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Some Thoughts on Llewellyn's the Common Law Tradition

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THE ART OF THE NEGLECTED OBVIOUS IN PRODUCTS LIABILITY CASES: SOME THOUGHTS ON LLEWELLYN'S THE COMMON LAW TRADITION

Terrence F. Kiely*

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If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway might have his action against the manufacturer of the defective axle.—Winterbottom v. Wright, 10 M. & W. 109, 111, 152 Eng. Rep. 402, 403 (1842) (Byles, counsel for defendant).

As always, I take the state of the art for granted. As always, what I have to offer is the neglected obvious.—K. Llewellyn, The Common Law Tradition 519 (1960).

I. INTRODUCTION

THE SPECTER raised by counsel Byles in the famous "non-products" liability case of Winterbottom v. Wright, has come to haunt his brothers and sisters in the defense in the past fifteen years.

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1. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). This is the decision requiring privity of contract as an absolute sine qua non for an action in tort against a manuf-
years. The citadel of privity has long since fallen, leaving in its place the still vibrant concept of strict liability.\textsuperscript{2} The rapid expansion of this concept has resulted in confusion and concern among both the practicing bar and legal educators about the issues of professional craftsmanship and the limits of responsible adjudication in this field. The pages of law reviews and bar journals are filled with articles either decrying the murky state of affairs in the field,\textsuperscript{3} offering practical suggestions to the neophyte on either side of the issue,\textsuperscript{4} or calling for the cessation of the wave of judicial opinions which allegedly impose haphazard and irresponsible quality control measures on American manufacturers.\textsuperscript{5}

It is the author's contention that a substantial portion of the contemporary confusion, both as to the scope of strict liability for products and the appropriate professional response to it, is the result of both court and counsel still seeking solace in the language structure of Section 402A of the \textit{Restatement (Second) of Torts}\textsuperscript{6} as a guide

\footnotesize

\begin{itemize}


\item \textsuperscript{5} See, e.g., \textit{Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort}, 81 \textit{Yale L.J.} 1055 (1972), for an interesting conceptual model which, in the authors' opinion, protects the interests of all parties concerned. \textit{See also}, \textit{Henderson, supra note 3, and the series of excellent commentaries in the article by Weinstein, supra note 3, which criticize the current method from a variety of practical and theoretical positions.}

\item \textsuperscript{6} \textit{Restatement (Second) of Torts § 402A} (1965). This section is the law for strict liability for products in virtually all jurisdictions in the United States.
\end{itemize}
to decision while using the philosophy of strict liability for products as the motive force for the doctrine's steady expansion. This type of phenomenon is not, however, of recent vintage. It is partially the result of a continuing feature of common law jurisprudence whenever rapid changes are judicially fostered in a new area of law. That feature is the overlooking of the way in which language is used, both as an expressive and dynamic tool in the systemization, development and utilization of a revolutionary legal idea.

Professor Leon Green aptly stated the proposition nearly fifty years ago:

Under whatever guise it has been undertaken, the search for a language technic which would solve the difficulties of government has been the falsest hope of legal scholarship. . . . It is not that a scientific language device is not desirable. It is merely that too much emphasis has been put upon it, and too much expected of it. The attempt has been made and still is made to make language do the service of judging itself.7

In addition to the undue emphasis traditionally placed on the verbalization of a legal idea, lawyers, in the face of tremendous demands on their time and energy, have also tended to overlook certain basic aspects of the common law decision-making process itself.8 The combination of these two historical facts in the context of a rapid development in any area of law, can result in confusion and professional cynicism.

An analysis of these two factors in relation to contemporary concern over the chaotic rise of products liability law over the past one and a half decades will be the central concern of this Article. Several germinal ideas set forth by Professor Karl Llewellyn in his master work The Common Law Tradition9 will be addressed first, followed by a brief exposition of this author's view of several problems associated with the evolution of legal language technic. These two in turn will serve as the context for an analysis of the development and current use of several key areas of Section 402A of the Restatement (Second) of Torts. The final section will scrutinize a groundbreaking products liability decision, Hall v. E.L. Du Pont De Ne-

8. See note 19 infra.
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mours & Co., as illustrative of the positions taken in the preceding discussion.

II. CRISIS OF CONFIDENCE

If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself great authority against its maintenance.—Winterbottom v. Wright, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 404 (1842) (Lord Abinger, C.B.).

Historically, whenever lawyers using the tools of their craft are nevertheless unable to predict with any degree of accuracy the range of probable results of cases requiring an appeal, a "crisis of confidence" and attendant professional cynicism are the result. Professor Karl Llewellyn stated in the preface to The Common Law Tradition, published fifteen years ago, that his purpose in writing the book was to resolve the current "crisis of confidence" among members of the bar regarding the "reckonability" of the state appellate decision-making process. This "crisis of confidence" was seen as having pervasive effects:

In most it no longer inspires healthy reaction to effect its cure; for most it has come to lay a pall and palsy on heart and hand because it goes to whether there is any reckonability in the work of our appellate courts, any real stability of footing for the lawyer, be it in appellate litigation or counseling, whether therefore there is any effective craftsmanship for him to bring to bear to serve his client and justify his being.

A major reason for this professional malaise, according to Llewellyn,

11. In THE COMMON LAW TRADITION, supra note 9, Llewellyn states: Of course, ever since lawyers began to lawyer, there have been losing counsel a plenty who have so believed in their causes that they have bitterly blamed the court. . . . Despite all this, the bar is bothered these days with a bother which has a new corrosiveness.
13. This book starts with the fact that the bar is bothered by our appellate courts—not the much discussed Supreme Court alone, but our appellate courts in general. The bar is so much bothered about these courts that we face a crisis in confidence which packs danger.
14. Id. at 3-4.
was a shift in the style in which modern appellate decisions are rendered.\textsuperscript{15} Llewellyn describes the current model, labeled the "Grand Style," as less rigid in the use of precedent generally, more infused with broad principle and reason as the decisional fulcrum, and extremely adept at the distinguishing or chipping away of bothersome or outdated precedent.\textsuperscript{16} As a result of courts imperceptibly shifting over the years from the "Formal Style," i.e., traditional, precedent oriented, the bar feels frustrated, inadequate and hostile.\textsuperscript{17} This "crisis of confidence" accordingly is the result of lawyers' loss of faith in their ability to responsibly utilize the tools of their craft on a client's behalf.

Likewise, a similar crisis has developed in current attempts by counsel to fathom the currents of modern appellate decisions in the products liability field. As will be discussed, the inherent frailty of the language structure of Section 402A of the Restatement (Second) of Torts\textsuperscript{18} stems from the courts' overriding emphasis on the philoso-

\textsuperscript{15} W. Twinning, in his book \textit{Karl Llewellyn and the Realist Movement} (1973), stated:

Llewellyn's importation of the concept of style into jurisprudential analysis is a good example of his flair for drawing attention to "the neglected obvious." Judicial opinions can be extraordinarily varied in respect of length, explicitness, individuality, the nature and range of source materials relied on, the manner of handling such materials, the modes of reasoning, and so on. "Style" is a useful generic term encompassing such characteristics of a series of opinions as may be considered to be distinctive . . . . In Llewellyn's usage the term refers to the manner of thought exhibited in judicial opinions rather than to their literary style, in so far as these are distinguishable.\textit{Id.} at 210.

\textsuperscript{16} In extremely rough form, Llewellyn posted at least sixty-four techniques for dealing with precedent. \textit{The Common Law Tradition}, \textit{supra} note 9, at 77-91. He was satisfied more by general acceptance of the multiplicity of techniques than by his ability to describe them more precisely:

The following classification of standard techniques is roughhewn. It is above all incomplete. The finer shadings are hard to communicate, perhaps hard to agree upon, and the going diversity even of the coarser approaches is too large to warrant the effort needed to exhaust it. It is enough if one can demonstrate a true multiplicity.\textit{Id.} at 76.

\textsuperscript{17} \textit{Id.} at 4:

You cannot listen to the dirges of lawyers about the death of \textit{stare decisis} (of the nature of which lovely institution the dirgechanters have little inkling) without realizing that one great group at the bar are close to losing their faith.

\textsuperscript{18} \textit{See} discussion at p. 924 \textit{et seq. infra}. 
phy of strict liability for products. An additional factor contributing
to this dilemma is that the entire field has developed and is continu-
ing to do so pursuant to "Grand Style" models of adjudication.

The great bulk of *The Common Law Tradition* is devoted to an
examination and elucidation of the two "styles" by way of close anal-
ysis of blocks of decided opinions. This analysis is effected in the
context of an overall structural study of fourteen "steadying fac-
tors"—which Llewellyn felt insured "reckonability" and thereby
resolved the false dilemma of contemporary practitioners. It is be-
yond the scope of this Article to systematically analyze a series of
products liability cases within Llewellyn's analytical model. Rather,
by keeping at the forefront the premises just stated and stressing
the "neglected obvious" in the development and current use of the
language technic of Section 402A, it is hoped that a clearer picture,
if not a resolution of the current "crisis of confidence" in the prod-
ucts liability field, may emerge.

This major book by Karl Llewellyn has been aptly described as
"Gothic." It is also exasperating and at times stylistically anarchic.
The fact remains that, to date, it is probably one of the most percep-

19. In appellate judicial deciding we have, materially steadying the activity
and its results, at least those lines of factor which follow. . . . (1) Law-
conditioned Officials, (2) Legal Doctrine, (3) Known Doctrinal Tech-
Right Answer, (6) An Opinion of the Court, (7) A Frozen Record from
Below, (8) Issues Limited, Sharpened, Phrased, (9) Adversary Argument
by Counsel, (10) Group Decision, (11) Judicial Security and Honesty,
(12) A Known Bench, (13) The General Period-Style and Its Promise,
(14) Professional Judicial Office.

20. See discussion at p. 924 et seq. infra.

21. As noted by Professor William Twining in his masterful study of Llewellyn's
book:

The critic is beset by conflicting impressions: . . . a thesis of classic sim-
plicity elaborated in a Gothic structure . . . ideas worked over and polished
for more than thirty years presented as a rude elementary analysis. The
principal addressee is the ordinary practitioner, yet the Teutonic thorough-
ness of the documentation wearies all but the most patient scholar;
empirical methods, idiosyncratically "scientific," are used to verify hypoth-
eses expressed in terms which look suspiciously metaphysical; a work of
theory on the grand scale is advertised as a do-it-yourself manual for judges
and advocates; the author preaches at greatest length where he was prac-
ticed least. . . . Richly specific in illustration, insipidly vague in general
conclusion. A success and disappointment.

tive and seminal treatises written on the actual workings of the common law appellate decision-making process.

III. THE NEGLECTED OBVIOUS AND STRUCTURAL METAMORPHOSIS

Whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach . . . gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life.—Winterbottom v. Wright, 10 M. & W. 109, 110, 152 Eng. Rep. 402, 403 (1842).

Professor Llewellyn often referred to his work as the "neglected obvious."22 In regard to how problems are structurally resolved in our common law system, this is still a prime factor in the dilemma experienced by lawyers in the face of dramatic changes in a particular field of law. The "neglected obvious" in the present author's frame of reference means, quite simply, the manner in which any human conflict situation, including a products liability case, is structurally channeled, altered, and legally characterized prior to eventual resolution in the rare instances where litigation and subsequent appeal are deemed necessary.

"Thinking like a lawyer" is an oft-heard catch-phrase containing within it a view of the end product of legal education entertained by the great bulk of first semester law students and perhaps the public at large. It takes substantial time and effort to dissuade the neophyte of that notion and to convince him that lawyers think like everyone else, but are required to express their thoughts about a matter brought to their professional attention in a highly specialized way.23

22. Llewellyn stated: "[T]he mere 'novelty' of the perceptions here recorded hinders then queerly from real denting of the mind. Not that, albeit novel, they are new. Quite the contrary. As has been shown, they are as traditional as our primeval trees." THE COMMON LAW TRADITION, supra note 9, at 142. This brings to mind the observation of Arthur Koestler regarding the nature of scientific discovery: "Discovery often means simply the uncovering of something which has always been there but was hidden from the eye by the blinkers of habit." A. KOESTLER, THE ACT OF CREATION 108 (1969).


Perhaps the first and possibly the most important factor in the [student-teacher] relation is that student and teacher talk the same language, and this will normally mean the teacher's language. But inasmuch as the
Every human conflict situation that comes to litigation as the appropriate mode of resolution is obviously infused with the philosophical, moral, social, or economic ideology of the respective litigants. What is too often overlooked is the fact that the problem, along with its attendant ideologies, must be set forth, clarified, refined, and legally characterized within the total organizational, conceptual, and language structures of the common law decision-making apparatus. This conflict-resolution structure, from its inception, causes the underlying human problem to undergo immediate alteration, the result being the gradual metamorphosis of the human problem into a series of legal issues.

The rules of civil practice necessitate the capsulization of the basic facts and require the plaintiff to state how he wishes the court or jury to officially characterize the defendant's conduct. This preliminary unofficial labelling sets in motion the plethora of litigation-related rules which determine the manner and pace at which the problem is to be channeled through the process to eventual resolution. It is here that legal theory enters and serves as the major catalyst in the process of structural metamorphosis.

In the event of an appeal, the encapsulation and fragmentation of the original problem is intensified due to the general concept and limited number of legal issues which serve as the focal point for appellate scrutiny. It is here, along with preliminary trial court rule-

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24. See, e.g., M. Franklin, The Biography of a Legal Dispute (1968). Leon Green expressed the idea as follows:

Thus facts, policies, and doctrine accepted as basis for judgment are colored by the desires of the people who have a part in a litigation. The litigation process can do little more than neutralize the deep colors given by the parties by the softer colors supplied by jurors and judges.

Green, Tort Law Public Law In Disguise (II), 38 Texas L. Rev. 257, 264 (1960).

25. The power of such unofficial characterizations serves as the basis for negotiation and settlement and as such is vital to the smooth functioning of any legal system. That particular aspect of social control through law is the neglected area of jurisprudence. See, e.g., K. Olvecrona, Law as Fact (2d ed. 1971).

26. The ultimate matter... which come[s] before the appellate judicial court to be decided [is] an issue already drawn, drawn by lawyers, drawn against the background of legal doctrine and procedure, and drawn largely in frozen, printed words. This tends powerfully both to focus and limit dis-
ings on legal questions, that the inherent frailty of \textit{language technic} comes to the fore. Here too, Llewellyn's "steadying factor" of issues "limited, sharpened and phrased"\textsuperscript{27} governs the development of the rules of decision. This aspect of the structural alteration process merits brief attention prior to a closer examination of its particular impact in the field of products liability.

\textbf{IV. THE FUNCTIONAL EVOLUTION OF LEGAL CONCEPTS}

By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.—\textit{Winterbottom v. Wright}, 10 M. & W. 109, 115, 152 Eng. Rep. 402, 405 (1842) (Lord Abinger, C. B.).

Any rule of common law, statute, ordinance, or administrative regulation in any area of law is the verbalization, in legal parlance, of a \textit{conclusion} as to how society views the appropriate ordering or results of specific types of societal relationships or interactions.\textsuperscript{28} In order for our common law system to function, the verbalization of a new judge-made conclusion must conform to a pattern of expression developed over the years. It must also be verbally consistent with other tangentially related rules or conclusions which serve as the conceptual context for the impact and dynamics of the new idea.\textsuperscript{29} Once such a conclusion has been initially verbalized, the process of legal evolution is initiated.

"Legal evolution" is the gradual process of judicial refinement of
cussion, thinking, and lines of deciding.
\textit{The Common Law Tradition}, \textit{supra} note 9, at 29.

\textsuperscript{27} \textit{Supra}, note 19.

\textsuperscript{28} Law is administered by means of countless concepts, abstractions, fictions, and generalizations—language fashioned by usage of lawyers and judges . . . . Thus the study of law is the acquisition of power—the power to pass judgment through the use of the concepts, abstractions and fictions which make up the language of the law.


\textsuperscript{29} It is understood and accepted that the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine; and that where there is no real room for doubt, that body of doctrine is nonetheless to guide the deciding; and that even where there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine.

\textit{The Common Law Tradition}, \textit{supra} note 9, at 20.
the verbalization of a new legal idea, both operationally and semantically. The original core idea ensconsed within the new rule statement is honed, elucidated, and brought to its functional fruition by way of a long series of decisions involving varied applications of the core idea in whole or part.\textsuperscript{30}

Lawyers generally consider the latest mutation in the legal evolution of a particular concept to be a good in itself. They react against any regressive tendencies exhibited by courts which attempt a return to the simplicity of the original core idea or conclusion as an aid to the resolution of a novel problem.\textsuperscript{31} This reaction, which was Llewellyn's major concern throughout The Common Law Tradition, can be seen as being based on two related factors: the ideal of a conceptual evolutionary process as the most desirable goal and, more importantly, the negative effect that such regressive applications have on the understanding and use of the lawyer's craft tools.

Hence, a concomitant aspect of the process of legal evolution is the structuring of the perimeters of the concept in the lawyer's mind, his familiarity with the constituent elements of the idea, and his general predictive ability regarding its overall applicability. An interference with this "reckonability" base, to use Llewellyn's terminology, jars the inbred sense of professional craftsmanship and raises the hue and cry of judicial gamesmanship.\textsuperscript{32} The legal evolution of Section 402A provides a specific case in point.

\textsuperscript{30} Llewellyn stated:
To understand, despite such now flagrant misdescription, the stubborn grip of the formula on men's minds, one must remember not only the lasting validity of the ideal expressed, but the tradition, the long tradition in which the same words had been a workably accurate depiction, and had acquired a sort of unchallengeable holiness of phrase.

\textit{Id.} at 187.

\textsuperscript{31} When talking about illegitimate precedent techniques, Llewellyn stated:
When the fair—even the strained—meaning of an authority is distorted into nonrecognizability, the immediate effect on the detail of doctrine is confusion . . . .

But whether the distortion be planned or sloppy, and regardless of the particular point, such distortion in any case opens to every attentive lawyer the peril that in any other case at all the like may be visited upon any authority at all; few situations present more dramatically Bentham's "second order" of harm from an offense: the rush, through a multitude, of insecurity and fear in matters of vital moment.

\textit{Id.} at 134.

\textsuperscript{32} Today all of this is so familiar and obvious as to bore, but there were reasons why, four or five decades ago, it shocked our legal world. The in-
V. THE LEGAL EVOLUTION OF THE IDEA OF STRICT LIABILITY FOR PRODUCTS

If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.—Winterbottom v. Wright, 10 M. & W. 109, 115, 152 Eng. Rep. 402, 405 (1842) (Alderson, B.).

* * * *

Any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago. One might venture on the paradox that by the time a proposition becomes generally articulate it ceases to be true—because things change about as fast as they are realized.33

This cogent observation of Justice Holmes about the development of legal concepts generally has special relevance to the articulation of the idea of strict liability for products via Section 402A of the Restatement (Second) of Torts34 and its legal evolutionary development.

In 1961, the authors of Tentative Draft No. 6 of the Second Restatement offered Section 402A as exemplifying the most comprehensive verbalization of the philosophy of strict liability for products as delineated in a series of cases over the preceding three decades. The section was limited however to food products only:

Section 402A. Special Liability of Sellers of Food

One engaged in the Business of Selling Food for Human Consumption Who Sells Such Food in a Defective Condition Unreasonably Dangerous to the Consumer Is Subject to Liability For Bodily Harm Thereby Caused to One Who Consumes It, Even Though

grained practice of that time was to write an appellate opinion as if the conclusion had followed of necessity from the authorities at hand and as if it had been the only possible correct conclusion. Accept those premises, and a “well-reasoned” opinion not only shows why the decision is wise and right, but would also show the process by which the decision was arrived at. Men liked that... Now these psychologists were insisting that that was not so at all—except of course by accident or on very occasional occasion [sic]. It is not hard to see why they, along with those men of law who adopted and adapted their insight, looked challenging, seemed like attackers and destroyers.

Id. at 11.


34. Restatement (Second) of Torts § 402A (1965).
(a) The Seller Has Exercised All Possible Care in The Preparation and
Sale of the Food, and
(b) The Consumer Has Not Bought The Food From or Entered Into
Any Contractual Relation with The Seller.®

At that time, one year after the publication of The Common Law
Tradition, the reporters noted that nineteen jurisdictions had ac-
cepted the idea of strict liability for food products without statute
and five more by way of enactment. Fourteen appeared equivocal,
while fourteen more had expressly rejected the idea.® Due to the
obvious lack of unanimity, the following caveat was stated:
The Institute expresses no opinion whether the rule stated in this section
may not apply
(1) to articles other than food, or
(2) to harm other than bodily harm, or
(3) to harm to persons other than consumers, or caused otherwise than by
consumption.®

It was emphasized, however, that the past year had witnessed a
"spectacular eruption" of cases extending the idea to non-food prod-
ucts,®® a state of affairs deemed likely to continue.®® In addition
to the lack of clear judicial support or guidelines, a major hurdle
at this preliminary stage was the appropriate verbalization of the core
idea of strict liability for products:

How should the Section be stated? After stating no less than twenty-nine
possible theories, most with an element of fiction, such as third party bene-
ficiary contracts, agencies to buy or sell, or offers to the consumer accepted
by his purchase, the courts now are in general agreement on the theory . . .
of a warranty running with the goods . . . .®

The massive conceptual confusion®° over the years as to the theo-

35. Restatement (Second) of Torts § 402A (Tent. Draft No. 6, 1961).
36. Id. at 24-28.
37. Restatement (Second) of Torts § 402A (Tent. Draft No. 6, 1961).
38. The groundbreaking decision by the New Jersey Supreme Court in Henning-
sen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) had been published,
along with several others containing strong dictum for the global application of the
39. "It is evident that the probable development of the law will carry the strict
liability to many products other than food. There is still great uncertainty as to
whether there are any limits, and if so what." Restatement (Second) of Torts,
40. Id. at 32.
41. In some instances this theory has proved to be an unfortunate one.
Although warranty was in its origin a matter of tort liability, and it is gen-
retical and practical differences between implied warranty in tort and implied warranty in contract was likely to continue and hence interfere with the simplicity of the core idea. This confusion and impediment to development was initially set to rest by the still conceptually vibrant and groundbreaking decision of Justice Traynor of the California Supreme Court two years later in *Greenman v. Yuba Power Products, Inc.*

Justice Traynor's opinion, anticipated by his remarks in *Escola v. Coca Cola Bottling Co.* decided nearly two decades earlier, set the tone for a return to the core idea of strict liability for products as the motive force for future development. Cutting through the thicket of warranty-generated problems created by the initial search for a *language technic*, Justice Traynor put the matter simply:

We need not recanvass the *reasons* for imposing strict liability on the manufacturer . . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.

Accordingly, the following verbalization of the philosophy of strict liability was set forth: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes

| 42.  | "It is much simpler to regard the liability here stated as merely one of strict liability in tort." | *Id.* at 39. |
| 44.  | 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion): [B]ut I believe the manufacturers' negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. |
| 45.  | 59 Cal. 2d at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added). This is historically ironic in the sense that Chief Justice Shaw in the famous case of *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), referred to the centuries old distinction between trespass and trespass on the case as mere "dicta" in the course of launching the idea of no liability *without* fault on the American continent. |
injury to a human being." This statement (or restatement) of the core idea of strict liability for products was the catalyst for the rapid application of the doctrine to virtually every significant party traditionally associated with the vertical chain of the American manufacturing and marketing process.

The general influence of the decision and Justice Traynor's work with Professor Prosser, who was the reporter for the Second Restatement's Committee re-drafting Section 402A, resulted three years later in the publication of the final draft of the version currently in use. Section 402A, which is now the language technic in virtually every jurisdiction in the United States, provides as follows:

**Special Liability of Seller of Product for Physical Harm to User or Consumer**

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Since its publication in final form in 1965, the legal evolution of Section 402A has been rapid and dramatic. This leaps and bounds application of the core idea of strict liability pursuant to the language technic of Section 402A has, in the author's opinion, resulted in the initial confusion fostered by the "warranty" cases returning full circle in 1975. The virtual en masse agreement that the Section is the most appropriate verbalization of the core idea of strict liability, once the more obvious applications have been made as to parties, has run head on with the increased willingness of courts to expand the

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46. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
49. I.e., to manufacturers, wholesalers, distributors and retailers.
application of the concept of "seller" to additional parties in the American business scene.\textsuperscript{50}

The consistent use over the past decade of the \textit{language technic} of Section 402A has, as with the legal evolution of any idea, refined its more obvious overall applicability and the specific applicability of its constituent elements to real life situations. Likewise, the process has built up the aforementioned professional "craft-tool" expectations of counsel and the concomitant "reckonability" base.\textsuperscript{51} Today, however, as litigants continue to urge the courts to further expand the \textit{idea} of strict liability for products, all parties concerned are experiencing increasing frustration at the apparent limits set to the task of prosecution or defense by the \textit{language technic} constraints of Section 402A.\textsuperscript{52}

Instead of breaking through the felt barriers to progress by a restatement of the core idea and thereby wreaking havoc on a substantial body of professional expectations, courts are currently utilizing more subtle \textit{language technics} to cautiously accomplish the basic task.

The inherent capability of slight shadings in the language of 402A to accomplish grander results and the danger it portends were noted early by cautious jurists:

\begin{quote}
The grand simplicity of the new doctrine—its sweeping aside of the concept of liability through fault—is its most dangerous aspect. The all-inclusive ring of "strict liability" will cause an overextension . . . of what is conceived by its progenitors to be a limited concept. Unlike its predecessor—doctrine of liability through "fault," which in the very statement of the principle suggests that the shifting of loss is to be the exception rather than the rule, \textit{the innuendos of the new verbiage are pervasive}.\textsuperscript{53}
\end{quote}

This cautious attempt to adjust the \textit{language technic} of Section 402A by returning via "reverse" legal evolution to the core idea of

\begin{footnotes}

\textsuperscript{51} See notes 11-21 and accompanying text supra.


\end{footnotes}
strict liability for products, brings to mind the sobering caution of Professor Leon Green:

The struggle which men are making to rise above the word level seems to have no end. . . . Word ritual under one guise or another has always been one of the primary methods of law administration, and the development of the uses made of words is one of the most puzzling of studies. . . . No sooner had the written word become a means of evidencing the dealings of men in every day life than it was shackled by all of these uses.\(^{54}\)

At this point, several key concepts related to the language technic of 402A will be examined to serve as examples of the contemporary judicial efforts at adjustment in order to foster the continuing viability of the core idea of strict liability. Out of a large number of examples,\(^{55}\) the following have been selected for closer analysis: the concept of "unreasonably dangerous" as a component part of proof of defects, the concept of "intended use" as setting limitations on manufacturers' liability for foreseeable risks, and the issue of the propriety of post-occurrence change evidence. The problems currently being encountered in each of the areas stem from the conflicts between the courts' continued faith in the efficacy of the language technic of Section 402A and their return, by way of reverse legal evolution, to the simplicity of the original core idea of strict liability.

A. Defective Condition Unreasonably Dangerous

There has been and continues to be a debate as to whether or not in a design defect case,\(^ {56}\) as opposed to a manufacturing defect setting,\(^ {57}\) the plaintiff must still, even under the conceptual canopy of Section 402A, in fact prove a negligence case.\(^ {58}\)

\(^{54}\) Green, *The Duty Problem in Negligence Cases*, supra note 7, at 1016-17.

\(^{55}\) See notes 91-96 infra.

\(^{56}\) This is the designation commonly used to classify cases where the entire line of a product is attacked i.e. overall design, packaging, warnings or instructions.

\(^{57}\) Here, the allegation is that the particular unit of an acceptable line of goods is different than the others in quality.

One of the more recent cases to enter the fray is Roach v. Kononen,⁵⁹ involving an alleged defectively designed automobile hood latch which failed and caused the hood to fly up, resulting in serious injuries. After devoting several pages to a discussion of the obvious distinction between a negligence and a strict liability case,⁶⁰ the court nevertheless concluded as follows:

It is generally recognized that in the vast majority of cases, the application of either the theory of strict liability or of negligence seldom leads to different conclusions. . . .

But in any case, whether a court characterizes the cause of action as arising in negligence or strict liability, the proof of a defect which must be marshalled in support of the plaintiff's case usually takes the same form and usually what proves one proves the other.⁶¹

Nevertheless, the key phrase "unreasonably dangerous" to the user or consumer is currently under heavy attack as being a verbal impediment to the further reaches of the core idea of strict liability for products.

The California Supreme Court, the progenitor of the core idea, has expunged the phrase as being inconsistent with the ideational content of Justice Traynor's opinion in Greenman v. Yuba Power Co.⁶² In Cronin v. J.B.E. Olson Corp.,⁶³ responding to allegations of trial court error in excluding the phrase "unreasonably dangerous" from the instructions, the court noted the pervasive influence of the language technic of Section 402A and that courts have "more frequently adopted than challenged its basic outlines."⁶⁴ However, a collision between the core idea stated in Greenman and the verbalization of the idea in Section 402A was inevitable:

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⁶⁰. The court distinguished the two as follows:
[It] is generally recognized that the basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did.
Id. at —, 525 P.2d at 129.
⁶¹. Id. at —, 525 P.2d at 129.
⁶³. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). The alleged defect was the design of an aluminum safety hasp securing trays in a bakery truck.
⁶⁴. Id. at 131, 501 P.2d at 1160, 104 Cal. Rptr. at 440,
The almost inextricable intertwining of the Greenman and Restatement standards in our jurisprudence was inevitable, considering the simplicity of Greenman and the fuller guidance for many situations offered by the Restatement and its commentary. Nevertheless, the issue now raised requires us to examine and resolve an apparent divergence in the two formulations.65

The inclusion of the qualifying phrase "unreasonably dangerous" was seen as creating a strict liability-negligence dichotomy for manufacturing versus design defect cases. This was seen as especially important regarding the marshalling of proof. Wishing to avoid "providing such a battleground for clever counsel,"66 the court concluded:

...[T]o require an injured plaintiff to prove not only that the product contained a defect but also that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in Greenman. We believe that the Greenman formulation is consistent with the rationale and development of products liability law... because it provides a clear and simple test for determining whether the injured party is entitled to recovery.67

This assault on the phrase "unreasonably dangerous" is gaining rapid acceptance in other jurisdictions68 and is a good indicator of the "reverse" legal evolution which is at the heart of a significant amount of contemporary professional discontent among defense counsel in this field. Discontent issues from the fact that lawyers can only defend a client by the utilization of their professional tools. When that effort proves consistently unfruitful or is seemingly under-

65. Id. at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 441.
66. Id. at 134, 501 P.2d at 1163, 104 Cal. Rptr. at 443.
67. Id. at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443 (emphasis added).
68. See, e.g., Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973); Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (Alas. 1973); Sutton v. Chevron Oil Co., 85 N.M. 604, 514 P.2d 1301 (1973); Bolm v. Triumph Corp., 33 N.Y.S. 2d 151, 305 N.E.2d 769 (1973); Pyatt v. Engel Equipment, Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974); Frericks v. General Motors Corp., 20 Md. App. 518, 317 A.2d 494 (1974); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). See also Phillips v. Kimwood Machine Co., — Ore. —, 525 P.2d 1033 (1974), where the court, after noting Cronin, concluded that while the phrase was still necessary to avoid absolute liability, it should be seen as meaning that the test is whether the seller knew of the risk involved, not whether the expectations of the consumer were disappointed as provided by the Restatement. This is basically the formula suggested by Professors Wade and Keeton, see note 58 infra. Their purpose in using this test was not to jar the "reckonability" base of the lawyer, since "it preserves the use of familiar terms and thought processes with which courts, lawyers and jurors customarily deal." Id. at —, 525 P.2d at 1037.
cut by decisions such as Cronin and its progeny, which offer no practical guides to future professional work, Llewellyn's "crisis of confidence" re-emerges.

In addition to jarring what is felt to be a basic conceptual understanding of the overall functional application of Section 402A (as in Cronin), the courts are currently making "irreligious" uses of tangentially related concepts traditionally understood as setting some limits on a manufacturer's liability for harm in fact caused by the use of their product. A prime example of this more specific type of "reverse" legal evolution is the current judicial efforts to break out of the conceptual straightjacket placed on the general concept of foreseeability under Section 402A by the evolution of the idea of "intended use."

B. The Intended Use Concept

The early development of the core idea of intended use was to serve the purpose of limiting the responsibility of manufacturers to only those injuries arising out of a range of foreseeable risks concomitant to the normal use of the product. This traditional majority view was recently restated by the Illinois supreme court in Winnett v. Winnett:

In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product . . . .

This view of the concept of intended use results in a limitation on the more open-ended foreseeability spectrum of general negli-

69. The succeeding stages of rules and principles and doctrines, with their formulas and standards reduced to well polished phrases, are still dominating our law. . . . To this array on theological methods we have added classification and analysis, the deductive and inductive processes of logic. . . . All of these have their utility, but the first requisite of intellectual freedom, and as much so in the study of the science of law as elsewhere, is a wholesome fear of words.

Green, The Duty Problem in Negligence Cases, supra note 7, at 1017.

70. See, e.g., Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

71. 57 Ill. 2d 7, 310 N.E.2d 1 (1974).

72. Id. at 11, 310 N.E.2d at 4.
gence law which usually only excludes from the defendant's required consideration risks possibly foreseen or not foreseeable at all. In the products liability field, risks of injury in fact perceived, whether to a likelihood or a certainty, may nevertheless be discounted by the manufacturer in its decision-making process if such risks are not cognizable within the normal range of the intended use of the goods.

The propriety of this conceptual limitation on foreseeability has been most vigorously debated in the so-called "second accident" cases in the automotive field. The conflicting views of Evans v. General Motors Corp. and Larsen v. General Motors Corp. raise the question of whether the manufacturer of an automobile has any responsibility to so design his vehicle to protect occupants from increased injury or death caused by a manufacturing defect following a collision for which the company bears no responsibility.

While the concept of negligence is technically alien to a strict liability case, it is obviously a necessary component of any analysis seeking to determine the range of the intended use of a product. As noted, foreseeability in fact versus foreseeability in law is the key distinction in the use of this traditional concept in the products field. In the years since the publication of Section 402A in the final form, this limited foreseeability concept applicable to the "intended use" idea has been generally accepted, even in the face of mounting evidence of increased injury and death as a result of automobile collisions.

Courts seeking to foster potential "second accident" liability have done so by returning to the origins of the intended use formula in line with the core idea of strict liability for products. This has been technically accomplished by expanding the intended use doctrine to include the idea of "environment." Because of the usefulness of the intended use concept in most non-automobile products cases, the return to the core idea of Greenman has been effected without pug-


74. 359 F.2d 822 (7th Cir. 1966). This case takes the negative on the issue and constitutes the majority position.

75. 391 F.2d 495 (8th Cir. 1968).
ing the concept in toto, by emphasizing that where a product is used is as important as how it is used in determining the spectrum of risks that must be considered by the manufacturers.

A current example of reverse legal evolution regarding this issue is the case of *Turcotte v. Ford Motor Co.*,76 where the plaintiff maintained that Ford had a responsibility under Section 402A to design its 1970 Maverick so that the top of the gas tank did not serve as the floor of the trunk. In this case, the decedent, plaintiff's son, was killed in a fire following a collision with another vehicle. After analyzing both *Larsen*,77 which was a negligence case, and *Evans*,78 brought under a strict liability theory, the court stated:

A literal *Evans*-type interpretation of "intended use" fails to recognize that the phrase was first employed in early products-liability cases such as *Greenman . . . merely to illustrate* the broader central doctrine of foreseeability. The phrase was not meant to preclude manufacturer's responsibility for the probable ancillary consequences of normal use . . . . Instead, a manufacturer "must also be expected to anticipate the environment which is normal for the use of his product and . . . he must anticipate the reasonably foreseeable risks of the use of his product in such an environment."79

This effort, slowly gaining acceptance,80 is a further example of the efforts of courts to break through the shackles of language and return to the core idea of strict liability for products. The present analysis of the inherent frailty of the *language technic* of Section 402A, can be furthered by briefly examining one more general products-liability area, the use of post-occurrence change evidence.

C. *Section 402A and Post-Occurrence Change Evidence*

Another heretofore sacrosanct products litigation truism, the exclusion of post-occurrence change evidence in a Section 402A case,

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76. 494 F.2d 173 (1st Cir. 1974). This case was a diversity case interpreting Rhode Island law.
77. 391 F.2d 495 (8th Cir. 1968).
78. 359 F.2d 822 (7th Cir. 1966).
80. 494 F.2d 173 (1st Cir. 1974).
is undergoing the first stages of attack by reason of the court's return to the core idea of strict liability for products. As noted earlier, the traditional distinction between a negligence and a strict liability case is that in the latter the conduct of the manufacturer preliminary to placing the goods on the market is technically irrelevant. Regardless, in design defect cases, the conduct of the manufacturer is obviously still vital on the issue of liability due to the necessity of having some evidentiary standard in fact upon which to determine the propriety of the design at issue. This is the litigation reality even though courts downplay this obvious fact by insisting on a theoretical construct such as "unreasonable danger" as the liability gauge.

In such cases, until relatively recent times, admissions of evidence of post-occurrence changes in the product under scrutiny have been held to be reversible error. The major rationale for such rulings has been the substantial prejudice that such evidence would have on the defendant's case and the overall chilling effect on a manufacturer's desire to continually improve his product. Interestingly, however, post-occurrence or contemporary design changes or alternatives by manufacturers other than defendant are admissible to show the "feasibility" of alternate design choices.

The judicially perceived distinction between negligence and strict liability in the design area as noted above, has recently resulted in several cases allowing, under various guises, post-occurrence change evidence in a strict liability setting. This is being done on the basis that, pursuant to the core idea of strict liability, all evidence is relevant to the issue of the propriety of the defendant's design.

The decision most often cited on this point is Sutkowski v. Univer-

See note 60 supra.

See, e.g., Drummond v. General Motors Corp., 2 CCH PROD. LIABILITY Rptr. ¶ 5611 (Cal. Super. 1966).


where it was held that installation by defendant of a post-occurrence safety device on a massive strip-mining machine was properly admitted on the issue of whether the allegedly defective product was “unreasonably dangerous.” Noting the general admissibility of “feasibility” evidence via proof of other manufacturers’ activities, and the shift in policy towards the safety of the product per se under Section 402A, the court concluded:

If the feasibility of alternative designs may be shown by the opinions of experts or by the existence of safety devices on other products or in the design thereof we conclude that evidence of a post-occurrence change is equally relevant and material in determining that a design alternative is feasible.86

A more current opinion taking the majority position, Ault v. International Harvester Co.,87 was recently decided by the California Supreme Court, mainly on the basis of a statutory provision in California’s Evidence Code. Justice Mosk, dissenting, noted the absence of sufficient case law in the area and attributed it, in effect, to insufficient emphasis being placed on the core idea of strict liability for products:

There are remarkably few cases on the subject, perhaps because the general law of products liability has been in a process of evolution since Justice Traynor’s seminal opinion in Greenman v. Yuba Power Products, Inc.88

As regards post-occurrence change evidence, Justice Mosk continued by criticizing the basic rationale of the exclusionary rule in light of the purpose and realities of strict liability for products:

When the context is transformed from [a] typical negligence setting to the modern products liability field, however, the “public policy” assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements

85. 5 Ill. App. 3d 313, 281 N.E.2d 749 (3d Dist. 1972). The product was a machine which was specially manufactured. Thus, because it was one of a kind, it did not relate to an entire line of goods. However, the problem of the manufacturer’s conduct remains the same. See also Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973).
86. 5 Ill. App. 3d at 319, 281 N.E.2d at 753.
88. Id. at —, 515 P.2d at 319, 110 Cal. Rptr. at 375 (citations omitted). As indicators of the gradual acceptance of the Sutkowski concept under a variety of approaches see the numerous citations analyzed by Justice Mosk in his dissenting opinion. Id. at —, 515 P.2d at 317-21, 110 Cal. Rptr. 373-77.
in its product and risk innumerable additional lawsuits and attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action for recovery on an injury that preceded the improvement.80

As noted throughout this article, the process of the legal evolution of Section 402A has proceeded, pell-mell, as to the more pressing problems of proper party-plaintiffs, the liability of the traditional participants in the vertical chain of distribution and the generic type of defects cognizable under the formulation. In addition, specific rulings on litigation-related matters were required to effect the basic functioning of the core idea in our adversary system. The ten-year period since the publication of Section 402A in final form accordingly necessitated a temporary hiatus in more direct judicial analysis of the future of the concept of strict liability for products. Contemporary confusion in the field is the result of the gradual re-emergence of the core idea, which in judicial form is straining the limits of the language technic of Section 402A and upsetting a decade's worth of arduously constructed professional expectations.

Issues felt by the bar to have been settled are being continuously re-opened by courts across the nation: the exclusion of services from the field of strict liability,90 the top91 and bottom92 lines of the verti-

89. Id. at —, 515 P.2d at 318, 110 Cal. Rptr. at 374.
90. See, e.g., Buckeye Union Fire Ins. Co. v. Detroit Ed. Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972), where the court, prior to upholding a verdict for the fire that burned plaintiff's home, stated:
   We see no reason why the concepts of implied warranty should depend upon a distinction between the sale of a good and the sale of a service. However, rather than make any sweeping generalizations by holding that implied warranties attach to the rendering of all services, we prefer to limit the scope of this decision to the sale of electricity. We are sure that sellers of some services, such as here when a dangerous force is involved, should give the warranties, while others should not. For the present, we feel that the expansion of the law in this area should proceed on a case by case basis at least until some general principles can be evolved.
91. See, e.g., Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974), where in a case involving the liability under Section 402A of defendants who constructed grenades for the government pursuant to specifications, the court stated:
   Whether the manufacturer "sells" his product in the normal sense of that word, leases it, or supplies it for a sole purchaser under contractual ar-
cal chain of distribution, the bare minimum needed to prove a manu-
ufacturing defect,\textsuperscript{93} the outside limits of the intended use concept\textsuperscript{94}

\textbf{rangements such as those present here, the policy considerations involving
the doctrine of strict liability remain the same.}

1974)} for exceptionally broad language regarding the supplier\textquoteright s duty to inform a
\textquotedblleft user\textquotedblright{} of any danger \textit{but} only in the situation where the supplier has no reason to
expect that the \textquotedblleft user\textquotedblright{} will discover its condition and realize the danger.

\textit{92. See, e.g., Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971), an early
case which squeezed into the \textit{language technic} of Section 402A the \textit{\textquotedblleft sale\textquotedblright} of a defec-
tive gas line fitting by a home repair contractor which caused the destruction of
plaintiff\textapos;s home by fire.}

\textit{As we hold that Barnes must be said to have manufactured and sold a
\textquotedblleft product\textquotedblright{} so as to bring into operation the doctrine of strict liability, so
also must we deem this case to involve \textit{\textquotedblleft goods\textquotedblright} within the purview of the
Uniform Commercial Code.}

\textit{Id.} at 208, 484 P.2d at 576.

the plaintiff sought to impose strict liability on a garage owner who repaired a tire
by inserting a new tube, which exploded when plaintiff attempted to mount the
wheel. In referring to the base necessity of a sale, the court stated:}

\textit{[A] sale is not necessarily an element required to establish liability under
§ 402A. The word \textquotedblleft sells\textquotedblright{} as contained in the text of § 402A is merely
descriptive, and the product need not be actually sold if it has been injected
into the stream of commerce by other means. The test is not the sale, but
rather the placing in commerce.}

\textit{Id.} at —, 312 N.E.2d at 130.

\textit{93. The increasing use by analogy of the core idea of res ipsa loquitur to prove
sought to impose strict liability on Admiral Corporation due to a fire that started
in a used Admiral television purchased from Pochel. In response to defendant\textapos;s ar-
gument that plaintiff had proven no specific defect in the set, the court noted that
it had been serviced prior to resale with Admiral parts, by Admiral trained repair-
men, according to an Admiral manual, and stated:}

\textit{[T]he fact that plaintiff is unable to point an accusing finger at a particu-
lar defective component does not preclude him from establishing that a
product was defective where, as in this case, the exact nature of the alleged
defect is that it is one causing the product to totally consume itself. . . .}

\textit{Id.} at 801, 802, 515 P.2d at 543. The reason for the relaxed proof requirement was
stated to be the core idea of strict liability for products:

\textit{[D]espite plaintiffs\textapos; inability to identify with precision the exact one of
several potentially defective and dangerous conditions which caused the fire,
we here note that there are significant policy reasons for imposing strict
liability.}

\textit{Id.} at 805, 515 P.2d at 545. \textit{See also Scanlon v. General Motors Corp., 65 N.J.

Here, the court upset almost ten years of precedent finding no duty to so design a
vehicle as to prevent injuries occurring to parties falling against or running into a
standing vehicle. Plaintiff, an eleven year old child, caught her finger in the stand-}
and even the question of when a product is a "product."\(^9\)

In addition to this piecemeal return to the core idea of strict liability for products as noted above, reverse legal evolution is currently surfacing as the\(_{\text{technic}}\) for the expansion of strict liability across vertical distribution lines to effect "enterprise liability" in the\(_{\text{literal}}\) sense. While the oft-heard phrases "enterprise liability" or the "deep pocket theory" have heretofore been used as catchphrases for the expression of the core idea of strict liability for products, there is increasing evidence of the willingness of courts by the use of re-

ard air vent of a sixteen year old Volkswagen, standing parked, while chasing her younger brother. In reversing a summary judgment in defendant's favor, the court stated:

It is not beyond foreseeability for the distributor (and the manufacturer) to have known that this Volkswagen bus would on many occasions be used for parking where children were playing. . . . \[W\]e have no doubt that defendant in this case did owe a duty not to sell a product which it knew (or should have known) to be defective so as to pose a hazard to a child who came in contact with it while playing in its vicinity.

\textit{Id.} at 433.

Judge Weick, dissenting, took strong note of the effect such a ruling would have on professional expectations as to the limitation on foreseeability set by the intended use concept:

[T]he part of the majority opinion most damaging to automobile manufacturers and distributors is that which erroneously extends the foreseeability doctrine to misusers of the automobile, for virtually every type of misuse is foreseeable. . . .

\textit{Id.} at 438 (dissenting opinion). Concluding, he stated:

While considerable progress has been made in recent years by the automobile industry in the development of safety standards, no one has yet come up with a design which would prevent injury to a person who runs into the side of a standing vehicle.

\textit{Id.} at 440 (dissenting opinion).

95. \textit{See}, e.g., Genaust v. Illinois Power Co., 23 Ill. App. 3d 1023, 320 N.E.2d 412 (1974). Here the court affirmed dismissal of plaintiff's complaints against defendant power company arising out of an injury occurring when an electrical current arced from uninsulated power lines to a metal antenna on which plaintiff was working. In commenting on the rarely raised issue of when a product is a product, the court stated:

Discounting those cases which have involved the transfer of possession or use of a product for promotional or testing purposes, no case can be found which has held a manufacturer liable in strict liability in tort for injuries which have occurred before a product has, at least, entered its final marketing or merchandising stage; nor has counsel suggested that any such cases exist.

\textit{Id.} at 1028, 320 N.E.2d at 416.

While the court is correct at the moment, there are indications that this issue is open to increased scrutiny in the near future. \textit{See}, e.g., Davis v. Gibson Prod. Co., 505 S.W.2d 682 (Tex. 1974); the language of Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974); and Lockett v. General Elec. Co., 376 F. Supp. 1201 (E.D. Pa. 1974).
verse legal evolution, to throw off the shackles of doctrinal technique and make entire industries share the loss.

At this point, a close analysis will be made of *Hall v. E.I. Du Pont De Nemours and Co.*,\(^6\) the component cases of which are currently in litigation,\(^7\) as an example of the use of the technique of reverse legal evolution and as a precursor of the next possible stage in the future evolution of the idea of strict liability for products.

VI. HALL V. DU PONT: LEGAL EVOLUTION IN A NUTSHELL

This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*: it is no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases it has been frequently observed, are apt to introduce bad law.—*Winterbottom v. Wright*, 10 M. & W. 109, 116, 152 Eng. Rep. 402, 405 (1842) (Rolfe, B.).

*Hall v. E. I. Du Pont De Nemours & Co.*,\(^8\) is the consolidation of two suits, *Hall* and *Chance v. E. I. Du Pont De Nemours & Co.*,\(^9\) arising out of eighteen separate accidents across the United States where children were injured by unidentified blasting caps. Plaintiffs pooled their resources and brought suit against the six major manufacturers of blasting caps in the United States\(^10\) and the Institute of Makers of Explosives (I.M.E.), the defendants' trade association. The crucial difference between the cases was that in *Chance* no specific manufacturers were causally connected to the plaintiffs' injuries, while in *Hall* specific defendants were linked to the injuries at issue.\(^11\) Thus the bulk of the court's analysis of enterprise liability

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97. Judge Weinstein's rulings in the latest decision in *Chance v. E.I. Du Pont De Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974), severed the cases of the multiple plaintiffs and transferred them to their respective federal district courts for trial. These trials already have or will begin in the very near future.


100. The remaining defendants, which originally numbered fifteen, were DuPont, Hercules Powder Co., Atlas Powder Co., American Cyanamid Co., Olin Mathieson Chemical Corp. and Austin Power Co. The number of original plaintiffs numbered forty-three.

and the use of the technique of reverse legal evolution was had in the *Chance* case.\(^{102}\)

Plaintiffs' theories were negligence and strict liability under Section 402A, both anchored in defendants' failure to warn of the danger inherent in the use of blasting caps. Judge Weinstein first addressed the threshold issue on the negligence count, that of duty, in response to defendants' motion to dismiss.

In a clear and scholarly manner, after citing and discussing virtually every authority in the negligence field, Judge Weinstein essentially utilized the basic triparte calculus of Judge Learned Hand in his famous decision in *United States v. Caroll Towing Co.*,\(^{103}\) which balances the factors of the foreseeability of the risk against both the severity of the harm if it materializes and the burden of precaution on the defendant to have avoided the risk. In regard to foreseeability, Judge Weinstein noted:

> Whatever the verbal formulation, the concept of "foreseeable risk" is universally taken to mean the foreseeability of a general kind or type of risk, rather than the foreseeability of the precise chain of events leading to the particular injury in question.\(^{104}\)

This formulation of the nature of the foreseeability doctrine, upon which there is still substantial disagreement,\(^ {105}\) was vital to the decision due to the overwhelming evidence of foreseeability *in fact* of the type of injuries at issue resulting from the information gathering and pooling functions of the I.M.E. In response to defendants' position that even in a negligence case the concept of intended use sets a legal limit on product related risks even if foreseen in fact, Judge Weinstein returned to the core idea of foreseeability, under negligence law, while admitting the *general* usefulness of the products-related limitation:

> Despite the *general* validity of the intended use principle, it does not warrant a conclusion that the blasting cap manufacturers in this case had no

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103. 159 F.2d 169 (2d Cir. 1949).
104. 345 F. Supp. at 362.
duty of reasonable care to the plaintiff-children. The doctrine of intended use is an illustration of the broader doctrine of foreseeability.¹⁰⁶

As will be seen, this was the first of several key analyses made by the court which illustrates both the continuing vitality of the common law system as well as the use of the concept of reverse legal evolution in a "Grand Style" context. Legal rules must not be seen as absolutes but as professional verbalizations of sound ideas whose functional evolution and continual use over the years have provided consistent practicality and justice in most instances where their use is appropriate. This leaves room for a return to core ideas as general support for the resolution of novel problems. It is the effect that such an approach has on counsel that has been the theme of this Article.

The core idea that certain obvious risks to children which are technically unrelated to the proper use of an instrumentality nevertheless merit attention by the possessor, was found to have continued viability once the analysis cuts through the crust of language technic built up over the past decade in the products field:

Application of general principles of foreseeability and reasonable care to unintended uses is not peculiar to modern products liability cases. A similar approach can be found in numerous cases decided in the nineteenth and early twentieth centuries involving children playing with railroad turntables, dynamite blasting caps and other dangerous instruments and machines. . . .

The doctrines evolved in these cases are now embodied in section 339 of the Second Restatement of Torts.¹⁰⁷

Accordingly, in light of the substantial indication of defendants' knowledge of the risks to children, a duty of due care was found to exist. The severity and burden of precaution aspects of Judge Learned Hand's calculus, the latter being translated into questions of costs and social utility, were given brief discussion and found not to outweigh the deciding factor of foreseeability in the duty analysis.¹⁰⁸

Moving to the more difficult strict liability count, Judge Weinstein again addressed the duty to warn issue as it is affected by the traditional view regarding a defendant manufacturer's conduct which is

¹⁰⁶ 345 F. Supp. at 363 (emphasis added).
¹⁰⁷ Id. at 365 (emphasis added).
¹⁰⁸ Id. at 366.
technically irrelevant under Section 402A. Noting the lack of any sharp boundary between the use of the idea of foreseeability as a liability criterion in negligence and strict liability cases, Judge Weinstein, in a statement reminiscent of Chief Justice Shaw's decision in Brown v. Kendall found the requisite duty here as well:

Reduction of the threshold probability required before a defendant-manufacturer can be held liable in either negligence or strict liability has resulted from the abandonment of rigid categorical judgments about what kinds of uses and users are foreseeable, and from an increased willingness to submit such issues to juries where the determination "depends on policy values underlying the common affairs of life."

The next crucial issue, that of joint liability, is perhaps the most apt example in the decision of how the return to the core idea of a legal rule can cause counsel to rail against its potential applicability in a unique setting. Judge Weinstein began his lengthy analysis of this issue with a clear statement of the idea of reverse legal evolution.

Joint tort liability is not limited to a narrow set of relationships and circumstances. It has been imposed in a wide range of situations, requiring varying standards of care, in which defendants cooperate in various degrees, enter into business and property relationships, and undertake to supply goods for public consumption. Developments in negligence and strict tort liability have imposed extensive duties on manufacturers to guard against a broad spectrum of risks with regard to the general population. The reasoning underlying current policy justifies the extension of established doctrines of joint tort liability in the area of industry-wide cooperation in product manufacture and design.

The idea that under certain appropriate circumstances a group might have to respond in damages for injuries caused by less than all the members is an idea that has been utilized throughout the history of the common law.

Even in its earliest form the doctrine of joint liability for concerted action contained all the elements necessary for its future development: (1) causing harm (2) by cooperative or concerted activities (3) which violated a legal standard of care.

The "fact-type settings," to use Llewellyn's expression, were admittedly far removed from the facts at bar, i.e., assaults, reckless driving,

109. See note 59 and accompanying text supra.
110. 60 Mass. (6 Cush.) 292 (1850).
111. 345 F. Supp. at 369.
112. Id. at 371 (emphasis added).
113. Id.
water pollution, collapsed commonly-owned wall, racing horses, and railroads burning brush. However, the core idea was readily applicable to defendants in light of their cooperative or parallel activities regarding the safety features of blasting caps via their trade association.  

In addition to the existent common law idea regarding joint control of risk as a functional technique to bind defendants together, the same idea in an even broader and more current form could be expressed in terms of the new separate legal concept of “enterprise liability.” Workmen's compensation structures, the law of respondeat superior, ultrahazardous activities, and more specific settings wherein a non-delegable duty of a business has been explicitly stated, all provide a wealth of underlying core ideas with which to construct a legal expression of the modern idea.  

While the idea of enterprise liability in fact was applicable to the facts at bar, the court was cautious in its statement regarding the use of the new idea in the future.  

To establish that the explosives industry should be held jointly liable on enterprise liability grounds, plaintiffs, pursuant to their pleading, will have to demonstrate defendants’ joint awareness of the risks at issue in this case and their joint capacity to reduce or affect those risks. By noting these requirements we wish to emphasize their special applicability to industries composed of a small number of units. What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers.  

The final major hurdle to overcome was the issue of cause-in-fact. Defendants contended that plaintiffs’ failure to plead causal relation as to all or one of their groups required a dismissal of the complaint. This was especially so in light of the fact that not all blasting cap

114. Judge Weinstein made a lengthy analysis of the overall idea of joint control of risk and distinguished it from the more specific requisites of the theories of joint enterprise and joint venture. Id. at 371. For more traditional and detailed discussions of this aspect of the case, see, Note, Products Liability—Enterprise Liability—Entire Industry May Be Liable If Impossible To Identify Actual Manufacturer of Defective Product, 19 WAYNE L. REV. 1299 (1973); Note, Recent Developments in Joint & Several Liability, 24 SYRACUSE L. REV. 1319, 1325-33 (1973); Note, Torts—Joint Liability—Joint Liability May Be Imposed Upon All Members of an Industry and Their Trade Association for Injury Caused by Defective Product Design if the Entire Industry Cooperated in Creating the Design and the Specific Manufacturer of the Injury-Causing Product Cannot Be Identified, 42 CINN. L. REV. 341 (1973).

115. 345 F. Supp. at 378.
manufacturers remained in the suit. While proof of causal relation has generally been deemed a sine qua non of recovery due to its obvious justice, that conclusion, as with most other legal rules, is not an absolute.

The cause-in-fact doctrine must and has given way in the past in cases where its use would impede justice in the face of other equally probative factors regarding the presence of responsibility. After analyzing the line of decisions flowing from the famous case of *Summers v. Tice* and the *Restatement (Second) of Torts* Section 433B, the court concluded:

The possibility—admitted by plaintiffs—that the caps may have come from other, unnamed sources, does not affect plaintiffs' burden of proof. Plaintiffs must show by a preponderance of the evidence—i.e., that it is more probable than not—that the caps involved in the accidents were the products of the named defendant-manufacturers. Plaintiffs do not have to identify which one of the defendant-manufacturers made each injury-causing cap. To impose such a requirement would obviate the entire rule of shifting the burden of proving causation to the defendants. It must be more probable than not that an injury was caused by a cap made by some one of the named defendant manufacturers, though which one is unknown.

The foregoing highly selective analysis of Judge Weinstein's groundbreaking decision in the *Chance* case is a prime example of the position asserted in this article: that courts, by returning to the core idea of strict liability for products, have created considerable confusion among the bar due to their utilization of the *language technic* of Section 402A as the functional means of expression. This piecemeal assault on a decade of carefully garnered professional expectations as to the impact of Section 402A, now that the more

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116. 33 Cal. 2d 80, 199 P.2d 1 (1948).
118. 345 F. Supp. at 379. In the companion case, *Hall*, since three groups of plaintiffs named two manufacturers, their actions against the others based on enterprise liability were dismissed on the basis of the "absence of any demonstrable need for joint liability in administrative or remedial terms. . . ." *Id.* at 386. The willingness to creatively utilize existing legal theory by the use of reverse legal evolution in the products field will be hampered in the foreseeable future by the traditional non-product related factors associated with the common law litigation structure, which comprise the existing "reckonability" base of the bar.

119. One of the defense counsels on the case described, in a conversation with the author, the result and technique used by Judge Weinstein to definitely be the law in eight to ten years.

120. One of the author's students aptly expressed the quandry by observing that defense attorneys "know the words but haven't got the music."
pressing issues have been settled to make the section functional, will continue. However, direct frontal assaults by way of returning to the large pool of doctrine underlying the plethora of specific tort rules are increasing in number. To date, Hall v. E.I. Du Pont De Nemours & Co.\textsuperscript{121} stands alone, given the factual basis of the decision. However, several recent decisions holding multiple companies in one industry liable on similar reasoning\textsuperscript{122} indicate which way the wind is blowing.

VII. CONCLUSION

Nothing was adduced which is not common knowledge; yet it seems to me that the rather careful gathering and stating of so much pertinent common knowledge, all in order, can hardly fail to rekindle faith.—Karl Llewellyn, The Common Law Tradition 520 (1960).

The task of bringing into full flower the seeds planted by Justice Traynor in Greenman v. Yuba Power Co.,\textsuperscript{123} has been limited by the language technic of Section 402A of the Restatement (Second) of Torts. However, the process of reverse legal evolution has initiated a return to the core idea of strict liability for products articulated in Greenman, a process which is becoming more obvious each time one reads an advance sheet. These current attempts to move forward with the core idea while keeping the language technic of Section 402A are or will have obvious negative effects on professional expectations.

 Courts are not likely to abandon the language technic of Section 402A, nor is the practicing bar likely to readily shed ten years of professional expectations as to its use resulting from the digestion of a dearth of cases addressing virtually every aspect of products liability litigation. In the author's view, an all-encompassing approach would be either a reformulation of Section 402A or the creation and gradual refinement of a new language tool more fittingly drafted to reflect the broad-based nature of much of the recent case law. In

\textsuperscript{121} 345 F. Supp. 353 (E.D.N.Y. 1972).
\textsuperscript{122} See, e.g., Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973), holding six major asbestos insulation manufacturers responsible for the death of an asbestos worker who contracted asbestosis following a thirty-three-year exposure to the products of each defendant. As in Chance, the issue was failure to warn.
\textsuperscript{123} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
the meantime, a simple realization of the "neglected obvious" in this field in light of Llewellyn's observations on the "Grand Style" model of adjudication, may clarify the problem and lead to a more rapid resolution of the "crisis of confidence" in the products liability area.

The Restatement is no more an absolute in language terms than is any rule of common law. Herbert F. Goodrich, a strong supporter of the concept of a restatement of the law, insisted on this idea in the face of intense criticism from Leon Green and other realist authors over the years. Goodrich stated:

It was always said by those responsible for the Restatement that all they hoped to do was to give the profession the correct rules up to time of publication. The Restatement said "This far." It did not say "This far and no farther." And courts, whose members really do have a fair amount of common sense, have not felt there was any implication of "no farther" either. Places where the law is alive and rules are developing continue to abound in new growth. That is as it should be. Examination of the course of recent decisions shows that what should be and what is are the same; a rare phenomenon in an imperfect world. The Restatement provides the fertile field for new growth; it does not impede it.124

The comfort of familiar language and the natural professional assumption of a modicum of stability once an idea has evolved to its functional limits detract from what Professor Goodrich saw as obvious. This is especially so in the products liability field, where the professional settling-in process regarding the scope of Section 402A has barely concluded. The advice given lawyers by Karl Llewellyn fifteen years ago in The Common Law Tradition as a means of getting hold of a development that took nearly a century to surface, should perhaps be taken by those involved in the fast-paced world of products liability litigation.

His continual urging of lawyers to "see it fresh," "see it clean" and "come back to make sure"125 contained the essence of realism which he always insisted was simply a technique to describe the functional operation of any institution, including the courts. The "neglected obvious" was both the professional's and the law's life blood:

125. The Common Law Tradition, supra note 9, at 510.
The material has always been there to see. . . .

If noticed, if taken to heart, it may help to bring back into blossom and fruit Lemuel Shaw's noble dream of American law and decision made plain, made warm and near, made proud, to the men and women from whom and for whom they are.126

A fresh look at the philosophy of strict liability for products and the language technic for effecting it can clear the air in this most active area of American law.127

126. Id. at 520.
127. For the fact is that the work of our appellate courts all over the country is reckonable. It is reckonable first, and on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted to settling disputes self-selected for their toughness. It is reckonable second, and on an absolute scale, quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.

Id. at 4.