

A Conspectus of Manufacturers' Liability for Products

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To organize the matters covered in this symposium and put them into perspective, a conspectus, or brief overview of the general subject with a modicum of explanation, may prove useful.¹

I. THEORIES OF RECOVERY

A. *Genesis of Strict Liability*

Let's start at the beginning, with the three theories of recovery: (1) negligence, (2) breach of warranty, and (3) strict tort liability. The traditional negligence theory has existed for some time and is well understood; and there is no need for me to trace its historical development. Breach of warranty includes both breach of implied warranty and breach of express warranty. In both, the major problem, at least in the beginning, was the requirement of privity. In the development of the strict liability theory, cases based on breach of warranty were the starting point. As a matter of fact, the cases upon which Dean Prosser relied in preparing section 402A and adding it to the *Restatement (Second) of Torts* were primarily breach of warranty cases involving food products. These cases were an appropriate basis for development of the strict liability theory because they were the cases in which the courts were doing away with the requirement of privity. If there is privity of contract there is no need to worry about strict liability in tort, because a breach of warranty theory would apply and provide relief for physical injury as well as for loss of bargain. As the privity requirement disappeared, the theory of strict liability in tort became dominant. The question of which came first, the *Restatement* or *Greenman v. Yuba Power Products, Inc.*,² is inconsequential; together they produced strict liability in tort.

B. *Relation to UCC*

There has been a question about whether strict liability in tort or the tort action for breach of warranty is constitutional. A number of writers have argued that the courts have trespassed on the

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¹This treatment is based upon a talk given at the Products Liability Institute. Although it has been slightly revised, it has not been rewritten and therefore retains the somewhat looser organization and more informal style of an oral presentation.

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

authority of the legislatures in indirectly changing the Uniform Commercial Code.³ Although there have been a number of articles, the question is now academic, because strict liability in tort has been widely adopted. My own analysis is that strict liability is accurately based on a form of negligence per se, much as actions based on the pure food statutes. Under these statutes it is held that if one sells unwholesome food he is negligent, without regard to whether he is negligent in letting the food get in that condition; and that is essentially the rationale of strict liability in tort. If the defendant sells a product that is defective or unreasonably dangerous, he is by that act at fault. It is not necessary for the plaintiff to prove in any respect how the product happened to get in that dangerous condition; putting the product on the market in that condition is the equivalent of negligence.⁴ That theory has been adopted by a number of courts, and has proved effective even in states that have comparative negligence statutes. They apply their comparative negligence statutes to the strict liability theory. In a number of states, including Indiana, it is possible to have counts in a complaint based upon each of these theories, and it often happens that a plaintiff will attempt to include each of them in order to gain any advantage that may flow from one as distinguished from another. We are discussing three or four different theories—contract warranty, tort warranty, strict liability, and negligence. There are advantages and disadvantages to each as a basis for an action, but in any case, whatever theory is used, the product itself must be actionable. In other words, the concern at this point is not with the conduct of the defendant; it is necessary to find that the product itself was actionable.

II. WHEN IS A PRODUCT ACTIONABLE?

There are three ways in which the product may turn out to be actionable. One is that something went wrong in the manufacturing process, and the product is not in the condition in which the manufacturer intended it to be. The product could be called "mismanufactured," or "mal-made," or, simply, wrongly made. The second way in which a product may turn out to be actionable occurs when there is something wrong with the design, the way in which it was intended to be made. This could be called "mal-design." The third way in which to find a product actionable is to find that there is an absence of necessary warnings or instructions or that the war-

³E.g., Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965).

⁴Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

nings or instructions are inadequate. That may be termed "non-warning," or "mal-warning." Indeed, this warning aspect could be treated as a form of mal-design, since the inclusion of the warning is a part of the design of the product itself.

Having examined the three ways in which a product may turn out to be actionable, it is necessary to formulate a test of some sort to determine when the product is actionable under one of these ways. It is important to remember that this requirement—that the product be actionable—is present no matter what theory the plaintiff sues on. I suppose the first theory an attorney thinks about is one based on warranty. There are, of course, two implied warranties—that the product is of merchantable quality, and that it is suitable for the purpose for which it was sold.⁵ If it fails on either of those counts, it is actionable. The prime purpose of these warranties as originally developed was not to allow a cause of action for injury incurred from the product, but to allow a cause of action when the buyer did not get what he expected in his bargain. It was carried beyond this, however, to the area we are discussing. Consider the warranty of merchantability in relation to unwholesome food. If food sold is unwholesome, then it is actionable, whether because the food had to be thrown away or because it was eaten and caused illness.

One term used in the *Restatement* is "defective." The word "defective" can be very helpful if what is being discussed is a manufacturing error. The product then is not in the condition the manufacturer intended it to be in, and it just trips off one's tongue to say that it is defective. But the use of that language can cause trouble when what is wrong with the product is an improper design. There are cases in which the courts have said that the product was made exactly in the way the manufacturer intended to make it and there was thus no liability. One of the most famous cases of this type involved a vaporizer.⁶ A child was lying near a steaming vaporizer when, for an unknown reason, it fell over. The top, which could not be screwed on, came off, and the child was badly burned. The court held in that case that the product was made as it was intended to be made; it was not defective. The decision may be correct, but it certainly was decided on the wrong basis. The court correctly pointed out that the way in which the manufacturer designed the product was safer than other methods might have been. If it had been designed so that the top was screwed on, the potential existed for a steam outlet to get stopped up and the whole thing might explode. Such a design would be more dangerous than the one marketed. The court's statement terming the product "not defective," however, is confusing.

⁵U.C.C. § § 2-314, 2-315.

⁶Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951).

A clearer and more meaningful term is "unreasonably dangerous," a phrase that can be applied to products that are mal-made, mal-designed, or lacking in instructions or warnings. My personal preference is to say that a product is not duly safe. Two tests are set out to determine whether a product is unreasonably dangerous. A test was initially set forth in connection with breach of warranty cases for loss of bargain. In that case, the courts said, what you look to is what the buyer expected to get. This test will work in many cases, but sometimes the buyer does not know exactly what he should have received; he is thinking only of what the product will do for him. In addition, it seems to me that in a tort action it makes more sense to put the complaint in terms of what the seller did rather than what the buyer expected. For these reasons the test is better expressed in this way: Would the seller be negligent if he put the product on the market knowing its dangerous condition? In other words, strict liability eliminates the need to prove negligence on the part of the seller or the manufacturer in letting the product get in a dangerous condition, in failing to discover that dangerous condition, or in failing to do something about it.⁷ There are some other important questions involved in determining whether a product is unreasonably dangerous, but I am leaving them for discussion under Special Problems, at the end.

III. CAUSATION

The emergence of theories of strict liability did not materially change the issue of causation.

A. Cause in Fact

It is necessary from the standpoint of cause in fact to prove that the product was defective or unreasonably dangerous, and that is sometimes a very difficult thing to prove. The plaintiff has to prove also that the defendant was responsible for that condition. The question here is not one of fault. The issue is whether the product was in that condition when it left the defendant, or was so potentially in that condition that he is responsible for it. And the plaintiff must also prove that the dangerous condition is what caused his injury.

The unreasonably dangerous condition of the product, defendant's responsibility for that condition, and the causal relation between the condition and the injury can often be proved by cir-

⁷I have discussed this general topic at more length and in more detail in *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973), reprinted in 1974 INS. L.J. 141 and 1974 PERS. INJ. ANN. 534. See also Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967); Fischer, *Product Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974).

cumstantial evidence. It is not necessary to have direct evidence, although direct evidence is fine. Proving these things by circumstantial evidence is like using circumstantial evidence in other situations, but the form of circumstantial evidence called *res ipsa loquitur* is not germane. *Res ipsa loquitur* is relied upon in a negligence action as the circumstantial evidence that the defendant was negligent. It is important to distinguish proof of negligence from proof that defendant's negligence was the cause in fact of the injury to the plaintiff. These are two separate proof problems. There is no occasion to invoke *res ipsa loquitur* in connection with strict liability in tort, because there is no need to prove negligence on the part of the defendant. The plaintiff must, however, prove cause in fact and proximate cause.

B. Proximate Cause

One way to talk about proximate cause is to talk about the risk created by the defendant's conduct. What dangers did his conduct create? Does this injury come within the scope of that risk? Strict liability in tort of the *Rylands v. Fletcher*⁸ type—strict liability in connection with an abnormally dangerous activity—was the original strict liability in tort, and an examination of this type of case shows that strict liability does not take care of the proximate cause problem. When the plaintiff is not called upon to prove fault on the part of the defendant, who is liable whether he is at fault or not, courts have enforced risk restrictions even more stringently than in negligence cases. In other words, the circle of liability for strict liability becomes a smaller circle than that for negligence, where the defendant was really at fault. Take the case of an elephant getting loose. A horse sees him and starts climbing a tree. Is that within the scope of the risk created by the elephant keeper? Is that a reason to impose strict liability for the keeping of elephants? The courts have disagreed, but they have approached the question from a consideration of the scope of the risk.

This same approach may well be used in connection with strict liability in tort for products. Here, too, the circle of liability for strict liability is somewhat narrow. Indeed, it has appeared to me that in some types of cases, such as the second-accident situation, a plaintiff might be better off, if he has the choice, to sue on the basis of negligence, because of the wider circle of liability. At issue in negligence is foreseeability, rather than intended use, one of the stumbling blocks of strict liability, as illustrated by such cases as *Evans v. General Motors Corp.*⁹ Intended use as an issue originally

⁸L.R. 3 H.L. 330 (1868).

⁹359 F.2d 822 (7th Cir. 1966).

came out of breach of warranty actions in which the suit was brought because the product did not perform in accordance with expectations. Merchantability, or suitability for the purpose for which the product is intended to be used if disclosed, is of particular significance in these cases. Defendants began by discussing intended use as though the issue were confined to the intent of the manufacturer, and of course the manufacturer did not intend his automobile to be used for just *any* purpose, much less for another automobile to be run into it. The courts began to expand the concept a little beyond that, to something like normal use, then perhaps to something like expected use, and then it was expanded to include a foreseeable use. Once one gets to foreseeable use, the liability is becoming as broad as that for negligence. The courts have not analyzed this problem thoroughly; the relationship between foreseeability and proximate cause is not fully settled.

In connection with proximate cause, problems also arise in regard to intervening causes—acts of third parties, natural forces, etc. Here again, in cases based on the *Rylands v. Fletcher* type of strict liability, courts have been more inclined to cut off the defendant's liability because of the intervening act of a third party or because of an act of God, than they would in an action based on negligence. It is not certain that this attitude will carry over to strict liability for products, but this could be another consideration for a plaintiff, another reason why he might be better off to base his action on negligence. The articles in this symposium indicate other reasons why a plaintiff may choose to sue in negligence, including the opportunity in a negligence action to introduce evidence about the blameworthiness of the plaintiff. That may make a very real difference in determining the scope of liability and proximate cause, and will almost certainly affect proof of negligence.

IV. DEFENSES

A. Plaintiff's Fault

The next item to be considered is plaintiff's fault. Much of the material in the symposium is devoted to this issue and that is indicative of the fact that the problem of how to handle plaintiff's fault is the most pressing problem in the current state of the law of products liability. The solution I would like to offer is that we adopt some form of comparative fault. The trouble with contributory negligence, assumption of risk, and other common law approaches to the problem of plaintiff's fault is that they go on the premise that everything is black and white—the plaintiff gets everything or he

doesn't get anything; there is no in between. These approaches are derived from old common law pleading. The common law never compromised anything, because compromise was to be used in equity, which was not regarded as real law. Equity courts, growing out of the ecclesiastical courts, were believed to compromise because they didn't know the real law. Common law pleading was based on the idea that everything should be reduced to an issue that could be answered yes or no. The answer could not be maybe, or yes if; it had to be yes or no, and law courts did not deign to look at the possibility of something in between. That attitude, especially as displayed in the common law doctrine of contributory negligence, produces rank injustice. Some commentators say it all averages out under the contributory negligence system with its numerous exceptions, and maybe if you average them up the cases as a group work out all right, but that means every single case is bad. The average has nothing to do with working things out properly in any individual case.

In this situation, without comparative negligence, a plaintiff doesn't bring his suit in negligence if he is at fault in the slightest degree. He must rely on strict liability and, perhaps even more, on breach of warranty. In strict liability ordinary contributory negligence of the mere inadvertent type has not customarily barred recovery. On the other hand, contributory negligence in which plaintiff discovered the defect and continued using the product despite ample opportunity to stop using it—sometimes called assumption of risk—has been a complete bar to recovery. Then the parties came up with the idea of misuse, and misuse is an idea easily misused, as I will indicate in discussing it a little later. The final approach to plaintiff fault is comparative fault, the approach I think should be applied to strict liability for products. It should apply in this situation to achieve a more equitable, balanced judgment.¹⁰

B. Other Defenses

We could discuss problems connected with statutes of limitations at great length. We have all been holding our breaths to see what happens to the proposals before the legislature of Indiana.¹¹ Immuni-

¹⁰The new Uniform Comparative Fault Act, promulgated in 1977, applies the comparative-fault approach to an action of strict liability for products as well as to one for negligence.

¹¹The Indiana General Assembly had before it two bills which would have set a statute of limitations in products liability cases, but the provisions were not passed. Ind. H.R. 1959, 100th Gen. Assem., 1st Sess. (1977); Ind. S.70, 100th Gen. Assem., 1st Sess. (1977).

ty is another defense, arising most often in connection with worker's compensation, since the employer is not liable in tort to the employee if worker's compensation applies. Release and settlement are defenses discussed in the symposium.

We have not examined the UCC defenses, which were responsible for the holding in *Greenman v. Yuba Power Products, Inc.*¹² The UCC provides for notice of defect within a reasonable time.¹³ That requirement is easily complied with in a strictly commercial transaction, where the suit is for failure of the product to perform properly. The buyer must give notice so that the seller has an opportunity to replace the defective product with a good one. But a provision for notice really is not applicable to a case in which the plaintiff is injured; you can't replace the person. And so in *Greenman v. Yuba*, that was the very reason the court held that strict liability in tort would apply, and the notice requirement was eliminated in the tort action. Another problem is disclaimer. How broadly liability may be disclaimed in connection with used products is something that the courts still have to determine.

V. INTERESTS PROTECTED

Another substantial problem is the question of interests protected by the tort action. Obviously included as an interest protected is physical injury to person or property. A plaintiff may also generally recover for the economic loss derived from the physical injury, such as loss of wages and medical bills. Although those items are economic loss, there is no trouble about them. The impediment to recovery of economic loss comes in connection with damages resulting from the fact that the product did not do what it was supposed to do. There is a split among the courts on this issue. The majority rule is that the tort action does not lie here, that this is really a claim for breach of contract and should be determined by contract rules. The minority rule, led by the New Jersey court in the *Santor* case,¹⁴ would hold that the tort action applies to this situation and recovery for economic loss should be granted. My own view is that the opinion of the California court in *Seely v. White Motor Co.*,¹⁵ holding that the claim sounds in contract, is probably the better position.

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

¹³U.C.C. § 2-607(3).

¹⁴*Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

¹⁵63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). See also my article cited in note 4 *supra*.

VI. PARTIES

A. Privity

I must make only a brief reference to the problems as to parties. One problem involves privity. From the standpoint of the defendants, or "vertical privity," the theory of the suit may make a difference. In a suit for negligence, a wholesaler or retailer may not be negligent and so not liable. In breach of warranty, the requirement of privity may still remain. In strict tort liability, section 402A would impose liability on all parties, but some jurisdictions may disagree in the case of a wholesaler.

From the standpoint of plaintiffs, the major question is whether a bystander can recover. For lack of authority this was the subject of a caveat to section 402A. But today, it is clear that recovery in strict tort liability is available to the bystander.

B. Contribution and Indemnity

Indemnity was consistently allowed at common law. One of the usual situations where it applied was in the case of a retailer (or wholesaler) held liable without negligence, who sued the negligent manufacturer. Though contribution was not allowed at common law, most states permit it today through statutes or judicial decision. In a state where contribution is based not on pro rata distribution but on the relative fault of the parties, the distinction between contribution and indemnity has become less meaningful and there are indications that they may be beginning to merge.¹⁶

VII. SOME SPECIAL PROBLEMS

A. Misuse

Let me come back now to talk about some of the special problems that cut across several elements previously treated. I begin with the concept of misuse. The issue of misuse can be placed in three different places in this discussion, and how it is handled may depend upon where one locates it. Misuse may be raised in determining whether a product was not duly safe, in determining

¹⁶See, e.g., *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). On the topic in general, see Phillips, *Contribution and Indemnity in Product Liability*, 42 TENN. L. REV. 85 (1974); Wade, *Contribution and Indemnity in Products Liability Cases*, 27th ANN. MISS. L. INST. 115 (1972).

whether the condition of the chattel was a proximate cause of the plaintiff's injury, or as a separate affirmative defense to the effect that the plaintiff was at fault. The choice of where to raise the issue makes possible a real difference in the outcome of the case, and both sides should be aware of the tactics involved. Consider the Texas case¹⁷ in which a man had read consumer literature, in which he was told that if he bought a tire a size larger and kept it well inflated it would last longer. He followed the instructions and some time later his wife and children were driving in the car when one of the tires went flat and then another one blew out. The wife completely lost control and they were all hurt. In an action brought against the tire manufacturer, the court talked about plaintiff's misuse of the product, using too large a tire and having it too greatly inflated. If you analyze this problem properly, I think you will decide that the real issue is whether that tire was unreasonably dangerous. If we assume that the manufacturer was not the one who put the tire on the car, the situation is like the early case in which a woman with a size seven foot bought a size five shoe, wore it a while, got some blisters and sued the shoe manufacturer.¹⁸ That was back in the earlier days when they talked only about negligence and it's obvious that the shoe manufacturer was not negligent in making a size five shoe. There should of course be no liability if the defendant did not put out an unreasonably dangerous product. Similar considerations arise if the concept of misuse is treated in terms of proximate cause: what is the risk of making these shoes in a size five? If the issue is put in terms of plaintiff's fault it is then one of assumption of risk or contributory negligence or comparative negligence. Defendant must be alert to this defense and to the tactic of switching the focus and talking about whether the plaintiff was contributorily negligent and thus perhaps being able to recover in an action based on strict liability, even though the product was not unreasonably dangerous at all. Conversely, in a case where the product was actually unreasonably dangerous and the plaintiff's contributory negligence was of the mere inadvertence type, a defendant may be able to bar recovery by invoking the talismanic concept of misuse. This concept is one by which a party may lead the other, and even the court, astray if they are not careful to analyze the way in which it is used.

B. Warnings

Both the plaintiff and the defendant may find warnings as potential devices in their favor. The plaintiff believes that if he cannot

¹⁷McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

¹⁸Dubbs v. Zak Bros. Co., 38 Ohio App. 299, 175 N.E. 626 (1931).

prove that there was something wrong with the product he can point to the failure to warn of danger and that will be easy to prove. The defendant thinks, if his product is not as safe as it ought to be, that he can put up a warning and call attention to the danger and then it will be duly safe. How should the problems of warnings be analyzed? It seems to me that these problems are so closely analogous to those related to obvious dangers that they should be handled in the same way. When we are dealing with plaintiffs who come on the defendant's premises, the question is whether a warning of a danger is adequate to make the premises reasonably safe. A warning may be adequate or inadequate, depending on whether the defendant acted with reasonable care to make the situation or the product safe.¹⁹ As a product example, suppose an electric appliance manufacturer failed to insulate the electric cord attached to the appliance adequately, but added a sign that said, "Be careful when you plug this in. Do not touch the wires. Doing so might electrocute you." Even if the manufacturer used language that emphatic, do you suppose that any court would hold the warning sufficient to make the product duly safe? A decision must be made on whether the existence of a warning is adequate or whether it is necessary to take reasonable action to make the product safe. A warning should be held sufficient only when it is really not feasible to make the product safe and the danger is not obvious.

Of course there are other problems in connection with warnings, including the manner in which they are expressed. What things do you need to warn about? Must the defendant think of every possible difficulty? Suppose a perfume, if swallowed, might make someone sick. Must the manufacturer add a warning, "Do not ingest"? What if a child is involved? Another problem concerns determination of whether the absence of a warning was a cause in fact of the injury incurred. There have been cases in which the plaintiff admitted he hadn't read any of the instructions attached to the product and then, of course, the lack of a warning doesn't make very much difference. But does it make *any* difference?²⁰ If the plaintiff had seen a warning, would he have followed it? What is the relationship between warnings and instructions? Do instructions suffice, or is a warning about what will happen if instructions are not followed also necessary? The ramifications in this connection are considerable, indeed.

¹⁹Cf. *Wilk v. Georges*, 267 Or. 19, 514 P.2d 877 (1973); RESTATEMENT (SECOND) OF TORTS § 343A (1965).

²⁰Cf. *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972).

C. *Express Warranty*

Express warranties raise a number of unique questions. The warranty can be salvation for a plaintiff. He may not be able to prove that the product was unreasonably dangerous, but if he can find an advertisement or brochure that includes a statement about some quality of the product, and this quality had anything to do with his injury—he might even contend that this statement was the only reason he bought the product—then he can claim he would not have been injured if he had not seen the manufacturer's statement. This consideration is of particular importance to a manufacturer who wishes to avoid litigation. One of the worst things a manufacturer can do is to put his product in the hands of professional advertisers and let them overclaim, presenting the object as extraordinarily attractive. That can create liability for manufacturers more often than a product that is unreasonably dangerous.

Two theories have been used to allow recovery for breach of an express warranty. One is section 402B of the *Restatement (Second) of Torts*, a section that is not nearly as well known as section 402A. Section 402A covers cases involving breach of implied warranty and bases recovery on strict liability in tort. Section 402B covers cases involving express warranties and calls the theory of recovery a tort action for misrepresentation. It may even be innocent misrepresentation; a claim will lie if physical injury results. That is not the majority approach, but it has been used in a number of states.²¹ The majority approach is to say that this sort of case is a tort action based on express warranty. Middlemen, including suppliers and retailers, are treated as mere conduits, if the advertising statements are directed at the buying public. If the plaintiff saw the advertisements and read them he is entitled to rely upon them and to hold the manufacturer liable because they were directed at him. Once again, however, it is important to remember that cause in fact must be shown: the plaintiff must show that he saw the advertisement, that he read it and that it was influential in inducing him to buy the product.

D. *Second-Accident Cases*

These cases arise when the dangerous condition of the product had nothing to do with initially producing the accident, but once the accident had occurred made the injuries worse. The situation can be discussed in all sorts of ways. I suspect that the best place to con-

²¹*E.g.*, *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966).

sider it is in relation to proximate cause. Is this occurrence within the scope of the risk created by the defendant? In this connection it seems to me that the *Larsen* case²² is far better reasoned than the *Evans* case.²³ The *Larsen* court said that it is expectable that an automobile may be in a collision, and a manufacturer should use reasonable care to design an automobile reasonably safe from this standpoint. We say reasonable care, because it is not necessary to design an absolutely safe product. To make an automobile fully crashworthy it would be necessary to design a tank, and a tank would be unreasonably dangerous to people outside that vehicle. Thus it cannot be designed to be absolutely safe. What the manufacturer must do is to consider all potential dangers and to use reasonable care in creating the design of his product.

As a matter of fact, when it comes to design cases and warning cases, there is no real difference between actions in negligence and in strict liability in tort. Strict liability in tort is of primary benefit to a plaintiff in an assembly-line error case when the manufacturer was not at fault in letting it happen or failing to discover it. In bad design cases the theory relied on may affect the treatment of plaintiff's fault or the liability of a wholesaler or a retailer who does not know of the dangers created by the design; but so far as the manufacturer is concerned, in most cases based on bad design or lack of warning there is no real difference between an action based on negligence and one founded on strict liability in tort.²⁴

E. The Unavoidably Dangerous Product

Finally, consider the effect of calling a product unreasonably dangerous or not duly safe. It seems to me that these words—"unreasonably" and "not duly"—afford the courts a considerable amount of discretion in many cases. Take the cases involving blood transfusions. Assuming that there is no way to discover the hepatitis germ and no way to eliminate it and that the blood is urgently needed, it would be perfectly proper to hold that blood containing hepatitis germs is not an unreasonably dangerous product. Courts differ, but it is much better to tackle the problem directly than to use the procedural dodge of saying that what is involved in the blood transfusion is not a sale but the rendering of a service. With other things, however, a determination could more easily be made, defining "unreasonably dangerous." Thus a common garden

²²*Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

²³*Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966).

²⁴*Cf. Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974).

tool like a hoe may be dangerous to human toes, but its usefulness, common design and fully apparent dangers make it fairly clear that the hoe is not unreasonably dangerous. Conversely, large firecrackers may be easily recognized as not duly safe. Other articles are between. Take the problem of allergies. There is probably no product that no one will be allergic to. But this is a situation in which a warning—an indication of the product's ingredients—may make a difference. This is also a case in which the negligence approach will probably protect plaintiffs adequately.²⁵

VIII. CONCLUSION

We are never going to reach the point where we say that there is true absolute liability, the insurer's type of liability. If we did, Ford Motor Company would be liable for every accident a Ford got into, Diamond Match Company would be liable for every fire that was started by a Diamond match, Bayer Aspirin Company would be liable for every stomach hemorrhage or even stomach upset produced by its aspirin tablets, the dairy farmers would be liable for heart attacks produced by cholesterol and the Indianapolis Water Company would be liable if someone drank too much water and died. There is no product that is not dangerous to somebody if it is used in some particular fashion. Lines have to be drawn and distinctions made.

When strict tort liability for products first developed, some lawyers thought that the problems of the plaintiffs' attorneys were all solved for them in advance and that defendants' attorneys had no grounds to stand on. A great judge declared privately that the law of torts was now destined to wither away in significance as a result and that a legal scholar ought to find other fields of the law to which to devote his energies.

They were all wrong. Since that time the number of appellate court decisions on products liability has increased geometrically, and there have been more disputes, treatises, symposia and law review articles to explain the intricacies than in any field of tort law. This article has attempted to provide an overview of the problems, but it has perforce been woefully shallow and incomplete.

²⁵In my article, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973), I attempt to compile and explain the factors that should be taken into consideration in making a determination whether a product is unreasonably dangerous. I also treat the issue of whether the determination should be made by judge or jury.