding the product sold.[51]

[hereinafter cited as PRODUCT LIABILITY IN EUROPE]; G. PETITPIERRE, LA RESPONSABILITÉ DU FAIT DES PRODUITS (1974); Davis, *Products Liability in South African Law*, 12 COMP. & INT'L L.J. S. AFR. 206 (1979). For a discussion of products liability in a national, European, and transnational context, see generally Tebbens, *Western European Private International Law and the Hague Convention Relating to Product Liability* in 2 HAGUE-ZAGREB ESSAYS 3 (1978); PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE (P. Rheingold & S. Birnbaum 2d ed. 1975). *See also* THE RESEARCH GROUP, FIRST WORLD CONGRESS ON PRODUCT LIABILITY (1977) [hereinafter cited as FIRST CONGRESS].

48. For a comprehensive discussion of English tort law, including product liability, see CLERK & LINDSELL ON TORTS (A. Armitage & R. Dias 14th ed. 1975); CHARLESWORTH ON TORTS (R. Percy 6th ed. 1977); T. WEIR, A CASEBOOK ON TORT (4th ed. 1979). *See also* R. DIAS & B. MARKESINIS, THE ENGLISH LAW OF TORTS: A COMPARATIVE INTRODUCTION (1976); M. MILLNER, NEGLIGENCE IN MODERN LAW (1967).

49. For this description of the English law, the author has relied upon a number of sources and summarized the data contained in these studies for purposes of the present article. *See* LAW COMM'N No. 64, *supra* note 1, at 16-22; TEBBENS, *supra* note 42, at 45-57; Paine, *England*, in PRODUCT LIABILITY IN EUROPE, *supra* note 47, at 101-15. *See also* Tobin, *Products Liability: A United States Commonwealth Comparative Survey*, 3 N.Z.U.L. REV. 377 (1969).

50. *See* TEBBENS, *supra* note 42, at 45-47.

51. *See generally* Conway, *The Supply of Goods (Implied Terms) Act 1973: How Far Consumer Protection?*, NEW. L.J. 589 (1974); Vitoria, *Statutes Unfair Contract Terms Act 1977*, 41 MOD. L. REV. 312 (1978); Jolowicz, *The Protection of the Consumer and Purchaser*

Under the theory of implied contractual terms, when the buyer uses a product in the way it was intended to be used and is injured because of a defect in the product, the product is clearly unfit for its usual purpose. The seller has breached the implied term of merchantable quality and is liable for damages. The buyer need not establish that the seller was somehow careless or otherwise negligent in selling the product; he need only prove that a defect existed and caused his injury.[52] Reasoning by analogy to tort concepts, the effect of this contractual doctrine and the implied terms made mandatory by statute is to impose a form of strict liability upon the seller. The injured buyer is not required to prove wrongful conduct on the part of the seller leading to the breach, but rather he need only prove: 1) that the product had a defect when it was sold; 2) that the product was used properly for its intended use; and 3) that the defect was the cause of his injury.[53]

At first blush, these contractual remedies appear to offer injured consumers a satisfactory legal theory and mechanism by which to resolve their grievances. In actual practice, however, this remedial framework suffers rather severe limitations. Under the privity requirement, such contractual remedies can be invoked only by a contracting party.[54] Consequently, an action based upon the implied term of merchantable quality is available only against the seller, i.e., the buyer can sue the retailer of the product and not the manufacturer. Moreover, the action can be brought only by the buyer.[55] There is substantial reluctance in England to modify the privity requirement because of the fundamental rule of English contract law that consideration must flow from the promisee.[56] While there is some recognition in England that the legal remedies available to parties injured as a result of defective products should be modified, it is thought that the modernization of English law in this area should not be affected by changing a fundamental rule of contract law. The proposals advocating change have been directed toward

of Goods Under English Law, 32 MOD. L. REV. 1 (1969); Waddams, *The Strict Liability of Suppliers of Goods*, 37 MOD. L. REV. 154 (1974); Wittenbort, *Products Liability and the English Implied Terms Bill: Transatlantic Variations on a Theme*, 49 NOTRE DAME LAW. 185 (1973); Yates, *The Supply of Goods Implied Terms Act 1973*, 17 J. BUS. L. 135 (1973).

52. *See generally supra* notes 50-51 and authorities cited therein.

53. *See id.*

54. *See generally* TEBBENS, *supra* note 42, at 45-47 and authorities cited therein.

55. *See id.*

56. *See id.*

the law of torts.[57]

C. Tort Theories of Liability

The tort doctrine relating to the English law of products liability is entirely a judicial creation. Its development, divided essentially into two phases, can be traced through a relatively small corpus of landmark case law illustrating the persistent reluctance of English courts to deploy a strict liability concept in the products context.

In a number of early cases, courts interpreted the privity-of-contract rule as a limitation upon the injured plaintiff's right to invoke remedies based upon theories in tort. *Winterbottom v. Wright*,[58] decided in 1842, is the classic decision in this area and is followed by an impressive progeny.[59] In *Winterbottom*, the plaintiff, a coachman, was severely injured when the axle of the coach he was driving broke. He brought an action against the maker of the coach, alleging both a failure to perform and negligent conduct on the part of the defendant. The defendant had contracted with a third party to keep the coach in a proper state of repair.[60] The court, apparently sensitive to the need to place limitations upon the liability of manufacturers in the context of developing industries, held for the defendant, reasoning that the maker of the coach owed no duty to the plaintiff. Lord Abinger characterized the concerns and reasoning of the court:

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[61]

In *Winterbottom*, the court declared that the manufacturer of a defective product owed a legal duty only to parties who were in con-

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57. *See id.*

58. 152 Eng. Rep. 402 (Ex. D. 1892).

59. *See, e.g.*, Longmeid v. Holliday, 6 Ex. 761, 155 Eng. Rep. 752 (1851); George v. Skivington, 5 L.R.-Ex. 1 (1869); Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883); Earl v. Lubbock, [1905] 1 K.B. 253; Blacker v. Lake & Elliot Ltd., 106 L.T.R. (n.s.) 533 (K.B. 1912); Bates v. Batey & Co., [1913] 3 K.B. 351.

60. 152 Eng. Rep. at 405.

61. *Id.*

tractual privity with him. The decision stood as authority for the celebrated maxim "no privity, no liability." In addition, and perhaps more importantly, the *Winterbottom* decision prevented the recovery in tort for non-buyers of the product unless the plaintiff could establish fraud on the part of the defendant. Otherwise, tort theories of liability could be invoked only in cases involving inherently dangerous goods, a restrictive class of products.[62]

D. The Donoghue *Rule*

The doctrine articulated in *Winterbottom* and applied by its progeny throughout the latter part of the nineteenth and early twentieth centuries[63] was eventually overruled in subsequent litigation. More contemporary courts articulated the social policy views of the day, views which had become more sensitive to the plight of injured consumers.

Despite the doctrinal advance made in the landmark decision of *Donoghue v. Stevenson*,[64] English courts still resisted the concept of strict liability to resolve products disputes. In *Donoghue*, a Scottish case decided in 1932, the plaintiff went to a café with a friend who purchased a bottle of ginger-beer for her. After drinking some of the beer, the plaintiff discovered a snail in the bottle. She did not discover the snail before drinking the beer because of the opacity of the glass bottle. As a result of drinking the beer, the plaintiff became ill. Mrs. Donoghue filed an action for damages against Mr. Stevenson, the manufacturer of the beer, claiming that the defendant was negligent in placing his product on the market.[65]

The circumstances of the case obliged the court to address the same issue that had been brought before the *Winterbottom* court, namely, whether the defendant-manufacturer owed any duty of care to the ultimate consumer with whom he had no contractual relationship. The *Donoghue* case went before the House of Lords on appeal. A majority determined that the plaintiff's theory for relief was legally sound, provided she could prove the facts alleged.[66] The holding established what became known as the "manufacturer prin-

62. *See* TEBBENS, *supra* note 42, at 50.

63. *See* CLERK & LINDSELL, *supra* note 48, at § 510.

64. 1932 A.C. 562. *See also* Heuston, Donoghue v. Stevenson *in Retrospect*, 20 MOD. L. REV. 1 (1957).

65. 1932 A.C. at 563.

66. *Id.* at 605, 622-23.

ciple,"[67] namely, that manufacturers owe a duty of due care in the manufacture of their products to the ultimate consumers of their products.[68] According to the language of the court,

> [t]he manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under [a] legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.[69]

Lord Atkin's speech in *Donoghue* made clear that the privity rule in contract would not defeat a party's claim in tort.

The legal duty imposed was defined according to a negligence and reasonable care formulation, and was owed to all foreseeable plaintiffs:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[70]

In a word, the *Donoghue* decision unequivocally established that an injured consumer had the right to bring a tort action against the manufacturer of a defective product.[71] Despite the fact that the manufacturer owed a contractual duty only to the wholesaler or retailer of the product, the scope of his duty in tort was not circumscribed by the privity rule in contract. The *Donoghue* court made clear that the duty of reasonable care in tort was independent of contractual obligations owed to consumers. While this doctrine represented a considerable advance over previous English jurisprudence in the products area, the court did not espouse a strict liability rule. Instead, the court provided only that manufacturers could be held liable for the negligent manufacture of their products when the

67. CLERK & LINDSELL, *supra* note 48, at § 882.
68. *Id.* at § 511.
69. 1932 A.C. at 578-79 (text of speech by Lord Atkin).
70. *Id.* at 580.
71. *See generally* TEBBENS, *supra* note 42, at 51.

products were defective and caused injury as a result of this negligence.

E. The Donoghue *Negligence Analysis*

To establish a cause of action in tort under the *Donoghue* analysis, the injured plaintiff-consumer had to satisfy a number of requirements.[72] First, the alleged defect in the product must have been a defect capable of causing injury to the plaintiff's physical well-being or property. Second, the defect must have existed at the time the product left the manufacturer's possession. Third, the defect must not have been the type of defect which the manufacturer reasonably could expect either the consumer or another third party to notice and correct before it could do any harm. Fourth, and perhaps most importantly, the plaintiff was required to establish that the existence of the defect was attributable to the manufacturer's lack of reasonable care.[73]

The fourth requirement of *Donoghue* places all English products liability litigation squarely within a traditional negligence standard, imposing the usual burden upon the plaintiff to prove a deviation by the defendant from the ordinary standard of care. In this context, the evidentiary burden is more onerous upon plaintiffs given the highly technical determinations that they may need to make and the fact that the manufacturing process is under the control of, and more familiar to, the defendant. It seems that the defendant-manufacturer would be in a better position to assume the burden of proof in these circumstances.

F. The Daniels *Interpretation*

The outcome in the well-known case of *Daniels and Daniels v. R. White & Sons Ltd., and Tarbard*[74] illustrates the inequities to which the application of an ordinary negligence analysis can give rise in the special circumstances of products litigation. In *Daniels*, the plaintiff purchased a bottle of lemonade from a retailer. Both he and his wife drank from it and became ill. The product contained carbolic acid, a poisonous disinfectant. The husband's breach of

72. *See, e.g.*, Paine, *supra* note 49, at 101.

73. *See id.*

74. [1938] 4 All E.R. 258 (K.B.). For a discussion of this case, see Diamond, *European Product Liability Developments: European Product Liability Developments Other than the EEC (Product Liability—An English View)*, in FIRST CONGRESS, *supra* note 47, at 229, 233. *See also* CLERK & LINDSELL, *supra* note 48, at § 511.

contract action against the retailer was successful. The wife, however, could not bring an action based upon contract theory; she had not been a contracting party and therefore lacked privity. Accordingly, she invoked a theory of tort liability, claiming that the presence of the carbolic acid in the lemonade bottle was due to the negligence of the defendant-manufacturer.[75]

At trial, the wife established a sufficient causal link between the product and her injuries to cause a shifting of the burden of proof. The court required the manufacturer to prove that the injury did not occur as a result of his negligence. Using expert testimony, however, the manufacturer established that he had recently installed what was described as a fool-proof system for cleaning, washing, and filling bottles in his plant.[76] Upon the basis of this evidence, the court dismissed the negligence action against the manufacturer. The court reasoned that while the defendant-manufacturer had a legal duty to be careful in the manufacture of his product, he was not required to be infallible:

> [i]t seems to me a little difficult to say that, if people supply a fool-proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity. . . . [T]he plaintiffs . . . have entirely failed to prove to my satisfaction that the defendant company were guilty of a breach of their duty towards the plaintiffs. . . .[77]

G. An Assessment of Donoghue *and* Daniels

The *Donoghue* and *Daniels* decisions are representative of the current status of English law. *Donoghue* unquestionably reflects a progression over previous doctrine: it provides injured consumers with a remedy in tort against the manufacturer of an allegedly defective product despite the lack of privity. Taken together, however, these decisions also make clear that English courts have refused to incorporate a strict liability rule into their products jurisprudence, maintaining what appears to be a rather conservative and traditional doctrinal posture.

In most industrialized countries today, it seems that tort liability determinations are no longer centered upon questions of blameworthiness and fault, but instead upon the more neutral question of

75. [1938] 4 All E.R. at 259.
76. *Id.* at 261-62.
77. *Id.* at 262-63.

which party is in the best position to assume the cost of risk and distribute these costs to the public. Tort law has ceased to have a primarily punitive function and instead has become a mechanism for compensating accident victims. Considering these developments, one wonders whether *Donoghue* should still be controlling in England; whether the English courts' attachment to fault-based liability determinations is not atavistic.

H. The Impact of Presumptions of Negligence

Such considerations have not persuaded English courts to adopt a strict liability rule as part of their jurisprudence in the products area. Some English courts and commentators maintain that the incorporation of the strict liability rule would not only unduly minimize the role of fault in tort liability determinations, but would also be unnecessary since the negligence formula articulated in *Donoghue* has the practical effect of a strict liability rule. Accordingly, the special characteristics of products litigation transform the implications and impact of a traditional negligence analysis. The plaintiff's burden of proof, for example, is considerably more limited than it appears initially; the application of a negligence formula leads, it seems, to the imposition of a strict legal duty in the special context of these cases. Proof of the existence of a defect, it is argued, creates an almost automatic presumption of negligence on the manufacturers' part which they must rebut in order to avoid liability.[78] *Donoghue* did not declare a strict liability rule. It did, however, take an intermediary position between negligence and strict liability in products cases, akin to the classical *res ipsa loquitur* doctrine[79] or the liability theory articulated in article 1384(1) of the French *Code Civil*.[80]

Part of the *Daniels* case illustrates this argument. There, the fact that the plaintiff established the existence of a defect and resulting injury was sufficient to shift the burden to the defendant-manufacturer to prove that he was not negligent in the manufacture of the product. In other words, although the doctrine applying to products cases is stated in terms of negligence, in actual practice, it seems that

78. For a discussion of this point, see Diamond, *supra* note 74, at 231; Paine, *supra* note 49, at 106. *See also* MILLNER, *supra* note 48, at 89-93.

79. *See, e.g.*, Diamond, *supra* note 74, at 231.

80. For a thorough discussion of this form of liability by a distinguished torts scholar, see generally Stone, *Liability for Damages Caused by Things*, in XI INT'L ENCY. COMP. L., at ch. 5 (1973).

the applicable theory is a flexible *res ipsa loquitur* doctrine. Once the plaintiff establishes a defect and resulting injury, the defendants must rebut the presumption that they were negligent in manufacturing the product. Moreover, it appears that the plaintiff has all the advantages of a *res ipsa loquitur* formulation without being saddled with any of its inconveniences, i.e., he need not satisfy the formal requirements for the application of the doctrine.[81] It seems, however, that other *Donoghue* elements for establishing a cause of action in tort against a manufacturer closely parallel the formal requirements for invoking the doctrine of *res ipsa loquitur*.

The other part of *Daniels* stands for an entirely different proposition. It illustrates the problems associated with the use of a negligence analysis in a products liability context. The defendant in *Daniels* established through expert testimony that he had a foolproof system which would preclude the type of defect of which the plaintiff complained. According to the defendant, he could not explain how the carbolic acid had been introduced into the lemonade bottle; his processing techniques could not allow for such an occurrence. Upon the basis of this evidence, the court held for the defendant, reasoning that he had taken all the care that a reasonable person would have taken in manufacturing the product. Despite proof that the product was dangerously defective, the injured plaintiff was denied recovery because she failed to establish the defendant's negligence.

The *Daniels* result attests to the fact that the *Donoghue* approach does not amount to a strict liability rule. If *Daniels* is at all typical of English products liability cases, the creation of a presumption of negligence merely adds additional perfunctory stages to an already complex litigation procedure. The plaintiff establishes the existence of a defect in the product which caused him injury; the defendant, then, is required to prove that the defect was not attributable to his negligence. The manufacturer satisfies his burden by producing evidence which shows how careful he was in making his product. If the defendant's evidence is not dispositive, the burden once against shifts to the plaintiff to contest the allegation of reasonable conduct, a burden which requires him to gain a thorough knowledge of the manufacturing process and a concomitant ability to locate the substandard conduct in perhaps a vast and highly technical process.

81. The authors are indebted to Professor Vernon Palmer for this point.

I. The Role of a Modified "Res Ipsa" Formula

If the modified *res ipsa* adjunct to the *Donoghue* negligence formulation is to be looked upon as the English courts' subtle way of introducing a strict liability rule in the products liability context, that effort should be viewed as a failed experiment. It seems that when the *res ipsa* doctrine is applied in this context, albeit in modified and more flexible form, it achieves none of its basic purposes. It serves no ostensibly punitive function for acts which are manifestly negligent in character since there are some substantial questions as to what constitutes a defect and what sort of conduct can give rise to an actionable claim. The evidentiary rationale for the doctrine—placing the burden of proof upon the party who has better access to the information and documentation—comes to naught, since, once the defendant describes and documents his careful conduct, the plaintiff must challenge his allegations on technical grounds.

If a negligence-*res ipsa* analysis is to be retained in products litigation, perhaps the defendant should be required to show not only that he was careful, but also how the defect might not have arisen given his precautions. Such an analytical framework would amount to the adoption of a strict liability rule in all respects but in name. According to *Daniels*, it seems that current English law still is very far from adopting this type of negligence-*res ipsa* formulation. The so-called presumption of negligence, nowhere mandated in the *Donoghue* opinion, can be easily rebutted by the use of general technical documentation which avoids the central issue. This places the consumer at a unfair disadvantage and makes English products liability law, with its apparently stubborn attachment to fault-based liability determinations, retrogressive in relation to the jurisprudence of other national jurisdictions.

J. The Grant *Decision*

Other English cases, however, have unequivocally established that the *Donoghue* negligence doctrine, regardless of how one interprets the presumption of negligence issue, may amount to the imposition of a *de facto* strict liability standard upon manufacturers. In the well-known *Grant v. Australian Knitting Mills* case,[82] the plaintiff alleged that he contracted dermatitis from wearing the defendant's underpants. The product allegedly contained an excessive amount

82. 1936 A.C. 85 (P.C.). For a discussion of this case, see Diamond, *supra* note 74, at 231; LAW COMM'N No. 64, *supra* note 1, at 16; WEIR, *supra* note 48, at 21.

of sulphites. The defendant denied that he had been negligent in the manufacture of the product and introduced evidence establishing that he had manufactured nearly five million pairs of underpants without ever receiving a complaint from customers.[83] The court, however, held the defendant liable. In applying the *Donoghue* negligence rule, the court reasoned that the plaintiff need not prove how the sulphites got into the product, but only establish that they were in the product and caused his injury. The manufacturer, then, was required to prove that he had not been negligent. Evidence indicating that the plaintiff's complaint was the first received in a sale of nearly five million articles was insufficient to either disprove negligence or to establish that the defendant had taken reasonable care in the manufacture of his product.[84]

K. The Burden of Proof for Exculpating the Manufacturer

In *Grant*, the court followed basically the same procedural steps as the *Daniels* court, but imposed a heavier burden of proof on manufacturers to rebut the presumption of negligence that had been created against them. It is characteristic of and perhaps endemic to the use of a negligence analysis that the application and interpretation of the standard of reasonable care varies from court to court even when courts are confronted with very similar, if not identical, facts. The *Grant* opinion is not focused on the procedural and substantive impact of the modified *res ipsa* doctrine, but rather on the meaning of reasonableness in the products liability setting. Specifically, it is concerned with the relationship between reasonable conduct and the presumption of negligence which arises from proof of a defect and resulting injury.

The defendant-manufacturer's evidence in *Grant* strongly suggested that he was even more careful and prudent than his counterpart in *Daniels*. The defendant did not argue that his plant contained a supposed fool-proof system of sanitation, but rather relied upon objective data—his safety record. Ironically, one court exculpated the *Daniels* defendant upon evidence which merely suggested careful and prudent conduct, while the *Grant* court held the defendant liable because of strong evidence that he was a careful and reasonable manufacturer.

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83. 1936 A.C. at 95.

84. *Id.* at 96, 108.

L. Grant *and* Daniels *Compared*

The *Daniels* and the *Grant* courts, although they applied the same negligence test articulated in *Donoghue*, obviously had very different conceptions of how the reasonable conduct requirement should function. The *Daniels* court took the *Donoghue* negligence requirement at face value and interpreted it to mean that although a consumer may be injured by a defect in a product, manufacturers will not be held liable if they establish either a general record of safety and care or that their process does not usually give rise to defects. One product out of one hundred thousand may be defective and cause injury. This risk of accidents must fall upon buyers since there is no legal basis upon which to premise liability upon a manufacturer—she was not unreasonable and, therefore, not at fault.

The *Grant* court advanced a radically different interpretation of the concept of reasonable conduct and, concomitantly, the role of the fault notion. It is an interpretation which seems to equate reasonable conduct on the manufacturer's part with an absolute legal duty to guarantee that none of their products are defective. From *Grant* to *Daniels* the focus and method of assessment changed completely. In *Grant*, the court's focus was not on conventional doctrinal implications of negligence, but rather on individual consumers and the harm particular products caused them. Although the analytical standard is expressed in terms of reasonable conduct, it does not matter whether the manufacturer was reasonable and careful. It appears that *Grant* stands for the proposition that once the plaintiff establishes that a product was defective and was the cause of his injury, the manufacturer will be liable in tort despite strong proof suggesting that he took reasonable care in the manufacture of his product. The *Grant* court seems to have imposed a strict legal duty upon the manufacturer to guarantee the consuming public that his products will be free, in every case, from harmful defects.

Clearly, the *Grant* and *Daniels* interpretations of the *Donoghue* rule radically differ. Moreover, although *Grant* was not, strictly speaking, an English decision—it was a decision of the Privy Council with the same membership as the House of Lords—*Daniels* was a decision of a judge of first instance. Technically, neither decision binds the English High Court or any higher court, but *Grant* would be a more persuasive precedent. While it is quite characteristic of tort litigation that the same doctrine is interpreted differently by different courts in the context of similar, if not identical, cases, the di-

chotomy of construction here is too fundamental to allow for coexistence, peaceful or otherwise.

It is uncertain what the applicable doctrine means: Does it impose an ordinary duty of reasonable care upon the manufacturer or is it merely a guise for a strict liability formulation which excludes the notion of fault and, therefore, the concept of reasonable conduct? It could be argued that there is no real inconsistency between the two interpretations because the *Donoghue* doctrine creates a presumption of negligence once the plaintiff establishes the existence of a defect. The resulting shift in the burden of proof amounts to a form of strict liability. As noted earlier, there are substantial problems in characterizing and determining what this presumption and shift in the burden of proof actually mean in both procedural and substantive terms. Moreover, the reasoning of the *Daniels* court is an illustration of the fact that any reasonableness standard that is taken as a criterion in determining liability can be a far cry from a strict liability rule. In the final analysis, the unavoidable conclusion is that these two courts arrived at different results by deploying two contradistinctive legal theories of tort liability. *Daniels* may be a more accurate reflection of what the *Donoghue* doctrine intended to articulate because it places primary emphasis upon the concept of reasonableness in reaching a determination of liability. *Grant* disregards the negligence formulation in favor of a strict liability rule. In this sense, it goes beyond *Donoghue* and may, perhaps should, stand as precedent for how contemporary English courts should decide products liability cases.

M. Hill: *A Contemporary Assessment of* Donoghue

A recent case seems to confirm the view that the *Grant* decision was the dispositive interpretation of the *Donoghue* doctrine. In *Hill v. James Crowe (Cases) Ltd.*,[85] the plaintiff, a driver of a van, was injured when a wooden case he was standing on collapsed. The plaintiff established that the wooden case had caved in because it had been badly nailed together. In an action against the manufacturer of the case, the plaintiff contended that the defendant owed a duty of care to those persons who were likely to come in contact with the case to make it strong enough to withstand the foreseeable hazards of its journey. The plaintiff alleged that one foreseeable hazard was that someone would stand on the case. In using an in-

85. [1978] 1 All E.R. 812 (Q.B. 1977).

sufficient number of nails, the manufacturer had breached his duty of reasonable care.[86]

The defendant-manufacturer introduced evidence indicating that: 1) the standards of workmanship and supervision in his factory were high, 2) that during his fourteen years of business he had never received a complaint of this kind, and 3) that given the manufacturing process, it was very unlikely that an accident of this type would happen. As a consequence, the manufacturer contended that he had not breached his duty of reasonable care to the plaintiff.[87] The court, however, held against the defendant. It ruled that this case came with the *Donoghue* rule and that the manufacturer's allegation that his manufacturing process consisted of supervised high quality workmanship was not a defense to the negligence claim.[88] The court concluded that since the plaintiff's injury was a reasonably foreseeable consequence of the manufacturer's faulty workmanship, the defendant was liable in negligence for plaintiff's injury. The court expressly refused to follow the precedent set in *Daniels*, characterizing it as a criticized opinion and inferring that it was an unstable precedent.[89] In the court's estimation, the dismissal of the negligence claim in *Daniels* was not justified:

> The manufacturer's liability in negligence did not depend on proof that he had either a bad system of work or that his supervision was inadequate. He might also be vicariously liable for the negligence of his workmen in the course of their employment. If the plaintiff's injuries were a reasonably foreseeable consequence of such negligence, the manufacturer's liability would be established under *Donoghue v. Stevenson*.[90]

The *Hill* opinion makes clear that the *Grant* construction of the *Donoghue* doctrine is the more persuasive interpretation of that case. It appears to be the controlling opinion among contemporary courts. Although *Hill* speaks in terms of a standard of reasonable care, it seems that the defendant's defense concerning his conduct is of little moment in assessing the liability question. Rather, the court's analysis focuses on the plaintiff. Once the plaintiff estab-

86. *Id.* at 813.
87. *Id.* at 815.
88. *Id.* at 815-16.
89. *Id.* at 816.
90. *Id.* This view of the *Donoghue* opinion is also confirmed by the recent House of Lords decision in *Tumor Books, Ltd. v. The Veitchi Co.*, in which the duty of care was extended to cover financial losses. *See* THE TIMES (London), July 17, 1982 (Law Report).

lishes that the product he purchased was defective and caused his injury, the question becomes whether the defect and the resulting injury were a reasonably foreseeable consequence of the negligence of the manufacturer or his employees (for whom the manufacturer is vicariously liable).

Under this reasoning, any claim by the plaintiff that the defect arose as a result of faulty workmanship, in light of the circumstances of mass production, will appear to be plausible. No matter how well-qualified or how stringently supervised workers are, and despite a previously flawless company record, workers, it can be assumed, are likely to commit errors. In these circumstances, the entire negligence analysis functions in form only as a label upon which to map out the stages of a reasoning with a pre-determined result. This result has nothing to do with the question of reasonable conduct. Once the theory of vicarious liability is introduced into the analysis, the requirement that the injury be a reasonably foreseeable consequence of the manufacturer's negligence becomes no more than a straw requirement. The existence of a defect, in effect, presupposes some error in the manufacturing process. While the manufacturing process may be perfect in mechanical terms, it includes a human component which may err. The most plausible explanation for the existence of a defect lies in the human element for which the manufacturer can be held legally liable. It is no more than an empty formality to ask whether the plaintiff's injury was a foreseeable consequence of this hypothetical negligence.

The *Hill* court goes through the motions of deploying a negligence analysis and never refers to policy considerations which could support the imposition of a strict legal duty. It appears manifest, however, that the court is introducing—surreptitiously but unmistakably—a strict liability rule under the guise of the negligence analysis consecrated by *Donoghue*.

N. The Impact of Hill *and* Grant

Under *Hill* and *Grant*, once the plaintiff establishes that he was injured as a result of a defect in a product, the litigation need not go any further: the existence of a defect points to "negligent" conduct on the part of the manufacturer. The existence of a defect, then, does not merely create a presumption of negligence, but is fully dispositive of the negligence issue and the liability question. Despite the evident contradiction in such a statement, it can be said that,

under the doctrine articulated in *Hill*, regardless of the manufacturer's care, the existence of a defect in a product indicates wrongful, substandard, and unreasonable conduct. Arguably, under the *Hill* and *Grant* analyses, English courts no longer are required to take seriously the distinction between reasonable and unreasonable conduct; liability determinations will not be premised upon the notion of fault or wrongful conduct. Rather, current English products liability doctrine unequivocally requires that manufacturers produce defect-free products or bear the financial consequences for injuries which result from the existence of rare and probably unavoidable defects in their products. Clearly, the applicable rule does not emerge from a negligence analysis, but from strict liability principles.

Under contemporary judicial interpretations, the *Donoghue* negligence analysis had been made to address and voice policy considerations and choices which underlie the adoption of a strict liability rule in the products context. It seems that the *Hill* decision acknowledges: 1) that risks are increasingly an inherent part of a modern technological society, 2) that accidents will occur in this setting and leave its victims both physically and financially impaired, and 3) that the nineteenth-century preoccupation with fault-based liability determinations has little relevance in modern society. The notion of legally wrongful conduct and blameworthiness has given way to the culpability-free concept of compensating accident victims in the most cost efficient manner for both economic and humanitarian motives. Tortfeasors now are actors upon a hazardous stage where injuries are inevitable and unavoidable. Money judgments no longer are seen as purely punitive measures, but rather as a way to transfer wealth from one party who bears some relation, be it proximate or otherwise, to the injury suffered by another party and who has the better possibility of distributing the cost of the occurrence. In a society fully into its mass production era, there appears to be no better way to interpret the notion of tortious liability in the products area except to rid it of its antiquated culpability base. Moreover, given the technical and sometimes inexplicable character of some occurrences, the notion of fault appears to be totally unsatisfactory and unworkable with regard to products litigation.

O. Other Defenses for the Manufacturer

The other grounds under the *Donoghue* analysis upon which

manufacturers can rely to exculpate themselves do not give rise to such extensive analytical difficulties as the primary grounds for the imposition of liability. They merit only a brief reference. First, the probability of an intermediate examination of the product may relieve the manufacturer of his "duty of care" to the plaintiff-consumer.[91] It should be noted that the mere possibility of such an examination will not relieve the defendant of his duty. Such an examination must be within the contemplation of the parties as a likely event.[92] The test established by the courts to decide this question is whether a reasonable person would anticipate an examination which would avoid injury to the user. The probability of an intermediate examination again is determined by reference to its foreseeability.[93] When an examination is probable and actually does take place, the manufacturer no longer is under the duty of care prescribed by *Donoghue*. The courts have ruled, however, that when there was no probability that an examination would take place, but one in fact took place, the manufacturer still can be held liable for a breach of his duty of care.[94]

The intermediate examination ground is only a limited ground of exculpation. For example, in the event that an intermediate dealer discovers a defect in the manufacturer's product and fails to remedy the situation, the manufacturer, in addition to the negligent dealer, is liable to the consumer.[95] This type of subsequent negligence by another party in the chain of distribution will relieve the manufacturer of liability only if it was clear, either expressly or impliedly, that the product was not to be used without first being examined or tested by an intermediate party. Moreover, even when the plaintiff is contributorily negligent, the manufacturer may not be relieved of liability.[96] A consumer may discover a defect in the product, but use it nonetheless. Such knowing conduct will not necessarily bar the plaintiff's recovery, provided that it was reasonable for him to take the risk under the circumstances.[97]

Second, the manufacturer will not be held liable when the

91. *See* LAW COMM'N No. 64, *supra* note 1, at 16-18; CLERK & LINDSELL, *supra* note 48, at §§ 512-520.

92. *See generally supra* note 91 and authorities cited therein.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

product was not dangerous when it left his possession and he had no reason to anticipate that it would become dangerous.[98] Third, the liability rule applies only to physical injury to persons and/or property and does not cover purely pecuniary loss.[99] Fourth, the manufacturer will not be held liable for injury resulting from a defect if the product was used in a way inconsistent with its intended use.[100]

P. Possible Modifications in the English Law

The doctrine articulated in *Donoghue* represents the controlling English jurisprudence in the products liability area. This case established that, despite a lack of privity, an injured consumer still may seek relief against the manufacturer of the product by invoking a tort liability theory. The *Donoghue* court did not refer to strict liability principles, but rather established that future products litigation in tort would be resolved on the basis of a negligence analysis. This analysis required that injured plaintiffs not only establish the existence of a defect, but also prove that the defect was the result of unreasonable conduct by the manufacturer.

Subsequent courts have given a variety of interpretations to the reasonable conduct requirement of the *Donoghue* negligence analysis. While one early court appears to have applied the reasonable conduct concept quite literally—making it a serious exculpatory factor for the manufacturer despite any presumptions that may be created in favor of the plaintiff's action—a more contemporary court seems to have translated the *Donoghue* rule into a strict liability principle by making the defendant's burden of proof nearly impossible to satisfy once the plaintiff establishes the existence of a defect.

The uncertainty these inconsistent holdings create in English products liability law needs to be rectified. There appears to be no imperative mandating that negligence language be maintained while a strict legal duty is imposed upon manufacturers. The aim of articulating a legal doctrine which is at once consistent and predictable would best be served by explicitly stating that manufacturers will be held strictly liable for injuries which result from defects in their products. A choice, with its attendant general societal implications, needs to be made about whether the loss associated with such injury should be borne by the injured party or be transferred to the

98. *Id.*
99. *Id.*
100. *Id.*

manufacturer of the product. Numerous considerations—the development of the law in other national jurisdictions, the recommendations of the EEC Draft Directive, and the basic conditions of modern technological society and mass production—call for eliminating the fault notion in the products area. In all likelihood, the use of a fault notion as a basis for the imposition of liability would pose difficult definitional and analytical problems and lead to arbitrary results perhaps incapable of reconciliation. Retaining a negligence standard and simply shifting the burden of proof to the defendant upon the plaintiff's satisfaction of basic evidentiary requirements would probably be ineffective in most cases and represent but a perfunctory measure which simply postpones the ultimate resolution of the dispute. After all, under a negligence analysis, neither party in these situations may be at fault in the classical sense. The manufacturer may have done all that was humanly possible to avoid dangerous defects, and the consumer may have reasonably used the product for its intended use. Under such circumstances, according to the conventional negligence analysis based upon fault and reasonable conduct, the defendant-manufacturer should not be held liable because in the final analysis, he did nothing wrong.

The veritable ends of justice as expressed through notions of equity and societal consensus, and even common sense, may not be achieved under the application of this traditional theory of tort liability. Of the two parties involved, the plaintiff needs to be compensated for the losses he suffered occasioned by the accident. The very existence of a defect suggests a certain amount of fault on the part of the manufacturer, no matter how slight and perhaps insufficient it is to characterize the conduct as socially substandard. The manufacturer clearly is in the better position to insure himself against claims arising from the use of his products and has the possibility of distributing the financial cost of these injuries to the consuming public at large.

As noted earlier, the implied warranty of merchantable quality creates a strict liability rule in contract, usually against the retailer of the product. If *Donoghue* is to function effectively as a means around the privity-of-contract rule, its modern construction should provide injured parties who lack privity with the same type of remedy and relief that is available under a contracts theory. Additionally, much doctrinal clarity would be gained by not masking a strict legal duty in the guise of a negligence analysis. Finally, and most

importantly, there is a strong European trend, modeled to some extent upon United States products liability jurisprudence and attested to by the Strasbourg Convention and the EEC Draft Directive favoring the adoption of a strict liability principle as the community law.

The need to foster a strong European community by achieving the harmonization and modernization of national laws is perhaps the greatest incentive to have England modify the *Donoghue* doctrine to have it reflect what some contemporary courts have interpreted it to mean within the context of late twentieth century society. Given the relative statistical insignificance of products litigation in England, the doctrinal clarity that could be gained in the national law by articulating an unambiguous standard of liability, and the intractable conflicts problems that could arise as a result of maintaining an isolated and antiquated national rule of liability, there is little that should stand in the way—save a stubborn and perhaps unjustifiable clinging to the would-be purity of past legal doctrine—of the English adoption of what appears to be the EEC consensus in this area.

IV. Experimentation With Civil Law Concepts in Louisiana

From a strictly conceptual perspective, the contrast between the American and English positions on products liability is indeed considerable. Its analogue in Louisiana law provides an interesting point of reference by which to highlight the comparison between these dichotomous doctrinal positions. The courts in Louisiana undoubtedly will pay unofficial heed to developments in other United States' jurisdictions and attempt to align their determinations along a standard which mirrors the essential dictates of section 402A. In addition, these courts must take into account the delictual liability provisions of the Louisiana Civil Code, some of which evidence a liability potential which may exceed that advanced in the *Restatement*. In this sense, the Louisiana decisional law has articulated the logical culmination of an absolute duty in the products context. Unfortunately, to use Justice Holmes' celebrated maxim, the "experience" of the law in this area has led to a recent judicial and the possibility of a future legislative reconsideration of the meaning of strict products liability in Louisiana. Rather than continuing its elucidation of the significance of the *Greenman* rationale which under-

pins the *Restatement* provision, the Louisiana Supreme Court has retreated to a liability position which characterizes the fault-based orientation of the English courts. Proposals are being drafted to have the legislature ratify this "about-face" in a revised statute. While the EEC hopes to harmonize European law on products liability by adopting a strict liability rule, the American jurisdiction with possibly the most advanced application of an absolute standard appears to be sounding the retreat to a negligence rule, seeing this retrogression as an appropriate response to the products liability crisis generated by the 402A language. Some of the political and practical difficulties which surround the adoption of the EEC Draft Directive, then, are also present in the United States.

A. The Applicable Law in Louisiana

The expansion of the doctrinal foundations of products liability law in Louisiana is of fairly recent origin. Due to the generalized nature of the relevant Civil Code articles,[101] much of the development of the applicable theory has been jurisprudential. Prior to 1971, the theories of liability available to injured plaintiffs were quite limited. A plaintiff could bring a tort action premised upon negligence under Civil Code article 2315.[102] In such a case, the plaintiff also could argue for application of *res ipsa loquitur* in order to lessen his burden of proof, provided the requisites of the doctrine were met.[103] Under the same code provision and in keeping with other United States' jurisdictions, the courts allowed consumers who were injured by deleterious foodstuffs and defective bodily products to directly sue a manufacturer for breach of the implied warranty of wholesomeness.[104] A conclusive presumption that the manufacturer knew of the defects in his product was routinely invoked, thereby relieving the consumer of his burden of proving a manufacturer's

101. LA. CIV. CODE ANN. arts. 2315, 2317, 2475, 2545 (West 1977). For an excellent discussion of tort law in Louisiana, see F. STONE, LOUISIANA CIVIL LAW TREATISE, TORT DOCTRINE (1977). For a recent commentary on Louisiana products liability, see Palmer, *In Quest of a Strict Liability Under the Code*, 56 TUL. L. REV. 1317 (1982).

102. LA. CIV. CODE ANN. art. 2315 (West Supp. 1982).

103. *Res ipsa loquitur*, a common law doctrine, has been grafted onto article 2315 by the Louisiana courts. *See* Franks v. Nat'l Dairy Prods. Corp., 414 F.2d 682, 685 (5th Cir. 1969). *See also* Houston-New Orleans, Inc. v. Page Eng'g Co., 353 F. Supp. 890 (E.D. La. 1972) (applying Texas law).

104. *See* LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952) (soft drinks); Lartique v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (cigarettes).

negligence.[105] Early courts were reluctant, however, to expand the strict liability notion based on an implied warranty in tort beyond the "bodily use" products.[106]

A third ground for imposing liability was available under Civil Code articles 2531 and 2545, contractual articles warranting a product against redhibitory defects.[107] This potential source of redress for injured consumers was based upon the redhibition articles found in Book III, Title VII, Of Sale.[108] The warranty obligations included warranty of merchantable title[109] and warranty of reasonable fitness for intended use.[110] Originally, recovery was restricted to purchasers who were in privity with the vendor of the defective product. The damages available were limited to the restoration of price and expenses of the sale in the case of a good faith seller.[111] A bad faith seller also could be held liable for damages; to justify labeling a vendor as one in "bad faith," however, a purchaser needed to prove the seller's actual or imputed knowledge of the defect.[112] A restrictive reading of the redhibition articles left a consumer, who was not the purchaser, without recourse and exculpated a manufacturer, who was not the immediate vendor, from contractual liability.

The same code provisions dealing with delictual liability that, prior to 1971, were utilized to limit the plaintiff's recovery were later reinterpreted to allow for more frequent recovery. In Louisiana, Civil Code articles 2315 and 2316 have been deemed to be the

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105. Robertson, *Manufacturer's Liability for Defective Products in Louisiana Law*, 50 TUL. L. REV. 50, 52 (1975-1976).

106. Except in the food and drink cases . . . the courts of this state have consistently rejected any deviation from the theory that Revised Civil Code Article 2317 must be read in connection with Revised Civil Code Articles 2315 and 2316. . . .

. . .

[F]ault is a prequisite for recovery in suits sounding in tort . . . .

Cartwright v. Firemen's Ins. Co., 254 La. 330, 338-39, 223 So. 2d 822, 825 (1969).

107. Louisiana Civil Code article 2545 permits a plaintiff to sue a "seller who knows the vice of the thing he sells and omits to declare it" for restitution of the price, expenses and damages. LA. CIV. CODE ANN. art. 2545 (West Supp. 1982). Louisiana Civil Code article 2531 permits recovery of the price and expenses of the sale against a good faith seller. LA. CIV. CODE ANN. art. 2531 (West Supp. 1982).

108. LA. CIV. CODE ANN. arts. 2531 (*as amended by* La. 1974, No. 673, § 1), 2476, 2545 (West Supp. 1982).

109. LA. CIV. CODE ANN. art. 2475 (West Supp. 1982). *See* U.C.C. § 2-314 (1977) (implied warranty of merchantibility).

110. LA. CIV. CODE ANN. art. 2475 (West Supp. 1982). *See* U.C.C. § 2-315 (1977) (implied warranty of fitness for a particular purpose).

111. LA. CIV. CODE ANN. art. 2531 (West Supp. 1982).

112. *Id.* at art. 2545.

"fountainhead" of tort liability.[113] These articles are the basic source for determining when one person's conduct which does harm to another is of such a nature that the actor must answer in damages.[114] Accordingly, "fault" is critical to a liability assessment. As defined by Civil Code article 2316, fault includes willful, unlawful conduct as well as imprudence or want of skill.[115] As interpreted by the Louisiana courts, the concept of fault, however, has come to embody both traditional negligent and non-negligent injurious conduct—the latter being legally prohibited for reasons of social policy.[116] As former Chief Justice Barham observed in *Langlois v. Allied Chemical*,[117] "[c]riminal laws, traffic regulations, zoning laws, health laws, and others may and often do set the standard for lawful conduct in personal relationships, although they are designed for social protection . . . ."[118] Accordingly, legal liability under article 2315 may be premised either on negligence or social policy considerations which articulate acceptable standards of conduct.[119]

This broad view of delictual fault—perhaps the most forthright statement of the basis of tort liability other than the Andrews dissent in *Palsgraf*—has had a considerable impact upon the way in which Louisiana courts have approached and resolved products liability cases. In the celebrated *Loescher v. Parr*[120] decision, Louisiana Supreme Court Justice Tate declared that "liability arises from [a] legal relationship to the person or *thing* whose conduct or *defect* creates an unreasonable risk of injuries to others."[121] Therefore, once a plaintiff proves that his injury resulted from a defective product which was unreasonably dangerous, one need only find a legal relationship between various members in the chain of distribution in order to impose liability.

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113. Langlois v. Allied Chemicals Corp., 258 La. 1067, 1078, 249 So. 2d 133, 137 (1971). *See also* DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981).

114. *Langlois*, 258 La. at 1074, 249 So. 2d at 136 (citing DOMAT, CIVIL LAW IN ITS NATURAL ORDER, Pt. 1, Book 2, Title 8, § 4, Art. 1 (Strahan trans., Cushing ed. 1861)).

115. 258 La. at 1075, 249 So. 2d at 136. LA. CIV. CODE ANN. art. 2316 (West Supp. 1982).

116. 258 La. at 1076, 249 So. 2d at 137. *See* Loescher v. Parr, 324 So. 2d 441, 445 (La. 1975); Pierre v. Allstate Ins. Co., 257 La. 471, 242 So. 2d 821 (1971).

117. 258 La. 1067, 249 So. 2d 133 (1971).

118. 258 La. at 1067, 249 So. 2d at 137.

119. *Id.* at 1077-78, 249 So. 2d at 137.

120. 324 So. 2d 441 (La. 1975).

121. *Id.* at 446 (italics added).

B. Landmark Products Cases

In the early 1970's, two Louisiana Supreme Court decisions significantly expanded the consumer protection rationale which underpinned redhibition and strict tort liability actions. Justice Tate's landmark decision in *Weber v. Fidelity and Casualty Insurance Company of New York*[122] changed the parameters of Louisiana products liability law by imposing upon manufacturers a form of liability functionally equivalent to that contained in section 402A—the rule in many United States' common law jurisdictions.[123] In *Weber*, the court held a manufacturer of cattle dip strictly liable for the loss of cattle and the illness of plaintiff's sons which resulted from the use of the product.[124] The court reasoned that a "manufacturer is presumed to know of the vices in the things he makes,"[125] and found him to be at fault without requiring the plaintiff to establish negligence:

> A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated.[126]

Accordingly, under the *Weber* doctrine, as in most United States' jurisdictions adhering to a section 402A standard, the injured plaintiff must prove that 1) the product was defective, 2) it was unreasonably dangerous for normal use, and 3) his injuries were caused by

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122. 259 La. 599, 250 So. 2d 754 (1971).

123. Section 402A provides in part:

Special Liability of Seller of Product for Physical Harm to User or Consumer

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and,
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold;
2. The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

Robertson, *supra* note 105, at 50; *See* Poland v. Beaird-Poulan, 483 F. Supp. 1256 (W.D. La. 1980); Philippe v. Browning Arms Co., 395 So. 2d 310 (La. 1980). The *Weber* court cites both *Greenman* and *Henningsen* in support of its position. 250 So. 2d at 755-56.

124. 250 So. 2d at 758.

125. *Id.* at 756.

126. *Id.* at 755.

the defect.[127]

A strict application of *Weber* would require a plaintiff to demonstrate that the product was "unreasonably dangerous," *i.e.*, one "that a reasonable seller with knowledge of the defect would not sell, or, alternatively, . . . one presenting risks greater than a reasonable buyer would expect."[128] As a result, and much like the section 402A standard upon which it appears to have been modeled, the "unreasonably dangerous" component in *Weber* seems to superimpose a negligence formulation upon an ostensible standard of strict liability. Accordingly, the two-fold requirement as to defectiveness appears to cause doctrinal and analytical confusion—the same type of confusion which is current in many United States common law jurisdictions applying section 402A. This two-fold requirement, however, was largely ignored in Louisiana. The application of the *Weber* analysis resulted invariably in consumer-oriented rulings by Louisiana courts.[129]

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127. Proof of defectiveness can involve establishing the existence of either a manufacturing or design defect. The latter constitutes a more onerous burden for an injured consumer; it can involve an "indictment of conscious manufacturer choice" and a finding of liability could have serious economic consequences on an entire industry. In most cases in which plaintiffs have alleged a defect in design, Louisiana courts continue to demand a specific showing of negligence. *See* ROBERTSON, *supra* note 105, at 65-66.

A discussion of what constitutes design defect may be found in Dean v. General Motors Corp., 301 F. Supp. 187 (E.D. La. 1969). The court in *Dean* stressed that the reasonable care standard would control and would be applied to facts known at the time the design was adopted. *Id.* at 192. In a more recent decision, the court stated that a manufacturer's liability may be limited insofar as "a manufacturer cannot be expected to design products with component parts which will never wear out." Poland v. Beaird-Poulan, 483 F. Supp. at 1264 (citing Foster v. Marshall, 341 So. 2d 1354, 1361 (La. App. 1977)). *See also* McMorris v. Insurance Co. of N.Am., 289 So. 2d 208 (La. App. 1973) (workman denied recovery for failure to prove propane cylinder negligently designed); Bowen v. Western Auto Supply Co., 273 So. 2d 546 (La. App. 1973) (manufacturer exonerated because mower not proved to be improperly designed).

128. ROBERTSON, *supra* note 105, at 61. *See also* Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Charlie Hairston Aircraft, Inc. v. Beech Aircraft Corp., 457 F. Supp. 364 (W.D. La. 1978).

129. A plaintiff who is contributorily negligent is not necessarily barred from recovery. Dorry v. LaFleur, 399 So. 2d 559 (La. 1981). This requirement has been construed narrowly to bar recovery by a plaintiff who misuses the product. Avoyelles Country Club v. Walder Kiddie & Co., 338 So. 2d 379, 382 (La. 1976). *See also* Christofferson v. Halliburton Co., 617 F.2d 403 (5th Cir. 1980) (manufacturer not liable if product put to extraordinary use); Bond v. Transairco, 514 F.2d 642 (5th Cir. 1975) (manufacturer not liable where purchaser failed to follow maintenance schedule).

While causation has been the least litigated element of the *Weber* test, forseeability of injury could be a more problematic determination. Although this negligence notion is seemingly at odds with a pristine theory of strict liability, the holdings of *Weber* and its progeny have virtually written out the forseeability requirement from the liability calculus altogether.

One year after *Weber*, the Louisiana Supreme Court again addressed the issue of manufacturer liability. While *Weber* was based on a tort analysis, *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.* [130] was grounded on the redhibition articles.[131] The court explicitly eliminated the privity requirement and held that purchaser had an action in redhibition against all of the vendor's ancestors in the chain of title.[132] Following the rationale of *Weber*, the *Media* court announced that, in an action in redhibition, a manufacturer of a defective product would be considered a bad faith vendor since manufacturers are presumed to know of any defects in their products.[133] Their liability, therefore, would arise under article 2545 and a consumer could recover not only for value and expectation loss, but also for damages and reasonable attorney's fees.[134]

Although the *Weber* opinion did not actually mention the term "strict liability," it has been viewed consistently as establishing "strict liability in tort . . . against manufacturers for defects in their products." Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974). *See* Heirs of Fruge v. Blood Services, 506 F.2d 841 (5th Cir. 1975); Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973).

130. 262 La. 80, 262 So. 2d 377 (1972).

131. Whereas Mercedes-Benz of North America, Inc. was technically a distributor, rather than a manufacturer, the court found that based on the particular position held by that company "the distributor occupied the position of a manufacturer." 262 So. 2d at 380.

132. *Id.* at 381. *See* Rey v. Cuccia, 298 So. 2d 840 (La. 1974); Reeves v. Great Atl. & Pac. Tea Co., 370 So. 2d 202, 206 (La. App. 1979); Litvinoff, *Manufacturer's Liability for Redhibitory Vices*, 35 LA. L. REV. 310 (1975). Litvinoff argues that based on article 2476, and possibly article 2503, a Louisiana purchaser has always possessed a cause of action against his vendor's ancestors in title. *See generally* BAUDRY-LADANTIERIE & SAINAT, TRATÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL—DE LA VENTE ET DE L'ÉCHANGE 368-69 (2d ed. 1960); HUC, 10 COMMENTAIRE THEORIQUE ET PRATIQUE DU CODE CIVIL 209 (1897).

133. 262 So. 2d at 377. LA. CIV. CODE ANN. article 2545 is based on *spondet peritiam artis*, the Roman maxim which expresses the presumption that a manufacturer knows the defects of the things he makes. *See* 3 OEUVRES DE POTHIER 88 (Bugnet ed. 1861). *See also* CODE CIVIL [C. CIV.] art. 1645 (Fr.); Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977); Rey v. Cuccia, 298 So. 2d at 845.

134. LA. CIV. CODE ANN. art. 2545, *amended by* Acts 1968 (West Supp. 1982). Subsequent cases have extended recovery against both manufacturers and retailers to bystanders and other third persons. For example, in Ross v. John's Bargain Stores Corp., 464 F.2d 111 (5th Cir. 1972), the court held a vendor liable for the death of a child (a non-purchaser) who was critically burned when her nightgown caught fire. The *Ross* court adopted the position that "a defendant may not take refuge behind an apparently applicable code section just because it does not specifically include the injured plaintiff's class." *Id.* at 113. Citing *Langlois*, 258 La. 1067, 249 So. 2d 133, the court concluded that a third party may be owed the same obligation as a purchaser. 464 F.2d at 113.

Two years later in the case of Hoffman v. All Star Ins. Corp., 288 So. 2d 388 (La. App. 1974), *cert. denied*, 290 So. 2d 909 (La. 1976), the owner of a boat and his two companions were injured when their boat nearly sank because of a defect in construction. The court awarded the owner the value of the boat *and* granted both the owner and passengers dam-

C. The Subsequent Development of a Sui Generis *Theory of Manufacturer Liability*

In the last ten years, Louisiana courts have struggled with the *Weber* and *Media* reasoning and, minimizing certain salient problems of doctrine, have elaborated a hybrid products liability analysis which merges tort and contractual theories of liability. This *sui generis* theory of manufacturer liability results primarily from three significant doctrinal permutations in the jurisprudence: 1) expansion of the definition of "manufacturer;" 2) modification of plaintiff's burden of proving defectiveness; and 3) fusion of the tort and redhibition theories of liability.

The term "manufacturer" has been extended to include professional vendors.[135] In *Chappuis v. Sears Roebuck and Co.*,[136] the court held that "[t]he responsibility of Sears is the same as that of the manufacturer" due to "the size, volume and merchandising practices of Sears" and its capacity "for controlling the quality of its merchandise . . . ."[137]

The courts have also given an expansive definition to the term "defect." The *Weber* analysis requires the plaintiff to prove that the product was "defective, i.e., unreasonably dangerous to normal use . . . ."[138] To determine whether a product is "unreasonably dangerous," the Louisiana Supreme Court, in *Hunt v. City Stores, Inc.*,[139] employed the celebrated Learned Hand balancing test normally used to make negligence determinations: "if the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous."[140] Accordingly, if a product caused injury and was "unreasonably

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ages for pain and suffering, loss of earnings, and loss of personal items based on LA. CIV. CODE ANN. arts. 2475 and 2476. *Id.* Although the *Hoffman* opinion lacks any doctrinal analysis setting forth the reasons for awarding expectation damages to a non-purchaser, it appears that Louisiana courts have opened wide the door for third-party recovery against both manufacturers and vendors under the redhibition articles.

135. According to Professor Litvinoff, *Media* began the trend of applying *spondet peritiam artis* not only to manufacturers, but also to professional vendors. *Manufacturer's Liability*, *supra* note 132, at 316.

136. 358 So. 2d 926 (La. 1978).

137. *Id.* at 930. *See* Spillers v. Montgomery Ward & Co., 282 So. 2d 546 (La. App. 1973); Pennsylvania v. Inferno Mfg. Corp., 199 So. 2d 210 (La. App.), *cert. denied*, 251 La. 27, 202 So. 2d 649 (1967); Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 529, 539 (1940).

138. 259 La. at 603, 250 So. 2d at 755.

139. 387 So. 2d 585 (La. 1980).

140. *Id.* at 589.

dangerous," a manufacturer could be held strictly liable. The *Hunt* court, however, applied circuitous logic to arrive at its liability determination; it manipulated the negligence notion of "unreasonably dangerous," virtually equating it with the happening of an unusual occurrence, i.e., an injury. In affirming an earlier supreme court decision—the 1979 *Marquez*[141] decision—the court reversed the sequence of evidentiary elements of the *Weber* doctrine. Rather than premise liability on the finding of a defect in a product which causes injury, the court looked first to the victim's harm; from that, it inferred the existence of a defect.

Conceivably, under the *Hunt* reasoning, the occurrence of virtually any mishap—no matter how accidental—(here, a child's shoe being caught in an escalator) would be enough of "an unusual occurrence" to raise an inference (possibly an irrebuttable presumption) that the product was "unreasonably dangerous."[142] By grafting a presumption of defectiveness in the law of strict liability for manufacturers in a fashion reminiscent of the judicial application in common law jurisdictions of the doctrine of *res ipsa loquitur*, Louisiana courts virtually eliminated any need to prove defectiveness. The *Hunt* decision was a forceful example of how strongly public policy considerations color and fix legal determinations in the products area. Holding both the manufacturer and the store owner liable *in solido* for the injuries sustained, the *Hunt* court reasoned: "Otis [the manufacturer] is in a better position to improve the design of the machine than City Stores [the store owner], but City Stores should not be allowed to keep a defective escalator and pass all liability to the manufacturer."[143]

In keeping with and perhaps transcending the perspective adopted in *Escola* and *Greenman*, Louisiana courts resolved the tension between doctrinal restraints and policy imperatives clearly in favor of "powerless" consumers, in Justice Traylor's apt characteri-

141. Marquez v. City Stores Co., 371 So. 2d 810 (La. 1979).

142. *Id.* at 813. Hunt v. City Stores, Inc., 387 So. 2d at 588. A federal district court in Louisiana had suggested a similar approach in 1972. In Houston-New Orleans Inc. v. Page Eng'g Co., 353 F. Supp. 890, 895 (E.D. La. 1972), the court held that "a defect can be inferred from unexplained occurrences." *See* Franks v. Nat'l Dairy Prods. Corp., 414 F.2d 682 (5th Cir. 1969). *See also* Vicknair v. T.L. James Co., 375 So. 2d 960 (La. App. 1979) (fact that rim lock flew off when tire blew out was occurrence which would not have happened had rim lock not been defective). *Accord* Broussard v. Pennsylvania Millers Mut. Ins. Co., 406 So. 2d 574 (La. App. 1982); Goodlow v. City of Alexandria, 407 So. 2d 1305 (La. App. 1981).

143. 387 So. 2d at 590.

zation, to protect themselves against products which prove to be "traps for the unwary."[144] Implicitly but unmistakably, the *Hunt* court incorporated into Louisiana jurisprudence the social insurance rationale suggested by comment *c* to section 402A:

> [P]ublic policy demands that the burden of accidental injuries caused by products . . . be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained . . . . [T]he consumer . . . is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the products.[145]

In *Philippe v. Browning Arms Company*,[146] the Louisiana Supreme Court accomplished an explicit merger of tort and redhibition theories of recovery. Ignoring the great debate between the *Sealy* and *Santor* courts and its implications, the highest Louisiana court specifically declared that "[t]here is no compelling reason to require a person injured by a defective product he has purchased to proceed either in contract or in tort."[147] In fact, under the *Philippe* doctrine, these two theories were joined to form the basis of the plaintiff's cause of action despite the fact that the plaintiff pleaded only one theory of liability.[148] The court supported its analysis by claiming that "the right and the extent of recovery by the purchaser of a thing against the seller or manufacturer is governed by the codal articles providing for responsibility in the seller-purchaser relationship, as applied through C.C. art. 2315."[149] While Civil Code articles 2315 and 2316 provide the basis for a purchaser's recovery, "the court which determines tort responsibility in a particular case must decide the applicable standard of conduct by consulting the many other codal articles, statutes and laws [such as the sales articles] which provide for certain responsibilities according to the person involved or to the relationship or activities involved."[150] Accordingly, the breach of a manufacturer's obligation to produce a safe product "gives rise to a cause of action . . . not only to demand

144. Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

145. RESTATEMENT, *supra* note 24, at § 402A comment *c*.

146. 395 So. 2d 310 (La.), *aff'd on rehearing*, 395 So. 2d 314 (La. 1980). *See also* S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE—OBLIGATIONS, Bk. 2 § 252 (1975); W. Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239 (1975).

147. *Philippe*, 395 So. 2d at 319.

148. In *Philippe*, plaintiff had only demanded tort damages, but the court awarded attorney's fees, available under LA. CIV. CODE ANN. art. 2545 (West Supp. 1982).

149. 395 So. 2d at 319.

150. *Id.* at 318.

the return of the purchase price, but also . . . to demand all damages caused by the defect and reasonable attorney's fees."[151] The Louisiana definition of the scope of the manufacturer's liability and the hybrid and fully compatible measure of damages were perhaps the most liberal and expansive expression of products liability doctrine. It was achieved by an exceptional accommodation of civilian

151. *Id.* Although the *Philippe* plaintiff was a purchaser, one would suppose, given the general orientation of the jurisprudence, that a non-purchaser would fare as well before a Louisiana court. *Media* and its progeny, most notably Rey v. Cuccia, 298 So. 2d 840 (La. 1974), put to rest any requirement of privity between the purchaser of a defective product and the manufacturer. If neither theory of liability requires proof of negligence and if privity is of no moment in the determination, then, a non-purchaser who is entitled to sue a manufacturer under Civil Code article 2315 should be able to recover under Civil Code article 2545. The combined theory of recovery would allow a non-purchaser plaintiff to recover attorney's fees, specifically provided for in article 2545. Whether the extention of the combined theory to a non-purchaser should permit him to recover value and expectation damages is a debatable and controversial question. The typical non-purchaser action centers upon a product defect that has resulted in personal injury rather than economic loss. In order to compensate such a plaintiff fully, it would seem unnecessary to reimburse him for value loss since he has suffered no pecuniary loss relating to the economic value of the product. Consequential damages bearing upon the plaintiff's future financial well-being, however, might be remunerated under a *Philippe* analysis without creating a sense of patent inequity. Although the courts have yet to confront this problem explicitly, it remains theoretically possible for a non-purchaser to make such a demand on the strength of the recent jurisprudence. *See Philippe*, 395 So. 2d at 310; Reeves v. Great Atl. & Pac. Tea Co., 370 So. 2d 202 (La. App. 1979).

Less innovation has taken place in the area of retailer's liability. Traditionally, a retailer was held liable for personal injuries resulting from breach of warranty only upon a showing of negligence. LA. CIV. CODE ANN. arts. 2315, 2531, 2545 (West Supp. 1982); Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977); Breaux v. Winnebago Industries, Inc., 282 So. 2d 763 (La. App. 1973). Former Justice Tate in his dissent in *Spillers* argued that a retailer, like a manufacturer, should be held strictly liable as a vendor of a defective article foreseeably injuring others, due to his placing into commerce articles which create an unreasonable hazard to others. 294 So. 2d at 810. If the seller had no knowledge of the defect, his liability would be limited to the restoration of the purchase price and expenses of the sale. LA. CIV. CODE ANN. art. 2531 (West Supp. 1982) . "There is no rule of law in Louisiana which imputes to the seller of new products . . . knowledge of latent vices and defects, where the seller is not the manufacturer." Peltier v. Seabird Industries, Inc., 304 So. 2d 695, 699-700 (La. App. 1974). *See also* Spillers v. Montgomery Ward & Co., 294 So. 2d 803 (La. 1974). For a theory expanding liability of a good faith seller by interpreting the phrase "expenses occasioned by the sale" to include some damages, see Morrow, *supra* note 137, at 542. A retailer was not under a duty to acquire knowledge: he owed a consumer only a duty of reasonable inspection, not to "make [a] minute inspection for latent defects." Hunt v. Ford Motor Co., 341 So. 2d 614, 619 (La. App. 1977). In a word, the retailer's liability was circumscribed through the application of a rather narrow notion of foreseeability. If, however, the seller in fact knew of "the vice of the thing he sold" and failed to warn the purchaser, he became answerable for damages and attorney's fees. LA. CIV. CODE ANN. art. 2545 (West Supp. 1982), *as amended by* Acts 1968, No. 84, § 1. As former Justice Tate urged in his *Spillers* dissent, expansion of retailer liability should be the furture orientation of Louisiana courts.

legal notions and policy considerations which underpin products litigation in all jurisdictions.

D. The Application of Civil Code Article 2317 to Products Liability Litigation

The combination of the *Weber*, *Media*, and *Hunt* doctrines with Civil Code article 2317 presents the possibility of an even greater expansion of the plaintiff's remedies in products litigation. This joining of the decisional law with the substance of article 2317 could lead to the imposition of liability upon a party who is not a vendor, holding him strictly liable for injuries (and attorney's fees) resulting from an unusual occurrence, absent any proof of defect in a product.

Loescher v. Parr is the leading case on liability of the custodian of a defective thing.[152] There, the court speaking through Justice Tate and applying article 2317, imposed strict liability upon the custodian of a thing,[153] reasoning that article 2317 imposes a duty to keep one's things in such condition or under such control that they cause no damage to others.[154] Prior to *Loescher*, Louisiana courts interpreted article 2317 in conjunction with articles 2315 and 2316, concluding that fault through negligence was essential for recovery under article 2317.[155] With *Loescher*, the jurisprudence, recognizing that legal fault does not presuppose negligence,[156] went further by holding a custodian liable once damage had been proven, regardless of whether the particular thing presented an obvious risk of harm.[157]

The proof of custody requirement has led to a rather limited application of article 2317 in the products area. Retailers who fall within the purview of the article do so because of their status as guardians of defective things when a customer is injured in a

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152. 324 So. 2d 441 (La. 1975).

153. *Id.* at 447-48.

154. *Id.* Former Justice Tate employed the principle of legal fault, similar to that of the French under C. CIV. article 1384(1). *See* Jand'heur c. Les Galeries Belfortaises, Feb. 13, 1930, Cass. ch. réun., Fr., 1930 Periodique et Critique [D.P.] I 57 (note by Ripert).

155. Cartwright v. Firemen's Ins. Co., 254 La. 330, 338, 223 So. 2d 822, 825 (1969). *See generally* Note, *Tort-Strict Liability for Damages Done by Things in Ones Possession*, 51 TUL. L. REV. 403 (1977).

156. 324 So. 2d at 445. *See* Langlois v. Allied Chem., 249 So. 2d 133 (La. 1971).

157. In *Loescher*, the damage was caused by a tree which had a defect which was not discoverable until the accident occurred.

store.[158] Even a broad interpretation of custody, however, might not lead to a finding of retailer or manufacturer liability under article 2317 once title has passed and actual custody of the product is relinquished. On the other hand, if custody is equated with control, a court might reason that a manufacturer, having control at the time the defect was created, maintained constructive control of the latent defect until it caused injury. Furthermore, as a conduit in the chain of enterprise, the retailer presumably could be subrogated to the manufacturer's liability. While such reasoning is speculative, constructive custody could justify a finding of manufacturer and/or retailer liability under article 2317.

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158. *See* Hunt v. City Stores, Co., 387 So. 2d 585; Marquez v. City Stores, Co., 371 So. 2d 810.

Hester v. Montgomery Elevator Co., 392 So. 2d 155 (La. App. 1980), a recent appellate court case, is the only decision that is remotely on point and its discussion of the various theories of recovery not only is lapidary, but also reflects essential confusion. There, suit was brought against an elevator company (a professional vendor) for injuries sustained when plaintiffs were trapped inside an elevator. Even though the elevator was admittedly defective, the court, in a cursory discussion, denied recovery based on *Loescher* and article 2317. The Court reasoned that the plaintiffs had failed to prove custody. The court never referred to *Media* or *Weber*. Although this result and reasoning may be explained in terms of the *de minimus* injury involved in the case, it is unfortunate that the court did not seize the opportunity to explore the logical interplay of the theories of liability particularly in the case of a non-purchasing "consumer" of a product.

Under the provisions of article 2317, a plaintiff injured by a defective product may sue any "guardian" of a product. However, article 2317 has been limited to movables. A lessee of an immovable has traditionally been granted damages under LA. CIV. CODE ANN. arts. 670, 2322, 2693, or 2695. *See* Smith v. Hartfort Acc. & Indem. Co., 399 So. 2d 1193 (La. App. 1981) for a discussion of lessor liability under these articles. In Cardwell v. Jefferson Rentals, 379 So. 2d 255 (La. App. 1979), the court expanded the notion of custody to comport with the French concept of *sous sa garde*; the *garde* of a thing connotes the "legal responsibility for its care and keeping." *Id.* at 257 (quoting *Loescher*, 324 So. 2d at 477 n.6). Thus, the guardianship contemplated by the article could be associated not only with ownership, but also apply inter alia, to the bailee, the lessee, the usufructuary, the borrower for use, and the repairman. Verlander, *We are Responsible*, 2 TUL. CIV. L. FORUM (1974). In *Cardwell*, the court held the lessor of a chain hoist liable for injury suffered by lessee's employee. Determination of custody, actual or constructive, thus would be a question of fact.

Williams v. Hempen, 396 So. 2d 999 (La. App. 1981), illustrates a convergence of theories of liability which are most favorable to the plaintiff-consumer. Although technically *Williams* was not a products liability case (in the strict sense that there was no sale involved) the court applied the liberal *Marquez* definition of defectiveness, i.e., "unusual occurrence," to find that a dumpster which "overturned for no apparent reason" was defective under article 2317. *Id.* at 1002. The lessee of the dumpster was found to have "custody at the time of the damage." *Id.* at 1001 (citing Trahan v. Liberty Mut. Ins. Co., 348 So. 2d 205 (La. App. 1977), *writ refused*, 351 So. 2d 163 (La. 1977)). Therefore the defendant was found liable.

E. The Retreat

During this ten-year period, the accomplishments of Louisiana courts in the products area not only were many, but distinguished and sophisticated. The broad concept of delictual fault premised upon considerations of public policy articulated in article 2315 of the Civil Code had been applied cogently and lucidly to this evolving area of litigation. The courts had minimized the distinction between economic loss and personal injury and furthered the *Greenman* rationale even more by contemplating the application of article 2317 and its custodial liability concept to products litigation. More importantly, the orientation toward consumer protection had been solidified considerably by minimizing, if not eliminating, the troublesome and controversial requirement of proving "unreasonable dangerousness," eventually applying this reasoning to proof of "defectiveness." Both of these requirements were established by the occurrence of harm, making the applicable rule totally estranged from a negligence formulation and grounding determinations on a pure strict liability theory.

Many of these advances, however, seem to have been put in jeopardy, if not actually reversed, by the recent Louisiana Supreme Court decision in *Kent v. Gulf States Utilities Company*.[159] There, a young worker was killed when a 30-foot aluminum pole he was using to perform construction tasks came into contact with uninsulated high voltage distribution lines located above the construction site.[160] At the trial level, the jury returned a $3,000,000 verdict against Gulf States Utilities, the owner of the overhead lines, and two executive officers of the victim's employer. Since the plaintiff had reached a settlement with the latter defendants, the trial court entered a judgment against Gulf States Utilities in the amount of $1,000,000.[161] On appeal, the court reversed the judgment against Gulf States Utilities, reasoning the victim's conduct barred his recovery. The decedent, Mr. Kent, was 18 years old and had just begun his employment with Barber Brothers Contracting Company at the time of his accident. His task on this project was to make antihydroplaning grooves in the surface of the highway by pulling a metal rake, approximately 5 feet wide, across the surface of freshly poured concrete. The uninsulated wires were some 25 feet above

159. 418 So. 2d 493 (La. 1982).
160. *Id.* at 495.
161. *Id.*

the construction site and everyone on the construction site, including the victim, was aware of them. Because other workers needed the walk bench bridge (a structure on wheels which straddled the slab) which Kent and his co-worker, Jenkins, were using to transfer the rake from one side of the poured concrete to the other, they began to "flip-flop" the rake by hand. They used this method until they came near the overhead lines; at this juncture, they walked away from the lines before flipping the rake.[162] Kent and Jenkins used this "flip-flop" method for about two hours in full view of their supervisors. Just before the accident, Smith, a cement finisher, warned Kent of the danger presented by the wires; Kent indicated that he was aware of them and joked with Smith about them. Jenkins testified that Kent suddenly "went up in the air" with the rake handle.[163] Kent was electrocuted as a result of the contract of the metal rake and the wires.

Before the Louisiana Supreme Court, counsel for the plaintiff advanced three arguments upon which to establish the liability of Gulf States for the decedent's injury.[164] First, Gulf States had been negligent in failing to take reasonable steps to guard against this type of foreseeable injury. Second, under article 2317, Gulf States should be held strictly liable for the injury since it was the custodian of the thing which caused the injury. Third, the defendant also could be held strictly liable because it was engaged in an ultrahazardous activity.

In its majority opinion, the court systematically rejected all these arguments and reaffirmed the holding of the appellate court. The breadth of the court's reasoning makes evident that it was taking the *Kent* facts as an opportunity to reorient the application of delictual liability principles in the Civil Code. At the outset of its analysis, the court focused upon the concept of custodial liability in article 2317 and the expansive *Loescher* interpretation of that form of strict liability. Implicitly emphasizing a "floodgates of litigation" idea, the court stated:

> Because the term "thing" encompasses a virtually unlimited range of subject matter, the *Loescher* decision has since been cited by innumerable litigants seeking to avoid the necessity of proving personal negligence in tort cases. The distinction be-

162. *Id.* at 496.
163. *Id.*
164. *Id.*

> tween negligence cases and strict liability cases (such as *Loescher*) has largely been either misunderstood or completely disregarded. It is therefore appropriate for this court, in determining the applicability of Art. 2317, to review first the distinguishing effect of applying strict liability under that article.[165]

The court's subsequent elaboration certainly clarified any misunderstanding that may have existed as to the role of strict liability under article 2317. However, in doing so, the court essentially eliminated any meaingful distinction between negligence and strict liability. In its assessment, the court propounded the view that a presumption of the defendant's knowledge of the risks of a thing is the key difference between a cause of action in negligence and one in strict liability.[166] Under principles of strict liability, the absolute character of the duty arises as to the discovery of potential risks and not as to the harmful effects of such risks—the actionable character of the latter remains a question of reasonableness and foreseeability:

> In a strict liability case against the same owner, the claimant is relieved only of proving that the owner knew or should have known of the risk involved. The claimant must still prove that under the circumstances the thing presented an unreasonable risk of harm which resulted in the damage (or must prove, as some decisions have characterized this element of proof, that the thing was defective). The resulting liability is strict in the sense that the owner's duty to protect against injurious consequences resulting from the risk does not depend on actual or constructive knowledge of the risk, the factor which usually gives rise to a duty under negligence concepts. *Under strict liability concepts, the mere fact of the owner's relationship with and responsibility for the damage-causing thing gives rise to an absolute duty to discover the risks presented by the thing in custody*. If the owner breaches that absolute duty to discover, he is presumed to have discovered any risks presented by the thing in custody, and the owner accordingly will be held liable for failing to take steps to prevent injury resulting because the thing in his custody presented an unreasonable risk of injury to another.
>
> Thus, while the basis for determining the existence of the duty (to take reasonable steps to prevent injury as a result of the thing's presenting an unreasonable risk of harm) is different in C.C. Art. 2317 strict liability cases and in ordinary negligence cases, the duty which arises is the same. The extent of the duty

165. *Id.* at 497.
166. *Id.*

> (and the resulting degree of care necessary to fulfill the duty) depends upon the particular facts and circumstances of each case.[167]

By associating defectiveness completely with unreasonable risk creation and explicitly making the latter a negligence determination, the court arguably reversed all of the strict liability and products liability decisional law which preceded *Kent*. The express language of article 2317 does not mention the notion of unreasonable risk creation; rather, it states that: "*We are responsible*, not only for the damages occasioned by our own act, but for that which is caused by the act of . . . the things which we have in our custody."[168] The language of the code creates a classical rule of strict liability, *i.e.*, liability for personal injury and property damage is predicated upon the occurrence of harm plus causation without reference to negligence.

By adapting the liability principle of article 2317 to the language of section 402A and misconstruing the implications of the "unreasonably dangerous" language contained in that section, *Kent* converted a strict rule of liability into a full-blown negligence determination. The presumption of knowledge-of-the-risks analysis fails to present a meaningful distinction between negligence and strict liability: an allegedly negligent actor always will be deemed to have had knowledge of the risks and dangers if his conduct is found to be unreasonable—the essence of the determination is that he should have known. If he did not actually know and, therefore, negligently disregarded the risks, he is liable anyway for breaching his duty to not create substantial and unwarranted risk of harm. No matter how subtle, the cloud of analytical verbiage cannot disguise the fact that the absolute duty as to knowledge of risks is an empty requirement.

In *Kent* the court anchors the concept of custodial liability in negligence principles rather than mere causation. As the court itself notes, the implications of such an analysis, especially its complete equating of defectiveness with an unreasonable risk, for strict products liability are considerable:

> In products liability cases, the manufacturer is presumed to know the dangerous propensities of its product and is strictly liable for injuries resulting from the product's unreasonable risk of

167. *Id.* (italics in original, footnote omitted).

168. LA. CIV. CODE ANN. art. 2317 (italics added).

> injury in normal use. The claimant nevertheless must prove that the product presented an unreasonable risk of injury in normal use (regardless of the manufacturer's knowledge), *thus in effect proving the manufacturer was negligent in placing the product in commerce with (presumed) knowledge of the danger*.[169]

As applied to the facts in *Kent*, the foregoing analysis yields the following results: the uninsulated character of the lines created a serious risk of harm of which the defendant was aware. Since there is no need to presume knowledge here, the question becomes one of the reasonableness of the defendant's conduct in taking precautions to protect others against the risk of harm. The court chracterizes this analysis of the issues as "essentially a negligence determination," noting that article 2317's "imposition of an absolute duty to discover the risks presented by the thing in its custody is not helpful to the determination of Gulf States' liability in this case."[170] It is submitted that the absolute duty to discover risks also would be irrelevant in any other custodial liability case. Under this reasoning, as in the products context, these cases would become negligence cases and not strict liability determinations. The presumptive absolute-duty-of-knowledge analysis is totally circuitous and meaningless in terms of strict liability. The existence of a risk only materializes in legal liability terms upon the occurrence of an injury; once an injury arises, the question of duty in a negligence case addresses the problem of the reasonable character of the injurious conduct. It is immaterial whether a duty of knowledge as to risk has been breached. Much like the celebrated notion of "negligence in the air," the modified notion of article 2317 custodial liability advanced by *Kent* is an absolute duty that is also in the air and equally unactionable. Its implications for strict products liability in Louisiana are evident and dire.

The court also dismissed the plaintiff's contention that Gulf States should be held liable on an ultrahazardous activity theory. The court correctly perceived that the classical form of strict liability articulated in *Rylands v. Fletcher*[171] and subsequent cases differs to some extent from custodial liability and products liability.[172] It is a form of strict liability which was created to deal with socially-beneficial activities which presented a substantial degree of risk no mat-

169. 418 So. 2d at 498 n.6 (italics in original).
170. *Id.* at 498.
171. 3 L.R.-E. & I. App. 330, [1861-1873] All E.R. 1, 19 L.T.R. (n.s.) 220 (1868).
172. 418 So. 2d at 501 (Marcus, J., concurring).

ter how careful an actor might be in exercising these activities, e.g., pile driving, storage of toxic gas, blasting with explosives, and the like.[173] The court further opined that this form of strict liability is "an *absolute* liability (as contrasted to the strict liability . . .), which virtually makes the enterpriser an insurer."[174] Under this theory, "liability is imposed as a matter of policy when harm results from the risks inherent in the nature of the activity"[175] no matter how careful the enterpriser may have been in attempting to protect others from the inherent risk of the activity.

Applying this analysis to the facts in *Kent*, the court reasoned that:

> [t]he transmission of electricity over isolated high tension power lines is an everyday occurrence in every parish in this state and can be done without a high degree of risk of injury. And when the activity results in injury, it is almost always because of substandard conduct on the part of either the utility, the victim or a third party.
>
> . . . .
>
> We accordingly conclude that Gulf States should not be held absolutely liable, as an enterpriser engaged in ultrahazardous activities, when its activity of transmitting electricity is a cause-in-fact of injury to another, unless fault was proved on Gulf States' part.[176]

However one might assess the court's application of the ultrahazardous activity form of strict liability to the *Kent* facts (and one could certainly criticize the manner in which the court classifies the activity in question and its use of a "frequency" rationale in conjunction with risk creation to arrive at that assessment), one must scrutinize the court's segregation of the various forms of strict liability and the implications of the distinctions it establishes. Although custodial liability and products liability are not exact replicas of the *Rylands* variety of strict liability, they nonetheless remain forms of or are intended to function as no-fault schemes of liability. In their intended form, they give rise to absolute duties in the sense that the duty they impose is one of guaranteeing that certain results do not occur. Similar to the *Rylands* type of liability, they have been im-

173. *Id.*; *Accord* W. PROSSER, THE LAW OF TORTS § 87 (4th ed. 1971).

174. 418 So. 2d at 498 (italics in original).

175. *Id.* at 498.

176. *Id.* at 498-99.

posed as a matter of policy and ultimately make the obligor an insurer of safety in regard to certain parties.

For example, the *Greenman* decision justified the application of a strict rule in the products liability area in terms of public policy, in the name of the "powerless consumer." There, the court felt (and ultimately the drafters of section 402A of the *Restatement* agreed) that the risk creation stemming from products in a highly technological, mass-producing, commercial society was equivalent to ultrahazardousness, that the consumer could not guard against harmful defects and had substantial evidentiary problems in making his case in negligence, and that the manufacturer was strategically located to safeguard the consumer and to pay for the cost of inevitable injury. Rather than establish negligence, the *Greenman-Section 402A* plaintiff was required to prove defectiveness and that the latter produced his injury. The *Rylands* plaintiff had the burden of convincing the court that the activity which caused his injury fell into the category of ultrahazardous activities.

These theories of absolute liability are separable from one another only in the sense that they emerged at different times and in response to different circumstances. The strict rule in products liability is an extension of the original *Rylands* principle to a different state of society. The duty and remedy provided are no less absolute or clear in their direction.

Custodial liability, a vintage concept in the civil law, is no less unequivocal in its statement of policy and in its imposition of a duty. The custodian of a thing is placed in much the same position as the manufacturer of products. In the words of the *Kent* court,

> The theory is that the owner-guardian is regarded as the risk-creator because of his relationship with the thing which presents the risk. As between him and the faultless victim injured as a result of the risk, the owner-guardian theoretically should bear the loss, because he was in the best position to discover the risk and to prevent the injury.[177]

Although there are a variety of circumstances in which a strict theory of liability may be applied, that fact does not mean that there are greater and lesser forms of absolute duties. The circumstances—things, products, ultrahazardous activities—may differ, but the essence of the theory (if it does apply) remains intact. One cannot speak of no-fault liability in name and apply principles of fault lia-

177. *Id.* at 497 n.5.

bility in practice, grounding the eventual result in both propositions simultaneously. These principles of liability are, by definition, mutually exclusive.

Having excluded other theories of liability, the *Kent* court resolved the case in terms of negligence:

> Gulf States' conduct at issue in this case is its decision not to take additional precautions (such as installing rubber hose in the area of construction) beyond the precaution of insulating its lines by isolation, which was done in the original construction of the lines. We find that conduct not to be unreasonable.[178]

What is abhorrent about *Kent* is not its result. As some of the concurring opinions illustrate, the court could have disposed of the case and reached the same result on other grounds (i.e., the failure to find a defect, as required by article 2317, in the wires, the ample evidence of victim fault). The unacceptable conceptual quality of the majority opinion, which is reinforced strongly by Justice Dennis' concurring opinion, resides in the unjustifiable dismembering of strict liability notions. Prior to *Kent*, Louisiana could boast of perhaps the most advanced and sophisticated products liability theory in the country. Products liability theory had been patiently elaborated by the courts over a decade, responded perfectly to the *Greenman* reasoning, and—most importantly—was firmly grounded in the substance of the existing code provisions. It corresponded well with, for example, the well-settled view that legal fault under article 2315 transcends negligence and involves public policy considerations. Article 2317 seemed tailor-made to legitimize an absolute duty for things in commerce which turned out to be defective and produced injury. Substantial, admittedly consumer-minded, advances had been achieved in defining defectiveness and the measure of damages. In what must have been an attempt to respond to what is perceived as a "products liability" crisis, the *Kent* court arguably "gutted" those developments and redefined the entire orientation of the delictual liability provisions in the Civil Code. Looking at the problem as an all-or-nothing proposition, it invented a new and meaningless duty of absolute knowledge as to risk and restated the strict liability principle unequivocally in negligence language.

The English courts, in recent decisions, have tended to disguise strict liability results behind the cloak of presumptions of negligence, in light of the legislative refusal to move ahead with a strict

178. *Id.* at 500.

rule in products. By contrast, the courts in Louisiana have gone from incorporating *Greenman* and section 402A in their decisional law—creating the most advanced domestic expression of Strict Liability—to arguably abandoning strict liability altogether by exclusively focusing upon an unreasonable risk analysis. It is in this sense that products liability, nationally and internationally, remains a frontier area of legal analysis. The *Kent* holding, in fact, may precipitate a legislative reassessment of Louisiana products liability law.

F. Possible Legislative Reconsideration

Responding to what it perceived to be "recent [possibly detrimental] changes in product liability laws" and "the crisis reported to be facing manufacturers and sellers,"[179] the Louisiana legislature formally requested the State Law Institute to study the pre-*Kent* decisional law on products liability and submit recommendations for possible change.[180] In its request to the Institute, the legislature expressed concern that the "explosion in the numbers of product liability suits is seriously affecting the production of goods,"[181] engendering increased costs and inflation due to higher insurance premiums.[182] In October 1982, a preliminary report was presented to the Law Institute Council, suggesting that the dilemma be resolved by "strik[ing] a reasonable balance between requiring compensation by the manufacturer to victims of product injury, and treating the manufacturer with basic fairness."[183] A critical examination of the preliminary report, however, reveals that the proposed "balance" would be heavily weighted in favor of manufacturers.

If enacted the recommendations would consolidate "all product liability recovery theories into one," and preempt any conflicting statutes.[184] While article 2315 ostensibly would remain the doctrinal basis of delictual liability, manufacturer "fault" would be defined

179. La. S. Con. Res. 135, 1979 Reg. Sess. 2 [hereinafter cited as RESOLUTION No. 135].

180. *Id.*

181. *Id.* at 1. The Resolution did not suggest any factual support for this conclusion.

182. *Id.* The Resolution cited as an example a small manufacturer's rising insurance premiums, which purportedly increased from $425 per year in 1973 to over $37,000 per year in 1978. *Id.*

183. LOUISIANA STATE LAW INSTITUTE, PRELIMINARY REPORT TO THE COUNCIL OF THE LAW INSTITUTE BY THE COMMITTEE FOR REVISION OF THE LAW OF PRODUCTS LIABILITY 2 (1982) [hereinafter cited as PRELIMINARY REPORT].

184. *Id.* at 4.

exclusively by the proposed Act.[185] Accordingly, products liability law would be divorced from the regulatory framework of the Code.

A separate body of law applying to products litigation may be desirable; however, the report falls short of achieving even this end. The proposed Act would not include any claims involving damages to the product itself or for economic losses arising therefrom.[186] The contractual provisions for purchaser remedies under the redhibition articles would continue to govern such claims. Only consequential damages to persons or other property not involving the product would fall within the ambit of the Act. The purpose of drawing this distinction, allegedly, is to eliminate the overlap between the contractual and delictual provisions of the Code.[187] More particularly, the report endeavors to limit recovery of attorney's fees to cases brought by a purchaser for breach of contract. Unfortunately, it leaves unclear whether such a purchaser who has a tort claim in addition to his contract claim would need to bring two separate suits. If the objective of the proposed Act is to eliminate the award of attorney's fees in products cases brought under a tort theory, separate suits seem inevitable. Otherwise, either an injured purchaser could effectively circumvent the statute by claiming that the fees related only to the contract portion of the suit, or a court would be forced to apportion the fees. Separate suits would be both a hollow solution to the problem of inequitable recovery of attorney's fees and a spur to an increase in the numbers of cases. If the concern is that it is unfair that only purchasers, and not other claimants, can recover attorney's fees, perhaps the extension of recovery to nonpurchasers would be the more equitable and practical solution. In its request, the legislature noted that there had been a 438% increase in the number of product suits filed in Louisiana between 1974 and 1978.[188] If the proposal is enacted and separate suits for tort damage and contract damage are required, the number of suits in this area might double.

It is evident that proposed changes in the elements of a products liability cause of action would have a considerable impact on the plaintiff-consumer's right to recover. Although the proposal might clarify otherwise nebulous doctrines, some attention must be paid to the injured consumer's right to judicial reparation. Under

185. *Id.* at 4-5.
186. *Id.* at 6.
187. *Id.* at 5-6.
188. RESOLUTION NO. 135, *supra* note 179, at 1.

the proposal, a claimant would first have to prove that the defendant manufactured the product or actually exercised control over the manufacturing process.[189] Under the existing law, it is sufficient for a victim to show that the seller had the "capacity" to control the manufacturing of a product.[190] At first blush, the proposed provision appears reasonable; only a seller who actually designed or otherwise influenced the product should be attributed the status of a manufacturer. Such a requirement, however, seems to place an inordinate burden of proof upon a claimant who may have a difficult time gaining the appropriate information.

Provided the claimant satisfies the court that the defendant is the proper party, he then must prove that the product was unreasonably dangerous. The proposed Act restricts the manufacturer's duty to provide a product free from unreasonable danger to four areas: 1) construction/composition of the product; 2) design of the product; 3) warnings or instructions for the product; and 4) express warranties made concerning the product.[191] Strict liability for injuries occasioned by the product would only lie in cases involving construction defects or erroneous express warranties.[192] All other cases would be decided on the basis of negligence.[193]

For a product to be found defective as to construction or composition, the variation in a manufacturer's specifications must be "material" and that particular variation must be the cause of the claimant's harm.[194] Broad leeway is afforded a court in deciding materiality and no guidance is offered regarding appropriate standards. Further, the claimant is placed in the untenable position of having to prove a technical aberration that, in all probability, was not apparent to the manufacturer himself.

The victim who claims a product caused harm because of a design defect must establish that the likelihood or gravity of his harm or similar harm outweighs *both* the burden on a manufacturer to design a safer product and the adverse effect of alternative designs on the usefulness of the product.[195] A manufacturer could successfully defend against such a claim by showing that the alternative

189. *Id.* at 7.
190. *Id.* at 8. *See* Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978).
191. PRELIMINARY REPORT, *supra* note 183, at 9.
192. *Id.* at 14, 19.
193. *Id.* at 14-18.
194. *Id.* at 14.
195. *Id.* at 15.

design was not feasible, based upon either "economic practicality or existing technological knowledge," to produce a safer product.[196]

Also, the report recommends the adoption of a "consumer-expectancy test" to etablish the extent of a manufacturer's duty to warn.[197] Accordingly, if the dangers associated with a product are greater than those "which would be contemplated by an ordinary person,"[198] the manufacturer must take adequate steps to communicate those dangers to the actual user of the product.[199] While this formulation of the duty to warn is in line with decisional law, the report's characterization of the measure of a manufacturer's duty to *discover* dangers is ambiguous:

> No concept of "reasonableness" is included with regard to ascertainability of the danger from a technological standpoint although the precise level of the manufacturer's overall duty to discover dangers associated with the product is significantly short of being one of strict liability, it is also considerably distant from a negligence standard.[200]

The most learned jurist would have difficulty extracting a workable standard from such obfuscated language. Courts would be provided with legislation that is less precise than the standards under existing case law.

Regarding the manufacturer's duty to refrain from extending erroneous express warranties, the proposal provides a remedy to a victim if the "harm was induced by reliance by claimant or another upon the erroneous warranty."[201] Accordingly, the duty would be expanded to encompass situations in which the claimant himself did not rely on the warranty, but another person, such as the claimant's employer or parent, did. Such an amplification of existing law comports with commercial realities and present notions of consumer protection.

Once the claimant has established that a manufacturer has produced an unreasonably dangerous product, he must then prove that his harm was proximately caused by the dangerous aspects of the product and that the product had been neither misused nor altered. The proposal eliminates any reference to "normal use" suggested by

196. *Id.* The proposal refers to this as the "state of the art" defense.
197. *Id.* at 16.
198. *Id.* at 17.
199. *Id.* at 18.
200. *Id.* at 17.
201. *Id.* at 19.

the *Weber* court[202] on the ground that the courts indiscriminately applied the concept both to the manner of use of the product at the time of the accident *and* post-manufacture changes which substantially modified the product itself.[203] While the report explicitly distinguishes the concepts of "misuse" and "alteration or modification," the burden in both instances is upon the claimant to negate their applicability.[204] The drafters of the report rationalize this reallocation of the burden of proof:

> Since the evidence relating to "misuse" and "alteration or modification" is ordinarily more accessible to claimant than to the manufacturer, and since with increasing frequency the manufacturer's first notice of the accident is when suit is filed and even then the product may be lost or otherwise no longer available, this burden was felt properly imposed on claimant.[205]

One wonders, however, why the claimant is better suited to sustain this burden if the injurious product is destroyed in the accident. It seems that this reallocation of the burden of proof could foreclose recovery in cases most deserving relief.

If the claimant is successful, his damages may be reduced because of "any fault of the claimant which was the proximate cause of his injury, including ordinary negligence and assumption of the risk."[206] Existing jurisprudence only recognized assumption of risk as a defense upon proof of which a claimant's recovery was totally denied.[207] The potential effect of this provision would be to allow a limited recovery to a claimant who is found to have assumed the risk of harm while restricting the recovery of the "negligent" victim. The report claims that this provision is "in accord with the current trend of the American jurisprudence" as well as recent Louisiana decisions.[208]

V. CONCLUSION

What conclusions can be derived from the study of these three different responses to the question of liability for harm resulting

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202. 250 So. 2d at 755.

203. PRELIMINARY REPORT, *supra* note 183, at 10.

204. *Id.* at 11.

205. *Id.* at 10-11.

206. *Id.* at 22.

207. *Id.*

208. *Id.* The report cites Dorry v. LaFleur, 399 So. 2d 559 (La. 1981) as beginning the "trend in Louisiana as to non-commercial defendants." *Id.* at 27.

from the use of products? What has been achieved in terms of the doctrinal integrity of a body of law still in evolution? From the perspective of the advocacy of consumer interests, English law proposes the least satisfactory doctrinal response, holding steadfastly to the application of fault through conventional means in this area. Even the goal of the harmonization of community law and its salutory effects do not appear to have attenuated the English view that the determination of fault is a necessary prerequisite to the imposition of legal liability. This reasoning applies even though contemporary English courts seem to be manipulating the doctrine of *res ipsa loquitur* to arrive at strict liability results—the majority response to products liability in *Escola*. Fault-based determinations—in the Holmes and Cardozo sense of legal fault as an exceptional finding designed to punish wrongful conduct—seem to be at the heart of most of the traditional English tort liability holdings.

The application of doctrine in this way stems in part, at least from the particular features of English society; unlike American courts, English courts do not have to contend with an unstated social insurance factor. They have no need to give the compensatory function of tort law primacy over its retributive aim since the existing social welfare system already provides much of the necessary compensation. Moreover, products litigation accounts for a statistically insignificant portion of personal injury litigation in England; a fraction of 1% of the total cases. The question of whether England should lend its support to the EEC Draft Directive, then, becomes not an issue of whether strict liability, however defined, is an appropriate liability calculus in products litigation, but rather an issue of national sovereignty, an entirely different consideration which goes beyond the confines of the usual debate concerning products liability.

United States' jurisprudence has moulded the liberal response to products liability problems. Under both the decisional law and the *Restatement*, the critical question becomes one of how far the advances should be taken? What sort of strict liability is envisaged in the products area? Are we speaking merely about establishing a defect and proving causation or is the burden more extensive, one which includes some element of unreasonableness and, therefore, fault in a traditional sense? These are preliminary questions which have yet to be resolved conclusively and which will color the determination of subsequent and more technical questions such as tech-

nological feasibility, the useful safe life notion, compliance with government standards, unavoidably dangerous products, and the effect of manufacturer's warnings. It seems that what the English have accomplished through their social welfare system while maintaining a purist position on legal doctrine has yet to be achieved in the United States.

The voice of consumer protection, it seems, was heard for a time most effectively in Louisiana where social policy imperatives underlying products litigation combined with a uniquely responsive judicial doctrine anchored in civil law delictual notions. No other United States' common law or other civilian jurisdiction had taken the plight of the consumer so seriously. After the incorporation of the common law 402A standard into Louisiana law in the seminal *Weber* decision, the courts progressively refined that standard into what it was originally intended to say: the liability of a manufacturer was triggered once his product, due to its defectiveness, caused harm to a user of that product. Fault, in the sense of unreasonable conduct or unreasonable dangerousness, was not a consideration; rather, the applicable standard was fault in the sense of Civil Code article 2315—legal liability imposed for reasons of social policy.

Moreover, Louisiana jurisprudence interpreted the elements of the strict liability rule in such a fashion as to foster (rather than defeat) its underlying social policy. The *Marquez-Hunt* definition of defectiveness as an unusual occurrence left the injured plaintiff essentially with the sole burden of proving causation. While the *Sealy-Santor* debate was still raging in most United States' jurisdictions, the *Philippe* case abolished any distinction between tort and contract remedies, thereby further alleviating the plaintiff's evidentiary burden. The Louisiana courts' liberal perception of products liability indeed was exemplary for advocates of consumer protection. The motivation for such a stance was difficult to isolate precisely. It could have arisen from the provisions of the Louisiana Civil Code on redhibition, which strongly imply a consumer protection rationale, and from the general protection the Civil Code affords to disadvantaged persons, such as minors, through the concept of lésion.

Be that as it may, the *Kent* decision portends rather ominously the continued viability of this decisional law. Moreover, proposals have been made to reduce the jurisprudential interpretations of ex-

isting code provisons into a comprehensive "Louisiana Product Liability Act." The express purpose of this suggested legislation is:

> to strike a reasonable balance between requiring compensation by the manufacturer to victims of product injury, and treating the manufacturer with basic fairness, taking into account that the overall best interests of society at large are not served by making the tort-litigation system the means for addressing injuries and damage caused by all product hazards.[209]

Such a proposal would reintegrate Louisiana law into a more skeptical mainstream by having it adopt a reticent posture in the face of a strict products liability rule and robbing it of its unique experimental thrust, all in the name of equity and reasonableness to large commercial concerns. Of course, any limitation of liability will lead to better predictability (if that is the social policy objective of products liability law). Moreover, it seems that a rule of limited liability will create a lesser incentive to make safe products than a rule of absolute liability.

As a final note in this comparative assessment, one would hope that, given the unique and original stature of the Louisiana decisional law, any proposed legislation would take into account more directly the innovativeness of the jurisprudence and not sound a retreat from the type of doctrinal experimentation that is unparalleled in any other jurisdiction.

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209. PRELIMINARY REPORT, *supra* note 183, at 2.