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THE UNINTENDED REVOLUTION IN PRODUCT LIABILITY LAW

Richard A. Epstein*

There is an ever greater recognition today that tort law writ large is a form of government regulation, best understood as part of some overall system of social control. Tort sanctions and criminal fines are often substitutes for each other, and public prohibitions and commands are substitutes for private injunctions. Everything, in a sense, is regarded as connected to everything else. Our watchword calls for a comprehensive evaluation of tort law, which thus enlarges and complicates the task of legal reform.

The proposition that the tort law operates as an integral part of a larger system has not been lost on common law judges, who, on some occasions at least, have been reluctant to impose important structural changes on the legal system by conscious judicial choice. Judge Mildred Lilly, writing a generation ago in the justly celebrated case of Hammontree v. Jenner, illustrates the cautious attitude. She had been asked to overturn the settled common law rule that excused a defendant for harms inflicted on strangers when the defendant had been overtaken by a sudden and unanticipated epileptic seizure while driving his car. Although she noted the “logic” of plaintiff’s position, Judge Lilly refused to upset the jury verdict in favor of the defendant by breaking new legal ground:

Appellants seek to have this court override the established law of this state which is dispositive of the issue before us as outmoded in today's social and economic structure, particularly in the light of the now recognized principles imposing liability upon the manufacturer, retailer and all distributive and vending elements and activi--

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A different version of this paper (with a discussion of the European Community Directive on Product Liability) was presented at a Conference on Product Liability held at Tel-Aviv University, and will appear in the Tel-Aviv University Studies in Law. I would also like to thank William Landes and Richard Posner for comments on an earlier draft of this paper.

1 20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971). The case has some currency today because it is featured prominently in at least two casebooks on the subject. Thus it is the first case in M. Franklin & R. Rabin, Tort Law and Alternatives—Cases and Materials 3 (4th ed. 1987), and R. Epstein, C. Gregory, and H. Kalven, Jr., Cases and Materials in the Law of Torts 115 (4th ed. 1984). The title of the Franklin and Rabin casebook makes the point of the first paragraph of this article.
ties which bring a product to the consumer to his injury.²

Judge Lilly then cited to Justice Traynor's classic concurring opinion in Escola v. Coca Cola Bottling Co.,³ and noted that "it is not enough to simply say, as do appellants, that insurance carriers should be the ones to bear the cost of injuries to innocent victims on a strict liability basis."⁴ She then advanced her clinching argument against judicial innovation:

To invoke a rule of strict liability on users of the streets and highways, however, without also establishing in substantial detail how the new rule should operate would only contribute confusion to the automobile accident problem. Settlement and claims adjustment procedures would become chaotic until the new rules were worked out on a case-by-case basis, and the hardships of delayed compensation would be seriously intensified. Only the Legislature, if it deems it wise to do so, can avoid such difficulties by enacting a comprehensive plan for the compensation of automobile accident victims in place of or in addition to the law of negligence.⁵

Read a generation later, this passage contains an enormous amount of irony. Hammontree raised an issue of great intellectual curiosity—has the defendant afflicted with seizure done any act or any wrong? By the same token, it is an issue of small practical importance. The percentage of automobile accidents caused by seizures, heart attacks, and the like is tiny, not only in absolute terms, but also in comparison to those caused by teenagers on the highway.⁶ Any suggestion that the plaintiff's requested simplification of the law might either delay compensation or induce administrative confusion is quite off the mark. Removing the mental disability questions from the tort law would only serve to speed up the disposition of cases, enhance the recovery of injured plaintiffs, reduce the administrative costs of insurance companies, and bring the system back into line with the general practices of automobile insurance companies in disposing of routine claims.⁷ One can easily see why the introduction of an au-

² Hammontree, 20 Cal. App. 3d at 531, 97 Cal. Rptr. at 741.
⁴ Hammontree, 20 Cal. App. 3d at 532, 97 Cal. Rptr. at 742.
⁵ Id. at 532-33, 97 Cal. Rptr. at 742 (quoting Maloney v. Rath, 69 Cal. 2d 442, 453, 445 P.2d 513, 515, 71 Cal. Rptr. 897, 899 (1968).
⁶ The law is far clearer that there is no reduced standard of care for infants, at least in so far as they engage in driving, and probably in other activities licensed by the state as well. See, e.g., Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966); Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961).
⁷ In [insurance adjusters'] day-to-day work, the concern with liability is reduced to the question of whether either or both parties violated the rules of the road as expressed in common traffic laws. Taking the doctrine of negligence per se to an extreme doubtless unforeseen by the makers of the formal law, adjusters tend to
tomobile no-fault plan would require explicit legislation, but the strict liability rule for automobile accidents requested by the plaintiff clearly falls within the class of incremental, and in this instance, welcome common law changes.

But what about product liability law, which has been fashioned by judicial innovation? Here there are surely antecedent references to modern doctrines. As Professor Gary Schwartz has pointed out, strict liability has been around for a long time, there were early exceptions to the privity doctrine, individual plaintiffs have succeeded in many watershed cases, and the early commentators often took a favorable view toward expanded product liability. Nonetheless, the proof of the pudding here is in the eating. The question is not whether there are doctrinal hints of future legal changes. The ultimate impact of doctrine is measured by its influence on the frequency and severity of product liability actions, which have been massive, no matter the system of accounting. The precise doctrinal levers may be hard to identify and evaluate. But the increase in liability for defective products has been substantial, and it has been almost entirely the creature of judicial action. Yet there has been no considered legislative evaluation of these doctrinal changes, or of their influence on the innovation, distribution, and pricing of the many different kinds of products that are (or at least should be) brought to market. Quite the opposite, the general view today is probably that judicial decisions in product liability cases have made marginal improvements, and that legislation could only upset the delicate balance that courts have achieved. Thus, Dean Harvey Perlman has written recently:

[T]he incidents of uncertainty have been substantially reduced as the courts have used the traditional trial and error method of the common law to fashion a cohesive body of doctrine. The most a legislature could do now is to codify our current understanding in its incomplete form and thus prevent further fine tuning.

define a claim as one of liability or of no liability depending only on whether a rule was violated, regardless of the intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge.


10 Perlman, Products Liability Reform in Congress: An Issue of Federalism, 48 Ohio St. L.J. 503, 505 (1987). The early cases in the area typically refused to regard the expansion of tort liability as a legislative function, as in the "crashworthiness" or "second collision cases."
The juxtaposition of these two attitudes is quite remarkable. Today legislative action is thought necessary for minor changes in the law governing automobiles, but largely inappropriate for the fundamental rules of product liability. At the very least, we have lost any real sense of the appropriate distribution of power between courts and legislatures. In part, this article examines the relationship between judicial and legislative change in the product liability area in three separate ways. The first section details the shift from traditional to modern product liability law. That shift is highlighted by two separate developments. The first is the rejection of freedom of contract for judicial regulation in the product liability area, and the second is the change in the definition of product defects and the affirmative defenses that have been developed under the new judicial orientation. Notwithstanding the protestation of judges and commentators, this common law reform has not been incremental, but revolutionary. The second section traces the allocative and distributional consequences of the transformation in product liability law as it applies to both old and new products. The third section then uses the conclusions developed in the first section to explain why legislative reform of product liability law is so difficult to design conceptually and hints at some of the political obstacles to the enactment of any product liability reform legislation. The present rules of product liability law are both inefficient and unwelcome, but by the same token, they are also resistant to legislative or judicial modification, at least in the short run, and probably in the long run.

I. CHANGES IN DOCTRINE: HIGH STAKES POKER

A. A Judicial Revolution

As noted above, the common law transformation of product liability law has not been preceded or accompanied by any detailed examination of either its distributive or allocative consequences. All the major changes were introduced by common law decisions, without any empirical studies as to their consequences, and even without any armchair speculation as to their probable effects. Ironically, if the situation had been otherwise, the changes we have witnessed could never have come about. It is quite one thing for the exponent of Critical Legal Studies or the champion of state socialism to announce that

See, e.g., Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974). Note that in this instance, the legislature itself appears to have concurred. See 15 U.S.C. § 1397(c) (1982) which provides: “Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.”
the existing system of liability is woefully inadequate and that more
must be done to shepherd wayward plaintiffs into court. Such rad-
cial innovation would strike cautious judges and experienced practi-
tioners as lying outside the proper judicial role. The frontal assault
would be regarded not only as a criticism of the tort system, but also
as an attack on the very fundamental institutions of the American
political order—which, in a sense, it is. Cynicism will not work.
The radical transformation of product liability law has been regarded
as incremental reform—reform that enjoyed the support of the re-
spectable portions of the legal community. Whatever its effects, its
intention had been to improve the common law by gradual evolution.
On the surface, the development of product liability law followed the
model of common law adjudication that Edward Levi celebrated in
An Introduction to Legal Reasoning. Small anomalies in doctrine
can be ironed out; ancient principles, such as strict liability, can be
imported from one area into another; artificial barriers to recovery,
such as privity and notice requirements, can be removed in order to
insure that the traditional objectives of justice and fair play are
respected in product liability cases as in other substantive legal areas.
The defenders of the current system of product liability law stress its
continuity with past doctrines. Like Professor Schwartz, they do not
see any radical changes in the way in which liability is formed. “The
common law is not sterile or rigid and serves the best interests of
society by adapting standards of conduct and responsibility that fairly

12 There is a parallel in constitutional law that is worth mentioning here. The most radical
departures from prior doctrine are found in such critical cases as West Coast Hotel Co. v.
Parrish, 300 U.S. 379 (1937) (upholding a minimum wage law for women only) and National
Labor Relations Bd. v. Jones & Laughlin, 301 U.S. 1 (1937) (upholding National Labor Rela-
tions Act as regulation of interstate commerce and thus subject to federal regulation). These
opinions were written by Chief Justice Hughes, who counted among his credentials being a
Republican Governor of New York, a Republican presidential candidate, President of the
American Bar Association, and an all-round establishment figure. He had been twice ap-
pointed to the Supreme Court, first by Taft and then by Hoover. His decisions could legiti-
mate the changes in a way that no liberal judge could have brought about.
13 Thus, Senator Hollings expressed the minority view with regard to The Product Liabil-
ity Reform Act: “The Product Liability Reform Act is unwise Federal Legislation. It would
preempt 200 years of common law development in the State courts and legislatures without
sound statistical data or evidence to support a crisis in product liability.” S. Rep. No. 422,
supra note 9, at 104.
Note that demands for empirical and statistical validation are imposed on Congress, but
not on the state law courts, whose changes are portrayed as having taken place—increment-
tally—for 200 years.
14 E. Levi, An Introduction to Legal Reasoning 7-19 (1949). The model of common law
adjudication is also examined in B. Cardozo, The Nature of the Judicial Process (1921). Note
that Schwartz refers to the Levi book as a model of common law incrementalism. Schwartz,
supra note 8, at 796-98.
meet the emerging and developing needs of our time," 15 is how one federal circuit court described its role.

Professor John Wade, whose risk/utility formulas, in my view, 16 have injected massive and unwanted uncertainty into product liability law, has always seen himself as a responsible establishment figure and never as the restless outsider. Yet his own proposals in product liability law have had consequences that he never appreciated or desired. His article, On the Nature of Strict Tort Liability for Products 17 was written with an eye toward making sense out of the elusive distinction between negligence and strict liability. In it, Wade proposed that the way to understand the then prevailing consumer-expectation test of liability was "to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else." 18 This test works an enormous shift in the scope of product liability law because it suggests that a defendant is liable for the failure to know what no one else in the world knew or could have known, or, arguably, for the failure to incorporate a set of design improvements that were not available technically or economically at the time the product was developed. It was clear that Wade's formulation influenced courts in such cases as Beshada v. Johns-Manville Product Corporation, 19 which stated that knowledge at the time of trial, not of manufacture, was relevant in assessing product risk in asbestos cases. The rule that Wade proposes works reasonably well with construction defects. But in design and warning cases, one central issue is how the risks of loss should be distributed when there is imperfect—or even no—information about anticipated loss and severity. To assume that the manufacturer has perfect knowledge of the relevant risk is to beg just this question, and to drive the law into treating all cases of imperfect information as if the defendant had perfect information and the plaintiff had none. One consequence of the Wade test is to shift huge residual

15 Larsen v. General Motors, 391 F. 2d 495, 506 (8th Cir. 1968).
18 Id. at 834. The proposed parallel jury instruction read:
A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe.
Id. at 839-40. The brackets are Wade's insertions into this instruction. His subsequent emendation of his earlier views are found in Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. Rev. 734, 763 (1983) [hereinafter Wade, The Effect of Knowledge].
risks from defendants to plaintiffs, without any effort to explore the incentive or administrative costs associated with that solution. Yet, as Wade himself wrote a decade letter, he had no such grand intentions:

I now would be inclined to think that there is no longer any particular value in using the assumed-knowledge language. Its usefulness, I thought, was in explaining the concept of strict liability when it was new by clearly contrasting it with negligence in which the defendant's actual culpability in failing to learn of the dangerousness of the product had to be shown. It always had overtones of fiction, and, like all fictions, can create difficulties if taken literally.\footnote{Wade, The Effect of Knowledge, supra note 18, at 764.}

The inadvertent way in which product liability doctrine has grown up has hampered the task of intelligent assessment and reform. Even if we put aside the political obstacles to reform, there is an intellectual task of the first order that still has to be solved: someone has to indicate which changes in the law of product liability as it stood before, say, 1960 were critical and which were less important. This section addresses that question.

B. The Decline of Privity and of Freedom of Contract

The first distinctively “modern” development of product liability law was ushered in by \textit{MacPherson v. Buick Motor Co.},\footnote{217 N.Y. 382, 111 N.E. 1050 (1916).} where Judge Cardozo removed the privity limitation in negligence cases, and routinely allowed the ultimate purchaser of a product to sue the original manufacturer in negligence only. The effect of this decision was to treat the “remote” seller, as he was then known, as though he were in direct contractual privity with the plaintiff. Once in direct privity, the plaintiff was necessarily “foreseeable” and hence was owed a duty of care by the defendant under conventional substantive law. The ordinary negligence action thus followed as the night does the day.

In practice, the level of product liability litigation did not increase substantially on account of \textit{MacPherson}. One measure of the consequences of that case is the flat level of insurance premiums for product liability that held firm in the decades that followed. All through the 1940s and 1950s, premiums remained very low, whether measured in absolute dollars or percentage of insurance sold. In some instances, product liability insurance was quite literally given away, as an added inducement to get more substantial lines of business, such as general liability, premise liability or workers' compensation programs. The simplest explanation for the stable condition of product liability
insurance premiums is probably the best. While plaintiffs could freely sue, their recovery was effectively hedged in by a broad range of substantive requirements that survived the demise of privity. Negligence itself could be difficult on occasion to prove, even with res ipsa loquitur; the causal connection between defendant and plaintiff had to be close—and most importantly, the conception of product defect was quite narrow, and the scope of defenses based upon plaintiff misconduct or assumption of risk was very broad. Several restrictive doctrines operating in tandem could do most of the work of the single privity limitation—which, it should be added, was far from watertight even before MacPherson.22 The earlier law had allowed some suits against manufacturers. MacPherson allowed a few more. Recasting the prior exceptions into a new rule was a conceptual tour de force, which changed the outcome in some small percentage of cases, but did not amount to any sea change in the law.

The first major shifts in received doctrine after MacPherson occurred in two cases decided in the early 1960s, Henningsen v. Bloomfield Motors23 and Greenman v. Yuba Power Products Co.24 These two cases stood for two propositions that are closely entwined historically, but nonetheless analytically separable: the rejection of freedom of contract and the adoption of strict liability (or implied warranty) in torts cases.

First, both these cases contain an explicit attack on, and rejection of, the principle of freedom of contract as it applies to product-related injuries. In Henningsen, the conclusion followed a detailed discussion about product warranties and the limitations on recovery that they contained. Heavily influenced by the "contract of adhesion" writing that dominated academic circles in the 1940s and 1950s,25 Henningsen concluded that private limitations on warranties served no useful

22 See, e.g., Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903). In fact, the difference in practice between Huset and MacPherson was, I believe, quite small. The only difference in outcome concerned those products that were imminently dangerous (e.g., defective car wheels) but not inherently so (e.g., poisons). Under Huset, the plaintiff could recover for imminently dangerous products only if the defendant knew of the defect in the product when marketed. Under MacPherson, recovery for this class of defect could occur on the same conditions as that for products inherently dangerous. On this point, MacPherson marked a small improvement and expansion over the earlier law. I have said a kind word for the general approach of Huset in Epstein, Product Liability as an Insurance Market, 14 J. Legal Stud. 645 (1985). See also, Schwartz, supra note 8, at 797.

social purpose, and were therefore an attempt by manufacturers to distance themselves from the harmful consequences of the defective products they had placed into the stream of commerce. The analysis was in accordance with the dominant learning of the time, which, in retrospect, is strikingly incomplete. The court focused solely upon the effects of the warranty upon recovery, given that the injury had occurred. At no point did the court ask how warranties could reduce the level of cross-subsidization across consumers, control against the problems of consumer moral hazard, or allow consumers to unbundle their purchases of insurance from that of automobiles. These are all important constraints upon the use of warranties in consumer contexts, and there is no obvious reason why these concerns cease to be of real importance when the plaintiff's injury moves from product failure to personal injury or property damage. On the one hand, the large potential losses from property damage and personal injury suggest a greater role for contract provisions, not a smaller one. On the other hand, the frequency of product failure is likely to be higher than that of personal injuries. The relative expected importance of each type of loss is hard to determine in the abstract. Yet so long as each type of loss is important, the contract approach—although not necessarily the identical contract terms—seems sensible.

All these complications were not understood. Instead, firms were potential villains, who had to be checked. Consumers were virtuous, and had to be protected. The standard economic assumption that contracts work ex ante for the mutual benefit of both sides was never mentioned, let alone examined. Sales were regarded as impositions upon purchasers, who themselves were unable to take effective precautions against loss. The strict liability rules, which make sense in stranger cases, were carried over without question to this branch of the law.

*Henningsen* established an instant judicial consensus. Just two years later in *Greenman*, Justice Traynor could confidently say:

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.

This sentence captures perfectly the dominant view of the law today.

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26 See, e.g., Priest, A Theory of the Consumer Warranty, 90 Yale L.J. 1297 (1981); Epstein, supra note 22, at 656-58.


28 *Greenman*, 59 Cal. 2d at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).
With contract rejected, the next question was what standard of liability the law should impose. The answer that was reached in both *Henningsen* and *Greenman* was strict liability. There is no question that this system has advantages over the alternative negligence view of the subject. One factual issue is removed from consideration at trial, and the defendant has a clearer sense of the net expenses that it could incur from the product in question. Indeed in the context of both *Henningsen* and *Greenman*, as well as the pre-Restatement (Second) of Torts cases, the strict liability rule looks quite effective. Both cases involved relatively new products with latent defects that failed in ordinary use. The strict liability standard thus did not appear to open any floodgates, or to pose any major threats in the underlying integrity of tort law. The relative want of any short-term institutional response shows that the immediate consequences of both cases were essentially benign.

Nonetheless, the anticontractual bias of both *Henningsen* and *Greenman* has proved to have devastating long-term consequences for the soundness of the product liability system. The system of product liability was stripped of its powers of self-correction. In essence, *Henningsen*, *Greenman*, and the Restatement (Second) of Torts reserved to the courts a legal monopoly to fashion the relevant terms and conditions on which all products should be sold in all relevant markets. The centralization of power has the same consequences here that it has in other areas of government regulation. It leads to a legal regime that is unresponsive to changes in demand or technology. The judicial standard form becomes a Procrustean bed into which all private transactions have to fit at their peril. It may well be the case that certain uniform provisions are appropriate for the full range of product liability cases. But if the optimal solution is one that cuts off the tort liability for consequential damages, then a judicial rule that renders tort liability nonwaivable will not only be uniform, but also wrong in every case. More likely, in practice there may be important variations in the kinds of terms that are appropriate for certain classes of products and defects. Strict liability on manufacturers for contamination of products sold in sealed containers may make good sense, but far more complex allocation of risks may be appropriate in design and warning cases, especially when third party intermediaries—employees or physicians—have special, and varying, roles to play. Yet here, too, all efforts to find better ways to sell and market products are cut off before they are born, so that new information about product liability terms cannot be generated by voluntary transactions. Today all doctrinal innovation has to come from the courts, where the technical
lags and information deficits are at their highest. Yet there is no alternative forum, save legislation, in which to override judgments when they have proved mistaken; indeed, there is no way to find out whether they are mistaken at all.

This anticontractual line of decisions took hold because of the fear of contracts of adhesion, or because of a sense that it is simply too costly for consumers to acquire the needed information about whether certain forms of disclaimers are efficient. Arguments of this sort have of late received strong endorsement, not only from the traditional believers of government regulation, but also from the ostensible supporters of market institutions within the law and economics tradition. In their recent book *The Economic Structure of Tort Law*, Professor Landes and Judge Posner argue that the current prohibitions against contracting out are justified in economic terms precisely because consumers are said to lack the information that is necessary to allow them to respond intelligently to the disclaimers. At one level, the argument is directed to any default provisions that might presumptively limit the scope of liability. In this context, there is little reason to doubt that they are correct, at least insofar as the questions at hand concern the traditional class of product defect—contaminated food cases, and exploding coke bottles, for example—where there are latent defects in the bottle that are not revealed by ordinary use. There are very few occasions in which the manufacturer would want to contract out, precisely because any disclaimer—"not responsible for botulism," or "not responsible for exploding bottles that cause serious bodily injuries in ordinary use"—does convey to the consumer all the information that he needs to have in order to decide to buy elsewhere. This exclusion advertises that the product is not safe, so buy from some other producer who will, if anything, capitalize on his willingness to "stand behind his product," as most manufacturers of foodstuffs and bottled drinks eagerly will.

Default provisions are surely important, if only because they influence the costs of contracting to the proper social position. There is, moreover, no reason to think that the presumption in food and drink

29 For a short account of the major differences between the way in which courts and professional organizations disseminate information, see Brown, Comment on Calabresi and Klevorick's "Four Tests for Liability in Torts," 14 J. Legal Stud. 629 (1985).


32 See, e.g., Bishop, The Contract-Tort Boundary and the Economics of Insurance, 12 J. Legal Stud. 241 (1983), which argues that one reason for warranties is to spare the consumer the need to acquire information about the goods so warranted.
cases carries over to drugs and complex capital equipment. For a wide range of products, the larger battle is not over default presumptions, but over the right to contract out of them. On this issue, Landes and Posner place far too great a weight on imperfect information:

Given the high costs (relative to benefits) of information about an extremely low-probability event, the expected damages from which are low, it may not pay a consumer to study a disclaimer of liability carefully, even if the disclaimer is clear and conspicuous. Manufacturers will then reap little consumer ill will from fooling consumers with disclaimers that consumers fail to read, because product accidents are so rare anyway, and for the same reason competing manufacturers will not find it profitable to try to compete by offering to disclaim disclaimers. High information costs relative to the benefits of the information may defeat voluntary contracting.33

The argument is badly misguided. One critical empirical question concerns the frequency and severity of product liability claims. Where these are high, then the incentives themselves to individuate by contract should be great. Yet on this question, Landes and Posner cite, suggestively to be sure, only a single 1919 case that involved “catching anthrax from a shaving brush.”34 The present battleground in products liability is over products with very different characteristics, uses, and failure rates. Thus, product liability insurance for private airplanes is a very large fraction of the total purchase price, amounting perhaps to $75,000 or more per plane.35 And the prospect of liability for defective drugs in cases such as MER/29 and Bendectin, or defective prosthetic devices, are very large matters indeed. Even in the context of exploding Coke bottles, the de minimis argument is flawed, for while the frequency of accidents may be low, the number of repeat purchases is very large, so that contracting with the consumer would be worthwhile if the manufacturers wanted to disclaim the risk.36 But with respect to the major aviation, automotive, drug, and machine tool cases, it is wholly misguided. The issue of

34 S.H. Kress & Co. v. Lindsey, 262 F. 331 (5th Cir. 1919).
35 Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1566. Priest's figures are $80,000 for a Beech aircraft and $75,000 for each Piper Aircraft, as reported in the first quarter of 1986. The numbers are doubtless higher today, if only because of inflation. The 1986 Report on the Product Liability Reform Act (S. Rep. 2760, 99 Cong., 2d Sess.) at 7, places the figure at $70,000 per airplane and reports a drop in sales in the general aviation market of 90 percent since 1979.
liability for personal injuries and consequential damages is always on everyone's mind. In commercial contexts, the relevant clauses are often carefully tailored and explicitly negotiated. Contractual silence on personal injuries in consumer sales is not a function of private indifference. It is a consequence of the certain invalidity of any terms that might be inserted by contract.

The Landes and Posner model prohibiting disclaimers, then, cannot rest upon any assertion that the issue is too unimportant for contracts to matter. Instead, it only makes sense if one believes in the skewed distribution of loss prevention skills posited by the modern cases. But why should manufacturers, out of possession of the product at the time of injury, be conclusively and universally presumed to be in a better position to avoid loss than "helpless" consumers in possession of the goods? There is little reason to think that this odd balance of prevention capabilities has ever been true in the general case—possession gives both control and information. The nineteenth-century cases set their presumptions in the opposite way to the modern law, precisely because of these reasons. The most relevant difference between the two eras lies in the cost of getting information about the product from producer to consumer—it must be lower today than it was in earlier times. If anything, therefore, we should expect a common law court today to be more sympathetic to contract arrangements since the cost of their implementation has fallen. Landes and Posner reach the opposite position only because they are so wedded to their "positive" theory that the common law rules of liability must be "efficient," when so often they are not. They can verify their Panglossian hypothesis only by altering their underlying description of producer and consumer behavior to fit modern legal doctrine. The consequence is to render plausible the legal conclusions that interventionist judges have reached on other grounds, such as inequality of bargaining power and adhesion contracts—grounds that Landes and Posner would generally reject.37 Their insistence on nonwaivability is yet another version of the Nirvana fallacy that measures the imperfections of voluntary contracts implicitly against some ideal, but unattainable, system of judicial control. The rigidities of centralized planning are as important in the context of the market for contract terms as they are in the market for widgets.

C. Doctrinal Modifications: Defects and Defenses

The inability to have private self-correction from decisions at the

center soon revealed its cost, as the next wave of judicial tort reform had very different allocative consequences from the modest judicial innovations of *Henningsen* and *Greenman*. Here, it is necessary to mention three important developments, each of which took place between 1968 and 1976. These are the adoption of the risk/utility test for design defects, the expansion of duty to warn liability both for drug and mass immunization cases, and the elimination of the open and obvious defect test, as it stood under the earlier law up to *Henningsen* and *Greenman*. These changes all point in the same direction: a rejection of markets in favor of explicit government control, parallel to that which occurred in the administrative area. The earlier law generally had a pro-market bias because its default rules all stressed the importance of communication from the product seller to the product consumer, who could then make informed choices on the basis of the information about the product that was presented to him. The constant stress was on liability for latent or hidden defects, because it was precisely these that the consumer could not be expected to guard against by ordinary care.

The second generation of rules took exactly the opposite tack. By the 1970s, the transmission of information about risks was no longer the sole, or even dominant, object of the law. Instead, the system was designed to nullify the choices that had been made by individual consumers, even with full information, on the ground that public agencies—typically the courts—were better able to make these choices for them. The shift from market to regulation is far more profound than any shift from negligence to strict liability, when both liability rules are confined to the class of latent defects. Yet today the strict liability/negligence choice, not the latent/patent distinction, receives all the attention, and all the pressure for legislative reform.1

1. Design Defects

The elimination of the negligence requirement in product liability cases brought to the fore the question of what counted as a product defect. In *Greenman*, Justice Traynor relied upon a conception of product defect that stressed the misrepresentation to the product user based on the product appearance, its accompanying literature, and the circumstances of its sale. “Implicit in the machine's presence on the

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market, however, was a representation that it would safely do the jobs for which it was built.” As such, the law of product defect bore a close affinity with the law of “traps” that had always been of such importance in, say, occupiers’ liability cases. Once the negligence limitation on recovery had been removed, this conception of defect (oftentimes styled “the consumer expectations” model) set the threshold for liability. But in retrospect, it seems clear that it could not survive the anticontractual bias of the courts. The theory of implied misrepresentation was articulated as part of the attack on freedom of contract in Greenman. But given that individual consumers could not sign disclaimers of liability, there was no reason to expect that they could sensibly evaluate all the options associated with the use of complex products, even with knowledge of the risks. The law had to do that for them. Toward this end, the definition of product defect was expanded to facilitate the necessary substitution of collective for individual judgment.

The tools that were available for that transition were, however, quite limited. It became clear that the standard of customary practice, itself discredited in ordinary negligence cases, could not possibly be revived in the new product liability environment. The dictates of custom and contract converge so closely that each is considered some variant upon the market standard. “Real” strict liability, of the sort which allows no cost/benefit analysis at all, could not be adopted either. While it may be sensible to make a polluter pay for pollution inflicted upon a stranger, no matter how great his level of precautions, it simply makes no sense to say that whenever a product is “involved” in an injury, it has necessarily been defective. Some collisions are too devastating even for the strongest cars to withstand;

40 See, e.g., Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), where strict liability was imposed only for concealed defects. “We do not determine whether strict liability would apply to a disclosed defect.” Id. at 464 n.4, 698 P.2d at 122 n.4, 213 Cal. Rptr. at 219 n.4.
41 See Restatement (Second) of Torts § 402A comment i. “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” The standard here explicitly rules out subjective assumption of risk as defining defects. The subjective element does come in for those cases where a product with a latent defect has been sold, for their specific knowledge of the defect can lead to the “unreasonable” assumption of risk defense set out in comment n.
42 See, e.g., The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (L. Hand, J.). This case has had an enormous influence in the product liability context, especially after the Second Restatement. The single sentence “a whole calling may have unduly lagged in the adoption of new and available devices,” 60 F.2d at 740, has itself been worth billions of dollars in transfer payments.
and the only machine tool that is completely safe is also completely inoperative. The complex duties between product maker and product user cannot be set by the simple "keep off" type of tests which characterize actions for trespass to land and nuisance.

By process of elimination, there was only one standard to invoke: cost/benefit. Oddly enough, the standard itself rings of the Hand formula and thus seems to invoke the very standards of negligence which the earlier strict liability cases such as Henningsen and Greenman had repudiated.43 There was a wide range of variations on the basic cost/benefit standard,44 and which should be adopted was an open question. The early cases, such as Larsen v. General Motors, all relied upon "general" negligence principles, as they applied to the new circumstances of automobile crashes. Thereafter, Professor Wade's risk/utility standard gave a more complicated version of the cost/benefit calculations that incorporated some explicit mention of the plaintiff's knowledge.45 Finally, such cases as Barker v. Lull Engineering Co.,46 held firm to some version of cost/benefit analysis while shifting to the defendant the burden of proof on product defect. Any continuity with pre-1960 cases is something of a mirage. Defendants would have obtained directed verdicts in the vast bulk of machine tool and automobile cases under the narrower standards of

43 Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 130, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972), noted how the use of an "unreasonably dangerous" standard as found in Restatement (Second) of Torts "rings in negligence."


45 (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
   (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
   (3) The availability of a substitute product which would meet the same need and not be as unsafe.
   (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
   (5) The user's ability to avoid danger by the exercise of care in the use of the product.
   (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
   (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, supra note 17, at 837-38. For my recent criticism of the formula, see Epstein, supra note 16.

46 20 Cal. 3d 413, 426, 573 P.2d 443, 456, 143 Cal. Rptr. 225, 238 (1978). The negligence elements in the case are apparent inasmuch as the plaintiff was allowed to establish a defect by showing that the product's design proximately caused his injury, and the defendant failed to establish that the benefits of the challenged design outweigh its inherent risk of danger. Id.
liability prior to Larsen, and even under the tests for design defects set out in Dix Noel's 1962 article on the subject.

2. Warning

A similar pattern emerges in the warning cases. Here, ostensibly the warning cases are congruent with the older version of product liability cases, because full disclosure of latent defects can well be regarded as an effort to insure consumer choice. Yet the underlying motivation of the modern cases is somewhat different. As with all things, information is costly to collect and to process. It is just not clear how much information any consumer would want before deciding to purchase or use a particular good. Thus, in drug and immunization cases, there is an argument for saying that some overall, "bottom-line" assessment of the riskiness of a drug provides a consumer with greater information than a detailed, separate account of each remote affliction, especially when the exhaustive explanation is provided without any explicit estimate of the tiny probabilities of each untoward occurrence. Most warning cases insist upon a level of warning ex post that is far higher than what is in fact demanded by consumers ex ante. Every consumer cannot be the marginal consumer, sensitive to small changes in phraseology or nuance.

In some instances, the justification for heavy liability depends less on the justice of the individual case, and more upon the political and strategic instincts of the judges. Heavy tort liability is viewed as a

47 There is here also the problem of selection bias. Cases of the older, latent defect/ordinary use variety are so clearly in the plaintiff's camp on liability that they will not be appealed on the basic question of product defect. They could amount to an important segment of cases, but however measured their importance seems small relative to the new generation of crashworthiness cases ushered in by Larsen, which, by the way, the defendant won on the facts when the case was thereafter tried.

48 Noel, Manufacturer’s Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816 (1962). The piece was cited in Schwartz, supra note 8, at 799, as evidence of the continuity in the law. But even a cursory look at particular fact patterns illustrates the gulf that separates the two bodies of law. Thus, Lindroth v. Walgreen Co., 338 Ill. App. 364, 87 N.E.2d 307 (1949), aff’d, 407 Ill. 121, 94 N.E.2d 847 (1950), involved a vaporizer that set itself on fire when it continued to generate heat after the water in it had boiled away. And in Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961), the design defect involved a leak in the gas tank of a car which resulted in an explosion when the plaintiff turned the key in the ignition. These are a far cry from the crashworthiness and foreseeable misuse cases that we have today, as both involve latent defects and normal use. Virtually all the other cases cited in Noel's scrupulously careful article fall into this pattern. Indeed, many of the cases cited involved defective materials which crumbled or broke. See, e.g., Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930) (tractor steering wheel broke free causing user to fall from seat). Greenman, with its bad set of screws, falls into this class of cases. While negligence is mentioned extensively, crashworthiness is not. To see the distance we have traveled, compare Blitzstein with the hundreds of modern design defect cases. See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950 (3rd Cir. 1980), cert. denied, 450 U.S. 959 (1981).
way-station along the road to a comprehensive system of no-fault liability, say for vaccination injuries, that the judges could not impose—and fund—on their own initiative. Instead, the effort is to induce the drug companies to lobby for such a comprehensive program as part and parcel of an effort to reduce or eliminate their own tort liabilities. But these judicial efforts to "game" the system easily can go astray in the face of the counter-strategies available to private firms. Firms seek to maximize profits, not to preserve their market share. If the costs of getting vaccine legislation are too high, then they will prefer leaving the market to the status quo rather than mounting the legislative action. While some judges may believe that industry still holds Congress captive on issues in which they have a vital interest, the political picture is far more clouded as other groups find it in their interest to keep the tort system just as it is.

But suppose what is not the case, that the judges have made the correct political calculations. Even then, there is still reason to doubt that the game is worth the candle. Consider in this context two alternative states of the world. In the first, ten persons per year suffer devastating injuries from vaccines for which they receive no compensation at all. In the second, the delays in innovation and the increase in costs result in one hundred persons suffering from the same injuries, for which ninety percent of them receive "full" compensation. If the goal of the system is to maximize the percentage of victims who receive compensation, then we should prefer the second to the first. If the goal is to minimize the number of uncompensated users, then we should be indifferent to the two results. But if it is to minimize the probability of harm, then we should prefer the first, especially since the released administrative costs could be redirected in part to the next generation of safer vaccines. The system-wide costs of the vaccine program have been documented time and again. It cannot be assumed that victim compensation and loss minimization go hand in hand. Given manufacturer self-interest, it is not possible to obtain the third state of the world in which the number of injuries is ten and the number of compensated injuries is ten as well. So long as manufacturers are free to enter and exit the market, there is no invisible hand to insure that they will behave as judges or legislators hope they will.

3. Open and Obvious Conditions

The last piece of the puzzle concerns the status of defenses. In a

world in which freedom of contract operates, assumption of risk by contract must be accepted. Before 1960, it was difficult to put the common law to the test, for there was scant occasion for any manufacturer to incur the costs of contracting out from product liability. In part, that outcome rests on the traditional position that open and obvious conditions were never actionable, whether or not they were specifically known by the plaintiff. This traditional position is justified on the ground that the obviousness of the risk transmits whatever information the defendant could usefully provide to the plaintiff. There was simply too great a moral hazard to allow persons to claim that they did not know of risks obvious to persons of ordinary intelligence. The assumption of risk defense therefore was relegated to cases in which plaintiffs in fact acquired knowledge of latent risks, which they then chose to incur.

This version of the open and obvious defense comports well with the freedom of contract model. It says that the private decision to proceed in the face of a known risk is binding upon the organs of the state. But any steadfast adherence to the open and obvious defense is inconsistent with the interventionist models of product liability law that depend on collective cost/benefit accounts of product defect. Again the mismatch in orientations could not survive, so that once the wider causes of action were in place, the “open and obvious” test was repudiated with evident eagerness: “The time has come to depart from the patent danger rule enunciated in Campo v. Scofield” was the first sentence in Micallef v. Miehle Co., a case which did just that. In place of the older rule came the same reasonableness calculations used to determine product defect, so that the entire case routinely lands in the lap of the jury with neither rule nor compass to guide it. The question of obviousness is now stated to go to the issue of whether a warning should be given. But it will not preclude an action for a design defect, even under the legislation proposed to cut

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50 See, e.g. Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). Noel does not treat the obviousness of the risk as a conclusive defense in these cases, and argues that the ordinary negligence calculus survives, taking his cue from F. Harper & F. James, The Law of Torts § 28.5 (1956). Noel, supra note 48, at 838. But both Noel, on the one hand, and Harper and James on the other, are quite critical of the Campo decision and use the negligence analysis as a counterweight to it. In essence, they give what might be regarded as a “restrictive” reading of the precedents. And even if they were correct in this, it is clear from the Noel article that the latent/patent distinction had far more bite in 1962 than it has today, even if it was in the initial stages of breaking down.

51 301 N.Y. 468, 95 N.E.2d 802 (1950).

back on the modern judicial innovations.53

4. The Payoff

The differences between the market and regulatory approaches are well illustrated by two possible views of the cigarette cases. The Restatement (Second) of Torts adopted general strict liability, and then proceeded to exclude ordinary cigarettes from its coverage. Comment i first announces a defect test that fits the market model:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.54

Under the above Restatement rule, which is arguably more restrictive than the case law of the time,55 all modern cigarette cancer cases are directed verdicts for the defendant, even with strict liability firmly in place. The product is not defective even if it is dangerous, because the dangers are not “to an extent beyond” what ordinary cigarette smokers know. With the product defect so defined, there is no reason to get into the questions of subjective knowledge raised by assumption of risk. Under the Restatement formulation, the only cases of defective cigarettes were those for contaminated products—a trivial concern, and certainly one for which no tobacco company would want to disclaim.

The new causes of action rest upon the modern theories of warning and risk/utility, in which allegations of addiction are incorporated

53 See, e.g., Product Liability Act, S. Rep. No. 100, 99th Cong., 1st Sess. 11, 15 (1985) which provides: “(e) A product is not unreasonably dangerous for lacking of warnings regarding—(1) dangers that are obvious.”

The section as drafted does not extend the obviousness defense to design defect cases, which are in turn governed by the elaborate negligence standards set out in § 5 of the Act.

54 Restatement (Second) of Torts § 402A comment i (1965).

55 This rule was not consistently followed in the cigarette litigation that preceded adoption of the Restatement (Second) of Torts, for cases did get to the jury on ordinary negligence principles, and indeed were won on the ground that the risks of tobacco were, at least in the early years, such that “no developed human skill or foresight can afford knowledge.” Ross v. Phillip Morris & Co., 328 F.2d 3, 6 (8th Cir. 1964) (emphasis supplied). Ross also expressly refused to carry strict liability rules over to the cigarette cases. “[I]n our considered view, if presented with the facts in this case, the Missouri courts would not apply the strict rules of the ‘fly in the bottle cases’ but—on the contrary, would limit absolute liability to the same extent that such liability was limited here by the district court.” Id. at 8 (emphasis in original). But the first generation of cigarette cases did not have risk/utility to turn to, and were heavily influenced by the draft versions of the Restatement. See, e.g., Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 37 (5th Cir.), cert. denied, 375 U.S. 865 (1963).
to undercut the assumption of risk defense. These cases, to the extent they are not covered by the preemption statutes, render any simple per se disposition of these cases quite impossible. Each jury is now in a position to decide whether new technologies—which have faced important regulatory barriers—could have allowed the marketing of a safer cigarette, or whether the risks of smoking are so great that it was "negligent" to market cigarettes at all. On the plaintiff's side, ordinary knowledge is no longer thought to be an accurate reflection of the knowledge of any individual smoker. The upshot is a detailed "life-style" examination of the mental state of each smoker to learn when he first learned of the risks of smoking and how well he internalized them. The per se rule of the Restatement has been undermined by a formless type of litigation which has yet to yield a plaintiff's verdict, but which has imposed enormous litigation and uncertainty costs that the older sensible per se rules have avoided. Within the context of product liability law, the big shift has been the now completed movement from no liability to liability, even if confined to liability "only" for negligence. The secondary shift, still unresolved, between negligence and strict liability is small by comparison, especially since any feasible strict liability standard itself has to be phrased, as noted above, in reasonableness terms.

II. DISTRIBUTIVE AND ALLOCATIVE CONSEQUENCES

What distributional and allocative consequences have flowed from these changes in product liability law? The question is important in two ways. First, it facilitates an assessment of the magnitude and desirability of the recent doctrinal changes on their merits. Second, it helps explain why it has proved impossible to fashion any so-


57 See Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (1982). The mandatory warnings specified in the Act have been held to preempt any common law tort action based upon a failure to provide an adequate warning; see, e.g., Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3rd Cir. 1986); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987). (For the record, I should state that I was a legal consultant to Phillip Morris in both cases.) The decision in both these cases turned upon the special language of the cigarette statute. Still, the basic pattern in these cases—that mandated warnings are conclusively presumed adequate—could be carried over with profit to drug and similar cases. For a recent attack on both Cipollone and Palmer, see Ausness, Cigarette Company Liability: Preemption, Public Policy and Alternative Compensation Systems, 39 Syracuse L. Rev. 897 (1988).

58 See, e.g., Calfee, The Ghost of Cigarette Advertising Past, Regulation, Nov./Dec. 1986, at 35, which points out, among other things, that the costs for innovation are higher when the company that makes the innovation is not allowed to advertise its advantages on health and safety grounds.
cially desirable and politically viable program of product liability reform during the past ten or so years. In dealing with these doctrinal changes, it is necessary to distinguish between the impact of the rules on products not yet placed in the stream of commerce and those previously placed in the stream of commerce, which, owing to their durability, have not been involved in any accident as of the introduction of the rules. The distinction is thus between the prospective and retroactive application of the rules, of especial importance here because of the potential useful life of many capital goods and the long-term deleterious effects of many drugs and chemicals.59

A. Future Injuries from Future Products

The basic analysis of this class of cases seems clear enough on the strength of what has already been said. The common law restrictions on freedom of contract are not justified by any concern with externalities, or with duress, fraud, and incompetence of individual consumers. (The alleged imperfect information problem could be cured by limited disclosure rules if thought to be a problem, which generally it is not.) The general conclusion about social welfare thus appears to apply to the particular case. While it might be a question whether greater losses will be suffered by consumers or producers, both groups will ex ante be worse off to the extent that the legal rules preclude bargains that work to their mutual advantage. The exact distribution of losses may vary from product to product, as a function of elasticity of demand (the greater the elasticity, the larger the producer loss), industry structure, rate of product innovation, and the like. But there is little reason to think that there are any positive outcomes that result in forcing products off the market that consumers are prepared to purchase.

The distributional consequences of this class of cases is harder to determine. George Priest has made the argument that the imposition of the modern product liability law operates like a regressive tax, because it imposes greater losses upon the poor for the benefit of the rich.60 The intuition behind his position may be tested against the

59 It should be understood that by retroactive effect, I am looking at the problem only from the point of view of the defendant who has parted with possession. The transaction is not retroactive from the point of view of the actual (or manifested) injury, which will occur in the future. I assume that everyone agrees that cases already litigated or settled should not be reopened because of a subsequent change in the law. On retroactivity as it applies to legislation, see Munzer, A Theory of Retroactive Legislation, 61 Tex. L. Rev. 425 (1982).
60 Priest, supra note 35, at 1565, 1585-86. See also Priest, Puzzles of the Tort Crisis, 48 Ohio St. L.J. 497, 502 (1987):
The irony, however, is that the expansion of third-party tort law insurance directly
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problem of worker injury with machine tools. As applied to this context, Priest's argument is that the more prosperous workers will have greater tort damages, funded by revenues drawn equally from all workers. The conclusion is, therefore, that the more prosperous workers could emerge as net winners and the less prosperous ones as net losers.

There are, however, several problems with this line of reasoning. First, there is no reason to think that either class of workers is necessarily better off. It could well be that the overall losses that flow from the restriction on contractual freedom hit one class of workers harder than the other. But that result is fully consistent with the proposition that both classes of workers have lost, albeit to different extents.

Second, one implicit assumption of the Priest model is that the probability of injury is constant for the two classes of workers (or consumers generally), so that the redistribution is attributable to the larger damages paid the skilled class relative to the unskilled. Nonetheless, there is no obvious reason to believe that probabilities of injury are constant across income levels and some reason to guess that the reverse might be the case. Thus, so long as there is some element of uncompensated loss upon prospective plaintiffs, they will have some incentive to take care against risks. Well-to-do and skilled plaintiffs may stand to lose more income if they do not recover, and this might serve to induce them to take greater care. In addition, if they are skillful workers or knowledgeable consumers, their costs of avoidance might be lower than those for poorer, less skilled persons. There is some reason to believe, for example, that a very large fraction of accidents occurs to workers who have just started to work on new types of equipment. If these assumptions hold, then we have to re-vise our assumption on the distribution of accidents. Relative to harms the poor among the consumer population. Obviously, the general price increase consequent to the expansion of liability affects those with low levels of resources most seriously. More importantly, the benefit low-income consumers receive from the addition of the liability insurance premium to the price of a product or service is worth less to them than its price. Again, the liability insurance premium tied to the sale of a product or service must be set according to the average expected liability payout. Tort judgments comprise medical expenditures, which are typically greater for higher income patients; past and future lost income; and damages representing pain and suffering, which are highly correlated with lost income. The high correlation of these damage elements with income, however, means that the premiums set equal to the average damage payout will undercharge high income consumers and overcharge low income consumers. The provision of liability insurance tied to the sale of products and services requires the low income to subsidize the high income.

61 Here it would be desirable to have explicit empirical support for the proposition, but the appellate decisions do have a very large number of cases in which accidents appear to occur on
skilled workers, new workers may well have a higher frequency of accidents, and the accidents that they suffer may also be more severe. The question is, of course, empirical in the end, but the redistribution may well run from the lower to the higher skilled workers.

The situation becomes still cloudier when the position of the employer is explicitly factored into the account. The employer has subrogation rights against the employee’s tort recovery, and these rights might consume a larger portion of the tort recovery from low-skilled workers whose damage awards are presumably less. Generalizations on the regressive effects of the tort law are not sustainable as a matter of theory, nor at present verifiable by any empirical evidence. All that we can say with confidence is that general progressive tax systems, with all their flaws, are better agents for redistribution from rich to poor than any modification of common law liability rules.

The expansion of the product liability system has also placed great strains upon the relationship between product suppliers and their insurers. The problem arises even where the changes in liability are wholly prospective, that is, arise with respect to products that have yet to be manufactured or sold. But here it may well be that insurance is not workable in the market at all because the underlying tort risks, and their associated administrative costs are too hard to price. In principle, it appears that the insurer might protect itself against the vagaries of the tort system by contractual stipulations. But these are no more reliable than the judicial interpretation that they receive, and the aggressive use of the principle of contra proferentem means that insurance companies have to bear the systematic risk that they will sign on to one deal only to be found that they are bound by yet another. The lack of confidence in judicial interpreta-

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62 See, e.g., Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (1982). There, the policy contained a pollution exclusion which, however, did not apply "if such discharge, dispersal, release or escape is sudden and accidental." Id. at 186 N.J. Super. at 160, 451 A.2d at 991-92. As Professor Abraham notes: "As to the meaning of the terms 'sudden and accidental' in the pollution exclusion itself, the court simply read them out of existence." Abraham, Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 963 (1988). How else does one interpret a sentence that reads as follows: "[T]he act or acts are sudden and accidental regardless of how many deposits or dispersals may have occurred, and although the permeation of pollution into the ground-water may have been gradual rather than sudden, the behavior of the pollutants as they seeped into the aquifer is irrelevant if the permeation was unexpected." 159 N.J. Super. at 165, 451 A.2d at 994.

I discuss these points in Epstein, Products Liability As An Insurance Market, 15 J. Legal Stud. 645 (1985). For further discussion of the insurance problem, see Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987); Trebilcock, The Social-
tion necessarily leads insurance companies to adopt fallback positions, to favor clear exclusions, large deductibles, co-insurance features, caps, and the like, all of which give the insured ex ante protection less desirable than would otherwise be available. This option also deprives insurance companies of their potential gains from trade as well, for no one ever made a profit from leaving the market. As ever, prospective redistribution always has its negative allocative consequences.

B. Future Injuries from Existing Products

The scope for redistribution becomes far more extensive when the legal changes are imposed upon products that are already in the marketplace. Many drugs, chemicals, and machine tools were sold years ago, when the dominant set of product liability rules sharply limited the exposure of manufacturers and retailers. Yet these products have endured longer than the legal regime under which they have been marketed. Machine tools made before 1950 are, with modifications and after resale, still in active use today. (The companies that made them, if still in business, are apt to have been the superior competitors in their line of business.) Drugs and chemicals that were first used during that same period could well have harmful effects that first manifest themselves only in a later generation.

The consequences for redistribution are far greater when the law changes between the time of sale and the time of injury. Yet here the general response of the common law to the problem has been to ignore it, just as it does with other areas of tort law. The argument made on behalf of that position rests heavily upon the perception that the changes in liability rules were of an incremental sort, of the kind that could—or should—have been foreseen by the reasonable product manufacturer, even before the modern developments took place. The prevalent attitude is similar to that found in other areas, where the norm against retroactive legislation has eroded in recent years. Basically, the argument holds that so long as there is notice of the prospective changes, a responsible party can take them into account in making the basic decision. At some level, the point is surely correct, but it hardly justifies the conclusion that is drawn from it. While knowledge might allow a party to mitigate the loss, it never enables

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63 See Schwartz, supra note 8, at 813-28.

him to reach the same level of utility that he could have reached if the
rules were sufficiently stable so that he need not mitigate at all.

Notice allows firms to minimize their losses. But it is an open
question whether the remaining losses, even when minimized, will be
large or small. With ordinary tort actions, the retroactive effects of
legal change tend to be small: automobile accidents are snapshot
torts, which are processed in relatively quick time. But the "inven-
tory" of old products which are then judged by new rules is quite
large. This retroactive imposition of liability has adverse conse-
quences on both issues of incentives and distribution that are simply
too large to ignore.

On incentives, there is little that prospective defendants can do to
minimize the loss from old products. The manufacturer may have no
idea who is in possession of a machine tool it made in 1950 or who
ingested its drugs. Nor does liability insurance afford any protection.
Any additional insurance coverage will be priced at levels that reflect
the present levels of risk, and not those when the product was first
made and sold. The change in legal rules functions like a giant incho-
ate lien ready to descend on particular assets upon the occurrence of
an injury. Insurance may liquidate in part this anticipated liability—a
net gain for a risk averse firm—but it will not make the lien disappear;
nor will it afford the manufacturer a chance to recoup its additional
costs by extracting a retroactive price increase from its original pur-
chaser. Some decrease in firm net worth necessarily follows. Dissolu-
tion of the firm may be the only way to escape the lien, given that
various doctrines of successor liability effectively undercut any at-
ttempt to defeat this inchoate lien by a sale of underlying assets.65

On the plaintiff side, the situation is mixed. With respect to some
products that cause latent injuries, there is also little that can be done.
But for many situations, this is not the case. This is surely the result
with ordinary accidents involving machine tools and the like, for
greater precaution yields lower levels of accidents. It also applies to
many toxic torts, such as asbestos. Exercise, diet, or quitting smoking
or drinking can have a vast effect upon the probability or severity of
injury. Plaintiffs still have strong incentives on this score, but unless
the effect of a large tort recovery has no influence upon behavior, then
these incentives must be dulled by the new prospect of some tort re-
cov-
active change in liability rules will do nothing to decrease the level of accident and disease. If anything, it will increase them slightly.

The key effects, however, are likely to be redistributive. With respect to future changes in liability rules, the question was whether there was an implicit redistribution within the class of workers or consumers, be it from rich to poor or the other way around. With retroactive changes, all those workers or consumers stand to gain from the new law. It is also possible—especially for those who think themselves likely to be harmed, such as persons who work with old capital equipment or who have been exposed to asbestos—that the value of any new cause of action far exceeds whatever private loss they suffer from any prospective limitation upon freedom of contract. Given this situation, they in turn will be prepared to invest resources—rent seeking again—to preserve the current legal status quo against attack. It is not surprising, therefore, that unions have generally been strong opponents of any form of product liability legislation.

In this venture, they also have very powerful allies and opponents. The lawyers for the plaintiffs’ bar stand to make a fortune on the new legal rules, retroactively applied. They can be counted upon as champions of the new status quo ante. Lawyers on the defendants’ side have a similar position. If all these retroactive claims were removed, then the business of defending clients on the merits of individual cases would no longer be of any consequence. The income of good defense lawyers is their ability to win cases on their merits—risk/utility and unreasonable assumption of the risk. Their workload and income are cut way down by a set of liability rules that make huge classes of cases irrelevant. The legal profession may desire some change, but never a return to the earlier regime of limited product liability.

The forces for reform are also powerful, for if the new retroactive liabilities create huge inchoate benefits, they impose huge inchoate losses. Here, the individual firms that are burdened with these liabilities will try to escape them. In part, they will challenge the legal rules by reform proposals; in part, they may engage in corporate restructuring; and in part, they will seek to fasten as large a share of these new and unwelcome liabilities upon the insurance carriers, who had underwritten all or part of their product liability risk. In this venture, some manufacturers have proved, in general, startlingly effective. In the asbestos area, for example, the producers are allowed to exhaust the benefit of any policy in effect during the period between first exposure and first manifestation, so that a day’s worth of premiums can in
effect be made to answer for years of prior exposure. The web of influence becomes ever broader, and the consequences ever more uncertain.

III. THE LEGISLATIVE PROCESS

The battle over legislative reform has been influenced both by the structural issues of tort reform and by the politics of redistribution. Each element has its own role to play, and what follows is but a short account of why it is that only ineffective reform proposals have been made, and why these have failed and are likely to continue to fail.

The first set of observations have to do with the substance of the proposed reforms. In general, the reform faction has tried several lines of approach. In some instances, they propose elaborate procedural rules. One such system allows the parties to opt out of the tort system upon the willingness to pay (or take) a sum equal to the economic losses of the plaintiff (usually defined as medical expenses and lost earnings, minus collateral payments) plus some limited amount for dignitary losses, including pain and suffering. In addition, some statutes speak to the coordination of workers' compensation with tort liability, or to the creation of a special statute of repose, or to limitations on joint and several liability for noneconomic damages in torts, or, on some occasions, to the modification of the legal rules that apply to design and warning cases or to affirmative defenses.

What is characteristic about the full range of reforms is that none

66 See Keene v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). Note that the insurance industry won other cases, including Eagle-Picher Industries v. Liberty Mutual Insurance Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983), but the insureds have the power to direct litigation into the D.C. Circuit and other jurisdictions that adopted a similar view, so that in all future industry-wide settlement cases, Keene became the norm. I have commented on the contract arguments raised in these coverage cases in Epstein, The Legal and Insurance Dynamics of Mass Tort Litigation, 13 J. Legal Stud. 475 (1984). An approach more sympathetic to the Keene decision is found in Note, Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis, 97 Harv. L. Rev. 739 (1984).

67 For a scheme of this sort, see S. 2760, 99th Cong., 2d Sess. §§ 201-06, 132 Cong. Rec. 31 (1986). Note that the system is potentially very tricky to operate, and its consequences are very hard to follow. Thus, each side has to compare its chances when it opts for the "expedited" settlement against those which it faces when it has to litigate under the ordinary rules of product liability. Generally, we should expect a side to propose this option only where it thinks that its expected costs are lower than under the tort system, and for it to be accepted where the other side makes its own similar calculation. If that is the case, then it appears that the conditions for this second tier will be satisfied only when the normal conditions for settlement are satisfied, at which point there is little change. But the rules are sufficiently complex that no one can be sure that the first approximation is the final outcome, which is one reason why legislatures should be rightly concerned about the creation of a new system of settlement in an area of litigation which itself is so highly charged.
of them tries to undo any of the major structural reforms that are found in product liability law. No one is willing to pass legislation that would allow disclaimers of liability, or even limitations upon liability subject to some legislative minimums. Contractual freedom is dead in this area, as is too often the case elsewhere. There is no effort to return to a theory of implied misrepresentations as the sole definition of product defect. There is no effort to undo the risk/utility analysis, but only to constrain it, perhaps by a negligence instead of a strict liability standard, or by insistence that plaintiffs demonstrate with some particularity the technical and economic efficacy of alternative designs.

In one sense, the range of proposals is quite remarkable, because even if they were all instantly enacted, the scope of tort liability still would be far greater today than it was at the publication of the Restatement (Second) of Torts in 1965. The present reform movement may be regarded as conservative when judged against the baseline of current state common law doctrine. But in its effort to tame the present set of current tort doctrines, it implicitly ratifies extensions of tort liability that would have been dismissed as inconceivable in the 1950s.

The question is: Why should this come to pass? In part, I think it is because there is a widespread social consensus that contractual arguments founder on perceived (if erroneous) difficulties with inequality of bargaining power and imperfect information. The law of product liability is difficult to understand, and the economic rationales for certain contracting practices are not fully understood even by the proponents of reform themselves. In addition, the contract solutions, however desirable in principle, would not work for the full backlog of products already in the marketplace, but which have yet to cause actionable injury. The proponents of reform are worried about products in the marketplace as well as future innovation. Established firms with many products in the field will have a relatively greater concern with the former than with the latter. Unlike new, possibly unformed, firms, they will want a set of reforms that is responsive to that set of cases. Given the dual concern with past and future, many firms will find it difficult to “cash out” the impact of legislative change to them, let alone to overall levels of accidents and prevention. While anecdotal evidence is easy to come by, accurate statistical data is harder to accumulate, even if there are a number of careful empirical studies that speak to smaller questions of product liability law.68

For their part, legislatures, unlike courts, always have the option to do nothing at all. The huge range of problems that have to be tackled as part of a single reform slows down the movement for legislative action both inside the private firms and the legislature. I do not wish here to discuss the interest group politics that frustrates legislative change at both the state and federal level. Suffice it to say that the size of the stakes are sufficiently large that the problem will not go away and will not be solved.

I close by noting the ironic course of the products liability revolution. In its inception, the major doctrinal innovations came by judicial decision, each of which seemed—to its advocates at least—modest enough when taken alone. But the whole is often far greater than the sum of its parts. The cumulative effect of these incremental parts has produced a system of judicial regulation which rivals, if it does not exceed, the systems of direct administration for product regulation. Now that the system is in place, it has taken on a life of its own. To undo the system by legislation is a daunting task, even in the absence of political conflict and struggle, for it requires a keen appreciation of which features of the older common law regime were critical to its success, and which had, at best, marginal importance. The constant focus on strict liability, as opposed to the definition of product defect, is evidence of how easy it is to misdiagnose the current situation. Yet even if these intellectual barriers could be overcome, the political obstacles seem well-nigh insuperable. While the modern changes were introduced without the slightest empirical investigation, precise data is now routinely demanded as a precondition to any substantive change in legal rules. The upshot is that we are now locked into the status quo unless and until the judges decide to reverse field and to moderate some of the rigors of product liability law. I believe that some changes in this direction will come, but my own fears are that the changes on this front will also be too little and too late. All those who think that common law experiments can be reversed by legislation should think again.

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