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lines in favor of the press⁵⁷ and that the judgment against appellant is constitutionally valid because the article was merely a commercial contrivance as distinguished from the dissemination of news or information.⁵⁸

Unless the press is to be afforded the protection to publish whatever it chooses for whatever reason, some limitations are inevitable. The case now before the Court presents for review those limitations which the New York courts have developed in the process of balancing the conflicting interests of the individual's privacy and the freedom of the press. Since the privacy protection in New York is more narrow than in many other states which have a common law right of privacy, it would seem that the restriction on the freedom of the press in New York would likewise be less than occurs in other states. Thus, the constitutional guidelines under the first amendment which may be forthcoming as to the New York privacy law will be very important to every jurisdiction where the interests of the individual and the freedom of the press collide in the privacy arena.

John W Warnock*

⁵⁷ Brief for Appellee, p. 15; see cases cited notes 10, 11 *supra*.

⁵⁸ Brief for Appellee, pp. 4, 13.

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PRODUCTS LIABILITY: WHAT TYPE OF LOSS WILL THE DOCTRINE OF STRICT LIABILITY IN TORT COVER?

"Aggrieved plaintiffs have scarcely known whether to sue in deceit or fraud or for negligence or for breach of warranty—or indeed whether it was worthwhile to sue at all."¹ Products liability has caused a number of problems, but California has taken long strides toward their solution. In a concurring opinion to *Escola v. Coca Cola Bottling Company*,² Justice Traynor put forth his solution. Traynor argued that when the plaintiff was personally injured by a defective product the basis of recovery should be strict liability in tort.³ In *Greenman v. Yuba Power Products*,⁴ almost twenty years after *Escola*, the California Supreme Court adopted Traynor's view. Strict liability in tort was established as the basis of recovery for

¹ *Spence v. Three Rivers Builders and Masonry Supply, Inc.*, 353 Mich. 120, 129, 90 N.W.2d 873, 878 (1958).

² 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944). The plaintiff was injured when a Coca Cola bottle exploded in her hand. The majority found for the plaintiff on the basis of negligent manufacture and applied *res ipsa loquitur*.

³ "It should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* at 461, 150 P.2d at 440.

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

personal injuries caused by a defective product.⁵ Shortly thereafter the doctrine was confirmed in *Vandermark v. Ford Motor Company*.⁶ The term "strict liability in tort," as used hereafter in this note, will refer to tort recovery in products liability as developed in *Escola*, *Greenman* and *Vandermark*.

To date California has applied the doctrine of strict liability in tort only to situations in which the plaintiff suffered personal injuries. Does it follow, then, that personal injury is the only area within which the doctrine must operate? In *Seely v. White Motor Company*,⁷ there were no personal injuries; the plaintiff suffered only property damage and economic loss. Chief Justice Traynor, writing for the majority, held that strict liability in tort is inapplicable as a basis of recovery for economic loss. Justice Peters, in a sole concurring opinion, challenged the majority view.

Seely v. White Motor Company

In 1959 the plaintiff purchased a truck from Southern Truck Sales for use in his hauling business. The truck was manufactured by the defendant White Motor Company, and the conditional sales contract contained a warranty from the defendant. The truck bounced violently, and thus could not be used for normal business purposes. For a period of eleven months, Southern Sales, with the aid and advice of the defendant's representatives, attempted in vain to rectify the problem. The brakes eventually failed, and the truck overturned, but no personal injuries resulted. After repairing the truck, Seely notified Southern Sales that he would make no more payments. The truck was repossessed, and plaintiff sued both Southern Sales and White Motor Company for the cost of repairs, the amount paid on the purchase price of the truck, and the business losses caused by the improper functioning of the truck. The action against Southern Sales was dismissed without prejudice. The trial court found that the plaintiff had failed to prove that the bouncing had caused the accident, and therefore recovery for the cost of repairs was denied. Recovery was allowed for the two claims which were unrelated to the accident, namely the amount paid on the purchase price and the plaintiff's economic loss. Chief Justice Traynor, speaking for the majority, affirmed the decision on the basis of breach of express warranty. Traynor then addressed himself to the contention that the doctrine of strict liability in tort had superseded the warranty scheme of recovery.⁸

⁵ *Id.* The plaintiff was injured by a defective power tool. The court refused to allow the use of the defenses of lack of notice and lack of privity to recovery based upon strict liability in tort.

⁶ 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

⁷ 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

⁸ The decision of the majority as to strict liability in tort would appear to be dictum, since recovery was based on another ground—breach of express warranty. However, the failure of the trial court to make a finding on strict liability in tort as to the property damage was made the basis of the plaintiff's appeal in the District Court of Appeal, 39 Cal. Rptr. 805 (1964), *vacated*. The District Court of Appeal held that the trial court was not in error, and that the doctrine would not cover property damage in any event. The applicability of the doctrine was urged at both levels of appeal. Therefore, the subject required discussion. See *Achen v. Pepsi-Cola Bottling Co.*, 105 Cal. App. 2d 113, 124, 233 P.2d 74, 81 (1951); *Southern California Enterprises v. Walter & Co.*, 78 Cal. App. 2d 750, 757, 178 P.2d 785, 789 (1947). *But see King v. Pauly*, 159 Cal. 549, 554, 115 Pac. 210, 212 (1911); *San Joaquin and King's River Canal & Irrigation Co. v. County of Stanislaus*, 155 Cal. 21, 28, 99 Pac. 365, 368 (1908).

Traynor's Opinion

Chief Justice Traynor would not allow strict liability in tort to be used for the recovery of economic loss. Briefly stated, his reasons for this limitation were as follows.⁹ The law of sales has been carefully articulated to govern economic relations between suppliers and consumers of goods. On the other hand, strict liability in tort developed to govern the distinct problem of physical injuries, not to replace warranty provisions completely. Recognition that *injured consumers* should not have to depend upon the intricacies of sales law caused the abandonment of warranty and the adoption of strict liability in tort as the basis of recovery in *Greenman* and *Vandermark*. Recovery in strict liability in tort results from the failure to meet a standard of safety for products placed on the market. This standard is defined in terms of conditions that create unreasonable risks of harm, not in terms of the bargaining positions of the buyer and seller, nor on the basis of industry-wide disclaimers.

The manufacturer can be held for physical injuries caused by defects which fail to meet this standard, and can insure against such risks and distribute the cost among consumers of his product, rather than forcing the individual consumer to bear the risk. However, since the doctrine does away with the limitations of warranty recovery,¹⁰ if it were applied to economic loss the manufacturer would be liable for damages of unknown and unlimited scope. Warranty rules, which function well in a commercial setting, determine the quality of product a manufacturer promises and, therefore, the quality he must deliver. In *Seely* the defendant was liable only because of his warranty and his efforts to repair. In strict liability in tort, however, the manufacturer would be liable even though he did not agree that the truck would perform as the plaintiff wished or expected. Furthermore, under these circumstances the manufacturer would be liable for business losses of other truckers caused by the failure of the product to meet their specific needs, even though those needs had been communicated only to the dealer. Products should not be required to meet a particular level of performance in a consumer's business unless the manufacturer has agreed that the product was designed to meet the consumer's demands. The risk that the product will not meet such demands can fairly be borne by the consumer. The manufacturer should not be forced to insure against such a risk.

At the same time, Chief Justice Traynor stated that strict liability in tort should cover damage to a plaintiff's tangible property. He argues that physical injury to property is so akin to personal injury that there is no reason for distinguishing between the two.

Peters' Opinion

Justice Peters, on the other hand, argues that strict liability in tort should be the basis of recovery for economic loss as well as for property damage. The following is a brief summary of Justice Peters' contentions.¹¹

The nature of the damage sustained should be immaterial so long as it was

⁹ 63 A.C. at 7-12, 45 Cal. Rptr. at 21-24, 403 P.2d at 149-52.

¹⁰ *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (disclaimers do not apply in strict liability in tort). See also *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (plaintiff not bound by the warranty requirement of notice, nor limited by privity of contract).

¹¹ 63 A.C. at 12-22, 45 Cal. Rptr. at 24-30, 403 P.2d at 152-58.

proximately caused by the defect. We should look to the nature of the transaction and to the relative roles played by the parties to the purchase contract in order to determine whether the transaction was "commercial" or was a sale to the "ordinary consumer" at the end of the marketing chain, for the "ordinary consumer" does not stand on an equal footing with the supplier and manufacturer of goods. Thus the nature of the sale itself, not that of the resulting damage, must determine the basis of recovery. The limitation on recovery established by the majority is arbitrary. If an "ordinary consumer" suffers a loss due to a defective product, he should be able to base his recovery on strict liability in tort, despite the type of loss. This would not be an extension of *Greenman*; all that is required would be an application or the reasoning of that case to a factual situation which cannot be logically distinguished. There is no distinction between economic loss and personal injury; each may be caused by a defective product. The doctrine expressed in *Greenman* is not a deterrent; it is not designed to induce the manufacturer to be more careful. Rather it is to insure that the costs of injuries caused by defective products are borne by the manufacturer and not by injured consumers, who are powerless to protect themselves. The limitation of the doctrine can be justified only if deterrence is the purpose. Moreover, the manufacturer would not be liable for damages of unknown and unlimited scope if the doctrine were applied to economic loss and if "defective" were viewed as being coextensive with "unmerchantable." The failure of a product to fulfill specific needs of a consumer would be immaterial, for the manufacturer would be liable only if the product failed to meet the ordinary needs of the consumer. This comports with the purpose of *Greenman*.

Warranty recovery would still be applicable to the "commercial transaction." However, if the "ordinary consumer" is required to rely on warranty provisions he may unfairly be barred from recovery by the requirements of privity, notice and disclaimer.

Summary Analysis

Chief Justice Traynor's argument for not extending the doctrine of strict liability in tort to cover economic loss is twofold: (1) The doctrine evolved to meet a specific need, *i.e.*, greater protection of the consumer whose person is injured by an unsafe product. (2) If the doctrine were extended to cover economic loss, the resulting burden on the manufacturer would be too great. Justice Peters argues that the doctrine can and should cover economic loss and that this does comport with the purposes of the doctrine. He further contends that, if applied to economic loss, the doctrine would not place a burden of unforeseeable scope on the manufacturer, as was suggested by the majority.

There is substance to the arguments of each of the Justices, but neither alone would seem to present a clear picture of the pros and cons of the issue of strict liability in tort as applied to economic loss. Let us probe the arguments of each of the Justices to the end of resolving some of the confusion.

Concept of Duty

The Chief Justice argued that strict liability in tort should not be allowed as the basis of recovery for economic loss. The precedents appear to support this argument. The doctrine was developed in *Escola*, *Greenman*, and *Vandermark* as a matter of public policy in order to reduce the hazards to life and health which

are inherent in defective products that reach the market and, eventually, the consumer.¹² The concern of the court in these cases was one of *safety*. As Traynor stated in *Greenman*, "Implicit in the machine's presence on the market, however, was a representation that it would *safely* do the jobs for which it was built."¹³ This standard of safety imposed on the manufacturer a duty to protect the consumer from products that have defects which will not be discovered at the time of purchase¹⁴ and which are of such a nature as to cause personal injuries. They are products which have *hazardous* defects.¹⁵ The manufacturer now has a duty and thus a standard of care. He will be liable if he places on the market a product which is below the standard, that is, which is unsafe, if the product proximately causes physical injury to the consumer.¹⁶

This duty has been placed on the manufacturer because the consumer no longer approaches products warily; rather, he accepts them on faith, relying on the manufacturer.¹⁷ Products are so complex that the consumer no longer has the skill or the means to judge their soundness.¹⁸ The manufacturer has control over the goods and therefore is in the best position to alleviate the risks which are created by unsafe products. Finally, the consumer's potential loss from a personal injury is so overwhelming that the manufacturer should be compelled to protect against it.¹⁹ Such losses can be insured against by the manufacturer and distributed among the public as a cost of doing business.²⁰

Thus we can see that the duty placed upon the manufacturer is to guard against unreasonable *risks* of physical harm. Chief Justice Traynor did not feel that this duty was breached in *Seely*. A defect which causes only economic loss is not, in Traynor's view, one which comes within the duty created by strict liability in tort, *i.e.*, it is not an unsafe defect. The distinction between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary but rests upon, "an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that *create unreasonable risks of harm*."²¹ In this respect it appears that Traynor has stayed within the boundaries created by his prior opinions. He seems unwilling to broaden the established concept of duty.

¹² *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d at 462, 150 P.2d at 440.

¹³ *Greenman v. Yuba Power Products*, 59 Cal. 2d at 64, 27 Cal. Rptr. at 701, 377 P.2d at 901. (Emphasis added.) Cf. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964). The court in *Vandermark* again emphasizes the safety factor.

¹⁴ *Greenman v. Yuba Power Products*, *supra* note 4 at 62, 27 Cal. Rptr. at 700, 377 P.2d at 900. The court defined the doctrine thus: "A manufacturer is strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being."

¹⁵ Cases cited note 13 *supra*. See also Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L.R. 363, 366, 367 (1965).

¹⁶ *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

¹⁷ *Id.* at 467, 150 P.2d at 443.

¹⁸ *Ibid.*

¹⁹ *Id.* at 462, 150 P.2d at 441.

²⁰ *Ibid.*

²¹ 63 A.C. at 10, 45 Cal. Rptr. at 23, 403 P.2d at 151. (Emphasis added.)

The extension of strict liability in tort to cover damage to tangible property would appear to fit into this same scheme of recovery. An unsafe product is just as likely to injure a human being as his property, and the two types of injury are so closely related²² as to make it illogical to have a different duty governing recovery for each.

Flaws in Majority Opinion

The majority opinion appears to assert improperly that strict liability in tort would make the manufacturer liable for the failure of its products to meet the specific needs of consumers.²³ Neither *Greenman* nor *Vandermark* suggests such a result. Strict liability in tort is based upon the failure of the product to do safely what it was intended to do, not upon the failure of the product to meet special needs of a consumer.²⁴ In addition, the manufacturer is not automatically liable if his product produces injuries or losses. The plaintiff must establish the defect²⁵ and prove that it proximately caused the injury.²⁶

Apart from the above, the opinion of the majority in *Seely* does substantially follow the prior cases. For example, Traynor argues that a manufacturer should be able to define the scope of his liability outside of a physical injury.²⁷ This would become difficult in many instances if strict liability in tort were used as the basis of recovery for economic loss.²⁸

Nevertheless, the majority opinion does seem to leave some problems unsolved. The majority position may rest to a great extent on semantics. It is difficult to separate the duty or standard from the injury. Possibly the injury dictates whether or not the duty was breached, for the injury may show whether there was an unsafe defect. However, a logical application of the majority position, if this position has been correctly interpreted, would appear to require the use of strict liability in tort if an unsafe or hazardous defect caused only economic loss. Thus, in light of the facts of *Seely*, the refusal to allow recovery for economic loss on the basis of strict liability can only follow logically from the majority's rationale if it is assumed that the court did not view the defect as unsafe. But it could be argued that the defect in *Seely*, the violent bouncing, was hazardous or unsafe. If so, strict liability in tort should have been the basis of recovery for the economic loss. Perhaps the application of the doctrine will actually be limited to and dependent upon a situation involving physical injuries. In this light, the argument of Justice Peters has more merit.

²² *Id.* at 13, 45 Cal. Rptr. at 24, 403 P.2d at 152.

²³ *Id.* at 9, 45 Cal. Rptr. at 22, 403 P.2d at 150.

²⁴ *Greenman v. Yuba Power Products*, 59 Cal. 2d at 64, 27 Cal. Rptr. at 701, 377 P.2d at 901.

²⁵ "A manufacturer is strictly liable in tort when an article he places on the market proves to have a defect that causes injury to a human being." (Emphasis added.) *Id.* at 62, 27 Cal. Rptr. at 700, 377 P.2d at 900.

²⁶ *Ibid.* Cf. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d at 261, 37 Cal. Rptr. at 899, 391 P.2d at 171. "Since the plaintiffs introduced or offered substantial evidence that they were injured as a result of a defect" (Emphasis added.)

²⁷ 63 A.C. at 9-10, 45 Cal. Rptr. at 22-23, 403 P.2d at 150-51.

²⁸ Cases cited note 10 *supra*.

Strict Liability in Tort Should Apply to Economic Loss

Justice Peters criticizes the majority for its fear of unlimited liability if strict liability in tort is extended to cover economic loss. He argues that liability may in fact be limited by viewing "defective" as coextensive with "unmerchantable," as derived from the California Commercial Code.²⁹ This amounts to a new public policy argument, in that it attempts to use strict liability in tort as the basis for recovery of all losses proximately caused by defects in products. The Justice, however, argues that his position is not an extension of the doctrine and that the majority position is arbitrary³⁰ insofar as it applies the doctrine on the basis of the resulting injury.³¹ Furthermore, he argues that the fact situation in *Seely* cannot be distinguished from that of *Greenman* on any other basis.³²

In so arguing, Justice Peters is actually viewing the duty placed on a manufacturer by *Greenman* and related cases in a different manner than does the majority, and he thereby attributes a different meaning to the term "defective." As has been seen, the majority decision purportedly rests not upon the nature of the injury, but upon the manufacturer's duty to protect the public from products with unsafe or hazardous defects. On the other hand, the duty as interpreted from the argument of Peters would appear to be a new duty—a greater one, not merely an extension of the old. It would be to protect the public from any loss, not merely from physical injury. A new meaning for "defective" would thus be created. It is no longer merely an *unsafe defect* against which the manufacturer must guard. He must also guard against a defect which may cause only economic loss.

The situation in *Seely* can be distinguished from *Greenman*. To apply strict liability in tort to the facts in *Seely* would place a greater duty on the manufacturer, because the fact situation purportedly does not include a hazardous defect. If such a basis of recovery were allowed, the standard of care placed on the manufacturer would be higher, and thus he would be forced to insure against a greater number of losses.³³

Nevertheless, this reinterpretation of the manufacturer's duty does not impose unlimited liability. If Justice Peters would require that the use made of the product be "ordinary," his interpretation of *Greenman* in this regard would be correct. "To establish the manufacturer's liability it was sufficient that the plaintiff proved that he was injured while using the shopsmith in a way it was *intended to be used*"³⁴

Peters' Opinion Applied

Peters seems to be arguing in favor of complete protection of the consuming public. In essence, he takes the view that the complexities of our society make the consumer powerless to protect himself from defective products, for he does not

²⁹ CAL. COMM. CODE § 2314(2)(c). (Goods to be merchantable must at least be fit for the ordinary purposes for which such goods are used.)

³⁰ 63 A.C. at 14, 45 Cal. Rptr. at 26, 403 P.2d at 154.

³¹ *Id.* at 18, 45 Cal. Rptr. at 28, 403 P.2d at 156.

³² *Id.* at 14, 45 Cal. Rptr. at 25, 403 P.2d at 153.

³³ *Id.* at 11, 45 Cal. Rptr. at 23, 403 P.2d at 151.

³⁴ *Greenman v. Yuba Power Products*, 59 Cal. 2d at 64, 27 Cal. Rptr. at 701, 377 P.2d at 901. (Emphasis added.)

have equal bargaining power with suppliers and sellers of goods.³⁵ Peters contends that a sales warranty does not provide adequate protection.³⁶ In short, he argues that, due to the intricacies of sales law, only strict liability in tort affords adequate protection for the "ordinary consumer."³⁷

The concurring opinion would have us look to the nature of the transaction,³⁸ rather than to the type of injury, to determine whether strict liability in tort should be applied. The basis of liability is determined by whether there was a "commercial transaction" or a sale to an "ordinary consumer."³⁹ The law of sales would still be applied to commercial transactions, but if an ordinary consumer suffered any loss from a "defective"⁴⁰ product he would recover in strict liability in tort.

Two problems remain in Peters' position. The concepts of a "commercial transaction" and an "ordinary consumer" would have to be distinguished and defined in the context of strict liability in tort. A possible solution is presented by Article Two of the Uniform Commercial Code, through its approach to dealings between "merchants" and its definition of a "merchant."⁴¹ Thus, a "commercial transaction" might exist when two or more "merchants" are transacting business.⁴² Another possible distinction between the two concepts could be based on the bargaining position of the parties. As Justice Peters suggests, when the positions are equal, the law of sales would be the basis of recovery, and, when unequal, strict liability in tort would apply.⁴³ There would be some problems in using such interpretations, but let us assume that an answer could be found.

³⁵ 63 A.C. at 19, 45 Cal. Rptr. at 29, 403 P.2d at 157. Peters points out where the parties are within the world of commerce, in which they generally bargain from equal positions, the Commercial Code would apply. He also notes that strict liability in tort does allow the defense of assumption of risk and therefore the manufacturer in certain circumstances could sell the product "as is."

³⁶ *Id.* at 21, 45 Cal. Rptr. at 30, 403 P.2d at 158.

³⁷ There is merit in the contention of Justice Peters that the unwary consumer may be barred from recovery due to lack of privity, notice and disclaimer. See *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398 (1896) (privity of contract required). But see *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960) (no privity required; member of "industrial family"); *Klein v. Duchess Sandwich Co. Ltd.*, 14 Cal. 2d 272, 93 P.2d 799 (1939) (no privity required, unwholesome food); *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (no privity; drugs same as unwholesome food); *Free v. Slus*, 87 Cal. App. 2d 933, 197 P.2d 854 (1948) (no privity required due to manufacturer's representations). See CAL. COMM. CODE § 2607(3)(a) (notice of breach of warranty required); CAL. COMM. CODE § 2316 (exclusion of liability); CAL. COMM. CODE § 2719(3) (exclusion of damages for economic loss not unconscionable).

³⁸ 63 A.C. at 13, 18, 45 Cal. Rptr. at 25, 28, 403 P.2d at 153, 156.

³⁹ *Id.* at 18, 45 Cal. Rptr. at 28, 403 P.2d at 156.

⁴⁰ Here "defective" is used in the broader sense as Peters uses it. It is not necessarily an unsafe defect.

⁴¹ A merchant is one who deals in particular goods, or has special skill or knowledge peculiar to the particular goods. In transactions between merchants both parties are chargeable with skill or knowledge of merchants. CAL. COMM. CODE § 2104(1), (3).

⁴² CAL. COMM. CODE § 2104; UNIFORM COMMERCIAL CODE § 2-104 (1962) Comment (1), states that special rules for professionals in a given field are not necessarily applicable to a casual or inexperienced seller or buyer.

⁴³ 63 A.C. at 19-20, 45 Cal. Rptr. at 29, 403 P.2d at 157.

At least one jurisdiction has offered a great deal of support for the application of strict liability in tort which Peters suggests. *Santor v. A. & M. Karagheusian*⁴⁴ applies the doctrine to a situation involving only commercial loss, resulting from a carpet which developed an imperfection. The plaintiff was allowed to recover for his economic loss due to the reduced value of the carpet. The defect was not hazardous or unsafe. The court rejected warranty as the basis for recovery and stated, "The obligation of the manufacturer thus becomes what in justice it ought to be—an *enterprise liability* ."⁴⁵ The court goes on to define a defective article as one "not reasonably fit for the *ordinary purposes* for which such articles are sold and used."⁴⁶ The court rationalizes its decision on the basis that circuity of action will be avoided if the manufacturer is directly liable and that consumers should not have to depend upon the intricacies of sales law.⁴⁷ *Santor* and the Peters opinion present us with an approach that has merit and may yet become the basis for application of the doctrine.

Conclusion

It is clear that California is a proponent of the doctrine of strict liability in tort in certain product liability cases. However, the doctrine is not applied to all situations involving a defective product. The standard of duty upon which the majority in *Seely* bases its decision does comport with the prior use of the doctrine. But Justice Peters is not entirely satisfied with the status quo. He argues for what in essence is a change, a greater duty. He opts for even greater protection for the consumer. The acceptance of either position leaves open problems which can only be resolved by future cases.

Will the limitation of *Seely* remain or will Peters' position be adopted? The answer depends to a great extent on public policy; as Professor Moreau has put it, "What kind of society do we want?"⁴⁸ In short, is the *Seely* of today the *Escola* of yesterday?

Craig A. Davis*

⁴⁴ 44 N.J. 52, 207 A.2d 305 (1965).

⁴⁵ *Id.* at 65, 207 A.2d at 311-12. (Emphasis added.)

⁴⁶ *Id.* at 66-67, 207 A.2d at 313. (Emphasis added.)

⁴⁷ *Id.* at 65, 207 A.2d at 311.

⁴⁸ Interview with Professor Frederick J. Moreau, in San Francisco, October, 1965.

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