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STRICT PRODUCTS LIABILITY AT 50: FOUR HISTORIES

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This Article offers four different perspectives on the strict products-liability "revolution" of a half-century ago. One of these narratives relates the predominant assessment of how this movement coalesced and spread across the states. The three alternative histories introduced by this Article view the shift toward strict products liability through populist, practical, and contingent lenses, respectively. The first of these narratives considers the contributions that plaintiffs and their counsel made toward this change in the law. The second focuses upon how a formerly common, but now moribund, type of products-liability lawsuit framed the argument for strict liability as a superior alternative to negligence. The third examines why tort law eclipsed warranty as the principal doctrinal forum for products-liability reform. As detailed herein, these three alternative accounts both challenge and complement the standard description of strict products liability's rise.

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I. INTRODUCTION

Strict products liability recently observed its fiftieth birthday. In 1960, the New Jersey Supreme Court breached the walls of the "citadel" of privity in *Henningsen v. Bloomfield Motors, Inc.*, a warranty case.[1] Three years later, the California Supreme Court formally adopted a tort theory of recovery for products liability, regardless of fault, in *Greenman v. Yuba Power Products, Inc.*[2] And 1964 witnessed the final approval of the long-awaited *Restatement (Second) of Torts* § 402A, which prescribed a basic framework to govern strict products liability in tort.[3] Today, these three events are widely recognized as seminal moments in the products-liability "revolution"[4] that would sweep the nation and come to be described as "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[5]

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1. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 73, 75, 81, 84, 99–100 (N.J. 1960). The "citadel" metaphor for the privity requirement was coined by Justice Cardozo in *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).

2. 377 P.2d 897, 900 (Cal. 1963).

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Though formally published in 1965, this section had been approved by the members of the American Law Institute in May 1964. *Friday Afternoon Session, May 22, 1964*, 41 A.L.I. PROC. 324, 375 (1965). This provision remains perhaps the most-cited of all *Restatement* sections. *See* Henry J. Reske, *Experts Tackle Torts Restatement*, 78 A.B.A. J. 18, 18 (1992) (observing that § 402A "has been cited by courts far more than any other part of any ALI restatement").

4. Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59, 60 (1999).

5. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793–94 (1966); *see also From the Editor's Scratch Pad*, AM. TRIAL LAW. ASS'N

The swift ascendance of strict products liability, whether framed in tort or warranty, has prompted thoughtful examinations of how and why this doctrine coalesced and gained acceptance. As to the "how," these accounts all drape around a handful of trends and events that represent generally accepted drivers behind, and milestones in, the development of products liability.[6] Meanwhile, two explanations have come to frame the "why" component of the discussion. The first focuses upon the roles played by a select group of judges and academics in molding and proselytizing the core concepts that underlie strict liability to the consumer.[7] Another account concentrates less on the contributions of individuals than on the environment that allegedly inspired them. This description assigns motive force to broad economic, political, and cultural trends that, by the middle of the twentieth century, supposedly aligned to make strict products liability inevitable.[8]

Repetition of these accounts over the years has tended to marginalize other aspects of strict products liability's emergence. As this doctrine enters its second half-century, this Article excavates its foundations and identifies three "hidden histories" buried under the prevailing dialogue.[9]

NEWS LETTER, Mar. 1965 (Boston, Mass.), at 38, 39 ("Sometimes progress in tort law comes not in isolated individual advances but in onrushing battalions. This is surely true of the yeasty field of products liability where development of the law since World War II has been spectacular & moved with lightning-like speed.").

6. *See infra* Part II.A. For a good example of a recent history of products liability that adopts this focus and format, see KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 141–49 (2008).

7. *E.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 168 (1980) ("The dramatic rise of strict liability theory in defective products cases between the 1940s and 1970 furnishes a striking example of the way in which tort law has been shaped by the interactions of influential scholars and visible appellate judges."); Robert C. Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963–87*, 37 LAW & SOC. INQUIRY 565, 566–68 (2012); James P. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 444 (1995); David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529, 529–30 (1985); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463–64 (1985); *see also* Jane Stapleton, *Bugs in Anglo-American Products Liability*, 53 S.C. L. REV. 1225, 1228 (2002) ("Section 402A of the *Restatement (Second) of Torts* . . . was a top-down law reform motivated, not by social or forensic pressures, but by the enthusiasm of a small group of Legal Realists that saw the opportunity to make what they saw as a small win-win change to legal entitlements.").

8. *See, e.g.*, Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 601–03 (1992).

9. The phrase "hidden histories" is borrowed from JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).

These additional narratives complement and challenge the existing literature by offering populist, practical, and contingent accounts, respectively, of strict products liability's emergence: three new lenses through which to view this change in the law.[10] The first of these stories concerns the contributions of consumers and the emerging plaintiff's personal-injury bar in generating the raw material—cases—for the products-liability revolution.[11] The second considers the practical problems that drove mid-century courts toward strict products liability, with a focus upon the issues presented by a certain recurring case type that appeared often at the time of strict products liability's inception, but is now almost extinct.[12] And the third examines the element of chance associated with the development and adoption of a theory of strict products liability sounding wholly in tort, as opposed to a solution more closely tethered to the previously prevailing language of warranty.[13]

The first of these "new" histories relates how consumers and their attorneys provided the momentum and matter for the products-liability avalanche. The lawsuits that led to the development and adoption of strict products liability did not appear out of thin air. Plaintiffs had to recognize an injury, connect their harm to a product, and appreciate the prospect of recovery; lawyers had to be willing to take these cases and present them effectively. As it happens, strict products liability unfurled in synch with evolving claim consciousness among prospective plaintiffs and enhanced sophistication of their attorneys.[14] Members of the public appreciated the existence of some products claims before they discerned

10. For a discussion of torts scholarship representative of a "contingency"-centric view of doctrinal change, see John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L. 1, 16–34 (2007). Professor Witt also delved into the contingencies associated with the development of modern American accident law in JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004), and John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 694 (2001). Meanwhile, the word "practical," as used here, signifies that this supplemental narrative is less concerned with whether and how elites kept the law in line with broader social trends (i.e., a broad "functionalist" narrative), than with how a larger cast of judges may have viewed strict products liability as a fix for more mundane problems that recurred on their dockets. For a discussion and critique of functionalist legal histories, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See infra* Part III.

others; predictably, the law followed a similar path.[15] Meanwhile, in the years following World War II, plaintiffs' counsel came to perceive products liability as an ennobling and potentially lucrative area of practice, and improved knowledge-sharing networks among these attorneys made these cases less daunting to pursue.[16] These conditions facilitated the lawsuits that provided the nation's courts with ample fodder for a doctrinal shift.[17]

The second narrative explains why strict products liability was endorsed not only by Dean William Prosser and Justice Roger Traynor,[18] but also by the C. William O'Neills[19] and Hamilton S. Burnetts[20] of the legal world. This story considers how certain types of lawsuits made a practical case for products liability by framing the argument for this innovation and auditioning it during its gestational phase. Specifically, this section of the Article examines the doctrinal pressures created by a particular type of products-liability lawsuit, the so-called "bottle case." Origin stories of strict products liability must account for *Escola v. Coca Cola Bottling Co. of Fresno*,[21] in which Justice Traynor of the California Supreme Court used a lawsuit over a broken soda bottle to sketch the arguments in favor of strict liability to the consumer.[22] Most commentators appreciate the prescience of Traynor's opinion; fewer recognize the ubiquity of the fact pattern he addressed.[23] From the 1940s through the 1960s, exploding or bursting beverage bottles probably generated more products-liability lawsuits than did any other single

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. This Article's analysis of the contributions made by the plaintiffs' bar toward the development and initial diffusion of strict products liability thus supplements and builds upon the discussion in Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994), which develops the hypothesis that "[t]he shape of modern product liability law is due to the interests of tort lawyers." *Id.* at 808 (emphasis omitted).

18. *See infra* text accompanying notes 91–93.

19. C. William O'Neill was an associate justice on the Ohio Supreme Court and wrote the majority opinion in *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185 (Ohio 1966), in which that court adopted strict products liability in tort. *Id.* at 191, 194.

20. Hamilton S. Burnett was a Chief Justice of the Tennessee Supreme Court and the author of *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966), in which that court adopted strict products liability in tort. *Id.* at 242. No disrespect is intended toward either Justice O'Neill or Justice Burnett by referencing them; the point is simply to underscore that strict products liability appealed to more than a handful of academics and similarly minded judges.

21. 150 P.2d 436 (Cal. 1944).

22. *Id.* at 440–44 (Traynor, J., concurring).

23. *See infra* note 310 and accompanying text.

consumer good.[24] These bottle cases also placed more strain on generic negligence principles than did most other products cases.[25] As these lawsuits mounted, so too did the argument for a strict-liability approach.[26] Yet these contributions toward the products-liability revolution are today forgotten. With bottle cases now rare,[27] it is easy to underestimate how they once may have weighed on minds of even relatively conservative mid-century jurists.

Finally, this Article considers the contingencies associated with the ascendance of a strict-liability theory rooted firmly in tort over an approach grounded in the language of warranty. Strict products liability in tort spread across the country like wildfire.[28] It took less than 25 years from the *Greenman* decision onward for 45 states to adopt this new branch of tort law.[29] Yet today, more than a quarter-century after Wyoming became the last state to clamber aboard this bandwagon, five states still prefer to cast their enhanced consumer protections in the language of warranty.[30] These holdouts underscore two fortuitous circumstances associated with the adoption of a "pure" tort approach to strict products liability. First, this doctrine capitalized upon a period of transition in warranty law, which otherwise might have absorbed more of the momentum for doctrinal change. Second, a critical mass of states adopted strict products liability during a brief window in which a preemption argument premised on states' contemporaneous adoption of the Uniform Commercial Code (UCC) had not fully matured. Had circumstances aligned only slightly differently, the path toward strict products liability—to the extent that it is truly strict at all—easily could have followed a somewhat different doctrinal route in many jurisdictions.

This Article proceeds as follows. This Introduction is followed by Section II, which offers a standard retelling of the path toward strict products liability and a summary of the prevailing explanations for this transition. Sections III through V then elaborate upon the three narratives described above. Finally, Section VI relates how the obscurity of these stories manifests recurring tendencies in the composition and

24. *See infra* note 310 and accompanying text.

25. *See infra* text accompanying notes 323–326.

26. *See infra* text accompanying notes 322–334.

27. *See infra* note 365.

28. *See* McCormack v. Hankscraft Co., 154 N.W.2d 488, 500 (Minn. 1967) (discussing the "remarkable shift" toward the adoption of strict products liability).

29. Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963); *see infra* note 167.

30. DAVID G. OWEN, PRODUCTS LIABILITY LAW 282–84 (2d ed. 2008).

consolidation of histories of doctrinal development in tort law. As others have observed, accounts of doctrinal movement commonly overlook the groundwork laid by prospective plaintiffs and their attorneys and downplay the fortuitous circumstances associated with the diffusion of many "successful" new ideas in the law.[31] This Article suggests still another bias, to wit, that many histories fail to appreciate how specific recurring case tropes can catalyze doctrinal change. By pulling these tendencies out of the shadows, as this Article seeks to do with strict products liability, one can better understand some of the complexities inherent in the processes of doctrinal change.

II. THE CONVENTIONAL NARRATIVE: LANDMARK CASES AND SIGNAL TRENDS

From the first state to adopt it through the forty-fifth, strict products liability in tort swept through the nation's courts faster than any other major doctrinal shift in the history of modern tort law.[32] But the rapid adoption of strict products liability came only after a very long incubation period. This gestational era incorporated a series of signal trends and events for which all origin stories must account. Following is a fairly conventional retelling of these developments.

A. A Brief History of Strict Products Liability

1. *Winterbottom* and the Privity Requirement

The first landmark event in the history of modern products liability is the decision of the English Court of Exchequer in *Winterbottom v. Wright*.[33] Decided in 1842, *Winterbottom* quickly became the leading stateside authority for a "privity of contract" (or simply "privity") requirement for the recovery in negligence against a manufacturer, wholesaler, or retailer for injuries associated with a defective product.[34]

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31. *See* Gordon, *supra* note 10, at 70 (opining that "Realist functionalism almost unconsciously reserves even what it believes to be the very marginal opportunities for legal influence on the direction of social change to an elite of policymakers: Mass movements and local struggles are not ordinarily thought of as makers of legal change," and that "essential working assumptions [of this approach] misleadingly objectify history, making highly contingent developments appear to have been necessary").

32. *See* Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. (forthcoming).

33. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.); 10 M. & W. 109.

34. *See infra* note 47 and accompanying text.

The plaintiff in *Winterbottom* was an English postman who worked for a contractor who had, in turn, been retained by the postmaster general to deliver the mail.[35] The plaintiff's duties required that he use a coach provided by the defendant, who had entered into a contract with the postmaster general to supply and maintain these vehicles.[36] Due to "certain latent defects," the coach broke down while the plaintiff was driving it, causing the plaintiff to "become lamed for life."[37] The plaintiff brought suit against the supplier of the coach, alleging negligence.[38]

In rejecting the plaintiff's suit, the Court of Exchequer stressed the absence of privity of contract between the plaintiff and the defendant. Per Lord Abinger's opinion,

> if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless 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.[39]

Winterbottom did not bar any and all recoveries by plaintiffs who lacked contractual privity with the manufacturer or other seller of a defective product. Significantly, Baron Alderson's concurring opinion in *Winterbottom* distinguished the recently decided case of *Langridge v. Levy*.[40] The court in *Langridge* had allowed a plaintiff, a minor, to recover for injuries caused by a defective gun that had been purchased from the defendant by the plaintiff's father.[41] The seller had represented to the father that the gun was safe.[42] Alderson saw the *Langridge* plaintiff's claim as sounding in fraud.[43] Since there were no comparable representations made in *Winterbottom*, the plaintiff could not recover.[44] In distinguishing *Langridge* in this manner, Alderson left open a narrow aperture for plaintiffs who could cast their products claims in the

35. *Winterbottom*, 152 Eng. Rep. at 402–03.
36. *Id.*
37. *Id.* at 403.
38. *Id.*
39. *Id.* at 405.
40. *Id.*; Langridge v. Levy, (1837) 150 Eng. Rep. 863 (Exch.); 2 M. & W. 519.
41. *Langridge*, 150 Eng. Rep. at 863, 869.
42. *Id.* at 863.
43. *Winterbottom*, 152 Eng. Rep. at 405; *Langridge*, 150 Eng. Rep. at 863.
44. *Winterbottom*, 152 Eng. Rep. at 405.

language of deceit.[45] In the years that followed, however, relatively few plaintiffs framed their cases this way, likely because the required representations and reliance rarely appeared.[46]

2. *MacPherson* and the Demise of Privity in Negligence Cases

American audiences appreciated *Winterbottom* as a leading case in the area of products liability,[47] but soon carved out a significant exception to its rule. In *Thomas v. Winchester*,[48] decided in 1852, a bottle of poison was erroneously given an innocuous label by the defendant, sold through a series of intermediaries, and ultimately purchased by the husband of the

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45. *Id.*

46. Note, *Sales—Manufacturer and Dealers—Liability of a Supplier of Goods to One Other Than His Immediate Vendee*, 21 MINN. L. REV. 315, 321 (1937) [hereinafter *Sales—Manufacturers and Dealers*] ("[A]s a practical matter, this solution offers little protection to the ultimate consumer, because very seldom can he prove the elements necessary to maintain this action . . . ."). Framed broadly, the *Langridge* holding can be understood as the wellspring for later decisions that allowed plaintiffs to recover against product manufacturers, notwithstanding a lack of privity of contract, by pleading and proving that the manufacturers had communicated express warranties to them through advertising or other representations. *E.g.*, Bahlman v. Hudson Motor Car Co., 288 N.W. 309, 312–13 (Mich. 1939); Rogers v. Toni Home Permanent Co., 139 N.E.2d 871, 886 (Ohio Ct. App. 1957); Baxter v. Ford Motor Co., 12 P.2d 409, 412 (Wash. 1932).

47. Most American torts treatises of the late 1800s and early 1900s lined up behind the *Winterbottom* rule. *E.g.*, THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 373 (John Lewis, student ed. 1907) ("The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article."); WILLIAM B. HALE, HANDBOOK ON THE LAW OF TORTS § 232a (1896); 2 EDWIN A. JAGGARD, HAND-BOOK OF THE LAW OF TORTS § 260 (1895); THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 54 (3d ed. 1880); FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE §§ 439–40 (1874). That said, a few of the leading treatises of that period failed to mention *Winterbottom* in their discussions of products liability. *E.g.*, FRANCIS M. BURDICK, THE LAW OF TORTS: A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW AND UNDER MODERN STATUTES FOR ACTIONABLE WRONGS TO PERSON AND PROPERTY § 550 (3d ed. 1913). One treatise appears to have regarded *Winterbottom* as stating an *exception* to the general rule:

> [T]he general result may be stated to be, that if the defendant intended or if he can fairly be assumed to have intended the acts of the intermediate agency, as where he expects or contemplates them, —for instance by making a railway carriage, to be used by passengers of the railway company for which it is made, —he will be liable, though his act was a breach of contract with another.

MELVILLE MADISON BIGELOW, THE LAW OF TORTS 189–90 (8th ed. 1907) (distinguishing *Winterbottom* with a "but see" signal in an accompanying footnote) (footnotes omitted).

48. 6 N.Y. 397 (1852).

unfortunate consumer.[49] In allowing the husband and wife's negligence suit to proceed, the New York Court of Appeals genuflected to *Winterbottom*'s reasoning and result, but found its rule inapposite in situations where the product involved was "imminently dangerous to human life."[50]

Other jurisdictions came to recognize a similar exception.[51] These decisions and other authorities phrased this principle in different ways. One leading treatise provided that the privity rule did not bar claims where "the act of negligence is one which in its nature endangers human life."[52] The Massachusetts Supreme Court bypassed the privity requirement in a case that involved "[t]he furnishing of provisions which endanger human life or health."[53] The Minnesota Supreme Court refused to bar a plaintiff's lawsuit when the defendant, a manufacturer of ladders, "had reason to apprehend that the use of [the product] by the plaintiff, or by any one, would be attended by serious personal injury."[54] And the New York Court of Appeals later applied the exception in cases involving a collapsing scaffold[55] and an exploding coffee urn[56]—potentially dangerous items, to be certain, but not quite as obviously so as mislabeled poison.[57]

These cases set the stage for the 1916 decision by the New York Court of Appeals in *MacPherson v. Buick Motor Company*.[58] *MacPherson* involved a Buick automobile that "suddenly collapsed," injuring the

49. *Id.* at 405–06.

50. *Id.* at 408.

51. *E.g.*, Norton v. Sewall, 106 Mass. 143, 144 (1870). Furthermore, some jurisdictions recognized exceptions to the general privity rule where "an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner," or (drawing from the *Langridge* precedent) when "one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities [and] any person . . . suffers an injury therefrom which might have been reasonably anticipated . . . ." Huset v. J. I. Case Threshing Mach. Co., 120 F. 865, 870–71 (8th Cir. 1903).

52. SHEARMAN & REDFIELD, *supra* note 47, § 54.

53. Bishop v. Weber, 1 N.E. 154, 154 (Mass. 1885).

54. Schubert v. J. R. Clark Co., 51 N.W. 1103, 1104 (Minn. 1892).

55. Devlin v. Smith, 89 N.Y. 470, 478 (1882).

56. Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064–65 (N.Y. 1909).

57. *See Devlin*, 89 N.Y. at 477; *Statler*, 88 N.E. at 1064.

58. 111 N.E. 1050 (N.Y. 1916). For a detailed evaluation of the *MacPherson* case, see James A. Henderson, Jr., MacPherson v. Buick Motor Co*.: Simplifying the Facts While Reshaping the Law*, *in* TORTS STORIES 41 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

owner.[59] Turned plaintiff, the owner attributed the accident to a defective wheel supplied by a components manufacturer and integrated by Buick into the finished vehicle, allegedly without adequate inspection.[60] Because the automobile had been purchased from an intermediary dealer, as a defendant Buick naturally pointed out the lack of privity of contract between it and the plaintiff.[61] The Court of Appeals, in an opinion by Justice Cardozo, held that the lack of privity did not protect Buick.[62] Drawing upon and engrossing *Thomas* and its progeny, the *MacPherson* court rejected a privity requirement in negligence actions where "the nature of [the product] is such that it is reasonably certain to place life and limb in peril when negligently made."[63]

MacPherson's diminution of privity requirement dovetailed with ongoing shifts in the market for consumer goods. The rise of mass production[64] and the transportation revolution of the 1800s and early 1900s[65] placed physical distance between the makers and users of many products, limiting the consumer's ability to interrogate the manufacturer about the qualities of its goods. This distance was accompanied by the introduction of wholesaler and retailer intermediaries into the supply chain,[66] which further alienated consumers from the manufacturers of the products they purchased. Also, product branding—a relative novelty as late as the 1880s[67]—became a central part of many companies' marketing strategies, with manufacturers turning more and more toward advertising, packaging, and promotion to influence how consumers perceived their

59. *MacPherson*, 111 N.E. at 1051.

60. *Id.*

61. Henderson, *supra* note 58, at 48–49 (discussing Buick's strategy on appeal).

62. *MacPherson*, 111 N.E. at 1053.

63. *Id.*

64. *See generally* DAVID A. HOUNSHELL, FROM THE AMERICAN SYSTEM TO MASS PRODUCTION 1800–1932 (1984) (tracking this evolution).

65. *See* JOHN STEELE GORDON, AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER 148–49 (2004) (discussing how the expansion of railroads contributed toward the creation of a national market); RICHARD S. TEDLOW, NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA 12–13 (1996) (discussing improvements in transportation and communication and their effects on market development).

66. Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 129 (1957) ("In a bygone age, when goods were largely made to order by local craftsmen, no legal distinctions between manufacturers and retailers were generally necessary to protect the consumer."); *Sales—Manufacturers and Dealers*, *supra* note 46, at 315 n.2; Note, *The Marketing Structure and Judicial Protection of the Consumer*, 37 COLUM. L. REV. 77, 78–81 (1937).

67. SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET 37 (1989).

products.[68] Finally, at the point of sale, customers gravitated toward large stores[69] and chain retailers[70] with showrooms that offered an ever-broader array of items[71] but were staffed by clerks who often knew little about these goods and were in no position to advise consumers about their proper use.[72] Combined, these trends threatened to make a lack of privity

68. *See* CHARLES F. MCGOVERN, SOLD AMERICAN: CONSUMPTION AND CITIZENSHIP, 1890–1945, at 10 (2006) ("[O]nly between 1880 and 1930 did Americans come to depend on the commercial marketplace, with few feasible alternatives, for the necessities of daily life."); Robert S. Lynd with the assistance of Alice C. Hanson, *The People as Consumers*, *in* 2 RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS 857, 871–77 (1933) [hereinafter Lynd & Hanson] (discussing trends in advertising and branding); DANIEL POPE, THE MAKING OF MODERN ADVERTISING 49–51 (1983); DANIEL STARCH, PRINCIPLES OF ADVERTISING 32–35, 674 (1923) (discussing the growth in print advertising venues in the years leading up to 1922, and charting the nearly 100-fold increase in trademarks registered annually between 1870 and 1921); STRASSER, *supra* note 67, at 52–57; Note, *Advertising and the Buyer's Remedies*, 6 VAND. L. REV. 376, 376 (1953) (discussing the prevalence of consumer advertising). By the early 1900s, branding and advertising had made a significant impact on consumer preferences. A 1917 study published in the *Journal of Applied Psychology* found that almost all consumers could identify at least one brand of twenty commonly used household products, and that advertising represented one of the principal influences upon purchasing decisions. L.R. Geissler, *Association-Reactions Applied to Ideas of Commercial Brands of Familiar Articles*, 1 J. APPLIED PSYCHOL. 275, 278–80 (1917).

69. *See, e.g.*, JAN WHITAKER, SERVICE AND STYLE: HOW THE AMERICAN DEPARTMENT STORE FASHIONED THE MIDDLE CLASS 8–29 (2006) (surveying the history of downtown department stores from 1900 to 1960).

70. *See* POPE, *supra* note 68, at 257 (relating that chain stores accounted for 36.6% of retail sales in 1963, as compared to 22% in 1929); Lynd & Hanson, *supra* note 68, at 870 ("It is only since 1900 that chains may be said to have gained real momentum, while only since the World War have they emerged into a position of dominance in distribution."); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1019–20 (2005) (discussing the growth of chain stores in the early 1900s); *Friday Afternoon Session, May 22, 1964*, *supra* note 3, at 357–58 (comments of Dean William L. Prosser) ("[T]he little corner shop, the little grocery store. Gentlemen, that is no longer the retailer of today to any very great extent. The retailer is Safeway Stores, The Great Atlantic & Pacific Tea Company, National Stores, a large chain . . . .").

71. *See* CHESTER H. LIEBS, MAIN STREET TO MIRACLE MILE: AMERICAN ROADSIDE ARCHITECTURE 117–35 (1995) (discussing the emergence and eventual dominance of supermarkets in the food-retail business); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO CONSUMERS' PROTECTION AND INTEREST PROGRAM, H.R. DOC. NO. 364, at 2 (1962) [hereinafter CONSUMERS' PROTECTION AND INTEREST PROGRAM] ("The typical supermarket before World War II stocked about 1,500 separate food items—an impressive figure by any standard. But today it carries over 6,000," and "[t]he housewife is called upon to be an amateur electrician, mechanic, chemist, toxicologist, dietician, and mathematician—but she is rarely furnished the information she needs to perform these tasks proficiently.").

72. *See* STRASSER, *supra* note 67, at 203–215, 222, 248–51 (discussing this trend).

an increasingly common, and increasingly unfair, defense for product manufacturers who failed to act with reasonable care.[73]

Whether because of these changes[74] or simply concurrently with them, a substantial majority of states adopted the *MacPherson* rule between 1916 and 1960.[75] In most of these jurisdictions, courts continued to require privity of contract between a plaintiff and the defendant(s) when the plaintiff brought a negligence claim that involved a product not "reasonably certain to place life and limb in peril when negligently made."[76] But these same courts softened this requirement through a broad construction of the "reasonably certain" standard.[77] Beginning in the 1940s, some states went further, and rejected the privity requirement in *all* products cases sounding in negligence, regardless of the nature of the product involved.[78]

The resulting upswell in products cases led to some doctrinal refinement, with clearer distinctions being drawn between different types of negligence claims involving defective goods. In addition to the negligent construction and testing at issue in *MacPherson*, plaintiffs could

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73. *See, e.g.*, Lester W. Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1, 2 (1938) (discussing the effect of changed circumstances on the equities of products liability); Robert W. Miller, *Liability of a Manufacturer for Harm Done by a Product*, 3 SYRACUSE L. REV. 106, 106 (1951) ("[C]ase law before the advent of radio, television, assembly line production, modern packing methods, mechanical refrigeration, high speed transportation and current legislation may or may not be in point in modern litigation.").

74. Several judges would reference these developments when contemplating reform in the products-liability context. *E.g.*, Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 443–44 (Cal. 1944) (Traynor, J., concurring); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 78, 80–81, 83 (N.J. 1960); Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 402 (N.Y. 1962).

75. David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 965–66 (2007); R.D. Hursh, Annotation*, Privity of Contract as Essential to Recovery in Negligence Action Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 74 A.L.R.2d 1111, 1128 (1960). While *MacPherson* involved liability to an ultimate purchaser, later cases extended its rule to non-purchaser third parties. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 84 (2d ed. 1955).

76. PROSSER, *supra* note 75, § 84 n.24; Hursh, *supra* note 75, at 1180–83 (listing cases).

77. Hursh, *supra* note 75, at 1128 ("The imminently dangerous product exception to the privity requirement is an exceedingly broad one, covering a wide range of products.").

78. In 1946, Massachusetts became the first state to make this leap. Carter v. Yardley & Co., 64 N.E.2d 693, 700 (Mass. 1946). A 1960 *American Law Reports* annotation identified Georgia, Kentucky, Maryland, Massachusetts, Michigan, Tennessee, and Wisconsin as states where the courts had generally rejected a privity requirement in products cases sounding in negligence. Hursh, *supra* note 75, at 1192–203.

and did allege negligence in product design,[79] negligent failures to warn,[80] and otherwise inadequate warnings.[81] Design and warning claims remained relatively uncommon, however, at least through the 1950s.[82]

3. *Escola*, Warranty, and the Rise of Strict Products Liability in Tort

Even after the *MacPherson* reform, a sense remained that negligence law could not adequately address all of the problems presented by defective products.[83] It remained difficult for plaintiffs in some of these cases to prove that a particular party in the product-supply chain had

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79. *E.g.*, Kieffer v. Blue Seal Chemical Co., 196 F.2d 614, 615 (3d Cir. 1952); Coakley v. Prentiss-Wabers Stove Co., 195 N.W. 388, 391–92 (Wis. 1923); Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909); Torgesen v. Schultz, 84 N.E. 956, 957 (N.Y. 1908); *see also* R.D. Hursh, Annotation*, Liability of Manufacturer or Seller for Injury Caused by Household and Domestic Machinery, Appliances, Furnishings, and Equipment*, 80 A.L.R.2d 598, 611–12 (1961) ("The manufacturer is under a duty to exercise reasonable care in adopting a safe plan or design for his product."). On this issue, § 398 of the *Restatement of Torts*, published in 1934, provides:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

RESTATEMENT OF TORTS § 398 (1934).

80. *See* Hardy Cross Dillard & Harris Hart, II, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955) (discussing this type of claim). For a discussion of failure-to-warn claims in the pre-*MacPherson* era, see *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 871–72 (8th Cir. 1903).

81. *E.g.*, Peaslee-Gaulbert Co. v. McMath's Adm'r, 146 S.W. 770, 771 (Ky. 1912); Farley v. Edward E. Tower & Co., 171 N.E. 639, 640, 642–43 (Mass. 1930); Hartmon v. Nat'l Heater Co., 60 N.W.2d 804, 810–12 (Minn. 1953); Noone v. Fred Perlberg, Inc., 49 N.Y.S.2d 460, 462 (App. Div. 1944), *aff'd*, 294 N.Y. 680 (1945); *see also* Hursh, *supra* note 79, at 612 ("A manufacturer, in furnishing instruction with respect to the use of his product, must exercise care to assure that the instructions are adequate to protect users from harm . . . ."); A.G.S., *Duty of Manufacturer or Seller to Warn of Latent Dangers Incident to Article as a Class, as Distinguished from Duty with Respect to Defects in Particular Article*, 86 A.L.R. 947 (1933) (collecting cases).

82. *See* Harold A. Katz, *Negligence in Design a Developing Area of Product Liability Law*, NACCA ELEVENTH ANNUAL CONVENTION 1957, at 216, 217 (1958) ("Negligence based on 'failure to exercise reasonable care in the adoption of a safe plan or design' is the field of product liability law to which least attention has been directed."); Harold A. Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863, 871 (1956) (observing that lawyers had not yet devoted significant attention to flaws in automobile design).

83. Feezer, *supra* note 73, at 3 ("[T]he legal problems arising from the function of manufacturers in the modern social organization cannot be handled adequately on the basis of negligence alone. Proof of negligence is impossible in many cases where human nature instinctively senses obligation.").

failed to exercise due care,[84] and the devices that courts adopted to avoid these problems struck some observers as needlessly circuitous.[85] Frustrated by these shortcomings, some critics lobbied for a comprehensive strict-liability approach. In the first edition of his *Handbook of the Law of Torts* treatise, published in 1941, William Prosser related the case for the imposition of strict liability upon the manufacturers of defective products. Prosser noted that "in recent years" there had been

> an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance. Added to this is the difficulty of proving negligence . . . with the aid of res ipsa loquitur, together with the wastefulness and uncertainty of a series of warranty actions carrying liability back through retailer and jobber to the original maker, the practice of reputable manufacturers to stand behind their goods as good business policy, and a recognition that the intermediate seller is usually a mere conduit to market the product. There is an obvious argument that in the public interest the consumer is entitled to the maximum of protection at the hands of some one [*sic*], and that the producer, practically and morally, is the one to provide it.[86]

Three years later, California Supreme Court Justice Roger Traynor would echo these arguments in his concurring opinion in the *Escola* case.[87] Traynor also emphasized that because of mass-marketing trends,

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84. Gerald A. Gleason, *Investigation, Preparation and Defense of Products Liability Cases*, 20 INS. COUNS. J. 114, 117 (1953) ("Negligence upon the part of the manufacturer is often very difficult to prove."); William L. Prosser, *Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1116–17 (1960) [hereinafter Prosser, *Assault upon the Citadel*].

85. *E.g.*, Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 442–43 (Cal. 1944) (Traynor, J., concurring); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 83 (1941) [hereinafter PROSSER, HANDBOOK OF THE LAW OF TORTS].

86. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83.

87. *Escola*, 150 P.2d at 440–44 (Traynor, J., concurring). Another jurist, Karl Llewellyn, thought along similar lines. A 1941 draft of the Revised Uniform Sales Act prepared by Llewellyn contained a Section 16 B, titled "Obligation to Consumer and to Dealer for Latent Dangerous Defect," that would have made manufacturers liable to remote buyers injured in person, property, or otherwise as a result of a defect in the manufacturer's goods. REVISED UNIF. SALES ACT § 16 B (Proposed Second Draft 1941). A comment to this section provided that the term "defect" was "intended to be broad enough to include defects of manufacture or design, adulteration, presence of foreign substances, and indeed the whole range of hidden danger, when the net product appears and ought to be safe to use in the ordinary manner, but

"[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product."[88]

In lobbying for strict liability in tort, Prosser noted that extension of the law of implied warranty represented "[t]he device most ready at hand to accomplish this result."[89] Indeed, breach-of-warranty claims would provide the principal vehicle through which plaintiffs pressed products cases through the 1950s.[90] A products case potentially implicated an express warranty,[91] an implied warranty of fitness for a particular purpose,[92] and an implied warranty of merchantability.[93] The last of these warranties gave rise to the most claims.[94]

Recovery under a warranty theory could be simpler or more complicated than in a lawsuit framed solely in negligence. Plaintiffs could obtain relief for a breach of the implied warranty of merchantability by showing that the goods they purchased from the defendant had not been "reasonably fit for the ordinary uses to which goods of [their] kind are

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is not." *Id.* § 16 B cmt. B.1; *see also* John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 13–17 (1983) (quoting REVISED UNIF. SALES ACT § 16 B and discussing the circumstances surrounding its preparation). When placed up for debate, this section did not meet with a rousing reception, and Llewellyn abandoned it. *Id.* at 16–20.

88. *Escola*, 150 P.2d at 443 (Traynor, J., concurring).

89. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83.

90. Gillam, *supra* note 66, at 124 ("The consumer's rights against the retailer now are stated principally in terms of warranty rather than in terms of negligence.").

91. Per the Uniform Sales Act,

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty.

UNIF. SALES ACT § 12 (1908). The Uniform Sales Act was adopted by thirty-four states between 1906 and 1947. Donald J. Smythe, *Transaction Costs, Neighborhood Effects, and the Diffusion of the Uniform Sales Act, 1906–47*, 4 REV. L. & ECON. 341, 341–42 (2008).

92. Under the Uniform Sales Act,

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

UNIF. SALES ACT § 15 (1908).

93. Per the Uniform Sales Act, "Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of a merchantable quality." *Id*.

94. SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT §§ 229, 232–34 (1909).

put,"[95] without also having to establish that the defect owed to the seller's negligence.[96] Liability under an implied-warranty theory was therefore "strict" in a manner that negligence liability was not. But there were trade-offs. Among them, there existed important defenses to a warranty claim that did not appear in the negligence context. Warranties could be disclaimed by the seller as part of a contract for sale,[97] and a plaintiff had to provide the defendant with reasonable notice of any breach of warranty.[98]

Of at least equal importance, under prevailing privity rules only the person who had purchased the goods at issue could claim warranty protections, and only against the immediate seller.[99] This privity barrier proved more resilient in the warranty context than it had been in negligence.[100] Although it was widely understood that the concept of an implied warranty had a historical and logical connection to public-policy precepts similar to those associated with tort liability,[101] it remained that

95. William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 130 (1943).

96. *Id.* at 119.

97. Per § 71 of the Uniform Sales Act,

> Where any right, duty, or liability would arise under a contract to sell or a sale of implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or sale.

UNIF. SALES ACT § 71 (1908); *see also* Fleming James, Jr., *Products Liability* (pt. 2), 34 TEX. L. REV. 192, 210–12 (1955) (discussing the law of disclaimers); Prosser, *supra* note 95, at 157–67 (same).

98. Under Section 49 of the Uniform Sales Act, "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." UNIF. SALES ACT § 49 (1908); *see also* James, *supra* note 97, at 196–98 (discussing the notice requirement); Donald P. Newell, *Notice Requirement in Warranty Actions Involving Personal Injury*, 51 CALIF. L. REV. 586 (1963) (same).

99. WILLISTON, *supra* note 94, § 244.

100. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.16 (1956); *see also* R.D. Hursh, Annotation, *Privity of Contract as Essential to Recovery in Action Based on Theory Other than Negligence, Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 75 A.L.R.2d 39, 44–45 (1961) ("The traditional, and still prevailing, view is that privity of contract is indispensable to recovery against the manufacturer or seller of a product which has caused injury where the defendant's breach of an express or implied warranty is asserted.").

101. *See, e.g.*, PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83 (observing that "the action for breach of a warranty was originally a tort action").

without *some* contract, there could be no warranty.[102] This connection led to a conflation of the two concepts, with courts declining to extend warranties to remote (downstream) purchasers, or to strangers to a purchasing contract, such as family members or employees of the consumer.[103] Even as they paid lip service to the privity rule, however, courts resorted to a number of stratagems to avoid it. The various legal fictions they developed toward this purpose,[104] which honored the privity requirement in theory if not in spirit, got the job done but failed to satisfy from a doctrinal perspective.[105]

The first batch of outright rejections of a privity requirement for an implied-warranty claim appeared in cases involving tainted or unwholesome food.[106] Starting with a Washington Supreme Court decision in 1913,[107] many states carved out an exception to the prevailing privity rule for warranty claims premised on rotten or adulterated food products. This deviation caught on slowly at first. In 1941, Prosser wrote that the majority of jurisdictions still demanded privity of contract between the plaintiff and defendant in these cases.[108] Prosser could have added the word "vast" in front of "majority," since the highest courts in only a handful of other states had joined Washington as of that time.[109]

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102. Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 923 (1964) ("[P]rivity—i.e., the existence of a direct contractual relationship—was a conceptual necessity because the seller's modern obligations for defective products developed as a part of the law of contracts.").

103. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83.

104. One commentator, writing in 1957, identified twenty-nine "fictions, subterfuges, and bold strokes" that courts had used to avoid the privity bar in warranty suits. Gillam, *supra* note 66, at 152–55.

105. *Id.* at 155; *see also* Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 991 (1966) (stating that the reasoning employed in cases that employed legal fictions to dodge the privity bar "was never very clear."). That courts were resorting to spurious fictions to avoid the privity requirement was far from a secret among judges. *See, e.g.*, Beck v. Spindler, 99 N.W.2d 670, 682 (Minn. 1959) ("It would seem that some other courts have tried to find a way of permitting recovery without expressly discarding the idea of privity.").

106. *See* Prosser, *Assault upon the Citadel*, *supra* note 84, at 1103–06.

107. Mazetti v. Armour & Co., 135 P. 633, 636 (Wash. 1913). Earlier decisions had applied a similar rule, but under the authority of state-specific pure food and drug laws. *E.g.*, Meshbesher v. Channellene Oil & Mfg. Co., 119 N.W. 428, 429–30 (Minn. 1909).

108. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83. Prosser noted, however, that "[t]he more recent cases . . . have shown a definite tendency in that direction. It seems probable that this will be the law of the future, and that the end of the next quarter of a century will find the principle generally accepted." *Id.*

109. Klein v. Duchess Sandwich Co., 93 P.2d 799, 804 (Cal. 1939); Swengel v. F. & E. Wholesale Grocery Co., 77 P.2d 930, 935 (Kan. 1938); Coca-Cola Bottling Works v. Lyons, 111

But the tide would soon change. A few states—Texas,[110] Florida,[111] Oklahoma,[112] Louisiana,[113] and Minnesota[114] (the latter in express warranty cases only)—forswore a privity element in food cases during the 1940s and the early 1950s. And then, the floodgates opened. Between 1957 and 1961, the supreme courts of eight states[115] all rejected or significantly pared back the privity rule in warranty cases involving food products.[116]

The post-World War II era also saw a few courts chip away at the privity rule in warranty cases involving products other than food. Some of these decisions rejected any need for privity where the product at issue was somehow analogous to food. For example, the privity requirement was lifted in a few cases involving defective animal feed,[117] "apparently on the bald theory that food is food."[118] Some of the few courts to confront the issue also declined to require privity of contract in cases involving personal-hygiene products, analogized to food on the ground that they were all used directly upon, if not inside, the person.[119] The Michigan

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So. 305, 307 (Miss. 1927); Davis v. Van Camp Packing Co., 176 N.W. 382, 390 (Iowa 1920); Kelley v. John R. Daily Co., 181 P. 326, 329 (Mont. 1919); Catani v. Swift & Co., 95 A. 931, 932 (Pa. 1915). Also, an appellate court in Ohio had upheld the privity requirement, but cast the consumer as a third-party beneficiary of the contract for sale between the manufacturer and the retailer. Ward Baking Co. v. Trizzino, 161 N.E. 557, 559 (Ohio. Ct. App. 1928). Arizona appears to have implicitly rejected a privity requirement in *Eisenbeiss v. Payne*, 25 P.2d 162, 166 (Ariz. 1933), but in a 1957 decision that formally interred the privity requirement in food cases, the Arizona Supreme Court said that the privity issue "has never before been presented to this court for decision." Crystal Coca-Cola Bottling Co. v. Cathey, 317 P.2d 1094, 1096 (Ariz. 1957).

110. Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W.2d 828, 834 (Tex. 1942).

111. Blanton v. Cudahy Packing Co., 19 So. 2d 313, 316 (Fla. 1944).

112. Griffin v. Asbury, 165 P.2d 822, 826 (Okla. 1945)

113. Le Blanc v La. Coca Cola Bottling Co., 60 So. 2d 873, 875 (La. 1952).

114. Randall v. Goodrich-Gamble Co., 54 N.W.2d 769, 771 (Minn. 1952).

115. Manzoni v. Detroit Coca-Cola Bottling Co., 109 N.W.2d 918, 921–22 (Mich. 1961); Asher v. Coca Cola Bottling Co., 112 N.W.2d 252, 255 (Neb. 1961); Greenberg v. Lorenz, 173 N.E.2d 773, 775–76 (N.Y. 1961) (rejecting the privity requirement, at least when the plaintiff was a member of the purchaser's household); Tiffin v. Great Atl. & Pac. Tea Co., 162 N.E.2d 406, 411 (Ill. 1959); Midwest Game Co. v. M. F. A. Milling Co., 320 S.W.2d 547, 550 (Mo. 1959); Swift & Co. v. Wells, 110 S.E.2d 203, 208–09 (Va. 1959); Schneider v. Suhrmann, 327 P.2d 822, 825 (Utah 1958); Crystal Coca-Cola Bottling Co. v. Cathey, 317 P.2d 1094, 1097 (Ariz. 1957).

116. Connecticut, meanwhile, abandoned the privity rule in warranty cases involving prepackaged consumer goods. Hamon v. Digliani, 174 A.2d 294, 297 (Conn. 1961).

117. *E.g.*, *Midwest Game Co.*, 320 S.W.2d at 550.

118. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1111.

119. *See* Alexander v. Inland Steel Co., 263 F.2d 314, 318 (8th Cir. 1958) (discussing these cases); Graham v. Bottenfield's, Inc., 269 P.2d 413, 418 (Kan. 1954); Rogers v. Toni Home Permanent Co., 139 N.E.2d 871, 873 (Ohio Ct. App. 1957).

Supreme Court would go a step further in 1958. The plaintiff in *Spence v. Three Rivers Builders and Masonry Supply, Inc.*,[120] owned a cottage built with cinderblocks supplied by the defendant and sold to a contractor hired by the plaintiff.[121] Shortly after the cottage was built, the blocks started to crack, chip, and decay.[122] The plaintiff sued the manufacturer of the blocks on implied- and express-warranty theories.[123] The court spotted actionable negligence on the facts alleged, but also gainsaid any privity requirement for recovery in warranty, as it saw "no reason in logic or sound law why recovery in [warranty cases] should be confined to . . . food and related cases and denied in all others."[124]

Through the 1950s, decisions such as *Spence* were few and far between.[125] Nevertheless, these rulings cheered a cluster of academics who had spent the past several years advocating for strict liability to the consumer. Among them, Yale Law School Professor Fleming James advocated for the "enterprise liability" of manufacturers in law review articles and in his influential 1956 treatise, co-authored with Professor Fowler Harper.[126] William Prosser, who had started the strict-liability ball rolling almost two decades before, wrote in 1960 that *Spence* and a handful of similar decisions collected from other jurisdictions evidenced a positive "Trend" toward strict liability to the consumer.[127]

Almost simultaneously with Prosser's announcement,[128] the New Jersey Supreme Court handed down *Henningsen v. Bloomfield Motors*,

120. 90 N.W.2d 873 (Mich. 1958).

121. *Id.* at 874.

122. *Id.*

123. *Id.* at 874–75.

124. *Id.* at 878.

125. *See, e.g.*, B.F. Goodrich Co. v. Hammond, 269 F.2d 501, 506 (10th Cir. 1959) (rejecting a privity requirement for an implied-warranty claim involving an exploding tire).

126. The most well-known of James's works on products liability are Fleming James, Jr., *Products Liability* (pts. 1–2), 34 TEX. L. REV. 44, 192 (1955), and the relevant portions of his treatise, HARPER & JAMES, *supra* note 100, §§ 28.1–28.33. A detailed review of James's scholarship, as it pertains to products liability, appears at Priest, *supra* note 7, at 470–83, 501–03.

127. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1112–14. While Prosser is today the most celebrated of these prophets, the general trend toward greater liability on the part of manufacturers and sellers was quite obvious to many observers of the time. *E.g.*, Paul Oberst, *Torts*, 1959 ANN. SURV. AM. L. 442, 459 (1960) ("As might be expected the year saw continued changes in the direction of thrusting the risk of injury by defective products upon those most able to absorb and distribute this burden.").

128. As sleuthed by Priest, *supra* note 7, at 506–07.

Inc.,[129] which rewrote the law of warranty in that state. *Henningsen* involved a new Plymouth automobile, bought by a husband for his wife.[130] Shortly after the vehicle's purchase, while Mrs. Henningsen was driving it, she heard a cracking noise under the hood.[131] Her Plymouth veered off the road, injuring Mrs. Henningsen and seriously damaging the car.[132] She and her husband sued both the dealer from which Mr. Henningsen had purchased the car, as well as the automobile's manufacturer, Chrysler.[133] The trial court threw out the plaintiffs' negligence claim, but allowed their implied-warranty claim to go to the jury.[134] After deliberations, the jury returned with a $30,000 plaintiffs' verdict—$26,000 to Mrs. Henningsen and $4,000 for her husband.[135] On appeal, the *Henningsen* defendants attacked the trial court's decision to allow the plaintiffs' warranty claims to proceed, since Mrs. Henningsen had not purchased the vehicle herself, and neither plaintiff had direct contractual relations with Chrysler.[136] The New Jersey Supreme Court unanimously rejected these arguments, in a striking renunciation of a privity requirement.[137] For good measure, *Henningsen* also held that the defendants' written disclaimer of warranties was void as contrary to public policy.[138]

The legal community appreciated the path-breaking nature of the *Henningsen* precedent, "the first unequivocal holding by the highest court of a state that privity is unnecessary to warranty liability."[139] Other states, most notably New York, soon followed *Henningsen*'s lead in eliminating

129. 161 A.2d 69 (N.J. 1960). For a thorough retelling and examination of the *Henningsen* case, drawing from original court documents, see Jay M. Feinman & Caitlin Edwards, Henningsen v. Bloomfield Motors, Inc. *(1960): Promoting Product Safety by Protecting Consumers of Defective Goods*, *in* COURTING JUSTICE: TEN NEW JERSEY CASES THAT SHOOK THE NATION 5–22 (Paul L. Tractenberg ed., 2013).

130. *Henningsen*, 161 A.2d at 73.

131. *Id.* at 75.

132. *Id.* at 73, 75.

133. *Id.* at 73.

134. *Id.* at 75.

135. Feinman & Edwards, *supra* note 129, at 8.

136. Brief for Defendant, Bloomfield Motors, Inc., as Cross-Respondent and Appellant at 23–24, Henningsen v. Bloomfield Motors, 161 A.2d 69 (1960) (No. A-50); Brief for Defendant, Chrysler Corporation as Cross-Respondent and Appellant at 13–16, Henningsen v. Bloomfield Motors, 161 A.2d 69 (1960) (No. A-50).

137. *Henningsen*, 161 A.2d at 84, 99–100.

138. *Id.* at 95, 97.

139. Recent Case, *Sales—Implied Warranties—Implied Warranty of Merchantability Renders Manufacturer Liable to Buyer's Wife Despite Disclaimer Clause and Absence of Privity of Contract*—Henningsen v. Bloomfield Motors, Inc. *(N.J. 1960)*, 74 HARV. L. REV. 630, 630 (1961).

or paring back privity requirements for warranty claims.[140] Within three years, however, *Henningsen* had been trumped by the California Supreme Court's *Greenman* decision, which shifted the focus of products-liability reform from warranty protections to "pure" tort law.[141]

Greenman, which involved an allegedly defective "ShopSmith" workbench, was brought as a negligence and warranty case.[142] The plaintiff received a judgment in his favor, which the Court of Appeal affirmed over the manufacturer's argument that the plaintiff had not given timely notice of the defect.[143] Upon granting review, the California Supreme Court endorsed the Court of Appeal's reasoning on the warranty issue.[144] Though this conclusion sufficed to resolve the case, the court further opined that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[145] The *Greenman* court only cursorily canvassed the policy motivations for its adoption of strict liability, stating that these reasons had been "fully articulated" elsewhere.[146] The court devoted more effort to explaining why tort, rather than warranty, represented the optimal doctrinal solution to the problems presented by defective products.[147] Notwithstanding the efforts that had been made to ground warranty in

140. *E.g.*, Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81, 83 (N.Y. 1963); Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 404 (N.Y. 1962); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449, 453, 456 (Iowa 1961); Greenberg v. Lorenz, 173 N.E.2d 773, 775–76 (N.Y. 1961); Peterson v. Lamb Rubber Co., 353 P.2d 575, 581 (Cal. 1960); *see also* Gen. Motors Corp. v. Dodson, 338 S.W.2d 655, 660–61 (Tenn. Ct. App. 1960) (allowing a lawsuit to proceed against the manufacturer of an automobile, even when purchased through a dealer, as "the jury could have found that [the manufacturer] was the actual person or entity with whom plaintiffs were dealing, and [the dealer] was a conduit or subterfuge by which [the manufacturer] tried to exempt itself from liability to the consumers who are the plaintiffs"). Federal courts were equally aggressive in attacking the privity requirement during this span. *See, e.g.*, Deveny v. Rheem Mfg. Co., 319 F.2d 124, 130 (2d Cir. 1963); Bowles v. Zimmer Mfg. Co., 277 F.2d 868, 874 (7th Cir. 1960); Chapman v. Brown, 198 F.Supp. 78, 118 (D. Haw. 1961), *aff'd*, Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); McQuaide v. Bridgeport Brass Co., 190 F.Supp. 252, 254–55 (D. Conn. 1960).

141. Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (Cal. 1963).

142. *Id.* at 898.

143. Greenman v. Yuba Power Products, Inc., 23 Cal. Rptr. 282, 286 (Cal. Dist. Ct. App. 1962), *aff'd*, 377 P.2d 897, 899 (Cal. 1963).

144. *Greenman*, 377 P.2d at 900.

145. *Id.*

146. *Id.* at 901.

147. *Id.*

tort law,[148] the *Greenman* court regarded warranty as still too closely tethered to the law of sales to provide an adequate basis for an obligation imposed for public-policy reasons.[149]

Notwithstanding *Greenman*, no other state adopted strict products liability grounded squarely in tort prior to the promulgation of the *Restatement (Second) of Torts* § 402A.[150] As prepared by Prosser, the reporter for this portion of the *Restatement Second*, this section went through a series of drafts that endorsed strict liability for an ever-expanding universe of products. A 1961 draft would have applied strict liability only to sales of food products.[151] One year later, Prosser revised the provision to extend strict liability to "products for intimate bodily use."[152] Finally, in 1964 Prosser tendered to the American Law Institute (ALI) a provision that allowed the "ultimate user or consumer"[153] to proceed in tort, on a strict liability basis, against the seller of "any product in a defective condition unreasonably dangerous to the user."[154] The blackletter of § 402A was accompanied by comments "a" through "q," which provided an atlas to the frontier opened up by the new rule.[155] These comments did not resolve every conceivable products issue that might arise—far from it—but they did address enough of the high-profile fact patterns of the era (involving products such as tobacco (at comment *i*)[156] and vaccines (at comment *k*))[157] to assure would-be adopters that the concept of strict products liability in tort did have some

148. *See, e.g.*, Randy Knitwear, Inc. v. Am. Cyanamid Co., 181 N.E.2d 399, 401 n.2 (N.Y. 1962) (discussing this connection). *But see* Gillam, *supra* note 66, at 131 ("The modern law generally regards warranty as contractual in nature.").

149. *Greenman*, 377 P.2d at 901 ("[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.").

150. Some courts had cited to tentative drafts of § 402A well before the section's publication in finished form. *E.g.*, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 25–26 (5th Cir. 1963); Strahlendorf v. Walgreen Co., 114 N.W.2d 823, 830–31 (Wis. 1962).

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

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

153. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 10, 1964).

154. *Id.*

155. *Id.* cmts. a–q.

156. At issue in *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); and *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963).

157. This provision may have been sparked by then-recent litigation over the defective Cutter polio vaccine. Gottsdanker v. Cutter Labs., 6 Cal. Rptr. 320 (Cal. Dist. Ct. App. 1960).

meaningful boundaries. The ALI approved Prosser's handiwork in May 1964,[158] and § 402A was formally published a year later.[159]

In the years that followed, courts (and a few legislatures) rushed to adopt a tort-based theory of strict products liability.[160] By 1976, forty-two states and the District of Columbia had jumped aboard the bandwagon,[161] a progression so rapid that it amazed even some of the judges who joined

158. *Friday Afternoon Session, May 22, 1964*, *supra* note 3, at 375.

159. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

160. Bespeaking judicial enthusiasm for the theory, several courts (such as *Greenman*) adopted a tort basis for strict liability under circumstances where it was either unnecessary to the case or arguably not properly presented for the court's consideration. *See* Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 715–17 (1970) (discussing this phenomenon).

161. In alphabetical order, these jurisdictions (with the accompanying decision or legislative act that adopted strict products liability in tort) are Alabama (Atkins v. Am. Motors Corp., 335 So. 2d 134 (Ala. 1976)); Alaska (Clary v. Fifth Ave. Chrysler Ctr., Inc., 454 P.2d 244 (Alaska 1969)); Arizona (O.S. Stapley Co. v. Miller, 447 P.2d 248 (Ariz. 1968)); Arkansas (Act of Feb. 13, 1973, Act 111, 1973 Ark. Acts. 331); Colorado (Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1975)); Connecticut (Garthwait v. Burgio, 216 A.2d 189 (Conn. 1965)); D.C. (Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807 (D.C. 1970)); Florida (West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976)); Georgia (Act of Apr. 9, 1968, No. 1085, 1968 Ga. Laws 1166); Hawaii (Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240 (Haw. 1970)); Idaho (Shields v. Morton Chem. Co., 518 P.2d 857 (Idaho 1974)); Illinois (Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965)); Indiana (Ayr-Way Stores, Inc. v. Chitwood, 300 N.E.2d 335 (Ind. 1973)); Iowa (Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970)); Kansas (Brooks v. Dietz, 545 P.2d 1104 (Kan. 1976)); Kentucky (Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. Ct. App. 1965)); Louisiana (Weber v. Fid. & Cas. Ins. Co., 250 So. 2d 754 (La. 1971)); Maine (Act of Oct. 3, 1973, ch. 466, 1973 Me. Laws 822); Maryland (Phipps v. Gen. Motors Corp., 363 A.2d 955 (Md. 1976)); Minnesota (McCormack v. Hankscraft Co., 154 N.W.2d 488 (Minn. 1967)); Mississippi (State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)); Missouri (Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969)); Montana (Brandenburger v. Toyota Motor Sales, Inc., 513 P.2d 268 (Mont. 1973)); Nebraska (Kohler v. Ford Motor Co., 191 N.W.2d 601 (Neb. 1971)); Nevada (Ginnis v. Mapes Hotel Corp., 470 P.2d 135 (Nev. 1970)); New Hampshire (Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969)); New Jersey (Santor v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965)); New Mexico (Stang v. Hertz Corp., 497 P.2d 732 (N.M. 1972)); New York (Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973)); North Dakota (Johnson v. Am. Motors Corp., 225 N.W.2d 57 (N.D. 1974)); Ohio (Lonzrick v. Republic Steel Corp., 218 N.E.2d 185 (Ohio 1966)); Oklahoma (Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974)); Oregon (Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967)); Pennsylvania (Webb v. Zern, 220 A.2d 853 (Pa. 1966)); Rhode Island (Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971)); South Carolina (Act of July 9, 1974, No. 1184, 1974 S.C. Acts 2782); South Dakota (Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973)); Tennessee (Ford Motor Co., v. Lonon, 398 S.W.2d 240 (Tenn. 1966)); Texas (McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967)); Vermont (Zaleskie v. Joyce, 333 A.2d 110 (Vt. 1975)); Washington (Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969)); and Wisconsin (Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967)).

in the movement.[162] Utah and West Virginia straggled into the fold in 1979.[163] In 1986, Wyoming became the last state to date to follow the trend.[164] As will be discussed in more detail later, Delaware, Massachusetts, Michigan, North Carolina, and Virginia remain holdouts, to a degree.[165] These five states continue to couch their (enhanced) consumer protections in the language of warranty.[166]

As a postscript, once courts adopted strict products liability in tort, it became apparent that the concept required further elaboration as applied to different types of claims. The 1970s through the early 1980s represented strict products liability's awkward teenage years, in which courts sought to define the parameters of the new rule.[167] Today, the brand of "strict liability" applicable to a case depends on whether the defect involved constitutes a "manufacturing defect," "design defect," or "warning defect."[168] Only as to the first of these—defined as a defect whereby a product's design does not conform to a manufacturer's intentions[169]—is liability truly "strict." The general principles most jurisdictions now apply to design and warning claims echo negligence rules, albeit with a paramount focus upon the qualities of the product itself, not necessarily the actions of the human agents who produced it.[170]

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162. *See McCormack*, 154 N.W.2d at 500 (commenting upon the "remarkable shift" toward adoption of strict products liability).

163. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

164. Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

165. OWEN, *supra* note 30, at 282–84.

166. N.C. GEN. STAT. § 99B-1.1 (2011); Jacobs v. Yamaha Motor Corp., U.S.A., 649 N.E.2d 758, 763 & n.6 (Mass. 1995); Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 57 & n.4 (Va. 1988); Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, 975–76 (Del. 1980). For a discussion of the approaches these states (and the other holdout, Michigan) have taken to products liability, see OWEN, *supra* note 30, at 282–84.

167. *See* JANE STAPLETON, PRODUCT LIABILITY 29–34 (1994); Owen, *supra* note 75, at 978–79.

168. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

169. *See id.* (defining a manufacturing defect).

170. *See id.* (defining design and warning defects); Michael D. Green, *The Road Less Well Traveled (and Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377, 380 (1999) (observing that "courts [have been] . . . essentially turning design defect law into a negligence standard"); James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 384 (2002) ("In the areas involving generic product risks, common law liability of manufacturers has always been, and will always be, based on fault."); James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1277 (1991) ("Although judges have talked repeatedly of imposing 'strict liability' for defective product designs and failures to warn, in

B. The History of Strict Products Liability: Prevailing Themes

So goes a standard, if somewhat lengthy, retelling of how strict products liability in tort came into being. Some form of this story represents the archetypal tale of doctrinal evolution in tort law—probably because of its affirmational, familiar, and scalable nature. The narrative details a steady and sensible progression of the law, in synch with broader social trends. Marking this evolution are series of touchstone judicial opinions, two of which were written by the most prominent state-court judges of their respective eras.[171] Academics also made significant contributions to the movement, with the most famous torts professor of all having perhaps the greatest impact.[172] Furthermore, an author pressed for space can jettison many of the details associated with this narrative and still construct a coherent tale of doctrinal evolution around the bare skeleton of *Winterbottom*, *MacPherson*, and the *Henningsen-Greenman-Restatement (Second) of Torts* § 402A triad.

That said, this story also contains some riddles. Among them, this narrative begs the question of why strict products liability in tort, after being under consideration for so long, was adopted by so many states in an extremely short window of time. Two explanations have been given for this dynamic. One account argues that various attributes of 1960s and 1970s culture disposed the judges of that era to adopt strict products liability. The other assigns primary responsibility to a cadre of academics who, from the 1940s through the 1960s, provided the intellectual breakthroughs that made strict products liability respectable.

The first of these explanations lays strict products liability in tort at the doorstep of the activist frisson of the 1960s and 1970s, and its impact upon judges. Reflecting on this atmosphere, Gary Schwartz has written:

> [I]n expanding liability [during the 1960s and 1970s] modern judges drew upon tort law's negligence tradition, upon the fairness and deterrence rationales embedded in that tradition, and upon the modern loss-distribution rationale, which could easily enough be linked with that tradition. Furthermore, those judges were

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reality they have retained a primarily fault-based approach to generic product hazards." (footnotes omitted)).

171. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring); *see also* ANDREW L. KAUFMAN, CARDOZO 3 (1998); Les Ledbetter, *Roger J. Traynor, California Justice: Noted Legal Scholar Headed the State's Supreme Court From 1964 Until 1970*, N.Y. TIMES, May 17, 1983, at B6.

172. Priest, *supra* note 7, at 464–65; *see infra* text accompanying notes 177–84.

> emboldened both by the problem-solving judicial activism of the Warren Court and by the more general reform-minded public-policy discourse of the 1960s and 1970s. In this latter respect modern tort law can be regarded as one of those ambitious programs initiated during the Great Society and then confirmed and further institutionalized during the 1970s.[173]

As directed toward products liability, the prevailing sense was

> that major American corporations—and in particular, the Big Three automakers—were economic colossi that could easily bear whatever burdens might be imposed on them by way of regulation and liability. A second feature of public opinion was that these corporations should not be held in high respect; indeed, they should be frequently distrusted. . . . During the 1960s, the consumer movement was gaining force; this movement portrayed innocent consumers as needing strong protection from manufacturers, which frequently treat consumers in shabby ways. . . . The willingness of courts by the late 1960s to impose strong liabilities on major corporations (especially on product manufacturers) was almost certainly facilitated by this discrediting of corporations that was occurring in the public outlook.[174]

An alternative explanation for the adoption of strict products liability identifies legal academics as a singularly important influence. George Priest's article *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law* represents the leading work in this genre.[175] Priest discounts the significance of "contemporary social currents" in the adoption of strict products liability,[176] and instead stresses the efforts made by Professors James and Prosser to lay a doctrinal foundation for strict liability in tort.[177]

As Priest explains (and as summarized earlier, in retelling the conventional account of strict products liability's ascendance), throughout the 1940s and 1950s James devised the basic theoretical framework for "enterprise liability," a theory of policy and responsibility

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173. Schwartz, *supra* note 8, at 619; *see also* Mark Geistfeld, Escola v. Coca Cola Bottling Co.*: Strict Products Liability Unbound*, *in* TORTS STORIES, *supra* note 58, at 229, 241–42 (discussing this view).

174. Schwartz, *supra* note 8, at 615.

175. Priest, *supra* note 7; *see also* Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1190–91 (1996) (discussing Priest's article).

176. Priest, *supra* note 7, at 464.

177. *Id.* at 464–65.

that would undergird strict liability to the consumer.[178] Prosser later advocated on behalf of strict liability in his scholarship, most famously in his *Assault upon the Citadel (Strict Liability to the Consumer)* article in the *Yale Law Journal*,[179] and steered the American Law Institute toward a full embrace of strict products liability through the drafts of § 402A that he prepared.[180] Per Priest's explanation, James brought passion and persistence to the debate over products liability,[181] while Prosser contributed catchy prose, a willingness to exaggerate,[182] good timing,[183] and an unparalleled bully pulpit.[184] Their combined efforts did the job. In Priest's version of the story, once enterprise liability gained a consensus among academics, "[j]udicial implementation followed almost immediately."[185]

Priest makes three specific assertions as to why academic efforts primed the nation's judges to adopt strict liability with "extraordinary" speed.[186] First, he argues that "the entire world of legal academics and thirty years of accumulated writing supported the change."[187] Second, he infers that the thrust of this scholarship resonated with the personal experiences of judges.[188] Third, according to Priest, strict products liability, as framed by James and Prosser, spread apace because of "its exceptional sophistication in comparison with extant theories of negligence and warranty law and the link that it provide[d] to a broader understanding of the judicial purpose."[189] Unlike the stodgy principles of negligence and warranty law, "[e]nterprise liability theory . . . appointed the judge an agent of the modern state."[190] The doctrinal shift "allowed judges . . . to aid the poor" and "adjust production decisions in the

178. For an overview of enterprise liability as a positive theory of tort law, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 537–44 (2003).

179. William Prosser, *Assault upon the Citadel*, *supra* note 84.

180. Priest, *supra* note 7, at 512–14.

181. *Id.* at 474.

182. *Id.* at 514.

183. As Priest observes, *id.* at 506, Prosser's *Assault upon the Citadel* article arrived in libraries and judicial chambers only a few months after the New Jersey Supreme Court issued its path-breaking decision in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

184. Priest, *supra* note 7, at 464–65, 512–14.

185. *Id.* at 464.

186. *Id.* at 518.

187. *Id.*

188. *Id.*

189. *Id.* at 518–19.

190. *Id.* at 519.

economy" such that they, too, could participate in the hydraulic adjustments of modern governance.[191]

The problem with these explanations is not that either is wrong, but that they do not tell the entire story.[192] For one thing, both accounts focus principally upon judicial *demand* for strict products liability, and overlook the factors that produced a steady *supply* of cases that implicated this theory of recovery. Adequate assessment of this other side of the products-liability equation requires an inquiry into the circumstances that led plaintiffs and their lawyers to press products claims. Had plaintiffs not come to appreciate products-related injuries as tortious, or had lawyers not been willing to take their cases, courts would have lacked the raw material with which to innovate.[193] It is easy to take these lawsuits as a given, at least if one assumes a receptive judiciary. But this assumption is not necessarily accurate. There exist plenty of potentially viable claims that never gain broad acceptance, either because plaintiffs do not recognize them, or lawyers do not consider them worth their while.[194]

Likewise, neither explanation spends much time considering prosaic, nuts-and-bolts reasons why judges may have adopted strict products liability. Writing in 1960, Prosser could identify only a few substantial problems with the application of negligence law in products cases. "Where the action is against the manufacturer of the product," Prosser

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191. *Id.*

192. Granted, it is impossible to isolate every trend or event that might have contributed toward the products-liability revolution. For an example of an arguably important indirect influence, between 1957 and 1980, the number of states claiming intermediate appellate courts almost tripled, rising from 13 to 33. Carl Norberg, *Some Second and Third Thoughts on an Intermediate Court of Appeals*, 7 WM. MITCHELL L. REV. 93, 94 n.1, 98 (1981). The creation of these courts conferred upon more state supreme courts the freedom of discretionary review, as opposed to mandatory jurisdiction over their torts caseload. This transition may have made the judges on state supreme courts more interested in molding public policy with their decisions. *See* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 983 (1978) ("[The] increasing discretion and diminishing caseload implied corresponding changes in the function of the supreme courts. It suggested an emerging societal consensus that state supreme courts should not be passive, reactive bodies . . . but that these courts should be policy-makers and, at least in some cases, legal innovators.").

193. *See infra* Part III.

194. *See* Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 377–78 (1990) (discussing how claim consciousness (or a lack thereof) among plaintiffs, as well as the interests and abilities of plaintiffs' counsel, affect the volume of litigation involving a particular cause of action); Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and Its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241, 1257–60 (2012) (discussing claim consciousness among plaintiffs).

acknowledged, "an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."[195] To Prosser, negligence "[broke] down" only when the negligent manufacturer was insolvent, unknown, or unavailable for process, and a plaintiff's suit against a middleman retailer or wholesaler would fail either because these entities had no duty to inspect the defective goods, or because a reasonable inspection would not have revealed the defect.[196] In the abstract, these concerns seem like a thin premise for such an important change in the law, particularly when modestly broadened warranty protections against the retailer might have provided an adequate remedy. But perhaps there existed prominent case tropes of Prosser's era that highlighted the problems he spotted, and possibly other difficulties with the application of standard negligence and warranty principles. If so, the clarity with which these cases framed the case for strict products liability may have intrigued even hard-headed judges who were otherwise skeptical about change.

Finally, neither explanation fully accounts for the continued existence of the five holdouts against casting strict products liability in the tort verbiage that Prosser and Traynor prescribed. Delaware, Massachusetts, Michigan, North Carolina, and Virginia also experienced "the more general reform-minded public-policy discourse of the 1960s and 1970s."[197] And there exists little indication that these states denied their judges access to Prosser's articles, much less the *Restatement (Second) of Torts*. Yet these states resisted the trend toward strict liability in tort, and opted to work within the law of warranty instead.[198] Perhaps strict products liability in tort was less overdetermined than conventional wisdom would suggest.

III. THE POPULIST NARRATIVE: THE CONTRIBUTIONS OF PLAINTIFFS AND THEIR COUNSEL

Thus, notwithstanding the vast amount that has been written about strict products liability, there remain several tales to be told. The first of the additional histories presented here concerns how heightened claim consciousness among would-be plaintiffs and an increasingly well-organized plaintiffs' bar affected the development and diffusion of this principle. The predominant narrative concentrates upon the adoption of

195. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1114.

196. *Id.* at 1116–17.

197. Schwartz, *supra* note 8, at 619; *see also* OWEN, *supra* note 30, at 282–83.

198. *See* OWEN, *supra* note 30, at 283–84; *supra* note 166.

strict products liability by judges. A different perspective would consider the forces that inspired individual claimants and especially their lawyers to pursue products lawsuits and to argue for doctrinal change.

A. The Emergence of Claim and Class Consciousness

The prevailing sociolegal explanation for strict products liability acknowledges that popular hostility toward corporations somehow "facilitated" judicial recognition of this approach.[199] This assessment understates the significance and agency of a burgeoning contingent of self-identifying consumers, who as the twentieth century progressed came to appreciate an ever-greater array of product-related claims.[200] As Robert Rabin has noted, this "removal of intangible barriers to claim consciousness" set the stage for the products-liability revolution.[201] The text below elaborates on Rabin's observation.

Consumer movements of various types have appeared throughout American history. The American Revolution was sparked by one such crusade.[202] A century later, the pure food and drug campaign drew strength from consumers sickened by accounts of unsanitary conditions in slaughterhouses and other food processing and distribution facilities.[203]

The consumer movement that contributed to the strict products-liability revolution evolved more gradually than had these earlier drives. This awakening originated with the same trends that caused jurists to reconsider the privity rule in negligence suits: mass production, the introduction of middlemen and retailers into the supply chain, enhanced advertising and promotion, and expanded retail showplaces.[204] In

199. Schwartz, *supra* note 8, at 615.

200. *See* Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 13–14 (1988) (discussing the development of claim consciousness among post-World War II consumers).

201. *Id.* at 14.

202. *See* T.H. BREEN, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE (2004) (discussing the politicization of consumers in the years leading up to the American Revolution).

203. *See* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 21 (2003) (discussing the Progressives' identification of "consumers as a new category of the American citizenry"); STRASSER, *supra* note 67, at 252–60. Women's organizations and magazines directed toward a female audience were particularly involved in this campaign. *See, e.g.*, *Progress*, GOOD HOUSEKEEPING, Jan. 1902, at 154, 154–55 (discussing the ongoing pure-food movement, and the magazine's role therein). On the pure food and drink movement as a whole, see generally LORINE SWAINSTON GOODWIN, THE PURE FOOD, DRINK, AND DRUG CRUSADERS, 1879–1914 (1999).

204. *See supra* notes 64–73 and accompanying text.

response to these changes, consumers sought out new sources of information regarding the quality and safety of products placed on the market.[205] One such resource was *Good Housekeeping* magazine's "Seal of Approval" for products, inaugurated in 1909.[206] Shoppers also began to receive assistance from organizations created to promote consumer awareness. The most important of these groups appeared after the 1927 publication of the best-selling exposé *Your Money's Worth: A Study in the Waste of the Consumer's Dollar*.[207] The success of this book led to the formation of Consumers' Research, Incorporated, a consumer advocacy group.[208] Beginning in 1931, this organization's biweekly bulletins detailed the hidden dangers of products such as toasters, vacuum cleaners, automobiles, and cosmetics.[209] Two Consumers' Research employees soon published another best-seller, *100,000,000 Guinea Pigs: Dangers in Food, Drugs, and Cosmetics*, which condemned the lack of safety testing before the titular products were released onto the market.[210] In 1936, disgruntled employees of Consumers' Research broke away and formed a rival organization, Consumers Union.[211] This organization launched its own magazine, *Consumer Reports*, which also sought to help consumers by testing products for safety and utility, and offering recommendations as to their acceptability.[212] This publication expanded

205. *Cf.* Lynd & Hanson, *supra* note 68, at 881 ("The increase in new kinds of goods and services, the decline in home handicraft knowledge, the increased complexity of mechanical devices and fabricated commodities, new pressures on the consumer to buy, and new tensions within the consumer, all make new demands for consumer literacy.").

206. *The Good Housekeeping Institute*, GOOD HOUSEKEEPING, Dec. 1909, at 742, 743.

207. STUART CHASE & F.J. SCHLINK, YOUR MONEY'S WORTH: A STUDY IN THE WASTE OF THE CONSUMER'S DOLLAR (1927); *see, e.g.*, MCGOVERN, *supra* note 68, at 170–83 (discussing this book and the response to it); Norman D. Katz, Consumers Union: The Movement and the Magazine, 1936–1957, at 37 (June 1977) (unpublished Ph.D. dissertation, Rutgers University) (same).

208. NORMAN ISAAC SILBER, TEST AND PROTEST: THE INFLUENCE OF CONSUMERS UNION 17–18 (1983).

209. MCGOVERN, *supra* note 68, at 191 & 426 n.7 (canvassing articles published by *Consumers Research* on the safety of products such as toasters, vacuum cleaners, automobiles, hair removal products, and cosmetics).

210. ARTHUR KALLET & F.J. SCHLINK, 100,000,000 GUINEA PIGS (1933); *see also* SILBER, *supra* note 208, at 18 (describing *100,000,000 Guinea Pigs* as "[o]ne of the best-selling books of the decade").

211. SILBER, *supra* note 208, at 21–23.

212. *See id.*

its circulation markedly in the years immediately after World War II, and boasted several hundred thousand subscribers by the early 1950s.[213]

In the post-World War II era, *Consumer Reports* and similarly minded publications had plenty of products to criticize. Cigarettes and a variety of other consumer products came under attack during this period as poorly designed or otherwise unsafe. In 1952, *Reader's Digest*—long "the only mainstream periodical of the time to crusade against the alleged perils of tobacco"[214]—ran a short story titled "Cancer by the Carton" that linked lung cancer to smoking.[215] Several other mainstream publications, including *Time* and *Life*, picked up the story.[216] When cigarette manufacturers unveiled "safer" filter-tip cigarettes in response to this negative publicity, reports circulated that these cigarettes had tar and nicotine levels similar to those found in "regular" cigarettes.[217] Congress responded by investigating whether cigarette companies engaged in false or misleading advertising in promoting their new products.[218]

While this hearing failed to produce legislation, other unsafe products did generate legislative responses. After flammable cowboy outfits killed or seriously injured many children in the late 1940s and 1950s,[219] leading to numerous lawsuits,[220] Congress enacted the Flammable Fabrics Act of

213. *See* COHEN, *supra* note 203, at 131 (pegging *Consumer Reports*' circulation at 700,000 as of 1954).

214. RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 112 (1997).

215. Roy Norr, *Cancer by the Carton*, READER'S DIGEST, Dec. 1952, at 738.

216. SILBER, *supra* note 208, at 59–60.

217. KLUGER, *supra* note 214, at 188.

218. *False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 85th Cong. (1957); *see also* KLUGER, *supra* note 214, at 188–89 (discussing these hearings); SILBER, *supra* note 208, at 66–68 (same).

219. At least one of the resulting lawsuits proceeded on a warranty theory (the statute of limitations having expired for the plaintiff's negligence claim), even though the fatally injured child was not the purchaser of the cowboy suit. Blessington v. McCrory Stores Corp., 111 N.E.2d 421 (N.Y. 1953); *see also* Parish v. Great Atl. & Pac. Tea Co., 177 N.Y.S.2d 7, 13 (Mun. Ct. 1958) (discussing this case).

220. *See* Barbara Young Welke, *Owning Hazard: A Tragedy*, 1 U.C. IRVINE L. REV. 693, 696 (2011) (discussing lawsuits brought between 1945 and 1953 over flammable cowboy outfits).

1953.[221] This law offered modest protections,[222] but it at least indicated a degree of interest in the subject of consumer protection. Not long thereafter, the deaths of more than 75 children trapped in refrigerators over a five-year span[223] brought about the Refrigerator Safety Act of 1956.[224]

Automobile design choices also came under closer scrutiny during the postwar period. Up until around 1950, people who decried the mounting number of automobile-related deaths focused mostly upon unsafe driving, not defects in the vehicles involved.[225] Consumer magazines had printed stories during the 1930s about how automobiles had been designed for "planned obsolescence," but these articles failed to spark broader interest in the subject.[226] Then, around mid-century, Cornell University's Aeronautical Laboratory began to conduct safety tests on

221. Flammable Fabrics Act, Pub. L. No. 88, 67 Stat. 111 (1953); *Flammable Fabrics: Hearing Before the S. Comm. on Interstate and Foreign Commerce*, 82nd Cong. 8–10 (1952) (statement of Henry Miller, Assistant General Counsel in Charge of Industry Cooperation, Federal Trade Commission) ("The great wave of burnings and even deaths which children have suffered when wearing highly flammable cowboy playsuits is still within the memory of many of us. Burning cases of most distressing character have also resulted from other fabrics and garments."); *see also id.* at 9–10 (listing examples of injuries caused by flammable fabrics and other clothing items); Elliot P. Paley, Letters to the Times, *Inflammable Play Clothes: Testing of Cowboy Suits and Stuffed Toys Suggested*, N.Y. TIMES, Mar. 4, 1948, at 24.

222. *See* Welke, *supra* note 220, at 737 (discussing the limited breadth of the Act's provisions).

223. COMM. ON INTERSTATE AND FOREIGN COMMERCE, REQUIRING CERTAIN SAFETY DEVICES ON HOUSEHOLD REFRIGERATORS, SEN. REP. No. 2700, at 1 (2d Sess. 1956). This report described the toll taken by these accidents:

> From time to time the people of this Nation have been shocked to read in the newspapers stories of children who were entrapped inside refrigerators and iceboxes and were suffocated to death. In 1952, 14 such deaths were recorded, and in 1953, 26 deaths were recorded. From January 1954 to June 1956, the records show that there were at least 33 incidents of suffocation in household refrigerators, involving 54 children, of whom 39 died. With the number of such deaths increasing each year, it is imperative that the Congress enact legislation to minimize these deaths insofar as possible.

Id.; *see also Old Refrigerators Are Safety Hazard*, N.Y. TIMES, June 16, 1955, at 38; *A Drive on Menace of Abandoned Iceboxes*, LIFE, Dec. 14, 1953, at 57 (discussing child fatalities associated with iceboxes, and reporting upon an exchange drive whereby 12-lb turkeys were traded for icebox doors); *cf. Child Safety Measure Passed*, N.Y. TIMES, Sept. 10, 1953, at 29 (describing an Oklahoma City ordinance that made it illegal to leave a refrigerator outside without removing the door or providing a means of escape).

224. Refrigerator Safety Act of 1956, Pub. L. No. 84-930, 70 Stat. 953.

225. SILBER, *supra* note 208, at 80.

226. *Id.* at 83.

automobiles.[227] These studies led to the formation of the Automotive Crash Injury Research (ACIR) project at Cornell in 1952.[228] The ACIR used the information it gathered from tests to develop specific recommendations about how to improve the design of automobiles for enhanced safety.[229] One such recommendation involved the installation of seat belts, which became available on Ford and Chrysler vehicles beginning with the 1956 model year.[230] Though few other immediate safety improvements resulted, the information produced by Cornell fed an emerging dialogue about automobile design and safety in the halls of Congress[231] and elsewhere[232] that continued throughout the 1950s and would yield significant results in the 1960s.[233]

During this same postwar period, disturbing revelations emerged about drugs and vaccines only recently hailed as panaceas. In the early 1950s, the antibiotic chloromycetin—praised as a new "wonder drug" on

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227. George H. Waltz, Jr., *Making the Death Seat Safer*, POPULAR SCI., July 1950, at 82, 82–83 (discussing research at Cornell).

228. SILBER, *supra* note 208, at 87.

229. *Id.*; *see also* SEYMOUR SCHWIMMER & ROBERT A. WOLF, LEADING CAUSES OF INJURY IN AUTOMOBILE ACCIDENTS (1962) (reporting the results of a study of crash-injury data).

230. SILBER, *supra* note 208, at 90.

231. In 1957, the House of Representatives held a hearing on safety belts in automobiles, in which witnesses testified as to their benefits. *Automobile Seat Belts: Hearings Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 85th Cong. (1957); *see also* Paul N. Janes, *Seat Belts vs. Traffic Deaths*, POPULAR MECHANICS, Mar. 1955, at 137; Paul W. Kearney, *How Safe Are the 1958 Cars?*, POPULAR SCI., Jan. 1958, at 126 ("Despite some dragging of feet, it is evident from the 1958 models that safety is getting increasingly serious attention in Detroit.").

232. *E.g.*, Daniel P. Moynihan, *Epidemic on the Highways*, THE REPORTER, Apr. 30, 1959, at 16 (arguing for the placement of greater pressure on automakers to enhance the safety of their vehicles); C. Hunter Shelden, *Prevention, the Only Cure for Head Injuries Resulting from Automobile Accidents*, 159 J. AM. MED. ASS'N 981 (1955); *Death on the Highways*, 163 J. AM. MED. ASS'N 262 (1957). The *Death on the Highways* article explained the value of the testing at Cornell:

> Experimental tests at Cornell University and the careful investigation of recent highway accidents have demonstrated the real values of such safety devices as seat belts, crash padding, safety door locks, and collapsible steering wheels. It is to be hoped that these safety features are only the beginning of a new era in basic automobile design. Fundamental standard equipment should be designed in full recognition of the fact that every car may be involved, quite innocently, in a serious crash or roll over.

Id. at 262.

233. *E.g.*, SILBER, *supra* note 208, at 93–99 (discussing automobile safety legislation of the 1960s).

the front page of the *New York Times* just a few years before[234]—was tied to a spate of serious, occasionally fatal blood disorders.[235] Meanwhile, a defective batch of polio vaccine manufactured by Cutter Laboratories in 1955 infected many children with the disease the vaccine was intended to prevent.[236] This tragedy led to a civil action and a plaintiffs' verdict on a breach of warranty claim against Cutter (notwithstanding a lack of privity), which was affirmed by a California Court of Appeal in 1960.[237] And perhaps most strikingly, in 1961 it became apparent that the anti-morning sickness drug thalidomide had resulted in serious birth defects, such as deformed limbs, in some of the children borne by women who used it.[238] Thalidomide never had been licensed for use in the United States, a close call that owed to the skepticism of a Food and Drug Administration reviewer.[239] Nevertheless, some samples had been distributed to doctors, leading to a small number of "thalidomide babies" being born in this country.[240]

By the early 1960s, these seriatim revelations had started to instill in many consumers a healthy skepticism regarding the safety of the products they used[241] and an enhanced appreciation of the available legal remedies when seemingly safe products proved to be anything but. The existence of unsafe products was nothing new; but expectations had changed. Earlier products cases such as *Winterbottom* and *MacPherson* establish that at least some consumers had long appreciated a possible tort claim

234. William L. Laurence, *"Wonder Drug," Foe of Plagues, is Made Artificially in Quantity*, N.Y. TIMES, Mar. 27, 1949, at 1.

235. *Continued Use of Chloromycetin Permitted, But Label Must Carry Warning to Physicians*, N.Y. TIMES, Aug. 14, 1952, at 30; *U.S. Warns Doctors on Chloromycetin*, N.Y. TIMES, Jul. 5, 1952, at 4; *see also New Light on the Wonder Drugs*, CHANGING TIMES, Dec. 1953, at 35.

236. Note, *The Cutter Polio Vaccine Incident: A Case Study of Manufacturers' Liability Without Fault in Tort and Warranty*, 65 YALE L.J. 262, 262 (1955).

237. Gottsdanker v. Cutter Labs., 6 Cal. Rptr. 320, 323, 326 (Cal. Dist. Ct. App. 1960).

238. John Lear, *The Unfinished Story of Thalidomide*, SATURDAY REV., Sept. 1, 1962, at 35, 35.

239. ROBERT N. MAYER, THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE 27 (1989).

240. Carl Zimmer, *Answers Begin to Emerge on How Thalidomide Caused Defects*, N.Y. TIMES, Mar. 16, 2010, at D3.

241. This skepticism was buoyed by Vance Packard's *The Hidden Persuaders*, a 1957 bestseller on "[t]he use of mass psychoanalysis to guide campaigns of persuasion." VANCE PACKARD, THE HIDDEN PERSUADERS 1 (1957). *The Hidden Persuaders* spent almost a year on the *New York Times* best-seller list. Richard Severo, *Vance Packard, 82, Challenger of Consumerism, Dies*, N.Y. TIMES, Dec. 13, 1996, at B16.

when a product unaccountably failed on them.[242] The prevalence of cases involving adulterated food products from the early 1900s onward signified the more widespread recognition of a particularly pungent and obvious class of claims.[243] As a further step in this progression, during the 1950s and 1960s consumers gravitated toward a view that manufacturers of a broad range of products owed them a responsibility to make safer products, that many products *could* be made safer, and that some unsafe products were—in the words of *Consumer Reports*' test results—not just to be avoided, but categorically "not acceptable."[244]

This enhanced claim consciousness, and its connection to both the trends of the time and the high-profile cases of the era, were captured by United States Supreme Court Associate Justice Robert Jackson in his dissent in *Dalehite v. United States*, a Federal Tort Claims Act case decided by the Court in 1953:

> This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being.

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242. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.); 10 M. & W. 109; MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

243. *See supra* notes 106–16 and accompanying text.

244. *See* ARWEN P. MOHUN, RISK: NEGOTIATING SAFETY IN AMERICAN SOCIETY 236–37 (2013) (discussing the emergence of this perception by the mid-1960s); *Nat'l Comm'n on Product Safety: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, 90th Cong. 9–11 (1967) (relating the types of products found "not acceptable" by Consumers Union between 1956 and 1966, and the reasons for this rating). This progression did not operate at an even pace across claims. Design defect claims tended to be more difficult for juries to appreciate:

> [I]n the design cases, particularly those involving widely-used products made by established manufacturers, judges and juries have been understandably hesitant to impose liability. This hesitation results partly from a reluctance to let a jury pass on a product prepared by experts in the field, and partly from a realization that a judgment for a particular plaintiff may open the door to many additional claims and suits. Occasionally there has been apprehension that a judgment for the plaintiff will necessitate extensive remodeling, or perhaps even removal from the market of some much-used and widely-advertised product, with serious consequences to both the manufacturer and his employees.

Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 816 (1962).

> Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.[245]

In short, by the time President Kennedy proposed a bundle of modest consumer-protection measures to Congress in 1962,[246] ushering in a decade of legislative innovation in this sphere,[247] a growing number of American consumers had learned to "name" their products-related injuries and were prepared to "blame" these injuries on manufacturers and others within the supply chain.[248] And as these consumers came to appreciate the possibility of legal redress for a growing array of products-related injuries, they could consult an increasingly sophisticated and well-organized pool of plaintiff's attorneys, who had reasons of their own for pursuing products claims.

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245. Dalehite v. United States, 346 U.S. 15, 51–52 (1953) (Jackson, J., dissenting).

246. CONSUMERS' PROTECTION AND INTEREST PROGRAM, *supra* note 71, at 2.

247. *See* COHEN, *supra* note 203, at 345–63 (discussing the consumer movement of the 1960s and 1970s and its origins).

248. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635 (1980–81); *see also* Rabin, *supra* note 200, at 14 (discussing the "removal of intangible barriers to claims consciousness" as a factor in the strict products liability revolution). Of course, this transformation was a gradual one, and the events of the 1950s simply laid a foundation for further evolution. The skepticism with which some early 1960s juries greeted products cases underscores that not every product-related injury was tethered to the product's manufacturer. *See* MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960–1979, at 42–44 (1982) (discussing the low success rate of Cook County plaintiffs in products cases during the early 1960s). *But see* MICHAEL G. SHANLEY & MARK A. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959–1980, at 54–55 (1983) (noting the high success rate among early 1960s products-liability plaintiffs in San Francisco). For an example of burgeoning claim consciousness within a particular milieu, see RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910, at 191–95 (1992) (attributing an increase in personal-injury lawsuits in New York City in the late 1800s and early 1900s to greater claim awareness among plaintiffs).

B. The Rise of Sophisticated Plaintiffs' Counsel

Personal injury lawyers, like attorneys generally, gravitated toward professional associations in the post-World War II era.[249] In 1946, eleven plaintiffs' workers' compensation attorneys formed the National Association of Claimants' Compensation Attorneys, or NACCA.[250] This organization soon expanded to serve the entire plaintiffs' personal-injury bar.[251] By 1956 the NACCA claimed 8,300 members across forty-four state branches and affiliates, and its flagship publication, the *NACCA Law Journal*, had a circulation of around 10,000.[252]

The law journal represented part of the NACCA's larger educational mission. It and another publication produced by the organization, the *NACCA News Letter*, informed readers of recent appellate opinions and lucrative jury verdicts, and offered tips on pleading, discovery, and trial techniques.[253] To similar effect were educational tours of the nation by some of the leaders of the organization, most notably Melvin Belli.[254] The San Francisco attorney and author of the multi-volume series *Modern Trials*[255] estimated in 1954 that over the preceding four years, he had addressed audiences in all but three states.[256] Also, each year the NACCA held an annual convention and pre-convention that functioned as a networking session, teaching seminar, and call to arms.[257] Nearly

249. Membership in the American Bar Association also swelled during this period. The ABA's membership rose from 34,134 as of July 1, 1945, *Report of the Special Committee on Membership*, 71 ANN. REP. A.B.A. 246, 246 (1946), to more than 100,000 in 1961, *Report of the Standing Committee on Membership*, 86 ANN. REP. A.B.A. 533, 533 (1961).

250. RICHARD S. JACOBSON & JEFFREY R. WHITE, DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE 8–11 (2004); Thomas F. Lambert, Jr., Editorial, *NACCA—Rumor and Reflection*, 18 NACCA L.J. 25, 26–27 (1956); *see also* WITT, *supra* note 9, at 240–46 (summarizing the history of the NACCA). In 1960, the NACCA changed its name to the National Association of Claimants' Counsel of America. *Id.* at 242. In 1964, it changed its name again, this time to the American Trial Lawyers Association. *Id*. Today, the organization is known as the American Association for Justice.

251. Lambert, *supra* note 250, at 27–28.

252. JACOBSON & WHITE, *supra* note 250, at 23; Lambert, *supra* note 250, at 27–28. The organization would continue to grow. By 1966, it claimed approximately 20,000 members. William E. Knepper, *About Tomorrow's Tort Trends*, 18 SYRACUSE L. REV. 1, 1 (1966).

253. *See* Lambert, *supra* note 250, at 30.

254. WITT, *supra* note 9, at 241–42.

255. For discussions of Belli and his work during this period, see Marshall A. Bernstein & Robert M. Landis, Modern Trials *by Melvin Belli*, 104 U. PA. L. REV. 129 (1956) (book review); Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637 (2009).

256. Robert Wallace, *The King of Torts*, LIFE, Oct. 18, 1954, at 71, 80.

257. *See* WITT, *supra* note 9, at 241–43 (describing these conventions).

verbatim transcripts of these proceedings were stitched together into book form and made available for purchase.[258]

One of the NACCA's priorities involved products-liability reform, and in particular, elimination of the privity requirement.[259] The NACCA fostered in its members a sense that by taking products-liability cases and arguing for doctrinal change, they could do good while doing well. Arnold Elkind, a prominent NACCA member,[260] summarized both the altruistic and the selfish reasons for bringing products cases in a speech to the American Bar Association's Section on Insurance, Negligence and Compensation Law in 1957.[261] Elkind told his audience that "there is a public service element involved. There is the satisfaction that by your lawsuit you are protecting consumer [*sic*], and frequently such a result obtains even though the lawsuit is unsuccessful."[262] Also, and probably of at least equal significance:

> On the practical side, we have found that the recoveries in such lawsuits represent satisfactory compensation for damage sustained more frequently than in the average case. We believe that this is so because first, there is usually absolutely no question of contributory negligence; secondly, there is a dramatic contrast between the innocent plaintiff and the profit-hungry manufacturer. If pressed, I would have to admit that in the capably tried products liability case there is probably an element

258. *E.g.*, TRIAL AND TORT TRENDS (Melvin M. Belli ed., 1956).

259. *See, e.g.*, Thomas F. Lambert, Jr., Editorial, *Touchstones of Tort Liability*, 24 NACCA L.J. 25, 25–26 (1959).

260. Elkind would later helm the National Commission on Product Safety. Eric Pace, *A.B. Elkind, A Lawyer, Panel Chief and Writer, 80*, N.Y. TIMES, Dec. 23, 1996, at B10.

261. Arnold B. Elkind, *Reflections of a Plaintiff's Lawyer on Manufacturers' Liability Cases*, 1957 A.B.A. SEC. INS. NEGL. & COMPENSATION L. PROC. 50.

262. *Id.* at 53. In their attractiveness to plaintiffs' lawyers, products-liability cases might be contrasted with slip-and-falls—frequently identified as least-loved component of a lawyer's caseload. *E.g.*, Robert G. Begam, *Slip and Fall*, *in* AMERICAN TRIAL LAWYERS ASSOCIATION (FORMERLY NACCA) NINETEENTH ANNUAL CONVENTION 1965, at 674, 674 (Jean Martin ed., 1966) ("The 'slip and fall' is the Cinderella of torts, and the stepchild of personal injury litigation. It is the case that can't be settled, except for nuisance value, and which can't be won if tried. Therefore, it is the case that no lawyer wants."); Thomas F. Lambert, Jr., *From the Editor's Scratch Pad*, NACCA NEWS LETTER (Boston, Mass.), May 1964, at 99, 99 ("There is a wearisome sameness in slip-&-fall cases, & after a while experienced trial lawyers can work them up by a kind of genetic awareness. But they remain important not only because of their recurrence (they rank next to automobile accidents in incidence), but because they can be singularly tough cases to win.").

> of penal damages which enters into the deliberations of the jury in fixing compensation.[263]

Other NACCA presentations also stressed the lucrative possibilities presented by products cases.[264] Attendees at the 1958 NACCA annual convention, for example, were advised of a recent Missouri decision in a products-liability matter, "a wonderful case" that, the speaker advised, was

> interesting on the damages point, too, because they gave an award of $85,000 to a woman claimant. And the court entered a remittitur and sliced her down to $65,000. But we have been advised that, even as reduced to $65,000, it is the largest award sustained for a woman claimant in Missouri.[265]

Three conventions later, a speaker reminded attendees that "products liability cases today, properly prepared, are bringing among the highest of damage awards."[266] Data bore out this assertion; just as the California Supreme Court was handing down its *Greenman* decision,[267] a report on jury verdicts calculated an average verdict of $25,879 in products-liability cases in which the plaintiffs had prevailed, as compared to an average plaintiff's verdict of $11,473 in personal-injury cases generally.[268]

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263. Elkind, *supra* note 261, at 53.

264. In emphasizing the large awards issued in a handful of products cases, these speakers may have deliberately or inadvertently sidestepped the fact that products cases could be a tough sell to juries. *See* PETERSON & PRIEST, *supra* note 248, at 42–44 (discussing plaintiffs' poor winning percentage in products-liability trials in Cook County, Illinois during the 1960s and 1970s, but also noting the large judgments that plaintiffs sometimes received in these cases).

265. Thomas F. Lambert, Jr., *Torts, Prospects and Retrospects*, *in* NACCA TWELFTH ANNUAL CONVENTION 1958, at 1, 9 (The Convention Comm. ed., 1958).

266. Louis R. Frumer, *Recent Product Liability Highlights*, *in* NACCA FIFTEENTH ANNUAL CONVENTION 1961, at 417, 417 (1962). These cases were not necessarily cheap to prosecute. One attorney estimated in 1969 that the costs incurred by a plaintiff in a mine-run products case, independent of legal fees, normally exceeded $5,000. NAT'L COMM'N ON PRODUCT SAFETY, HEARINGS 488 (1970) (statement of James J. Reidy).

267. Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963).

268. Wallace E. Sedgwick, *Products Liability: Trial Problems in Warranty* Cases, 30 INS. COUNS. J. 616, 616 (1963). A study of Chicago jury verdicts in tort cases tried during this time frame also revealed higher average verdicts in products-liability lawsuits than in any other class of tort suits. PETERSON & PRIEST, *supra* note 248, at 24–26. *But see* SHANLEY & PETERSON, *supra* note 248, at 18 (describing products-liability lawsuits as "modest-payoff" cases for plaintiffs in San Francisco courts, based on a study of jury verdicts rendered in that city between 1960 and 1979). Shanley and Peterson do observe, however, that "[u]nlike other types of cases, product liability suits always had a few very large awards," even in the early 1960s. *Id.* at 54.

The NACCA's publications, training curriculum, networking opportunities, and other offerings sought to help members overcome the practical issues associated with recognizing and trying products cases. In the 1950s and early 1960s, appellate decisions that chipped away at privity requirements in warranty cases received close attention in the *NACCA Law Journal*.[269] Annual meetings commonly featured sessions in which attorneys shared tips on handling products-liability matters.[270] Leading cases were promoted at these meetings as "wedges" for further doctrinal change in the products field.[271] Other speakers encouraged plaintiffs' attorneys to pursue novel products-liability claims. One speech given at the NACCA's annual convention in 1954, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles*, urged attendees to incorporate design-defect allegations into their automobile-accident cases.[272] "As lawyers, our inquiry in automobile accident cases has been directed toward determining the cause of the accident," the speaker advised, "to the exclusion of the equally pertinent question as to whether the injuries may have resulted from the design of the vehicle in which our client was riding in addition to the fact of the collision."[273] A few years later, the organization initiated a products-liability "exchange" whereby members could share pleadings, briefs, and information regarding experts and individual products.[274] In launching the exchange, the NACCA's

269. *E.g.*, Thomas F. Lambert, Jr., *Comments on Recent Important Personal Injury (Tort) Cases*, 25 NACCA L.J. 47, 84–91 (1960) (discussing B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959)); *id.* at 94–95 (discussing Peterson v. Lamb Rubber Co., 343 P.2d 261 (Cal. 1960)).

270. *E.g.*, *Products Liability*, *in* NACCA TWELFTH ANNUAL CONVENTION 1958, *supra* note 265, at 290, 305 (1958) (comments of Melvin Belli) (encouraging plaintiffs' attorneys to plead several causes of action in products-liability cases, as they were "on the frontier of something new"); *see also* TRIAL AND TORT TRENDS: 1957 BELLI SEMINAR 86–89 (Melvin M. Belli ed., 1958) (relating a free-ranging discussion about products liability among several NACCA attorneys); TRIAL AND TORT TRENDS: 1958 BELLI SEMINAR 50–57 (Melvin M. Belli ed., 1959) (discussing warranty cases).

271. *Products Liability*, *supra* note 270, at 308 (comments of Melvin Belli).

272. Harold A. Katz, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles*, *in* TRIAL AND TORT TRENDS: THE 1955 NACCA CLEVELAND CONVENTION PROCEEDINGS 903 (Melvin M. Belli ed., 1956).

273. *Id.* at 904.

274. Paul D. Rheingold, *NACCA Products Liability Exchange*, *in* NACCA SIXTEENTH ANNUAL CONVENTION 1962, at 359, 359–64 (1963); Alfred S. Julien, *President's Column*, NACCA NEWS LETTER (Boston, Mass.), Sept. 1958, at 1, 2 (discussing the creation of the products-liability exchange).

president advised the organization's members that "no one need ever again feel alone in his professional tasks in the tort field."[275]

This increasingly well-organized plaintiff's personal-injury bar helped catalyze and capitalize upon the caselaw breakthroughs of the early 1960s.[276] Attorneys increasingly framed their products cases with an eye toward prompting doctrinal change. For example, Martin Itzikman, the attorney who tried the *Henningsen* case for the plaintiffs, perceived in the matter an opportunity to make new law.[277] Working toward this same goal, Bernard Chazen, an NACCA member who argued the *Henningsen* appeal for the plaintiffs, incorporated within the plaintiffs' opening appellate brief excerpts from both the Prosser and the Harper and James treatises in which the authors criticized a rigid privity requirement in warranty cases.[278] Then, when the New Jersey Supreme Court sided with the *Henningsen* plaintiffs,[279] the NACCA's publications arm immediately broadcast the decision to its members. The July 1960 *NACCA News Letter* announced that

> The New Jersey Supreme Court, on May 9, 1960, in a masterly opinion by Justice Francis, handed down a decision which is not only a milestone, landmark and turning point in the history of products liability but also one of the finest accomplishments of the judicial process in our generation.[280]

The *NACCA Law Journal* similarly described *Henningsen* as "a milestone, turning point and breakthrough in the law of products liability."[281] Later that year, Chazen and another attorney who also worked on the *Henningsen* appeal told attendees at the NACCA's annual convention that the opinion was "[l]ike a new star in the skies."[282]

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275. Julien, *supra* note 274, at 2.

276. *See* Knepper, *supra* note 252, at 2 (discussing the efforts of the plaintiffs' bar during this period).

277. Interview with Martin Itzikman, Jan. 9, 2014; Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 72 (N.J. 1960).

278. Brief for Plaintiffs as Cross-Appellants 18–21, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (1960) (No. A-185-58); HARPER & JAMES, *supra* note 100, § 28.16; PROSSER, *supra* note 75, § 84.

279. *Henningsen*, 161 A.2d at 102.

280. Thomas F. Lambert, Jr., *From the Editor's Scratch Pad*, NACCA NEWS LETTER (Boston, Mass.), July 1960, at 3, 3.

281. Lambert, *supra* note 269, at 96.

282. Nathan Baker & Bernard Chazen, *The* Henningsen *Case: A Landmark in Products Liability*, *in* NACCA FOURTEENTH ANNUAL CONVENTION 1960, at 588 (1961).

Armed with *Henningsen*, plaintiffs' attorneys filed an unprecedented number of products-liability actions across the nation.[283] As early as 1961, a former NACCA president said that the field was "widening so rapidly that it is difficult to keep up with the march of citations."[284] By 1963, a defense attorney would describe products liability as "the fastest growing, the most controversial and probably the most important field in tort law and casualty insurance today."[285] On this point, the attorney related the findings of a recent study that had detected an uptick in products-liability lawsuits.[286] The authors of the report attributed this spike to "(1) relaxation of the privity requirement in many jurisdictions, and (2) increased awareness and use of the breach of warranty cause of action."[287]

Plaintiffs' lawyers redoubled their efforts after the *Greenman* decision and the promulgation of §402A, as the products-liability terrain shifted away from a warranty framework and toward a more "pure" tort-law approach.[288] The overlapping nature of warranty and tort in the products-liability context encouraged these attorneys to dangle §402A bait in front of courts that already had bit on warranty. After all, it cost very little to allege an additional theory of recovery in these cases.[289] As early as 1958, Melvin Belli had advised his colleagues at the NACCA annual convention to allege as many as six or seven causes of action in a products case: a specific act of negligence, res ipsa loquitur, express and implied warranty, "absolute liability," a violation of any pertinent statute, and a failure to warn claim.[290] The availability of multiple possible defendants

283. Jack L. Kroner, Michael Pantaleoni, Leonard J. Koerner & Kenneth A. Mutterperl, *Torts*, 1966 ANN. SURV. AM. L. 209, 224 (1967) ("[I]n the mere six years following *Henningsen*, over 200 decisions in more than thirty states have adopted strict liability." (footnotes omitted)).

284. Alfred S. Julien, *Trial Techniques*, *in* NACCA FIFTEENTH ANNUAL CONVENTION 1961, at 403, 403 (1962).

285. Sedgwick, *supra* note 268, at 616.

286. *Id.*

287. *Id.*

288. JACOBSON & WHITE, *supra* note 250, at 98–99 (discussing the ubiquity of NACCA members in lobbying courts to adopt strict products liability).

289. *See Products Liability*, *supra* note 270, at 305 (comments of Melvin Belli) (discussing the strategy of pleading a products-liability case).

290. *Id.*; *see also* TRIAL AND TORT TRENDS: 1958 BELLI SEMINAR, *supra* note 270, at 50–51 (also relating this presentation). Tellingly, Belli did not include a design-defect claim within this mix, underscoring its marginal status as of that time. *Cf.* Kenneth A. Parker, Lawrence S. Horn, Howard P. King & Edward J. Trieber, *Torts*, 1967 ANN. SURV. AM. L. 191, 217 (1968) (observing that design-defect cases are "still predicated upon the theory of negligence" and that there was a "low rate of recovery in this area of products liability law"); Kroner et al., *supra* note 283, at 210 ("As a practical matter, it is probably a good deal more difficult to convince a judge to permit a jury to decide a design issue, as distinguished from a

in many products cases also encouraged innovation. Even where courts had not adopted broadened warranty protections, if the plaintiff had purchased the offending item the retailer (at a minimum) represented a viable defendant under existing law.[291] With at least *some* recovery likely, it cost the plaintiff relatively little to add the manufacturer or wholesaler as a defendant, and to tack on a strict-liability tort claim as to all of the allegedly responsible parties.[292]

The discussion above provides a different way of understanding the switch to strict products liability. Academics conceived of products liability and defined its contours; judges adopted it. The prevailing narrative ends there. But the contributions of plaintiffs and their attorneys also must be acknowledged, since they provided the lifeblood for this transformation in the law. Without their cases, academics and judges would have little motivation to innovate, and no material with which to work. And while it is easy to assume that plaintiffs and their attorneys will rally around every liability-enhancing reform—an "if you build it, they will come" approach to doctrinal change—this is not in fact the case. Plaintiffs do not appreciate each and every cause of action that may arise,[293] and may abandon even well-recognized torts.[294] Likewise, attorneys may turn their backs on or decline to cultivate causes of action that do not appear to be especially lucrative.[295] In this respect, the proliferation of strict products liability may owe as much to its literal

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construction issue, and to get a jury to decide a design issue against a defendant, because of the relatively esoteric nature of the question . . . .").

291. *See* Lambert, *supra* note 269, at 97–98.

292. *See* Graham L. Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1, 1–2 (1960).

293. *See* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 121–23 (1991) (finding a marked difference in claiming tendencies between persons injured in automobile accidents on the one hand, and persons injured in different circumstances on the other); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099–103 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183–86 (1992) (reviewing several studies regarding injury awareness and claiming patterns among prospective and actual plaintiffs).

294. *See generally* Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359 (2008) (discussing the disappearance of various tort theories due to abolition, abandonment, or other reasons).

295. *See* Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 154 (2014) (discussing the damages threshold under which plaintiffs' attorneys, per their survey responses, will not accept a medical-malpractice case).

value, from the perspective of attorneys, as to its expressive value, in the minds of judges.

At the same time, not all mid-century products lawsuits placed equal pressure on existing doctrine. Some types of cases made the argument for a strict-liability approach better than others did. The next section of this Article discusses another way to view the products-liability revolution, as a practical response to the challenges presented by particular case tropes that appeared often at mid-century, if not today.

IV. THE PRACTICAL NARRATIVE: "BOTTLE CASES" AND THEIR DISCONTENTS

In hindsight, it seems odd that courts adopted strict products liability as quickly as they did, given the relative rarity of these cases at the time of this transition. According to one study, between 1955 and 1970, products liability and malpractice cases, combined, amounted to only 1.6% of all cases heard by a surveyed subset of the nation's state supreme courts.[296] Products cases were not especially common at the trial-court level, either; one study of case outcomes in Los Angeles Superior Court in 1961 and 1962 identified only fifteen warranty cases among the 945 jury verdicts rendered in tort matters during that span.[297]

That courts nevertheless rushed en masse toward strict liability to the consumer suggests that either they perceived products cases as more common than they actually were or that they regarded the issues presented by these cases as particularly troubling or significant. On the latter point, prevailing explanations of strict products liability's rise attribute judicial enthusiasm for this reform to a sense that it perfectly captured the intellectual and social zeitgeist.[298] Judges had to sign on, lest they were to appear behind the times.[299]

Such sentiments probably did influence many judges. Yet there existed another, more practical reason for courts to adopt an unvarnished

296. Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 145 (1977).

297. *Los Angeles Jury Verdicts for 1961–1962 Summarized*, L.A. DAILY J., Mar. 25, 1963, at 1. Per this tabulation, automobile cases dominated the Superior Court's docket. *Id.* Warranty cases also were outnumbered by slip-and-falls, malpractice cases, and construction accidents. *Id.*; *see also Jury Verdict Chart for 1954–57 Shows L.A. County Recoveries*, METROPOLITAN NEWS (L.A.), Apr. 22, 1958, at 1 (showing only a handful of warranty cases among Los Angeles Superior Court cases with reported jury verdicts during the 1954–1957 time frame).

298. Priest, *supra* note 7, at 518–19.

299. *Id.* at 519.

exception to the prevailing negligence rule. While strict products liability, whether framed in tort or in warranty, had much to commend it from a broad policy perspective, it also had certain practical (if less revolutionary) advantages over a negligence regime, especially as applied to certain case types that appeared quite often before mid-century judges. Most notably, strict products liability averted the thorny problems that could arise with proving a particular defendant's fault when there existed multiple parties in the supply chain and a product that could have been compromised anywhere between the points of manufacture and sale.

This advantage represented an essential component of the reformist pitch for strict liability. Here, consider once again Prosser's discussion in his *Assault upon the Citadel* article of the specific problems associated with applying the negligence rule to products cases.[300] In relating his concerns, Prosser's usual talent for drumming up string citations to hammer home a point momentarily deserted him. Prosser cited only one case for the proposition that the product's manufacturer may be outside the jurisdiction, and just one other for the principle that the manufacturer may be unknown.[301] But when it came to the problem of proving negligence on the part of a particular defendant in the supply channel, Prosser had no trouble producing a hypothetical with a lengthy list of citations.[302] These cases all involved a single product: glass beverage bottles that had exploded, shattered, or chipped.[303]

Prosser wisely relied upon breaking bottles to advance his argument for strict products liability, as Traynor had done sixteen years earlier in his *Escola* concurrence.[304] Bottle lawsuits neatly captured the intractable

300. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1116.

301. *Id.* at 1116 nn.125–26.

302. *Id.* at 1116 n.127.

303. *Id.*

304. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring); Prosser, *Assault upon the Citadel*, *supra* note 84, at 1120. Likewise, Harper and James would rely on exploding bottles as a paradigm example of the problems that could be associated with proving a particular defendant's negligence in a products case. HARPER & JAMES, *supra* note 100, § 28.14. Other commentators of that era made similar observations. One noted:

> A classic example of the difficulties involved in actions based on negligence is pointed up in the exploding bottle claims. It is quite generally accepted that the almost complete impossibility of proving negligence in such suits together with the lack of privity of contract upon which to base a breach of warranty action, is responsible for the trend towards adoption of the res ipsa loquitur doctrine in many states.

Gleason, *supra* note 84, at 117; *see also* Fleming James, Jr., *Products Liability* (pt. 1), 34 TEX. L. REV. 44, 74–75 (1955) (using exploding-bottle cases as an example of the difficulties

problems with negligence doctrine as applied to certain products cases, and were common (and factually similar) enough to make these shortcomings apparent to a broad audience.

Though this fact may be difficult to appreciate today, as late as 1969 the humble glass beverage bottle was described by a National Commission on Product Safety official as being among the most dangerous of all household products.[305] And although *Escola v. Coca Cola Bottling Company of Fresno*[306] is the only widely remembered bottle case today, these matters once provided courts with a great deal of business.[307] Stacks of reported cases dealt with the aftermath of a bottle that had cracked or exploded.[308] In the fifteen years prior to 1963, the supreme courts of more than half of the states took up at least one of these matters.[309] Indeed, bottle cases may have been the most common

associated with connecting a product defect to a particular defendant in the supply chain); Robert W. Miller, *Manufacturers' Product Liability Re-Visited*, 23 INS. COUNS. J. 175 (1956) (discussing numerous bottle cases in connection with a more general examination of products liability).

305. NAT'L COMM'N ON PRODUCT SAFETY, *supra* note 266, at 441–42 (testimony of Larry A. Schott) (describing the results of a survey of insurance claims involving household products, which revealed that glass bottles gave rise to the most claims, by far). According to this official, glass bottles were associated with 150,000 injuries a year, 90,000 of which involved children ages 15 or younger. *Id.* at 441; *see also* Paul S. Bergeson, Sally A. Sehring & James R. Callison, *Pop Bottle Explosions*, 238 J. AM. MED. ASS'N 1048, 1049 (1977) ("The problem of explosions of carbonated soft drink bottles is an environmental hazard that has not received adequate attention in the medical literature but appears to be of substantial magnitude.").

306. 150 P.2d 436 (Cal. 1944).

307. *See* Julien, *Trial Techniques*, *supra* note 284, at 404 (describing bottle cases as "a real staple in products liability").

308. In 1960, Roscoe Pound identified 133 published decisions involving exploding bottles, coming from 31 different jurisdictions. Roscoe Pound, *The Problem of the Exploding Bottle*, 40 B.U. L. REV. 167, 169 (1960); *see also* Paul D. Kaufman, *Torts*, 1944 ANN. SURV. AM. L. 938, 954 (1946) ("The bottle cases continue without abatement. Standardization of judicial treatment would seem to be indicated." (footnote omitted)); Lambert, *supra* note 269, at 99 (referencing a "floodtide" of bursting-bottle cases); Walter M. Clark, Note, *The Applicability of the Doctrine of Res Ipsa Loquitur to Cases Involving Bursting Bottles*, 1951 WASH. U. L.Q. 216, 216 ("The past few decades have seen the rise of considerable litigation concerning injuries to persons resulting from bursting or exploding bottles."); C.S. Patrinelis, Annotation, *Res Ipsa Loquitur as Applied to Bursting of Bottled Beverages, Food Containers, Etc.*, 4 A.L.R.2d 466 (1949) (listing bottle cases).

309. At least 28 state supreme courts decided at least one injury-by-bottle case during this span (with only the last decision listed in jurisdictions entertaining more than one of these cases): Alabama (Florence Coca Cola Bottling Co. v. Sullivan, 65 So. 2d 169 (Ala. 1953)); Arkansas (Coca-Cola Bottling Co. of Fort Smith, Ark. v. Hicks, 223 S.W.2d 762 (Ark. 1949)); California (Zentz v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344 (Cal. 1952)); Colorado (Chapman v. Redwine, 370 P.2d 147 (Colo. 1962)); Connecticut (Crisanti v. Cremo Brewing Co., 72 A.2d 655 (Conn. 1950)); Delaware (Ciociola v. Del. Coca-Cola Bottling Co., 172 A.2d

of all products-liability lawsuits during that era.[310] These cases were well

252 (Del. 1961)); Florida (Burkett v. Panama City Coca-Cola Bottling Co., 93 So. 2d 580 (Fla. 1957)); Kansas (Morrison v. Kan. City Coca-Cola Bottling Co., 263 P.2d 217 (Kan. 1953)); Kentucky (Bogie v. Royal Crown Bottling Co. of Danville, 343 S.W.2d 809 (Ky. 1961)); Maryland (Joffre v. Canada Dry Ginger Ale, Inc., 158 A.2d 631 (Md. 1960)); Massachusetts (Selissen v. Empire Bottling Co., 180 N.E.2d 324 (Mass. 1962)); Michigan (Pattinson v. Coca-Cola Bottling Co. of Port Huron, 52 N.W.2d 688 (Mich. 1952)); Minnesota (Johnson v. Coca Cola Bottling Co. of Willmar, 51 N.W.2d 573 (Minn. 1952)); Mississippi (Johnson v. Coca-Cola Bottling Co., 125 So. 2d 537 (Miss. 1960)); Missouri (Maybach v. Falstaff Brewing Corp., 222 S.W.2d 87 (Mo. 1949)); New Hampshire (Smith v. Coca Cola Bottling Co., 92 A.2d 658 (N.H. 1952)); New Jersey (Bornstein v. Metro. Bottling Co., 139 A.2d 404 (N.J. 1958)); New York (Day v. Grand Union Co., 109 N.E.2d 609 (N.Y. 1952)); North Carolina (Graham v. Winston Coca-Cola Bottling Co., 125 S.E.2d 429 (N.C. 1962)); North Dakota (Kuntz v. McQuade, 95 N.W.2d 430 (N.D. 1959)); Oklahoma (Michel v. Branham, 327 P.2d 440 (Okla. 1958)); Oregon (Robertson v. Coca Cola Bottling Co. of Walla Walla, Wash., 247 P.2d 217 (Or. 1952)); Pennsylvania (Braccia v. Coca-Cola Bottling Co. of Philadelphia, 157 A.2d 747 (Pa. 1960)); South Carolina (Boyd v. Marion Coca-Cola Bottling Co., 126 S.E.2d 178 (S.C. 1962)); Tennessee (Coca Cola Bottling Works, Inc., v. Crow, 291 S.W.2d 589 (Tenn. 1956)); Texas (Hankins v. Coca Cola Bottling Co., 249 S.W.2d 1008 (Tex. 1952)); West Virginia (Ferrell v. Royal Crown Bottling Co. of Charleston, W. Va., 109 S.E.2d 489 (W. Va. 1959)); and Wisconsin (Weggeman v. Seven-Up Bottling Co., 93 N.W.2d 467 (Wis. 1958)).

310. To probe this point, a search was conducted of all state supreme court decisions issued between January 1, 1955 and December 31, 1959, that have been tagged with West Reporter Service Key 313A (Products Liability). This query returned 87 decisions, two of which were discarded on the ground that they did not appear to involve any defective products. Notwithstanding the key, some of these decisions were not "true" products-liability cases, in that the gravamen of the plaintiff's claim or claims concerned negligence on the part of a product *user*, rather than a defect in the product itself. Nevertheless, the products involved in these cases provide some indication of the sorts of products-liability claims being pressed at that time. In declining order of frequency with which they appeared, the products associated with these cases were: beverage bottles (fifteen cases); automobiles (eight cases); tractors and tractor accessories (four cases); mink feed, rifles (three cases each); firearm cartridges, liniments (two cases each); antiseptic, a baler, a building truss, carbon tetrachloride, cattle feed, a cautery instrument, cement, cement base paint, a chair, cinder blocks, a concrete mixer, concrete, concrete slabs, an escalator, feed barrels, fish food, flea repellant, floor finish, a furnace, a gas meter, a gas range, gasoline, a glass door, a glass jar, hair dye, a harvester, a house trailer, an ice crushing machine, insecticide, a kerosene wallpaper steaming machine, liquefied natural gas, lockers, a mixer machine, a perfume bottle, a portable grain elevator, a power mower, a refrigerator, sausage, a scaffold, shampoo, a steam pipe, a stepladder, steel, suntan lotion, turkey feed, a valve, wood preservative, and an X-ray cable (one case each).

In an identical search performed on case law issued one decade earlier (i.e., state supreme court cases decided between 1945 to 1949), the proportion of bottle cases among the 48 cases marked with a Products Liability key (one case appearing twice, due to a petition for rehearing) was even more pronounced. Beverage bottles were involved in fifteen of these cases, as compared with automobiles (three cases); pesticide, a water heater (two cases each); an abrasive cutting-off wheel, antifreeze, a baler, a beer barrel, carbon tetrachloride, a cosmetic box, fungicide, a fur collar, a furnace, a gas heater, glass, hair lacquer, hay, hydrofluoric acid, an ice-scoring machine, liquid heat quench, milling machinery, perfume, a portable grain elevator, a rail-support hanger, seed corn drier, shampoo, a stove, stove polish, sulphuric acid, and a vulcanizing machine (one case each).

known among academics and practitioners, too. Numerous law review articles addressed exploding-bottle lawsuits and the problems they presented,[311] and NACCA seminars often included presentations on how to try these matters.[312]

Bottle cases were common throughout the early to mid-1900s because of a robust claim consciousness of the sort discussed in the prior narrative.[313] Glass beverage bottles were ubiquitous from the early 1900s, when new technologies appeared that allowed for their mass manufacture,[314] through the 1970s, when they were overtaken first by aluminum cans equipped with the novel "pop-top" mechanism,[315] and later by plastic containers.[316] Throughout this span, when one of these bottles suddenly ruptured, it was easy for would-be plaintiffs to appreciate that they had suffered an injury attributable to an outside force rather than their own fault.[317] Enough bottles exploded, shattered,

311. *E.g.*, Will D. Davis, Comment, *Liability of Manufacturers of Bottled Beverages*, 5 BAYLOR L. REV. 258 (1953); William E. Night, *Let the Bottler Beware!*, 21 INS. COUNS. J. 72 (1954); Pound, *supra* note 308; Craig Spangenberg, *Exploding Bottles*, 24 OHIO ST. L.J. 516 (1963); Alfred L. Steff, Jr., Comment, *The Exploding Bottle—Why Not Absolute Liability?*, 26 U. PITT. L. REV. 115 (1964); Leon Whitehurst, Jr., Case Comment, *Torts: Res Ipsa Loquitur in Exploding Bottle Cases*, 1 U. FLA. L. REV. 470, 472 (1948) ("[W]ith each new application of res ipsa loquitur the growing majority of American courts move ever nearer to the imposition of absolute liability upon the bottler." (footnote omitted)); *Res Ipsa Loquitur—Explosion of Bottle*, 92 CENT. L.J., 290 (1921); Clark, *supra* note 308.

312. *E.g.*, *Products Liability*, *supra* note 270, at 296–99 (comments of Alfred S. Julien); *see also* J. Campbell Palmer III, *Advances in Exploding Bottle Cases*, NACCA THIRTEENTH ANNUAL CONVENTION 1959, at 191, 192–95 (The Convention Comm. ed., 1960).

313. *See supra* Part III.A.

314. Machinery that could mass-produce glass bottles was invented in 1907. U.S. CONSUMER PRODUCT SAFETY COMM'N, HAZARD ANALYSIS: BOTTLES FOR CARBONATED SOFT DRINKS 1 (1975). Some of these bottles were "returnable." *Id.* The cleaning and reuse of these bottles subjected them to significant wear-and-tear, making them more prone to breakage. *See id.* In 1948, there appeared "nonreturnable" bottles, which avoided the problems of reuse, but at a price. Nonreturnable bottles were made of thinner glass, and may have been more likely to explode upon initial use. *Id.*

315. E.C. Fraze invented a practical pull-top for beverage canisters in 1962. 2 PHAIDON DESIGN CLASSICS 592 (2006); Alfonso A. Narvaez, *E.C. Fraze, 76; Devised Pull Tab*, N.Y. TIMES, Oct. 28, 1989, at 11. This invention (and its successor, the ring top) solved a problem that, up to that point, had prevented the widespread use of metal cans as beverage containers.

316. Glenn Fowler, *N.C. Wyeth, Inventor, Dies at 78; Developed the Plastic Soda Bottle*, N.Y. TIMES, July 7, 1990, at 12. Today, soda sold in glass bottles accounts for only two percent of all soda sales. Paul Ziobro, *Glass Bottles Lend Pop to Soda Makers*, WALL ST. J., June 24, 2013, at B3.

317. Once these cases started to appear, there may have been a "snowball effect," with other would-be plaintiffs and their attorneys becoming conditioned to regard bottlers and bottle manufacturers as entities amenable to suit. *Cf.* TRISTAN DONOVAN, FIZZ: HOW SODA

or chipped to inflict a substantial number of cut fingers and gouged eyes,[318] but not so many that people appreciated these harms as the price paid for a "pause that refreshes."[319] Quite the contrary; these injuries seemed completely at odds with the pleasant messages conveyed by beverage companies' omnipresent advertising.[320] Finally, the popularity and notoriety of a related variety of lawsuit, the "mouse in a bottle" adulterated-beverage claim, may have conditioned prospective plaintiffs and their lawyers to regard bottlers as entities susceptible to suit in tort.[321]

Given these circumstances, people seriously injured by glass bottles readily appreciated that they might have a claim and found lawyers to take their cases.[322] But regardless of whether a plaintiff sued the bottle's manufacturer, the bottler who filled it with a drink, the retailer who sold

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SHOOK UP THE WORLD 77–78 (2014) (discussing various types of claims brought against soda bottlers, and the bottlers' response). One datapoint that suggests that people injured by bursting bottles were especially cognizant of the possibility of recovery involves the frequency with which these individuals filed insurance claims. At least in the 1960s, people injured by bottles appear to have filed more insurance claims, on a per-injury basis, than people injured by other products. *See* NAT'L COMM'N ON PRODUCT SAFETY, *supra* note 266, at 447 (statement of Larry A. Schott) (discussing how far more insurance claims were filed for injuries associated with glass bottles than were filed for injuries associated with power lawn mowers, even though the two types of products produced roughly equal injury tolls.).

318. *E.g.*, Weggeman v. Seven-Up Bottling Co., 93 N.W.2d 467, 471 (Wis. 1958) (referencing a damages demand of $31,537 in an exploding-bottle case where the glass had put out a child's eye); 10 AM. JUR. TRIALS *Exploding Bottle Litigation* § 3 (1965) (discussing the types of injuries that appeared in exploding bottle cases); Morton Mintz, *Insurers Report High Claims of Injury by Exploding Bottles*, WASH. POST, July 30, 1969, at A2 (discussing the injuries that children had suffered due to exploding or broken bottles).

319. Andrew Dingwall, *Exploding Bottles*, 11 NACCA L.J. 158, 170 (1953) ("[T]he public knows nothing of 'the idiosyncrasies of glass' especially with regard to internal damage and does not expect to handle beverage bottles with all the tenderness of a new father for his first born child."); *see also* NAT'L COMM'N ON PRODUCT SAFETY, *supra* note 266, at 567–68 (statement of Owens-Illinois, Inc.) (observing that Owens-Illinois bottles were involved in approximately twelve billion soft drink and beer bottle "usages" annually between 1965 and 1968, but the company encountered fewer than ninety bottle claims and lawsuits each year).

320. For an example of judicial notice being taken of soda companies' prolific advertising campaigns, see *Le Blanc v. Louisiana Coca Cola Bottling Co.,* 60 So. 2d 873, 874–75 (La. 1952).

321. *See* DONOVAN, *supra* note 317, at 77–78 (discussing the various types of lawsuits alleged against soda bottlers, and the bottlers' response).

322. More speculatively, the abundance of published appellate decisions that involved bottle cases also may have owed to particularly aggressive defenses put on in these matters. A plaintiff's attorney testified before the National Commission on Product Safety in 1969 that the defendants in bottle cases "generally don't settle them," partially because "it was very difficult to prove" these cases—at least, prior to the adoption of strict liability in tort. NAT'L COMM'N ON PRODUCT SAFETY, *supra* note 266, at 484–85 (testimony of James J. Reidy).

the product,[323] or some combination of these defendants, she usually had a tough row to hoe in proving negligence.[324] Even assuming a jurisdiction had adopted the *MacPherson* doctrine, removing privity as an issue in most negligence cases,[325] the mere fact of a broken or exploding bottle did not necessarily spell negligence on the part of the manufacturer, bottler, or retailer, either individually or collectively. Each of these defendants could point a finger at the others (or at the plaintiff) as the culpable parties, and even a bottle that had been created, cleaned, filled, and inspected with care could break or explode for unknown reasons.[326]

Many of these bursting-bottle plaintiffs, lacking a clear act of negligence to focus upon, sought to rely on res ipsa loquitur as a path toward recovery.[327] These litigants encountered several difficulties. The offending bottle typically had gone through the hands of several actors as part of the supply chain, and the plaintiff herself often had custody of the bottle for some time prior to its rupture. These facts meant a given

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323. Of these possible defendants, bottlers were identified as plaintiffs' "prime target" in bottle cases. *Exploding Bottle Litigation*, *supra* note 318, § 27. This same resource described suits against bottle manufacturers as rare, due to jurisdictional issues that sometimes appeared, and difficulties associated with proving the manufacturer's fault. *Id.* § 14. As for retailers, "[a]s a tactical matter a plaintiff suing the bottler on a negligence theory will often join the retailer as a defendant on a warranty theory," for reasons including the fact that "[t]he memory of the retailer's clerks . . . is often greatly improved under these circumstances." *Id.*

324. Gleason, *supra* note 84, at 117; Clark, *supra* note 308, at 216 ("In order to recover from the manufacturer, a person so injured is confronted with a serious proof problem.").

325. For a sample of the many cases that expressly rejected a privity requirement in bottle cases sounding in negligence, as opposed to warranty, see Macres v. Coca-Cola Bottling Co., 287 N.W. 922, 925–26 (Mich. 1939); Stolle v. Anheuser-Busch, 271 S.W. 497, 499 (Mo. 1925); Smith v. Peerless Glass Co., 181 N.E. 576, 577 (N.Y. 1932); Grant v. Graham Chero-Cola Bottling Co., 97 S.E. 27, 28–29 (N.C. 1918).

326. *See* Dingwall, *supra* note 319, at 167–70 (discussing the difficulties associated with detecting a defective bottle). Most plaintiffs' attorneys focused blame on the soda bottler, rather than the manufacturer of the bottle or the retailer. *Products Liability*, *supra* note 270, at 296–97 (comments of Alfred S. Julien). Among the errors attributed to the bottler, it was believed that methods used to clean returnable bottles introduced "chattersleek," a scoring of their interiors that might make them prone to explode upon reuse. *Id.*; *see also* 33 AM. JUR. PROOF OF FACTS 2D, *Due Care in Handling Bottle Containing Carbonated Beverage* § 1 (1983) (discussing the various ways in which the integrity of a glass bottle can become compromised); Dingwall, *supra* note 319, at 167–69 (same).

327. The doctrine of res ipsa loquitur permits an inference (or, in some jurisdictions), a presumption of negligence upon the satisfaction of three conditions:

> (1) [T]he accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 42.

defendant lacked the "exclusive control" of the harm-causing instrumentality that courts traditionally demanded as a prerequisite for application of res ipsa loquitur.[328]

Unsurprisingly, some judges tinkered with existing doctrine to provide a remedy, or at least a jury, to sympathetic plaintiffs.[329] Writing in 1960, Roscoe Pound identified seven different approaches courts had taken to the negligence issue in exploding bottle cases.[330] Several of these approaches liberalized res ipsa loquitur doctrine to allow plaintiffs an inference of negligence, at least against the bottler, notwithstanding the lack of exclusive control.[331] One case cluster allowed the plaintiff a res ipsa loquitur inference provided that she introduced some evidence that indicated the bottle had not been abused or mishandled after it left the defendant's hands.[332] Other courts allowed the plaintiff to invoke res ipsa loquitur if she showed that other bottles filled by the bottler had exploded around the time of the accident in question.[333] And still another approach allowed a plaintiff to rely upon res ipsa loquitur merely upon establishing that her bottle had exploded, "since reasonable men know that when bottles are properly manufactured and filled, they do not blow up."[334]

The increasingly aggressive application of res ipsa loquitur in bottle cases[335] meant that by mid-century, many observers understood that some

328. *Id.*; Mark Shain, *Res Ipsa Loquitur*, 17 S. CAL. L. REV. 187, 192 (1944).

329. *See* Johnson v. Coca-Cola Bottling Co., 125 So. 2d 537, 541–42 (Miss. 1960) (relating a perceived transition toward liberalized application of res ipsa loquitur in bottle cases); Evangelio v. Metro. Bottling Co., 158 N.E.2d 342, 346 & n.3 (Mass. 1959) (same); James, *supra* note 304, at 76–77 (same); Patrinelis, *supra* note 308, at 467–68 (same).

330. Pound, *supra* note 308, at 169–70.

331. *Id.*; *see also* Dix W. Noel, *Manufacturers of Products: The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 978 (1957) (discussing the trend toward application of liberalized versions of res ipsa loquitur in exploding-bottle cases).

332. *E.g.*, Thompson v. Burke Eng'g Sales Co., 106 N.W.2d 351, 353–54 (Iowa 1960) (discussing this line of precedent); Florence Coca Cola Bottling Co. v. Sullivan, 65 So. 2d 169, 175 (Ala. 1953) (stating that the "general trend" in exploding-bottle cases was to adopt this approach); *see also* James, *supra* note 304, at 76–77 ("Today . . . a majority of courts seem willing to invoke res ipsa loquitur in bursting bottle cases, where a proper foundation is laid.").

333. *E.g.*, Merch. v. Columbia Coca-Cola Bottling Co., 51 S.E.2d 749, 751 (S.C. 1949); *see also* Patrinelis, *supra* note 308, at 479 (discussing this approach).

334. Ford Motor Co. v. Fish, 335 S.W.2d 713, 718 (Ark. 1960). A few courts, but only a few, also authorized the use of res ipsa loquitur to generate an inference of negligence against multiple defendants in the supply chain. *E.g.*, Nichols v. Nold, 258 P.2d 317, 323 (Kan. 1953); Loch v. Confair, 93 A.2d 451, 454 (Pa. 1953).

335. *See, e.g.*, Riecke v. Anheuser-Busch Brewing Ass'n, 227 S.W. 631, 632 (Mo. Ct. App. 1921) (affirming the use of res ipsa loquitur in an exploding-bottle case where the defendant bought "only the highest grade of bottles," part of each order was tested before purchase, the

courts were applying negligence in name only in these matters, and justifying this sleight-of-hand on public-policy grounds.[336] One such commentator, summing up the state of the law in 1960, wrote that "it seems obvious from the talk of public policy which constantly recurs in opinions, that courts are designedly imposing strict liability as a means of ensuring that soft drink manufacturers take consummate protections."[337]

But these reforms did not assist every plaintiff in a bottle case. Even under liberalized regimes, many plaintiffs could not show that the bottle in question had been handled reasonably carefully since it left the bottler's hands.[338] Most bottle cases therefore remained difficult to prove when grounded in negligence.[339] In these situations, the law of warranty provided the plaintiffs' only hope.[340] But many courts continued to insist

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bottles' mold also was tested prior to its use in the manufacture of bottles, the substance (Bevo) poured into the bottles was "not naturally an explosive substance," and the case before the court "was the first time that a bottle had ever exploded.").

336. *See* Night, *supra* note 311, at 73 ("[I]t is apparent that the present judicial trend is toward absolute liability in bottle cases."); Whitehurst, *supra* note 311, at 472 ("[W]ith each new application of res ipsa loquitur the growing majority of American courts move nearer to the imposition of absolute liability upon the bottler.").

337. Fricke, *supra* note 292, at 32 (footnote omitted). Four years earlier, a similar observation had been made regarding judicial handling of a close cousin of the exploding-bottle line of cases, the mouse-in-a-bottle case:

> New York, for what appears to be the first time, applied res ipsa to a foreign-object-in-a-bottle case. The facts were typical. The bottling company's evidence indicated that a mouse couldn't possibly have been in a bottle of coke, but there it was just the same. This case is a good illustration of the way strict liability is extending its grip in the area of manufacturer's liability. Courts more and more are taking the attitude that industry must pay its way, regardless of "fault" in the conventional sense. Once res ipsa is applied in a bottle case, for instance, the bottler might as well give up the ghost. If he introduces no evidence, he is sure to lose. If, on the other hand, he introduces evidence that his washing, capping, and inspection systems are excellent, he will probably lose anyway because the jury will conclude that, if the precautions are so high grade, some employee *must* have erred in applying them. It is true for all practical purposes, therefore, that res ipsa in such cases "has ceased to be a procedure for proving actual negligence to sustain liability, and has become a means of establishing a basis for liability irrespective of negligence."

John V. Thornton & Harold F. McNiece, *Torts*, 1955 ANN. SURV. AM. L., 433, 442 (1956) (footnotes omitted) (quoting C.A. Peairs, Jr., *The God in the Machine: A Study in Precedent*, 29 B.U. L. Rev. 37, 65 (1949)).

338. *E.g.*, Joffre v. Canada Dry Ginger Ale, Inc., 158 A.2d 631, 636–37 (Md. 1960); Trust v. Arden Farms Co., 324 P.2d 583, 585–86 (Cal. 1958); Burkett v. Panama City Coca-Cola Bottling Co. 93 So. 2d 580, 582 (Fla. 1957).

339. *See* Julien, *Trial Techniques*, *supra* note 284, at 404 (describing bottle cases as "a real challenge").

340. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963) (the plaintiff brought a breach of warranty and a negligence claims).

upon privity in bottle cases when a breach of warranty was alleged, a position that tightly circumscribed the universe of viable plaintiffs and plausible defendants.[341]

The ongoing post-World War II trend toward lifting the privity requirement in warranty cases involving food thus presented an opportunity for plaintiffs in bottle cases, and a challenge for judges. Bottle cases stood at a crucial analogical pivot, halfway between food and all other consumer products. On the one hand, increasingly widespread rejection of a privity requirement in adulterated food cases begged the question of why defective food containers should be treated any differently. Why should the plaintiff's recovery depend upon whether a soda bottle chipped on the inside, depositing glass shards into a drink, or on the outside, sending the shards into the plaintiff's hand?[342] On the other hand, if courts accepted this analogy and lifted the privity requirement for food containers, too, such a holding contained no apparent limiting principle. If food containers, why not automobiles, space heaters, or any other consumer good? In the 1950s, a few courts leapt into the breach, rejecting a privity requirement for warranty claims in bottle cases.[343] It was around this time that proposals for strict products

341. *E.g.*, Ciociola v. Del. Coca-Cola Bottling Co., 172 A.2d 252, 257 (Del. 1961) (rejecting a plaintiff's claim in a bottle case on lack-of-privity grounds); Prince v. Smith, 119 S.E.2d 923, 925 (N.C. 1961) (same); Wolfe v. S.H. Wintman Co., 139 A.2d 84, 85–86 (R.I. 1958) (same); Burke v. Associated Coca-Cola Bottling Plants, Inc., 181 N.Y.S.2d 800, 801 (N.Y. App. Div. 1959) (same); *see also Exploding Bottle Litigation*, *supra* note 318, § 1 (observing that in exploding-bottle cases, "the principal legal problem [for the plaintiff] is the requirement of privity between the plaintiff and the defendant"); Hursh, *supra* note 100, at 44–45 (discussing the privity rule). Where the plaintiff had purchased the bottle, she typically could sue the retailer for breach of an implied warranty. *Exploding Bottle Litigation*, *supra* note 318, § 1. But non-purchasing plaintiffs lacked privity with even the retailer, and the bottler, not the retailer, was generally understood as the party most to blame for an exploding bottle. *Products Liability*, *supra* note 270, at 296–97 (comments of Alfred S. Julien). An additional problem that vexed plaintiffs in some states involved judicial limitation of implied warranties to the contents of a container, as opposed to the contents and container combined. *See Exploding Bottle Litigation*, *supra* note 318, § 1 (discussing this issue in the context of exploding-bottle lawsuits).

342. Canada Dry Bottling Co. of Fla. v. Shaw, 118 So. 2d 840, 843 (Fla. Dist. Ct. App. 1960), *disapproved by* Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 222, 225–27 (Fla. 1965) (drawing this analogy); *see also* Note, *Strict Products Liability and the Bystander*, *supra* note 102, at 929–30 (making this argument); Richard G. Wilson, *Products Liability: The Protection of the Producing Enterprise* (pt. 2), 43 CALIF. L. REV. 809, 821 (1955) ("[I]t is not self-evident that a marketer of a bottle which explodes should be held to bear less risks . . . than a marketer of a bottle which turns out to contain a foreign substance.").

343. *E.g.*, *Shaw*, 118 So. 2d at 843; Nichols v. Nold, 258 P.2d 317, 323 (Kan. 1953); Mahoney v. Shaker Square Beverages, Inc., 102 N.E.2d 281, 289 (Ohio Ct. Com. Pl. 1951).

liability in tort began to coalesce into a workable rule, through the *Restatement (Second) of Torts* § 402A.[344]

Would some variation of § 402A have come about, even without bursting-bottle lawsuits? Almost certainly. Thought leaders like Prosser and Traynor had lobbied for a strict-liability approach to products problems, grounded in tort, for more than twenty years.[345] Bottle cases only typified, rather than exhausted, their concerns.[346] And yet these cases deserve more than the obscurity in which they have languished. Each time a bottle case appeared, from the 1940s through the 1960s,[347] it reminded even the most unimaginative judges of the nagging problems created by the prevailing rules.[348] The recurrence of these disputes, meanwhile, allowed courts to use them as an ongoing experiment with negligence doctrine, trying to blaze a path around the problems of proof associated with these cases (and other, similar case types as well).[349] In the end, these efforts gravitated toward a negligence approach in name that imposed strict liability in fact.[350] Judges who surveyed this record likely found that it justified their more straightforward embrace of strict liability, whether couched in warranty or in tort.[351]

Meanwhile, even if bottle cases did not prompt § 402A, judging from Dean Prosser's pointed reference to bottle cases in his *Assault upon the Citadel* article, they likely informed the approach toward product defects that he promoted in the *Restatement*.[352] Much ink has been spilled over

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344. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see supra* text accompanying notes 150–54.

345. *See supra* text accompanying notes 83–86.

346. *See supra* text accompanying notes 84–93, 302–12; *see also* Rabin, *supra* note 200, at 9.

347. The California Supreme Court, for example, heard three more bottle cases during the interval between *Escola* and *Greenman*. Trust v. Arden Farms Co., 324 P.2d 583 (Cal. 1958); Zentz v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344 (Cal. 1952); Gordon v. Aztec Brewing Co., 203 P.2d 522 (Cal. 1949). These cases represented a substantial subset of all products cases heard by that court over this span. *See also* Simmons v. Rhodes & Jamieson, Ltd., 293 P.2d 26 (Cal. 1956) (cement); Rose v. Melody Lane of Wilshire, 247 P.2d 335 (Cal. 1952) (collapsing stool installed at a restaurant).

348. *See supra* notes 300–04, 323–28 and accompanying text.

349. *See supra* notes 329–34 and accompanying text.

350. *See supra* notes 283–92 and accompanying text.

351. Indeed, bottle cases had served as a testing ground for doctrinal reforms well before the adoption of strict products liability in tort. *See* Hewitt v. Gen. Tire & Rubber Co., 284 P.2d 471, 475 (Utah 1955) (likening the exploding tire in the matter before the court to the exploding bottles addressed in other cases, and concluding that the present case should be resolved under res ipsa loquitur rules developed in the bottle cases).

352. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1116 n.127.

Prosser's intentions in drafting § 402A. In particular, there exists an ongoing dispute over whether § 402A contemplated only what are today known as "manufacturing" defects (with other products claims being left to negligence law), or both these and other types of product-defect allegations, such as lawsuits premised on unsafe designs and inadequate warnings.[353] The bottle cases suggest that this argument may be orthogonal to the issue as Prosser perceived it, at least if one assumes his thinking was framed by the recurring case tropes of his era. A glass bottle could explode or shatter for any of several reasons. Among them, these bottles could be designed with glass too thin to withstand successive reuse;[354] a bottle could contain an inclusion or other irregularities that made it more prone to shatter;[355] or the bottler could abrade and thereby weaken the glass in cleaning prior to reuse,[356] over-carbonate the beverage inside,[357] or damage the bottle when affixing the bottle cap.[358] Alternatively, the glass could be damaged by careless handling by the distributor, retailer, plaintiff, or someone else,[359] or the glass simply might break for reasons unknown.[360] Today, some of these fact patterns would be classified as involving "manufacturing" defects, others as "design" defects, and still others as negligence. To Prosser, an essential point of strict liability was to make these distinctions essentially irrelevant to recovery.[361] Per the *Restatement*, the liability issue would instead simply hinge on whether the product had failed to satisfy the expectations of a reasonable consumer.[362] A soda bottle that inexplicably exploded in the

353. *Compare* George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989) ("[T]he [creators of *Restatement (Second) of Torts* Section 402A] intended the Section's strict liability standard, with minor exceptions, to apply *only* to what we now call manufacturing defect cases."), *with* Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 836 (2009) ("Section 402A and the scholars and courts that crafted it were concerned about easy cases in which products failed in performing at a minimal level of safety. . . . In this era, the type of defect was not important.").

354. *See* Dingwall, *supra* note 319, at 167; *Due Care in Handling Bottle Containing Carbonated Beverage*, *supra* note 326, § 1.

355. Dingwall, *supra* note 319, at 167; *Due Care in Handling Bottle Containing Carbonated Beverage*, *supra* note 326, § 1.

356. Dingwall, *supra* note 319, at 168–69.

357. *Due Care in Handling Bottle Containing Carbonated Beverage*, *supra* note 326, § 1.

358. Dingwall, *supra* note 319, at 161.

359. *Due Care in Handling Bottle Containing Carbonated Beverage*, *supra* note 326, § 1.

360. *See* James, *supra* note 304, at 74–75 (discussing these possibilities).

361. Prosser, *Assault upon the Citadel*, *supra* note 84, at 1143.

362. *Id.* at 1145.

plaintiff's hands certainly qualified under this test, regardless of the source of the defect.[363]

In the final analysis, perhaps the most intriguing aspect of the bottle cases is the fact that strict products liability, as extended to all products, was built atop a fairly limited universe of decided cases,[364] and the most numerous of these case types has virtually disappeared.[365] For several decades, bottle cases appeared in the background (and sometimes the forefront) of the debate over products liability.[366] Even if these cases were banal, their ubiquity and the substantial body of caselaw they produced made them an integral part of the legal culture.[367] Now they are mostly gone, and essentially forgotten. Meanwhile, strict products liability lives on. One might infer from this disconnect that the different lifespans of specific case types on the one hand, and doctrine on the other, can make it difficult to appreciate, in hindsight, the specific concerns that prompted judges of other eras to adopt a given doctrinal innovation. Where now-defunct cases contributed to a still-intact rule, modern observers may overestimate the importance of broad policy arguments in making the case for change, and underestimate the contributions made by particular problems associated with the most visible and common cases of an earlier era.

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363. This perspective on original intentions, if credited, would tend to support the position taken by Professor Green. *See* Green, *supra* note 353, at 836.

364. Priest, *supra* note 7, deconstructed the seemingly voluminous body of case citations that Prosser tendered in support of § 402A, and concluded that few supported a broad strict-liability-in-tort principle. *Id.* at 514–17.

365. The infrequency with which bottle cases appear today captures in miniature the rarity of modern litigation over "manufacturing" defects, the sort of defect (to impose modern terminology on the cases of yesteryear) likely associated with most exploding or collapsing bottles. By the mid-1980s, at the latest, design-defect cases had become far more common than manufacturing-defect cases. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 303 tbl.10.5 (1987) (charting the number of design-defect and manufacturing-defect cases heard by the federal courts of appeals between January 1982 and November 1984); STAPLETON, *supra* note 167, at 30 (observing that since the early 1980s, defective-design claims "have formed the overwhelming bulk of US product lawsuits"); *see also* Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857, 890 (1993) ("[M]anufacturing defect injuries are random and relatively rare events."); Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 MARQ. L. REV. 7, 18 (2006) ("Manufacturing defects are rare events.").

366. *See supra* text accompanying notes 305–10.

367. *See supra* text accompanying notes 307–12.

Of course, judges vexed by bottle cases did not necessarily have to adopt a "pure" tort solution to the problems presented by these matters; the law of warranty, with some adjustments, might have done the trick just fine. The next section of this Article begins at this junction, and discusses why so many courts adopted an approach to products liability consciously grounded in tort law.

V. THE CONTINGENCY NARRATIVE: TORT VS. WARRANTY

A third and final story concerns how a "pure" tort theory eclipsed the rhetoric of warranty as the dominant method of framing a products-liability claim. As late as the 1950s, most of those who saw some form of strict products liability as inevitable assumed that this transition would occur within the prevailing warranty rubric.[368] Defying these expectations, an approach squarely grounded in tort law came to conquer the field of consumer protection, with warranty law now occupying a backup role.

In hindsight, it is easy to attribute this shift to certain perceived advantages of a "pure" tort approach, as embodied in *Restatement (Second) of Torts* § 402A, over a regime that would remold the law of warranty so as to give it the function, if not quite the precise form, of a tort remedy. Unlike warranty, a tort solution was not encumbered by notice and disclaimer rules associated with generic sales law.[369] The tort approach also did not suffer from decades of name-calling by Prosser, who described warranty as "a freak hybrid born of the illicit intercourse of tort and contract," among other choice epithets.[370] But none of these

368. Gillam, *supra* note 66, at 124; *see also Sales—Manufacturers and Dealers*, *supra* note 46, at 322 ("The theory most likely to be relied on in the future as a means of holding the manufacturer liable to the ultimate consumer is the theory of an implied warranty running from the manufacturer to the ultimate consumer."); *cf.* Titus, *supra* note 160, at 781 ("One cannot help concluding that *Greenman* and section 402A would not have come into being if the courts and lawyers had used the Sales Act warranties more creatively.").

369. *See* Prosser, *Assault upon the Citadel*, *supra* note 84, at 1127–34.

370. *Id.* at 1126. This comment represented a continuation of Prosser's longtime preference for a "pure" tort approach to products liability over a scheme premised on warranty law. In 1941, he had written:

> [I]t seems far better to discard the troublesome sales doctrine of "warranty," and impose strict liability outright in tort, as a pure matter of social policy. It is "only by some violent pounding and twisting" that the concept can be made to yield the desired result; and the reliance traditionally necessary to a warranty is not easy to find in the case of a consumer who does not even know who made the goods, or who has not even made a purchase but is a mere donee.

PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 85, § 83 (quoting Edwin W.

problems was intractable—*Henningsen* refused to honor a seemingly airtight disclaimer of warranties,[371] and *Greenman* gainsaid a notice requirement in warranty suits before going on to recognize a tort remedy.[372] Meanwhile, warranty had its competitive advantages, too, the most important of which was inertia.[373] The fact that, even today, a handful of states still apply a modified warranty framework to products claims[374] suggests that the broad, swift adoption of the tort approach may have owed to fortuitous circumstances as much as any inherent superiority of a tort formulation. The text below spins out this possibility, suggesting that the preference for tort over warranty may owe partially to the fact that warranty was compromised as an alternative to tort at an especially crucial moment. By the time this damage had been repaired, § 402A already had gained a critical mass of adherents.[375]

This crucial setback for a warranty approach occurred in 1951, in the drafting process for the UCC.[376] As background, a decade earlier Karl Llewellyn had unsuccessfully sought to engraft liberalized privity rules onto the Uniform Sales Act.[377] This effort failed,[378] but Llewellyn tried again with the UCC. In 1951, Llewellyn prepared a draft of the UCC that, within its proposed § 2-318, would have extended express and implied warranties to

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Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 358 (1924)).

371. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 85–97 (N.J. 1960); *see also* Jeffery W. Deaver, Note, *Products Liability in New York: Section 2-318 of the U.C.C.—The Amendment Without a Cause*, 50 FORDHAM L. REV. 61, 70–71 (1981) (discussing New York's assimilation of the UCC, which the state adopted in 1964, with its prior recognition of broad warranty protections).

372. Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (Cal. 1963). For a discussion of the discretion accorded judges in interpreting this requirement, see Morris G. 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, 27–29 (1965).

373. An anecdote underscores this point. Observers were so conditioned to think of products liability in warranty terms the headline for the *Los Angeles Daily Journal* article that reported the *Greenman* decision read, "Injured Consumer Need Not Give Notice Under Sales Act." *Injured Consumer Need Not Give Notice Under Sales Act*, L.A. DAILY J., Jan. 30, 1963, at 1. The revolutionary portion of the *Greenman* opinion, grounding the plaintiff's recovery in tort law, went unmentioned. *See id.*

374. *See supra* note 165–66 and accompanying text.

375. *See supra* text accompanying notes 160–66.

376. U.C.C. § 2-318 (Proposed Final Draft Spring 1950); U.C.C. § 2-318 (Final Text Edition November 1951).

377. *See* discussion *supra* note 87.

378. *See* discussion *supra* note 87.

> any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.[379]

The National Conference of Commissioners on Uniform State Laws (NCCUSL) rejected Llewellyn's approach in favor of a narrower view.[380] As approved by the conference, § 2-318 extended warranties only to

> any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.[381]

This language excluded persons such as employees of the buyer, friends who were not houseguests, and bystanders. Meanwhile, in its comments, the code expressed a neutral view about whether remote purchasers could claim warranty protections, leaving the issue open for development in caselaw.[382]

Section 2-318, as promulgated, quickly become the law in most states. Between 1953 and 1967, the Uniform Commercial Code swept the nation, in the same way that strict products liability in tort soon would. Only six states had adopted the UCC by the end of 1960.[383] But eight states did so in 1961, four more in 1962, ten in 1963, one in 1964, thirteen in 1965, five

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379. U.C.C. § 2-318 (Proposed Final Draft Spring 1950). A Comment to this section provided that it followed

> the dominant trend of judicial opinion developed in the light of modern distribution methods and the fact of group consumption," and was "intended to broaden the right and the remedy of the consumer in warranty, to free them from any technical rules as to "privity" and to make them, insofar as feasible, directly enforceable against the party ultimately responsible for any injury.

Id. § 2-318 cmt. 2.

380. *See* U.C.C. § 2-318 (Final Text Edition November 1951).

381. *Id.*; *see also* PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, 1966 OFFICIAL RECOMMENDATIONS FOR AMENDMENT OF THE UNIFORM COMMERCIAL CODE 8–9 (1967) (discussing the history of Section 2-318).

382. U.C.C. § 2-318 cmt. 3 (Official Draft, Text and Comments Edition 1952); U.C.C. § 2-318 cmt. 3 (1962 Official Text with Comments) (providing that the section was "neutral," and "not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.").

383. FRED H. MILLER, 12 WEST'S LEGAL FORMS, COMMERCIAL TRANSACTIONS § 1.1 (4th ed. 2013).

in 1966, and two in 1967, leaving Louisiana as the lone holdout.[384] The version of the UCC adopted by most states parroted the language of § 2-318 as promulgated.[385] There were some dissenters, however. California and Utah declined to adopt § 2-318.[386] In California, where the supreme court already had extended warranty protections to employees of the purchaser,[387] concerns existed that the UCC's privity rules represented a "step backward" from the status quo.[388] Other states, meanwhile, adopted counterparts to § 2-318 that incorporated broader warranty protections than appeared in the standard text. In 1961 and 1962, respectively, Wyoming and Virginia adopted statutes that extended sales warranties to any person "who may reasonably be expected to use, consume or be affected by the goods" and was "injured by breach of the warranty"[389] (Wyoming) or "a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods" (Virginia).[390]

Notwithstanding these developments, upon revisiting the privity issue in 1964 the Permanent Editorial Board for the UCC decided to stand pat with the existing language of § 2-318. The Board observed, "At present there appears to be no national consensus as to the scope of warranty protection which is proper. Therefore, no amendment to the Official Text should be made in order to permit the decisional development of such a consensus."[391] After other states also adopted statutes with broadened warranty provisions over the next two years,[392] in 1966 the

384. *Id.* Louisiana would veer toward the pack in 1974, when it adopted the UCC except for Articles 2 and 2A. *Id.*

385. *See* Brian D. Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 BUS. LAW. 925 app. (1974) (surveying state laws).

386. William Michael Karnes, Comment, *Section 2-318 of the UCC: the Sleeping Giant*, 20 CLEV. ST. L. REV. 181, 186–87 (1971); *see also The Uniform Commercial Code: A Special Report by the California State Bar Committee on the Commercial Code*, 37 J. ST. B. CAL. 119, 144 (1962) (explaining why California rejected Section 2-318 of the UCC).

387. Peterson v. Lamb Rubber Co., 353 P.2d 575, 581 (Cal. 1960).

388. PERMANENT EDITORIAL BD. FOR THE UCC, REPORT NO. 2, at 40 (1964).

389. Act of Feb. 28, 1961, ch. 219, 1961 Wyo. Sess. Laws 406, 426–27.

390. Act of Mar. 31, 1962, ch. 476, 1962 Va. Acts 804, 804; *see also* William I. Aronwald, Note, *Privity and Section 2-318 of the Uniform Commercial Code*, 31 BROOK. L. REV. 367, 370–71 (1965) (discussing the Virginia and Wyoming statutes).

391. PERMANENT EDITORIAL BD. FOR THE UCC, *supra* note 388, at 39. This declination caused one set of authors to wonder, "After generating the monumental change wrought by the Code, are its fathers now afraid to push their luck?" Kroner et al., *supra* note 283, at 229.

392. PERMANENT EDITORIAL BD. FOR THE UCC, 1966 OFFICIAL RECOMMENDATIONS FOR AMENDMENT OF THE UNIFORM COMMERCIAL CODE 8 (1967).

Permanent Editorial Board finally yielded and proposed two "alternatives" (labeled "Alternative B" and "Alternative C") to the pertinent language of § 2-318.[393] These alternatives followed the Virginia and Wyoming models by extending warranties to any persons "who may reasonably be expected to use, consume or be affected by the goods."[394] Alternative B extended warranties only for personal-injury claims, while Alternative C did so for all claims.[395] By 1974, a total of 17 states had adopted either Alternative B or C, or had previously endorsed closely analogous provisions.[396]

But by then, more than three dozen states had adopted a tort approach to strict products liability, and it was too late for warranty to make up its lost advantage.[397] The timing of the UCC's diffusion across the states, relative to the *Greenman* decision and the promulgation of the *Restatement (Second) of Torts* § 402, could not have been better calibrated to nudge courts toward a tort-law approach to products-liability cases. The narrow warranty protections of the UCC doubtless encouraged courts in adopting jurisdictions to look to tort law for a solution to ongoing products problems. Even though the UCC was neutral regarding judicial expansion of "vertical" privity,[398] the boundary it drew around the family, household, and household guests insofar as "horizontal" privity was concerned may have convinced many judges that they would be rewriting recently enacted law, contrary to their

393. *Id.*

394. *Id.*

395. "Alternative B" provided that a seller's express or implied warranty would extend to "any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." *Id.* "Alternative C" extended the warranties to "any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty." *Id.* All three Alternatives (the original text now being identified as "Alternative A") provided that the seller could not "exclude or limit the operation of this section," at least with respect to the person of an individual to whom the warranty, so redefined, extended. *Id.*

396. Cochran, *supra* note 385, at 939–45. In alphabetical order, these states were Alabama, Arkansas, Colorado, Delaware, Hawaii, Kansas, Maine, Maryland, Massachusetts, Minnesota, North Dakota, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and Wyoming. *Id.*; *see also* MILLER, *supra* note 383, § 1.1 (listing dates of adoption).

397. *See supra* text accompanying notes 160–64.

398. And indeed, several state supreme courts would embrace such an expansion as the 1960s progressed. *See, e.g.*, Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 55 (Mo. 1963); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449, 456 (Iowa 1961).

legislature's intent, if they cast additional consumer and (especially) bystander protections in warranty terms.[399]

Concurrently, the excitement that surrounded the development of a coherent theory of strict products liability in tort drowned out, for a few years, concerns that the UCC's warranty provisions displaced or preempted alternative strict-liability approaches to products liability.[400] Some members of the American Law Institute wondered about overlaps between the UCC and the *Restatement (Second) of Torts* § 402A when drafts of the section were under consideration.[401] These concerns were brushed aside, with Prosser disavowing any conflict between the UCC and the *Restatement*.[402] The first few courts to address the subject likewise gave the matter short shrift, paying little heed to defendants' displacement contentions.[403]

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399. *See* Karnes, *supra* note 386, at 181 (observing that the enactment of UCC § 2-318 in many states "compelled courts to stretch, bend and squeeze breach of warranty into the realm of strict liability in tort"); Kroner et al., *supra* note 283, at 226 (observing that in arguing for strict liability, "[p]laintiffs will probably prefer to rely upon *Restatement* section 402A because of the reluctance of some courts to extend the duty beyond that expressly defined in the Code"); Comment, *UCC Section 2-318: Effect on Washington Requirements of Privity in Products Liability Suits*, 42 WASH. L. REV. 253, 261 (1966) (observing that while "[t]he majority of courts seemingly do not regard section 2-318 as a restraint on judicial resolution of the privity issue in warranty actions . . . the danger of a restrictive approach . . . should not be overlooked"); *cf.* Mitchel J. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 UCLA L. REV. 281, 327 (1961) (warning that if California were to adopt § 2-318, doing so might "inadvertently reverse" recent case law that had extended warranties to the employees of the product's purchaser). A relatively recent study of the privity requirement in jurisdictions that retain the "standard" language of § 2-318 found a relatively tangled web of rules. William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 20 PEPP. L .REV. 1215, 1220–22 (1993).

400. *See* Titus, *supra* note 160, at 715 & n.13.

401. *Wednesday Morning Session, May 17, 1961*, 38 A.L.I. PROC. 19, 69–70 (1962).

402. During the ALI's consideration of the 1961 draft of § 402A, Dean Prosser emphasized that the UCC, in its comments to § 2-318, contemplated possible judicial engrossment of warranties to remote purchasers. *See Wednesday Afternoon Session, May 17, 1961*, 38 A.L.I. PROC. 76, 77–78 (1962). The next year, Prosser acknowledged that the *Restatement* "entrenched" upon the UCC insofar as both addressed liability to non-purchasers, but otherwise disclaimed any conflicts. *Thursday Afternoon Session, May 24, 1962*, 39 A.L.I. PROC. 198, 238–240 (1963) (comments of William L. Prosser).

403. Pearson v. Franklin Labs., Inc., 254 N.W.2d 133, 139 (S.D. 1977) ("In adopting the doctrine of strict liability in tort . . . we did not pause to consider the potential conflict between the warranty provisions of the Uniform Commercial Code and the concept of strict liability. In this we were not alone."); *see also* Franklin, *supra* note 105, at 974 ("Recently . . . several cases have raised the possibility that the products liability development may be affected, indeed controlled, by the Uniform Commercial Code. The possibility has been barely recognized—and still is not fully appreciated."); John W. Wade, *Is Section 402A of the Second Restatement*

As years passed, however, it became more difficult to ignore this argument. A prominent law review article concluded that while the UCC contemplated some judicial expansion of warranty protections, certain provisions of the UCC, such as its notice and disclaimer provisions, could not be avoided simply by replacing the vocabulary of warranty with that of tort.[404] Another author regarded the displacement issue as a state-by-state affair, with the status of warranty law within a jurisdiction prior to its adoption of the UCC dictating whether warranty would represent the exclusive vehicle for strict products-liability lawsuits in that state.[405] In the early 1970s, the first of these arguments found a taker in Oregon Supreme Court Chief Justice Kenneth O'Connell, who wrote separately in a products-liability case to express his opinion that

> [a] careful reading of the Uniform Commercial Code reveals that it prescribes a legal framework for the recovery of damages for personal injuries resulting from defective products. Recovery for personal injuries resulting from the negligent conduct of the seller is left for the courts to develop. But it is apparent that aside from the negligence cases the Code provides an integrated and comprehensive scheme under which recovery for personal injuries may be sought both by privity and non-privity plaintiffs.[406]

None of O'Connell's colleagues joined his opinion,[407] highlighting the marginal nature of the displacement argument at the time. In 1980, however, the Delaware Supreme Court unanimously concluded that strict products liability in tort had been preempted by the state's adoption of

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of Torts Preempted by the UCC and Therefore Unconstitutional?, 42 TENN. L. REV. 123, 125 (1974) (noting that up through the time of writing, most courts had ignored the preemption argument, but that there were "indications that some judges, at least, may have a feeling of guilt regarding the matter, and the whole atmosphere is one suggesting uneasiness and malaise").

404. Franklin, *supra* note 105. For other law review articles expressing concern that the UCC may preempt or displace a strict-liability approach grounded wholly in tort, see Reed Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. Rev. 205 (1977); Reed Dickerson, *Was Prosser's Folly Also Traynor's? Or Should the Judge's Monument be Moved to a Firmer Site?* 2 HOFSTRA L. REV. 469 (1974); Donald J. Rapson, *Products Liability under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *supra* note 372, at 25. Surveying the literature in 1983, John Wade observed that "the preemption viewpoint may perhaps be the weightier side from the standpoints of both the number of articles and the vehemence of the position taken." Wade, *supra* note 87, at 3–4.

405. Titus, *supra* note 160, at 760–82.

406. Markle v. Mulholland's, Inc., 509 P.2d 529, 536 (Or. 1973) (O'Connell, C.J., concurring) (footnote omitted).

407. *Id.*

Alternative B to the UCC in 1966.[408] The Massachusetts Supreme Judicial Court similarly observed that the Bay State legislature's "expansive amendments" to the UCC meant that no space remained for strict products liability in tort.[409] Through these amendments, the court said, the Massachusetts legislature had "transformed warranty liability into a remedy intended to be fully as comprehensive as the strict liability theory of recovery that has been adopted by a great many other jurisdictions."[410]

The point is not that this preemption argument is correct, only that it might have persuaded a few more judges, had it more time to develop before courts rushed to adopt strict products liability in tort. Such an interval also would have allowed courts the opportunity to tinker with the newly adopted UCC. Decisions that engrossed the UCC's warranty protections and limited its notice and disclaimer provisions might have relieved some of the pressure for a different solution for gnawing products problems.[411]

Significantly, states that embraced robust warranty protections at an early juncture lagged behind other jurisdictions in adopting strict products liability in tort. Among the states where legislatures enacted warranty protections more expansive than those found in the initial version of § 2-318, only Minnesota adopted strict products liability in tort during the 1960s, and that state's high court did so in a case that arose before the enhanced warranty protections became effective.[412] Most of the other Alternative B or Alternative C states took their time in

408. Cline v. Prowler Industries of Md., Inc., 418 A.2d 968, 975 (Del. 1980). The *Cline* court acknowledged that other states had rejected the preemption argument, but regarded those decisions as distinguishable. *Id.* at 979. Four years earlier, the Delaware Supreme Court had adopted strict liability in the "bailment-lease" context. Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 584 (Del. 1976). Delaware thus adheres to a system in which the applicability of strict liability in tort hinges on whether the product at issue was distributed to the public through a sales transaction (in which case the UCC preempts strict liability in tort) or otherwise (in which there is no such preemption). Beattie v. Beattie, 786 A.2d 549, 553–54, 559 (Del. Super. Ct. 2001).

409. Jacobs v. Yamaha Motor Corp., U.S.A., 649 N.E.2d 758, 763 n.6 (Mass. 1995); *see also* Act of Aug. 18, 1971, ch. 670, 1971 Mass. Acts 497; Act of Sept. 7, 1973, ch. 750, 1973 Mass. Acts 739; Act of Apr. 25, 1974, ch. 153, 1974 Mass. Acts 80.

410. Back v. Wickes Corp., 378 N.E.2d 964, 968 (Mass. 1978).

411. One such decision was *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129, 135 (Mich. 1965) (refusing to require privity of contract in a lawsuit brought by an injured bystander). *See also* Salvador v. Atl. Steel Boiler Co., 319 A.2d 903, 904 (Pa. 1974) (abolishing the "horizontal privity" requirement in warranty).

412. McCormack v. Hankscraft Co., 154 N.W.2d 488, 499 n.13 (Minn. 1967).

recognizing strict products liability in tort. The seventeen states to adopt statutory variations of Alternative B or C as of the early 1970s account for eleven of the nineteen last states to adopt strict products liability in tort, and three of the five remaining holdouts.[413] Wyoming adopted strict products liability in tort only in 1986;[414] Virginia never has. Thus pioneers in one area of the law became laggards in another.

The differences between tort and warranty might seem like mere semantics, given how warranty protections have been construed so broadly in Delaware, Massachusetts, Michigan, and Virginia as to be essentially equivalent to strict liability in tort.[415] Even so, the different path taken by these states illustrates how there often exists more than one doctrinal route to a generic objective, and that the amount of traffic on each of these avenues may depend in large part on idiosyncratic circumstances and matters of timing.[416]

The status of products liability in the one true outlier, North Carolina, offers additional instruction on this point. Among warranty states, only North Carolina has adopted a truly distinctive approach. North Carolina courts never adopted a tort-law approach to strict products liability prior to the enactment of a statute in 1979 that made products-liability cases more difficult for plaintiffs to win[417] and of a 1995 statute that expressly

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413. The laggards were Alabama (1976), Arkansas (1973), Colorado (1975), Kansas (1976), Maine (1973), Maryland (1976), North Dakota (1974), South Carolina (1974), South Dakota (1973), Vermont (1975), and Wyoming (1986). *See, e.g.*, Act of Feb. 1973, Act 111, 1973 Ark. Acts. 331; Act of Oct. 3, 1973, ch. 466, 1973 Me. Laws 822; Act of July, 1974, No. 1184, 1974 S.C. Acts 2782; Act of Feb. 28, 1961, ch. 219, 1961 Wyo. Sess. Laws 406. The holdouts are Delaware, Massachusetts, and Virginia. *See supra* note note 166.

414. Ogle v. Caterpillar Tractor Co, 716 P.2d 334 (Wyo. 1986).

415. *See* Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, 976 (Del. 1980) ("[T]he defenses of privity, notice, and disclaimer have, in large measure, become ineffective in consumer product liability cases in this State."); *Back*, 378 N.E.2d at 969 ("The Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)."); Owens v. Allis-Chalmers Corp., 268 N.W.2d 291, 293 (Mich. Ct. App. 1978) ("[T]he requisite elements for a cause of action based upon strict liability in tort are congruent to those for breach of warranty."); OWEN, *supra* note 30, at 282–84 (discussing all five states' approaches toward products liability).

416. For a somewhat similar tale of convergence, see Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303, 371–79 (2012) (discussing the practical convergence, over time, of automobile-accident compensation schemes premised on liability for negligence with regimes that embrace no-fault principles).

417. Act of May 28, 1979, ch. 654, 1979 N.C. Sess. Laws 687. Among its provisions, this statute interposed contributory negligence as a defense to all products-liability actions, whether framed in negligence or warranty, *id.* at 688–89, and created a six-year statute of repose, *id.* at 689. The period before repose has since been increased to 12 years. Act of Aug. 5, 2009, ch. 420, 2009 N.C. Sess. Laws 808.

prohibited judicial recognition of strict products liability in tort.[418] These developments mean that, more so than any other state, North Carolina still relies on negligence and warranty law as rules of decision in products-liability cases.[419] Insofar as claims against product manufacturers are concerned, however, this difference does not place many North Carolina plaintiffs in much worse of a position than that occupied by their counterparts elsewhere.[420] Since most contemporary products-liability claims involve design or warning issues,[421] where even strict liability has gravitated toward what resembles a negligence approach, the burden that North Carolina plaintiffs bear is strikingly similar to that cast upon claimants in other states.[422]

VI. CONCLUSION

Ever since the works of Willard Hurst,[423] legal historians have appreciated that a "complete" narrative of doctrinal change must encompass more than merely a series of stepping-stone judicial opinions. Nevertheless, subtle biases as well as common limitations of time, space, and attention mean that discussions of particular shifts in the law tend to focus upon seminal decisions, with a few trends in the ambient legal, political, or social culture perhaps thrown in for context. Other narratives tend to get marginalized.

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418. Act of July 29, 1995, ch. 522, 1995 N.C. Sess. Laws 1872.

419. Moore v. Coachmen Indus., Inc., 499 S.E.2d 772, 777 (N.C. Ct. App. 1998) ("A products liability plaintiff may base the claim on various causes of action, including negligence (negligent design, manufacture, assembly, or failure to provide adequate warnings) and breach of warranty."); *see also* DeWitt v. Eveready Battery Co., 565 S.E.2d 140 (N.C. 2002) (allowing a plaintiff in a products case to proceed on an implied warranty theory); Red Hill Hosiery Mill, Inc. v. MagneTek, Inc., 582 S.E.2d 632 (N.C. Ct. App. 2003) (affirming a jury verdict for the plaintiff on an implied-warranty theory).

420. A more significant hurdle for North Carolina plaintiffs in products cases is the fact that contributory negligence (still recognized in that state) represents a defense to all products-liability claims, whether framed in negligence or in tort. N.C. GEN. STAT. ANN. § 99B-4(3) (West 2011).

421. *See* Geoffrey Christopher Rapp, *Torts 2.0: The Restatement 3rd and the Architecture of Participation in American Tort Law*, 37 WM. MITCHELL L. REV. 1582, 1592 (2011) ("[D]efective design . . . came to dominate the products liability caseload of courts in the latter part of the twentieth century."); Dominick Vetri, *Order out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1375 (2009) ("Product design defects are the predominate type of litigated [products liability] cases today.").

422. N.C. GEN. STAT. ANN. § 99B-4 (West 2011).

423. *E.g.*, JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

The standard history of strict products liability, in particular, suffers from three biases that can compromise histories of doctrinal change in tort law. First, developments in the claim consciousness of prospective plaintiffs and the capabilities and interests of their attorneys may not receive enough attention.[424] These transformations can be difficult to identify and track, at least compared to judicial opinions, law review articles, treatises, and other influences that are memorialized in print and connected to one another through citations.[425] The challenges associated with charting the relative sophistication of claimants and their lawyers tends to obscure the importance of these actors in the process of doctrinal change. But as related above, without plaintiffs and their counsel courts would lack both raw material with which to work, and a sense of urgency in their task.[426]

Likewise, it is easy to underestimate the importance of old case tropes whose significance lay principally in the frequency with which they appeared. Bottle cases were bread-and-butter matters for the personal-injury attorneys of the 1940s and 1950s, and judges of that era certainly knew about these cases and the problems they presented. The prosaic nature of these disputes and their subsequent disappearance has erased them (except, of course, for the *Escola* case)[427] from modern retellings of why strict products liability emerged when and in the form that it did. This invisibility, combined with the seeming indignity of associating broad doctrinal shifts with particular case tropes, has meant that bottle cases are assigned no credit in the development of strict products liability. This omission seems wrong, as bottle cases were an important part of the mid-century legal culture. It seems hardly coincidental that for good or for ill, the products-liability framework that Prosser devised was perfectly attuned to the difficulties associated with bottle cases.[428] Furthermore, not many courts would have felt compelled to adopt strict products liability in tort had judges regarded this approach as applicable to only a handful of disparate cases. Bottle lawsuits provided a center of gravity to

424. *Id.* That these subjects are underemphasized does not mean that they are entirely ignored. For example, there exists a body of scholarship on the contributions that lawyers may make to doctrinal change. *See, e.g.*, Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523 (1996) (discussing and critiquing what is described as the "lawyer rent-seeking hypothesis").

425. *See* Gordon, *supra* note 10, at 120 (commenting on the accessibility and utility of "mandarin materials" such as cases and treatises).

426. *See supra* Part III.

427. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

428. *See supra* text accompanying notes 300–04, 338–51.

an otherwise disparate array of products matters. By instantiating and grounding the argument for a strict-liability approach, these cases may have helped persuade courts that the reform game was worth the candle.

Finally, the history of strict products liability provides additional evidence of another documented bias—an eagerness to treat doctrinal change as inevitable once it already has occurred.[429] It seems likely that by the Atomic Age, circumstances had aligned so as to guarantee some additional protections to consumers injured by a defective product. But it was not similarly preordained that almost all jurisdictions would cast these protections in the language of tort law, as opposed to expanded warranty safeguards. It seems likely that had circumstances changed only modestly, perhaps ten or more states would have preferred to continue to tinker with prevailing warranty rules instead of making the leap to a "pure" tort solution. In this alternate reality, the substance of the law might be similar to its present state, but the moral of the products-liability "revolution" might be subtly different. Instead of a functionalist tale of academics and judges rushing to invent and adopt new theories to keep the law in step with the times, the core message to be drawn from a movement grounded more in warranty law might be one of pragmatic doctrinal flexibility, or of the availability of alternative doctrinal approaches to arrive at similar results.

429. Gordon, *supra* note 10, at 71.