

Tort Reform and American Political Economy

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The expansion of tort liability throughout the last century was a unique period of American legal history. In the field of products liability the expansion was dramatic; so much that it can be considered revolutionary. Also, the reaction to this expansion was so forceful that it thwarted the larger goals of the expansionary movement. This paper will review the purposes of the expansion of tort law in the twentieth century and the purposes and effects of the reaction it spurred at the state level. In short, it is my conclusion that the expansion of products liability after World War II -- the "Tort Revolution" -- was primarily judicially driven and resulted in long-lasting liability changes, but that the goals of the larger liability expansion movement were thwarted and the trends toward expanded liability were greatly curbed by actions at the state and federal levels.¹ The Tort Revolution caused friction between courts and legislatures, and resulted in tort policy-making, which had traditionally been left to state courts, being injected into the pluralist realm of majoritarian politics. Part I of this article will examine the extant scholarly literature on the origins of the Tort Revolution, covering the period from the late nineteenth century through the 1960s, and provide an argument for the factors that made the Tort Revolution. Part II will examine some of the state-level legislative responses to the expansion of tort liability. This paper will not examine in detail the initial federal efforts to respond to the Tort Revolution, as I will address such federal efforts in a future essay.

Part I: The Origins of the Tort Revolution

The history of American law in the twentieth century demonstrates that American Progressive-Era politics had a long

reach. Tort law, or the law governing intentionally and carelessly wrongful acts (other than contract law), was dramatically expanded during the twentieth century. As torts scholar William Prosser once noted, tort law is “a battleground of social theory.”² From the Progressive period through the 1960s, American legal progressives, specifically legal academics and state court judges, successfully waged this battle in the area of defective products law. One of the central tenets of progressive politics was the need to regulate businesses in order to have them better serve and protect the consumer in the modern industrial economy. Some progressive reformers thought that greater consumer protection could be achieved by expanding the liability of the makers of defective goods that injured consumers. At the turn of the twentieth century under the law of all states in the United States the maker of a defective good was liable only to those with whom he had a contract of sale.³ This rule was derived from a British case, *Winterbottom v. Wright* (1842),⁴ wherein a postal employee was injured while riding on a carriage, which was purchased by the post office (the employer) from the carriage maker.⁵ The “*Winterbottom* rule” -- an injured person can recover for a manufacturer’s defective product only if that person has a contract of purchase with the manufacturer -- was adopted as the rule throughout America.⁶

Yet, the emergent American industrial economy was one wherein consumers often bought mass-manufactured goods directly from retailers or wholesalers, less so from manufacturers. This was a hallmark of the “modern industrial economy,” goods were assembled or manufactured in one location and shipped to many different wholesale or retail locations for sale to consumers. Face-to-face dealing between buyer and maker became an artifact of the nineteenth-century past. Progressives argued for a new tort system that would socialize costs by making manufacturers responsible. Those costs would then be borne by the general consuming public in the form of higher prices. For example, in

1906 legal academic Roscoe Pound argued that the prevailing common law rule regarding purchases of goods, *caveat emptor* (“buyer beware”), was a “scheme of individual initiative” that was “breaking down” in “our modern industrial society.”⁷ In 1914, Pound argued for strict product liability, contending that “in the exigencies of social justice” businesses could best “bear the loss” arising from activities that led to injury, even when neither party was at fault. He referred to this as liability for the “enterprise.”⁸

Change in the common law system has been described as occurring incrementally, over long periods of time, through the “accretion” of cases.⁹ Yet, the law of products liability changed rapidly in America. For example, a New York case, *MacPherson v. Buick Motor Co.* (1916),¹⁰ was important in changing American products liability law from the *Winterbottom* contractual standard to a fault-based negligence standard. In *MacPherson*, a defective automobile injured the buyer. The consumer sued the Buick dealer, claiming it was negligent for failing to ascertain the defect.¹¹

Judge Benjamin Cardozo authored the majority opinion for the New York Court of Appeals in *MacPherson*. Cardozo wrote that when a product was negligently made, then it became “a thing of danger.” Any defective good exposed the manufacturer to liability for the negligence that led to the good’s faulty condition.¹² Cardozo was mindful of, and subtly acknowledged, the public policy arguments that underlie the decision. He implicitly echoed the Progressives’ arguments regarding consumers in the modern industrial state: “We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers.”¹³ Under such conditions, a manufacturer was liable for the tort of negligence -- regardless of whether any contract existed between it and the ultimate consumer.

As John Goldberg and Benjamin Zapursky have noted, *MacPherson* arguably introduced moral fault-based concepts of tort law into products liability law, an area theretofore dominated by contractual concepts ever since American courts adopted the *Winterbottom* rule.¹⁴ Although a plaintiff would still need to prove that a manufacturer had been negligent in making the product and that the product was defective, the *MacPherson* case portended a considerable expansion of the manufacturer's liability because ultimate consumers were able to recover against the negligent manufacturer. There is some disagreement on how broadly and quickly other states' courts adopted *MacPherson*. Enthusiast William Prosser considered it a watershed in the early twentieth century, claiming it soon became the majority rule in the nation.¹⁵ However, more recently, George Priest has noted that only a few jurisdictions had adopted the *MacPherson* approach by 1960.¹⁶ Nevertheless, many contemporary scholars consider *MacPherson* a significant case, likely because of several factors: well known jurist Benjamin Cardozo wrote the opinion, the case was decided in New York state, and, most importantly, the case was the first to establish a rule that was eventually followed by a majority of states by the 1960s.¹⁷

The expansion of products liability in the 1960s was, in the words of enthusiast Robert Keeton, "abrupt." Between 1960 and 1966 products liability shifted throughout much of the nation from contract-based and negligence-based, fault-oriented standards to a strict liability, no-fault model.¹⁸ From the early 1960s through the early 1970s approximately 39 American states adopted some form of strict liability for makers of defective products. (By 1986, strict liability had been adopted in 45 states, either by court decision or statute.)¹⁹ State courts managed a swift and dramatic reorientation of tort law – namely in products liability law -- from a conservative regime of individualistic rules of liability to a progressive, liberal regime of socialized risks and costs. Some scholars have

contended that absolute liability was the end result of these doctrinal changes, while others have contended the courts were simply making decisions about who should bear the responsibility of loss on a case-by-case basis, and still others have argued that the changes simply removed barriers to plaintiff recovery.²⁰ The evidence suggests this was a broad attempt on the part of state court judges to create a no-fault system. That is, this was a tort revolution in the area of products liability: the overthrow of a moral fault-oriented tort regime and its replacement by a compensatory, no-fault tort regime.²¹

Strict liability was liability without regard to fault. That is, a plaintiff was not required to prove a defendant had been negligent in order to recover; the plaintiff merely had to prove the product was “defective.” This was a system that sought to make manufacturers veritable insurers of their goods.²² As California Supreme Court Justice Roger Traynor, author of one of the seminal strict liability cases of the 1960s put it, the objective of strict liability was to help effectuate “[t]he transition from industrial revolution to a settled industrial society.”²³

Many legal scholars have traced the history of liability expansion from the early nineteenth century through the 1960s, with an emphasis state court decisions that changed particular states’ liability for defective products from contractual liability to strict liability. These accounts concentrate on the importance of state court judges’ views on risk spreading and achieving compensation for injured consumers in the modern industrial society. James R. Hackney, Jr. has argued that it was extra-legal philosophical ideas -- what Hackney termed “pragmatic instrumentalism,” the combination of philosophical pragmatism, institutional economics, and legal realism -- of the late nineteenth century that greatly enabled the academic and judicial effort to expand liability in the twentieth century.²⁴ Additionally, these

accounts review the role of legal academics, particularly those academics at the American Law Institute in Philadelphia, who in the early 1960s promulgated scholarly “restatements” of the common law that advocated for strict liability.²⁵ Although state court judges ultimately effectuated the revolution in the 1960s, it was instigated and publicly advocated by legal academics from the Progressive Era through the 1960s. George Priest, a leading proponent of the mandarin-led revolution view, has argued that Progressive-era academics and, later in the 1960s, state court judges sought to extend liability in order “reduce the accident rate and help the poor.”²⁶ Priest has contended that the ideas of three individuals were key in producing the expansion of liability in the 1960s: academics Fleming James, who wrote about the socialization of risk, and Friedrich Kessler, who wrote about the dangers of adhesion contracts and market power, and William Prosser, a mid-century legal academic who wrote in favor of expanded liability, coalesced to form a unified theory of “enterprise liability.” These theories served as the intellectual basis for state courts to expand liability for defective product in the 1960s.²⁷

Other scholars, such as William M. Landes and Richard A. Posner, have argued that the expansion of liability was the logical consequence of the impersonal forces of the Industrial Revolution in America, namely the increased “complexity of products” since the 19th century and increased urbanization during the twentieth century. Landes and Posner argued expanded liability was logical because economic efficiency was served by such expansion.²⁸ Landes and Posner’s arguments suggest that expanded liability was almost inevitable because of the efficiencies to be obtained through requiring manufacturers to bear the costs of injuries caused by defective products. Sally H. Clarke has argued that liability rules, particularly under the *Winterbottom* contract standard, shaped how auto-manufacturing companies structured their operations and tried to create efficiencies in light of liability limits.²⁹

Clarke has demonstrated how rules can shape behavior, but it is important to observe that the rules could be and were the conscious policy choices of judges.

Still other scholars have merged these approaches and argued that tort law was reformed because of conscious policy choices *in response to* the impersonal, structural conditions of the modern industrial state. For example, John Fabian Witt has argued that the product liability expansion of the mid-twentieth century was the unintended consequence of late-nineteenth century arguments by scientific management enthusiasts to design firms that could comprehensively control their operations.³⁰

Perhaps the most influential of the early 1960s cases was decided by the California Supreme Court in 1963 under the leadership of Justice Roger Traynor: *Greenman v. Yuba Power Products, Inc.*³¹ The case involved a defective power tool and the California Supreme Court held the manufacturer strictly liable for the plaintiff's injuries. Justice Roger Traynor, the author of the unanimous opinion in *Greenman*, later proclaimed that "the whole purpose of strict liability [was] to get away from notions of fault."³² Yet, Justice Traynor could not escape the fault-orientation when in explaining *Greenman* he wrote that manufacturers could no longer effectively say: "We let our victims fall where they may, redressing only the injuries of the [contractual] privity-privileged."³³ State courts thereafter that adopted strict liability usually cited *Greenman*.

One question that lingers and remains debatable is why the changes in tort law occurred so quickly and extensively, roughly between 1960 and 1964. The massive and rapid adoption of strict liability by a majority of state courts in the 1960s may appear to have been inexorable, especially if one agrees with the rationale offered in support of strict liability: that no-fault liability is necessary in a complex commercial society with vertical distribution chains

and a lack of first-hand knowledge on the part of consumers to evaluate the condition of a product prior to purchase. Many scholars who have commented on the rapidity of change across the nation during the 1960s have described it as one of “momentum” created by the first courts, namely New Jersey and California’s.³⁴ Charles Lopeman has noted that among legal scholars most research has “been directed toward better understanding of the *policy produced* rather than to the basic decision whether or not to produce it. There has been no investigation of what causes some court to embrace the policy-making role and others to reject it.”³⁵ The remainder of this section investigates *why* state courts made the Tort Revolution.

The answers to these questions appear to lie in a confluence of factors: (1) the role of the American Law Institute (ALI), (2) the channels of communication in the legal community and the frequency of litigation regarding defective products (*i.e.*, the opportunities for courts to take action and adopt a doctrine), (3) the specialization of the tort bar, and (4) the view held by many judges of the twentieth century that law “must be flexible and responsive to social needs.”³⁶

(1) The Role of the American Law Institute

One factor in state courts’ willingness to adopt strict products liability may have been the support given by the American Law Institute (ALI). The ALI, using leading legal scholars, created “restatements” of the law in order to foster “constructive improvement of the law and its administration.”³⁷ The Restatements were lead by a “reporter” who was responsible for organizing advisory panels of experts for drafting the restatements. By the 1960s torts scholar William Prosser was the reporter for ALI’s restatement of tort law. After California’s *Greenman* case was decided in 1963, Prosser was convinced that *Greenman’s*

strict liability rule was “the rule of the near future,” and “unless the Restatement declares for it [i.e., strict liability for all general products], it is actually likely to be dated even by the time of publication.”³⁸ Prosser claimed such an immediate and expansive revision was needed because of “many recent decisions.”³⁹ Yet, it is likely the *Greenman* case was the only reason for a revision. Prosser advocated strict liability be applied to “any product,” no matter what its intended purpose. The ALI committee, with the recent addition of *Greenman* author California Associate Justice Roger Traynor, supported the compensatory goals of strict liability and sought to aid the judicial reorientation of negligence law toward a no-fault system, with its publication in 1965.⁴⁰

Courts frequently cited ALI’s *Restatements* as quasi-authoritative sources. As Jonathan R. Macey has noted, the *Restatements* “served as authoritative guides for both legal briefs and judicial opinions.”⁴¹ Between 1932 and 1950, appellate courts cited the various *Restatements* almost 18,000 times.⁴² By 1972, the various *Restatements* in all areas of law had been cited over 46,000 times by American courts.⁴³ By 1991, the *Restatements* had been cited by appellate courts over 114,000 times, with almost *forty percent* of those citations being to the *Restatement of Torts*.⁴⁴ Clearly this rule-based approach to the tort law had taken on an authoritative tenor for many lawyers and, most importantly, courts, state and federal. It is reasonable to suspect that the emphasis and approval given to strict products liability by the *Restatement of Torts* was helpful in persuading state courts of the need for the doctrinal change.

(2) Channels of Communication and Frequency of Litigation

Scholars’ work suggests that state courts’ willingness to adopt new doctrines has been greatly shaped by trends in other states’ courts and the litigation opportunities presented by high-

population states to innovate.⁴⁵ Some studies of citation patterns have suggested that courts have been inclined to adopt the decisions of sister states in their geographical regions and whose courts are included in their regional case reporters.⁴⁶ However, other studies specifically of tort innovation have shown that regionalism was not a factor in adoption. Instead, there seems to be a national “market” for ideas in policy innovation. But such innovations, of course, are dependent on there being the cases brought to the courts to provide the opportunity to innovate. That is, the frequency of litigation, which is discussed below, is quite important.⁴⁷

Population density appears to be strongly correlated to litigation rates. Bradley Canon and Lawrence Baum published a study of the adoption of 23 different tort doctrines over the course of the twentieth century. They found that the pattern of adoption of new doctrines was less strongly correlated with political ideology or culture than it was with population and the cases generated in high-population states, which provided opportunities for courts to innovate, or adopt new doctrines.⁴⁸ Innovation appears to have incentivized more lawsuits and resulted in plaintiff success rates, at least from the early 1960s through the mid-1980s.⁴⁹ This was likely a reflection of the general willingness of Americans – probably in more urban and suburban areas – to engage in tort litigation. The evidence that Americans have (and perhaps always have had) little reluctance to sue one another, especially in the twentieth century, is substantial.⁵⁰ As the quick adoption of a no-privity rule and/or strict liability by almost thirty states within a few years of *Greenman* (1963) suggests, the courts did not need to wait long for opportunities to change the law.⁵¹ The shift to strict liability in many states in the 1960s probably provided additional incentive to file product liability lawsuits. Additionally, jurisdictional rules over potential manufacturer defendants were no impediment to the spread of strict liability.⁵²

There has been a debate about whether 1970s saw a litigation “explosion.” Some scholars have argued that the increase in litigation has been exaggerated.⁵³ For the 1960s and 1970s, data regarding the numbers and kinds of tort cases filed in state courts has been rare and usually insufficient for identifying trends regarding specific types of tort suits. This occurred because few legal historians have been able to accumulate longitudinal information regarding the types of claims asserted in court actions and the method and reason for resolution of such suits.⁵⁴ Although there is scant state-based data, there are some specific products liability jury award figures from two urban counties, Cook County, Illinois (Chicago) and San Francisco County, California. This data set covers a long period, from 1960-1999. There is a shorter data set for 1960-1984 available through the Inter-University Consortium for Political and Social Research (ICPSR).⁵⁵ The jury awards for identified products liability cases in both counties rose during the early 1970s and early 1980s.⁵⁶ Additionally, the Carter Administration’s Task Force on Product Liability’s research showed, as of 1978, that between 1970-1976 “pending [product liability] claims [made to insurers]... increased each year.”⁵⁷ Opportunities for innovation must be taken by courts willing to innovate. As Canon and Baum noted, courts in the post-World War II period were staffed by judges that believed the “law should be flexible and responsive to social needs.”⁵⁸ Such judges are those most likely to support doctrinal innovation, especially strict liability, with its advocacy of adjustment to the modern industrial state.

(3) The Specialization of the Tort Bar

By the 1960s, there were firmly established “plaintiffs” and “defense” bars throughout the nation and both sides served as “pressure groups seeking changes in the general declarations of law and innovators who develop[ed] techniques of litigational [*sic*] combat.”⁵⁹ There were formal organizations, such as the American

Trial Lawyers Association (pro-plaintiff) and the Defense Research Institute (founded 1960) (pro-defense/pro-insurer), that sought to train lawyers to advocate policies in the courts and legislatures that would benefit their respective clients. Although plaintiff and defense bars were organized and had regional or local groups prior to World War II, in 1946 plaintiff-oriented attorneys formed a national organization, the National Association of Claimants Compensation Attorneys (NACCA), which in 1973 became the Association of Trial Lawyers of America.⁶⁰ This group advocated for “more than adequate award” in tort litigation. As John Fabian Witt has noted, ever since the 1950s, under the leadership of president Melvin Belli, NACCA (later ATLA) was an advocacy group that actively lobbied not only legislatures but judges, too, for the expansion of tort liability. For example the group would organize regional and national conferences, bringing together practicing tort lawyers, legislators, and judges. NACCA also organized information sharing among plaintiffs’ attorneys so that members could remain informed of legal changes throughout the nation and obtain astute advice on litigation techniques.⁶¹ By 1952, the defense bar responded by organizing its own national “educational” and advocacy organization. Thereafter, both bars engaged in ongoing issue advocacy, litigation skills education for practicing lawyers, and lobbying for legislative interventions in tort law.⁶² By the mid-1960s, both plaintiffs and defense lawyers were concerned with the shift from defendant-friendly negligence standards to plaintiff-friendly strict liability.

Litigants and their increasingly well-organized attorneys provided cases, but the doctrines were ultimately changed by state court judges. As one products liability attorney put it in 1975, a judge is necessary to carve out a path in common law litigation. Only then will litigants (and their attorneys) deem it worth the cost and time to pursue claims.⁶³ This brings us to what was arguably the most important factor in the shift to strict liability.

(4) Progressivism and the Legitimacy of Courts as Policymakers

The expansion of strict liability to cover all product defects might be placed within the framework of what historian William E. Nelson has termed the “legalist reformation” efforts of the post-war period. Nelson has described this movement as seeking “social change and the expansion of existing hierarchies to include people who had been previously made subordinate,” without “repudiat[ing] the commitment to the rule of law.”⁶⁴ The Tort Revolution was an effort at achieving social change through legal rulemaking. Whether the consumer had theretofore been “subordinate” to manufacturers is debatable, but this appears to have been how the judges that crafted the decisions saw consumers’ plight in the modern industrial market.

As Bradley C. S. Watson has noted, Progressivism among judges was a “judicial disposition in search of a theory.” At its most elemental level, judicial Progressivism meant “loosen[ing] the chains of large-scale industrial society enough to allow for social growth.”⁶⁵ Yet, Progressives sought to maintain a watchful eye upon the market and protect consumers through positive law. Although the Progressive period was (and by some scholars, continues to be) thought to have ended around 1920, the ideals and dispositions of the state court judges of the 1960s and 1970s demonstrate that Progressivism not only retained vitality, but also was key in motivating judicial willingness to innovate in tort law. As one former justice of the California Supreme Court in the 1960s, Allen E. Broussard, noted, justices like Roger Traynor were known for “forg[ing] a new step in the law” and “in a few years the law [in other states’ supreme courts] caught up with them.”⁶⁶

After the adoption by a majority of states of either strict liability or expanded liability in the 1960s, there was a reaction on

the part of state legislatures, federal elected officials, insurance companies, and products manufacturers. This reaction was so significant that it can be identified as a kind of “Tort Counterrevolution” and it is the subject of the remainder of this essay.

Part II: The State-level Responses to the Tort Revolution

The most forceful responses to the Tort Revolution came from state legislatures that saw the trends in state courts and preempted their own judiciaries. By 1986, 45 states had adopted some form of strict liability; the five that did not were Alabama, Delaware, Michigan, North Carolina, and Virginia. In the states that did not adopt strict liability the rationales and history of the resistance to the national trend is helpful in understanding the alternative approaches available to state courts and legislatures.

Alabama’s experience is instructive. In 1967 the Alabama legislature enacted a “non-uniform” version of the Uniform Commercial Code (UCC).⁶⁷ This statute was tailored to reach by statute the expanded liability goals other states were reaching through the courts.⁶⁸ The legislature cited the ALI *Restatement* as its philosophical guide.⁶⁹ A decade later the Alabama Supreme Court adopted what it referred to as a “negligence per se” standard, or what it officially termed the “Alabama Extended Manufacturer’s Liability Doctrine,”⁷⁰ also citing the pro-strict liability American Law Institute’s *Restatement (Second) of Torts*, § 402A. However, the Court claimed it was *not* adopting strict liability because such was no-fault liability, which did not allow for common law defenses. The new “negligence per se” rule still entertained “affirmative defenses not recognized by the *Restatement [(Second)’s]* no-fault concept of liability.”⁷¹ Also the Court noted that negligence principles still controlled.⁷² The Court noted a defendant manufacturer, supplier, or seller could assert the common law defenses of no causal

relation, assumption of the risk, and contributory negligence.⁷³ These defenses were not allowed under the emergent strict liability or the ALI's *Restatement (Second)*'s description of the law. Unlike California's *Greenman* standard, which socialized the risk of loss across all members of the distribution chain, the Alabama Court sought to retain a standard that targeted only at-fault parties, but made the chances of recovery higher than under the old common law standard.⁷⁴ The policy of socializing risk *per se* was not one of the Alabama Court's objectives. Rather the Court was socializing risk among *at-fault* parties in the distribution chain by making it easier to successfully sue manufacturers.

The Alabama legislature's move to enact reforms that supported the policy approach begun by the *Greenman* case indicates a degree of majoritarian support for consumer-oriented protections. However, the Alabama Supreme Court's subsequent adoption of an alternative to the *Greenman* rule shows not only the Court's attempt to formulate a public policy regarding tort law and its goals, but to do so independent of the state legislature. The Court expressly characterized the legislature's adoption of the UCC as "guidance," leaving the Courts free to craft tort policy.⁷⁵ This was the Alabama Supreme Court's attempt to make a "third way" alternative between no-fault strict liability and a traditional negligence rule. The Alabama Court saw itself as a policymaking institution that was achieving policy goals necessitated by the nature of the contemporary economy. However, the justices thought their modified fault-based approach was preferable to the then-emergent strict liability approach.

North Carolina exemplifies the state courts that expressly rejected the trends of the 1960s. In 1964 and 1967, in the midst of the national shift to strict liability, the North Carolina Supreme Court twice refused to adopt the rule.⁷⁶ In the latter case, the Court acknowledged that the traditional rule of contract had been "under

vigorous assault over all the country [and] [t]he assault has been successful in all but a few jurisdictions.”⁷⁷ Any expansion of North Carolina tort standards would be left to the state legislature.

A decade later in May 1977, four North Carolina state senators introduced the first products liability bill in North Carolina history.⁷⁸ The proposed legislation was friendly to manufacturers. The bill would have limited product liability lawsuits by requiring any suit to be brought “within six years after the date of initial purchase ... or ten years after the date of manufacture.” Also, in order to be “defective,” a product had to be “unreasonably dangerous,” which meant it was dangerous to an extent “beyond that which would be contemplated by the ordinary and prudent buyer.” Also, there was a rebuttable presumption that a product was not defective if it complied with government or industry standards in design or method of production. Finally, there would be no liability if the product had been altered after it was sold.⁷⁹

As Senator E. Lawrence Davis, III, a Democrat, publicly noted in committee, the bill was propelled by the complaints of manufacturer constituents. The owner of the Burrell Equipment Company of Winston-Salem, North Carolina had complained to Senator Davis that the company’s “product liability insurance had gone up 400%, [and] that some companies could not even buy such insurance.”⁸⁰ Such local concerns reflected national trends. By the late 1970s, there was empirical evidence that strict liability led to higher insurance premiums for manufacturers and those costs were passed on to consumers in the form of higher prices.⁸¹ The Insurance Services Office, the statistical and rating organization of the commercial insurance industry, noted that between 1969 and 1973 product liability premiums increased 154 percent, but losses increased 279 percent. In 1973, insurers received \$216.6 million in premiums but incurred \$292 million in loss adjustments, “without even taking into account other expenses

such as sales commissions, taxes and general company overhead.”⁸² Also, surveys of manufacturers conducted by the U.S. Commerce Department’s Intergovernmental Task Force on Product Liability discovered that between 1975 and 1976 premiums increased nationally “over 200 percent.” Anecdotal evidence gathered by the Task Force showed increases “over 1,000 percent.”⁸³ Accordingly, the threat as perceived by manufacturers in the mid-1970s was real and substantial. The plaintiff-oriented North Carolina Academy of Trial Lawyers lobbied against the bill, presenting the testimonies of accident victims regarding the need for product liability insurance.⁸⁴ Although a pared down bill passed the Senate and was later modified by the House,⁸⁵ the modified bill ultimately failed in the state Senate.⁸⁶

Although this initial foray into legislating upon product liability claims did not pass, it yields insight into the pluralistic nature of the product liability issue at the state level. The courts across the nation had interjected the issue of products liability into the political process. Nationally, constituents complained to both state and federal legislators for state and/or federal protective legislation regarding either insurance premiums or substantive products liability law. Even in North Carolina, where the state supreme court had clearly indicated it would not expand its products liability law, the liability insurance rates had dramatically increased as they had in other areas of the nation. This reaction -- later called “tort reform” in the early 1980s -- was a pluralistic political counterrevolution.

The bill that eventually became North Carolina’s first product liability law was introduced in 1979.⁸⁷ Again, manufacturers had organized to propel this bill. The effort started with a private self-styled “task force” created by wholesalers and retailers in North Carolina, who claimed they could not purchase liability insurance at affordable rates.⁸⁸ Manufacturers sought to prohibit lawsuits

against manufacturers whose products complied with regulatory standards, or had been altered after sale, or when a consumer had been “negligent in using and maintaining” the product.⁸⁹ Manufacturers renewed their complaints about insurance rates “so prohibitive businesses cannot afford [sic] it.”⁹⁰ The manufacturers that supported the bill were makers of both consumer goods and capital goods in the state.⁹¹ Manufacturers urged protective legislation because of “changing court decisions, increasing damage awards, and higher insurance costs.”⁹² The bill’s opponents included groups such as the Ethics League, the N.C. Consumer Council, and the N.C. Academy of Trial Lawyers.⁹³ Interest groups like the North Carolina Academy of Trial Lawyers argued the bill would “deprive the consumers of their rights,” and insurers, driven by their “insatiable appetite for money,” were the real culprits, not the manufacturers. The Academy contended its position was not based on “protection of personal income” of attorneys but rather the trial lawyers’ concern for the “fundamental rights” of injured citizens.⁹⁴

Both houses of the General Assembly passed the bill overwhelmingly.⁹⁵ The North Carolina Products Liability Act effectively prohibited strict liability in product defect cases.⁹⁶ However, contrary to prior North Carolina case law, the Act eliminated the manufacturer’s defense of lack of contractual privity.⁹⁷ The legislature was endorsing the Progressive-Era approach of the *MacPherson* case, rejecting the contract-oriented privity rule, but allowing only negligence -- not strict liability -- claims against remote manufacturers.

The North Carolina legislature intervened in an area theretofore dominated by the courts. Not only was the legislature stepping in to prevent any chance of the judiciary implementing strict liability but it was also overturning previous judge-made common law rules regarding contractual claims. As the

experiences of both Alabama and North Carolina suggest, the response to the trend in favor of strict liability was not merely outright rejection. Rather both states had majoritarian reactions to the efforts of their sister states' courts, and those reactions were efforts to accommodate the apparent need for amelioration of the traditional privity rule while simultaneously quelling any possible move by their own state supreme courts to adopt strict liability. This state-level legislative response to the Tort Revolution also demonstrates that, as in Alabama and North Carolina, state supreme courts and legislatures vied for policy-making authority over tort policy. During the early 1980s many states not only halted liability expansion by statute, but enacted restrictions on plaintiffs' abilities to recover. For example, state legislatures enacted limits on punitive damages, the time within which plaintiffs could sue after the making of a product, and non-economic damages; legislatures also allowed admission of evidence that medical and health expenses had already been paid, which would deter large jury awards.⁹⁸ The route of "tort reform" -- the rejection and reversal of expanded liability -- proceeded largely through the pluralist process at the state legislatures.

The majoritarian tort counter-revolution of the 1970s and thereafter was a response to the claims of strict liability's proponents. As Theodore Eisenberg and James Henderson have noted, the advancement of strict liability expansion and plaintiffs' recovering jury verdicts under a strict liability theory largely ground to a halt in the mid-1980s. They discerned a "pro-defendant" outcome in cases that pre-dated pro-defendant statutory enactments. The authors concluded "tort reform efforts are more important than the [statutory] reforms themselves."⁹⁹ There has been no comprehensive tort reform legislation that has progressed very far in the United States Congress. The only federal products liability law was the Product Liability Risk Retention Act (1981), which created incentives for insurance companies and

manufacturers to create large pools of funds for resolving claims and suits.¹⁰⁰ Throughout the 1980s and 1990s states continued to enact various protections for manufacturers. For example, by the mid-1980s one-third of the states had enacted statutes of repose, which are limits on when a lawsuit can be brought after the making of the product.¹⁰¹ Additionally, many states limited punitive and non-economic damages.

In addition to legislative reactions to strict liability, juries have given the doctrine a rather cool reception. The pleading rules in modern jurisdictions allow for multiple theories to be advanced in order to recover. Therefore, in a state allowing strict liability a plaintiff can avail himself/herself of strict liability, breach of warranty, and negligence in the complaint. The judge or jury can decide the case upon any of the available theories. The U.S. General Accounting Office (GAO) studied five states products liability cases from the 1980s. The study was noteworthy because, although all five of the states studied allowed for claims based on strict liability, in less than a third (27 percent) of the product liability cases the recovery was based solely upon strict liability or a breach of warranty theory.¹⁰² Also, one study of civil jury cases in a state trial court between 1989 and 1991, which was based on interviews with jurors in civil tort cases against businesses, concluded that jurors “expressed skepticism of plaintiff claims, described a conservative approach to determining awards, and reported expending effort to treat corporations the same as individuals.” It has been speculated that this is due to the jurors’ desire to find fault and place blame only upon those who are wrongdoers.¹⁰³ There have been similar experiences with juries’ skepticism in medical malpractice cases, where plaintiffs had victory rates at trial of less than thirty percent.¹⁰⁴ Accordingly, the effort to switch to strict liability was not only confronted with legislative backlash, but so too a popular reaction among jurors on tort cases. This largely halted the momentum of the strict liability movement in some states.

Conclusion

The Tort Revolution was initially victorious but quickly became a contested revolution. Its victory was limited and the “assault upon the citadel” (as William Prosser called it) was victorious only in relation to the end of the privity of contract rule. The Revolution was born out of the progressivism of the early twentieth century, with the objective of spreading the risk of loss and elevating compensation regardless of fault above the principle of moral fault. Yet, fault seems to be a dearly held concept of some judges, legislators and jurors. The Tort Counter-revolution was mounted on multiple fronts, but clearly suggests a preference among its supporters for fault-based liability. Accordingly, the Counter-revolution may be characterized as a return to the concept of fault and a rejection of the no-fault approach of strict liability. A return to fault was well within the norms of American tort law. In fact, the prominence of fault throughout American tort law suggests, perhaps, that the Tort Revolution -- the shift to strict products liability -- was an aberration, or a detour to the margins of acceptable policy preferences. Nevertheless, strict liability remains a policy in many states and competes with fault-based negligence as a method juries and judges can use to decide cases.

Notes

¹ Liability expanded in the mid-twentieth century not only in defective products liability, but also in medical malpractice and landowner liability. This essay only addresses products liability expansion. In Robert E. Keeton's *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard University Press, 1969), pp. 169-76, he listed thirty-six examples of doctrinal changes in or affecting tort law.

² William L. Prosser, *Handbook on the Law of Torts*, 3d ed. (St. Paul, MN: West Publishing Co., 1964), p. 14. Prosser, Book Review, *Minn. L. Rev.*, Vol. 19, No. 2 (Jan., 1935), p. 257.

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³ The only caveat to this rule was the concept of “inherent dangerousness,” like blasting operations, where states allowed for a third party to sue under a theory of strict liability. See *Schubert v. J.R. Clark Co.*, 49 Minn. 331; 51 N.W. 1103 (1892), and William L. Prosser, *Handbook of the Law of Torts* (Second Ed.) (St. Paul: West Publ. Co., 1941, 1955 ed.), p. 334 (citation omitted).

⁴ 10 M&W 100 (1842).

⁵ Francis H. Bohlen, “The Basis of Affirmative Obligations in the Law of Tort,” *Am. L. Reg.*, Vol. 53, No. 5 (May, 1905), p. 209 & 273, 282.

⁶ Vernon Palmer, “Why Privity Entered Tort – An Historical Reexamination of *Winterbottom v. Wright*,” *Am. J. Legal Hist.*, Vol. 27, No. 1 (Jan., 1983), pp. 85, 89-90. *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8th COA, 1903); William L. Prosser, *Cases and Materials on Torts* 8th ed. (Westbury, NY: Foundation Press, Inc., 1988), pp. 700-701 n. 1.

⁷ Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association*, Aug. 29-31, 1906 (Philadelphia: Dando, 1906), p. 403.

⁸ Roscoe Pound, “The End of Law as Developed in Legal Rules and Doctrines,” *Harv. L. Rev.*, Vol. 27, No. 3 (Jan., 1914), p. 195, 233.

⁹ Christopher Columbus Langdell, *A selection of cases on the law of contracts: with a summary of the topics covered by the cases: prepared for use as a text-book in Harvard Law School*, 2nd ed. (Boston, 1879), p. viii. *The Making of Modern Law*. Gale. 2010. Harvard Law School Library. Gale, Cengage Learning. <<http://galenet.galegroup.com.proxyum.researchport.umd.edu/servlet/MOML?af=RN&ae=F3706371448&srcht=a&ste=14>>. Gale Document Number: F3706371448, (“by slow degrees”).

¹⁰ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

¹¹ *MacPherson v. Buick Motor Co.*, 160 A.D. 55, 56-57; 145 N.Y.S. 462, 462-63 (1914). Sally H. Clarke, “Unmanageable Risks: *MacPherson v. Buick* and the Emergence of a Mass Consumer Market,” *Law & History Review*, Vol. 23, No. 1 (Spring, 2005), pp. 1-2.

¹² At the time, “inherently dangerous” products were the only exception to the *Winterbottom* rule. *Thomas v. Winchester*, 6 N.Y. 397 (1852) (mislabeling of drug).

¹³ *MacPherson*, 217 N.Y. at 390; 111 N.E. at 1053.

¹⁴ John C. P. Goldberg and Benjamin C. Zipursky, “The Moral of *MacPherson*,” *Univ. of Penn. L. Rev.*, Vol. 146, No. 6 (Aug., 1998), p. 1733-1847.

¹⁵ William L. Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer),” *Yale L. J.*, Vol. 69 (1960), pp. 1100-1102.

¹⁶ George L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,” *J. Legal Stud.*, Vol. 14, No. 3 (Dec., 1985), pp. 461-462.

¹⁷ The Shepard’s citation service in the Lexis database shows that *MacPherson* has been cited in 998 law review articles. No doubt Benjamin Cardozo’s authorship increased the apparent prominence and importance of the case for scholars and courts alike. Examples include Andrew L. Kaufman, *Cardozo* (Cambridge: Harvard, 1998), and G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford, 1976) (Chapter 10). James A. Henderson, Jr., “*MacPherson v. Buick Motor Co.*: Simplifying the Facts While Reshaping the Law,” in Robert L. Rabin and Stephen D. Sugarman, eds., *Tort Stories* (New York: Foundation Press, 2003), 14-72.

¹⁸ Robert E. Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard Univ. Press, 1969), p. 3. George L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,” *J. Legal Stud.*, Vol. 14, No. 3 (Dec., 1985).

¹⁹ Robert C. Bird and Donald J. Smythe, “Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963-87,” *___ Law & Social Inquiry ___* (forthcoming 2011), p. 4.

²⁰ John G. Fleming, “The Role of Negligence in Modern Tort Law,” *Va. L. Rev.*, Vol. 53, No. 4 (May, 1967), pp. 838-840 (absolute liability); Guido Calabresi and Jon T. Hirschoff, “Toward a Test for Strict Liability in Torts,” *Yale L. J.*, Vol. 81, No. 6 (May, 1972) (allocating responsibility on case-by-case basis); James A. Henderson, Jr., and Aaron D. Twerski, “Closing the American Products Liability Frontier: The Rejection of Liability Without Defect,” *N.Y.U. L. Rev.*, Vol. 66 (Nov., 1991), pp. 1271-1273 (doctrinal change aiding plaintiff recovery).

²¹ Melvin Belli apparently coined the term “tort revolution.” Belli, ed., *Trial and Tort Trends, 1964-65 Seminar*, p. 3 (quoted in Ben Field, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor* (Berkeley: Berkeley Public Policy Press, 2003), p. 103).

²² William L. Prosser, *Handbook of the Law of Torts*, 2d ed. (St. Paul: West Publ. Co., 1955), pp. 345-49, 510-11. Prosser contended manufacturers should bear “full responsibility” for defective products.

²³ Roger J. Traynor, “The Ways and Meanings of Defective Products and Strict Liability,” *Tenn. L.R.*, Vol. 32, No. 3 (Spring, 1965), p. 363.

²⁴ James R. Hackney, Jr., “The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism,” *The American Journal of Legal History*, Vol. 39, No. 4 (Oct., 1995), pp. 443-509.

²⁵ Steven P. Croley and Jon D. Hanson, “Rescuing the Revolution: The Revived Case for Enterprise Liability,” *Mich. L. Rev.*, Vol. 91, No. 4 (Feb., 1993), pp. 695-712.

Victor Schwartz, Kathryn Kelly & David F. Partlett, *Prosser, Wade and Schwartz's Torts: Cases and Materials* (Minneapolis: Foundation Press, 12th ed., 2010), pp. 830-832.

²⁶ George L. Priest, "The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform," *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer, 1991), p. 31.

²⁷ George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," *J. Legal Stud.*, Vol. 14, No. 3 (Dec., 1985), p. 461-528; G. Edward White, *Tort Law in America: An Intellectual History* (Expanded Edition) (New York: Oxford Univ. Press, 1980, 2003 ed.); White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," *Va. L. Rev.*, Vol. 58, No. 6 (Sept., 1972), pp. 999-1028; and *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford Univ. Press, 1976).

²⁸ William M. Landes and Richard A. Posner, "A Positive Economic Analysis of Products Liability," *J. of Legal Studies*, Vol. 14, No. 3 (Dec., 1985), pp. 547, 551-553.

²⁹ Sally H. Clarke, "Unmanageable Risks: *MacPherson v. Buick* and the Emergence of a Mass Consumer Market," *Law & History Review*, Vol. 23, No. 1 (Spring, 2005), p. 1-52.

³⁰ John Fabian Witt, "Speedy Fred Taylor and the Ironies of Enterprise Liability," *Columbia L. Rev.*, Vol. 103, No. 1 (Jan., 2003), p. 1-49.

³¹ 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

³² Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, p. 4, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

³³ Roger J. Traynor, "The Ways and Meanings of Defective Products and Strict Liability," *Tenn. L. Rev.*, Vol. 32, No. 3 (Spring, 1965), p. 364.

³⁴ G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (New Haven: Yale, 1988), p. 40.

³⁵ Charles S. Lopeman, *The Activist Advocate: Policy Making in State Supreme Courts* (Westport, CT: Praeger Publ., 1999), p. 2.

³⁶ Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *APSR*, Vol. 75, No. 4 (Dec., 1981), p. 985.

³⁷ N.E.H. Hull, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute," *Law & Hist. Rev.*, Vol. 8, No. 1 (1990), pp. 55-56.

³⁸ Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, unnumbered page, referred to as "Pink Sheet" with "Suggested Questions for the Council," in the

Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

³⁹ ALI, The 120th Meeting of the Council (Dec. 12-14, 1963), p. 9.

⁴⁰ Cornelius F. Murphy, Jr., "Medieval Theory and Products Liability," *B.C. Indus. and Comm. L. Rev.*, Vol. 3, No. 1 (Fall, 1961), p. 29. Traynor was offered committee membership in late 1963. ALI, The 119th Meeting of the Council (May 21, 1963), p. 5; ALI, The 120th Meeting of the Council (Dec. 12-14, 1963), p. 2 in Council Meeting Minutes (1923-1990), Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA, available online at <http://www.law.upenn.edu/bll/archives/ali/minutes/8019-11.pdf>. Volumes 1 and 2 of the Restatement of Torts (Second), including §402A, were published in 1965. Volumes 3 and 4 were published in 1977 and 1979, respectively. ALI, Publications Catalog, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=120.

⁴¹ Jonathan R. Macey, "The Transformation of the American Law Institute," *Geo. Wash. L. Rev.*, Vol. 61, No. 4 (Apr., 1993), p. 1212, 1216.

⁴² Herbert F. Goodrich, "The Story of the American Law Institute," *Wash. U. L. Q.*, Vol. 1951, No. 3 (June, 1951), p. 283, 292.

⁴³ Editorial, "The A.L.I. at Fifty," *A.B.A. J.*, Vol. 59, No. 7 (July, 1973), p. 761.

⁴⁴ Hans A. Linde, "Courts and Torts: 'Public Policy' Without Public Politics?" *Val. U. L. Rev.*, Vol. 28, No. 3 (Spring, 1994), p. 821, 841 n. 86.

⁴⁵ Shapiro, "Decentralized Decision-Making in the Law of Torts," pp. 50-51 (trends in sister states). Canon and Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *The American Political Science Review*, Vol. 75, No. 4 (Dec., 1981) (population).

⁴⁶ Peter Harris, "Difficult Cases and the Display of Authority," *J. L. Econ. & Org.*, Vol. 1 (Fall, 1985), pp. 215-16; Gregory A. Caldeira, "The Transmission of Legal Precedent: A Study of State Supreme Courts," *American Political Science Review*, Vol. 79 (1985), pp. 178-93.

⁴⁷ Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *American Political Science Review*, Vol. 75, (1981), pp. 975-987 (identifying adoption of 23 plaintiff-oriented tort doctrines between 1876 and 1975); Baum, "Courts and Policy Innovation," pp. 423-24.

⁴⁸ Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *The American Political Science Review*, Vol. 75, No. 4 (Dec., 1981), p. 975-987. See also Richard A. Posner, "Explaining the Variance in the Number of Torts Suits Across U.S. States and Between the United States and England," *Journal of Legal Studies*, Vol. 26 (June, 1997), p. 477-489 (Urbanization, income, insurance, and population are all measurable factors.).

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⁵⁰ Robert A. Kagan, "Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry" *Law & Social Inquiry*, Vol. 19, No. 1 (Winter, 1994), pp. 1-62. Maurice Rosenberg, "Contemporary Litigation in the United States," in Harry W. Jones, ed., *Legal Institutions Today: English and American Approaches Compared* (Chicago: American Bar Assn, 1977), p. 153. Marlene Adler Marks, *The Suing of America: Why and How We Take Each Other to Court* (New York: Seaview, 1981), and Jethro K. Lieberman, *The Litigious Society* (New York: Basic, 1981). For contrary views, see Marc Galanter, "An Oil Strike in Hell: Contemporary Legends About the Civil Justice System," *Arizona L. Rev.*, Vol. 40, No. 3 (1998), pp. 717-52; Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (Berkeley: Univ. of Calif. Press, 2002); and William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: Univ. of Chicago Press, 2004).

⁵¹ William L. Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," *Minn. L. Rev.*, Vol. 50, No. 5 (1966), p. 791.

⁵² Michael E. Solimine, "The Quiet Revolution in Personal Jurisdiction," *Tulane L. Rev.*, Vol. 73 (Nov., 1998), pp. 38-39, 54.

⁵³ William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: Univ. of Chicago Press, 2004); Stephen S. Meinhold and David W. Neubauer, "Exploring Attitudes About the Litigation Explosion," *Justice Sys. J.*, Vol. 22, No. 2 (2001), p. 105-115.

⁵⁴ James Willard Hurst, "The Functions of Courts in the United States, 1950-1980," *Law and Society Review*, Vol. 15 (1980-1981), pp. 403, 418.

⁵⁵ Eric Helland, Jonathan Klick and Alexander Tabarrok, "Data Watch: Tort-Uring the Data," *The Journal of Economic Perspectives*, Vol. 19, No. 2 (Spring 2005), p. 207, 209 Tbl. 1, 210 Fig. 1. See Study No. 6232, available online at <http://www.icpsr.umich.edu>.

⁵⁶ George L. Priest, "Understanding the Liability Crisis," *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), pp. 198-99.

⁵⁷ U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), p. I-26.

⁵⁸ Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *The American Political Science Review*, Vol. 75, No. 4 (Dec., 1981), p. 985.

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⁶² Davidson Ream, *A History of DRI: Serving the Defense Bar* (Chicago: Defense Research Inst., 2005), pp. 1-2.

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⁶⁴ William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill: UNC, 2001), p. 7.

⁶⁵ Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington, DE: ISI Books, 2009), p. 153.

⁶⁶ Allen E. Broussard, *A California Supreme Court Justice Looks at Law and Society, 1964-1996* (Berkeley: Regents of the Univ. of CA, 1997), p. 203.

⁶⁷ *Atkins v. American Motors Corp.*, 335 So. 2d 134, 141-42 (Ala., 1976). The U.C.C. was a model act and deviations from the provisions of the model act were referred to as “non-uniform.”

⁶⁸ The most significant modification of the model act was the prohibition on sellers attempting to exclude liability for personal injury damages arising “in the case of consumer goods.” Code of Ala. § 7-2-316(5) (2008). William Prosser interpreted Alabama’s UCC statute as a statutory enactment of strict liability. William L. Prosser, “The Fall of the Citadel,” *Minn. L. Rev.* Vol. 50 (1965-66), p. 796.

⁶⁹ *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala., 1976) (defective manufacture and design) and *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala., 1976) (defective design).

⁷⁰ *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, 134 (Ala., 1976).

⁷¹ *Atkins*, 335 So. 2d at 137.

⁷² *Casrell v. Altec Industries, Inc.*, 335 So. 2d at 132.

⁷³ *Atkins*, 335 So. 2d at 140-43.

⁷⁴ *Atkins*, 335 So. 2d at 140-41.

⁷⁵ *Atkins*, 335 So. 2d at 141.

⁷⁶ *Terry v. Double Cola Bottling Co., Inc.*, 263 N.C. 1, 138 S.E.2d 753 (1964); *Tedder v. Pepsi-Cola Bottling Co. of Raleigh, N.C., Inc.*, 270 N.C. 301, 154 S.E.2d 337 (1967).

⁷⁷ *Tedder*, 270 N.C. at 305, 154 S.E.2d at 339 (citing most of legal scholar William L. Prosser's then-recent articles on the abrogation of negligence, warranties, and the doctrine of privity in favor of strict liability).

⁷⁸ S.B. 746, "Product Liability Act," North Carolina Senate Journal, First Session 1977 (May 23, 1977), pp. 574-75 [Kyre, pp. 82-84]. Introduced by Senators E. Lawrence Davis III (D-Winston-Salem), J. J. Harrington (D-Lewiston), Carl D. Tothorow (D-Winston-Salem), and Robert B. Jordan, III (D-Mount Gilead). [Kyre, p. 11.] Invaluable research assistance regarding this Act was provided by the work of Kenneth Kyre, Jr., an attorney in private practice in North Carolina, who compiled and photocopied many original public legislative documents regarding the legislative history of the Product Liability Act in its various incarnations and amendments. Mr. Kyre's legislative history is not an interpretive or analytical work and apparently none of the text is his own, with the exception of a chronologically organized table of contents. Rather it is a compilation and organization of photocopies of original public documents. All interpretations regarding these materials are my own. His compilation is available at the North Carolina Legislative Library in Raleigh, North Carolina and is entitled *Legislative History of the Products Liability Act and the Products Liability Statute of Repose: Senate Bill 189, N.C. Gen. Stat. Chapter 99B and § 1-50(a)(6) (And the History of Senate Bill 746, House Bill 235, and House Bill 993)*, 1 vol. (various foliations): ill.; 30 cm., by Kenneth Kyre, Jr., of Pinto Coates Kyre & Brown, PLLC of Greensboro, N.C. (August, 2007). Call No. KFN 7597.7 .L44 2007. Hereinafter cited as "Kyre".

⁷⁹ N.C. Bill Book (Senate Bill 746), pp. 1-3, [Kyre, pp. 82-84].

⁸⁰ Minutes of N.C. Senate Judiciary II Committee, at 2 (May 31, 1977), [Kyre, pp. 85-86].

⁸¹ James L. Croyle, "An Impact Analysis of Judge-Made Products Liability Policies," *Law & Soc'y Rev.*, Vol. 13, No. 4 (Summer, 1979), p. 949-69.

⁸² "Product Liability: A Tale Written in Red Ink," *J. of American Ins.*, Vol. 52, No. 3 (Fall, 1976), pp. 16-17.

⁸³ U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report*, (Washington, D.C.: 1978), pp. VI-11-27.

⁸⁴ Minutes of N.C. Senate Judiciary II Committee, at 2 (May 31, 1977), [Kyre, pp. 85-86]. The quotes in this paper are from the legislative summaries, which paraphrase the views or statements of members and witnesses; there are rarely any first-person quotes from particular members or witnesses.

⁸⁵ 1977 N.C. House Journal (June 29, 1977), p. 1211; N.C. Bill Book (Senate Bill 746), Roll Call, N.C. House of Representatives, June 29, 1977, [Kyre, pp. 113-14]. There were no listed "no" votes. N.C. Bill Book (Senate Bill 746), [Kyre, p. 98].

⁸⁶ 1978 N.C. Senate Journal, p. 1418, [Kyre, p. 123]. Senator Marshall A. Rauch (D-Gastonia) moved that the Senate and House versions not be reconciled; he specifically requested the Senate not request conferees. *Ibid.*

⁸⁷ 1979 N.C. Senate Journal (Senate Bill 189) (Jan. 29, 1979), p. 60, [Kyre, p. 126]. The bill had 23 co-sponsors. The House version was introduced on the same day. 1979 N.C. House Journal (House Bill 235) (Jan. 29, 1979), pp. 82-83, [Kyre, pp. 141-42]. The House bill had ten co-sponsors.

⁸⁸ Charles F. Blanchard and Doug B. Abrams, “North Carolina’s New Product Liability Act: A Critical Analysis,” *Wake Forest L. Rev.*, Vol. 16, No. 2 (April 1980), p. 171.

⁸⁹ Minutes of N.C. Committee on Manufacturing, Labor and Commerce, pp. 1-2 (Feb. 8, 1979), [Kyre, pp. 155-56]. Senator Robert B. Jordan, III, (D-Mount Gilead) introduced Howard Manning, a lobbyist on behalf of the North Carolina Products Liability Task Force, a group of manufacturers who wanted restrictions on product liability suits. Minutes of N.C. House Judiciary II Committee (Feb. 8, 1979), p. 2, [Kyre, p. 158].

⁹⁰ Minutes of N.C. House Judiciary II Committee (Feb. 8, 1979), p. 2, [Kyre, p. 158].

⁹¹ Nineteen companies appeared before the N.C. Senate Committee on Manufacturing, Labor and Commerce. Minutes of the North Carolina Senate Committee on Manufacturing, Labor, and Commerce on Senate Bill 189 – Products Liability. Feb. 28, 1979, p. 1 [Kyre, p. 161].

⁹² Statement of W.L. Beerman, Jr., Chairman of the Government Liaison Council of the Greensboro Chamber of Commerce to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979. [Kyre, p. 188].

⁹³ *Ibid.*, p. 2 [Kyre p. 162].

⁹⁴ Statement of Allen Bailey of the N.C. Academy of Trial Lawyers to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979. [Kyre, pp. 201-07].

⁹⁵ N.C. Bill Book (House Bill 189) (May 23, 1979 for Senate, passing with 41 yes votes, 0 no votes, 11 absences) (May 24, 1979 for House, passing with 91 yes votes, 0 no votes, 29 absences) [Kyre, pp. 394-96, 405].

⁹⁶ N.C. Gen. Stat. § 99B-2(a) (1979).

⁹⁷ N.C. Gen. Stat. § 99B-2(b) (1979).

⁹⁸ Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment* (San Diego: Harcourt Brace Jovanovich, 1985), pp. 445-446. The reforms in all fifty states and the District of Columbia from 1980 through 2011 have been collected by

Ronen Avraham in the *Database of State Tort Law Reforms (DSTLR 4th)* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711 (Sept., 2011).

⁹⁹ Theodore Eisenberg and James A. Henderson, Jr., "Inside the Quiet Revolution in Products Liability," *UCLA L. Rev.*, Vol. 39 (April, 1992), pp. 776, 791-796.

¹⁰⁰ Pub. L. No. 97-45, 95 Stat. 949, 15 U.S.C.A. §§ 3901-3904. The federal tort reform efforts will be the subject of a subsequent essay.

¹⁰¹ Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment* (San Diego: Harcourt Brace Jovanovich, 1985), p. 445.

¹⁰² U.S. GAO, "Product Liability: Verdicts and Case Resolution in Five States," GAO/HRD-89-99 (Washington, D.C.: Sept., 1989), p. 30.

¹⁰³ Valerie P. Hans and William S. Lofquist, "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate," *Law & Soc'y Rev.*, Vol. 26, No. 1 (1992), p. 85, 108.

¹⁰⁴ Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* (Ann Arbor, MI: Univ. of Mich. Press, 1997), pp. 38-43; 265.

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