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Secondhand Jurisprudence in Need of Legislative Repair: The Application of Strict Liability to Commercial Sellers of Used Goods

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SECONDHAND JURISPRUDENCE IN NEED OF LEGISLATIVE REPAIR: THE APPLICATION OF STRICT LIABILITY TO COMMERCIAL SELLERS OF USED GOODS

I. INTRODUCTION

"For almost three decades, 'American courts have struggled with the question of whether to hold commercial sellers of used products to the same legal standards of responsibility for defects as commercial sellers of new products.'"[1] Despite the fact that a majority of jurisdictions now refuse to apply strict liability to commercial sellers of used goods who did not create the alleged defect, and who sold the product in the same condition as when the seller acquired it for resale,[2] the

1. Stanton v. Carlson Sales, Inc., 728 A.2d 534, 535 (Conn. Super. Ct. 1998) (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 8 cmt. a (1998)).

2. *E.g.*, Allenberg v. Bentley Hedges Travel Serv. Inc., 22 P.3d 223, 231 (Okla. 2001). *See generally* Tracy A. Bateman, Annotation, *Products Liability: Application*

problem is no more resolved than when it began. The typical methods used in the earlier decisions to resolve this issue were: (1) for each jurisdiction to rely on its own perceptions of the policy considerations justifying strict liability, and then apply those justifications to commercial sellers of used goods;[3] (2) to refuse to apply strict liability without further explanation;[4] or (3) to somewhat mechanically adhere to the implications of the *Restatement (Second) of Torts*.[5] Consequently, much of the commentary on the subject falls within these categories insofar as the authors analyze the debate in light of the various public policy arguments the courts use when deciding whether to apply strict liability to secondhand dealers.[6]

This apparent commitment to resolving the issue within the confines of tort law is unfortunate, because injustice will ensue, despite the policy arguments a court uses to justify its position.[7] To illustrate,

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of Strict Liability Doctrine to Seller of Used Product, 9 A.L.R.5th 1, 1, 14–17, 24–28, 32–38, 43–51 (1993), 3 (Supp. 2002) (listing the various fact situations in which courts refuse to apply strict liability to commercial sellers of used products).

3. *See, e.g.*, Turner v. Int'l Harvester Co., 336 A.2d 62, 67–69 (N.J. Super. Ct. Law Div. 1975) (arguing in favor of the application of strict liability to commercial sellers of used goods using various policy considerations and arguing to analyze those justifications (to extend or preclude the use of strict liability) to commercial sellers of used goods); Tillman v. Vance Equip. Co., 596 P.2d 1299, 1302–04 (Or. 1979) (refusing to apply strict liability to commercial sellers of used goods based on state policy considerations).

4. James S. Kats, Comment, *Used Products and Strict Liability: Where Public Safety and Caveat Emptor Intersect*, 19 CAL. W. L. REV. 330, 330 (1983) (citing Brigham v. Hudson Motors, Inc., 392 A.2d 130, 135 (N.H. 1978); Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837, 840, 844 (Miss. 1971)).

5. *Id.* at 330–31 (citing Sterner v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974); Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970); Rix v. Reeves, 532 P.2d 185 (Ariz. Ct. App. 1975); Peterson v. Lou Bachrodt Chevrolet Co., 329 N.E.2d 785 (Ill. 1975); Hovenden v. Tenbush, 529 S.W.2d 302, 305–06 (Tex. Civ. App.—San Antonio 1975, no writ); Realmuto v. Straub Motors, 322 A.2d 440 (N.J. 1974)).

6. *See, e.g.*, Steven J. Christiansen, Comment, *Used Products and Strict Liability: A Practical Approach to a Complex Problem*, 1981 BYU L. REV. 154, 157–59 (discussing policy considerations justifying strict liability); David B. Goodwin, Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535, 537–48 (1981) (discussing policy considerations justifying strict liability); Paul W. Hahn, Note, *Consumer Protection: Should It Mandate Extension of Section 402A to Used Products Dealers?*, 50 MO. L. REV. 186, 188–90 (1985) (discussing policy considerations justifying strict liability); Gary J. Highland, Note, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805, 811–19 (1979) (discussing policy considerations justifying strict liability); William L. Humes, Note, *The Application of Strict Liability in Tort to the Retailers of Used Products: A Proposal*, 16 OKLA. CITY U. L. REV. 373, 384–96, 399–407 (1991) (discussing policy considerations justifying strict liability); Kats, *supra* note 4, at 336–47 (discussing policy considerations justifying strict liability); Israel Ramòn, Jr., Note, *Torts—Products Liability—Strict Liability Is Imposed on the Seller of a Defective Used Product*, 8 ST. MARY'S L.J. 196 *passim* (1976) (examining various courts' decisions, which fall into the three categories above).

7. Courts must continue answering the question of whether to burden the seller because he may distribute the loss to buyers of other products or to neglect the plaintiff and declare that he has no remedy since such decision

applying strict liability to commercial sellers of used products, while facilitating compensation to injured victims, poses substantial problems for commercial sellers who are unable to pay large damage awards and implement procedures to prevent product-related injuries in the future.[8] This result seems highly unfair to sellers of used products. Furthermore, the imposition of strict liability is counterproductive because it may "actually *increase* the total cost of accidents"[9]—by causing consumers to substitute noncommercial used goods, which may be more dangerous, because noncommercial sellers of used goods are not subject to strict liability and have no incentive to correct defects in the products they sell.[10]

On the other hand, refusing to apply strict liability leaves consumers at the mercy of the negligence doctrine and the warranty theory, both of which are inherently inefficient in the area of products liability.[11] Subjecting injured consumers to the formidable task of proving negligence is unfair because, not only is negligence difficult and expensive to prove, but also it often results in no compensation at all, given that

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would be unfair to the seller of the used product. The recent cases indicate that injustices may result regardless of whom the court holds liable.

Ramòn, *supra* note 6, at 202; *see* Goodwin, *supra* note 6, at 548 ("Taken together, the four-part rationale for strict liability [enterprise liability, market deterrence, compensation, and implied representation], does not unambiguously resolve the question of strict liability for commercial sellers of used products.").

8. *See* Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 527 (Wis. 1991) (Steinmetz, J., concurring) (quoting Kemp v. Miller, 453 N.W.2d 872, 879 (Wis. 1990)); Goodwin, *supra* note 6, at 548; *see also Tillman*, 596 P.2d at 1304 ("The dealer in used goods generally has no direct relationship with either manufacturers or distributors. Thus, there is no ready channel of communication by which the dealer and the manufacturer can exchange information about possible dangerous defects in particular product lines or about actual and potential liability claims."); Frey v. Harley Davidson Motor Co., 734 A.2d 1, 19 (Pa. Super. Ct. 1999).

> Most dealers in used products cannot and/or do not influence the safety related decisions of the original manufacturers and distributors of those products when new because there is no relationship between those sellers who initially put the product into the stream of commerce and those who redistribute it much farther downstream. Thus, to impose strict product liability would merely impose a burden on used product dealers that many could not bear . . . .

Id.

9. *See* Goodwin, *supra* note 6, at 548; *Nelson*, 467 N.W.2d at 529–30 (Steinmetz, J., concurring).

10. *See Nelson*, 467 N.W.2d at 529–30 (Steinmetz, J., concurring).

11. *See generally* LaRosa v. Superior Court, 176 Cal. Rptr. 224, 235 (Cal. Ct. App. 1981); FRANK J. VANDALL, STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS 20 (1989) ("[W]ith strict liability the courts are trying to distance themselves from negligence and to favor the consumer while at the same time reducing his burden of proof."); Highland, *supra* note 6, at 817–18 ("One of the reasons for establishing strict liability 'was to relieve [the] plaintiff from the problems of proof inherent in pursuing negligence . . . .'") (quoting Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972)) (alteration in original).

"defects frequently occur[ ] even in the absence of negligence."[12] Furthermore, the warranty theory contains a number of stringent requirements that often lead to no compensation for injured consumers.[13]

In this light, a well-reasoned decision to apply, or to refuse to apply, strict liability to commercial sellers of used goods essentially becomes a choice between the lesser of two evils. As evidenced by a recent Oklahoma decision on the subject, this method of determining whether to apply strict liability to secondhand dealers will continue.[14] Thus, unfair, inefficient, and unjust resolutions of situations in which an unlucky consumer is seriously injured or killed because of a defect in a used product will endure.

This Comment will discuss the inability of tort law to provide an adequate solution to this issue, and why this issue should be taken out of the hands of the courts altogether and regulated by state legislatures. State legislatures have the capability to fashion a solution to this problem that would provide adequate compensation to injured consumers without: (1) adversely affecting the used goods market; (2) forcing injured consumers to deal with the expenses and difficulties of litigation using the negligence doctrine or warranty theory; or (3) unfairly holding secondhand dealers liable for defects they did not cause that may put them out of business. In Part II, this Comment will give a brief overview of the history of strict liability for products. Part III will canvass the various policy considerations of strict liability on which courts rely when faced with this issue. Part IV will explain why any solution based on the policy considerations of strict liability is inadequate. Finally, Part V will propose that a no-fault compensation plan fashioned by a state legislature could offer an effective remedy to the problem. Part VI will conclude with some final remarks on the future of products liability law.

II. ORIGIN OF STRICT LIABILITY FOR PRODUCTS

The evolution of products liability in tort involved concepts from traditional tort law, as well as concepts from contract law.[15] Expanded negligence principles were combined with the notion of "strict" liability from contract law to form an entirely new theory of liability that would govern product-related injuries.[16]

12. *See* Kats, *supra* note 4, at 332 (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 62 (N.J. Super. Ct. Law Div. 1975); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

13. *See generally* WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 97, at 690–92 (5th ed. 1984).

14. Allenburg v. Bentley Hedges Travel Serv. Inc., 22 P.3d 223, 231 (Okla. 2001) (refusing to apply strict liability to commercial sellers of used products based on an evaluation of the relevant policy considerations of past decisions).

15. 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 5:2, at 253 (3d ed. 2000) [hereinafter MADDEN & OWEN].

16. *See id.*

A. *Tort Law: Expansion of the Negligence Theory*

The earliest tort law cases involving product-related injuries were confined to the traditional principles of negligence.[17] From the decisions rendered in these earlier cases, it was apparent that the duty of reasonable care and the concept of foreseeability of harm were to be limited to encompass only those parties who had a contractual relationship with each other.[18] Thus, where a consumer was injured by a manufacturer's product, but did not purchase the product directly from the manufacturer, the consumer could not bring a negligence cause of action against the manufacturer because it was not foreseeable that the consumer would be harmed by the product, absent a contractual relationship.[19] The privity requirement effectively protected manufacturers from liability if a retailer sold the manufacturer's product to a consumer, no matter how negligent a manufacturer may have been in designing or producing a defective product.[20]

The limitations on the concept of foreseeability in light of the privity requirement can be seen in the nineteenth-century English case *Winterbottom v. Wright*.[21] Winterbottom was injured when a coach he was driving collapsed.[22] He sued Wright, the serviceman of the coach, in negligence for his injuries, but was denied recovery because Wright had a contractual relationship with Winterbottom's employer, and not with Winterbottom directly.[23] Lord Abinger reasoned:

> There is no privity of contract between [the plaintiff and the defendant]; and 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.[24]

Thus, the privity requirement prevented many injured consumers from maintaining a negligence cause of action, notwithstanding the

17. *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 612–15 (4th ed. 2001) (giving a brief history of the development of strict liability for products).

18. *See, e.g.*, Humes, *supra* note 6, at 377–78 ("The concept of duty is often defined and limited by the nature of the relationship between the parties.") (citing EDWARD J. KIONKA, TORTS IN A NUTSHELL § 4-5, at 102–12 (3d. ed. 1999)).

19. *Id.*

20. *Id.* at 377–78.

21. *See* 152 Eng. Rep. 402 (Ex. Ch. 1842), *microformed on* The English Reports—Volumes 91 to 176 CD-ROM (Jutastat Ltd.), *discussed in* PROSSER & KEETON, *supra* note 13, § 96, at 681, *and* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 695–97 (1993).

22. *See id.* at 403.

23. *See id.* at 402–03, 405.

24. *Id.* at 405.

fact that a manufacturer's or service provider's negligence was the cause of injury.[25]

However, courts have acknowledged some exceptions to the privity requirement in situations involving inherently or imminently dangerous products.[26] This exception applies to the negligent manufacture of products such as food, drugs, firearms, and explosives.[27] For instance, in the influential New York case *Thomas v. Winchester*,[28] a drug manufacturer mislabeled a bottle of belladonna, a deadly poison, as a harmless bottle of dandelion extract.[29] The manufacturer sold the bottle to a druggist, who in turn sold the bottle to a second druggist, who then sold the bottle to the plaintiff.[30] Despite there being no privity between the manufacturer and the plaintiff, the court held the manufacturer liable under the negligence doctrine.[31] In extinguishing the privity requirement in this instance, the court explained:

> [There is a] distinction . . . between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.[32]

Although this case destroyed the privity rule for inherently or imminently dangerous products,[33] the privity requirement remained in place for other products.[34] This served to insulate manufacturers from injured consumers where there was no privity.[35] This obstacle to manufacturer liability would last until the beginning of the twentieth century.[36]

Finally, in 1916, the New York Court of Appeals bridged the gap between negligently made inherently dangerous products and negligently made inherently non-dangerous products in the landmark case of *MacPherson v. Buick Motor Co.*[37] In this case, MacPherson successfully sued Buick for negligence when a car that MacPherson purchased from a dealer, not directly from Buick, proved to be

25. Croley & Hanson, *supra* note 21, at 696.
26. *See, e.g.*, Thomas v. Winchester, 6 N.Y. 397 (1852); *see also* PROSSER & KEETON, *supra* note 13, § 96, at 682.
27. Kats, *supra* note 4, at 331.
28. *See* 6 N.Y. 397 (1852).
29. *Id.* at 405.
30. *See id.*
31. *See id.* at 409–11.
32. *Id.* at 410 (citations omitted).
33. *Id.*
34. *See* 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 256.
35. *See id.*
36. *See id.*
37. *See* 111 N.E. 1050, 1053–55 (N.Y. 1916).

defective.[38] *MacPherson* had two extremely influential effects on the negligence doctrine with regard to product-related injuries.[39] Apart from removing the privity requirement from negligence actions, *MacPherson* allowed consumers to sue manufacturers for injuries caused by *any* product—not simply those products that were inherently or imminently dangerous.[40] The court held:

> [T]he principle [that manufacturers owe a duty of care beyond the immediate purchaser] is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it then is a thing of danger.[41]

Although the *MacPherson* decision signaled the end of the privity requirement and broadened the category of manufacturers against whom the negligence doctrine could successfully be used, the burden of proving the defendant's fault still loomed large for injured consumers.[42]

B. *Law of Contracts: Warranty Theory*

Because of the problems and expense of proving negligence against manufacturers,[43] many consumers injured by defective products opted to sue under the warranty theory.[44] The warranty theory was preferred because the manufacturers' liability was "strict," in that it did not depend upon proof of the manufacturers' negligence or fault.[45]

Initially, breach of warranty was a tort action[46] that preceded any notions of contract law or the law of assumpsit.[47] Being grounded in

38. *See id.* at 1051.

39. Croley & Hanson, *supra* note 21, at 697 (stating that *MacPherson* "was important in two respects": "it dealt a serious blow to the privity rule by allowing a person other than the immediate purchaser to recover from a manufacturer," and "it moved the liability standard away from absolute consumer liability toward negligence by significantly expanding the application of the negligence standard beyond those cases that involved 'imminently dangerous' products").

40. *See MacPherson*, 111 N.E. at 1053.

41. *Id.*

42. *See* 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 256.

43. *See supra* note 11 and accompanying text.

44. Humes, *supra* note 6, at 379.

45. *See* 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 253; Humes, *supra* note 6, at 379.

46. William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943) [hereinafter Prosser, *Implied Warranty*].

47. 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 254; LAW DICTIONARY 35 (Barron's 4th ed. 1996).

> Under mature English law, actions in assumpsit for expectation damages, based on defendant's breach of an express contract whose details were alleged in the complaint, came to be known as SPECIAL ASSUMPSIT. Actions in assumpsit to recover a debt came to be known as GENERAL ASSUMPSIT. In certain cases, general assumpsit was proper even though the contract was express—for example, where the plaintiff had not fully performed but the

tort, a cause of action for breach of warranty was usually justified by reference to some form of misrepresentation, deceit, fraud, or express warranty.[48] However, shortly following 1750, attorneys viewed an express warranty claim as a contract provision and began grounding these claims as a form of breach of contract.[49] Furthermore, by the beginning of the nineteenth century, near the emergence of the implied warranty theory, attorneys were taught that a warranty claim was a part of contract law.[50] Thus, breach of warranty became equated to the notion of breach of contract.[51] A number of limitations to recovery under a warranty theory resulted from its association with traditional contract law.[52] For instance, in order to bring a successful warranty claim, the consumer had to: (1) rely on an express or implied assertion;[53] (2) provide notice of the breach shortly after the consumer knew or should have known of the breach;[54] (3) be in privity with the seller of the product;[55] and (4) overcome any disclaimers by the seller.[56]

Warranty law continued to be grounded in tort in food cases, despite modern conceptions of a warranty claim as being a part of the law of contracts.[57] For example, when a consumer was injured by tainted food, the consumer of that food could sue the manufacturer,

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> nonperformance was excusable, or where the plaintiff had fully performed and nothing remained but the payment of the price in money by the defendant. General assumpsit was also the appropriate action for a promise implied in either fact or in law, and was accordingly the action of choice where plaintiff was suing for restitution—even restitution for benefits conferred under an express contract.

Id.

48. *See* Prosser, *Implied Warranty*, *supra* note 46, at 118–19.

49. *Id.* at 119.

50. *Id.* at 120.

51. *See id.* at 120–21.

52. RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965); *see* 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 256 ("[A]lthough the courts were divided, many jurisdictions enforced a special food warranty running to remote consumers that lay outside of contract law and hence was one of tort."); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring).

> This court and many others have extended protection according to such a [warranty] standard to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend "upon the intricacies of the law of sales" and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy.

Id. at 442 (Traynor, J., concurring) (quoting Ketterer v. Armour & Co., 200 F. Supp. 322, 323 (S.D.N.Y. 1912)).

53. Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963) (en banc).

54. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966) [hereinafter Prosser, *Fall of the Citadel*].

55. *Id.*

56. *See id.*

57. *See id.* at 800–01.

even in the absence of privity.[58] Nevertheless, the courts refused to expressly abolish the privity requirement[59] and devised "various fictions to rationalize the extension of the manufacturer's [implied] warranty to the consumer."[60] For instance, the courts reasoned:

> that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They . . . also held the manufacturer liable on a mere fiction of negligence: "Practically he must know it [the product] is fit, or take the consequences, if it proves destructive."[61]

The implied warranty theory spread beyond the food cases to cover products other than food for human consumption, such as animal food and "products for intimate bodily use, such as cosmetics."[62] But as one commentator explains, "[a] partial extention to other products came in 1958, with *Spence v. Three Rivers Builders & Masonry Supply, Inc.*,"[63] which involved an implied warranty for cinder blocks.[64] Then in 1960, the Supreme Court of New Jersey issued a landmark decision in *Henningsen v. Bloomfield Motors, Inc.*[65] In this case, Clause Henningsen purchased a car from Bloomfield Motors, and was manufactured by Chrysler Corporation.[66] Henningsen's wife was injured when a defect in the car caused it to hit a brick wall.[67] Mrs. Henningsen sued both Bloomfield Motors and Chrysler for "breach of express and implied warranties and for negligence."[68] However, at trial, the negligence claims were dismissed, leaving only the implied warranty issue, upon which both defendants were held liable.[69] On appeal, the court held that neither the privity requirement[70] nor Chrysler's disclaimer would bar Mrs. Henningsen's recovery.[71] Thus, it was settled that an implied warranty of safety attached to a product, even in the absence

58. *See id.* at 800–01 (implying that the warranty would attach to the food product and remain with it no matter through whose hands it passed).

59. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring) (citing Ketterer v. Armour & Co., 200 F. Supp. 322, 323 (S.D.N.Y. 1912); Klein v. Duchess Sandwich Co., 93 P.2d 799, 803 (Cal. 1939); Decker & Sons, Inc. v. Capps, 164 S.W.2d 828 (Tex. 1942); Rollin M. Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 86 (1919)).

60. *Id.* (Traynor, J., concurring).

61. *Id.* (Traynor, J., concurring) (quoting Parks v. G.C. Yost Pie Co., 144 P. 202 (Kan. 1914)) (alteration in original).

62. RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965); PROSSER & KEETON, *supra* note 13, § 97, at 690.

63. PROSSER & KEETON, *supra* note 13, § 97, at 690 (citing Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873, 874–75 (Mich. 1958)).

64. *Spence*, 90 N.W.2d at 874–85.

65. *See* 161 A.2d 69 (N.J. 1960).

66. *Id.* at 73.

67. *See id.* at 75.

68. *Id.* at 73.

69. *Id.*

70. *Id.* at 83.

71. *See id.* at 95.

of privity or proof of negligence, and despite a manufacturer's attempt to limit liability through disclaimers. Many jurisdictions followed the lead of the New Jersey Supreme Court.[72]

Acceptance of this new form of implied warranty was further supported by the Uniform Commercial Code (U.C.C.).[73] In solidifying the existence of an implied warranty, section 2-314 provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale,"[74] and those goods must be "fit for the ordinary purposes for which such goods are used."[75] Furthermore, the U.C.C. recognizes the trend to hold manufacturers liable under a warranty theory in absence of privity in that "[a] seller's warranty whether express or implied extends 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."[76]

Despite the increased applicability of warranty theory to product-related injuries, the doctrine continues to pose significant problems for injured consumers because of its foundation in contract law.[77] For example, the requirement that the consumer must rely on a manufacturer's assertion creates difficulties when the consumer does not know who manufactured the product.[78] The "notice" requirement also serves as an obstacle to recovery because "[t]he injured consumer is seldom 'steeped in the "business practice" which justifies the rule,' and at least until he has legal advice, it will not occur to him to give notice to one with whom he has had no dealings."[79] Finally, the U.C.C. recognizes a manufacturer's ability to avoid liability with a disclaimer.[80]

C. *Strict Liability for Products in Tort Law*

As early as the 1930s, commentators recognized the problems with warranty theory and the negligence doctrine in the area of product-related injuries and suggested a new form of strict liability for defective products that would lie in tort.[81] As Dean William Prosser explains:

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72. *See, e.g.*, PROSSER & KEETON, *supra* note 13, § 97, at 690 ("There was a deluge of cases in other jurisdictions following the lead of New Jersey, and finding an implied warranty of safety as to a wide assortment of products. It is quite clear that the 'citadel of privity' has fallen.").

73. *See* U.C.C. § 2-314 (2002).

74. *See id.* § 2-314(1).

75. *See id.* § 2-314(2)(c).

76. *See id.* § 2-318 (Alternative C).

77. *See* PROSSER & KEETON, *supra* note 13, § 97, at 691.

78. *See id.*

79. *Id.* (quoting Fleming James, Jr., *Products Liability (Pt. II: Manufacturers)*, 34 TEX. L. REV. 192, 192, 197 (1955)) (footnote omitted).

80. *Id.* at 656 (citing U.C.C. § 2-316(2) (1977)).

81. *See, e.g.*, Robert C. Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939); L.W. Feezer, *Capacity to Bear Loss as a Factor*

> [T]he suggestion was sufficiently obvious that all of the trouble lay with the one word "warranty," which had been from the outset only a rather transparent device to accomplish the desired result of strict liability. No one disputed that the "warranty" was a matter of strict liability. No one denied that where there was no privity, liability to the consumer could not sound in contract and must be a matter of tort. Why not, then, talk of the strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondeat superior, and discard the word "warranty" with all its contract implications?[82]

Heeding the arguments for strict liability in tort, Justice Traynor initiated its development in his concurring opinion in *Escola v. Coca Cola Bottling Co.*,[83] dubbed by one scholar as "the most renowned concurring opinion in all of American tort law."[84] The case involved a waitress who was injured when a Coca Cola bottle exploded in her hand.[85] Notwithstanding that the exact cause of the explosion was unknown, the Supreme Court of California reasoned that the waitress could use the *res ipsa loquitur* doctrine to supply an inference of negligence.[86] In his concurrence, Justice Traynor addressed both the negligence doctrine and warranty theory, and explained that strict liability in tort was the next logical step for cases involving product-related injuries.[87] In analyzing the negligence doctrine, Justice Traynor explained:

> I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover . . . . [I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings . . . . In these cases the source of the manufacturer's liability was his negligence [but e]ven if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.[88]

Justice Traynor also noted that the negligence doctrine, as it currently applies to product-related injuries, approaches strict liability and should be replaced by the strict liability doctrine if courts wish to hold

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in the Decision of Certain Types of Tort Cases, 78 U. PA. L. REV. 805 (1930); John Barker Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936).

82. Prosser, *Fall of the Citadel*, *supra* note 54, at 802.

83. *See* 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

84. 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 257.

85. *Escola*, 150 P.2d at 437.

86. *Id.* at 440.

87. *See id.* at 440–44 (Traynor, J., concurring).

88. *Id.* at 440 (Traynor, J., concurring).

manufacturers responsible, regardless of negligence or fault, for the products they place on the market.[89] He argued:

> The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a sub-manufacturer of a component part whose defects could not be revealed by inspection or unknown causes that even by the device of res ipsa loquitur cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.[90]

Next, Justice Traynor explained why strict liability should be preferred over warranty theory.[91] "Observing the analogy to the food warranty cases, Justice Traynor asserted that the same doctrine should be extended to products in general."[92] Rather than relying on fictitious rationalizations to extend the manufacturer's warranty to consumers, Justice Traynor felt that "[s]uch fictions [were] not necessary to fix the manufacturer's liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer and based on the law of torts as a strict liability."[93]

Finally, Justice Traynor maintained that strict liability was necessary because "the close relationship between . . . producer and consumer has been altered."[94] He reasoned that:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, . . . [m]anufacturing

89. *See id.* at 441 (Traynor, J., concurring).

90. *Id.* (Traynor, J., concurring) (quoting Blank v. Coffin, 126 P.2d 868, 870 (Cal. 1942)).

91. *See id.* at 441–44 (Traynor, J., concurring).

92. 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 258; *Escola*, 150 P.2d at 442 (Traynor, J., concurring) ("Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products.").

93. *Escola*, 150 P.2d at 442–43 (Traynor, J., concurring) (citations omitted).

94. *Id.* at 443 (Traynor, J., concurring).

> processes . . . are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devises such as trade-marks . . . . The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries.[95]

Thus, Justice Traynor's concurrence was the first real instance when the theory of strict liability in tort was not only articulated in a judicial opinion, but suggested as a more adequate remedy for consumers injured by defective products. Despite the soundness of Justice Traynor's concurrence, "it received little more than passing notice for many years."[96]

Not until almost twenty years later would strict liability in tort be established as the leading doctrine in defective products cases. This took place in 1963, when the Supreme Court of California issued the decision in the landmark case of *Greenman v. Yuba Power Products, Inc.*[97] In *Greenman*, the plaintiff was seriously injured when a defect in a combination power tool he received as a Christmas gift caused a piece of wood to fly out of the machine and hit him in the head.[98] He sued both the retailer and the manufacturer for negligence and breach of warranty, and the manufacturer of the product was held liable for negligence and breach of express warranty.[99] The manufacturer appealed, claiming that the plaintiff did not give notice of the breach within a reasonable time.[100] Justice Traynor, this time speaking for a unanimous court, authored the opinion.[101] Dispensing with the notice requirement for express and implied warranties, Justice Traynor explained that not only was it inappropriate "for the court to adopt [the notice requirement] in actions by injured consumers against manufacturers,"[102] but "to impose strict liability on the manufacturer under the circumstances of this case, it was not [even] necessary for [the] plaintiff to establish an express warranty."[103] Relying on case law from various jurisdictions, Justice Traynor argued that:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the man-

95. *Id.* (Traynor, J., concurring).
96. 1 MADDEN & OWEN, *supra* note 15, § 5:2, at 259.
97. *See* 377 P.2d 897 (Cal. 1963) (en banc).
98. *See id.* at 898.
99. *Id.* at 898, 899.
100. *Id.* at 899.
101. *See id.* at 898, 902.
102. *See id.* at 899–900.
103. *Id.* at 900.

> ufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed . . . .
>
> The purpose . . . is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.[104]

Thus, when a manufacturer places a product on the market, knowing that it will not be inspected for defects, that manufacturer is strictly liable in tort if that product's defects cause injury to human beings.[105] Finally, strict liability in tort emerged to govern cases involving product-related injuries.

Two years later, the American Law Institute published section 402A of the *Restatement (Second) of Torts*,[106] which solidified the doctrine's dominance in the area of products liability. Section 402A provides that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused."[107] The *Restatement* makes clear that liability under section 402A "does not rest upon negligence"[108] and "is a very different kind of warranty from those usually found in the sale of goods . . . [in that] it is not subject to the various contract rules which have grown up to surround such sales."[109] Thus, from the amalgamation of traditional negligence and contract law principles came the doctrine of strict liability in tort.

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104. *Id.* at 901 (citing State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 110 N.W.2d 449, 455–56 (Iowa 1961); Graham v. Bottenfield's, Inc., 269 P.2d 413, 418 (Kan. 1954); Rogers v. Toni Home Permanent Co., 147 N.E.2d 612, 614 (Ohio 1958); Pabon v. Hackensack Auto Sales, Inc., 164 A.2d 773, 778 (N.J. Super. Ct. App. Div. 1960); Linn v. Radio Ctr. Delicatessen, Inc., 9 N.Y.S.2d 110, 112 (N.Y. Mun. Ct. 1939); Gen. Motors Corp. v. Dodson, 338 S.W.2d 655, 658–61 (Tenn. Ct. App. 1960); Decker & Sons, Inc. v. Capps, 164 S.W.2d 828, 831–32 (Tex. 1942); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124–34 (1960)).

105. *Id.* at 900.

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

107. *Id.*

108. *See id.* at cmt. m.

109. *Id.*

III. Policy Justifications for Strict Liability[110]

As the strict liability doctrine began to gain popularity in the 1960s, courts and commentators offered a number of different public policy arguments to justify its role in the area of products liability.[111] Although many justifications "generally predicat[ed] such liability on the increasing intricacy and danger of modern products comprised of complex mechanical and chemical substances, the safety of which . . . modern consumers had no practical way to detect,"[112] a need to promote two very important goals of social policy became discernible.[113] One was "the need to provide compensation to injured consumers, through the mechanism of risk-spreading, by means of a third-party accident insurance system imposed on manufacturers by the courts."[114] The other was "the need to improve product safety and restrain the power of manufacturers through rules designed to deter the production of dangerous products."[115] The modern equivalent of these two functions is what one commentator labels, the "traditional four-fold rationale for strict liability" that encompasses "enterprise liability, market deterrence, compensation, and implied representation."[116] The first goal is promoted through the compensation and implied representation justifications because they "address the need to repay accident victims for any injury or disappointment caused by a defective product."[117] The second goal is promoted through enterprise liability and market deterrence arguments that "focus on reducing the number of accidents caused by defective products."[118] A brief overview of each policy justification will be represented in the following subparts to provide a better understanding of the justifications as they apply to commercial sellers of used goods.

110. For a more comprehensive discussion of the policy justifications for the strict liability doctrine, see Humes, *supra* note 6, at 384–96, 399–407.

111. *See, e.g.*, 1 Madden & Owen, *supra* note 15, § 5:4, at 282–83; *see also* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 Notre Dame L. Rev. 427, 430–31 (1993) [hereinafter Owen, *Moral Foundations*].

112. 1 Madden & Owen, *supra* note 15, § 5:4, at 283.

113. *See* Owen, *Moral Foundations*, *supra* note 111, at 430–31.

114. *Id.* at 430.

115. *Id.* at 430–31.

116. *See* Goodwin, *supra* note 6, at 536.

117. *See id.*

118. *See id.*

A. *Enterprise Liability*[119]

Enterprise liability is generally considered the predominant policy justification for strict products liability.[120] Support for this theory has come under the rubric of either fairness considerations or economic utility.[121]

The argument underlying the fairness prong of enterprise liability theory is that product manufacturers will inevitably place some defective products into the stream of commerce.[122] Because the manufacturer or that "enterprise" benefits from the activity in the form of profits, it is the enterprise, and not the injured consumer, who should bear the costs associated with the products.[123] Enterprise liability forces manufacturers to internalize the accident costs related to their defective products as a cost of doing business, similar to the manner in which manufacturers must absorb other production costs, including materials, labor, and capital.[124] This result is perceived as fair because of the presumption that the "doer" should bear the burden of losses,[125] which is the enterprise in this case.

"The economic utility of enterprise liability is that, theoretically, it tends to promote optimal allocation of society's resources through market processes."[126] The basic assumption of this proposition is that consumers should be able to judge the safety of a product through its price as compared to other competing products.[127] However, for this to occur, the enterprise responsible for placing defective products into the market must internalize the injury-related costs of its products and accurately reflect that cost in the product's price.[128] As enterprises are held strictly liable for the injuries their products cause, those enterprises will have to pay compensation to victims or higher insurance premiums, which they will then pass on to consumers in the form of

119. For a more comprehensive discussion of the theory of Enterprise Liability, see Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–07, 514–15 (1961), and Humes, *supra* note 6, at 387–91. A broad discussion of the Enterprise Liability theory is beyond the scope of this Comment. Accordingly, this Comment generally touches on a few aspects of the Allocation of Resources Justification for strict liability as articulated in the Calabresi and Humes articles. Therefore, use of similar language, concepts, and ideas is only meant to adequately convey the gist of the Allocation of Resources Justification for strict liability and is in no way meant to assume responsibility for the manner in which the theory is presented.

120. *See, e.g.*, Highland, *supra* note 6, at 811; Humes, *supra* note 6, at 387.

121. *See* Highland, *supra* note 6, at 811–12.

122. *See* Christiansen, *supra* note 6, at 157–58.

123. Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1286 (2001).

124. 1 MADDEN & OWEN, *supra* note 15, § 5:4, at 283.

125. Humes, *supra* note 6, at 387.

126. Highland, *supra* note 6, at 812.

127. *See* Humes, *supra* note 6, at 388–90.

128. *See id.* at 388–89.

increased prices for their products.[129] If the increased price of the product reflects the costs associated with the activity, then the natural tendency of consumers to substitute lower-priced products will also result in greater consumption of safer products, thus, a decrease in total accident costs to society.[130] "The 'hidden' value of these products becomes apparent when compared to more dangerous products, which are priced relatively higher under a strict liability system than under a non-strict liability system."[131] Optimal allocation of resources is realized because the consumer is able to make an informed decision about which product to purchase and thus, purchases only the products that he or she truly desires.[132]

However, in order to prevent a misallocation of resources and a possible increase in total accident costs to society, strict liability must be applied across the board to all similar products.[133] If a manufacturer produces a more dangerous product but is not subject to strict liability, then that manufacturer will not be forced to internalize the accident costs associated with its products, and the price of those products will not increase.[134] As compared to the other, more expensive products that are subject to strict liability, it will be those cheaper, more risky products that will attract consumers, and the result will be a misallocation of resources and an increase in accident costs.[135]

B. *Market Deterrence*

"While enterprise liability functions to reduce consumption of a product whose price increases after strict liability is imposed, market deterrence depends on the impact of increased liability costs on producers and sellers."[136] Strict liability provides an economic incentive for companies to produce safer products.[137] The resultant decrease in injury costs may take place in two instances.[138] The first occurs when a company is faced with injury costs that are greater than the costs of implementing procedures to produce safer products.[139] In this instance, it would be more cost-efficient for the company to eliminate the defects in its products that cause injury to consumers than continue to compensate those injured consumers through the strict liability system.[140] The second manner in which strict liability may lead to

129. *Id.* at 388–89.
130. *See id.* at 389; Highland, *supra* note 6, at 813–14 & n.67.
131. Highland, *supra* note 6, at 813–14.
132. *See* Humes, *supra* note 6, at 388.
133. *Id.* at 390.
134. *Id.* at 389.
135. *See id.* at 389–90.
136. Goodwin, *supra* note 6, at 539.
137. Highland, *supra* note 6, at 815.
138. *Id.*
139. *See id.*
140. *See id.*

the production of safer products is through the allocation-of-resources argument mentioned in the previous subpart.[141] When strict liability is applied to a manufacturer whose products are less expensive, though more dangerous than those of competitors, because of a refusal to improve its production process, that manufacturer is forced to internalize the accident costs of those products, thereby increasing their price to consumers.[142] Because the products are more dangerous than available substitutes, the price increase caused by the internalization of accident costs will reveal the actual cost of those products to society,[143] which will be higher than that of products already made safer through the strict liability system.[144]

C. *Compensation*

Although compensation alone should not be the primary consideration in applying strict liability,[145] it is important to note the manner in which strict liability facilitates compensation to injured consumers. Strict liability removes the need to prove the manufacturer's fault in order to receive compensation from that manufacturer.[146] This aids the injured consumer because proving negligence against the manufacturer is expensive and, at times, impossible.[147] Furthermore, strict liability dispenses with the traditional contract limitations that continue to plague the warranty theory.[148] Despite the inadequacy of compensation to stand alone as a justification for strict liability, the importance of it cannot be overlooked. If strict liability did not make it substantially easier for injured consumers to obtain compensation from manufacturers of defective products, then the overwhelming costs of lost time and health care that results from injury would fall upon the injured consumers who are unprepared to remedy its consequences.[149]

D. *Implied Representation*

The implied representation justification for strict liability is a holdover from warranty theory.[150] The purpose of this justification is both "to protect the consumer's fair expectations of safety in goods mass

141. *See id.*; *see also supra* text accompanying notes 126–35.
142. *See* Highland, *supra* note 6, at 815–16.
143. *See id.* at 815.
144. *See id.* at 815–16.
145. Humes, *supra* note 6, at 396.
146. *See id.*
147. *See supra* notes 11–12 and accompanying text.
148. *See supra* text accompanying notes 82, 104.
149. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).
150. *See* 1 MADDEN & OWEN, *supra* note 15, § 5:4, at 284.

merchandized by reputable manufacturers"[151] and to force manufacturers to stand behind the implicit safety of their products.[152]

With regard to consumer expectations, Justice Traynor articulated an implied representation justification in his opinion in *Greenman*.[153] He argued that "[i]mplicit in the machine's presence on the market . . . was a representation that it would safely do the jobs for which it was built."[154] Justice Traynor went on to base the manufacturer's liability on this implied representation, stating:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.[155]

Despite criticism from some commentators that an implied representation theory, standing alone, is not a sufficient justification for strict liability,[156] a number of jurisdictions continue to include it as one of the major policy justifications supporting strict liability.[157]

IV. Inadequacy of Tort Law to Deal with Commercial Sellers of Used Goods

Because of certain unique features of the used goods market, the conventional methods used to reach a decision whether to apply strict liability to commercial sellers of used goods are obsolete. Additionally, substantial hardships to both secondhand dealers and injured consumers are likely to result, whether a court chooses to apply strict liability in this situation or not.

A. *Harm Caused by Applying Strict Liability to Commercial Sellers of Used Goods*

Many of the public policy justifications supporting the application of strict liability to some entities do not support the application of strict liability to secondhand dealers.[158] Because of the popularity of noncommercial used goods,[159] the marginal profitability of used goods

151. *Id.*
152. *See* Humes, *supra* note 6, at 395.
153. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (en banc).
154. *Id.*
155. *See id.*
156. *See, e.g.*, Highland, *supra* note 6, at 818; Roscoe Steffen, *Enterprise Liability: Some Exploratory Comments*, 17 Hastings L.J. 165, 167 (1965).
157. *See* Highland, *supra* note 6, at 818.
158. *See* Tillman v. Vance Equip. Co., 596 P.2d 1299, 1304 (Or. 1979) ("[T]he relevant policy considerations do not justify imposing strict liability for defective products on dealers in used goods, at least in the absence of some representation of quality beyond the sale itself or of a special position vis-à-vis the original manufacturer or others in the chain of original distribution.").
159. *See* Humes, *supra* note 6, at 401.

dealers,[160] and the economic status of many of the consumers of used goods,[161] the application of strict liability in this situation would have a substantial adverse effect on the used goods market and those involved.

1. Possible Increase in the Total Cost of Product-Related Injuries

Many courts argue that "if a jurisdiction has adopted the principle of strict liability on the basis of enterprise liability, the liability of the seller of either a new or used product would logically follow."[162] This is because the policy of enterprise liability is to force those responsible for placing the defective product into the stream of commerce to internalize the consequent accident costs as a cost of doing business.[163] Like sellers of new products, commercial sellers of used products are equally capable, then, of distributing accident costs to consumers in the form of higher prices.[164] While this argument may seem attractive theoretically, its application in the used goods market may actually serve to increase the total costs of accidents.[165]

The adverse effect of applying strict liability to commercial sellers of used goods is a result of one of the limitations expressly stated in section 402A of the *Restatement (Second) of Torts*.[166] Comment (f) to section 402A provides that "[t]he rule stated . . . applies to any person engaged in the business of selling products for use or consumption,"[167] but does not apply to "the occasional seller of food or other such products who is not engaged in that activity as a part of his business."[168] The comment continues:

> Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it.[169]

Because of the failure to apply strict liability across the board to all sellers in the used goods enterprise, the result may be a misallocation of resources and an increase in total product-related accidents. To illustrate, if strict liability is applied to commercial sellers of used goods, then those sellers will internalize the accident costs associated with their products, which will, in turn, cause an increase in the price

160. *See* Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 529 (Wis. 1991) (Steinmetz, J., concurring).
161. *See id.*
162. *E.g.*, *Tillman*, 596 P.2d at 1302.
163. *See supra* notes 120–25 and accompanying text.
164. Turner v. Int'l Harvester Co., 336 A.2d 62, 69 (N.J. Super. Ct. Law Div. 1975).
165. *See supra* note 9 and accompanying text.
166. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
167. *Id.* at cmt. f.
168. *Id.*
169. *Id.*

of those products.[170] On the other hand, as the price of commercial used goods rises, noncommercial used goods or used goods sold by occasional sellers will become more attractive because those prices will remain the same.[171] However, noncommercial used goods may be more risky than commercial used goods.[172] If this is true, then applying strict liability to commercial sellers of used goods and not to noncommercial sellers of used goods will cause consumers to substitute cheaper, more risky noncommercial goods, thereby increasing the total number of accidents and injury-related costs.[173] Unfortunately, consumers injured by noncommercial used goods will generally bear the majority of the accident costs because of the difficulties in proving negligence and of the fact that noncommercial sellers of used goods are not subject to strict liability.[174] Furthermore, resources will be misallocated because consumers will purchase more risky, noncommercial used goods that they would not have purchased had they known the true cost of such products.[175] Based on the reasoning outlined above, strict liability will generally increase the total cost of accidents to society caused by defects in used goods, and will cause resource misallocation unless it is applied to noncommercial sellers of used products.[176]

2. Substantial Burden Placed on Used Goods Dealers

In order for the application of strict liability to the used goods market to effectively reduce the total cost of product-related accidents, it is crucial that the enterprise have the ability to internalize and pass on the increased costs of doing business.[177] The ability to absorb this increased cost is, in turn, directly related to the profitability of the used goods dealer. This is because the dealer must have assets available to cover unfavorable strict liability judgments either personally or in the form of increased insurance premiums, and the dealer must be able to increase inspection and repair of its used goods in order to avoid such judgments in the future.[178] Because many used goods dealers are small businesses, it is unlikely that they would have the financial power to bear the increased costs associated with the imposition of strict liability and may be forced to go out of business.[179]

170. *See* Humes, *supra* note 6, at 400–02.
171. *See id.* at 401–02.
172. *Id.* at 402.
173. *See id.*
174. *Id.*
175. *See id.* at 400–01.
176. *See id.* at 400–02.
177. *See supra* note 124 and accompanying text.
178. *See* Frey v. Harley Davidson Motor Co., 734 A.2d 1, 18–19 (Pa. Super. Ct. 1999); Goodwin, *supra* note 6, at 543–44.
179. *Frey*, 734 A.2d at 18–19.

When faced with an adverse strict liability judgment, dealers in used goods must first determine how they will pay damages. Theoretically, a used goods dealer should be properly insured against such judgments; however, the cost and availability of insurance poses significant problems for used goods dealers.[180] For example, a great number of businesses involved in selling used products are only marginally profitable and simply do not have the finances to purchase sufficient insurance.[181] In these situations, an unfavorable strict liability judgment is likely to force the used goods dealer out of business, because an uninsured dealer generally has no other means to cover damage awards.[182] Furthermore, even if a used goods dealer could afford proper insurance, he or she would still have to contend with the decreasing or nonexistent availability of such insurance.[183] Finally, if a dealer in used goods is even able to locate and afford adequate insurance, the application of strict liability to sellers of used goods is certain to cause an increase in the price of insurance premiums for that dealer because the strict liability doctrine makes it easier for the dealer to be held liable.[184] Accordingly, this will result in an increase in the cost of doing business, which marginally profitable used goods dealers are unable to absorb.[185]

Similarly, it is important to note that the mechanisms that usually allow a manufacturer or supplier of products to spread the risk of loss associated with adverse judgments, particularly indemnification and contribution, are not as effective for dealers of used goods.[186] Generally, after paying damages in a product liability suit, a manufacturer, retailer, or supplier may seek indemnification or contribution for part or all of those losses if it can prove that another party was completely or partially responsible for the injury-causing defect.[187] "Indemnity enables a tortfeasor to shift the entire liability to another party, while contribution allows him to shift a portion of the liability."[188] However, in the used goods market, the efficacy of indemnification and contribution is greatly reduced because used goods dealers typically do not maintain a working relationship with the manufacturers, designers, or suppliers of the secondhand goods.[189] Because of the time lapse between the manufacture or design of the product and the injury

180. *See* Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 528–29 (Wis. 1991) (Steinmetz, J., concurring).

181. Goodwin, *supra* note 6, at 543.

182. *Id.* at 543–44.

183. *Nelson*, 467 N.W.2d at 528 & n.4 (Steinmetz, J., concurring); Goodwin, *supra* note 6, at 543 n.39 ("Product liability insurance is often unavailable or unaffordable for a number of significant industries, including used product sellers.").

184. *See Nelson*, 467 N.W.2d at 528 (Steinmetz, J., concurring).

185. *Id.* at 528–29 (Steinmetz, J., concurring).

186. *See id.* at 530 (Steinmetz, J., concurring); Kats, *supra* note 4, at 345–46.

187. *See* Kats, *supra* note 4, at 345 (citation omitted).

188. *Id.* (citing PROSSER & KEETON, *supra* note 13, § 51, at 341, 344).

189. *See Nelson*, 467 N.W.2d at 528–30 (Steinmetz, J., concurring).

caused by its defect, it is sometimes difficult or impossible for a used goods dealer to locate a solvent manufacturer and trace the defect to that manufacturer.[190] The statute of limitations in each state also presents significant barriers to indemnification and contribution.[191] As a result of these problems, many used goods dealers will be forced to bear the full burden of unfavorable strict liability judgments.[192]

Additionally, regardless of the difficulties associated with paying damages and receiving compensation for those losses, used goods dealers would be forced to adopt costly procedures aimed at avoiding product-related injuries in the future if they hope to remain in business.[193] Presumably, this would require used goods dealers to become more knowledgeable about the history of use and the condition of their products so the dealers could readily inspect, repair, or warn consumers of the products' defects.[194] This task could become extremely costly and burdensome, given that many used goods dealers offer a wide variety of secondhand products for sale, and do not have the technical understanding and proper equipment to sufficiently repair defective products.[195] In light of these difficulties, it becomes apparent that the imposition of strict liability to commercial sellers of used goods would substantially increase the cost of doing business for many such dealers who would be unable to operate at such an increased price.[196] Inevitably, many businesses that provide a useful service to society would be forced to go out of business.[197]

3. Burden Placed on Consumers of Used Goods

Inasmuch as the application of strict liability to the used goods market will increase the cost of doing business for commercial sellers of used goods or force them to go out of business, an increasingly significant burden will be placed on consumers of used goods.[198] Many consumers of used goods have "relatively low disposable incomes"[199] and purchase their basic household necessities from the used goods market because of the low prices.[200] As commercial sellers of used goods attempt to cope with the difficulties caused by the imposition of strict liability, the prices of used goods will increase, forcing consumers to

190. *See* Kats, *supra* note 4, at 346.
191. *See id.* (citing Tillman v. Vance Equip. Co., 596 P.2d 1299, 1304 (Or. 1979)).
192. *See id.*
193. *See* Frey v. Harley Davidson Motor Co., 734 A.2d 1, 18–19 (Pa. Super. Ct. 1999).
194. *See id.* at 18.
195. *See* Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 528 (Wis. 1991) (Steinmetz, J., concurring).
196. *See id.* at 529 (Steinmetz, J., concurring).
197. *See id.* (Steinmetz, J., concurring).
198. *See id.* (Steinmetz, J., concurring).
199. *Id.* (Steinmetz, J., concurring).
200. *Id.* (Steinmetz, J., concurring).

either pay the higher prices for commercial used goods[201] or substitute less expensive, and possibly more risky, noncommercial used products.[202] Either way, consumers of used goods will be made worse off in terms of their ability to acquire safe and inexpensive products.[203] Furthermore, as a result of the application of strict liability, many used goods dealers will be forced out of business and, most, if not all, will have to increase the prices of their products.[204] The result of this situation is that consumers of used goods will be subject to increased prices for fewer available used goods.[205] Also, as a consequence of the inability of used goods dealers to operate at higher costs, consumers who are injured by defective used products will be inadequately compensated for their injuries and will have to bear the cost on their own.[206]

B. *Harm Caused by Refusing to Apply Strict Liability to Commercial Sellers of Used Goods*

For both parties involved, the reality of a products liability suit is extremely grim.[207] First, the issues involved in a product liability case are usually highly technical and arcane.[208] Both parties must spend the money and time to locate credible expert witnesses not only to testify, but also to teach the attorneys about the technical aspects of the product.[209] Furthermore, most plaintiff's attorneys take product liability suits on a contingency fee.[210] Thus, the expense of trial preparation and the trial itself must come out of the attorney's pockets.[211] This is further complicated by the fact that if the case is lost, the attorney receives nothing.[212] As one commentator concludes:

> Except for a few victims "lucky" enough (1) to be seriously injured by a product with a demonstrably provable defect, (2) to hire skilled counsel, and (3) to possess a case which—miracle of miracles—can run the gantlet of countless legal and practical pitfalls, money which could help to compensate injured consumers largely accrues to . . . a number of thoroughly trained engineers and technical experts, and some casualty insurance companies (with the latter loudly com-

201. *Id.* (Steinmetz, J., concurring).
202. *See id.* at 529–30 (Steinmetz, J., concurring); *see also supra* notes 129–30 and accompanying text.
203. *See Nelson*, 467 N.W.2d at 529–30 (Steinmetz, J., concurring).
204. *See supra* notes 177–97 and accompanying text.
205. Frey v. Harley Davidson Motor Co., 734 A.2d 1, 19 (Pa. Super. Ct. 1999).
206. *See* Goodwin, *supra* note 6, at 544.
207. *See* Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 752–53 (1973).
208. *See id.* at 752.
209. *See id.*
210. *Id.* at 753.
211. *See id.*
212. *Id.*

> plaining about how much money they are losing on the whole operation).[213]

As a result, the decision to bring a products liability suit replete with the potential to cost both sides a limitless amount of money and time, is not easily made.[214] In fact, for many of the already disadvantaged consumers of used goods, the decision is not made.[215] Because of the difficulties inherent in bringing a products liability suit, injured victims who consult attorneys are unaware of when, how, and if they will be compensated.[216] Consequently, to advise an injured consumer to pursue legal action may complicate their situation more than it helps.[217] Moreover, because of the costs related to defending a product liability suit, a successful defense of the suit may even result in forcing the used goods dealer out of business.[218]

The complications outlined above occur regardless of the theories of liability available to injured consumers of used goods. When one evaluates the above-mentioned problems in light of the fact that injured consumers may have to sue under the negligence doctrine or warranty theory instead of strict liability, it becomes apparent that such a decision would cause a disproportionately greater burden on injured consumers.[219] Under the negligence doctrine, the used goods dealer will not be held liable if he can show that he met his duty of reasonable care.[220] Thus, the relevant issue in the negligence suit will be what that duty of reasonable care entailed, and whether the used goods dealer acted reasonably; not whether the product was defective and caused the consumer to be injured, which would be the issue in a strict liability suit.[221] Assuming that the used goods dealer was not negligent, where does that leave the injured consumer? Should a used goods dealer who sold a defective product that caused injuries be able to avoid an adverse judgment simply by proving that he acted reasonably? Furthermore, the duty of reasonable care would inevitably be linked to the profitability of the used goods dealer. The question would be, "Did the used goods dealer behave as a reasonable dealer in used goods with the same assets available for inspection, repair, or warning consumers of the defects in his products?" Because many used goods dealers are marginally profitable, satisfying the duty of

213. *Id.* at 755–56.
214. *See id.* at 752.
215. *See id.* at 754.
216. *Id.* at 759.
217. *Id.* at 754.
218. *See* 1 AM. LAW INST., REPORTER'S STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, THE INSTITUTIONAL FRAMEWORK 265–66 (1991).
219. *See* Nelson v. Nelson Hardware, Inc., 467 N.W.2d 518, 521, 526 (Wis. 1991).
220. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (speaking of manufacturer liability, Justice Traynor says that "[t]he inference of negligence may be dispelled by an affirmative showing of proper care").
221. *See id.* at 440–41 (Traynor, J., concurring) (distinguishing a cause of action grounded in negligence from a cause of action grounded in strict liability).

reasonable care might only require that trivial precautions to be taken and also might not prevent consumers from being injured by defective used goods. Justice Traynor acknowledged this possibility in *Escola*,[222] asserting that "[t]he injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer . . . . The inference of negligence may be dispelled by an affirmative showing of proper care."[223] Accordingly, Justice Traynor reasoned that strict liability was necessary in order to remedy the negligence doctrine's inherent inadequacy in preventing product-related injuries.[224] He argued that "[e]ven if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[225] Apart from the harm caused to consumers and used goods dealers from the application of strict liability to the used goods market, it would seem that strict liability is better suited to provide at least some compensation than is the negligence doctrine. Forcing injured consumers to sue under the negligence theory would inevitably lead to less product liability suits in this area and, consequently, fewer injured consumers receiving compensation, because used goods dealers would not be held liable for the injury-causing defects in their products. The duty of reasonable care does not deter used goods dealers from selling defective products, and even if it did, used goods dealers can relatively easily prove that they satisfied the duty.[226] Moreover, it is unlikely that injured consumers will choose to pursue valid product liability claims under the negligence doctrine, given the cost and likely outcome of the suit.

Similarly, if the negligence doctrine is inadequate to provide compensation to injured consumers, then the warranty theory, with its foundation in contract law, is also an inadequate theory of liability to deal with product-related injuries.[227] This is because the warranty theory poses many barriers to liability that make sense when applied to commercial contracts but have little utility to provide compensation for injured consumers.[228] For instance, warranty theory has traditionally required a contract or reliance on some express or implied assertion by the seller, and notice to the seller.[229] While these requirements may serve to properly insulate commercial sellers from invalid claims, when the consumer is injured by the product, these ob-

222. *See id.* at 441 (Traynor, J., concurring).
223. *Id.* (Traynor, J., concurring).
224. *See id.* at 440–41 (Traynor, J., concurring).
225. *Id.* at 440 (Traynor, J., concurring).
226. *See id.* at 441 (Traynor, J., concurring).
227. *See generally* PROSSER & KEETON, *supra* note 13, § 97, at 691.
228. *See id.*
229. *Id.*

stacles become a "booby-trap for the unwary."[230] Often, no contract exists between the consumer and the seller, no assertions as to the quality of the product are made, and the consumer does not have the wherewithal to provide the seller with sufficient notice of the accident.[231] Furthermore, even if the consumer has met these requirements, he or she may still lose a valid warranty claim because of a disclaimer.[232] Injured consumers of used goods usually have neither the assets available nor the legal knowledge necessary to know the technical issues involved in a warranty suit.[233] While the detailed requirements for a warranty action may be reasonable for a "buyer" of commercial goods, they only serve to hamper the ability of consumers injured by defective goods to receive compensation.[234]

V. LEGISLATIVE ACTION

In light of the discussion above, it would seem that tort law is unable to resolve the issue of whether strict liability should be applied to commercial sellers of used goods and, because of this, it continues to pose a serious dilemma for judges who must attempt to make an argument justifying a decision either way. The crux of any effective resolution to this problem is to discover a way to maximize compensation to injured consumers, while minimizing various costs of compensation such as skyrocketing insurance premiums, litigation costs, increases in the prices that consumers must pay for used goods, and general increases in the cost of doing business for commercial sellers of used goods. Tort law is much too rigid and the theories of liability are too grounded in their traditional roots to provide an adequate solution. The negligence doctrine, the warranty theory, and strict products liability feed into the equation and wreak havoc on the other end. Why continue to try and hammer a square peg into a round hole? Why continue to try and fit this issue with existing theories of liability that clearly do not resolve the problem, when a sufficient resolution could be tailored to adequately resolve the issue by a state legislature?

Over the years, many scholars have advocated tort reform by substituting or supplementing tort law with highly detailed and creative regulation and no-fault compensation plans.[235] The most widely accepted compensation schemes in the United States are workers' compensation and automobile no-fault plans.[236] Under the workers' compensation model, employers provide injured employees with compensation

230. *See id.*
231. *See id.*
232. *See id.* at 691–92.
233. *See id.* at 691.
234. *Id.*
235. *See* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 101 (1989).
236. *See id.*

for lost income, medical expenses, and costs associated with rehabilitation for injuries that occur during the course of employment regardless of the employers' fault.[237] Similarly, the no-fault automobile insurance plan purports to provide all accident victims with compensation for less severe injuries regardless of fault, and in exchange for compensation, the injured victim gives up his tort rights.[238] It is highly possible that some form of a no-fault compensation plan could and should be constructed to deal with compensation issues for consumers injured by defective used goods.

A. *Elective Plan*

The plan would consist of an election process whereby consumers may elect to give up their tort rights in exchange for prompt payment of costs associated with lost income, medical expenses, and rehabilitation costs.[239] However, the traditional tort system would also remain in effect. Under the no-fault plan, contributory negligence would not be a defense.[240] Also, no payments would be made for pain and suffering.[241] Payments for medical benefits would be unlimited, but in exchange for the prompt payment that the no-fault compensation plan would offer, payments for lost wages would be capped at a certain maximum amount and periodically paid as long as the injured consumer could not work.[242] In order to extinguish the cost of product liability suits as much as possible, the injured consumer would have to choose under which system he wants to be compensated as soon as possible after the accident.[243]

Similarly, the used goods dealer would have to decide the extent of his coverage under the no-fault compensation plan.[244] As an added incentive to coverage under the no-fault plan, any used goods dealer that chose to be covered exclusively by the plan could not be sued under traditional theories of liability.[245] Furthermore, the used goods dealer would have to choose whether to cover all defect-related injuries or only certain designated accidents.[246] This decision would bind the injured party if made before the occurrence of the accident.[247]

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237. *Id.*
238. *See id.* at 101–02.
239. The plan this Comment proposes is loosely based on previous plans proposed by Professor O'Connell. O'Connell, *supra* note 207, at 774, *cited in* SUGARMAN, *supra* note 235, at 104.
240. O'Connell, *supra* note 207, at 773.
241. *See id.*
242. *See id.* at 773–74.
243. *See id.* at 774.
244. *See id.*
245. *See id.*
246. *See id.*
247. *Id.*

The benefits of this plan to used goods dealers would be numerous. For example, although used goods dealers would have to provide compensation for more people, the amount paid would be considerably less because they would only have to pay for costs not provided by other forms of insurance.[248] Also, this type of no-fault plan would decrease the loss in time and money associated with having to defend a products liability suit.[249] The plan could also provide great benefits for injured consumers. Instead of having to wait and see what, if anything, will come from a long and expensive product liability suit, injured consumers would have the option to receive prompt compensation, which is probably the most grueling aspect of a product liability suit.

B. *Funding for the No-Fault Compensation Plan*

Because of the marginal profitability of many used goods dealers[250] and the relatively low incomes of consumers of used goods,[251] any no-fault plan that would be beneficial to the used goods market would have to be funded through a complex system of taxes, reimbursements, penalties, and awards in order to stabilize the costs to used goods dealers and the price of used goods. This is because if the cost of doing business dramatically increases, then used goods dealers will be forced out of business.[252] Similarly, if the prices of used goods substantially increase, consumers of commercial used goods will no longer be able to afford them and may substitute noncommercial used goods.[253] For these reasons, the no-fault compensation plan would have to be managed by an agency charged with the task of compiling data on the types of products that tend to be resold by manufacturers, the types of such products that cause injury, and when in the chain of distribution those defects in products that cause injury are most likely to arise. The manufacturers most likely to sell defective products according to the data, and used goods dealers in general, would pay a tax that would go into a fund to pay injured consumers and increase inspection of the used goods in question. Manufacturers of the defective or "likely defective" products would pay more than used goods dealers, because (1) They are generally in a better position financially to bear the burden of accident-related injuries; (2) This would greatly reduce situations in which used goods dealers cannot locate solvent manufacturers for indemnification or contribution, or a statute of limitations has run; and (3) With manufacturers paying the majority of the

248. *See id.* at 774–75.
249. *See id.* at 775.
250. *See supra* note 181 and accompanying text.
251. *See supra* note 161 and accompanying text.
252. *See supra* notes 177–79 and accompanying text.
253. *See supra* notes 129–32 and accompanying text.

cost of accidents, the cost of doing business for used goods dealers and the price of used goods will be better stabilized.

However, some penalties and reimbursements must exist in the no-fault compensation plan in order to provide incentives for manufacturers and used goods dealers to increase inspection, repair, or warning of product defects and for manufacturers to maintain some kind of relationship with the individuals who sell their products used. For example, periodic evaluations could be done to determine whether an increase or decrease in product-related injuries had occurred for the products labeled by the study as "most likely to be sold used and cause injury". If it could be shown that because of increased attention to the use and quality of the products the number of injuries had decreased, then the manufacturers would be reimbursed for a portion of their contributions to the fund. However, if an increase in injuries had occurred, then the manufacturer as well as the used goods dealer would have to pay more into the fund. This method of funding the no-fault compensation plan would provide incentives for manufacturers to keep track of their products and coordinate inspections with used goods dealers to insure that the products are safe. Furthermore, in addition to stabilizing the cost of doing business for used goods dealers by placing the majority of the burden of the costs on manufacturers, this funding method also places penalties on used goods dealers who continue to sell defective used products that cause injury. Presumably, if a used goods dealer is forced to go out of business because it cannot afford the penalty tax associated with continually selling defective goods, then it is best for society to have that dealer out of business.

VI. CONCLUSION

As it has been for the last thirty years, the idea of no-fault compensation in the area of products liability continues to be a relatively revolutionary one.[254] On one hand, manufacturers, sellers, and distributors of products would be among the first to attack legislation proposing a no-fault compensation plan because of the possible costs to their respective enterprises.[255] On the other hand, even some dedicated liberals have refused to staunchly support programs for social reform, which may be unpredictable and offer inconsistent results.[256] Furthermore, individuals in the legal profession—lawyers as well as judges—seem to be petrified by no-fault compensation plans that do not depend on fault or defect.[257]

254. *See* O'Connell, *supra* note 207, at 795.

255. *See id.*

256. *See id.* at 795–96.

257. *Id.* at 769.

It is evident that the application of strict liability to commercial sellers of used goods may begin a vicious cycle, which puts sellers out of business in the end. However, the inherent problems in utilizing the negligence and warranty theories of liability to provide compensation to injured consumers is the reason for strict liability in products in the first place. The logical solution would be to submit the issue to a state legislature that could tailor an adequate solution, which would be free of the devastating effects of tort law. One commentator's reaction to the ability of the law to mature and expunge inconsistencies is that "[t]he role of logic in law is to iron out the small contradictions, the big ones we leave alone."[258] Let us hope that this is not true.

Derrick Williams

258. *See id.* at 762 (quoting Harry Kalven, Jr., *Tort Law—Tort Watch*, 34 AM. TRIAL LAW. ASS'N L.J. 1, 32 (1972)).