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Touro Law Review

Volume 10 | Number 1

Article 6

1993

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Recommended Citation

Gray, Oscar S. (1993) "Reflections on the Historical Context of Section 402A," *Touro Law Review*. Vol. 10: No. 1, Article 6.

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REFLECTIONS ON THE HISTORICAL CONTEXT OF SECTION 402A

Hon. George C. Pratt:

Thank you Mr. Crofton. It takes all of my self-control not to respond to some of the comments regarding the jury selection process. We may get to that later. We will move ahead to Professor Gray.

Professor Oscar S. Gray:*

It is probably unnecessary for me to remind you that the American Law Institute is not a law-making body. It is a private organization that publishes works that attempt to be scholarly.¹ It does not make much difference whether the form of the publication embodies recommendations that purport to be either black letter or commentary. Neither the comments nor the black letter is law. There is no way to expect any predictability or precision in actual results when we are talking about a common law field. The law that emerges will depend on the extent to which courts all over the country find it advisable to follow the suggestions of the Institute.² Whether or not they follow the recommendations

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1. The American Law Institute consists of a group of distinguished "legal scholars who are responsible for the Restatements in the various disciplines of the law. . . ." BLACK'S LAW DICTIONARY 82 (6th ed. 1990). "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." The American Law Institute, 68 A.L.I. PROC. 883 (1992).

2. Many courts throughout the country have followed the recommendations of the American Law Institute, particularly with regard to § 402A of the Restatement (Second) of Torts. *See* *Buttrick v. Arthur Lessard & Sons, Inc.*, 260 A.2d 111, 113 (N.H. 1969), in which the court stated:

The basis for the present rule of strict liability is the 'ancient one of special responsibility for the safety of the public undertaken by one who

will not depend on the difference between black letter and commentary; instead, it will depend on how persuasive we are in the view of the events. The quest for certainty in the law is not only illusory, in general, but is specifically not assured of fulfillment by the work that we are now engaged in reconsidering Restatement (Second) of Torts section 402A.³

enters into the business of supplying human being[s] with products which may endanger the safety of their persons and property and forced reliance upon that undertaking on the part of those who purchase such goods.'

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965)); see also *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fla. 1976) (holding that manufacturer may be liable under § 402A, as distinct from breach of implied warranty of merchantability, for injury to user of product and to bystander); *Shields v. Morton Chem. Co.*, 518 P.2d 857, 859 (Idaho 1974) (adopting § 402A to find chemical company liable for damage to wholesaler's seed beans); *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970) (adopting principles found in § 402A where automobile brakes were defectively manufactured); *Everett v. Bucky Warren, Inc.*, 380 N.E.2d 653, 660 (Mass. 1978) (holding manufacturer strictly liable under § 402A for unreasonably dangerous design of hockey helmet); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966) (adopting § 402A to find manufacturer liable for injuries sustained by explosion of beer keg); *Herbert v. Loveless*, 474 S.W.2d 732, 737 (Tex. Civ. App. 1971) (stating that "Texas is firmly committed to the rule stated in . . . section 402A . . ."); *Earnest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979) (adopting the language of § 402A by finding manufacturer of steel joists strictly liable when mall collapsed due to their defective condition).

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This provision provides in relevant part:

- (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) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

First, I would like to address a few points made by Mr. Crofton. Mr. Crofton has pointed out something very important on a matter I respect, but about which I was not at all certain. Those of you who have read the *Cornell Law Review* article, by Professors Henderson and Twerski,⁴ may recall an assertion to the effect that liability for unknowable risks is uninsurable.⁵ This assertion struck me as questionable. It is a very serious matter if it is correct, because it seems to me that one of the social objectives we ought to pursue is commercial stability. It is important that we have an economy that works. It is also important that honest businesses are not judged unbusinesslike. Businesses ought to have the means available to them for providing an orderly way of assessing liability.⁶ Therefore, to the extent that liability could be uninsurable, we would be talking about something that is not advisable. I am, therefore, glad to hear from Mr. Crofton, if I

Id.

4. James A. Henderson, Jr. & Aaron D. Twerski, *The Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

5. *Id.* at 1517. The article states: "[I]nsurers cannot provide coverage for unforeseeable or indeterminable risks. Furthermore, to impose liability for unforeseeable and hence incalculable risks would violate a manufacturer's right to be held to a liability standard that it is capable of meeting." *Id.* The authors propose to resolve this problem by applying a risk-utility balancing "to determine which risks are more fairly and efficiently borne by product sellers, and thus by users generally, and which should be borne by individual [] product users who suffer injury." *Id.*

6. See Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167 (1989). "Clearly, the widespread availability of product liability insurance at a reasonable cost is central to the validity of [a strict products liability] theory." *Id.* at 175. In essence, strict liability presumes that "the corporations making and selling a product are in the best position to insure against the risk of injury from that product." *Id.* at 174-75. "[C]orporations can pass on any increased costs they incur to consumers through a modest increase in product price." *Id.* at 175. This theory is known as a "cost-shifting" mechanism which "shift[s] the economic costs of physical and mental injury from the person injured, to the maker or seller of the product that caused the injury." *Id.* at 174 (citing George L. Priest, *The Current Insuring Crisis and the Modern Tort Law*, 96 YALE L.J. 1521, 1534-36 (1987)).

understood him correctly, that the problem for insurers is not that unforeseeable risks of physical damage are uninsurable.⁷ They can be insured, as long as insurers understand the existence of liability and the present state of the law.⁸ The risk that undermines the insurability of hazards, more than the risk of strict liability for unknowable hazards, is the risk of changes in the law.⁹ That accords with what would have been my guess. However, it is comforting that it seems so to Mr. Crofton as well.

One obvious consequence of the risk of changes in the law is that insurers should have understood forty years ago that the state of American liability law would expand liability.¹⁰ By now, Lloyds of London, and all insurers, should understand that there is much liability for defective products. Therefore, they cannot rely on any assumption that our understanding of defectiveness will not increase in the future. The expansion of liability should not come as a big surprise to insurers. Insurers' tasks should not be rendered unworkable if we were simply to follow section 402A in its most rigorous form, including strict liability for de-

7. See Michael Crofton, *From a Defense Attorney's Perspective: "There Is No Free Lunch,"* 10 TOURO L. REV. 57, 58 (1993).

8. See Cortese & Blaner, *supra* note 6, at 182. At the time strict liability began expanding, insurers could not predict when a court would find a manufacturer liable for unforeseeable product defects. Therefore, insurance actuary tables did not calculate unpredictable risks into the premiums. As a result, insurance companies were paying for these unforeseeable defects in product liability suits. Soon thereafter, insurance companies dramatically increased premiums, decreased coverage and sometimes refused coverage altogether. *Id.*

9. In 1986, Congress recognized "the inherent unpredictability of the tort litigation system, as well as the increasing difficulty of predicting potential losses due to expanding concepts of liability" to be contributing factors to the growing product liability litigation and unaffordability of liability insurance. S. REP. NO. 422, 99th Cong., 2d Sess. 6 (1986).

10. The purpose of § 402A, at the time of its promulgation, was to expand recovery for claims of harms caused by products which were defective or dangerous to the consumer. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter *Assault Upon the Citadel*]; William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 790 (1966) [hereinafter *Fall of the Citadel*].

sign defects¹¹ and warning defects.¹² We can take some comfort from the proposition that expansion of liability is not a reason for revising section 402A.

Now, I would like to revert to some doctrinal analysis and try to focus what we are talking about in a doctrinal context. You may then decide, after we have been through the exercise, that you want to follow my colleagues, Professors Henderson and Twerski, in the future.

Section 402A, when it was promulgated a generation ago,¹³ was a section providing something supplemental to a body of highly developed negligence and other tort law.¹⁴ The relevant

11. See Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U. L. REV. 1, 17 (1982). The author reports that courts have recognized four different definitions of defective design: 1. "the consumer expectations approach" (reasonable consumer could not have anticipated the unsafe conditions of the product); 2. "a risk/utility or feasibility analysis" (the risks of the product's design outweigh its benefits); 3. "a negligence or reasonableness standard" (the manufacturer did not act as a reasonable prudent person in designing the product); and 4. "a prima facie defect theory" (plaintiff establishes that the product caused the injury). *Id.* at 17-19.

12. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (providing that unavoidably unsafe products are not defective if accompanied by adequate warning); see also M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 223 (1987):

To be adequate under any theory of liability, a necessary warning, by its size, location and intensity of language or symbol, must be calculated to impress upon a reasonable prudent user of the product the nature and extent of the hazard involved. The language used must be direct and should, where applicable, describe methods of safe use. An adequate warning should also be timely and should advise of significant hazards from reasonably foreseeable misuse of the product and, where appropriate, antidotes for misuse.

Id. (footnotes omitted).

13. Section 402A of the Restatement (Second) of Torts was promulgated in 1965.

14. The founders of § 402A sought to expedite consumers' claims of personal injuries against manufacturers for product defects by utilizing a strict liability approach, rather than through tort or warranty law which proved to constrain the consumers' claims. See *Fall of the Citadel*, *supra* note 10;

context also included, outside of tort law, a body of applicable statutory law under the Uniform Commercial Code,¹⁵ which gave rise to warranty law.¹⁶ It was entirely clear under section 402A that there was nothing in it intending to displace the effect that would normally be expected from the balance of the Restatement of Torts.¹⁷ In fact, section 402A comment a has an explicit sentence which says, in effect, to the extent that a party can make a

George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

15. See U.C.C. §§ 2-313, 2-314, 2-315, 2-316, 2-317, 2-318, 2-715 (1993). The Uniform Commercial Code has been adopted by every state except Louisiana.

16. Some courts decided that consumers of defective products could proceed against manufacturers under either strict products liability or warranty provisions of the Uniform Commercial Code. See, e.g., *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981) (Uniform Commercial Code was not "intended to preempt the entire area of products liability, [instead s]trict products liability developed in large part to fill gaps in the law of sales with respect to consumer purchases.") (citations omitted), *overruled by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990); *Santer v. A & M Karaghieusian, Inc.*, 207 A.2d 305 (N.J. 1965) (finding that ultimate purchaser of defective carpeting who suffered economic losses could bring action against manufacturer for either breach of implied warranty of fitness or strict liability in tort); cf. *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976) (holding that bailor of rented truck may be liable for strict liability in tort for personal injuries to bailee and for damage to bystander's property caused by defective brakes). The court noted that the Uniform Commercial Code did not preempt products liability for bailments, instead it only offered guidance. *Id.* at 584 n.6. However, the majority of courts precluded economic recovery based on strict products liability in tort, and based recovery solely on the Uniform Commercial Code. In the seminal decision of *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), the court would not permit recovery of lost profits based on strict products liability because the law of sales governs commercial transactions. *Id.* at 151. See also *Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co.*, 360 F. Supp. 25 (S.D. Iowa 1973); *Miehle Co. v. Smith-Brooks Printing Co.*, 303 F. Supp. 501 (D. Colo. 1969); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1978); *Beauchamp v. Wilson*, 515 P.2d 41 (Ariz. 1973); *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968 (Del. 1980); *Long v. Jim Letts Oldsmobile, Inc.*, 581 P.2d 784 (Idaho 1978); *Rhodes Pharmacal Co. v. Continental Can Co.*, 219 N.E.2d 726 (Ill. 1966); *Marcil v. John Deere Indus. Equip. Co.*, 403 N.E.2d 430 (Mass. App. Ct. 1980).

17. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

negligence case, that law remains independent of section 402A.¹⁸ I think section 402A should be understood as having developed as a result of the evolution of both negligence and warranty laws to protect people who were injured by dangerous products.¹⁹

Historically, if you think back to the state of the law at the turn of the century or the early years of the twentieth century, the problems that an injured consumer faced were largely in the area of negligence law.²⁰ The manufacturer was insulated from liability by privity doctrines which arose out of *Winterbottom v. Wright*.²¹ Later, in the 20th century, the privity barrier was eliminated as a result of *MacPherson v. Buick Motor Co.*²² Therefore, it was possible for an injured consumer to successfully sue a manufacturer in negligence, as long as the consumer could

18. *Id.* at cmt. a. Comment a provides in pertinent part: "The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved." *Id.*

19. See generally Priest, *supra* note 14.

20. See generally L. W. Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935) (discussing the development and expansion of tort law liability without privity of contract by reason of negligently defective products); A. J. Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L.J. 388 (1932) (analyzing manufacturers' liability to third parties on basis of negligence for defective food or drugs); Lindsey R. Jeanblanc, Comment, *Manufacturers' Liability to Persons Other than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937) (discussing the liability of manufacturer to the ultimate purchaser on basis of negligence).

21. 10 M & W 109, 152 Eng. Rep. 402 (Exh. 1842). In *Winterbottom*, plaintiff contracted with a sub-contractor of defendant for a "fit, proper, safe and secure" mail-coach. *Id.*, 152 Eng. Rep. at 402-03. While plaintiff was driving the mail-coach in a proper manner, the mail-coach broke down and plaintiff was thrown from it, causing physical injuries to him. *Id.* at 110, 152 Eng. Rep. at 403. The court stated that "[u]nless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Id.* at 114, 152 Eng. Rep. at 405.

22. 217 N.Y. 382, 111 N.E. 1050 (1916) (holding manufacturer, who sold automobile with defective wooden wheel to a retail dealer, liable for injuries sustained by plaintiff as a result of collapsed wheel which had been initially purchased from another manufacturer). "There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use." *Id.* at 393, 111 N.E. at 1054.

prove negligence. Negligence was either proven by actual evidence²³ or by *res ipsa loquitur*.²⁴ However, at times, there remained difficulties in the proof of negligence.²⁵

23. See, e.g., *Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (2d Cir. 1919) (holding corporation manufacturing automobiles negligent for injuries sustained as a result of a defective wheel that corporation purchased from another manufacturer); *Carter v. Yardley & Co.*, 64 N.E.2d 693 (Mass. 1946) (holding manufacturer of perfume liable in negligence for second degree burns sustained by plaintiff who purchased the perfume from a retail shop); *Hoenig v. Central Stamping Co.*, 273 N.Y. 485, 6 N.E.2d 415 (1936) (holding that manufacturer of a coffee urn, who sold it to a distributor, then a retailer and ultimately to a social organization, was negligent for injuries sustained when one of the handles broke off); *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 579 (1932) (holding manufacturer, who filled bottle with soda and then placed it on the market, negligent for injuries caused by an explosion of the bottle); *Rosebrock v. General Elec. Co.*, 236 N.Y. 227, 140 N.E. 563 (1923) (holding manufacturer who shipped electric current transformer liable for negligent conduct to an injured employee for failing to give buyer/employer notice of the potential dangers); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (holding public weighers hired by a seller to weigh bags of beans liable to purchaser of goods for negligent weighing).

24. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (relying on *res ipsa loquitur* to supply an inference that manufacturer's negligence was responsible for defective condition of a bottle of Coca Cola at the time it was delivered to restaurant); *Bressler v. New York Rapid Transit Corp.*, 277 N.Y. 200, 13 N.E.2d 772 (1938) (applying doctrine of *res ipsa loquitur* to prove negligence where pane of glass in railroad car spontaneously shattered); *Hake v. George Wiedemann Brewing Co.*, 262 N.E.2d 703 (Ohio 1970) (holding that the trier of fact may infer negligence from surrounding circumstances under doctrine of *res ipsa loquitur* where plaintiff suffered injuries as a result of empty beer keg that rolled off second story stairway platform).

25. See, e.g., *Boyd v. American Can Co.*, 249 A.D. 644, 291 N.Y.S. 205 (2d Dep't 1936) (holding manufacturer of a can and key appliance not liable for injury that was not reasonably foreseeable), *aff'd*, 274 N.Y. 526, 10 N.E.2d 532 (1937); *Liedeker v. Sears, Roebuck & Co.*, 249 A.D. 835, 292 N.Y.S. 541 (2d Dep't) (holding manufacturer of collapsible beach chair not liable for injuries that are not reasonably probable), *aff'd*, 247 N.Y. 631, 10 N.E.2d 586 (1937); *Cullem v. M. H. Renken Dairy Co.*, 247 A.D. 742, 285 N.Y.S. 707 (2d Dep't 1936) (holding manufacturer of milk bottle not liable to customer for injury sustained while washing bottle given the lack of direct proof that bottle was defective and exercise of reasonable and ordinary care by manufacturer). When plaintiffs could not prove negligence, some brought claims against manufacturers for injuries arising from products based on other

In the meantime, there was a background in commercial law of strict liability for harm caused by unmerchantable products.²⁶ The barrier to recovery under strict liability was the predominant use of contract defenses, by manufacturers, through the use of such things as disclaimers²⁷ and limitations of liability.²⁸ Thereafter, the decision in *Henningsen v. Bloomfield Motors, Inc.*²⁹ initiated the wholesale amelioration of the insulating effect

theories, such as misrepresentation. *See, e.g.*, *Baxter v. Ford Motor Co.*, 12 P.2d 409 (sufficient for liability that injury arose from shattered windshield which was described by manufacturer as "shatter proof"), *aff'd*, 15 P.2d 1118 (Wash. 1932).

26. *See, e.g.*, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958) (holding manufacturer of defective cinder blocks liable on basis of negligence or implied warranty to buyer who had no direct relations with manufacturer); *Worley v. Procter & Gamble Mfg. Co.*, 253 S.W.2d 532 (Mo. Ct. App. 1952) (finding that manufacturer of defective skin detergent may be liable on basis of breach of warranty for injuries to ultimate consumer); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958) (holding manufacturer liable on basis of express warranty for harm caused to ultimate purchaser who relied on manufacturer's advertisements of product quality and merit); *Jacob E. Decker & Sons, Inc. v. Capps*, 164 S.W.2d 828 (Tex. 1942) (holding non-negligent manufacturer of contaminated food liable on basis of implied warranty for injuries to ultimate consumer).

27. The Uniform Sales Act § 71, and its successor, the Uniform Commercial Code § 2-316 permit disclaimers to defeat warranties. Uniform Sales Act § 71 (1909); U.C.C. § 2-316 (1993). *See, e.g.*, *Gibson v. California Spray-Chem. Corp.*, 188 P.2d 316 (Wash. 1948) (finding that express disclaimer of warranty in sale of chemical compound precluded recovery for damages to apple crop whether the product was or was not used in accordance with directions); *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931) (upholding disclaimer of warranty clause within a sales contract regarding the productivity and quality of crop of Japanese onion sets); *Seattle Seed Co. v. Fujimori*, 139 P. 866 (Wash. 1914) (holding purchaser of seed peas bound by an express disclaimer which waived all responsibility for the crop).

28. *See, e.g.*, *Sharples Separator Co. v. Domestic Elec. Refrigerator Corp.*, 61 F.2d 499 (3d Cir. 1932) (permitting manufacturer of refrigerators to limit liability by providing an exclusive remedy for breach of warranty).

29. 161 A.2d 69 (N.J. 1960) (holding manufacturer liable for breach of implied warranty of merchantability when plaintiff suffered injuries from accident caused by defective steering mechanism although the purchase order contained disclaimer of all express and implied warranties not contained in the order).

of disclaimers.³⁰ With *Henningsen*, the pendulum shifted from negligence to warranty law as the best vehicle for protecting consumers.³¹

Warranty law, however, still had many disadvantages which caused some problems, such as privity requirements³² and requirements in commercial statutes for certain types of notice to persons against whom warranty claims were invoked.³³ In the important case of *Greenman v. Yuba Power Products, Inc.*,³⁴ the California Supreme Court resurrected the tort background of warranty law by taking the position that warranty liability existed

30. See *id.* In *Henningsen*, the court expressed its disfavor of disclaimers, and construed them strictly against the seller. *Id.* at 77-78. The court rejected, as contrary to public policy, the manufacturer's disclaimer of all warranties to the replacement of defective parts. *Id.* at 95.

31. See, e.g., *Ford Motor Co. v. Tritt*, 430 S.W.2d 778 (Ark. 1968); *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1963); *Crown v. Cecil Holland Ford, Inc.*, 207 So. 2d 67 (Fla. Dist. Ct. App. 1968); *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449 (Iowa 1961); *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. Nassau County 1969).

32. See, e.g., *Conner v. Great Atl. & Pac. Tea Co.*, 25 F. Supp. 855 (W.D. Mo. 1939) (holding that implied warranty of food does not extend to third persons who eat the food, but only to those who buy the food); *Welshausen v. Charles Parker Co.*, 76 A. 271 (Conn. 1910) (finding no implied or express breach of warranty where subpurchaser brought suit against manufacturer for injuries sustained by defective gun); *Pearl v. William Filene's Sons Co.*, 58 N.E.2d 825 (Mass. 1945) (holding that husband cannot recover consequential damages from seller of hair product which injured wife because no contract existed between husband and seller); *Bowman Biscuit Co. v. Hines*, 251 S.W.2d 153 (Tex. 1952) (holding wholesaler/middleman not liable to person who purchased contaminated food from retailer); *Prisen v. Russos*, 215 N.W. 905 (Wisc. 1927) (holding restaurant owner not liable to wife for contaminated ham where husband purchased the ham for his wife).

33. The Uniform Sales Act § 49 and its successor, the Uniform Commercial Code § 2-607(3) require a buyer to give notice to the seller within a reasonable time after he knows or should have known of the breach, in order for the buyer to recover based on warranty law. Uniform Sales Act § 49 (1909); U.C.C. § 2-607(3) (1993).

34. 377 P.2d 897 (Cal. 1963) (finding that a manufacturer may be held strictly liable in tort for injuries caused by defective power tool given to plaintiff as gift from his wife who purchased from retailer).

in tort, parallel to its existence in commercial law, and independent of some of the statutory restrictions in commercial statutes.³⁵

Professor Twerski spoke to us about the early history of section 402A.³⁶ My memory is not exact, however my recollection is that it was *Greenman* that led to section 402A in its present form.³⁷ It is true that William Prosser's original draft of section 402A preceded *Greenman*.³⁸ However, Dean Prosser's earlier drafts were limited to particular types of products, such as food³⁹ and those for intimate bodily use.⁴⁰ The drafts of section 402A applied only for those types of products until the decision of *Greenman*.⁴¹ The effect of *Greenman* was to encourage the American Law Institute, on the strength of one case, to expand

35. *Id.* at 901. The court in *Greenman* held:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. *The liability is not one governed by the law of contract warranties but by the law of strict liability in tort.*

Id.

36. See Aaron D. Twerski, *From A Reporter: A Prospective Agenda*, 10 *TOURO L. REV.* 5, 9-11 (1993).

37. See John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 *VAND. L. REV.* 551, 554 (1980). Justice Traynor's decision, in *Greenman*, was simultaneous to his membership in the Reporter's Advisory Committee and the Council of the American Law Institute, during which he participated in the critical stages of drafting § 402A. In the final draft of § 402A, William Prosser did not suggest *Greenman* as either an authority, or a different approach to strict products liability in tort. Almost instantly, however, numerous jurisdictions adopted § 402A and *Greenman* as the predominant authorities of products liability. *Id.* at 554-55.

38. In 1963, *Greenman* was one of the first cases to apply a tort theory of strict liability, but it was not until 1964 that § 402A of Restatement (Second) of Torts was accepted by the American Law Institute.

39. *RESTATEMENT (SECOND) OF TORTS § 402A* (Tentative Draft No. 6, 1961).

40. *RESTATEMENT (SECOND) OF TORTS § 402A* (Tentative Draft No. 7, 1962).

41. *RESTATEMENT (SECOND) OF TORTS § 402A* (Tentative Draft No. 10, 1964). The *Greenman* decision applied strict liability in tort to a defective home carpentry outfit. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

strict liability in tort, previously recognized for food⁴² and cosmetics,⁴³ to the entire range of unreasonably dangerous and defective products. It was a bold step initially recognized by only one case, but ultimately validated by a widespread consensus throughout the country.⁴⁴ Its ruling was the direction in which the common law wanted to grow.

What made it so widespread? It became so widespread because it reflected well developed concepts already well advanced in negligence and warranty laws. As an outgrowth of negligence law, it recognized, at least with regard to manufacturing defects, that if you used a somewhat liberal application of *res ipsa loquitur* and similar doctrines, it was easy to persuade courts, under conventional doctrines, that there was probably some negligence

42. See, e.g., *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913); *Eisenbeiss v. Payne*, 25 P.2d 162 (Ariz. 1933); *Klein v. Duchess Sandwich Co.*, 93 P.2d 799 (Cal. 1939); *Blanton v. Cudahy Packing Co.*, 19 So. 2d 313 (Fla. 1944); *Criswell Baking Co. v. Milligan*, 50 S.E.2d 136 (Ga. App. 1948); *Patargias v. Coca-Cola Bottling Co.*, 74 N.E.2d 162 (Ill. 1947); *Davis v. Van Camp Packing Co.*, 176 N.W. 382 (Iowa 1920); *Parks v. C.C. Yost Pie Co.*, 144 P. 202 (Kan. 1914); *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 60 So. 2d 873 (La. 1952); *Jackson Coca-Cola Bottling Co. v. Chapman*, 64 So. 791 (Miss. 1914); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 90 S.W.2d 445 (Mo. App. 1936); *Ward Baking Co. v. Trizzino*, 161 N.E. 557 (Ohio App. 1928); *Griffin v. Asbury*, 165 P.2d 822 (Okla. 1945); *Jacob E. Decker & Sons v. Capps*, 164 S.W.2d 828 (Tex. 1942); *Swift & Co. v. Wells*, 110 S.E.2d 203 (Va. 1959).

43. See, e.g., *Graham v. Bottenfield's, Inc.*, 269 P.2d 413 (Kan. 1954) (hair dye); *Worley v. Procter & Gamble Mfg. Co.*, 253 S.W.2d 532 (Mo. App. 1952) (detergent used for hands); *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958) (permanent wave solution).

44. Courts have extended strict liability to a wide variety of products. See, e.g., *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337 (9th Cir. 1986) (asbestos products); *Lily-Tulip Cup Corp. v. Bernstein*, 181 So. 2d 641 (Fla. 1966) (paper cups); *Horne v. Liberty Furniture Co.*, 452 So. 2d 204 (La. App. 1984) (chairs); *Lee v. Crookston Coca-Cola Bottling Co.*, 188 N.W.2d 426 (Minn. 1971) (bottles of soda); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979) (sheet metal rolling machine); *McCown v. International Harvester Co.*, 342 A.2d 381 (Pa. 1975) (tractor wheel); *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128 (Pa. Super. Ct. 1985) (electric power); *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31 (S.D. 1983) (clothes dryer).

if the wheels fell off a car, and it was not worth the administrative expenses of forcing the plaintiff to prove it.⁴⁵ The warranty background initiated the notion that products causing harm because of unmerchantable qualities are subject to strict liability without having to worry about negligence.⁴⁶ Fault simply had nothing to do with it.⁴⁷ Section 402A put those two ideas together.⁴⁸

However, section 402A also generated a lot of subsidiary doctrines which were confusing because of the verbiage. We have heard, for instance, about "risk-utility" analyses⁴⁹ and

45. See Page Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963). The majority of jurisdictions have adopted the principle of *res ipsa loquitur*. See, e.g., *Bissonette v. National Biscuit Co.*, 100 F.2d 1003 (2d Cir. 1939); *Coca-Cola Bottling Co. v. Davidson*, 102 S.W.2d 833 (Ark. 1937); *Dryden v. Continental Baking Co.*, 77 P.2d 833 (Cal. 1938); *Gross v. Loft, Inc.*, 185 A. 80 (Conn. 1936); *Coca Cola Bottling Co. v. Creech*, 53 S.W.2d 745 (Ky. Ct. App. 1932); *Richenbacher v. California Packing Corp.*, 145 N.E. 281 (Mass. 1924); *Pillars v. R. J. Reynolds Tobacco Co.*, 78 So. 365 (Miss. 1918). Similar doctrines were applied by other jurisdictions. Pennsylvania applied an "exclusive control" doctrine, which allows a negligence recovery when defendant controls and manages the cause of the injury. See *Loch v. Confair*, 93 A.2d 451, 453 (Pa. 1953). South Carolina and Maine used circumstantial evidence to accomplish the same result as *res ipsa loquitur*. See, e.g., *Lajoie v. Bilodeau*, 93 A.2d 719 (Me. 1953); *Merchant v. Columbia Coca-Cola Bottling Co.*, 51 S.E.2d 749 (S.C. 1949).

46. See *Assault of the Citadel*, *supra* note 10; *Fall of the Citadel*, *supra* note 10.

47. W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 407-08 (1970). It is entirely irrelevant in strict liability cases if the manufacturer "was excusably unaware of the extent of the danger and had not committed any negligent act or omission that caused the danger" *Id.*

48. See generally Priest, *supra* note 14; *Assault Upon the Citadel*, *supra* note 10; *Fall of the Citadel*, *supra* note 10.

49. The risk-utility analysis, balancing the risks inherent in the design of a product with the benefits of the product, has been adopted by numerous jurisdictions to provide strict liability for defective products. See, e.g., *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 181 (5th Cir. 1990) (applying Louisiana statute requiring plaintiff to prove safer alternative design and the "risk avoided by using the alternative design . . . would have exceeded the burden of switching to the alternative design"), *cert.*

“consumer expectation” tests.⁵⁰ Those doctrines can best be understood by reference to the background of negligence law and warranty law. I think “risk-utility” analysis was originally an inelegant way of referring to established doctrines for the analysis of unreasonableness of risk in negligence law,⁵¹ which, as Mr. Vargo pointed out quite correctly, really transcends the ranking of quantifications.⁵² We have instead, in negligence law, a moral dimension,⁵³ but its evaluation does involve comparisons. There

denied, 1993 WL 248287 (1993); *Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1227 (3d Cir. 1989) (applying Pennsylvania law by “evaluat[ing] the risks of a product versus its social utility . . .” (citations omitted)). Some jurisdictions have applied both a risk-utility analysis and a consumer expectation test. *See, e.g.*, *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 458 (Cal. 1978) (applying the risk-utility analysis and the consumer expectation test to find a manufacturer strictly liable for defective high lift loader). *Cf. Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246 (Colo. 1987) (applying risk-utility analysis and explicitly rejecting the application of consumer expectation test because it does not focus on “the nature of the product . . .”), *cert. dismissed*, 485 U.S. 901 (1988).

50. The consumer expectation test was adopted in § 402A comment i and asks whether the product, as sold, was “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

51. *See* 1A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.03(4), at 3-609 to 3-610 (1991); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972); Christine M. Moylan, *In Pursuit of the Appropriate Standard of Liability for Defective Product Designs*, 42 ME. L. REV. 453, 462-63 (1990).

52. *See* John Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 TOURO L. REV. 21 (1993).

53. John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1626-29 (1993). According to Mr. Vargo, risk-utility analysis should not be the only factor to determining economic efficiency. Mr. Vargo quotes Andreas Teuber, who believes morality should be a factor when determining risk-utility analysis

‘[b]ecause it fails to respect the distinctiveness of people’s responses to risks, or to do justice to the morally significant ways in which risks can be distributed, or to give proper weight to the importance we attach to human life in situations of felt urgency, or to capture the special significance of our concern for autonomy and rights, cost-benefit analysis cannot yield the same result as individual consent. For these

is a valid notion that some investments in safety become too costly, while other investments are worthwhile. You have to compare what you are investing with what you can afford in order to explain why you think some failures to invest further are unreasonable and others are not.⁵⁴

Similarly, I think, as Mr. Vargo suggests, the test under section 402A represents negligence law with an imputation of knowledge.⁵⁵ Under section 402A, the issue is often whether it would have been negligent for someone who had actually known of the hazard to have put the product on the market.⁵⁶ The

reasons we should not be persuaded to allow cost-benefit analysis to determine public policy—to do, as it were our talking for us.’

Id. at 1628-29 (quoting Andreas Teuber, *Justifying Risk*, DAEDALUS 247, Fall 1990; see also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993).

54. See Vargo, *supra* note 53, at 1628 (“The core of any economic analysis is the measurement of ‘economic costs’ and ‘economic benefits.’” (footnote omitted)).

55. See Vargo, *supra* note 52, at 24-25. Imputation of knowledge occurs when knowledge of a danger is imputed to the manufacturer. The manufacturer is strictly liable for manufacturing defects regardless of its knowledge of the defect. Therefore, the plaintiff does not have to prove negligence by the manufacturer. The plaintiff, however, must demonstrate that the “reasonable manufacturer knowing of the product’s danger would have changed the product before marketing it.” Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1192-93 (1992). See also James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 928 (1981). The author refers to imputation of knowledge as the “Wade-Keeton” test, which questions “whether a reasonable manufacturer, knowing of the design hazards that are known at the time of trial, would have designed and marketed the product in the same manner as did the defendant.” *Id.* (footnotes omitted); Moylan, *supra* note 51, at 466. The author refers to imputation of knowledge as the “reasonably prudent manufacturer” test, which “balances the risks of the product against its utility, imputing knowledge of the risks to the manufacturer.” *Id.*

56. See *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984) (holding manufacturer of drug strictly liable where manufacturer did not have knowledge at time of the marketing that the drug had the side effect of tooth discoloration). The court stated:

The question in strict liability design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the

“consumer expectation” test is simply the flip side of that under warranty law.⁵⁷ The question is whether the product would have

product, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given. Thus, once the defendant’s knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant’s conduct.

Id. at 385; *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974) (finding manufacturer of defective sanding machine strictly liable for injuries sustained by plaintiff). In *Phillips*, the court used the test of “whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product.” *Id.* at 1036 (citations omitted).

57. See *Kotler v. American Tobacco Co.*, 685 F. Supp. 15, 19 (Mass. Dist. Ct. 1988) (finding that under Massachusetts law, the expectations of a reasonable consumer determine whether or not goods are merchantable); *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 454 (Cal. 1978) (finding that the consumer expectation test “reflects the warranty heritage upon which California product liability doctrine in part rests”); Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 Ky. L.J. 687, 692-93 (1993). The author recognizes the similarities between the consumer expectation test and the Uniform Commercial Code:

Under section 2-314 of the Uniform Commercial Code, sale of a product by a merchant carries with it an implied warranty of merchantability. A warranty of merchantability was also implied under the Uniform Sales Act. The test for merchantability appears to be the same as the consumer expectations test that is applied in strict products liability in tort cases. A product is merchantable if it would ‘pass without objection in the trade under the contract description.’ This standard looks to the expectations of those in the trade, which would be the same as the expectations of the ordinary consumer, unless the expectations of consumers and producers in the trade differed.

Id. at n.31 (citing U.C.C. § 2-314(2) (1987)); John W. Wade, *On the Nature of Strict Torts Liability for Products*, 44 Miss. L.J. 825, 833-34 (1973) (applying contract theory prior to implementation of strict liability “for purchasers who might have had ‘expectations’ from the manufacturer or supplier” (footnote omitted)); see also *Gray v. Manitowoc Co.*, 771 F.2d 866, 869 (5th Cir. 1985) (“[C]onsumer expectation test of section 402A is rooted in the warranty remedies of contract law, and requires that harm and liability flow from a product characteristic that frustrates consumer expectations.” (citing Page Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY’S L.J. 30, 37 (1973))).

been merchantable if the market had known about the hazard.⁵⁸ Is this a product that would have passed in the trade under the trade description if the hazard had been known to the public? Well, a car whose wheels fall off would not pass in the trade,⁵⁹ while some other defects would not amount to unmerchantability.⁶⁰ Either perspective can be relevant to the issue of whether a product is “unreasonably dangerous” for purposes of section 402A.

Against that background, we understood section 402A to be simply a doctrine relative to liability for harm caused by defective products, which is derived in part from regular negligence law, and similarly derived in part from regular warranty law, both of which still exist today.⁶¹ Now my real question regarding the project that has been undertaken here is structural. Where is the new material on section 402A intended to exist in relation to negligence law and warranty law?

One possible application of this question relates to the issue of “generic defect,”⁶² referred to by Professors Henderson and

58. The Uniform Commercial Code does not recognize a breach of implied warranty of merchantability when there is an obvious danger or defect of goods that were or should be examined. U.C.C. § 2-316(3)(b) (1993).

59. *See, e.g.,* Rahmig v. Mosley Mach. Co., 412 N.W.2d 56 (Neb. 1987) (applying “user-contemplation” test to find manufacturer liable for injuries to worker caused by unmerchantable blade of metal scrap shears); *Leichtamer v. American Motors Co.*, 424 N.E.2d 568 (Ohio 1981) (applying consumer expectation test to determine unmerchantability of jeep roll bar).

60. *See, e.g.,* Hartman v. Miller Hydro Co., 499 F.2d 191 (10th Cir. 1974) (holding manufacturer of washing machine not liable for injuries to plaintiff because the danger was obvious to an ordinary consumer); *Mexicali Rose v. Superior Court*, 822 P.2d 1292 (Cal. 1992) (finding that chicken bone in chicken enchilada not unmerchantable where bone is a natural substance and consumer could reasonably expect such natural substance); *Koperwas v. Publix Supermarkets, Inc.*, 534 So. 2d 872 (Fla. Dist. Ct. App. 1988) (holding the maker and seller of clam chowder containing clam shell not liable for unmerchantability because ordinary consumer could reasonably anticipate such substance).

61. *See supra* notes 13-48 and accompanying text.

62. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1333 (1991). The authors note that generic defects are comprised of “design defects and failures to warn.” *Id.* (footnote omitted); Joseph A.

Twerski. In determining whether there is strict liability for a product, the analysis may be based on the Restatement regarding negligence law or section 402A, or it may be based on whether the conduct of people who market a product was unreasonable under the circumstances.⁶³ If a business markets a product that has no social utility and great social danger, it is perfectly conceivable to bring a negligence action against them.⁶⁴ If negligence is intended to be overtaken by a new handbook on

Page, *Generic Product Risks: The Case against Comment k and for Strict Liability*, 58 N.Y.U. L. REV. 853, 853 (1983). A generic defect has also been defined as a "[risk] that [does] not derive from flaws in the manufacturing process but from product design or from the very nature of the product." *Id.*

63. See RESTATEMENT (SECOND) OF TORTS §§ 291, 292, 293 (1965). See also A. WEINSTEIN ET AL., *PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT* 17 (1978). The plaintiff of a products liability claim based on negligence must establish that the conduct of a manufacturer was unreasonable. *Id.*; Page, *supra* note 62, at 854-55. The author reports that claims of persons injured by asbestos and DES had to prove that the manufacturers engaged in unreasonable conduct. *Id.* at 855.

64. See RESTATEMENT (SECOND) OF TORTS §§ 291, 292, 293 (1965). To determine negligence, §§ 291, 292 and 293 implement a balancing test between the social utility of the product and its harm. Section 291 provides:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id. § 291. Section 292 provides as factors to determining utility of an actor's conduct:

(a) social value which the law attaches to the interest which is advanced or protected by the conduct; (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct; (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

Id. § 292. Section 293 provides as factors to determining risk:

(a) the social value which the law attaches to the interests which are imperiled; (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member; (c) the extent of the harm likely to be caused to the interests imperiled; (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

Id. § 293.

products liability, so that a comprehensive view of products liability is to be set forth in the new proposed sections, my question is whether that will really fly in terms of ignoring the dynamics of negligence law as being one of the major components of our jurisprudence.

Similarly, to the extent the attempt is made to deny liability for the product that is defective, in terms of its defective instructions or the lack of foreseeability of the hazard, I cannot conceive of the revision of the Restatement of Torts eliminating the potential application of the Uniform Commercial Code to this claim. If the attempt is going to be made to do that in this exercise, my prediction is that we will have further swinging of the pendulum, as it was prior to the Restatement (Second), when it swung back and forth between negligence law and warranty law as the basis of liability for harm caused by unreasonably dangerous products. In the future, I imagine we will have a swing from tort, as the queen of product liability law, to warranty law and the Uniform Commercial Code reclaiming some of the strict liability for products that should be regarded as unmerchantable. I refer to the grounds Professor Twerski identified, namely that if a particular accident looks like *Henningsen v. Bloomfield Motors, Inc.*,⁶⁵ we feel instinctively that there ought to be liability.⁶⁶ Of course, we feel instinctively there ought to be liability, and the source is our common law background from warranty law. Thank you.

Hon. George C. Pratt:

Thank you Professor Gray. Mr. Crofton, I cannot let your statements about juries go uncommented. I do not have any problem with the state system of selecting juries. It is wasteful. Attorneys, of course, do not want impartial jurors. They want jurors that are partial their way. Good advocacy normally would cancel out the imperfections there. My own background, as a practicing attorney, was almost exclusively trying non-jury cases.

65. 161 A.D.2d 69 (N.J. 1960). See *supra* notes 29-31 and accompanying text.

66. See Twerski, *supra* note 36, at 14.

It is just the way it happened. I subscribed to the idea, "Oh, jurors, they do not know anything. You cannot rely on them because they blow with the wind and are very much swayed by their emotions." When I became a district judge, I very quickly developed a high respect for juries. I remember selecting juries in the federal system by not taking the first group that came into the box, but it did not come far from it. I believe this way provided a quicker cross-section in terms of efficiency. However, the jurors were selected. I spoke to many of them after trials, and, of course, observed them through trials.

My personal conviction is that virtually all jurors try extremely hard to do precisely what is asked of them. What is asked of them is a combination of what the attorneys present to them, and what the judge presents to them. If jurors are dismissed, because they cannot understand the complexity of the products liability case, I believe this is a criticism of the lawyers that try the case to them. Jurors come with an orientation toward trying to understand the case. The level of education and intelligence of the jurors to whom I have been exposed, which is essentially Long Island jurors, is a level that is capable of understanding.

Of course, you may have to give jurors an education in a course of relatively confined time periods of a trial. There are lawyers who are extremely effective in structuring a case that does educate them. Issues can be presented to a jury in terms of special verdicts or interrogatories, depending upon the case. I have presided over approximately three to four hundred trials, most of them jury trials. In only two or three of those, I think the jury was off the mark. My own contact with jurors has given me a great respect for the jury system and for the ability of jurors to deal with complex questions, not only questions of fact, but the impossible questions that we give them, such as, who is lying. The impossible questions of every lawsuit are the ones that are given to the jury. The idea of instituting more rules of law so judges can decide them is not one that I favor. The more you try to characterize something as a rule of law, the more it tends to become fact finding at the appellate level. I did not want to let your comments go unchallenged. There is another view of the

jury system, and Mr. Vargo, I sense you are itching to say something.

Mr. John Vargo, Esq.:

You may forget about the plaintiff's view, the defendant's view and the judge's view; however, please consider something that I did not have time to discuss in my remarks. We should pay close attention to very recent studies regarding the tort system of which Professor Henderson has been a part. Recent empirical data have shed light on the jury system. Thus, we finally have factual information which is not developed by either the plaintiff or defendant. This empirical data is from a sociologist, Professor Valerie P. Hans,⁶⁷ who has performed the largest study of juries in our country. I highly recommend that you read her book. Professor Hans is not a plaintiff's witness or a defense's witness but has produced factual data that refutes the old wife's tale that juries favor plaintiffs. This has not been true for over ten years in this country. Juries favor defendants in products liability actions eighty-three percent of the time.⁶⁸

Furthermore, Professor Landes and Judge Posner performed a study that clearly indicates that the number of products liability punitive damage cases have been decreasing since 1986.⁶⁹ I believe Professor Henderson has come to the same conclusion concerning all products liability cases.⁷⁰ All students should pay

67. Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992).

68. *Id.* at 93-97. To be specific, tort jurors, having negative judgments about lawsuits and litigation, believe that "[t]here are far too many frivolous lawsuits today" 83% of the time. *Id.* at 95.

69. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

70. Theodore Eisenberg and James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992). The authors report that products liability "plaintiffs probably remain better off than they were before the mid-1960's, when modern products liability doctrine took hold. Nonetheless, the indicators strongly suggest that products [liability] plaintiffs are worse off today than they were in 1985." *Id.* at 770.

close attention to such empirical datum, as they reflect what is actually happening, rather than what is allegedly happening. I also find it curious that there is such a concern about punitive damages, since there have been five separate empirical studies concerning punitive damages in products liability litigation. These studies indicate that there have been very few punitive damage cases, and of those juries which have awarded such damages, almost half have been overturned.⁷¹ I believe the American Law Institute should attempt to develop more empirical datum concerning its project on strict liability.

Michael Crofton, Esq.:

The jury system is not going to go away in the United States. It is part of history⁷² and there are very deep reasons why the

71. See STEPHEN DANIELS & JOANNE MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS 38 (1987) (reporting that punitive damages for products liability cases were awarded only in 3.8% of 25,627 jury verdicts, and these awards were proportionate to the actual damages); WILLIAM M. LANDES & RICHARD R. POSNER, NEW LIGHT ON PUNITIVE DAMAGES 35-36 (Oct. 1986) (reporting that state products liability judgments were upheld fewer than two percent of 119 cases, which is a percentage lower than in federal cases); MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 30 (1987) (reporting that "most large punitive damage awards were reduced by post-trial activity, and only half of the money originally awarded by juries in the sampled cases eventually ended up in plaintiffs' hands."); MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS 30 (1991) (reporting that since the 1970's slightly more than half of the punitive damage awards at trial have been reversed or decreased by appellate courts); U.S. GEN. ACCT. OFF., REPORT TO THE CHAIRMAN SUBCOMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND COMPETITIVENESS, COMMISSION ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, PRODUCTS LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES 38 (1989) (reporting that out of 12 punitive damage awards reviewed by appellate courts, seven were reversed, two were affirmed and three were vacated and remanded).

72. See Marvin E. Aspen, 72 JUDICATURE 254 (1989) (reviewing JOHN GUNTHER, THE JURY IN AMERICA (1988)) ("Indeed, the American jury trial probably ranks with the flag, motherhood, apple pie and baseball as one of the sacred symbols of contemporary Americana.").

public would not tolerate a system without it. I do not suggest its abolition. I suggest there are things that could be done to reform it.⁷³

Jurors often sit through trials that take months. They do not take notes.⁷⁴ They are then given a four, five or six-hour sum-

73. See generally William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575 (1991). Judge Schwarzer suggests many changes at all stages of litigation to help jurors better understand the details of lengthy and complex trials. At the pretrial stage, Judge Schwarzer recommends the following changes: issues should be narrowed down to those that are most important; testimony and exhibits trimmed to avoid redundancy; specific time requirements set by a judge in which a trial must be completed; all exhibits marked and submitted before trial and all objections and other legal matters argued after court hours. *Id.* at 577-79. At the jury selection stage of the trial, Judge Schwarzer recommends the following: a non-random jury selection process where each juror is selected to sit on a case because that juror's education and background will best qualify that juror for that particular case; questionnaires should be handed out to each juror before voir dire to get basic information about each juror; have alternate jurors not sit in designated seats, and at the end of the trial draw lots to decide which jurors will be dismissed so all jurors must pay close attention throughout. *Id.* at 580-82. At the jury instruction stage of the trial, Judge Schwarzer recommends the following: judges should make short instructions and use plain language to better educate juries about the law; give the jurors pre-argument instructions to give them a good idea of what to expect during the trial; allow jurors to have a copy of the jury instructions that the judge will read to them; require the jury to return a special verdict that responds to questions dealing with material factual issues; give jurors all relevant information concerning the case, including "insurance coverage, dismissal of or settlement with other parties, or trebling of damages in anti-trust cases." *Id.* at 582-87. Additionally, Judge Schwarzer would allow jurors to be more active in the judicial process by allowing the following changes: allow all juries to pick a foreperson whom they think will be a leader during deliberations; encourage note-taking by jurors so they will better focus on and remember the evidence presented; allow jurors to ask questions during the trial to clear up any confusion that may not be known to the court; permit jurors during the trial to talk among themselves about the case to help each other better understand the evidence that was presented. *Id.* at 590-94.

74. See Aspen, *supra* note 72, at 254 ("[T]he practice in a majority of our trial courts is not to permit jurors to take notes, no matter how complex or lengthy the trial.").

mation in one shot.⁷⁵ Then they are charged. I believe in many circumstances that, by that stage, jurors' minds are just incapable of remembering what was said by any particular witness. Thus, the system does not lend itself to careful objective analysis. What often happens in a jury room is that the persons with the best memories, who happen to be the most articulate, will end up persuading others as to their point of view.⁷⁶ Maybe we can have a system of note-taking,⁷⁷ or an agreement as to factual memoranda being put before the jury by each side, basically summing up what their case is, so that people can be kept up to date on the facts on an ongoing basis.

Second, I do not believe that to suggest that Long Island jurors are representative of jurors in the United States, in general, is really fair. I have tried cases on Long Island and I have found Long Island jurors to be terrific. Quite frankly, I think there is no problem there. What happens however, in the way that the New York State system works, is that you go to jury selection in New York Supreme Court and initially, you start off with a very diverse group of people because they all received the same slip of

75. See generally Steven I. Milligram, *Closing Arguments*, in WINNING THE SLIP AND FALL CASE, at 181, 184 (PLI Litig. & Admin. Practice Course Handbook Series No. 462, 1993):

[L]ong-winded, repetitious summations are certain to bore the jury at best and cost a victory at worst. The closing argument should be no longer than the length of the trial and complexity of the issues mandates. A three day trial should not require a summation that takes as long to make as it took to present all the proof that the jury heard.

Id.

76. See, e.g., Kenneth M. Mogill & William R. Nixon, Jr., Ph.D., *A Practical Primer on Jury Selection*, 65 MICH. B. J. 52, 56-57 (1986) (noting that certain individuals on the jury will take leadership positions and that "high education, intellectual prowess, an articulate verbal style and the projection of decisive thinking" are some of the qualifications those leaders often possess).

77. Larry Heuer & Steven Penrod, *Increasing Juror's Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUMAN BEHAVIOR 231, 233 (1988). After reviewing several field studies on juries, the authors noted that "[t]he obvious advantage of allowing juror notetaking is that it will result in a jury that is better informed about the evidence and the law during its deliberations--in short, jurors' notes can be expected to serve as a useful memory aid." *Id.*

paper. Those people that do not want to sit on the jury, or any jury, during that time will not do so. They know what to say. The small businessman who wants to get back to his job will plead to be released for some generic reason such as, "I never believe that a plaintiff should succeed," or "I distrust insurance companies completely." One answer like that and he is off the jury. He knows what to say and he says it.

The American public has a romantic love affair with the jury system, but look how many people willingly want to take part in it. Most people look for every possible reason to get out of the jury system and brag about it. I get phone calls occasionally from clients of mine saying, "I got called to jury selection," or "My son got called for jury selection. Can you go down and speak to the prosecutor?" Is this a country in love with the jury system? When I made my remarks earlier, I said that if we believe that juries should represent one's peers, let us put them in a room, no exemptions,⁷⁸ attorneys, judges, doctors, everybody. It should be compulsory to serve on juries, no excuses. Then you will get fair representation. Then you will get trust. What you get today is that by the time all these people have made their excuses and said the things they know will get them out of the jury system, you are left essentially with the dregs, what the trial lawyers talk about as a "Friday panel." At the end of the week, you get the real dregs, and it is a problem.

Another thing, if juries really were so fair and impartial, I present Mr. Vargo with some real empirical evidence. Why is it that the plaintiffs' bar loves juries and the defense bar does not? I said that my study was unscientific. However, I do not believe I spoke

78. See N.Y. JUD. LAW § 512 (McKinney 1992). This section exempts clergy and Christian Science practitioners, physicians, lawyers, dentists, pharmacists, optometrists, psychologists, podiatrists, registered and practical nurses, Christian Science nurses, embalmers, police officers, correctional officers, firemen, solo proprietors, prosthetists, orthotists and licensed physical therapists from jury duty. See generally Gary Spencer, *Kaye Plans Jury System Reforms: Panel Will Launch 'Innovative' Study*, N.Y.L.J., Aug. 26, 1993, at 1 (noting that a committee, appointed by Chief Justice Kaye of the New York Court of Appeals, will study whether statutory exemptions from jury duty should be discontinued).

to a single person who regularly does defense work who would prefer to try a case in front of a jury rather than a judge. That is empirical evidence, and that is a reflection on practitioners' impressions of how good or bad juries are in assessing factual material.

On the question of punitive damages, I do not believe that the plaintiffs' bar is entirely innocent in its attitude. I believe it would be innocent if the punitive damages did not go to its clients, the plaintiffs, but rather went to some cause, some public cause.⁷⁹ I would be quite happy with that. If a manufacturer has acted in a way that is flagrantly in violation of the public's safety, let the punitive damages go to some research organization that will do public work in that area. The plaintiff would still be fully compensated. Currently, that does not happen. Punitive damages go into the plaintiff's pocket and the plaintiff's attorney's pocket.⁸⁰ Thank you.

79. See, e.g., N.Y. CIV. PRAC. L. & R. § 8701 (McKinney Supp. 1993) (requiring that 20% of punitive damages awarded in civil actions be paid to the state). In addition, several state legislatures have adopted this approach and passed legislation which requires a percentage of punitive damage awards be "remitted to the public." See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1322-23 n.275 (1993). However, at least two courts have struck down the statutes as an unconstitutional taking of a property interest. See *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (holding unconstitutional a state statute that enables the state to take 75% of all punitive damage awards in product liability cases); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 264 (Colo. 1991) (holding unconstitutional a statutory requirement that one-third of exemplary damages awarded be paid into state general fund).

80. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1617 (1993) (noting that "[p]laintiffs and their attorneys generally enter into contingent fee agreements that provide for fees as a percentage, usually one-third, of the amounts recovered in an action"). For additional information on contingent fee agreements, see generally F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964).

Hon. George C. Pratt:

I have often thought that punitive damages should be used for the improvement of justice, such as increasing judges' salaries. Are there any questions from the audience for the speakers or the panel?

Audience Member:

I would like to ask a question of Professor Twerski, but it was mentioned by someone else. I am a student who is not as experienced as those on today's panel. However, after listening to the discussion that there would be no liability held for design defect for prescription drugs,⁸¹ I cannot believe that liability has never been imposed on Thalidomide or DES manufacturers.⁸² Considering the fact that plaintiffs injured by those drugs had no way of knowing their dangers, why should they not be compensated? Can anyone address that?

Professor M. Stuart Madden:

I think there has been liability before comment k of section 402A⁸³ and after it. Under section 402A comment k, there is an

81. See Aaron D. Twerski, *From A Reporter: A Prospective Agenda* 10 TOURO L. REV. 5, 16-18 (1993).

82. See *infra* note 85 and accompanying text.

83. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). Comment k states:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot

extrapolation from liability if the product is prepared and marketed as safely as possible.⁸⁴ In the Thalidomide and DES cases, there was sufficient proof for a jury to conclude that the manufacturers were negligent in the manner in which they tested the product prior to marketing.⁸⁵

legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Id.

84. *Id.*

85. See *Sindell v. Abbott Lab.*, 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980). In *Sindell*, the court found that:

[d]uring the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger.

Id. at 925-26; Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 313-15 (1992). The author reports that Thalidomide was sold without a prescription and marketed around the world in 1960. *Id.* at 313. Once the disastrous effects of Thalidomide were revealed, the FDA withheld its approval until further testing proved the drug's safety. *Id.* at 313-14. However, "[w]hile Thalidomide was still under review by the FDA, 2,500,000 tablets were distributed and given to nearly 20,000 individuals, including 624 pregnant women. Ultimately, at least ten American babies were born with defects attributed to Thalidomide." *Id.* at 314 (footnotes omitted).

Professor James Henderson:

I am not allowed to tell you chapter and verse of what we are doing, because we are only a couple of weeks away from sending our revisions to the A.L.I. I will, however, tell you that we are thinking very seriously in the direction of review, on a limited basis, of drug design.

When I wrote the *Cornell Law Review* article,⁸⁶ I was of the firm belief that drug design cases could never change. While I cannot go into detail at this time, I can say that there is growing authority to suggest that prescription drug design cases are not out of the reach of section 402A. Furthermore, it is interesting to note that at the last advisor's meeting, held in September, 1992, there was a lot of sentiment that prescription drugs should not be treated that much differently than other products. We are listening today, and your sentiment is shared not only with peers, but with a growing number of courts.

Audience Member:

I would like to ask what effect this will have on tobacco litigation, particularly in light of the recent revelations about the tobacco industry's awareness of the known hazards of the product. Was it this knowledge that prompted the failed attempt by Liggett Group, Inc. and Liggett & Myers Tobacco Co., Inc. in 1981 to develop the "smokeless cigarette," only to be told by their lawyers that it would not be good for business?⁸⁷

86. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

87. See Michael F. McNamara, Comment, *Smokeless Tobacco: Defective Marketing Creates a New Toxic Tort*, 21 TULSA L.J. 499 (1986) (discussing product liability claims against smokeless cigarette manufacturers).

Hon. George C. Pratt:

I question lawyers who have the temerity to tell their clients what is good or bad business. It might create some legal problems with respect to other things that they were marketing.

Mr. John Vargo, Esq.:

I have a chapter in my treatise which covers this question.⁸⁸ In it you will find the documents connected with *Cipollone v. Liggett Group, Inc.*⁸⁹ I think that these documents, which contain quotes from counsel in that case, will answer your question.

Professor Oscar S. Gray:

I think that the question really invokes recollections of what Judge Pratt started off talking about in his initial remarks. It always helps to show culpability on the part of a defendant. To the extent knowledge can be proven, negligence can be shown. Moreover, to the extent that knowledge can be shown, you are closer to being able to show fraud. So my answer would have to be that I cannot definitively say what effect it will have. However, such renovations will surely be very positive in the plaintiffs' forum.

Professor M. Stuart Madden:

I interpreted the question to ask also what the effect would be of proof of misrepresentation and concealment in the litigation of the cigarette and tobacco product. I think that actual proof of misrepresentation and concealment would operate to eliminate the effectiveness of defendants' characteristic defense of assumption

88. JOHN F. VARGO, PRODUCTS LIABILITY PRACTICE GUIDE ch. 42 (1989).

89. 112 S. Ct. 2608, 2609 (1992) (holding that the Federal Cigarette Labeling and Advertising Act does not preempt state law damages action or claims based on conspiracy, misrepresentation, intentional fraud and express warranty).

of the risk and would also operate to destroy many of the premises of implied preemption.

Audience Member:

Again, as a student, I am in a position where I can make a comment which may be naive. It may be impudent, but it would seem that the manufacturing industry's concerns regarding the impact of strict liability could be mitigated in large part by minimizing the amount of plaintiffs' recovery to what would reasonably compensate victims without punishing the defendants to the extent that they are forced to go out of business.

Hon. George C. Pratt:

That is exactly what a jury is instructed to do if it finds damages.

Audience Member:

Someone must have missed those instructions in the award given in the recent case of *Moseley v. General Motors Corp.*⁹⁰

Hon. George C. Pratt:

In our next session, we will examine whether this award will stand up.

90. 61 U.S.L.W. 2564 (Ga. State Ct. Feb. 26, 1993) (No. CA 90V6276) (holding that a statute permitting Georgia 75% of \$101 million punitive damages award in a products liability case is unconstitutional).

