MANUFACTURERS' LIABILITY IN TORT (OR DEVELOPMENTS IN THE FIELD OF PRODUCTS LIABILITY)

The scientific and technological revolution which has gathered momentum since World War II has been accompanied by widespread changes in consumer products and the introduction of a vast range of new products, particularly those of a chemical or pharmaceutical nature. With these advances there are of course benefits, but there are also increasing dangers to individual safety not only in the manufacturing process but also in the use of the finished products. There is a growing social concern over the incidence of unintended harm occurring in the use of manufactured products and that therefore behoves us from time to time to re-examine the principles concerning responsibility. In the Commonwealth Courts a pre-requisite for the responsibility of manufacturers in tort has been a finding of negligence on the part of the manufacturer. This article will discuss whether, as the range of products widens, there is sufficient certainty in the application of responsibility in contract (warranty) and tort. I doubt if any manufacturer in New Zealand can assume complete perfection in his process. Because a product may possibly have dangerous end results, it does not necessarily follow that the ultimate consumer can sue the manufacturer for making a dangerous substance: for example, cigarette smokers are aware of the dangers of smoking and if they elect to continue doing so, surely that is their own business.[1] I think we would all agree with Professor Keeton, Dean of Law, University of Texas when he says that "liability should not be extended to makers for harm resulting from unavoidable injurious effects of highly desirable products, such as good penicillin, good cigarettes or good whisky".[2] He goes on to say that "it is doubtful whether strict liability induces greater care than does negligence liability. Moreover, if strict liability does induce greater care, it can be argued that if will also tend to inhibit the development of new products. Thus, the importance of the development of new products may be a factor to be considered in establishing the limits of strict liability".[3]

Let me by way of example, discuss a drug such as thalidomide. As Mr D.M.J. Bennett of Sydney has recently pointed out,[4] it seems fairly clear that in Commonwealth countries no action on behalf of the affected children would lie for breach of warranty against the manufacturers of thalidomide. Liability for breach of warranty being strictly contractual the doctrine of privity of contract would effectively block any recovery. As Mr Bennett says "by no stretch of the imagination, could it be said that a foetus injured by a drug taken by its mother was in any way a purchaser of the drug or had any privity of contract with the drug manufacturer or retailer".[5]

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1 In all four major cigarette-cancer cases fully litigated to date the defendant cigarette companies were successful. See R.A. Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678 (1966).

2 P. Keeton, Products Liability - Some Observations About Allocation of Risks, 64 Mich. L. Rev. 1329, 1333 (1966).

3 Ibid.

4 D.M.J. Bennett, The Liability of the Manufacturers of Thalidomide to the Affected Children, 39 Aust. L.J. 256 (1965).

5 Ibid., 257.

In order to succeed therefore the plaintiffs would have to base their claim on tortious principles. The vital role of the law of torts in this type of case is therefore quite apparent.

Having made these general observations I intend to divide the subject as follows:

(1) The principles enunciated in the classic case of Donoghue v. Stevenson.[6]

(2) The developments since this decision in the law of the Commonwealth.

(3) The American approach to the subject.

(4) What of the future? Reference will be made, inter alia, to:

(a) Reasonable foresight.

(b) The arguments pro and contra strict liability.

(c) Liability for defects in the product resulting in economic loss rather than injury to persons or property.

(d) The Hedley Byrne[7] principle as affecting advertising of products.

1. Donoghue v. Stevenson

In 1928 a Miss M'Alister, later Mrs Donoghue, was "shouted" an ice-cream and a bottle of ginger beer by a friend in Glasgow. Departing from good manners, she poured the ginger beer over the ice-cream and when eating this unpalatable mess observed in the remaining contents of the bottle, a decomposed snail. She suffered shock and gastro-enteritis. After winning the first round in Court on the basis that the manufactured goods had been exposed to a risk of contamination and this was a wrong for which the defendant was liable, Mrs Donoghue had to meet an appeal which was allowed. Proceeding in forma pauperis to the House of Lords, plaintiff won her case by a majority of three to two. There was obviously no contract between the manufacturer and Mrs Donoghue; liability was founded in negligence and Lord Atkin stated the manufacturer's duty as follows:

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."[8]

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6 [1932] A.C. 562.
7 [1964] A.C. 465.
8 [1932] A.C. 562, 599.

In the field of manufacturers' negligence, this case disposes of the rule that contractual liability of A to B excludes tort liability of A to C. Simultaneously, it introduces the positive principle that for manufacturers of dangerous substances any potential consumer is a "neighbour" to whom a duty of care is owed by the manufacturer with corresponding liability for negligence in the manufacture of the product. It seems however, that this duty is now modified and it is not essential there should be no reasonable possibility (or probability)[9] of intermediate examination as long as the article is intended by the manufacturer to reach the ultimate consumer in the state in which it left him.[10] This was decided in Grant v. Australian Knitting Mills[11] where is was stated that:

> "The decision in Donoghue's case did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer subject to the same defect as it had when it left the manufacturer."[12]

This case extended the liability of manufacturers to harm caused by independent contractors, where, as in many modern industries, the process of manufacture is apportioned. A doctor contracted dermatitis from woollen underwear he had purchased and in which a chemical sulphite irritant had remained. Not only was the manufacturer of the finished product held liable for a defect which might have been caused by an independent contractor, but also, by the application of the maxim 'res ipsa loquitur', the onus of proof was in effect shifted to the defendant: it was for the manufacturer to show that a cause outside his sphere of responsibility had intervened: the Privy Council said:

> "The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong: negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances."[13]

Two years later came the much criticised decision of Daniels & Daniels v. R. White & Sons Ltd. & Tarbard[14] where a 'foolproof' process for filling lemonade bottles was held to rebut evidence of negligence resulting from the poisoning of a consumer through carbolic acid contained in a bottle which had been subjected to this process. The Court went to great lengths to show the contractual relationship with the retailer.

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9 Paine v. Colne Valley Electricity Supply Co. Ltd. [1938] 4 All E.R. 803, 808, per Goddard L.J.
10 See Charlesworth on Negligence (4th ed., R.A. Percy 1962), 357, Para. 792.
11 [1936] A.C. 85 (P.C.).
12 Ibid., 106, per Lord Wright delivering the advice of the Privy Council.
13 Ibid., 101.
14 [1938] 4 All E.R. 258.

The 'products' mentioned by Lord Atkin in Donoghue v. Stevenson are not confined to food and drink; pants, hair-dye, kiosks, motor cars, lifts, designs and possibly tombstones are included. As stated in Clerk & Lindsell on Torts[15] "the list is neither exhaustive nor closed".

I used the words 'dangerous substances' earlier in this subheading. The concept of 'dangerous' in this and other torts has been so widened as practically to lose any really distinctive meaning. As Professor W.G. Friedmann has said:

> "No article or substance is in itself either dangerous or non-dangerous: the conduct, circumstances, and relations of the parties concerned determine whether it has become dangerous in a particular instance. At most the presumption is stronger in the case of some articles than of others, but it all resolves itself into a question of care."[16]

2. The Developments in the Commonwealth since Donoghue v. Stevenson

Cases since Donoghue v. Stevenson on the liability of the manufacturer have adopted as the basic rule the classic formulation of the principle of manufacturer's liability enunciated by Lord Atkin. In the interpretation of it in Commonwealth countries there have however been several developments affecting the responsibility of the manufacturer.

(1) The protection of the rule has been extended to cover not only consumers and users but others within the vicinity of its probable use such as the pedestrian injured through a defect in a motor vehicle.[17]

(2) Lord Atkin's requirement that the product should be intended to reach the consumer in the form it left the manufacturer has not been insisted on in any strict sense. It has been sufficient that the product would retain all its material features.[18] In the New Zealand case of Grant v. Cooper McDougall & Robertson Ltd.[19] the manufacturer was held liable although the product was mixed, as intended, with another article.

(3) Lord Atkin's rule imposed only where there was no reasonable possibility of intermediate examination. Subsequent cases however have narrowed the scope of this restriction by imposing liability unless:

> (a) The intermediate examination is not merely possible but is probable or should reasonably be anticipated[20] and

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15 Clerk & Lindsell on Torts (12th ed., A.L. Armitage 1961), 414, Para. 758.
16 W.G. Friedmann, Social Insurance and the Principles of Tort Liability, 63 Harv. L. Rev. 241, 244 (1949).
17 Stennett v. Hancock [1939] 2 All E.R. 578.
18 Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85 (P.C.).
19 [1940] N.Z.L.R. 947.
20 Herschtal v. Stewart & Arden Ltd. [1940] 1 K.B. 155, 172; Haseldine v. C.A. Daw & Son Ltd. [1941] 2 K.B. 343, 363, 379.

(b) The examination which is anticipated is such as ought reasonably to reveal the defect[21] and

(c) It would not be contemplated that a consumer discovering the danger would incur the risk of it.[22]

(4) The duty Lord Atkin spoke of was to use care in the preparation and putting up of products. In accordance with this expression of the content of the duty, liability has been imposed on manufacturers not only for defects in their own manufacturing process but also for negligence in

(a) Failing adequately to check or inspect the component part made by another manufacturer[23]

(b) Failing to give proper instructions for the use of the product.[24]

(5) One of the most important practical facets in holding manufacturers liable for defects in their products has been the principle of res ipsa loquitur. Provided there is not a substantial likelihood that the defect causing the injury is due to extraneous causes outside the manufacturer's control, the defect will itself be evidence of negligence in the manufacture and it is then for the manufacturer to show that there was no absence of reasonable care. Thus in Grant v. Australian Knitting Mills Ltd.[25] the presence of the chemical irritant in the pants was regarded as sufficient evidence of negligence. The res ipsa principle of course is particularly important in this context as the cause of the defect will often be difficult if not impossible to ascertain. Without the defect being itself evidence of negligence proof of negligence would be extremely difficult; with it the manufacturer has a very difficult assignment to disprove negligence.

The period since the decision in Donoghue v. Stevenson has seen a great development in the law of negligence generally. In addition to providing a rule as to manufacturer's liability Lord Atkin enunciated the general principle of reasonable foreseeability of injury as the test of the existence of a duty of care. And this principle has since been used as the guiding light or inspiration for new duties in particular cases. There has been a general tendency to assimilate particular rules for different classes of case to the general test of reasonable foreseeability. The legislature in New Zealand and England has - in the field of occupier's liability - even taken a hand in this process.

Viewed against this general development the principles governing a manufacturer's liability for his products have not

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21 Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85 (P.C.).
22 Denny v. Supplies & Transport Co. Ltd. [1950] 2 K.B. 374.
23 MacPherson v. Buick Motor Co. 217 N.Y. 382; 111 N.E. 1050 (1916) referred to with approval in Donoghue v. Stevenson [1932] A.C. 562.
24 Grant v. Cooper McDougall & Robertson Ltd. [1940] N.Z.L.R. 947.
25 [1936] A.C. 85 (P.C.).

made a marked advance. Products liability has tended to remain a confined corner of the law of negligence with its own special rules rather like the law of occupier's liability was until attempts to rationalize it were made by the judiciary and finally by the legislature.

In at least two respects the rules enunciated by Lord Atkin and developed in later cases still deny recovery to the victim of a defective product where the simple application of his neighbour formulation, his general principle of reasonable foreseeability, would allow the injured plaintiff to succeed:

(i) If an intermediate examination is probable the manufacturer escapes liability. Yet it must surely be arguable that the manufacturer would reasonably foresee that if he is negligent and produces a defective product, injury may result. On normal principles if the plaintiff carelessly fails to inspect and discover the defect caused by another's failure to take reasonable care he now recovers damages reduced for contributory negligence. If it is an intermediate party who fails in the sphere of inspection then one might expect that the responsibility will be apportioned between him and the negligent manufacturer. But as the law stands in both these cases the manufacturer is under no duty to the victim of the defect.

(ii) Although the position is not clear, there is high authority - in Grant v. Australian Knitting Mills Ltd.[26] and London Graving Dock Co. Ltd. v. Horton[27] - for the view that knowledge of the defect on the part of the plaintiff defeats the claim. Such a position seems clearly wrong in principle. If a manufacturer should foresee injury from any negligence on his part - particularly where there is no intermediate examination contemplated which is likely to reveal the defect and deter the consumer - he should be regarded as in breach of a duty of care. Knowledge of the danger unless it amounts to volenti non fit injuria is not generally a bar to a claim in negligence but only a factor in contributory negligence. The criticism and legislative reversal of the decision in London Graving Dock Co. Ltd. v. Horton making knowledge of the danger a complete bar in the occupier's liability field suggests that it should not be applied in other fields.

3. The American Approach to the Subject

To endeavour to summarise the American law of products liability would be to attempt the impossible. Not only are there fifty different jurisdictions to contend with but the law has developed so rapidly that even American commentators find it difficult to state the law with any degree of certainty.[28] For these reasons I propose to examine briefly the law of products

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26 Ibid., 105.
27 [1951] A.C. 737, 750.
28 Literally hundreds of articles have been written on the subject. See, e.g., the list cited in 69 Yale L.J. 1099, 1100 (1960).

liability in one State only, that State being California.[29]

To appreciate fully the sweeping changes that have occurred in California it is necessary to return momentarily to the decision of the House of Lords in Winterbottom v. Wright.[30] That was a case involving an alleged breach of contract, negligence apart from contract not being alleged or proved. However, the case was often cited as authority for the proposition that a purchaser could recover damages caused by a defective product only from his immediate vendor and it is notable for the following statement by Lord Abinger:

> "There is no privity of contract between these parties; 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."[31]

As Dean Prosser has said "what happened in the next century was enough to make the learned jurist turn in his grave".[32] The Courts began by the usual process of developing exceptions to the general rule of non-liability to persons not in privity. The most important exception was that the seller of an inherently dangerous chattel owed a duty of reasonable care to make it safe for anyone who might be expected to use it.[33] Then in 1916 came Justice Cardozo's famous opinion in MacPherson v. Buick Motor Co.[34] Speaking for the majority of the New York Court of Appeals Cardozo stated that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger".[35] Thus by a drastic widening of the exception as to inherently dangerous products the general rule of non-liability to persons in privity was overturned. In subsequent years the rule of the MacPherson case was extended by degrees so that "it has become, in short, a general rule imposing negligence liability upon any supplier for remuneration of any chattel".[36] In California however, MacPherson v. Buick was merely the beginning. Indeed one commentator has said that "as the past generation of law students was taught that the most noted chapter of legal history was the growth of the law from Winterbottom v. Wright to MacPherson v. Buick the next generation will learn that this is only half the plot and that the line moves on to Escola v. Coca Cola Bottling Co. in 1944 and to Greenman v. Yuba Power Products Inc. in 1962".[37]

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29 It is probably true to say that California leads the other States in this field and this is largely due to the opinions of Chief Justice Traynor of the Supreme Court of California.

30 10 M. & W. 109; 152 E.R. 402 (1842).

31 Ibid., 114; 152 E.R. 405 (1842).

32 W.L. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1100 (1960).

33 Thomas v. Winchester 6 N.Y. 397 (1852).

34 217 N.Y. 382; 111 N.E. 1050 (1916).

35 Ibid., 389; 111 N.E. 1050, 1053. The MacPherson case was of course relied upon by the majority of the law Lords in Donoghue v. Stevenson [1932] A.C. 562.

36 Prosser, supra, note 32 at 1102.

37 H. Kalven, Torts: The Quest for Appropriate Standards, 53 Calif. L. Rev. 189, 202 (1965).

The Escola case,[38] decided by the Supreme Court of California, involved an exploding Coca Cola bottle. The plaintiff pleaded res ipsa loquitur and succeeded in negligence. The case is notable for the concurring opinion of Traynor J. who began by announcing the broad proposition that "manufacturers' negligence should no longer be singled out as the basis for the plaintiff's right to recover in cases like the present one".[39] He then went on to say "even 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. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent, in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection."[40]

This broad statement was buttressed by four other considerations: (1) in allowing res ipsa loquitur to be pleaded freely, the law of negligence approaches strict liability; (2) where a warranty is available there is already strict liability; (3) it is pointless to have the plaintiff sue the retailer and the retailer in turn sue the manufacturer; and (4) in the cases relating to foodstuffs strict liability has long been accepted.[41] In subsequent Californian Supreme Court cases the strict tort liability theory was followed, and the surreptitious use of res ipsa loquitur and the law of sale of goods to achieve the same result was severely criticised.[42]

Then in 1962 the same Court decided Greenman v. Yuba Power Products Inc.[43] with Justice Traynor delivering the unanimous opinion of the Court. The plaintiff was injured when a combination

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38 24 Cal. 2d 453; 150 P. 2d 436 (1944). This case may also be found in C.A. Wright, Cases on the Law of Torts, 299 (1954).
39 24 Cal. 2d 453, 461; 150 P. 2d 436, 440 (1944).
40 Ibid., 462; 150 P. 2d 436, 441.
41 Ibid., 463; 150 P. 2d 436, 441.
42 See, e.g., Gordon v. Aztec Brewing Co. 33 Cal. 2d 514, 523; 203 P. 2d 522, 528 (1949) where Traynor J., concurring, said: "If such liability is to be imposed it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases." See also Trust v. Arden Farms Co. 50 Cal. 2d 217, 235; 324 P. 2d 583 (1958).
43 59 Cal. 2d 57; 377 P. 2d 897 (1962).

power tool proved to be defective. He sued the manufacturer who defended on the ground that notice of the breach of warranty had not been given as required by the Uniform Sales Act. This defence was rejected, the reasoning being that since the liability was a strict one in tort the law relating to warranty was not appropriate. The plaintiff made out his case by proving merely that he was injured while using the tool "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".[44]

The effect of this decision has been an abandonment of the warranty theory in favour of strict liability in tort divorced from any contract rules.[45] Dean Prosser concludes that the number of American Courts which have since adopted this strict tort liability approach is "sufficient to make it reasonably certain that this is the law of the immediate and the distant future. There are still Courts which have continued to talk the language of 'warranty', but the forty-year reign of the word is ending, and it is passing quietly down the drain".[46]

In 1965 the Supreme Court of California took another major step in the case of Vandermark v. Ford Motor Co.[47] There it was held that the obligation of the manufacturer to supply the eventual purchaser with a safe motor car was such that it could not be delegated to the car dealer, and that the manufacturer could not escape liability for an unsafe product on the ground that the defect in the brakes might have been caused by something the car dealer did or failed to do in preparing the car before final delivery. Furthermore, the retail dealer was subject to the same strict tort liability as the manufacturer. The Court also decided that disclaimer of liability as a possible defence to the retail dealer was impermissible as contrary to the policy of the law even where the product was dangerous to human safety. The defence of disclaimer had previously been denied to manufacturers.

Finally we have the decision in Seely v. White Motor Co.[48] with the question of recovery for economic losses suffered by the plaintiff. Chief Justice Traynor speaking for the majority, approved the trial Court's award of damages for lost profits and for money paid on the purchase price of the truck on the basis of breach of an express warranty contained in the purchase order signed by the plaintiff. However, the Court limited the Greenman[49] decision to situations in which there has been personal or property damage. The reasoning applied was that if recovery for economic loss was allowed on the basis of strict tort liability, the manufacturer would be liable for the business losses of purchasers for the failure of its products to meet the specific needs of their businesses even though those needs were communicated only to the dealer. The Court said:

> "A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury

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44 Ibid., 64; 377 P. 2d 901.
45 See W.L. Prosser, The Fall of the Citadel (Strict Liability to the Consumer) 50 Minn. L. Rev. 791 (1966).
46 Ibid., 804.
47 61 Cal. 2d 256; 391 P. 2d 168 (1964).
48 403 P. 2d 145; 45 Cal. Rptr. 17 (1965).
49 Supra, note 43.

when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."[50]

To summarise, the effect of the Californian cases is to create alongside the warranty obligation of the retailer a new tort imposing strict liability on the manufacturer for personal injuries caused by defective products. There is no privity requirement as there is with warranty so that the plaintiff's status prior to his injury is irrelevant. Any user or consumer of the product in the widest sense of the terms comes within the protection of this new tort. There is no defence of disclaimer and the rule applies to all kinds of products. It is enough that the product, if defective, will be dangerous to the user or to his property. The fact that the product is to be serviced by a dealer before it is ready for use by the consumer does not absolve the manufacturer. However, it would seem "that there is no strict liability when the product is fit to be sold and reasonably safe for use, but has inherent dangers that no human skill or knowledge has been able to eliminate".[51]

It seems that strict liability will not change the rule that the seller of a product is not liable when the consumer makes an abnormal use of it. Furthermore, the rule of the negligence cases that failure of the dealer, or some intermediary to discover a defect is no defence, applies in this field. Similarly, it appears that contributory negligence is available as a defence except where the plaintiff's only failure is to discover the danger in the product. As far as proof is concerned, the strict liability doctrine still requires the plaintiff to establish that the defendant sold a product which he should not have sold and that it caused his injury. In addition, it must be shown that the defect existed when the product was sold to the particular defendant. Finally, in California at least, the plaintiff cannot recover for economic loss.

4. What of the Future

(a) Reasonable Foresight

It seems to me that over the last few years the law has been moving irresistably towards the concept of persons being liable for damage or injury when they should reasonably foresee that their actions might cause such damage or injury. That this appears to be the position is now reinforced by the decision of the Privy Council in Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty.[52] This case makes it clear that a person must be regarded as negligent, if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. As Lord Reid said "a reasonable man would only

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50 403 P. 2d 145, 151; 45 Cal. Rptr. 17, 23 (1965). Contra: Santor v. A. & M. Karagheusian Inc. 44 N.J. 52; 207 A. 2d 305 (1965), where the New Jersey Supreme Court allowed the plaintiff to recover for economic losses.

51 Prosser, supra, note 45, 812.

52 [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709.

neglect such a risk, of small magnitude, if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it".[53] I therefore submit that if a manufacturer in order to eliminate a danger or risk from his article or process has to spend extra money for this purpose, the law would imply that he should "not neglect such a risk if action to eliminate it presented no difficulty, and involved no disadvantage...."[54]

As Lord Wilberforce said in Goldman v. Hargrave & Others,[55] "one may say in general terms that the existence of a duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it".[56]

(b) The Arguments for and Against Strict Tort Liability

This is a problem which goes to the very heart of the law of tort. Professor Seavey has observed that:

> "In determining whether there is tort liability when harm has been caused, the focal point of conflict has been whether one should be liable for harm irrespective of fault. The law has been in a state of flux in its desire to protect the two basic interests of individuals - the interest in security and the interest in freedom of action. The protection of the first requires that a person who has been harmed as a result of the activity of another should be compensated by the other irrespective of his fault; the protection of the second requires that a person who harms another should be required to compensate the other only when his activity was intentionally wrongful or indicated an undue lack of consideration for the interests of others. At any given time and place the law is the resultant derived from the competition between these two basic concepts."[57]

The competition between these two basic concepts is very much in evidence today. The fault principle has by no means been eliminated[58] but the gap between strict and non-strict liability appears to be narrowing. In a number of torts such as liability for damage by fire, vicarious liability, damage by dangerous animals, liability based on breach of statutory duty, liability for cattle trespass, and the situation in Rylands v. Fletcher, a fairly strict form of liability applies[59] and in other areas of tort law strict liability has been strongly advocated.[60]

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53 Ibid., 511; [1966] 2 All E.R. 718.
54 [1966] 3 W.L.R. 498, 512; [1966] 2 All E.R. 719.
55 [1966] 3 W.L.R. 513; [1966] 2 All E.R. 989 (P.C.).
56 Ibid., 524; [1966] 2 All E.R. 989, 996.
57 W.A. Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 73 (1942).
58 See R.E. Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 404 (1959).
59 See D.P. Derham and D. Mendes da Costa, Absolute Liability, 1 N.Z.U.L.R. 37, 49 (1963).
60 See, e.g., D.R. Harris, The Law of Torts and the Welfare State [1963] N.Z.L.J. 171, the dissent of H.R.C. Wild Q.C. (as he then was) to the Report of the Committee on Absolute Liability 43 - 52 (1963), and the remarks of the Master of the Rolls in [1966] N.Z.L.J. 170 - 171.

In the U.S.A., as we have seen, the doctrine of strict tort liability for defective products is gaining acceptance in many States. What then are the arguments pro and con strict tort liability?

The Arguments in Favour of Strict Liability

(1) Strict liability eliminates the difficulties of proof and the procedural obstacles faced by an injured consumer.[61]

(2) A loss should be shifted from plaintiff to defendant if the defendant is a more efficient loss distributor. The essence of this argument is that "in this way a loss will be spread more generally in the community among those who benefit from the activity out of which the loss arises".[62] In other words the assumption is that the manufacturer can shift the loss to the consumers by acquiring insurance protection and by charging higher prices for the products. But on the other hand:

> "In fixing limits to the legal liability of makers based on this view, in conjunction with the discussion above, it would obviously seem desirable for the courts and legislatures to consider other existing ways for shifting or guarding against losses. For example, the availability of, as well as the practices of acquiring, insurance is quite important. Since nearly every head of a family, with the exception of the indigent, protects himself and his dependents by means of life insurance, it may be undesirable to shift losses from wrongful deaths to makers without regard to this widespread use of life insurance. Also significant is the fact that employees of industrial and commercial users of products are already covered by workmen's compensation, and thus a satisfactory compensation scheme might be an answer to the problem of distributing losses attributable to physical harms suffered in the course of their employment. Such a plan would eliminate the costly and time consuming task of identifying the cause of an accident, such as an explosion that occurs during the use by one enterpriser of an oxygen cylinder supplied by a second enterpriser and an acetylene torch furnished by a third. In these situations, the users of the products are fully capable of assuming and distributing losses."[63]

(3) The manufacturer creates the risk of harm by placing the merchandise on the market in order to gain the profits associated with his endeavours and it is therefore incumbent on him to bear any losses which are attributable to his defective product. Furthermore, in placing the goods on the market he represents to the public that they are suitable and safe for use.

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61 See Prosser, supra, note 32, 1117.
62 R.E. Keeton, supra, note 58, 405.
63 P. Keeton, supra, note 2, 1333 - 1334.

(4) The public interest in human life, health and safety demands the maximum protection the law can give against dangerous defects in products which consumers must buy and the manufacturer has the greatest ability to control the danger created by such defective products.[64]

(5) The imposition of strict liability is likely to influence manufacturers toward achieving higher quality in production because they will want to avoid the danger that their products will develop a reputation for being unsafe and so be unacceptable to the purchasing public.

(6) Strict liability avoids circuity of action and therefore reduces the number of cases arising from the same set of facts.

> "The strict tort approach makes unnecessary the series of warranty actions which frequently arise when an injured consumer cannot bring a suit for breach of warranty against a manufacturer of a defective product because the plaintiff is not in privity of contract with the producer. The plaintiff often recovers on a warranty theory from the retailer, who then brings suit on the same theory against the manufacturer or the distributor, with whom the retailer is in privity. The same ultimate result may be reached under the strict tort doctrine in a single suit, for since privity between a plaintiff and a defendant is not a pre-requisite to recovery on this theory, an injured consumer can bring his action directly against the most affluent member of the distributive chain."[65]

The Arguments Against Strict Liability[66]

(1) The arguments for strict liability do not justify a departure from the traditional principle of fault as a basis for the allocation of losses.

(2) The abrogation of the fault principle would place a premium on carelessness.

(3) The cost of the finished product would be greatly increased and this increase would have to be borne by the consumer. Thus the consumers would be forced to accept substantial price increases on everything they buy in order to compensate others for their misfortunes.

(4) Strict liability will deter producers who seek to improve their products from adopting new but untried manufacturing techniques.

(5) Not all manufacturers are large enough to be able to absorb or distribute the increased costs which would result from the imposition of strict liability. Thus the

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64 See Prosser, supra, note 32, 1122.
65 Comment, Products Liability - The Expansion of Fraud, Negligence, and Strict Tort Liability, 64 Mich. L. Rev. 1350, 1371 (1966).
66 See generally Prosser, supra, note 32, 1114 et seq.

smaller scale manufacturers may be forced out of business altogether.

(6) While strict liability may be appropriate in one sphere of the law e.g. automobile collisions, it may not be suitable in another sphere such as manufacturer's liability for defective products.

I do not propose to examine the merits of the argument at this time but I do suggest that the issues here are enormously complex and of vital importance to the general community. It seems to me therefore that a great deal more research needs to be done before a definite conclusion can be reached. Even then I doubt whether the issue is one which can be successfully dealt with by a Court within the framework of a typical common law adjudication. The distinctive function of the judges is the reasoned elaboration of the law and an issue of this kind is more suitable for resolution by the legislature.

(c) Liability in Tort for Defects in the Product Resulting in Economic Loss Rather than Injury to Persons or Property

A reading of Donoghue v. Stevenson[67] indicates that Lord Atkin's comments were expressed as applicable only to injuries to persons or property. The law has always permitted recovery for economic loss which is the consequence of injury to persons or property, but has however declined to compensate the plaintiff who suffers a direct economic loss. Mr Justice Widgery recognized this limitation in Weller & Co. v. Foot & Mouth Research Institute where he said:

> "The difficulty ... is that there is a great volume of authority both before and after Donoghue v. Stevenson to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or at least threaten directly to injure, the plaintiff's person or property but merely caused consequential loss as, for example, by upsetting the plaintiff's business relations with a third party who was the direct victim of the act or omission. The categories of negligence never close, but when the court is asked to recognise a new category it must proceed with some caution."[68]

(d) The Hedley Byrne[69] Principle as Affecting Advertising of Products

One could properly submit that consumers "lose" far more each year through the deception inherent in the sophisticated means of modern merchandising and by being effectively denied the information needed to make wise purchases than they do as a result of physical form. Hitherto, liability in respect of statements in the merchandising process has depended on proof of fraud. However, the decision in Hedley Byrne's case has

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67 [1932] A.C. 562.
68 [1966] 1 Q.B. 569, 577.
69 [1964] A.C. 464.

provided liability in certain circumstances for negligent misstatement. On a proper reading of the case it seems to me that the special relationship between the parties is a pre-requisite to the use of the principle and that the relationship between the manufacturer and the consumer is not of the special kind contemplated.

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