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THE WAYS AND MEANINGS OF DEFECTIVE PRODUCTS AND STRICT LIABILITY*

ROGER J. TRAYNOR**

We have come a long way from MacPherson v. Buick Motor Company.¹ The great expansion of a manufacturer's liability for negligence since that case marks the transition from industrial revolution to a settled industrial society. The courts of the nineteenth century made allowance for the growing pains of industry by restricting its duty of care to the consumer. They restricted the duty so much that in 1842 a court could say about the injured plaintiff in Winterbottom v. Wright that "it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced."² With a tour de force of supreme simplicity the court demonstrated that it was not under the influence. It ignored strict liability, made short shrift of the issue of the manufacturer's negligence, carried the injured plaintiff to the doorstep of privity of contract, and left him on the doorstep. However clearly the manufacturer could foresee injuries to others, the court confined his duty of reasonable care to those in privity, and confined privity to those with whom he dealt directly. It feared that otherwise there would be "the most absurd and outrageous consequences."³ In effect it feared a plaintiff-population explosion, and could not envisage how a manufacturer could be expected to exercise reasonable care toward just anybody he could foresee might suffer injury from his defective product.

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¹ This article was delivered as a lecture at the Seventy-fifth Anniversary Program of the University of Tennessee College of Law on April 23, 1965.

² Chief Justice, Supreme Court of California.


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1. 217 N.Y. 382 (1916).
The Winterbottom rationale assumed that industry could not grow and prosper if it had to pay for any and all injuries its defective products caused. The assumption rested on the oft-disproved notion that wheels operate at peak efficiency when unattended by brakes. It took time, a long stretch of it from 1842's Winterbottom v. Wright to 1916's MacPherson v. Buick Motor Company, for the courts to articulate their disquiet over the ever-widening zones in which the defective products of enterprise were set loose. Disquiet there was as injuries mounted and often went uncompensated in the wake of mass production and distribution. In many an opinion the question festered without satisfactory answer: Can enterprise hew to the line of the profit margin only by letting its victims fall where they may, redressing no more than the privity-privileged?

When Judge Cardozo rejected so narrow a view, he raised the standard of care to normal by reasoning from what had long been obvious but unheeded. The manufacturer of automobiles often deals only with dealers, and the dealer resells the product to the consumer. "The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion." 4

With the manufacturer's liability thus expanded, courts soon progressed to a realization that it was not enough to raise, to normal the manufacturer's standard of care in the making of the product. The safety of the product was also of primary concern. This insight led to the invocation of res ipsa loquitur to permit an inference of negligence from the presence of a defect in cases where there was hardly a basis in common experience for concluding that a defect was probably caused by negligence. 5 With more directness, though at first solely in food cases, 6 the courts began to impose liability on the manufacturer without negligence when his defective product injured the consumer.

The law developed erratically, however, since compensation for injury usually depended on how determined or adept the court was to justify it in terms of conventional legal concepts from (A)gency to at

5. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 532 (1949) (concurring opinion); Jaffe, Res Ipsa Loquitur Vindicated, 1 Buffalo L. Rev. 1, 13 (1951); but see Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products — An Opposing View, 24 Tenn. L. Rev. 938, 944 (1957).
least (W)arranty.\textsuperscript{7} There was repeated invocation of the law of sales warranty, though with curious twists and turns. The courts reached to construct a promise by the manufacturer. He would then be liable for physical injury caused by products that fell short of the judicially created promise. Nothing in the law of sales warranty, however, afforded a rational basis for covering some injuries but not others with judicially created promises. However well warranty served in the field of commercial transactions, its invocation in torts to rationalize compensation for injury also served to frustrate it. The right to disclaim, the requirement of timely notice, and chronic preoccupation with privity of contract barred recovery in ways that were "pernicious and entirely unnecessary."\textsuperscript{8} They still bar recovery in many courts, occasionally even in food cases.\textsuperscript{9} Nevertheless, an increasing number of courts\textsuperscript{10} that invoke warranty to afford recovery for physical injuries have rejected the requirements of notice\textsuperscript{11} or privity\textsuperscript{12} and the right to disclaim.\textsuperscript{13} Others have rejected the fiction of warranty \textit{in toto}, holding the manufacturer to strict liability in tort.\textsuperscript{14}

Regardless of whether a court resorts to tortured concepts of warranty or invokes strict liability in tort, the manufacturer is liable only for some of the physical injuries caused by his products. Until recently courts and commentators have concentrated on eliminating bars to recovery imposed by the law of sales.\textsuperscript{15} Now they confront the central question: When should the manufacturer be responsible to those injured by his products? One cannot look to warranty for a comprehensive answer, for it was designed to ensure commercial satis-

\textsuperscript{8} Prosser, \textit{The Assault Upon the Citadel}, 69 Yale L. J. 1099, 1126 (1960).
\textsuperscript{10} See Prosser, \textit{Law of Torts} 677-8 (3d ed. 1964); Noel, \textit{supra} note 1, 24 Tenn. L. Rev. 963 (1957).
\textsuperscript{13} Heningsen v. Bloomfield Motors, 32 N.J. 358 (1960).
\textsuperscript{15} See, e.g., Prosser, \textit{supra} note 8, 69 Yale L. J. 1099 (1960).
faction rather than compensation for physical injury.\textsuperscript{16} The common warranty standard is that the goods be fit for the ordinary purposes for which they are used.\textsuperscript{17} The Supreme Court of California has adopted the enlarged standard that “a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”\textsuperscript{18} Similarly, the Second Restatement of Torts provides that “one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused. . . .”\textsuperscript{19} The predication of the manufacturer’s liability on a defect in the product precludes compensation for injuries from the use of non-defective products. Thus the manufacturer’s strict liability depends on what is meant by defective.

The reasons justifying strict liability emphasize that there is something wrong, if not in the manufacturer’s manner of production, at least in his product. Thus, it is said that strict liability “will provide a healthy and highly desirable incentive for producers to make their products safe,”\textsuperscript{20} and that “the public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products . . . .”\textsuperscript{21}

Some two decades ago it seemed to me more forthright, in a concurring opinion in Escola v. Coca-Cola Bottling Company, to fix liability upon the one best able to anticipate and bear the risks of injury from defective products. “Those who suffer injury from defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of the injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best suited to afford such protection.”\textsuperscript{22}

It should be clear that the manufacturer is not an insurer for all

\begin{enumerate}
\item See Uniform Commercial Code §2-314 (2) (a), (b), (d), (e), (f).
\item Uniform Commercial Code §2-314 (2) (c).
\item Restatement (Second), Torts §402A (Tent. Draft No. 10, 1964).
\item Cf. Prosser, supra note 8, 69 Yale L. J. 1099, 1119 (1960).
\item Cf. id. at 1122 (1960).
\item 24 Cal.2d 453, 462 (1944) (concurring opinion); see Restatement (Second), Torts §402A, Comment c (Tent. Draft No. 10, 1964).
\end{enumerate}
injuries caused by his products. A bottling company is liable for the injury caused by a decomposing mouse found in its bottle. It is not liable for whatever harm results to the consumer's teeth from the sugar in its beverage. A knife manufacturer is not liable when the user cuts himself with one of its knives. When the injury is in no way attributable to a defect there is no basis for strict liability.

How then do we determine what injuries are attributable to the manufacturer? How do we recognize the fatal flaw that imposes liability?

A defect may be variously defined; as yet no definition has been formulated that would resolve all cases. A defective product may be defined as one that fails to match the average quality of like products, and the manufacturer is then liable for injuries resulting from deviations from the norm. Thus, the lathe in Greenman v. Yuba Power Products, Inc. was defective because it was not built with a proper fastening device as other lathes are. The automobile in Vandermark v. Ford Motor Co. was defective because the brakes went on unexpectedly, as normal brakes do not. Although many questions still attend the problem of harm caused by smoking itself, courts have found the manufacturer liable for injury from a foreign object in the tobacco. If a normal sample of defendant's product would not have injured plaintiff, but the peculiarities of the particular product did cause harm, the manufacturer is liable for injuries caused by this deviation.

Definition of a defect in terms of deviation from the norm, however, breaks down in some cases, as when it is over-inclusive. On guard against such a possibility, the Restatement of Torts would impose no strict liability for what are classified as "unavoidably unsafe products." A classic example is blood. Courts have yet to hold a hospital or blood bank liable when a patient contracts hepatitis in consequence of receiving a transfusion of infected blood. The common rationalization is that the transfusion of blood is a service, not a sale, and that there is hence

27. See Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241 (1961); Perlmueller v. Beth David Hospital, 308 N.Y. 100 (1954); Parker v. State, 280 App. Div. 157 (1952); Merck & Co. v. Kidd, 242 F.2d 592 (6th Cir. 1952); Balkowitsch v. Minneapolis War Memorial Blood Bank, 132 N.W.2d 805 (Minn., 1965); Comment, 63 Colum. L. Rev. 515, 523 (1963).
no implied warranty of merchantability. \(^{28}\) Another view is that since it is as yet impossible to detect or prevent serum hepatitis, the risk thereof is inherent in blood transfusions. Thus the New York Court of Appeals has declared that "The art of healing frequently calls for a balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, when no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to save or otherwise assist the patient."\(^{29}\) Still other courts rationalize that hospitals and blood banks should be exempt from liability by virtue of being charitable, nonprofit organizations. The Supreme Court of Utah has set forth this view picturesquely in its statement that "We think that practically all hospitals are bourns of mercy and most physicians are unselfish disciples of relief and the cure of human ills. We think of hospitals not as profit-seeking vendors in the market place as might be attributed to General Foods, General Motors. . . . No hospital gives green trading stamps as some commodity vendors do, or a car for one having the lucky blood purchase order number."\(^{30}\) The court's logic is as facile as its humor. The usual patient enters a hospital with the hope of getting well, not of getting hepatitis. He would happily pay, given the choice, for some commercial stamp or number that would give him no chance of getting no compensation in the event he got hepatitis.

Far from restricting immunity from strict liability such as blood banks enjoy, the Restatement would extend it even to manufacturers of many drugs of uniform quality,\(^{31}\) if their usefulness appears to outweigh the known dangers that attend their use. Thus ill health offers adventure; no one has a better chance to live dangerously than the ill who must take their medicine.

There has been criticism of such limitations on liability. If a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger? Such scrutiny is especially sensible for drugs for which a reasonably safe substitute exists.


30. Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241, 243-244 (1961).

Thalidomide sleeping pills afford a recent dramatic example of such a dangerous product.\textsuperscript{32} Other drugs, which must be used despite the danger, perhaps should be treated differently. No test differentiates the nature of a defect in such disparate circumstances.

The definition of defect in terms of deviation from a norm presents other difficulties, as in the allergy cases.\textsuperscript{33} Why should a manufacturer be liable for injury caused by one sample in 10,000 containing a foreign substance and yet not be liable for injury to the one user in 10,000 who is allergic to any sample? The argument is that the injury is as much attributable to the user's allergy as to the product, and hence he should bear the costs of injury. Who can know, however, what his allergies will be until they emerge in contact with a given drug? The inevitable query is whether a manufacturer should provide for the occasional risk of allergy as a cost of doing business.\textsuperscript{34} A manufacturer of nonessential products, such as cosmetics, might more appropriately be held responsible for such risk than the manufacturer of essential drugs.

The issue of the manufacturer's liability in the allergy cases cannot be resolved in terms of the deviation-from-the-norm test of defectiveness, for it is the allergic user and not the drug that proves to be outside the norm. Some courts have therefore resorted to what might be called the numbers test, adjusted for the gravity of the harm. If the allergy is rare, the defect is deemed to be in the user and not in the product, and therefore the manufacturer is not held for the harm resulting from the use of his product.\textsuperscript{35} If the allergy is common, or if it is serious though uncommon, the courts tend to associate defectiveness with the product rather than with the user.\textsuperscript{36} It is difficult and often impossible, however, to compile reliable statistics on such matters.\textsuperscript{37} Moreover, there is a gray area wherein an adverse reaction has yet to be identified as an allergy.

Even in standard cases the deviation-from-the-norm test is not so simple as it sounds. If an automobile part normally lasts five years, but the one in question proves defective after six months of normal use,

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  \item \textsuperscript{33} Cf. Noel, supra note 1, 24 Tenn. L. Rev. 963, 969-971; 12 Vand. L. Rev. 331 (1959).
  \item \textsuperscript{34} See Green, \textit{Should the Manufacturer of General Products Be Liable Without Negligence}, 24 Tenn. L. Rev. 928, 934 (1957).
  \item \textsuperscript{35} E.g., Bonowski v. Revlon, Inc., 251 Iowa 141 (1959); Bennett v. Pilot Products Co., 120 Utah 474 (1951); Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956).
\end{itemize}
there would be enough deviation to serve as a basis for holding the manufacturer liable for any resulting harm. What if the part lasts four of the normal five years, however, and then proves defective? For how long should a manufacturer be responsible for his product? Moreover, with what class of goods should the product be compared? The deviation from the norm would vary according to whether, for example, a part in a used 1949 car is compared with like parts in other used cars, or in other used cars of the same make, or in other used 1949 cars, or in other cars with comparable ownership and driving histories.

The Restatement of Torts suggests another definition of defectiveness. "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." 38 Such a definition is designed to exclude liability in certain cases; thus "good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful..." 39 The definition emphasizes the unexpected dangers of the product.

The Restatement test can encompass deviation-from-the-norm defects, though its primary concern is with the surprise element of danger. Thus abundant public discussion of the cancer-producing possibilities of cigarette smoking has insured common knowledge of potential dangers. It can hardly be said now that the risk comes as a surprise merely because millions of users regard them as fit for ordinary use.

Some dangers are generic to the goods, so that people regard the goods as fit for ordinary use even with such qualities. The manufacturer would not be liable, under the Restatement test, for harm caused by generic dangers. Under such a test, liability would turn on what we mean by generic.

The now patent risks of cigarettes are not comparable to those of, say, matches or knives. Commentators describe the ignitable tip or the cutting edge as qualities generic to the goods; both the manufacturer and the consumer expect and want the product to burn or cut. The cancer-producing qualities of cigarettes are generic only in the sense that all cigarettes have those qualities but they are neither produced nor consumed for that reason. They may be likened to the matches of the nineteenth century, whose phosphorous fumes entered the body through cavities in teeth and caused necrosis of the liver, or poisoned the air that people inhaled. With the development of the safety match, these dangers were eliminated. 40 The harm-producing qualities of

39. Ibid.
40. 15 Encyclopedia Britannica 45-47, Match.
cigarettes may be no more generic than the harm-producing qualities of pre-safety matches.

Emphasis on generic qualities, or what the Restatement views as commonly contemplated characteristics, should not afford a basis for charging the consumer with assumption of the risk of the harm some products cause. Were a consumer deemed to assume all commonly known risks, we would come full circle round to the problems generated by the disclaimer of warranty in the implied warranty cases.\textsuperscript{41} A consumer compelled to assume the risks of the products he uses would be denied recovery in the face of the public policy that holds the manufacturer liable for some of the injuries caused by his products. The role of assumption of risk in products liability cases is properly a limited one. It applies only to actions of the consumer that shift the blame from the manufacturer to him. Thus, courts require the plaintiff to show that he made "normal use" of the product.\textsuperscript{42} Moreover, if the plaintiff understands the risk in a product, consents to take that risk, and continues to use the product, the harm thereafter incurred would seem to be self-inflicted, and the plaintiff would then be barred from recovery.\textsuperscript{43}

The cigarette cases illustrate the difficulties presented by the definition of defect in terms of deviation from common expectation. One of the purposes of the test is to exclude liability for the harmful effects of smoking. Yet, until recently, the harm caused by smoking was unknown to the consumer, so that the cigarette manufacturer would be liable under this test to those injured before the danger became widely known. Even now, assumption of the risk presents special difficulties in connection with cigarette smoking. Given the habit-forming nature of cigarettes, it is questionable how voluntarily many consumers are continuing to smoke. Moreover, there are no warnings on cigarette packages of a sort to bring home the gravity of the risk. Important though it may be to scrutinize one man's meat for signs of nonconforming poison, it may more often prove necessary to scrutinize his conforming poison for signs of warning as to its use and even reminders as to its patent risks.


\textsuperscript{42} \textit{Prosser, supra note 8}, 69 \textit{Yale L. J.} 1099, 1144 (1960); see James, \textit{General Products — Should Manufacturers Be Liable Without Negligence}, 24 \textit{Tenn. L. Rev.} 923, 927 (1957).

What is the effect of warning or notice? The *Restatement* provides: “Where proper warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning which is safe for use if the warning is heeded, is not in a defective condition. . . .”

Example: poison. A warning or notice cannot be used, however, to mask a disclaimer of responsibility that would shift the risk to the consumer. Thus, a notice by a manufacturer of soft drinks listing the possible foreign substances that might be contained in a bottle of its beverage, or a notice by an automobile manufacturer listing possible difficulties that might be encountered by the user of the car, would not preclude liability. On the other hand, it may sometimes be unnecessary for a manufacturer to give a warning or notice, either because the danger is obvious or because it is unknown. Again, cigarettes illustrate the possibilities. A manufacturer’s failure to give warning or notice might render the product defective. A warning or notice might cure a defect attributable to the product. A warning or notice might be unnecessary, either because the danger is widely known or, as in earlier cases, the danger is not known at all.

The complications surrounding the definition of a defect suggest inquiry as to whether defectiveness is the appropriate touchstone of liability. Some cases avoid such inquiry by defining *defect* so loosely as to hold the manufacturer liable for all harm resulting from the use of his product. Thus, in *Pritchard v. Ligget & Myers Tobacco Company*, the court would find a breach of warranty of merchantability if the cigarettes were not “reasonably fit and generally intended for smoking without causing physical injury.” *Defect* becomes a fiction, however, if it means nothing more than a condition causing physical injury. Judge Goodrich would not impose liability unless harm resulted from the adulteration of a product or a failure to keep a promise of safety. In his homely words: “If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable. . . . The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer

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45. See Noel, supra note 1, 71 YALE L. J. 816, 844 (1962).
48. *Id.* at 296 (1961).
who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously. 49

No single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries, but there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty law.

The law of contracts and sales can nevertheless still play a vital role in the delineation of a manufacturer's liability for purely economic loss as distinguished from physical injuries. In *Kyker v. General Motors Corporation*, 50 the Supreme Court of Tennessee held that the purchaser of an automobile, in an action against the manufacturer, could not recover the money paid for the automobile since there was no privity of contract. 51 Warranty law, carefully spelled out in the Uniform Sales Act and the Uniform Commercial Code, is designed to govern such commercial questions between the parties. In the commercial setting the rules of warranty and of notice and disclaimer function well. A warranty affords a ready basis for determining whether a product is defective in relation to what the consumer has been led to expect. Only if the manufacturer agreed to supply a product meeting the consumer's needs could the consumer hold him liable for the economic loss when the product failed to meet those needs. Thus courts have been reluctant to impose liability on a tort theory solely for economic loss even in actions for negligence. 52

As matters now stand the manufacturer's strict liability in tort is limited to physical injury caused by a defective product. The early cases limited strict liability to recovery for physical injuries to the person, but physical injury to property bears such close analogy to personal injury that there is no reason for distinguishing them. Thus courts have been reluctant to impose liability on a tort theory solely for economic damage to property as well as to persons. 53

49. *Id.* at 302 (1961) (concurring opinion)
50. 381 S.W.2d 884 (1964).
51. The proposition that recovery for economic loss should be governed by the Sales Act is accepted even by states that have abolished those requirements in personal injury cases. See *Seely v. White Motor Co.*, 63 A.C. 1 (Cal. 1965). In *Kyker*, the Supreme Court of Tennessee relied on *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963), for the proposition that the Sales Act requires privity between the parties. *Kyker v. General Motors Corp.*, 381 S.W.2d 884, 886 (1964). Although recognizing that the Sales Act requirements are still appropriate in some circumstances, California held in *Greenman* that lack of privity will not bar recovery in personal injury cases. Tennessee has not abolished the requirement of privity in such cases. *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545 (1915); *Berry v. American Cyanamid Co.*, 341 F.2d 12 (6th Cir. 1965), cf. *Gottsdanker v. Cutter Laboratories*, 182 Cal. App.2d 602 (1960).
53. *Id.* at 1143 (1960).
A recent California decision gives us a capsule view of how complications can set in to aggravate the issue of strict liability. The plaintiff sued a manufacturer of aspirin. He had used six or eight of its tablets every other day for 22 years, and there was no issue as to their uniform quality. His complaint was that acidic substances in the aspirin caused physical injuries that necessitated removal of his stomach and other internal organs. In an age of sleep pills and pep pills and pain-relief pills, and placebos, did plaintiff consume pills to excess? Since he consumed them only every other day, his daily average was only three or four. Did 22 years constitute an excessively long span of consumption? Was he an ordinary consumer or an addict? Did he understand the risks of his steady dosage? If the acidic qualities of aspirin were characterized as generic, would they correspond to the generic cutting edge of a knife, or the cancer-producing elements of cigarettes?

Was there as little common understanding of such risks as there was little common understanding until recently of the risks of cigarette consumption? If so, the manufacturer would have had no reason to give warning. If, on the other hand, the manufacturer was well situated to know of such risks, would a warning be enough to prevent liability? Would failure to warn afford a basis for liability? Would a warning be superfluous if there were common understanding of the risks? Would it be as unreasonable to require a manufacturer to caution against a given intake of aspirin as it would be to require a distiller to caution against a given intake of alcohol?

What if the plaintiff’s reaction to aspirin were allergic and ironically the source of his continuing dependence on aspirin? Would the allergy be a relatively common one or the one-in-a-million case? What if the aspirin alone were to blame but rarely caused such havoc? Should the manufacturer still be liable on the ground that he is well situated to bear the cost or to pass it on? Or is there an interest in holding down such costs on such a staple drug?

One could not conclude the discussion of a case with so many fascinating problems without asking what became of them. Who knows? There is no mention of them in the opinion, for the case was decided on unrelated grounds.

55. Cembrook v. Sterling Drug Inc., 231 A.C.A. 77, 41 Cal.Rptr., 492 (1965). Complications can set in also on the perennially hazardous highway. Recently the purchaser of an automobile sought damages of 1.1 million dollars from the manufacturer, alleging that the windshield wipers failed to work during a heavy rainstorm, that he therefore had to drive with his head out the window, and that in consequence he contracted bronchial pneumonia. WALL STREET JOURNAL, p. 1, April 30, 1965.
So the courts must still struggle not only to delineate the scope of the manufacturer's liability but also to enforce it. A chronic problem of enforcement is to obtain jurisdiction over the defendant.\textsuperscript{56} Due process precludes jurisdiction over nonresidents unless there are "sufficient contact or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice."\textsuperscript{57} Consumers often seek to hold suppliers with whom they have not dealt directly, and the latter may have only tenuous contacts with the forum state. The defendant in a recent case,\textsuperscript{58} an Ohio manufacturer of safety valves, sold one of its products to a Pennsylvania manufacturer of water heaters. The Pennsylvania corporation sold a water heater to the plaintiff, a resident of Illinois. The plaintiff was injured when the safety valve failed to work, and she sued the defendant in Illinois. The only contact that the defendant had with Illinois was that the plaintiff was injured by the malfunctioning of its safety valve there. The Supreme Court of Illinois held that there was jurisdiction over the defendant. It held that the occurrence of the injury within Illinois fulfilled the statutory requirement that the tortious act must be committed there and that due process did not preclude the exercise of jurisdiction over the defendant. Other courts have yet to extend their jurisdiction so far.\textsuperscript{59} What if a nonresident defendant did not contemplate any interstate business and the plaintiff brought its product into the state? Such problems of jurisdiction will continue to attend the enforcement of a manufacturer's liability for injuries arising from defective products.

Now comes the time to ask \textit{Quo vademus} in strict liability.

The development of strict liability for defective products, for industrial injuries covered by workmen's compensation, and for injuries caused by ultra-hazardous activities, presages the abandonment of long-standing concepts of fault in accident cases. The significant innovations in products liability may well be carried over to such cases.\textsuperscript{60} On the highways alone injury and slaughter are not occasional events, but the order of the day, and sooner or later there is bound to be more rational distribution of their costs than is now possible under the law of negligence. It is ironic that in the field of automobile accidents, where the need for compensating victims regardless of fault is most urgent,

\textsuperscript{56} See Comment, 63 Mich. L. Rev. 1028 (1965).
\textsuperscript{57} International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).
\textsuperscript{59} E.g., Twinco Sales, Inc. v. Superior Court, 230 A.C.A. 348, 40 Cal.Rptr. 833 (1964).
\textsuperscript{60} See Kalven, \textit{Torts: The Quest for Appropriate Standards}, 53 Calif. L. Rev. 189, 205-206 (1965).
we continue to let fault determine whether or not there shall be compensation.\(^6\)

Any system of enterprise liability or social insurance designed to replace existing tort law as the means for compensating injured parties should provide adequate but not undue compensation. Only if reasonably adequate compensation is assured can the law justify closing traditional avenues of tort recovery. On the other hand, once adequate compensation for economic loss is assured, consideration might well be given to establishing curbs on such potentially inflationary damages as those for pain and suffering.\(^6\) Otherwise the cost of assured compensation could become prohibitive.

If in time the accident problem is solved through some compensation scheme that covers the basic economic losses of accident victims, it will remain to be seen whether the law of negligence as we know it today in this area will atrophy or will survive in a diminished role to afford additional compensation to victims whose injuries are caused by actual fault on the part of others.\(^6\) Money damages, of course, can never really compensate for the noneconomic losses resulting from personal injuries. Although it is therefore reasonable to exclude such losses from coverage in any purely compensatory system, inherent justice between the person injured and the person who caused the injury may demand compensation for such losses when the latter was actually at fault. Something of this sort has apparently taken place in England. The adoption of broad social insurance to cover accident and other losses has been followed by judicial limitation of strict liability in tort. Liability for negligence remains, however, and the problem of double recovery is resolved pragmatically by deducting one-half of the social insurance benefits that would be received for the first five years after the accident from the damages for lost earnings.\(^6\)

As we enter the computer age we are still far from solving the massive accident problems that began with the industrial revolution. The cases on products liability are emerging as early chapters of a modern history on strict liability that will take long in the writing. There is a wealth of analogy yet to be developed from the exploding bottles of yesteryear, from lathes on the loose, and capricious safety valves, and drugs with offside effects. There are meanings for tomorrow to be drawn from their exceptional behavior.

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\(^6\) See 2 Harper & James, Torts 729-784 (1956).
\(^6\) Friedmann, supra note 63 at 155 (1959).