Tort Liability and Reinsurance Contracts

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Many reinsurers resist paying mass tort and environmental claims. One of their key arguments is to urge that developments in American tort law took them (and everyone else) by surprise and hence that it is unfair for them to pay. This argument is wrong for three reasons. First, the common law develops and changes. Everyone knows that this change is a risk that (re)insurers assume. Second, the rise of enterprise and strict liability in the United States was a well-foreshadowed, forecastable trend. Third, if a reinsurer did not see (or, at least, sense) this development coming, then it received obtuse legal advice. This article focuses on the second of these three reasons.

Reinsurers have been resisting the payment of some claims arising out of liability policies. Mass tort, pollution-related claims bottomed on strict-liability theories exemplify these trends. The asbestos claims are probably the best example. Bottom line: London reinsurers and their European retrocessionaires are probably resisting payment because they are financially pressed.

Resisting reinsurers are deploying two kinds of arguments. On the one hand, they give quite narrow, technical arguments pertaining to the wording of the policies. Arguments about the meaning of aggregate extension clauses fall into this narrow category. More generally, on the other hand the reinsurers are resisting because they are claiming that developments in American law, after the formation of the contracts of reinsurance, have taken them by surprise. Their general position is that relatively early contracts of reinsurance should not be interpreted in such a way as to include the torts that have been invented during roughly the last third of the twentieth century.

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CCC 1040-6026/95/080167-45
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The public policy argument presupposed by the approach of the reinsurers is unsound and its rebuttal is quite simple. Here it is. There were themes in tort law and tort law scholarship as early as World War II, and even before, that made the "American Torts Revolution" foreseeable by insurance contract planners. Hence, the public policy argument of the reinsurers is factually wrong because its history is bad. The historical documentation of this simple rebuttal is easy to trace, but not quickly recounted.

POINT AND COUNTERPOINT

The notion that the reinsurance industry has been taken totally by surprise by the "American Torts Revolution" is false. The reinsurers are claiming that compensability of the losses in question was unforeseeable, and therefore outside the ambit of contractual intent. John Butler, a barrister and an employee of the reinsurance industry posing as an objective scholar, is perhaps the most shrill exponent. He suggests that American insurance policies have been distorted by the courts and hence that "reinsurance covers will not respond, for the simple reasons that they were not designed for and were never meant to apply to such situations."[1] Obviously, the persuasive power of technical, narrow legal arguments is quite often a function of broader, more policy-oriented arguments. If the argument for surprise is logically and factually weak, the technical (re)insurance arguments are thereby weakened from a rhetorical standpoint.

Put formally, the "London Argument" goes like this:

P_1: The recent expansion of tort liability in America was totally unexpected, unforeseen, and—indeed—unforeseeable.

P_2: That which is not foreseeable is not within the intent of the contracting parties.

P_3: Hence, when the American insurers and the London reinsurers formed their contract of reinsurance in the 1950s and early 1960s, neither American insurers nor London reinsurers intended those reinsurance contracts to cover such catastrophes as the asbestos toxic epidemic.

P_4: All contracts (including contracts of insurance and reinsurance) are to be construed by reference to the intent of the parties.

C: Hence, the terms of the reinsurance contracts should not be construed expansively and in such a way as to include asbestos catastrophes within coverage.

The American liability insurers—who would otherwise be the "victims" of this argument—have a number of counterarguments. Some of these are technical arguments, but one is a direct refutation of the "London Argument." We will review the technical arguments, and then we turn to the broader "American Counter Argument."

First, contracts of insurance which are ambiguous are construed against the insurer, even when the insured is sophisticated in matters of insurance.[2] Contracts of *re*insurance are contracts of *insurance*. Hence, they should be construed against the reinsur*er*. Thus, if there are coverage questions that are not disposed of by the clear language of the contract, and if the American insurers can provide a reasonable construction of the contracts favoring coverage, the court should find coverage.

Second, the touchstone of contract construction is objective intent, not the secret, subjective, purely mental and private intentions of the parties.[3] Therefore, the mere fact that no one thought of asbestos or other mass tort catastrophes at the time of contract formation is not dispositive. American insurers were astounded when American courts held that toxic tort injuries such as asbestos were covered. The fact that the American insurers had not anticipated the kinds of injuries for which they were asked to pay is completely irrelevant. The real issue is objective intent rather than actual subjective intent.

Third, contracts of reinsurance are supposed to "follow the fortunes" or "follow settlements" of the underlying contracts of insurance.[4] Hence, if the underlying contract owes indemnity, then so does the reinsurer. In fairness, if an insurer must pay for unanticipated categories of risk, then so must the reinsurer.

Fourth, the relationship between foreseeability, contractual language, and contractual intent is much more complex than P_2 captures.[5] Parties to a contract can certainly allocate risks which neither of them can think of at the time of contract formation. In fact, insurance itself is usually thought of as involving the transfer of risks. Obviously, risk transfer involves the transfer of uncertainties and some of them may be unconceived.

Finally, we turn to the broader, thematic argument. The American insurers have a direct counter argument to the "London Argument." The "American Counter Argument" goes like this:

P_1': The expansion of tort liability for products in the United States has been actively contemplated in authoritative legal circles since World War II, at the very latest.

P_2': Hence, a substantial expansion of insurer liability was

foreseeable at least since around the time of World War II.

P_3': The London market was aware of this trend in legal history.

C': Therefore, contracts of reinsurance should be interpreted expansively to include tort liability for asbestos, etc., if American insurance contracts are thus construed.

Obviously, the conclusion, C, of the "London Argument" and the conclusion, C', of the "American Counter Argument" are contradictory. The same is true of the key premises of the two contending arguments. P_1 of the "London Argument" and P_1' of the "American Counter Argument" are flatly contradictory: necessarily, if P_1' is true, then P_1 is false.

The purpose of the remainder of this article is to demonstrate the truth of P_1', thereby the falsity of P_1, and to suggest the truth of P_3'. In other words, the general thrust of this article is that the "London Argument" is unsound, because its first premise is false. If so, then the rhetorical force of the reinsurers' technical insurance arguments is weakened. The technical legal argument is persuasive only if it fits with the great tendencies of the times in which the argument is given. Nineteenth century constitutional arguments have a tight elegance which the immature and the ideologically committed find attractive. These arguments do not have congruence with our times. They are, therefore, legally unpersuasive.

A radical expansion of tort liability was actively contemplated in influential legal circles since before World War II. The article proceeds by recounting and exploring academic and judicial thinking about expanding tort liability and about consequent expansions of insurance coverage. For the sake of simplicity, the article concentrates on a single family of arguments which were developed first for both expanding tort liability and then obliquely used to support expanding insurance coverage.

The Key Argument: Enterprise Liability and the Insurance Justification

From World War II until quite recently, in increasing numbers, leading American judges, commentators, and scholars argued as follows. Modern American society is characterized by a high level of prosperity which has been produced by a heavily industrialized and highly technological society. Fast, heavy, and complex means of transportation are crucial to technological industrialism. Most accidental injuries are the consequence of processes characteristic of that social order. As a result, society as a whole, or some appropriate segment of

society should pay for those losses. The most efficient way to cover those losses is to visit the cost of them upon the economic enterprise(s) which created them. The costs of accidents are thereby internalized to the appropriate enterprise and then redistributed to society at large through the price of the product. This redistribution can be accomplished directly, through corporate savings, which is self-insurance, or it can be done indirectly through the purchase of third-party insurance, the price of which is then included in the (cost and hence the) price of goods sold.

Two things invariably accompany this argument, whether articulated by courts or commentators. First, this reasoning involves an abandonment of fault as an express precondition for liability for conduct which is not intentional. Indeed, the theory is frequently called "enterprise liability," to emphasize that liability is being visited upon an enterprise simply because it is an enterprise rather than because of fault.[6] Second, exponents of enterprise liability have understood that insurance would play a key role in the complex process of distributing risks and costs. Indeed, the argument spelled out in the preceding paragraph is sometimes called "the insurance argument" or "the insurance justification."[7] Obviously, these two themes are not inherently dependent;[8] equally obvious, they are causally, practically, politically, and rhetorically linked.

Sometimes the insurance justification is viewed in terms of the establishment and proliferation of strict liability for product defects.[9] The insurance justification is in fact much broader than that. It has also been used to expand concepts of other tort causes of action such as nuisance[10] and to curtail a variety of immunities from liability.[11]

The age, power, and currency of the argument for enterprise liability refutes P_1, that the recent expansion of tort liability was unexpected, unforeseen, and unforeseeable. Obviously, so long as enterprise liability theory or the insurance justification had currency in prestigious and (hence) influential judicial, practical, and scholarly writings and conversations, it can hardly be argued that the objective intent of the reinsurers and insurers excluded radically expanding tort liability from its purview.[12]

The first premise of the "American Counter Argument," P_1', is demonstrated overwhelmingly by surveying some influential academic opinions from the pre-World War II period as well as post-war. (Fleming James, Jr., and Albert A. Ehrenzweig are two of the leading torts scholars of the immediate post-war period.) This proposition is also established by examining the views of William Prosser, reviewing judicial opinion on the subject from World War II to 1960 (for example,

the *Escola* concurrence of Justice Traynor), discussing three key legal events of the early 1960s (namely, the decision of *Henningsen*, the decision in *Greenman*, and the American Law Institute's adoption in 1965 of Section 402A of the *Restatement (Second) of Torts)*, and exploring the subsequent impact of the theory of enterprise liability in insurance justification and judicial decision making in the insurance coverage area. Later phases of the development of tort law in the last half century need not be discussed.

Phases of the "American Torts Revolution"

The torts revolution in America has involved five phases. The first phase, the preparatory phase, has been going on during most of the twentieth century. The workers' compensation legislative revolution, the radical shift in tort scholarship from doctrine to policy and function, and the general social trends away from laissez-faire economics have all contributed to this first phase. The second phase occurred during the early 1960s when certain bellwether jurisdictions, including New Jersey, California, and New York, abandoned an exclusively fault-based torts regime and the American Law Institute adopted Section 402A. The third and fourth phases occurred more or less concurrently through the 25 years following the adoption of Section 402A. The third phase included the spread of no-fault torts, and the fourth included the relaxing of the fault-based components of the negligence sector of the torts regime. The fifth phase of the tort revolution is the insurance litigation responding to the consequences of the earlier phases of the torts revolution.

The truth of P_1', and hence the erroneous character of the "London Argument" is demonstrated by reference to the first phase of the "American Torts Revolution." If the idea that tort liability might change and expand as social and industrial conditions change is an idea which has been "in the air" during the entirety of the last 100 years, sophisticated insurers at any level cannot seriously claim to have been taken totally by surprise. Hence, this article concentrates on the first phase. It also reviews the second phase, since activity in that period shows how the first phase came to fruition. The later phases, while interesting, are not integral to our assignment. The thinking of William Prosser is the place to start.

EARLY ACADEMIC OPINION

From a variety of viewpoints, Prosser is the key academic tort thinker of the twentieth century. His writings are widely known and actually read (at least in bits and pieces). His work is regarded as

encyclopedic rather than idiosyncratic. Indeed, most people regard his textbooks on torts as simple reflections of the real conceptual organization of the law, rather than the reconstructive systemizations they really are.

To some degree, it is possible to divide twentieth century theorizing about torts into the pre-Prosser Phase, the Prosser Phase, and the post-Prosser Phase. In some sense, much of what preceded Prosser culminated in him, and much of what came after is footnoted to him. As a result, Prosser's views have a special bearing on the "London Argument." Hence, we consider them first, and then we historically refer to some writers from the pre-Prosser Phase.

Prosser

William Prosser published the first edition of *Handbook of the Law of Torts* in 1941. In Chapter 15 of that text, entitled "Suppliers of Chattels and Contractors," Prosser drew together the scholarship of the 1920s and 1930s, argued for strict liability for product defects on social policy grounds (including enterprise liability and insurance justification), and predicted that strict liability would become the rule governing the liability of chattel manufacturers within the next quarter century.[13]

Prosser's text was immediately well-received.[14] It was widely known in both the United States and England.[15] The text was immediately and repeatedly cited by American courts,[16] and the contents of Chapter 15 were specifically cited,[17] as was the section entitled "Strict Liability–'Warranty.'"[18] Thus, there can be no question about the dissemination of Prosser's views. His views of strict liability and his predictions for the future were both well-known. Moreover, the fact that he drew together the pro-strict liability scholarship of the preceding decades also had to be known.[19]

Prosser's vision was sweeping and elegant. He titled Section 82 of the 1941 edition "Liability of Suppliers to Those Supplied." In that section, Prosser argued that "[a] supplier of chattels is under a duty to the person supplied to exercise reasonable care to see that the goods are safe for their intended use." In the subsection entitled "Strict Liability—'Warranty,'" Prosser stated that although this duty was originally grounded upon negligence, it was "now very largely superseded by strict liability for a breach of warranty. . . ."[20] Prosser observed that warranty law is largely based on tort, even though it has become somewhat contractual in the twentieth century. Most significantly, Prosser emphasizes that "A breach of warranty gives rise to strict liability, which does not depend upon any knowledge of defects on the part of the seller, or any negligence." Section 83 is entitled "Liability of

Suppliers to Third Persons." In this section, Prosser discussed the idea that contract drives out negligence and that the doctrine of privity inherent in classical contract law limits the liability of a promisor to only his promisee. Prosser was harshly critical of the prevailing understanding of *Winterbottom v. Wright*,[21] which is generally taken to be the classical source for the strict privity rule. Prosser observed that the trend of cases in the twentieth century holds a manufacturer of chattels liable for negligence. Prosser believed that during the nineteenth century, social policy protected industry from the potentially heavy burden of hundreds of claims from unidentified consumers. In the twentieth century, however,

> there has been a definite change in our social philosophy. It is now generally recognized that a manufacturer or even a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective. The existence of a contract with the buyer of course does not prevent the existence of a tort duty to a third person who will be affected by the seller's conduct.

It is important to notice that there is no express reference to negligence in Prosser's report of philosophic tendencies imminent in existing social trends.

Prosser went on to observe that the privity rule was first abrogated in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Technically, *MacPherson* simply held that an automobile was inherently dangerous,

> [b]ut its reasoning and its fundamental philosophy was clearly that the manufacturer, by placing the car upon the market, assumed a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase, and the foreseeability of harm if proper care were not used.

Moreover, legal commentators provided an expanded justification for the case as follows:

> the manufacturer derives an economic benefit from the sale and the subsequent use of the chattel, and his duty is analogous to that of a possessor of land toward his business visitors. . . .

Obviously, this is a primitive analogy, which is moving toward the

theory of enterprise liability. Originally, the liability of *business premises'* owners to business invitees was based, in part, on the economics of the situation.

MacPherson was a negligence-only case. Prosser considered the implications of the modern social trends in the subsection entitled "Strict Liability—'Warranty.'" There, Prosser observed that strict liability is a natural extension of negligence liability, under the social and technological conditions of the twentieth century. He characterized strict liability as a system which would, in effect, make the manufacturer "a guarantor of his product, even though he had exercised all reasonable care." Prosser claimed that the theory of strict liability had "considerable impetus," and—at least for the time frame immediately before his writing—that it "met with the approval of every legal writer who has discussed it."

Most importantly, Prosser observed that strict liability was supported by the theory of enterprise liability:

> [S]ocial policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance.... There is an obvious argument that in the public interest the consumer is entitled to the maximum of protection at the hands of some one, and that the producer, practically and morally, is the one to provide it.

Notice that the theory of enterprise liability and the insurance justification occur in precisely the same sentence. Prosser goes on to remark that the theory of strict liability is preferable to the theory of negligence, because it is difficult for a plaintiff to prove negligent acts, even with the doctrine of *res ipsa loquitur*. Prosser was also dissatisfied with the piecemeal litigation which is required by the privity rule, and he believed that the doctrine of strict liability was congruent with the already existing practices of reputable manufacturers. Finally, Prosser was inclined to think that strict liability might constitute an incentive for greater care on the part of manufacturers.

The significance of Prosser's discussion of strict liability in the first edition of *The Law of Torts* is greater than even its magisterial text reveals. It is also important that in the early 1940s, a scholar and widely known lawyer—from outside the elite, but arguably, "out-of-touch," Harvard-Yale-Columbia-Penn orbit—was openly advocating strict liability and predicting its ascendancy in the relatively short run. Well after he published the first edition, and after several years practicing in

Minneapolis, Prosser became Professor of Law at the Boalt Hall School of Law at the University of California at Berkeley in 1948,[22] where he became Dean shortly thereafter. He ultimately became the Reporter for American Law Institute's *Restatement (Second) of Torts*, as well as the principal draftsman of Section 402A.[23]

Another important thing to keep in mind about Prosser is that he was a consensus theorist of tort law.[24] Prosser was no wild-eyed radical; he was not even a thorough-going reformer of the foundations of tort law. Rather, Prosser sought to build a loose and flexible view of tort law which would attract the many, including practitioners, and not just the few. Indeed, Prosser was very much a consensus-oriented thinker, and he tried to synthesize the doctrinal themes in tort law with the underlying, and shifting, policy orientations of tort law. Professor G. Edward White suggested that Prosser's synthesizing impulse, as well as his style, counted for his phenomenal success. In any case, Prosser was widely read in the 1940s and 1950s and was never thought of as an outsider berating the system. Hence, Prosser's views were by no means alien to the American legal community; indeed, they appear to have expressed the spirit of the times. Hence, it is impossible to say that the ascension of strict liability was totally unexpected, and hence, not foreseeable by sophisticated observers in the 1940s and 1950s.

Other Early Authors

Prosser was by no means the first legal scholar to recognize that enterprise liability might constitute a foundation for tort liability.[25] Moreover, the theory of enterprise liability was used as a foundation for other important doctrines in tort law, such as the doctrine of *respondeat superior*.[26] Both the theory of enterprise liability and the insurance justification were staples of the "Legal Realist School" of legal theory which flourished in the 1920s and 1930s.[27]

Thus, legal scholars were discussing theoretical foundations of strict liability for decades before its adoption. It is totally contrary to historical continuity to suggest, as the "London Argument" does, that strict liability was completely revolutionary and totally unforeseeable. Indeed, strict liability has been used during most of this century as one way to handle industrial accidents.

ENTERPRISE LIABILITY AND WORKERS' COMPENSATION

Legislative systems regulating compensation of workers for industrial accidents have existed in this country since the turn of the century.[28] Although systems of workers' compensation struggled for legislative passage and judicial validation for the first 30 years or so of

this century, by 1930 the validity and contours of modern workers' compensation law were established.[29] The comprehensive Workman's Compensation Act was first passed in 1913.[30]

Both legislatures and courts frequently justified workers' compensation systems on the basis of the theory of enterprise liability and the insurance justification.[31] One current textbook describes the historic situation as follows:

> An important economic and social theory of the *workers' compensation idea* is that the cost of employment related injuries, diseases and deaths ultimately should be borne by the purchasers and consumers of products and services. In other words, built into the cost of any product in the employer's insurance premium for the cost of workers' compensation or the cost of self-insurance. Thus, the costs of employment related injuries, diseases and deaths are properly distributed throughout society.[32]

Under the influence of legislative workers' compensation systems, courts developed systems of strict liability for handling industrial accidents.[33] Obviously, it is not a very long step from handling industrial accidents through a regime which is not fault-based to handling consumer injuries through a tort regime which is not fault-based.

JUDICIAL OPINION AT MID-CENTURY: *ESCOLA* AND THE INSURANCE JUSTIFICATION

Academic opinion notwithstanding, the fault standard was still preeminent in American tort law at mid-century. Nevertheless, there were some important warning signals of things to come. The thinking of Roger Traynor, then an Associate Justice on the California Supreme Court, exemplifies this point. Beginning in 1944, Justice Traynor—who was to become the leading state court jurist of the post-war period—began a crusade to establish strict liability for product defects. This section tells the first three quarters of that story, and his ultimate victory in 1963 will be reserved for later in the article.

The Opening Shot

Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), was an *en banc* decision of the California Supreme Court. The plaintiff was a waitress and a bottle of Coke broke in her hand during work. She recovered from the bottler upon a negligence theory which utilized *res ipsa loquitur*. The Supreme Court affirmed the plaintiff's victory.

At trial, the bottler demonstrated that all bottles were inspected carefully so that a latent defect was extremely unlikely. The bottler also presented evidence that, although the bottle which injured Escola was not a new bottle, latent defects were of the sort which might cause accidents of the type which injured her, but which were not likely after initial testing.

The California Supreme Court ruled that even though the defendant-bottler had presented some evidence defeating Escola's claim of negligence, whether to draw the inference of negligence under an instruction of *res ipsa loquitur* was a matter for the jury. Roger Traynor concurred in the judgment but wrote a separate opinion. Traynor's opinion was immediately and widely understood to be a call for the use of strict liability in tort litigation. Traynor deployed both the theory of enterprise liability and the insurance justification in his concurring opinion. Since the Traynor concurrence in *Escola* is, even today, the *locus classicus* for virtually all discussions of enterprise liability and the insurance justification,[34] his opinion needs to be described at some length.

Traynor starts by saying that he does not believe that negligence should any longer be singled out as the theoretical foundation for a plaintiff's right to recovery from a manufacturer in cases of personal injury. According to Traynor, courts should adopt the following rule:

> 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 440 [Emphasis added.]

Although Justice Traynor uses the language of "absolute liability," it is clear that there is such liability only upon the proof of a defect. This makes Traynor's proposed rule substantially similar to the doctrine of strict liability as we now know it.

Traynor's opinion develops a three-pronged argument in support of his theory. His first argument concerns public policy, which is a restatement of the theory of enterprise liability supported by the insurance justification. His second argument suggests the similarity between warranty law and strict liability. His third argument establishes the changing relationships between manufacturers and consumers over time.

Public Policy Argument

According to Traynor, public policy demands that legal responsibility be fixed at that point where such responsibility will be most

efficacious in reducing hazards to life and health inherent in defective products that reach the market. Even if manufacturers drastically reduce the number of defects which appear in their products, accidents would still occur from time to time. The world is not perfect; therefore, the risk of an injurious occurrence is constant and general. It makes more sense for manufacturers to assume financial responsibility for such events than for individual victims to assume it, since manufacturers are larger and have easier access to assets than do individuals who have just undergone disaster. In fact, because the general risk of particular injuries is quite predictable, manufacturers can insure against it, and thereby distribute that risk amongst the public as a cost of doing business.

This is a vintage statement of the theory of enterprise liability, as well as a classic summary of the insurance justification for enterprise liability. Justice Traynor also appears to assume that a theory of strict liability may enhance public safety.

Legal Argument

Justice Traynor's legal argument is designed to show that the theory of strict liability is already incipient in legal doctrine and practice. His strategy is to try to locate two places where strict liability already subsists in the law and then to recommend that the law "come clean" and use the theory directly. The two places where strict liability is found inchoate in the law are, one, the practice surrounding negligence cases, including *res ipsa loquitur*, and, two, in the law of sales warranties.

Practicalities of Negligence Cases

Traynor argues that actions against manufacturers for defective products are already converging upon a theory of strict liability. Significantly, a plaintiff need not prove active negligence on the part of the manufacturer; an act of negligence by a "submanufacturer" is sufficient. In addition, the plaintiff may rely on the doctrine of *res ipsa loquitur*. Theoretically, a manufacturer can dispel this inference by showing that it took proper care. However, it is generally recognized that this is somewhat unfair, since injured people are not normally in a position to disprove a manufacturer's proof of proper care. Juries seem well-aware of unfairness, since the courts leave "it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, [so that as a result] the negligence rule approaches the rule of strict liability." Traynor finds the use of *res ipsa loquitur*, the rebuttal thereto and jury inferences as "needlessly circuitous." According to him, the whole procedure "make[s] negligence the basis of

recovery and impose[s] what is in reality liability without negligence." Why not do directly what has already been done indirectly? asks Traynor rhetorically.

Sales Warranties

There is already strict liability between the sellers and buyers in the form of "implied warranties of fitness for proposed use in merchantable quality *including the warranty of safety of the product.*" (Emphasis added.) These warranties are not, of course, necessarily contractual or even consensual, as they are implied by law. Moreover, action upon a warranty has its foundation in tort, so that—insofar as warranties generate strict liability—there is already strict liability in the law of torts.

Retailers are not well-suited to bear the costs of implied product warranties, such as an implied warranty of safety. Hence, the law recognizes that a retailer may recover from the entity which sold the product to him, and so on up the chain to the manufacturer. This is surely an inconvenient, uncertain, and indirect method for making manufacturers liable to end users. "Such a procedure. . .is needlessly circuitous, and engenders wasteful litigation. Much would be gained if the injured person could base his action directly upon the manufacturer's warranty." A manufacturer's warranty of product safety really should not be limited only to his immediate buyer, since—to a practical certainty—the manufacturer's immediate buyer will not be the end user. According to Traynor, an injured consumer should be recognized as "the real party in interest" to the manufacturer's safety warranty, as Justice Cardozo recognized in *MacPherson* a quarter of a century earlier.

Justice Traynor recognizes that the step he is taking has already been accomplished with respect to foodstuffs, but he points out that

> [d]angers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products.[35] [Citations omitted.]

Thus, Justice Traynor presents a purely legal argument based on the tendencies in legal doctrine, procedure, and practice, which suggests that strict liability should be adopted broadly, that enterprise liability is at the foundation of strict liability, and that insurance is the justification for enterprise liability.

Historical Argument

Justice Traynor also gives an argument based on economic and social history. He points out that mass production has replaced

handicrafts and that with mass production has come complex transportation facilities. This economic transformation has ended "the close relationship between the producer and the consumer of product[s]." Manufacturing processes are no longer available to public or consumer scrutiny. They are either secret or too complex to be learned. Consumers no longer have the skill to judge themselves whether manufacturers have been prudent or even inspect products for safety, since they frequently are presented in sealed packages. Concomitantly, consumer "vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks."

As a result, *caveat emptor* no longer makes normative sense, since consumers accept "products on faith, in reliance on the reputation of the manufacturer or his trade-mark, and no longer approach products warily and in a skeptical spirit." Part of this is the result of manufacturers' efforts to "justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds."

Under these circumstances, with complex markets replete with many intermediaries, "it no longer makes sense to insulate manufacturers from liability for consumer complaints. To be directly liable for defects they should be seen as guarantors of product safety."

Observations on Escola

Justice Traynor's concurring opinion in *Escola* is surely among the most widely cited, quoted, and discussed opinions in the history of product liability law. (It has been cited in opinions throughout the country no less than 297 times.) It did not, of course, exercise immediate influence on the *courts*, but it exercised enormous influence on tort law between World War II and the election of John F. Kennedy. Probably the very structure of the concurrence itself was significant. Justice Traynor put his straightforward appeal to the theory of enterprise liability first. His opinion implies that he regarded the theory of enterprise liability (and its insurance justification) as the foundation of his view, and no mere afterthought.

Escola is significant in evaluating the reinsurer's foreseeability argument. Justice Traynor was a widely respected jurist; his influence was well-known; and he was regarded as a moving force in the law. All of these propositions have been true since early in his career. Moreover, California has been a bellwether jurisdiction since the 1940s. As stated, the *Escola* concurrence was well-known and widely discussed. This fact alone dismisses the reinsurers' unforeseeability argument.

The Next Shot

Justice Traynor fired his next shot on behalf of strict liability for product defects in *Gordon v. Aztec Brewing Co.*, P.33 Cal. 2d 514, So.3 P.2d 522 (1949). *Gordon* was another bottling case, and Justice Traynor both dissented and concurred. Plaintiff obtained a judgment after the jury was instructed on both negligence and *res ipsa loquitur*; the defendants appealed, criticizing the *res ipsa loquitur* instruction; and the majority affirmed the giving of those instructions. Justice Traynor dissented on this point, pointing out that the defendant was not at all times in control of the injury-causing item. Justice Traynor concurred in the affirmance, however, since recovery was justified on a theory of strict liability for products, as set forth in *Escola*.

Justice Traynor quotes the enterprise theory and insurance justifications of *Escola in toto*. He also extends the legal reach of the legal principle he proposes in *Escola*, as follows:

> It is therefore necessary to decide whether the *bottler's strict liability extends* not only to defects existing when he relinquishes control, but also *to defects that arise as a result of normal handling thereafter*. The facts of this case suggest that not uncommonly a plaintiff will be unable to trace the defect to the bottler or to fix negligence on any of the persons through whose hands the bottle passes before it reaches him. [Emphasis added.]

Nevertheless, from the time they are kept until they are opened, bottles are subject to many foreseeable hazards in transportation, storage, and the like.

> At any time along this hazardous course a bottle may become defective and thus a risk to those who handle it. The risk is one the consumer cannot reasonably be expected to anticipate or protect himself against. He does not ordinarily inspect bottles, and in any event it is not likely that he is qualified to detect latent defects. He accepts the bottle on faith. . . . The reasons that make the bottler strictly liable for defects in his bottles when they leave his control extend his liability to defects that result from normal marketing procedures.

Those reasons precisely consist in the theory of enterprise liability and the insurance justification. Indeed, the extension of the bottler's liability would make no sense in the absence of enterprise liability.

Although *Gordon* was important enough to be noted in the *American Law Review*,[36] it did not receive the wide dissemination

accorded *Escola*. Nevertheless, anyone with the slightest sense of the power of the California Supreme Court and anyone with the slightest inkling of Justice Traynor's judicial virtues would anticipate that strict liability might become a significant legal doctrine in the future. With concurrences like those of Justice Traynor in *Escola* and *Gordon* on the books, contract planners cannot claim to be taken totally by surprise.

Trust v. Arden Farms Co.

Next came *Trust v. Arden Farms Co.*, 50 Cal. 2d 217,324 P.2d 583 (1958), in which Traynor filed yet another famous concurrence and dissent. The majority affirmed a superior court's grant of a nonsuit in a defective milk bottle case. The majority at least impliedly recognized a cause of action for breach of warranty in a broken bottle case but held that this plaintiff could not prove that there was no change in the condition of the bottle while in her possession. In response, Traynor emphasized "[T]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."[37] Traynor then claimed that

> [P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436, 440, concurring opinion; *see*, 2 Harper and James, Torts, pp. 1570 et. seq.
>
> In the *Escola* case, as in *Gordon v. Aztec Brewing Company*, 33 Cal.2d 514, 203 P.2d 522, the court invoked res ipsa loquitur to affirm judgments for damages resulting from explosions of beverage bottles. My own concurrence in those judgments rested on the ground that '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.' 24 Cal.2d at p. 461, 150 P.2d at p. 440. I adhere to that view and would therefore reverse the judgment of nonsuit in favor of Arden Farms in this case.

Traynor and the Scholars

In *Trust*, Traynor cites James, whose ideas we discuss presently. Professor G. Edward White has argued persuasively that Traynor' s concurring opinion in *Escola* was substantially influenced by Prosser's discussion in the first edition of *Law of Torts*, even though Traynor does not cite Prosser.[38] White points out that the arguments given by Prosser and the arguments given by Traynor are almost identical. In addition, Traynor lived in Berkeley, served on the faculty there early in his life,

and knew many faculty members. In particular, he knew Albert Ehrenzweig quite well, whose ideas we discuss presently.

Traynor's Subsequent Ideas

Justice Traynor advocated strict liability and enterprise liability throughout his career. He recognized that enterprise liability and its attendant use of insurance could not solve all compensation problems. In particular, he did not see how to use them to deal with roadway accidents, and he did not see how to blend social insurance—necessary to create support-floors—with the torts (and especially the negligence) system.[39] Justice Traynor viewed strict products liability as the beginning of an effort to cope with accident problems created by mass industrialization.

Ultimate Victory

Justice Traynor, who became Chief Justice of the California Supreme Court, eventually persuaded his court to adopt strict liability. In 1963 he decided *Greenman v. Yuba Products*, 59 Cal. 2d 57,377 P.2d 897, 27 Cal. Rptr. 697 (1962). That case was a sweeping victory for the views of Prosser, James, Ehrenzweig, and Traynor himself. Since the views of James and Ehrenzweig have yet to be discussed, an analysis of *Greenman* will be deferred until later in the article.

THE QUIET SPREAD OF ENTERPRISE LIABILITY

The theory of enterprise liability, and the insurance justification, also spread through tort law in ways less obvious than suggested by Justice Traynor's direct assault. Typical of this spread is the attack on immunities such as charitable immunity, governmental immunity, and the immunities of premises' owners. This spread is by no means complete, even in 1995, but it began before mid-century.

The decision of Wiley Rutledge, then Associate Justice on the United States Court of Appeals for the District of Columbia circuit (and later a Supreme Court justice), in *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942), is typical. The issue in that case was "whether a charitable corporation is liable for injury negligently caused by an employee acting in the course of duty." The court was immediately skeptical of the doctrine of charitable immunity because it

> reverses the general trend of responsibility in a risk-sharing and distributing age. Institutions have a survival value no individual

> possesses. They withstand vicissitudes individuals cannot meet. It is probable that charitable ones resist demise more stoutly than business ones. Certainly they incur no greater risks. If charity should exempt either institutions or individuals, it should be the latter. But there should be no distinction.

In addition to reviewing general *principles*, the court exhaustively reviewed what it described as "the confused state of decision[s]." For many pages, the court delineates the ins and outs of the liabilities of charitable institutions and succinctly demonstrates that the insurance justification affects that doctrine, since at least two states "impose liability if the charity is protected by insurance." In summarizing numerous judicial decisions, Justice Rutledge described the rule of charitable immunity as one "not for modification, but for abandonment."

Following a review of judicial opinion, Justice Rutledge extensively commented on the policies supporting and negating immunity. He expressly adopted the insurance justification theory as negating a need for charitable immunity, as follows:

> if there is danger of dissipation [of the asset base of the charitable institution], insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums. While insurance should not, perhaps, be a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence. What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets.

Justice Rutledge also considered the theory of enterprise liability, in addition to the insurance justification theory. Indeed, he called it "the starting point."

> The law's emphasis ordinarily is on liability, not immunity, for wrongdoing. Respondeat superior has widened it in an institutionally, and to a large extent corporately, organized community. Charity generally is no defense. . . . The rule of immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them.

Obviously, this is a near-classic statement of the theory of enterprise liability, worthy even of Justice Traynor. It is important to notice that Justice Rutledge regarded the theory of enterprise liability as a fundamental legal policy and took it to be a "general trend."

Justice Rutledge, thus, treated the theory of enterprise liability as a well-known legal fundament during World War II. He was writing for a unanimous court. It is extremely difficult, therefore, to give credence to the proposition that insurance contract planners were incapable of foreseeing a torts regime based on the theory of enterprise liability and insurance justification.

Hughes is merely one among many.[40] Through the years, since World War II, the theory of enterprise liability has figured prominently in a variety of cases attacking various forms of immunity. Governmental immunity was abrogated in *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) and *Hicks v. State*, 88 N.M. 588,544 P.2d 1153 (1975). Charitable immunity was done away with in *Piper v. Epstein*, 326 Ill. App. 400, 62 N.E.2d 139 (1945) as was landowner immunity in *Rowland v. Christian*, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). All of these cases relied on similar reasoning as found in *Hughes*.

POST-WAR OPINION

After World War II, many legal scholars embraced a liberalized view of tort law, adopting strict liability, implications of the theory of enterprise liability, and insurance justification. Two figures, however, tower over all the others; these are Albert A. Ehrenzweig and Fleming James.

Ehrenzweig was already a judge in Europe before he came to the United States. Here he took a law degree from the University of Chicago, practiced law in New York City with Sullivan Cromwell, worked on problems of automobile negligence for the State of New York and eventually joined the faculty of Boalt Hall at the University of California, Berkeley.[41] Ehrenzweig was enormously influential in the fields of international law and conflicts, but also he was (at least indirectly) influential on tort law. In contrast, Fleming James spent his entire career at Yale, where he restricted himself to torts. He was an immensely prolific scholar, and he coauthored the second edition of a leading, multivolume tort treatise.[42] A survey of the views of Ehrenzweig and James gives one a reasonable "feel" for development of strict liability thinking in the immediately post-war period.

A.A. Ehrenzweig

Today, and since the 1960s, the name of Albert Ehrenzweig is probably more associated with conflicts of law than it is with torts, but

from the late 1930s, at least through the 1960s, Albert Ehrenzweig wrote repeatedly on the theory of enterprise liability and the insurance justification. His most important statement on the subject was published as a book[43] in 1951 and even earlier as a law review article.

According to Ehrenzweig, negligence implied blame for neglect. He regards this implication as unrealistic in the modern world and suggested that "[a] *new law of enterprise liability is in the making.*" (Emphasis added.) The law of enterprise liability, a law involving "negligence without fault," would be a better rule on the grounds of its simplicity, clarity, and compatibility with the actual doings of courts.

Ehrenzweig saw this tendency in the law as connected to the growth of the insurance industry.

> Enterprise liability for negligence without fault has been promoted by, and has in turn promoted, the institution of liability insurance as a means of the injured's compensation.

According to Ehrenzweig, the spread of enterprise liability would

> initiate a semi-social 'third party beneficiary insurance' which would distribute losses caused by hazardous enterprise without regard to the entrepreneur's liability.

At the end of the 19th century, according to Ehrenzweig, the maxim "no liability without fault," seemed to dominate legal thought, but it was always riddled with exceptions and was probably only accepted because no coherent way could be seen to limit liability without some reference to fault. Ehrenzweig believed courts should look to the origin of the risk—whether it be found in "mechanical enterprise"—and base a new principle of civil liability on that realistic assessment.

The courts have already recognized the unrealistic nature of the maxim "no liability without fault," since they have adopted respondeat superior and *res ipsa loquitur*, neither of which involves fault. Modern courts look to the social purpose underlying these two exceptions to the 19th century maxim in determining a new trend for products liability. The issue—when viewed in terms of social purpose—is not reprehensibility, but risk distribution.

There are those who argue that tort law has always been a system of risk distribution and that in the nineteenth century risks were visited upon workers and consumers in order that industrial development might be subsidized.[44] Many scholars who did not adopt this radical (and perhaps simplistic) thesis entertained something akin to it. They

conceptualized the assets of industry as a trust fund for the future of industrial production, which needed to be protected. Ehrenzweig had little patience with the view that industry needed protection in the second half of the twentieth century. He believed that argument to be refuted by the availability of liability insurance, as has been recognized in various cases abolishing such things as charitable immunities. Thus, in the work of Ehrenzweig, the insurance justification rationale played a crucial role in broadening recoveries in tort law, whatever the cause of action or whatever the underlying theory.

At a deep level, Ehrenzweig talked about the very function of tort law itself. He contrasted an *admonitory theory of torts,* whereby tort liability was designed to encourage nonnegligent conduct, with a *compensation theory of torts,* in accordance with which the principal function of torts was to compensate injury. Ehrenzweig suggested the existence of liability insurance totally undercuts the admonitory theory of tort liability, at the same time it supports a theory of tort liability as a compensation system.

> Though by its terms implying blame for 'neglectful' conduct, the negligence rule has come to be used largely to impose liability for harm caused by the lawful activities of modern enterprise. However, the original admonitory meaning and rationale of this rule, though almost forgotten, have been preserved in the language and in occasional applications of the law.

Obviously, Ehrenzweig advocated the elimination of even the rhetorical remnants of the admonitory rationale of tort law. This suggestion obviously undercuts the prevalence of a fault-based torts regime.

Ehrenzweig's conception of enterprise liability is similar to that of Prosser, Traynor, and James. Accordingly, the entrepreneur is ***not*** liable because of the reprehensibility of his conduct. Indeed his conduct is quite lawful, and to be encouraged. The manufacturer pays because intermittent injuries are part of the system and the system should pay. The manufacturer is simply the nodal point—conduits—through which payment will be made. Ehrenzweig wrongly predicted that the insurance justification and enterprise liability rationales would lead to the admissibility of evidence regarding insurance. Indeed, he believed that a person injured by a dangerous product would eventually recover directly from insurers. Obviously, that has not come to pass most places, although settlements are frequently effected directly between injured persons and insurers. In economic terms, it is an efficient method—judged by cost-benefit analysis of which payment may be

made, and in legal terms, a manufacturer's agreeing to pay for injuries caused by its product is a price it must pay for governmental permission to enter the market. Indeed, Ehrenzweig envisaged a "social contract" between manufacturers in the state.

Some of the terms of this social contract would include the nature and limits of the compensation available to those injured by defective products. Ehrenzweig suggested that the rule of *Hadley v. Baxendale* limits tort damages. His theory-sketch went something like this. The terms of the contract are these: A manufacturer agrees to attempt to manufacture useful products, whereas the state grants him a license to attempt to do so. The manufacturer will be permitted to make whatever profits he can, and the state will not interfere, except within the purview of its police power. However, both parties acknowledge that the manufacturer is exposing the community to risk, as well as bestowing the blessings of material wealth upon it, so that the manufacturer will be liable for any individual harm that defects in its product cause. In other words

> the entrepreneur is assumed to indemnify anybody 'typically' injured by the enterprise; a promise made in consideration of the toleration of the 'initial negligence,' committed by starting the dangerous enterprise. Closely akin to the contract analogy is the theory of 'assumption of responsibility,' proposed for the 'manufacturer's' liability in § 16-B of the Revised Second Draft of the Uniform Sales Act. Calculability of the harm should be. . .the proper test of both strict and 'quasi-strict' liabilities has probably found its most striking expression where liability is made to depend upon the existence of liability insurance.

"Negligence without fault" sounds odd to the English speaker. Ehrenzweig's idea was roughly this. Manufacturing involves danger. Hence, manufacturing involves the imposition of risk. Risk is not free-floating but will inevitably, although haphazardly, become instantiated as injury. This means that some real-live human beings will sustain injury, disability, and death as an inevitable result of worth-while manufacturing and marketing processes. Ehrenzweig's idea might better have been formulated in terms of "risk creation without fault" for which public policy demands there be compensation, but this phrase does not have nearly the same lilt and paradoxical attraction of "negligence without fault."

Perhaps another way to put the same point is this. There is negligence (necessarily or likely somewhat amorphous) involved in

the creation of all dangerous industrial activity, but that activity is made lawful because of the overriding social value. (In any complex manufacturing society, defective products are as inevitable as industrial and automobile accidents.) However, that overriding social value is really present only when the industrial system includes a method of compensation for those sporadic situations in which the general risk potential in industrial and commercial activity becomes an actual injury.

Thus, Ehrenzweig grasped some main tendencies in tort law quite clearly. He elaborated on them and placed the theory of enterprise liability and insurance at the center of the law. Most significantly, he observed that tort law is primarily a system for providing compensation, rather than for finding fault and keeping score. The currency and influence of Ehrenzweig's ideas undercut P_1, the notion that the expansion of tort liability was unexpected, unforeseen, and unforeseeable, and the "London Argument" in general.

Fleming James

One of the most prestigious prolific tort scholars of the post-war period was Fleming James of the Yale University Law School. Not only did James write article after article on tort law,[45] he revised Fowler Harper's great 1936 treatise on tort law,[46] and the resulting second edition was probably the greatest torts treatise in the English language published during the third quarter of the twentieth century.[47] James' views were widely disseminated, well-known, and carefully considered during the 1950s. This is true both of the United States[48] and in England.[49]

James unquestionably subscribed to the theory of enterprise liability and its insurance justification. The prestige of his faculty position, his prolific writings, and the elegance of his advocacy established the proposition that his ideas were part of the *lingua franca* of the law during the 1950s and 1960s. Indeed, Professor George Priest of Yale Law School, in his history of opinion on enterprise liability, suggested that James is *the* pivotal figure.[50] If so, it cannot be argued that enterprise liability was unforeseen, much less unforeseeable.

In a famous and widely-cited 1948 paper, James argued succinctly for the enterprise theory of liability and the insurance justification. His bottom line was to advocate for a social insurance theory of tort law. James assumes that tort regimes must have an economic and social foundation. Hence, a new organization of production requires a new approach to tort law.

> Human failures in a machine age cause a large and fairly regular–though probably reducible—total of life, limb, and property. As a class, the victims of these accidents can ill afford the loss they entail.

Thus, in an age of mass production, industry does not require the subsidy which results from limited liability. Therefore, tort law should be focused singularly on dealing with machine-age losses.

> The *best and most efficient* way to do this is to assure accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it. Such a basis of administering losses may be called social insurance. [Emphasis added.]

Thus, it is no part of the tort law to subsidize industry. Nor is it a surface element of tort law to admonish those who act with fault. Rather, the basis of tort law is solely compensatory. James argues that economic efficiency requires the enterprise theory.[51] According to James, justice also demands the theory of enterprise liability.

> Society does benefit from the wide and regular distribution of losses, taken alone. . .if a certain type of loss is a more or less inevitable byproduct of a desirable but dangerous form of activity, and it may well be just to distribute such losses among all the beneficiaries of the activity though it would be unjust to visit them severely upon those individuals who had happened to be the faultless instruments causing them.

Thus, not only economic efficiency but also considerations of distributive justice suggest that individual injuries should be compensated by all those who enjoy the benefit of the product which injures.

According to James, the elimination of the economic subsidies created by limited liability and the actualization of the theory of enterprise liability were both made possible by "the prevalence of liability insurance—a device which was unknown until practically the end of the last [19th] century." Indeed, according to James, the existence of liability insurance has enormously affected the workings of tort law in a variety of ways. First, it has made possible not only loss-shifting but also loss-redistribution. Second, insurance has led to more widespread compensation because of the settlement practices of liability insurers. Third, the existence of liability insurance has actually contributed to loss prevention because of the use of policy conditions, because liability insurance tends to promote safety through research

into loss prevention, and because rates are adjusted in accordance with safety records.

One of the main themes in James's argument is that the semiautomatic nature of insurance payments to accident victims and the widespread redistribution of monetary burden of losses resemble both what James calls "social insurance" and what might be called "social welfare" schemes.[52] James argues that the purpose, structure, and function of tort law should be redesigned to fit the idea of a social insurance/welfare system, and he does so on the basis of the theories of enterprise liability and insurance justification. Toward the end of his article he writes as follows:

> The main job of accident law is, therefore, to promote the well-being of accident victims if this can be done without imposing too great a social cost in other directions. It is the writer's conclusion that a system of social insurance can do this. The expressed doctrines of tort law are not well adapted to such an end. They are horse and buggy rules in an age of machinery; and they might well have gone to the scrap heap some time ago had not the tremendous growth of liability insurance and the progressive ingenuity of the companies made it possible to get some of the benefits of social insurance under—or perhaps in spite of—the legal rules.[53]

Better, James implies, for the express rules of tort law to reflect the purely compensatory goals of tort law.[54]

Obviously, James is not arguing directly for a theory of strict liability, as Prosser and Ehrenzweig did. In fact, James had an even more radical idea.[55] Nevertheless, a tort regime implying strict liability is more consistent with James's philosophy than a fault-based system. And James is obviously arguing for a system in which injured people will be able to recover easily, relatively speaking.

James specifically embraced strict liability in a famous paper published in 1957.[56] He based his advocacy of the doctrine of strict liability specifically on the theory of enterprise liability:

> Strict liability is to be preferred over a system of liability based on fault wherever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb. This is true at least where the accident victims are as a class economically ill-equipped to carry the burden of serious accident losses. The impact of such losses on the individual in terms of human hardship is often crushing and the repercussions of this blow reach far beyond the individual and pose a significant social problem.

James borrows "Ehrenzweig's happy phrase" "strict enterprise liability" for the name of his idea. James advocates the view based on a theory of accident reduction and on the proposition that "strict enterprise liability" would lead to the "administration of [those] losses that do happen in such a way as to minimize the individual and social burden of them." Obviously, this is insurance justification.

James advocates that courts should move toward what he calls "strict enterprise liability," whenever it can be done, through a process of growth within the common-law tradition. He suggests that this is exactly what has happened within the area of products liability and, more specifically, through the law of implied warranties. Naturally, James has no patience with the doctrine of privity as applied to implied warranties. According to him, privity has no place when you are trying to make the manufacturers pay for the inevitable cost of their—perhaps beneficial—activities.

James is quite explicit about the rationale underlying the theory of enterprise liability. According to James, the manufacturer "is in a peculiarly strategic position to promote safety in his products" and "is often in the dominate economic position in the chain of production and distribution." Moreover, according to James, there is nothing onerous about strict enterprise liability if it is required that an injured person must trace his or her injury back to the quality or condition of the product which is unreasonably dangerous and which is present from the initial manufacture. If the manufacturer is liable only for casualties and hazards that are injected into society by his activities (i.e., for hazards which are reasonably foreseeable) then it is reasonable that

> the risk of loss from dangerously defective products would be put upon (and distributed by) the producer rather than upon the consumer or innocent bystander, even where the producer is also innocent.

Obviously, this is vintage strict liability and is virtually identical with the liability imposed by Section 402A.[57] James's restricted conception of damages under a strict liability regime was not his only predictive failure. James also thought that a strict liability regime would be instituted only by legislative action.[58] At the end of the 1950s James is arguing that modern strict liability flows from a principle of insurance, "which recognizes that broad distribution of a loss diminishes its disutility or human hardship, although of course it cannot diminish the loss." A torts regime based on strict liability will encompass a policy of "allocating losses in the social interest."

James provides an empirical and functional jurisprudence for a strict liability torts regime. In such a regime:

> The optimum legal rule for any given type of situation is one which will best conserve and promote the values involved, with a proper balance between competing ones. My thesis here is simply this: This is fundamentally a human, economic, or social problem, not a legal one. The legal rules and techniques are only means or tools for conserving or promoting the values selected as important in any given type of situation.

Thus, in the age of mass production, one simply needs to find that legal rule which will maximize efficient loss distribution. That legal rule will be a rule of strict liability, "at least if coupled with reasonable limitation on [damage] amounts."

In some places, James suggests that only legislatures can create strict liability regimes. In the meantime, he suggests that courts should "consciously and expressly deal with the factual and policy questions really involved in the problem," "extend the law of negligence so as to eliminate pockets of immunity under existing law," "relax the burden of proof. . .[and] enlarge the jury's role on the issues of liability," and "maintain and extend existing areas of strict liability." James also suggests that the courts need to rethink the measure of damages for a strict liability system. Indeed, James argues that a jury award of damages in a strict liability system must be very carefully supervised by the courts, although the juries should get a larger scope of freedom in the area of liability findings.

The upshot of James's work is that a fault-based tort system should be replaced by a system of social insurance. An adjudicatory system of social insurance should facilitate the compensation of injured people, and theories of recovery must be articulated which will serve that end. The theory of enterprise liability and the insurance justification point that way. They tend to suggest that a doctrine of strict liability should be utilized as the adjudicatory device to obtain a shift away from a fault-based torts regime.

No one who appreciates James's position and understands much of his jurisprudence of modern tort law could fail to realize that strict product liability based on enterprise liability and the general easing of the requirements in negligence law was quite probable in the offing. James was a widely known, well-published, and deeply respected torts commentator during the 1950s. Thus, no one familiar with trends in tort theory at that time could possibly contend that strict liability came as a complete surprise.[59] This is true even though James, unlike Prosser,

tied his advocacy of the doctrine of strict liability to legislative action and did have a wide-open theory of tort damages.[60]

THE DAM BREAKS

This article has demonstrated that even superficial awareness of the first phase of the American Torts Revolution makes it impossible to contend that reinsurance contract planners were unaware of impending changes in the American torts regime. By the early 1960s, the preparatory phase was over, and the revolution had begun in earnest. The opening events of the revolution consisted of three types of events. First, there was a landmark law review article published by Professor Prosser, which announced the arrival of strict liability. Second, there was a series of three cases in bellwether jurisdictions in which strict liability was imposed. Third, the American Law Institute adopted Section 402A, and—as everyone knows—Section 402A spread like wildfire.

Prosser Revisited

In the 1960s, Prosser published two significant and broadly influential law review articles.[61] The first one, entitled "The Assault Upon the Citadel" and published in 1960, reviews cases abolishing the privity requirement for the strict liability characteristic of breach of warranty claims. The second essay, entitled "The Fall of the Citadel" and published in 1966, concerns the abolition of privity and the arrival of strict liability in tort. Each of these articles explores the doctrinal and policy rationales underlying the arrival of strict liability, and each of them discusses the theory of enterprise liability.

In "Assault," Prosser suggested that one of the main reasons for the arrival of strict liability was in order to "get at" distributors. Prosser thought that negligent theories were quite sufficient to reach manufacturers. He observed that injured plaintiffs seldom failed to prove manufacturing negligence, at least in cases serious enough to get to the appellate courts. Such was not the case with distributors, which frequently were not negligent. Prosser was skeptical about strict liability enhancing safety. He was also somewhat skeptical about the very "risk-spreading" arguments which he enunciated for the first time in his 1941 book, but he reviewed Traynor's *Escola* opinion in detail and stated that the argument was entitled to some consideration. As with many of Prosser's expositions, the nature and foundation of his skepticism are unclear. He did not appear to doubt the policy wisdom of the theory of enterprise liability. Rather, he was concerned that the popular will may not have been quite "ready to adopt so sweeping a

legal philosophy, and to impose so heavy a burden abruptly and all at once on all producers." Prosser was similarly reserved, in "Assault," about the insurance justification which accompanies the theory of enterprise liability. He asserts that the existence of liability insurance has not come to play a significant role in products-liability cases; nevertheless,

> [w]hat insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance—and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortune.

In other words, Prosser recognized the essentially political nature of transforming tort law in accordance with the theory of enterprise liability. He went on to discuss the political problems at some length:

> Even the distribution of the losses through insurance may be a process that has its flaws. Until we develop, by analogy to workman's compensation, a comprehensive system of compulsory insurance with rigidly limited damages—which no one as yet seems to have proposed specifically in this particular field—there will always be uninsured defendants, there will always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers. Liability insurance is obviously not to be ignored; but it is a makeweight, and not the heart and soul of the problem.

Prosser, of course, is right. Liability insurance is not absolutely essential to the theory of enterprise liability. However, it can hardly be described as "makeweight." This is true even though every one of the problems Prosser mentioned remain problems to this day.

In the second article, "Fall," Prosser's view of the theory of enterprise liability is more complex than it was in "Assault." What he said about the theory of enterprise liability was this:

> The 'risk distributing' theory—the supplier should be held liable because he is in a position to insure against liability and add the cost to the price of his product—has been an almost universal favorite with the professors; but it has received little mention in the cases, and still appears to play only the part of a makeweight argument.

Thus, Prosser did not dismiss the theory of enterprise liability. He only suggested that it may be a little on the theoretical side. Rather, he

suggested that it has not been causative in the coming of strict liability. He envisioned the courts as responding to other stimuli. For our purposes, Prosser's skepticism is irrelevant. What is relevant is the fact that he discussed the "risk-spreading" argument and indicated that it was entitled to some respect. It is also relevant that his main reservation about the argument was the speed at which it would come to be accepted by the general public. The very fact that he discussed it at some length shows that it was "in the air."

Key Cases

Starting in approximately 1960, the years of preparation, nurturence, and slow growth paid off. It was as though a hundred flowers bloomed. It was as though strict liability, enterprise liability, and the insurance justification swept quickly across the judicial mind. (In fact, there were years and years of preparation.) The plausibility of the "London Argument" depends on forgetting the pre-1960 history of products liability jurisprudence.

Henningsen, Santor, and Schipper

In 1960, the New Jersey Supreme Court decided *Henningsen*, *Santor*, and *Schipper*. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), involved an automobile accident in which the plaintiff sought recovery from the manufacturer upon a theory of implied warranty of merchantability, but the purchase order contained an adhesionary disclaimer of any such warranty. The *Henningsen* opinion began with the fundamental law that an implied warranty of merchantability is an "integral part" of every transaction, and that an implied warranty of merchantability "simply means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold." Liability for breaches of implied warranties of merchantability is strict.

Much of the rest of the *Henningsen* opinion is an attack on the warranty disclaimer issued in that case. The court describes the terms of the printed warranty as "a sad commentary upon the automobile manufacturers' marketing practices" and "illusory." The court also discusses the restriction of privity upon recovery.

Nevertheless, the court is critical of warranty disclaimers in a mass marketing society. Freedom of contract may be important between competent parties with equality of bargaining power, "[b]ut in the framework of modern commercial life and business practice, such rules cannot be applied on a strict, doctrinal basis." Instead, the courts must look to social policy, mass production methods, manufacturing

and distribution, as well as to the relative bargaining power of those involved in the transactions. Stated the court:

> In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a *special obligation* in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly. [Emphasis added.]

It is well-known that the court was offended by Chrysler's warranty language. "The language gave little and withdrew much." "An instinctively felt sense of justice cries out against such a sharp bargain." The court then spends page upon page analyzing the difference in bargaining power between those who make cars and those who buy them.

This case devotes almost no discussion to the theory of enterprise liability or to insurance justification. It proceeds almost completely on the basis of moral analysis of contract law. Nevertheless, it is significant for several reasons. First, it started the torts revolution by broadening the strict liability basis of recovery for consumers. Second, it repeatedly indicated that the foundation of consumer rights and manufacturer duties depended on public policy. Third, it abolished privity as a limitation on warranty liability. And fourth, it explicitly indicated that warranty liability is strict.

Five years later, in 1965, *Henningsen* was followed by *Santor v. A. & M. Karagheusian, Inc.*, 43 N.J. 52,207 A.2d 305 (1965). *Santor* involved the suit of a purchaser of defective carpeting against its manufacturer and dealer. The plaintiff's original complaint alleged that the carpet was defective and sought recovery of its costs. Later, the plaintiff amended and added a charge against the defendant/manufacturer for breach of an implied warranty of merchantability.

The manufacturer conceded that the carpeting was manufactured defectively but argued that there was no privity of contract between the purchaser and itself. The manufacturer argued that the court's holding in *Henningsen* was distinguishable because it involved personal injury. The court noted, however, that *Henningsen* involved a claim for property damage in addition to personal injury. Accordingly, the court held that:

> [A]s ultimate purchaser of the defective carpeting, [plaintiff] may maintain his action directly against the defendant manufacturer,

> Karagheusian, for breach of its implied warranty of reasonable fitness. We hold, also, that privity of contract between them is not necessary and that such action may be prosecuted even though plaintiff's damage is limited to loss of value of the carpeting.

The court's holding was based on the fact that it is perfectly justifiable to make the manufacturer responsible for defective articles he places in the channels of trade for sale to the public and that there is no justification for distinction on the basis of the type of injury suffered.

The court also noted that "breach of implied warranty" was simply a convenient legal device to make manufacturers responsible to ultimate purchasers. The court conceded that the cause of action it created was a hybrid, having "its commencement in contract and its termination in tort." The court went on to note that:

> In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. The quest has found sound expression, we believe, in the doctrine of strict liability in tort. . . . The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales.

The court claimed the purpose behind adopting such a cause of action was

> [T]o insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injury or damaged persons who ordinarily are powerless to protect themselves.

Thus, *Santor* stands for the proposition that the purpose of imposing enterprise liability is to create strict liability for manufacturers of defective products regardless of whether the defectiveness results in personal injury or property damage.

Santor was immediately followed by *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), in which the plaintiff sought recovery against a builder-vendor of mass-produced homes for injuries sustained by a child of the purchaser's lessee when he drew excessively hot water from the bathroom faucet. The defendants were granted a dismissal at the end of the plaintiff's case, after the plaintiff's expert had demonstrated that the mixing valve was of the type usually utilized and

after testimony that there was a homeowner's guide which drew attention to certain dangers inherent in hot water faucets.

Schipper applies the doctrine of strict liability to developers like *Levitt*, referring to *MacPherson*, *Henningsen*, *Goldberg*, *Greenman*, and *Santor*. The court reiterated the theory of enterprise liability and observed that existing liability policies probably covered product liability in a wholly adequate manner, and implied that if they did not, this decision might encourage vendors of mass-built homes to purchase appropriate coverage.

Greenman

In the 1962 case of *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697 (1962), the California Supreme Court held, in an opinion written by Justice Traynor, that a plaintiff injured by a defective power tool had a cause of action against the tool's manufacturer despite a lack of privity. Traynor also stated explicitly that the "rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products." Traynor's reason for distinguishing between the law of sales and strict liability for defective products was based on the fundamental difference in purpose of the two bodies of law. According to Traynor, the purpose of strict products liability is

> to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.

Here, at last, *Escola* becomes the rule of decision in California.[62] Significantly, Justice Traynor's proposal had changed little in the intervening 18 years.

Greenman has been called "*the* landmark decision" for the doctrine of strict tort liability for products, perhaps since it has been cited in more than three quarters of the states. *Greenman*'s strong-willed and visionary author is also, by some, awarded "full credit" for strict liability, partly because "[h]e had offered the theory in 1944, a fully-worked-out presentation, long before others had conceived of it." This is an overstatement, perhaps, since it neglects Prosser, Douglas, Feezer, Smith, and others. Nevertheless, it points toward the continuity in the developments in the tort law since World War II and thereby undercuts P_1, which asserts that expanding tort liability was unexpected, unforeseen, and unforeseeable.

Goldberg

In *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), the New York Court of Appeals followed *Henningsen*. Importantly, *Goldberg* expressly utilized the theory of enterprise liability. *Goldberg* arose when plaintiff's decedent was killed in the crash of a commercial airliner. Plaintiff sued the airline, the manufacturer of the airplane, and the manufacturer of an allegedly unmerchantable part. The court held that an action for the breach of an implied breach of merchantability lay against the airplane manufacturer, but not against the component manufacturer. That result is consistent with both *MacPherson* and *Henningsen*, although it is not within the spirit of *Henningsen*.

The court reasoned that a breach of warranty is both a violation of the sales contract and a "tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." The court observed that ticketed airline passengers are obviously contemplated users and are hence proper plaintiffs to sue for breaches of warranty.

Part of the court' s justification was the theory of enterprise liability. It formulated and relied on this theory by discussing *Greenman*. The court characterized *Greenman* as an opinion which established strict tort liability—a characterization which the New York Court of Appeals found quite accurate—regardless of privity. Said the New York court:

> The California court said that the purpose of such a holding is to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves and that implicit in putting such articles on the market are representations that they will safely do the job for which they were built.

This is merely an obvious rehearsal of the theory of enterprise liability. The New York Court of Appeals appears to be adopting it, since it says that:

> for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer. . .of a component part.

In other words, the New York Court of Appeals adopts the rule in *Greenman* and its rationale insofar as it applies to the final manufacturer of the article, but it will not extend it to component manufacturers. Insofar as the California Supreme Court created the tort of strict liability

independent of an actionable breach of an implied warranty of merchantability, the New York court adopted that rule in *Goldberg*, and it did so expressly on the theory of enterprise liability.

It is absolutely impossible for a contract planner of any kind not to have seen the writing on the wall by 1963. Indeed, the three dissenting judges of the New York Court of Appeals recognized the revolutionary import of *Goldberg* and discussed what they took to be the deficiencies of the theory of enterprise liability at great length. *Goldberg* was widely discussed in the law review literature of the time.[63]

Section 402A

The American Law Institute has restated the American law on a variety of topics: property, conflicts, judgments, agency, contracts, torts, and others. Some of this law is restated twice: contracts, conflicts, and torts, for example. A third restatement of torts is in the works. Various restatements published by the ALI have been the focus of much prestigious effort and controversy. Some of them have also been enormously influential.[64]

Perhaps the most controversial and the most influential section of all is Section 402A in the *Restatement (Second) of Torts*. This section was Prosser's brainchild. He was the reporter for that particular restatement, and it states as follows:

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

This language is so well-known that it is emblazoned *in toto* upon the memories of many lawyers and has been quoted so often that it barely needs requotation. Nevertheless, it is important for our purposes to

compare the language of Section 402A with the doctrines set forth by Prosser in his original torts treatise published in 1941 and with the opinions of Justice Traynor in *Escola* and *Gordon*. It is the same doctrine.[65] The more similar the formulations are, the stronger our refutation of P_1. Section 402A and Justice Traynor's early opinions are substantially similar. Moreover, the language of Section 402A is substantially similar to the doctrines advocated by Ehrenzweig and James, with the possible exception that James and Ehrenzweig would have restricted damages in a way which neither Section 402A nor the remainder of the *Restatement (Second) of Torts* does.

While Section 402A may be the most famous legal doctrine of the "American Torts Revolution," perhaps its theoretical underpinnings are not so well-known. Comment c to Section 402A expresses some of its rationale.

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility [shades of *Henningsen*] toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; *that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained*; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the products. [Emphasis added.]

As is obvious, Comment c contains the theory of enterprise liability prominently. Courts began relying on Comment c immediately,[66] and both Section 402A and Comment c have been cited repeatedly as the torts revolution has progressed.[67]

"AMERICAN TORTS REVOLUTION": OTHER STAGES

As the common law develops the justifications for its rules receive less and less explicit judicial attention. Those doctrines have continuing vitality, although they are mentioned less and less as later cases concentrate more on doctrinal elaborations and technicalities rather than on fundamentals.[68] Perhaps the best indication of a continuing vitality of the theory of enterprise liability is to be found in the cutting-edge cases.[69] For the purposes of this article, however, we need not

discuss any latter-date developments. Our point is solely to demonstrate that tort developments in America were foreseeable by reinsurance contract planners.

For the same reason, we are not particularly interested in the fifth stage of the "American Torts Revolution," since it all came too late to affect our argument regarding foreseeability. Nor are we interested in the current legal controversy over whether enterprise liability was a good idea. The theory of enterprise liability has unquestionably shaped the fundamental contours of tort and insurance doctrine since at least the 1930s.[70] Irrespective of its ultimate intricacies, problems, and perhaps even demerits, irrespective of its ultimate contribution to economic efficiency, and irrespective of whether it remains a pillar of legal doctrine in the twenty-first century, the theory was unquestionably influential in the period immediately before and after World War II. Moreover, its influence grew and grew through the third quarter of the 20th century and it continues to be suggestive.[71] No one can claim, therefore, that strict liability in tort was an unforeseeable risk as of the end of World War II. Such an assertion is contrary to the evolutionary nature of common law, in general, but it is more specifically inconsistent with the well-known currency in tort law of ideas which are recounted herein.

NOTES

1. John Butler, "Introduction to Recent Tort Developments in the United States and the Asbestos Claims Situation," *International Reinsurance: Asbestos Claims* 6 (1988) (March 14-15, 1988 Conference Papers, Kluwer Law Publishers, London). See Thompson, *Asbestos-Related Claims in the USA—Impact on the Reinsurance Industry* 97 (1986) (Greven and Bechtold GmbH, Cologne). (A variant of the unforeseeability argument is that claims arrangements are "really" a renegotiation of the contract of reinsurance. This is just a rhetorically advantageous way of talking about unforeseeability.) In many ways, this article is an elaborate refutation of Butler and his views.

2. This proposition has been a fixed truth for many years. It has been applied in asbestos insurance coverage cases. *Borel v. Fibreboard Paper Prod. Corp.* 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). It is under some pressure in trend-setting jurisdictions, such as New York, California, and New Jersey. Most states which are expressing doubts about the contra-insurer ambiguity rule require extensive participation in the drafting of the contract by the insured. Indeed, the sophisticated insurer exception might be better entitled a joint drafting exception. See *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976); *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 682 P.2d 1100, 204 Cal. Rptr. 435, 441 (1984); *McNeilab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525, 546-47 (D.N.J. 1986).

3. Insurance coverage cases make it quite clear that insurance policies do more than

transfer financial exposure for individual risks, where the general category of risks was foreseen. Generally worded contracts of insurance also transfer monetary exposure for categories of risk which were not anticipated. *Williston on Contracts* §35 (3d ed. 1936); *Restatement (Second) of Contracts* §21 (1981).

4. J. Butler and R. Murkin, *Reinsurance Law* §C.1.3 (1989); *American Ins. Co. v. North Am. Co. for Property & Casu. Ins.*, 679 F.2d 79, 81 (2d Cir. 1982); *Allendale Mut. Ins. Co. v. Crist*, 731 F. Supp. 928 (W.D. Mo. 1989).

5. K. Abraham, *Insurance Law* 3 (1990).

6. The theory of enterprise liability needs to be distinguished from that which is discussed in *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). *Sindell* is concerned with the problem of DES victims who could not prove causation. They took fungible DES, but could not match up the drug they took with particular manufacturers. These plaintiffs sought "industry-wide liability" on a variety of theories. *Sindell* distinguished between the "theory of enterprise liability" as that phrase is being used here and "industry-wide liability." Id. at 928 n. 9. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 1069 (1989) (market share theory using national market for determining liability was an appropriate method for determining liability and apportioning damages in a DES case in which the identification of the manufacturer was impossible).

7. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592, 598 (1963); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314, 323 (1965); *Purvis v. Consolidated Energy Prod. Co.*, 674 F.2d 217, 219 (4th Cir. 1982) (applying South Carolina law).

8. Enterprise liability can be stated and could be adopted, at least theoretically, without insurance institutions. Similarly, the existence of insurance can impact purely fault-based torts regime, *Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), and need not lead to a strict liability torts regime.

9. *Restatement (Second) of Torts* §402A Comment c.

10. W. Prosser, *Law of Torts* §87, at 574 (4th ed. 1964).

11. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 567, 70 Cal. Rptr. 97 (1968) (landowner immunity); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 823 (D.C. Cir. 1942) (charitable immunity); *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1976) (sovereign immunity).

12. This claim is most especially true of the discourse of commentators, academics, and other legal intellectuals who influenced judicial behavior and legal practice. The enormous influence of the works of the late Prosser suggest that academic writing does in fact have influence. See G. White, *Tort Law in America: An Intellectual History* 156, 157-58, 163 (1980).

13. W. Prosser, *Handbook of the Law of Torts* §83, at 692 (1st ed. 1941).

14. See Harper, 55 *Harv. L. Rev.* 312 (1941); Lockhart, 30 *Calif. L. Rev.* 120 (1941); Gregory, 9 *U. Chi. L. Rev.* 196 (1941). According to White's *Tort Law in America*, "[t]he reviews were numerous, almost entirely praiseworthy, and disinclined to probe Prosser's jurisprudential perspective." See G. White, cited in note 12, at 162. Again, according to White, "[t]he most searching criticism of *The Law of Torts* came from a mythical symposium of criticism of *The Law of Torts* held by the equally fictional

'National Union of Torts Scholars' (known popularly by its initials). Of course, both were created by Prosser in a 'review' of his own book. When an author is his severest public critic, success or anonymity is assured, and Prosser was not destined to be anonymous." Id. at 162.

15. United States: G. White, cited in note 12, at 139-179 (1980). (This chapter is entitled "William Prosser, Consensus Thought, and the Nature of Tort Law, 1945-1970.") Note, 23 *S. Cal. L. Rev.* 417 N. 1 (1950); Note, 29 *St. John's L. Rev.* 314 n. 2 (1955); James, "Scope of Duty in Negligence Cases," 47 *NW. U.L. Rev.* 778, 784 n. 38 (1953); McNeice and Thorton, "Affirmative Duties in Tort," 58 *Yale L.J.* 1272, 1273 n. 4 (1949). England: R.G. Wilson, "Chattels and Certificates in the Law of Negligence," 15 *Mod. L. Rev.* 160, 165 n. 35 (1952). Prosser's book was also reviewed in British journals.

16. *Clark v. U.S.*, 109 F. Supp. 213 (D. Or. 1952); *Rozhon v. Triangle Publications*, 230 F.2d 359 (7th Cir. 1956); *Northwestern Mut. Fire Ass'n v. Allain*, 226 La. 788, 77 So.2d 395 (1954); *Ensminger v. Ensminger*, 222 Miss. 199, 77 So.2d 308 (1955); *Atlantic Coast Line RR v. T. T. Scott*, 95 Ga. App. 70, 97 S.E.2d 325 (1957); *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957).

17. *Shaw v. Calgon*, 35 N.J. Super. 319, 114 A.2d 278 (N.J. Sup. Ct. 1955); *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

18. *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 286 P.2d 1041 (1954); *Collum v. Pope & Talbot*, 135 Cal. App. 2d 653, 288 P.2d 75 (1955); *Rogers v. Toni Home Permanent Co.*, 5 Ohio St.2d 328, 139 N.E.2d 871 (1957).

19. W. Prosser, cited in note 13, at 689 n. 43-44.

20. Prosser described the law of warranties as resulting from the "illicit intercourse" of contract in tort. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 *Yale L.J.* 1126 (1960).

21. 10 M&W 109, 11 L.J. Ex. 415 (1842).

22. G. White, cited in note 12, at 155-56.

23. Prosser was also the author of two of the leading law review articles, which, along with §402A and certain court decisions, paved the way from the negligence regime of the 1950s to the strict liability regime of the 1970s and 1980s.

24. G. White, cited in note 12, at 155-79.

25. One commentator prophesied in 1923 that "within the next hundred years, the possibilities of the principle of insurance will lead to very marked changes in the prevailing attitude towards the whole subject of legal responsibility." Y. Smith, "Frolic and Detour," 23 *Colum. L. Rev.* 444, 459, 460 (1923). See also Freezer, "Tort Liability of Manufacturers and Vendors," 10 *Minn.. L. Rev.* 1 (1925); Russell, "Manufacturer's Liability to the Ultimate Consumer," 21 *Ky. L.J.* 388 (1935); James, "Products Liability," 34 *Tex. L. Rev.* 192 (1955).

26. Smith, "Frolic and Detour," 23 *Colum. L. Rev.* 444 (1923); Douglas, "Vicarious Liability and Administration of Risk I," 38 *Yale L.J.* 584 (1929); Laski, "The Basis of Vicarious Liability," 26 *Yale. L.J.* 105 (1916).

27. Greene, "The Individual's Protection Under Negligence Law: Risk Sharing," 47 *N.W. L. Rev.* 751 (1953); Klemme, "The Enterprise Liability Theory of Torts," 47 *U. Colo. L. Rev.* 153, 155 (1956).

28. J. Hood and B. Hardy, *Workers' Compensation and Employee Protection Laws* 8-12 (1984).

29. Texas, for example, amended its Constitution to enable a workers' compensation system in 1936, Tex. Const. art 3, §59.

30. Tex. Rev. Civ. Stat. Ann. art. 8306 et seq. (Vernon 1967).

31. *Woolsey v. Panhandle Refining Co.*, 131 Tex. 449, 116 S.W.2d 675 (1938).

32. J. Hood and B. Hardy, cited in note 28, at 28. See 1 A. Larson, *The Law of Workmen's Compensation*, §2.20 (1972). See also K. Lerner, *Workers' Compensation Law and Practice* §1, at 2-3 (1989).

33. This is also true of maritime law. Before the twentieth century, seamen were allowed maintenance and care, but they had no effective negligence remedy against their employers. *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903) (superseded by statute in *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1979). In the 1940s, the Supreme Court transformed the doctrine of unseaworthiness into an effective liability basis for recoveries by seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946); *Cookingham v. United States*, 184 F.2d 213 (3d Cir. 1950), cert. denied, 340 U.S. 935, 95 L. Ed. 675, 71 S. Ct. 495 (1950); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 88 LK. Ed. 561, 64 S. Ct. 455 (1944). The doctrine of unseaworthiness essentially imposes liability without fault on the part of a ship owner who fails to provide a safe and seaworthy vessel.

34. H. Steiner, *Moral Argument and Social Vision in the Courts* 105-107 (1989).

35. *Escola*, cited on p. 77, at 442.

36. See Annotation, "Manufacturer's Duty to Test or Inspect as Affecting His Liability for Product-Caused Injury," 6 *A.L.R.*3d 91, 100. n. 19 (1966).

37. Quoting from *Ketterer v. Armour*, 200 F. 322, 323 (SD NY 1912).

38. G. White, cited in note 12, at 198-200.

39. See Traynor, "The Ways and Meanings of Defective Products and Strict Liability," 32 *Tenn. L. Rev.* 363, 376 (1965).

40. W. Prosser, *Law of Torts*, 993 (1971).

41. "Tribute to Albert A. Ehrenzweig," 54 *Calif. L. Rev.* 1419 1966); "In Memoriam Albert A. Ehrenzweig," 62 *Calif. L. Rev.* 1069 (1974).

42. F. Harper and F. James, *The Law of Torts* (2d ed. 1956).

43. A. Ehrenzweig, *Negligence Without Fault: Trends Towards an Enterprise Liability for Insurable Loss* (1951).

44. M. Horowitz, *Transformation of American Law* 97 (1977) (This book won the prestigious Bancroft Prize for scholarship in history in 1977 and other awards as well.)

45. James, "Future of Negligence in Accident Law," 53 *Va. L. Rev.* 911 (1967); "Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability," 54 *Calif. L. Rev.* 1950 (1966); "Evaluation of the Fault Concept," 32 *Tenn L. Rev.* 374 (1965); "Imputed Negligence and Vicarious Liability: The Study of a Paradox," 10 *U. Fla. L. Rev.* 48 (1957); "Products Liability," 34 *Tex. L. Rev.* 44 (1955); "Tort Trends in Connecticut," 1 *Amicus Cur.* 14 (1955); "Assumption of the Risk," 61 *Yale L.J.* 141

(1952); "Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)," 37 *Va. L. Rev.* 179 (1951); "Qualities of the Reasonable Man in Negligence Cases," 16 *Mo. L. Rev.* 1 (1951); "Functions of Judge and Jury in Negligence Cases," 58 *Yale L.J.* 667 (1949); "Accident Liability Reconsidered: The Impact of Liability Insurance," 57 *Yale L.J.* 549 (1948) (This list is not exhaustive.).

46. F. Harper, *The Law of Torts* (1936).

47. F. Harper and F. James, *The Law of Torts* (1956) (now in its third edition). See Harper, James, and Gray, *The Law of Torts* (1986).

48. Cases citing Harper and James number in the hundreds.

49. J. Salmond, *Salmond on Torts*; G. Williams, *Aims of the Law of Torts* (1951).

50. Priest, "Strict Products Liability: The Original Intent," 10 *Cardozo L. Rev.* 2301 (1989). See "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," 14 *J. of Legal Studies*, 461 (1985). See also Priest, "Modern Tort Law and Its Reform," 22 *Valparaiso U.L. Rev.* 1 (1987).

51. In some ways, James is a precursor of the "Law and Economics School" of legal theory. Some of the members of that school argue that strict liability is economically efficient. Other members of the "Law and Economics School" dispute this proposition and argue for a fault-based theory. Thus, whether enterprise liability contributes to economic efficiency is still a matter of substantial dispute: See G. Calabresi, *The Cost of Accidents* (1980). Professor Calabresi points out that the question itself is not completely clear. Unquestionably, James attended closely to economics.

52. James, "Social Insurance and Tort Liability: The Problem of Alternative Remedies," 27 *N.Y. U.L. Rev.* 537 (1952) ("[S]ocial insurance legislation has grown apace in America. Such legislation is based on a faith that the general welfare is best served by protecting individuals from the consequences of pecuniary loss through such vicissitudes of life as accident, old age, sickness, and unemployment.").

53. James, "Accident Liability Reconsidered: The Impact of Liability Insurance," 57 *Yale L.J.* 549, 569 (1948).

54. James argues that the tort system constitutes a system of social insurance, although he has some qualms about the role of subrogation. Id. at 557. He is reasonably confident that a tort regime based on enterprise liability would come close to social insurance, particularly with vicarious liability and liability insurance engrafted under the regime. Id. at 560. In drawing the connection between enterprise liability and social insurance, James cites Ehrenzweig's *Negligence Without Fault*, cited in note 43.

55. See Priest, "The Invention of Enterprise Liability: A Critical History of Intellectual Foundations of Modern Tort Law," 14 *J. of Legal Studies* 46 (1985).

56. James, "General Products–Should Manufacturers Be Liable Without Negligence?," 24 *Tenn. L. Rev.* 923 (1957).

57. Actually, the extent of damages which James had in mind might be more circumscribed than allowed under §402A. In a less well-known paper, James argued that the social insurance function of tort law "is not an argument for full compensation to these victims as we think of compensation in tort cases today (i.e., as of a tort regime of the mid-1950s). It calls for damages or awards that will provide for care, cure, and rehabilitation; for the preservation of homes and the necessary maintenance of

dependents during periods of incapacity; and for the reparation of economic loss. But allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons." James, "Some Reflections on the Basis of Strict Liability," 18 *La. L. Rev.* 293, 297 (1958). Thus, James is arguing that damages for pain and suffering which are appropriate under a fault regime may not be appropriate under a strict liability/social insurance regime.

This paper of James constituted the foundation for an extremely interesting exchange of views among tort scholars in 1958. See symposium, "Jurisprudential Basis of the Law of Strict Liability," 9 *Loy. L. Rev.* 31 (1958). James is joined by Harry Kalven, a brilliant and influential professor of law at the University of Chicago, and by others. Several important points about strict liability, the theory of enterprise liability, and the insurance justification are made. First, James and Kalven agree that strict liability is one of the "architectonic notions of tort law," and that a fault-based regime is best seen as a (possibly equitable) limitation on strict liability-based recoveries. Second, "strict liability can be restated with great force and sophistication. . .but only in a context that includes insurance or some other device for a wide distribution of risk and loss." Third, when an insurance-based doctrine of strict liability is articulated, "the very meaning of the term 'liability' changes considerably. The issue is not whether the actor or the victim should pay for the accident, but whether compensation for accidents cannot in some way be 'socialized.'" Fourth, this implies that fundamental issues no longer concern corrective justices between individuals, but the questions of "loss administration between large groups." Kalven regards loss-shifting as an issue of social justice, whereas James regards it as an issue in social utility. Both Kalven and James agree that risk distribution (insurance) justification for enterprise liability is not simply a deep-pocket theory, but is, rather, a theory to create a situation in which the right pockets will still be deep. The issue, thus, "is whether the legal system ought to concern itself with creating in advance an ability to pay for accidents." This leads immediately to principles of insurance and to whether the state ought to make compulsory this "brilliantly useful institution."

The participants in this symposium appear to agree that there were a number of technical questions concerning insurance justification. How should risk pools be drawn? Why should third-party insurance be utilized rather than first-party insurance? Are questions about efficient risk distribution necessarily questions of insurance, and so forth. At bottom, however, James seems to set the theme well by claiming that if it is statistically certain that an enterprise will injure someone, then unjust enrichment would occur if it did not have to compensate the persons who were injured. This 1958 symposium bankrupts the "London Argument" and its P_1. All of the participants in this 1958 symposium clearly understood the interrelationship between the theory of enterprise liability, strict liability, and the insurance justification.

58. James, "Tort Law in Midstream: Its Challenge to the Judicial Process," 8 *Buffalo L. Rev.* 315 (1959).

59. "Legal scholarship finds an important function not only in research and instruction, but as the most effective agency for constructive criticism of judicial thought and action. Great names in law rest on this foundation, some as revered as any made so by the judicial function itself...a few have combined the two functions, each adding luster to the other.... Therefore, when opinion among scholars who are not judges is uniform or nearly so and that among judges is in high confusion, the former gives direction to the law of the future, while the latter points presently in all directions." *President &*

Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1944) (abolition of charitable immunity) (citation omitted).

60. The theory of enterprise liability and insurance justification were not universally accepted by legal scholars. Indeed, there was serious critique of the actuarial, economic, jurisprudential, and philosophical foundations of the theory of enterprise liability, although it was usually combined with substantial reservations about one or more components of a poorly fault-based regime. One trenchant critique of the theory was Morris, "Enterprise Liability and the Actuarial Process–The Insignificance of Foresight," 70 *Yale L.J.* 554, 583-588 (1961). Obviously, the fact that some legal scholars disputed the views of the most prestigious and influential legal scholars of the time does not tend to establish that the coming of the "American Torts Revolution" was unforeseeable. Indeed, if anything, it makes it even more foreseeable.

61. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 *Yale L.J.* 1099 (1960); "The Fall of the Citadel (Strict Liability to the Consumer)," 50 *Minn. L. Rev.* 635 (1966).

62. See Wade, "Chief Justice Traynor and Strict Tort Liability for Products," 2 *Hofstra L. Rev.* 455, 459 (1974) for an account of *Greenman* and a general assessment of Justice Traynor's contribution. Wade succeeded Prosser as a reporter to the ALI's *Restatement (Second) of Torts*, and he edited a casebook on torts with Prosser.

63. Note, "Airline Passenger's Lack of Privity Bars Implied Warranty Action Against Manufacture of Defective Component Part But Not Against Assembler of Completed Airplane," 63 *Colum. L. Rev.* 1522 (1963); Note, "Torts: Sales: Implied Warranties: Requirement of Privity in Contracts in Airplane Accidents: *Goldberg v. Kollsman Instrument Corp.*," 49 *Cornell. L.Q.* 354 (1964); Note, "New York Abolishes Privity Requirement in Implied Warranty Actions," 38 *N.Y. U.L. Rev.* (1963).

64. See Henderson, "Promissory Estoppel and Traditional Contract Doctrine," 78 *Yale L.J.* 343 (1969); Boyer, "Promissory Estoppel: Principle From Precedents," 50 *Mich. L. Rev.* 639 (1952).

65. The only slight difference which we can detect comes in *Gordon* in which Traynor would assess strict liability against a manufacturer for defects which foreseeably arise after the shipment of the item. This is really a semantical distinction, because such products would not develop post-shipment defects if they did not have latent flaws already existing at the point of manufacture. Justice Traynor seems to realize this, for he says, "A bottle can hardly be considered not defective if it cannot safely withstand the treatment it will normally receive in carrying its contents to the consumer."

66. *Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 176, 242 A.2d 231, 236 n.2 (1968). See *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539, 545 (1967) (also discussing the insurance justification).

67. *Brocklesby v. U.S.*, 767 F.2d 1288, 1296 (9th Cir. 1985); *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245, 253 (7th Cir. 1965); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1140 (D.C. Tex. 1980); *First Nat'l Bank of Mobile v. Cessna Aircraft Co.*, 365 So.2d 966, 967 (Ala. 1978); *Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 176, 242 A.2d 231, 236 (1968); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976).

68. For example, in *Borel* (cited in note 2), regarded as *the* asbestos case, there was no systematic discussion of these matters. The court merely referred to comment k to §402A to confirm the jury verdict.

69. Perhaps the best example of this is *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

70. Cost spreading, which is the intuitive foundation of the theory of enterprise liability, has also provided a public policy rationale for state and federal statutes in the environmental area. In particular, CERCLA, and its progeny, are based on the theories that those who created the pollution, and profited from it, should pay for it. "Developments in the Law: Toxic Waste Litigation," 99 *Harv. L. Rev.* 1458, 1477 (1986). One of the difficulties which insurers face in resisting policyholder claims that CGL insuring agreements cover on CERCLA-mandated cleanup costs is the background ideology of the theory of enterprise liability. H. Steiner, *Moral Argument and Social Vision in the Courts* 204 (1990). Some judges have resisted the idea that pollution liability should be spread further than amongst the polluters themselves. *Boeing v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 748 P.2d 507, 525-27 (1990) (C.J. Callo dissenting). The self-consciously adopted notion that environmental losses should be spread as far as possible, when combined with the theory of enterprise liability, makes it extremely difficult to suggest that liability insurers ought not be reached. For an example of how explicit the loss spreading is in the environmental area, see, Note: Weber, "Misery Loves Company: Spreading the Costs of CERCLA Clean-up," 42 *Vanderbilt L. Rev.* 1469 (1989).

71. Kenneth S. Abraham and Paul C. Wyler, "Enterprise Medical Liability and the Evolution of the American Healthcare System," 108 *Harv. L. Rev.* 381 (1994) (arguing that the evolution of the organization of the practice of law toward large enterprises such as health insurance, hospitals, large medical practices, and HMOs, justify the imposition of liability for medical injuries based on a sophisticated model of enterprise liability).