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Strict Products Liability in California: An Ideological Overview

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Introduction

California courts have consistently asserted that strict products liability is a doctrine that helps consumers. The notion of strict liability for products was first raised in California case law in 1944 in Escola v. Coca Cola Bottling Co. of Fresno.¹ In Escola, Justice Traynor reasoned that public policy required the adoption of strict products liability because strict products liability deters manufacturers from placing defective products on the market, the injured victims cannot afford the cost of the harm as well as the manufacturers who make and sell the products, proof of negligence is difficult or impossible for the consumer to provide, manufacturers have greater access to knowledge of the risks involved in a product, and the manufacturer is better able to spread the cost of injury by passing it along to consumers.² These argu-

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2. Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that
ments have been reiterated in subsequent California decisions emphasizing that strict products liability helps consumers because it is less burdensome than negligence theory. Also, the public generally perceives strict liability as benefiting consumers at the expense of manufacturers, in contrast with negligence law.

The California Supreme Court adopted strict products liability...
it in 1963 as a basis of liability in cases where consumers were injured by products.\(^5\) Justice Traynor wrote: "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."\(^6\)

In its decision the court established the requirements of defect and causation as central to the injured plaintiff's prima facie case of strict products liability.\(^7\) This Article examines how the elements of defect and causation have fared as the body of strict products liability case law has evolved.

In recent years a group of scholars in diverse fields of law has illustrated how the development of legal doctrine perpetuates and legitimates the existing economic and social systems.\(^8\) In the field of tort law, Professor Morton Horwitz has suggested that negligence law developed in order to bolster a growing industrial capitalist economic order.\(^9\) He postulates that pre-existing strict liability doctrine was supplanted by negligence so that industry could grow without undue concern for liability costs.\(^10\) Professor Richard Abel, also writing about the tort compensation system, has demonstrated that the existing tort system exhibits a lack of humanity by putting a price tag on human suffering and that the system does

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6. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700 (emphasis added).
7. Proof of damages, although part of the plaintiff's prima facie case in strict products liability litigation, and defenses are beyond the scope of this article.
not truly help the victims of accidents. Abel points out that no amount of money can truly make a person whole. Yet the tort system perpetuates a mythology that high damage awards remedy the victim's suffering and that by so doing somehow take care of the problem of safety.

This Article examines California strict products liability law in light of these critiques. Part I of the Article discusses the case law relating to defect and shows how the developing doctrine is similar to negligence law. Part II examines the evolution of causation case law, which has not been unique to strict products liability and therefore would not be distinguished from negligence. The Article's thesis is that the development of strict products liability has not helped consumers as the California courts have suggested. The doctrine does not emphasize the importance of prevention of injury. The proof requirements placed upon the injured plaintiff are not very different from the plaintiff's burdens under negligence law. Rather, the evolution of the doctrine merely has created the illusion that the tort system is responding to the needs of those injured by products. The myth that strict products liability benefits consumers at the expense of manufacturers should be dispelled.

I. THE DEFECT REQUIREMENT

To establish a prima facie case of strict products liability, a plaintiff must show that the product which caused injury was defective. Greenman v. Yuba Power Products, Inc. implied that a defective product was one that was "unsafe for its intended use."

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12. See Abel, A Critique, supra note 11, at 203.
13. The Article examines California Supreme Court and Court of Appeal cases. These cases are only the tip of the litigation iceberg, because many cases settle, end in trial, or terminate in some manner short of appellate review. Nevertheless, appellate decisions comprise the body of law that attorneys can cite in seeking early dispute resolution and this precedential value has an ideological impact. Appellate cases are also reported in the media and contribute to the mythology about law that is available to the general public. From the appellate decisions an ideology based on doctrinal development emerges.
16. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
The *Greenman* court did not define precisely how unsafe the product had to be because of the defect to enable an injured plaintiff to maintain a strict products liability suit.

**A. Defining Defect as an Unreasonably Dangerous Product**

In an attempt to clarify the defect requirement, lower level courts\(^\text{17}\) adopted the definition of defect set forth in section 402A of the Restatement (Second) of Torts,\(^\text{18}\) but the Restatement definition did not serve this clarifying function. The Restatement defined a defective condition as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."\(^\text{19}\) "Unreasonably dangerous" was defined as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."\(^\text{20}\) These Restatement definitions injected the negligence notion of reasonableness into strict products liability. The notion of reasonableness diluted the strict liability notion of responsibility for defect. It gave a manufacturer permission to injure as long as the manufacturer was reasonable in so doing. The use of a reasonableness standard burdened the plaintiff with proof problems similar to those that the California Supreme Court had said it was seeking to avoid when it adopted strict products liability.

The Restatement definitions also borrowed from warranty law the idea of focusing on the expectations of a hypothetical consumer, instead of the particular plaintiff who was injured.\(^\text{21}\) The

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19. *Id.* comment g.
20. *Id.* comment i.
21. The court had warned in *Greenman* that:

\[ \text{[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purpose for which such liability is imposed. "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."} \]

introduction of hypothetical consumer expectations into strict products liability injected into the jurisprudence the image of plaintiffs as fungible commodities, interchangeable, with a consequent loss of individuality. The particular injured plaintiff is viewed not as a human being who is hurt, but rather as a part of a formula. Thus the Greenman strict liability formulation, which was strongly pro-consumer, was undercut by the Restatement notions of reasonableness borrowed from negligence law and consumer expectations borrowed from warranty law.

The California Supreme Court showed its own ambivalence toward defining defect in 1970 in *Pike v. Frank G. Hough Co.* where it used both the Greenman and section 402A definitions of defect. The next year, in *Jiminez v. Sears & Roebuck Co.*, the court recognized the difficulty facing litigants pursuing a strict products liability action without a more precise definition of defect.

The *Jiminez* court pointed out that the term "unreasonably dangerous" defect had not been defined in *Pike*, whereas the factors used in the balancing test for negligence were clearly delineated. Plaintiff Jiminez had requested jury instructions on both strict products liability and negligence. The Court noted:

> Over the years a considerable body of law has been developed as to negligence permitting definitive instructions based upon tested and settled principles; whereas the same development has not as yet occurred with respect to the more recent doctrine of strict liability in tort . . . . In many cases, a plaintiff might well be benefited by resort to settled negligence princi-

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Emphasis on ... what the Restatement views as commonly contemplated characteristics should not afford a basis for charging the consumer with assumption of the risk of the harm some products cause. Were a consumer deemed to assume all commonly known risks, we would come full circle round to the problems generated by the disclaimer of warranty in the implied warranty cases.


23. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

24. *Id.* at 384, 482 P.2d at 684, 93 Cal. Rptr. at 772. The clear delineation of factors balanced in the negligence decision does not mean that the negligence decision itself is formulac. The ideology of law promotes the understanding that legal rules lead to a carved-in-stone certainty. The reality of negligence decisions is not so predictable.
Thus even the court that had adopted strict products liability seemed to question the usefulness of the doctrine compared with "settled" negligence principles.

The court finally rejected the Restatement's "unreasonably dangerous" requirement in Cronin v. J.B.E. Olson Co. because it "burdened the plaintiff with proof of an element which rings of negligence." However, the court did not provide a substitute definition for defect.

After Cronin, trial and appellate court judges continued to use the term "unreasonably dangerous" in spite of Cronin. Plaintiffs tried to appeal cases where jury instructions including the phrase "unreasonably dangerous" were followed by unfavorable verdicts, but would lose where they had "invited error" by asking for such an instruction. Some trial and appellate judges drafted their own definitions of defect. At least one definition devised by a trial

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25. Id. at 384, 482 P.2d at 684, 93 Cal. Rptr. at 772.
26. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
27. Id. at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 441.
28. This left plaintiffs, defendants, and the courts in a quandary. One appellate court decision, Cavers v. Cushman Motors, 95 Cal. App. 3d 338, 157 Cal. Rptr. 433 (1979), noted that "the lack of 'definitive precedent' on the concept of defect . . . caused the Committee on Standard Jury Instructions to avoid issuing jury instructions defining either 'defect' or defective condition . . . ." Id. at 345, 157 Cal. Rptr. at 146.
31. In Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973), a nine year old boy knocked over a paint can filled with gasoline, which flowed towards a gas-fired water heater. The gas ignited and the boy was severely burned. The court found no defect in the water heater, but found that the water heater had been installed in a "defective location," the garage floor. Id. at 773, 111 Cal. Rptr. at 264.

[I]t seems clear that the doctrine [of strict liability in tort] may be applied where, as the proximate result of a defect in the design of a residential building, and installation of an article pursuant thereto, injury results to a human being. It is possible that an article or a machine may function safely in one location in the design but not another.

Id.

In Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974), the court wrote:
court judge was held reversible error. One appellate court, echoing Jimenez, adopted the position that plaintiffs would be better off suing under negligence than strict products liability.

While defective design is an amorphous and elusive concept once we have progressed beyond the idea of fitness for intended use, its contours certainly include the notion of excessive preventable danger. When an automobile's fuel tank has been located in a position relatively more hazardous than others, . . . when the danger is well-known to the designers, and when the tank could have been readily relocated in a safer position, a jury could conclude that the location of the fuel tank made the design of the automobile defective.

In Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976), the court stated:

The reasonableness of an alternative design - whether the design can actually be produced, the materials for production are available, the costs are not prohibitive, etc. - is a factor to be considered in determining whether the design which was actually used can be characterized as defective . . . . Requiring an injured plaintiff who seeks damages against a manufacturer on the basis of strict liability in tort for a defective design to show that alternative designs for a product could reasonably have been developed does not enlarge plaintiff's burden of proof. An injured plaintiff has always had the burden to provide the existence of the defect. The reasonableness of alternative designs, where a design defect is claimed, is part of that burden.

The trial court in Baker had defined defect as:

A defective design is one which proximately causes or increases foreseeable and unnecessary injury to the user or to another in the course of the intended use of the product if the product can reasonably be designed and produced for its intended purpose without causing or increasing injury to the user or to another.

In Heap v. General Motors Corp., 66 Cal. App. 3d 824, 136 Cal. Rptr. 304 (1977), the trial court judge ruled that there was no defect in the car's accelerator, based upon his own ownership of a similar make of car, and the fact that several of these cars had not caused problems.

We know that there is such a thing as judicial knowledge, and I cannot ignore the fact that I know that there are an awful lot of Buick Le Sabres on the road . . . . I can't ignore the fact that for the past eight years I have been driving an Oldsmobile that has a very similar type of accelerator . . . . Now, to hold that this is defective just doesn't make sense to me. It's operating in tens of thousands of automobiles without incident.

The appellate court reversed, stating: "This is not the test for determining a defective product. The mere fact that there are thousands of similar accelerator pedals in use does not make the one in plaintiff's case any less defective if it is poorly designed and causes injury in an accident." Id.

B. Alternative Tests for Defining Defect

In an attempt to fill the definitional void, the court in Barker v. Lull Engineering Co. set out two alternative tests by which a plaintiff could prove that a product design was defective. Under the first test, plaintiff must show that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." The court noted, however, that consumer expectations should not be the only test because "in many situations, the consumer would not know what to expect, because he would have no idea how safely the product could be made." The court therefore added a second choice. Under this test, a plaintiff could prevail "if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."

1. The Consumer Expectation Alternative

The Barker court noted that the first choice, the consumer expectations test, was similar to the Uniform Commercial Code warranties of merchantability and fitness for a particular purpose. This test also resembled section 402A's definition of an unreasonably dangerous product as one that is more dangerous than a consumer with ordinary common knowledge would expect.

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34. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). The Barker court felt that a special test needed to be devised for design defects, as opposed to manufacturing defects because:

In general, a manufacturing or production defect is readily identifiable because a defective product is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line . . . . A design defect, by contrast, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all such units will reflect the same design.

Id. at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

35. Id.

36. Id. at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (quoting Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825, 829 (1973)).

37. 20 Cal. 3d at 435, 573 P.2d at 454, 143 Cal. Rptr. at 239-40.

38. Id. at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.

39. See supra note 23.
The California Supreme Court, in Cronin, had rejected using the Restatement’s viewpoint of the “ordinary” consumer in determining safety expectations and product defectiveness. The court had reasoned that if an ordinary consumer would have expected the defective condition of a product, the seller might escape strict liability. The adoption of a consumer expectation test poses several issues for consumers, including definition of that expectation and the reintroduction of negligence and warranty doctrine into strict products liability.

Garcia v. Joseph Vince Co. illustrates some of the problems inherent in a consumer expectation approach. There the court found that a fencer risked receiving an eye injury because he could not have reasonably expected that the products used in the sport would be as safe as other products. The Garcia court, citing Greenman, wrote that the purpose of strict products liability is to have manufacturers pay the cost of injuries rather than consumers who are “powerless to protect themselves.” The opinion concluded “[i]t is difficult to perceive a person choosing to engage in the sport of sabre fencing as one powerless to protect himself.”

Justice Traynor had envisioned that strict products liability should apply even to products whose “norm is danger.” Garcia negated such a possibility, for it implied that persons engaged in dangerous activities somehow have more power to protect themselves from injuries than other consumers or at least have different expectations about safety, and hence do not deserve the protection of strict products liability.

40. 8 Cal. 3d '121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
41. Id. at 132-33, 501 P.2d at 1161-62, 104 Cal. Rptr. at 442.
43. In Garcia, the plaintiff was injured when an unusually sharp blade pierced his face mask. The court found that the blade was defective, but denied recovery to the plaintiff because he could not prove which of two manufacturers produced the blade. The court found that the mask was not defective because the manufacturer could not have foreseen that an unusually sharp blade would be used. The court also stated that “fencing is a form of combat, a dangerous sport. The fencing rules provide that fencers assume the risk of injury during a bout.” Id. at 878, 148 Cal. Rptr. at 849. “[T]he risk to which we refer is not a form of contributory negligence but is conduct indicating an awareness that the available physical protection reasonably to be expected is much less than that to be expected from some other product.” Id. at 878 n.2, 148 Cal. Rptr. at 849 n.2.
44. Id. at 878 n.2, 148 Cal. Rptr. at 849 n.2.
45. Id.
46. Traynor, supra note 21, at 368.
47. It is unlikely that an ordinary consumer would expect a defective blade to be used.
The California Supreme Court interpreted the Barker "consumer expectations" language in *Campbell v. General Motors Corp.* The plaintiff in *Campbell* was a sixty-two year old woman who was injured when the bus on which she was riding made a sharp turn throwing her to the floor. She contended that the bus was defectively designed because it did not have handrails or guardrails which she could have reached for to avoid falling. In reversing the trial court’s ruling for the defendant, the court held that the lack of rails presented sufficient evidence to reach a jury concerning design defect which did not meet ordinary consumer safety expectations. The court noted that “in determining whether a product’s safety satisfied the first prong of Barker, the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case.”

This definition, by equating the Barker consumer expectation test to the section 402A unreasonably dangerous test for determining product defect, further undercut the Cronin directive to downplay consumer expectations.

In adopting the standard of the hypothetical ordinary consumer which it had previously rejected, the court has interjected elements of both negligence and warranty into strict products liability. The court thus makes possible the absolution of manufacturers from liability when there is a finding that an ordinary consumer would have expected the product to be less safe than the injured plaintiff claims he expected it to be. One of the avowed benefits of strict products liability, to make proof easier for plaintiffs, is eroded. Proof by a plaintiff, therefore, is no easier in a strict products liability action than in a negligence action, because litigants have no way of determining how much danger a court will find an ordinary consumer to have expected. This standard can, and has, led to unjust results, for it does not take into account youth, inexperience, and mental and emotional disabilities.

49. Id. at 126, 649 P.2d at 232, 184 Cal. Rptr. at 899.
50. Id. at 126 n.6, 649 P.2d at 233 n.6, 184 Cal. Rptr. at 900 n.6.
This standard also creates uncertainty for plaintiffs. Each case will raise an issue as to how long a product must be on the market before knowledge of its dangers will be attributed to the injured plaintiff as being the knowledge of an "ordinary" consumer. Safety is not thereby being promoted. The dilution of strict products liability doctrine with negligence and warranty principles undercuts the goal of compensating injured plaintiffs, while maintaining the illusion that the doctrine benefits them.

The *Barker* court acknowledged that the consumer expectation test was problematic. It stated:

> The flaw in the Restatement's analysis, in our view is that it treats such consumer expectations as a "ceiling" on a manufacturer's responsibility under strict liability principles, rather than as a "floor".... [P]ast California decisions establish that *at a minimum* a product must meet ordinary consumer expectations as to safety to avoid being found defective.\(^\text{62}\)

For this reason, the *Barker* court offered as an alternative the risk-benefit balancing test.\(^\text{63}\) However, this balancing test, like the consumer expectation test, provides an opportunity for manufacturers to escape liability, and it is not an easy test for consumers to meet.

2. **The Balancing and Burden-Shifting Alternative**

There is very little difference between the negligence and *Barker* balancing tests other than the difference in placement of the burden of proof. The same basic factors are evaluated under both. The factors which the *Barker* court stated that the jury should consider in balancing the benefits of the design against its risks are: "(1) the gravity of the danger posed by the challenged design, (2) the likelihood that such danger would occur, (3) the

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\(^{52}\) Barker, 20 Cal. 3d at 426 n.7, 573 P.2d at 233 n.7, 143 Cal. Rptr. at 237 n.7 (emphasis added).

\(^{53}\) The alternative test for liability under *Barker* provides that once the plaintiff proves that the product's design was the proximate cause of his injury, the burden shifts to the defendant to prove that the product is not defective by showing that the benefits of the design outweighed its risks. A plaintiff, suing under negligence, carried the burden of proof. 20 Cal. 3d at 432, 573 P.2d at 455, 143 Cal. Rptr. at 237. The negligence burden could prove an insurmountable obstacle in obtaining access to information on alternative designs and their feasibility.
mechanical feasibility of a safer design, (4) the financial cost of an improved design and (5) the adverse consequences to the product and to the consumer that would result from an alternative design.” In an action for negligent design, a jury must determine whether a manufacturer used “reasonable care” in designing the product. To determine this, the jury weighs “(1) the likelihood of harm to be expected from a machine with a given design and (2) the gravity of the harm, against (3) the burden of precaution which would be effective to avoid the harm.” The only difference between the Barker test and a negligence balancing test is that the Barker case elaborates on the factors involved in determining the burden of precaution necessary to avoid the harm. The tests are not truly distinct, although the court asserts that they are.

The Barker court argued that its balancing test was different from the negligence test because “the jury’s focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer’s conduct.” This distinction is artificial because decisions as to whether an improved design would be too costly, would be mechanically feasible, or would adversely affect the product or consumers are made by the manufacturer, not by the product “itself.” The Barker factors involve an evaluation of the manufacturer’s reasonable care just as the negligence factors do. Two of the three factors in a negligent design case, the likelihood of harm and the gravity of harm, focus on the product and its capacity for danger. It is just as likely that juries in negligence suits will focus on the product, as it is that juries in strict products liability cases will focus on the manufacturer’s conduct.

The Barker test specifically allows the manufacturer to justify seriously injuring consumers if it can prove that to manufacture a better design would be too costly. Juries in negligence cases may balance costs against injuries, but the Barker court has actually legitimized injuries on this basis and has made such injuries an acceptable part of the manufacturing process.

To shift the burden of proof under the Barker balancing test,

54. Id. at 431, 572 P.2d at 455, 143 Cal. Rptr. at 237.
56. Barker, 20 Cal. 3d at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239.
the plaintiff has the burden of proving first that there was a design defect, and that the defect proximately caused his or her injury. In contrast, the Cronin court required a plaintiff to show only these elements to prevail under strict products liability. The Barker test runs counter to Cronin by articulating a negligence balancing test through which a manufacturer can avoid liability once the burden of proof shifts. This negligence language burdens the plaintiff because, under Cronin, the plaintiff would have prevailed simply by proving that the design defect was the proximate cause of the injury. The Barker balancing test leaves several issues unresolved. The balance between a manufacturer's desired margin of profit, on the one hand, and the responsibility to produce a safe product regardless of the cost of ensuring safety, on the other, is not addressed. Nor is the question of how much testing a manufacturer must conduct before marketing a product resolved. These issues are significant for a system which has safety of consumers as a goal. Purportedly, the California decisions have sought to deter the marketing of defective products. Yet, the court has not addressed those cost-related issues that bear on safety. These court decisions do not motivate manufacturers to reduce accidents.

The Barker decision also did not explain how a plaintiff might prove the existence of a design defect. The fact that the product injured the plaintiff had been held insufficient to establish a defect. In Garcia, the court of appeal interpreted Barker as still requiring the plaintiff to prove that there was an alternative safer design before the burden of proof could be shifted to the defendant. The Garcia opinion stated: "Barker v. Lull . . . did not alter the need for demonstrating the availability of reasonable alternative design, but simply shifted to defendant the burden of proving
the unreasonableness of requiring an alternative in terms of such items as cost of producing the alternative product.\textsuperscript{60} If the Garcia decision is correct, the Barker risk-balancing test puts the plaintiff at an even greater disadvantage than would a negligence action. The plaintiff will have to gain access to manufacturing information, just as he or she would under negligence, plus the Barker test gives the manufacturer an opportunity to escape liability by proving that the alternative design offered by the plaintiff would be unfeasible or too costly. Thus Barker makes explicit the notion that a manufacturer can avoid liability where the safer alternative design is too expensive.

The case development defining defect has not served the interests of consumer safety and of easing the injured plaintiff’s burden of proof—the reasons for adopting strict liability in the first place. Justice Traynor’s vision of strict products liability as a means of ensuring compensation for injured plaintiffs by simplifying their litigative burden has become a complex doctrine that does not serve that goal.\textsuperscript{61}

In contrast to the defect requirement, the development of the causation doctrine has ostensibly served to ease plaintiffs’ proof problems. However, that development has not been exclusive to strict liability cases, suggesting that strict liability has not been the boon to consumers that the court decisions have implied it would be.

II. THE CAUSATION REQUIREMENT

The element of causation\textsuperscript{62} is not unique to strict products liability cases. A plaintiff in a tort case based on intentional wrongdoing or negligence, as well as on strict liability, carries the causation burden of proof.\textsuperscript{63} The causation doctrine serves to perpetuate an individualist ethic in the ideology of tort law because a plaintiff can only recover when the named defendant tortfeasor is shown to

\textsuperscript{60} Garcia, 84 Cal. App. 3d at 879 n.3, 148 Cal. Rptr. at 849 n.3.

\textsuperscript{61} Although his vision of strict products liability purported to simplify plaintiff’s litigative burden to ensure compensation, Justice Traynor did not approve of large recoveries by plaintiffs based on a pain and suffering award. See, e.g., Seffert v. L.A. Transit, 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961).

\textsuperscript{62} Causation as used here includes both actual cause and proximate cause.

\textsuperscript{63} Torts, supra note 2, at 263.
have caused plaintiff's harm. In modern tort law causation has been separated into two elements—actual cause (or cause in fact) and proximate cause (or legal cause). Actual cause is often described as a factual decision and proximate cause as a policy question. The term proximate cause (or legal cause) is also used as an umbrella term to encompass both aspects of the causation decision.

A. The Illusion of Causation

Several commentators have described how the doctrine of actual causation has been used to provide an illusion that the liability decision is an objective one. Professor Wex Malone, who initiated this approach to the subject, has suggested that the "skein of fact and policy" is not so easily separated into two separate entities. The notion that the actual cause decision is an objective one creates an illusion about the tort decision-making process and tends to reinforce the notion of identifiable individual responsibility.

Professor Horwitz has documented the efforts of nineteenth century legal writers to maintain a doctrine of objective causation in order to ensure that liability not be automatically assigned to a "deep-pocket" capitalist defendant. He writes that the doctrine of causation serves as a way to limit liability while simultaneously denying the interdependency of society by focusing on an individual actor's responsibility. Horwitz concludes that without objective causation the "problem of assigning liability had become simply a question of the fairness of the distribution of risks."

64. But see infra text accompanying notes 88-92.
66. Torts, supra note 2, at 264.
67. Id. at 273.
68. Id. at 264.
70. Malone, supra note 69, at 60.
71. Horwitz, supra note 65, at 205-06.
72. Id. at n.10.
73. Id.
Ironically, the individualist mythology of causation has "begun to be transformed into a world of liability insurance" where the cost of liability is shared by interdependent insureds. 74

In addition to the actual cause decision, the proximate causation part of the causation question requires a policy decision as to the fairness of holding defendant responsible for plaintiff’s harm. The fairness question arises in the context of unexpected injuries, 75 unlikely sequences of events giving rise to those injuries, 76 the foreseeability of the plaintiff, 77 and shifting responsibility. 78

The California strict products liability causation cases do not deviate from the typical pattern in which the fairness of finding defendant liable is debated using proximate cause words of art. 79 The cases dispute sufficiency of evidence as to causation, 80 foreseeability, 81 burden of proof, 82 and subsequent injury in a hospital. 83 They do not change the mythology of causation (articulated by Horwitz) that causation must be attributable to an individual defendant with no mention of any collective or interdependent responsibility between actors for liability to attach. This view of causation perpetuates the notion that the members of society function as atomistic individuals who may become wrongdoers. 84

74. Id. at 211.


79. The exception is Sindell v. Abbott Laboratories discussed infra. See infra text accompanying notes 84-88.


82. See, e.g., Miller v. Los Angeles County Flood Control Dist., 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973).


84. See Abel, A Critique, supra note 11, at 206.
B. A Break From Traditional Causation Theory

The idea that liability ought only to attach to individual wrongdoers was eroded by the 1980 California Supreme Court decision in Sindell v. Abbott Laboratories.85 Plaintiff Sindell, a DES daughter, sued eleven drug manufacturers for personal injuries. Her suit, based on several alternative theories of liability, including negligence and strict products liability,86 was dismissed by the trial court which found plaintiff could not identify the manufacturer that had produced the DES to which she had been exposed.87

The California Supreme Court reversed the dismissal in a decision which dispensed with the usual causation requirement that plaintiff identify the specific defendant who manufactured the DES which her mother had taken. The court held that each defendant DES manufacturer would be liable for the portion of plaintiff’s damages representing that defendant’s share of the DES market.88

This decision marks a significant departure from typical tort ideology. The interdependence of society’s members is recognized, in that drug companies can be held liable for each other’s products, and in that plaintiff’s inability ever to prove the identity of the precise tortfeasor does not bar her recovery. The Sindell decision, however, is not limited to cases of strict liability. It was also a negligence case and so this same short-circuiting of the causation doctrine could occur in either a negligence or a strict liability scenario. Therefore, the Sindell decision cannot be viewed as making strict liability doctrine more pro-plaintiff than negligence doctrine. Sindell has not been as significant in easing plaintiffs’ burden of proof as a reading of the case would suggest. In the five years since it was decided, the Sindell decision has not had the practical

85. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).
86. Other causes of action included violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and “lack of consent.” Sindell, 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.
87. Id. at 596, 607 P.2d at 926, 163 Cal. Rptr. at 134.
impact of encouraging settlements based on market share liability. Expert tort litigators agree that companies remain unwilling to settle DES claims absent identification of the harm-causing drug manufacturer. Here again the court decision creates an image that injured consumers are being assisted by the tort system. In reality that care is illusory.

**Conclusion**

Professor Abel cites the evolution of tort law in the "choice of negligence over strict liability" as support for the notion that "[b]ecause capitalists have to maximize profit in a competitive market, they must sacrifice the health and safety of others . . . ." One can read Professor Abel as implying that the doctrine of strict liability would not serve capitalists in the same way that negligence could. Yet a tort compensation system operating on a strict liability principle, as California's product liability system does, remains susceptible to several of the criticisms Abel makes of the negligence system. The manufacturer's motivation is to reduce liability costs rather than accident costs.

The creation of strict products liability does not create an overriding interest in consumer safety. The time lag between the marketing of a product and compensating an injured consumer means that manufacturers still accrue profits. Consumption patterns are not necessarily changed by the tort litigation system. The product (later found defective) has already been purchased and is in use by consumers who may be injured. A strict liability standard does not introduce any standardization of product testing to ensure that only safe products are placed on the market. The existence of an after-the-fact compensation system, whether based on strict liability or negligence, serves to lessen the concern for prevention of accidents and refocuses the systematic concern on costs. Perhaps most egregiously, the strict liability system creates the myth that, through the progressiveness of the judicial system, injured people are being taken care of, yet prevention of injury is still relegated to an unimportant status.

89. Conversation with Nancy Hersh, Hersh & Hersh, in San Francisco (Feb. 21, 1985).
California’s strict liability doctrine has not emerged as a theory dramatically different from negligence law. The proof of defect requirement has evolved to require that plaintiffs litigate the same issues that would be litigated under negligence doctrine, although the shifting burden of proof does alter the plaintiffs’ burden somewhat. In the causation arena, the Sindell decision could give plaintiffs an advantage, but that decision is not limited to strict product liability cases. In significant ways tort cases based on strict product liability and negligence remain disturbingly similar from the consumer’s perspective.