Comment, A Critique of the Justifications for Employee Suits in Strict Products Liability Against Third Party Manufacturers

Pierre John Schlag

University of Colorado Law School

Follow this and additional works at: http://scholar.law.colorado.edu/articles

Part of the Jurisprudence Commons, Labor and Employment Law Commons, Law and Economics Commons, Legal Remedies Commons, and the Torts Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
A CRITIQUE OF THE JUSTIFICATIONS FOR EMPLOYEE SUITS IN STRICT PRODUCTS LIABILITY AGAINST THIRD PARTY MANUFACTURERS

Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.

C.J. Fortescue*

INTRODUCTION

By the middle of this century, all states had enacted legislation governing the compensation of employees for work-related injuries.¹ These workers' compensation statutes provide the exclusive remedy of an employee against his or her employer for work-related injuries,² but an employee sustaining an injury compensable under workers' compensation nevertheless retains a common-law right of action against third parties.³ Thus, the law of work-related injuries is currently governed in part by the principles of workers' compen-

* * 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 626 (3d ed. 1922) (quoting Y.B. 36 Hen. VI, ff. 25b-26 (1585)).
1. See A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.30 (1972) (hereinafter cited as LARSON): "By 1920 all but eight states had adopted compensation acts and on January 1, 1949, the last state, Mississippi, came under the system." Professor Larson is one of the leading commentators on workers' compensation. His treatise is the most thorough compilation and discussion of workers' compensation law in existence at this time.
sation and in part by the principles of tort law. This dual treatment, which results in greatly varying measures of compensation, has stimulated much controversy as to which remedy ought to be applicable in a given context: workers' compensation, a broader tort measure of recovery, or some combination of both.

Currently, when an employee receives a product-caused injury while on the job, the employee may be entitled to workers' compensation benefits as well as a common-law cause of action against the third party manufacturer on the theory of strict products liability. By contrast, if the source of the injury is ascribed solely to the

of the Liabilities and Rights of Non-Employers, 37 TEXAS L. REV. 389, 393-95 (1959); see notes 73-78 & accompanying text infra.

4. The workers' compensation acts determine the scope and application of tort law to work-related injuries either by preemption, see, e.g., CAL. LAB. CODE § 3600 (West 1971), or by explicit authorization, see, e.g., CAL. LAB. CODE § 3852 (West 1971).

5. Tort damages provide a far greater degree of compensation than workers' compensation. See note 34 infra. Forty-three states provide less than $20,000 disability benefits for loss of an arm at the shoulder, 45 states provide less than $15,000 disability benefits for loss of a foot, and 45 states provide less than $15,000 disability benefits for loss of an eye. REPORT OF THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 70 (1972). These figures do not include medical benefits provided for the injured employee.

Perusal of the newsletter of the Association of the Trial Lawyers of America will reveal that the prevailing level of tort compensation far exceeds workers' compensation benefits.

6. The issue has most often been phrased in terms of who should be treated as a third party and thus be subjected to tort law, or conversely, who should be treated as the employer and thus be subjected to workers' compensation law. LARSON, supra note 1, at §§ 71.00-73.30; Brooks, Tort Liability of Owners and General Contractors for On-The-Job Injuries to Workmen, 13 UCLA L. REV. 99 (1965); James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U. L. REV. 537 (1952); Larson, The Rationale of the Election of Remedies Under Workmen's Compensation Acts, 12 U. Chi. L. REV. 231 (1945); Larson, Workmen's Compensation Insurer as Suable Third Party, 1969 DUKE L.J. 1117; McCoid, note 3 supra; Mitchell, supra note 2, at 349; Millender, Expanding Employees' Remedies and Third Party Actions, 17 CLEV.-MAR. L. REV. 32 (1968); Comment, Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine, 5 ST. MARY'S L.J. 818 (1974).

7. See note 76 infra.

8. The phrase "third party manufacturer" is loosely used throughout this Comment to designate any person or business entity in the chain of product distribution who might be a defendant in strict products liability suits. See note 46 infra.

9. The employee's cause of action in tort against third parties is preserved despite the availability of workers' compensation benefits. See notes 73-75 & accompanying text infra. In suits against third party manufacturers the employee can proceed not only on the theory of strict products liability, but also on the grounds of negligence and express or implied warranty. For a discussion of these three other theories of liability, see W. PROSSER, THE LAW OF TORTS 641-56 (4th ed. 1971) [hereinafter cited as PROSSER]. These other grounds of recovery for product injuries are not discussed because it is assumed in the vast majority of cases that a plaintiff who can prevail on any of these three grounds can also prevail on the doctrine of strict products liability. See Prosser, Strict Liability to the Consumer in
negligence of the employee, employer, co-employee, an unavoidable consequence of the production process, or to a combination of these factors, then compensation for the injury is limited to workers' compensation benefits. Thus, the mere presence of a defect in machinery or products can have a tremendous financial impact on the amount that the employee is entitled to recover.

Such widely variant measures of compensation, contingent solely upon whether a product defect contributed to an employee's

California, 18 Hastings L.J. 9, 18 (1966). It has been suggested that the advent of strict products liability has made little difference in the law of product injuries. See California Citizens' Comm'n on Tort Reform, Righting the Liability Balance 78 (1977) (unpublished draft on file at the UCLA Law Review office). In part, the explanation for the minimal impact of the advent of strict products liability lies in the fact that the courts had been more generous in the application of the doctrine of res ipsa loquitur to product cases prior to the establishment of strict liability for product injuries. Id.

In terms of comparing the justifications for the doctrine of negligence and the theory of enterprise liability, see text accompanying note 14 infra, it has been suggested that "the scope of the negligence liability of enterprises not strictly liable has approached that of a strict liability for typical causation, and the similarity between both types of liabilities as to their rationale has become increasingly obvious." A. Ehrenzweig, Negligence Without Fault 55 (1951). Although this view was presented prior to the inception of strict products liability, it is nevertheless applicable, since strict products liability is a type of enterprise liability. See note 14 infra.


11. See, e.g., Williams v. State Comp. Ins. Fund, 50 Cal. App. 3d 116, 122, 123 Cal. Rptr. 812, 814 (3d Dist. 1975) (holding that an employee's suit against his employer on grounds of strict products liability could not be maintained where the employer built the machine primarily for use by his own employees).

12. Employees frequently seek tort damages from third party manufacturers for injuries resulting from defective products. According to one estimate, 30% of all products liability suits involve industrial accidents covered by workers' compensation. O'Connell, Bargaining for Waivers of Third Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers, 1976 U. Ill. L.F. 435, 440 n.26. Twenty-eight per cent of the products liability suits brought in Cook County, Illinois in 1974 involved machinery. In 1975 machinery accounted for 25% of the products liability suits. In both years machinery accounted for more product liability suits than any other type of product. Automotive goods, the runner up category for product liability suits, accounted for only 16% of such suits in 1974 and 13% in 1975. Because machinery is the most frequent instrumentality of harm in products liability suits, it is reasonable to surmise that a high proportion of product liability suits are the result of industrial accidents. Products Liability, Report to the California Citizens Comm'n on Tort Reform 217 (1977) (unpublished draft on file at the UCLA Law Review office) (citing Cook County Jury Verdicts Reporter (1974 & 1975)). Since the variance of compensation afforded by the tort system and workers' compensation is significant, see note 5 supra, entitling employees to a common law cause of action in strict
injury, present a special problem when one recognizes that both strict products liability and workers’ compensation are based on the theory of enterprise liability, which posits that losses to society created or caused by an activity ought to be borne by that activity.14 Since strict products liability and workers’ compensation, as systems of enterprise liability, are justified on similar grounds,15 one would expect both compensation mechanisms to apply similar liability rules and measures of compensation.16 But the law paradoxically embraces differing measures of recovery for the same injuries depending on whether the injury stems from a product defect or whether it is attributable solely to the employee’s, employer’s or co-employee’s negligence or to an unavoidable consequence of industrial production.17

This Comment will attempt to determine whether there are any sound rationalia underlying the distinction between those situations where workers’ compensation is the exclusive remedy and those where both workers’ compensation and a strict products liability cause of action against a third party manufacturer are available to an injured employee. The justifications advanced for allowing common-law actions by employees against third parties will be analyzed products liability against third party manufacturers has a substantial financial impact.13 The emergence of strict products liability as a distinct cause of action has created problems of fairness within the tort system itself. Professor Franklin has commented on the equity of applying strict liability to product-caused injuries while retaining a negligence standard for the vast remainder of tort cases. He argues:

It is most unlikely that the courts will abolish damages for pain and suffering in strict liability cases . . . . The consequence is that even within the narrow confines of the tort system similar injuries are being treated differently. A broken limb caused by a defective home lathe will result in strict liability, while if the limb is broken by a truck delivering that lathe to the home or if the lathe should topple over in the store and break a prospective customer’s leg, a showing of fault would be required. One would be rather hard put to justify these differing treatments of identical injuries from the point of view of either the defendant or the victim.


15. See notes 17-66 & accompanying text infra.


17. Ostensibly, awards under workers’ compensation and damages under tort law are not designed to accomplish the same ends. A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he has lost; it gives him a sum which, added to his remaining earning ability, if any, will presumably enable him to exist without being a burden to others.

If our compensation theory is correct, then the amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution. This is indeed so.

Larson, supra note 1, at § 2.50; see note 34 infra. Although the measures of compensation under the two systems purportedly fulfill different objectives, it is
and their relevance to strict products liability actions will be ascertained. The Comment will argue that the present policy granting employees remedies in both workers' compensation and strict product liability is unjustified, inequitable and inefficient. Finally, a statutory proposal will suggest that product-caused employee injuries which are typical of the employment relation should be compensated solely under workers' compensation. 

Not readily apparent, given the justifications for these systems, why different goals should be sought.

One of the reasons commonly given for the differing rates of compensation under the two systems is that workers' compensation benefits must be low enough to discourage fraud or malingering. See West v. Industrial Accident Comm'n, 79 Cal. App. 2d 711, 721, 180 P.2d 972, 978 (2d Dist. 1947); 2 W. Hanna, California Law of Employee Injuries and Workmen's Compensation § 1.05(5) (2d ed. 1976) [hereinafter cited as Hanna]. The danger of full compensation for employee injuries is that the employee may choose to remain in the benefit status rather than return to work. Berkowitz, Workmen's Compensation Income Benefits: Their Adequacy & Equity, in Supplemental Studies for the National Comm'n on State Workmen's Compensation Laws 189 (1973). This argument is perhaps most forceful where the employee injury falls into the categories of temporary partial disability or temporary total disability. In these types of cases, the injury is most likely not serious. Since the disability is of short duration, the employee's wage loss might not be a serious economic setback. However, where the employee sustains an injury which causes a permanent partial disability, the "malingering" argument becomes less convincing. In these cases the worker is suffering from a permanent impairment, the injury may be serious, and the damage caused is likely to be substantially more than wage loss. At the extreme end of the injury spectrum,

When a worker is killed on the job or is permanently incapacitated, his workmen's compensation benefits are based upon the wages he was earning immediately prior to his accident. Yet his wage loss is obviously the amount of money he would have earned as wages throughout his entire working career. Workmen's compensation statutes do not provide for any forecast of potential earnings barring death or injury. Id. at 219.

Another reason commonly advanced for the limited compensation of workers' compensation is that full protection of the worker would constitute an invitation to be careless on the job: The worker "would then lose nothing in assuming a disabled status." West v. Industrial Accident Comm'n, 79 Cal. App. 2d 711, 721, 180 P.2d 972, 979 (2d Dist. 1947). Presumably, the idea here is that it is proper or efficient to have the worker engage in a certain amount of accident prevention to protect himself: Full compensation would take away the incentive for workers to avoid injuring themselves. For an example of the schedules of compensation this argument can lead to, see Table 9, Maximum Benefits for Scheduled Injuries—The Loss of the Fourth Finger, in Berkowitz, supra; Monroe, Workmen's Compensation Income Benefits: Their Adequacy and Equity, in Supplemental Studies for the National Comm'n on State Workmen's Compensation Laws 213 (1973).

Regardless of what one thinks of these rationalia supporting differing measures of compensation under the tort system and under workers' compensation, they do not indicate which employee injuries should be treated under workers' compensation and which should be treated under the tort system. Indeed, if one wanted to decide, in terms of the two rationalia given, which employee victims should be treated under the tort system, one might ask the question in this way: "For what types of injuries is the employee entitled to mangle and from what occupational risk is he entitled not to protect himself?" See note 96 infra.
caused injuries which are atypical of the employment relation would, in accordance with this scheme, remain compensable under both workers’ compensation and strict products liability.

I. WORKERS’ COMPENSATION AND STRICT PRODUCTS LIABILITY: PURPOSES

Although the liability rules underlying workers’ compensation and strict products liability differ substantially, the justifications marshalled in support of each theory are nevertheless very similar. This similarity suggests that no sound criteria can be isolated to determine which set of liability rules, workers’ compensation or strict products liability, ought to govern product-caused employee injuries, and, moreover, that there may not be sound reasons for tolerating the difference in the extent of compensation available under the two systems.

A. Workers’ Compensation

Under workers’ compensation statutes, an award of benefits is contingent upon a showing of the requisite employment relation, an injury or disease arising out of and in the course of employment, and a showing of a compensable disability.

Workers’ compensation is at once a form of social insurance.
and a type of liability mechanism. The widespread establishment of workers’ compensation schemes early in this century was partially in response to substantive tort law barriers and administrative barriers to employee recovery. The major argument for the establishment of an independent compensation system for work-related injuries, however, was the social policy of keeping injured and


26. The American workmen’s compensation system is distinguishable from public social insurance in its essentially private nature, in the question of qualification for and measure of benefits, in the allocation of the burden of payment, in its retention of some relation between hazard and liability, and in its mechanism of unilateral employer liability.

LARSON, supra note 1, at § 3.00.

27. The substantive tort law barriers facing the worker at common law were the defense of assumption of risk, its corollary the fellow servant rule, and the defense of contributory negligence. In accordance with the prevailing nineteenth century intellectual climate of extreme individualism, Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837), established both the doctrine of assumption of risk and the fellow servant rule in the field of employee injuries. In defining the application of assumption of risk, Lord Abinger stated:

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as is the master.

Id. at 6, 150 Eng. Rep. at 1032-33. Under the fellow servant rule, one of the risks the employee assumed as a matter of law was the negligence of his fellow employees. The doctrine of assumption of risk and the fellow servant rule found their way into American common law via Farwell v. Boston & Worcester R.R., 45 Mass. (4 Met.) 49 (1842). The rule of contributory negligence was established in Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). See Smith, Sequel to Workmen’s Compensation Acts, 27 HARV. L. REV. 235, 242 (1914). For a complete history of the employer defenses, their erosion, and the first attempts at worker’s compensation, see W. DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION 1-52 (1936); 2 HANNA, supra note 17, at § 1.00; LARSON, supra note 1, at §§ 4.00-6.00.

Many of the tort barriers to employee recovery in the courts had been struck down by legislation prior to the inception of workers’ compensation. Larson suggests that this “precompensation legislation” did no more than restore “the employee to a position no worse than that of a stranger injured by the negligence of the employer or his servants.” LARSON, supra note 1, at § 4.50. Larson concludes that the pre-compensation legislation “did not adequately protect employees and that some entirely new principle was needed.” Id. For another view, suggesting that workers’ compensation schemes were designed to meet the needs of private business groups as much as those of injured workers, see Weinstein, Big Business and the Origins of Workmen’s Compensation, 8 LAB. HIST. 156 (1967); see also Lubove, Workmen’s Compensation and the Prerogatives of Voluntarism, 8 LAB. HIST. 254 (1967).

28. Because of their low socio-economic status workers could ill afford the expensive cost and time consuming delays of the tort system. See DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION 19-26 (1936).
disabled workers above the poverty line\textsuperscript{29} without making them public charges.\textsuperscript{30}

The workers' compensation systems have been viewed as a balancing of interests.\textsuperscript{31} On the one hand, the employee gets the benefits of a no-fault system which theoretically assures speedy

\textsuperscript{29} Larson, \textit{supra} note 1, at § 4.30; see Nonet, \textit{supra} note 25, at 16-40 (1969), citing a Chairman of the Industrial Accident Commission in 1914: "Workmen's compensation is only one of the numerous problems causing our present social unrest... approximately 40 per cent of the poverty is chargeable to work accidents; and when we have poverty, we have crime, insanity, and all other forms of social evils... It is apparent on the face of it that if these injured people, instead of being unable to bear their burden directly, had been compensated at the time of their injury by industrial compensation... so that they could have rehabilitated their earning power and thus kept [themselves] from dropping over into the poverty line, that society would have been richer, private property safer, and our taxes much less." Id. at 18.

\textsuperscript{30} See Nonet, \textit{supra} note 25, at 41-65. Nonet sets forth the two broad alternatives presented to the founders of workmen's compensation. The first possibility was to establish a system of accident insurance for employees. Under this approach, accident insurance would have been managed by the state or by labor organizations for the direct benefit of injured employees. With this approach, there is \textit{a priori} no reason why the scheme should affect the common law rights of employees against their employers. This welfare approach was not taken. The second possibility, the one adopted, was to impose a liability on the employer for employee injuries and to provide for a system of liability insurance to protect the employer against the risk of liability. The receipt of insurance proceeds by an injured worker under the first approach would have been clearly independent of his common law rights against the employer: indeed, the first approach presents a classic collateral source rule situation. The receipt of benefits by a disabled worker under the second approach, however, is contingent upon liability rules. The adoption of the second approach favored discarding the common law rights of employees against their employers: The idea that one set of liability rules would govern the rights of employees against their employers seemed perhaps more appealing and more elegant than the idea of having two sets of liability rules governing the employment relation.

However, the notion that two sets of liability rules cannot apply to the same relation is by no means universally acknowledged. In the German Federal Republic, an injured employee covered by workers' compensation can sue for damages in excess of the benefits due him under the work-accident insurance law for injuries resulting from the intentional act or the gross negligence of a fellow employee or the employer. \textit{National Comm'n on State Workmen's Compensation Laws, Compendium on Workmen's Compensation} 70 (1973).

Interestingly, in the USSR, work related injuries are given preferential treatment, resulting in greater compensation than injuries caused by other social risks. Id. at 73. In the Netherlands, "[w]ork-connected risks and the needs for services and cash benefits arising therefrom are treated no differently from other contingencies." Id. at 76.

\textsuperscript{31} See Larson, \textit{supra} note 1, at § 65.10; 2 Hanna, \textit{supra} note 17, at § 1.05(8).

[Workers' compensation is] a socially enforced bargain which compels an employee to give up his valuable right to sue in the courts for full recovery of damages... in return for a certain, but limited, award. It compels the employer to give up his right to assert common-law defenses in return for assurance that the amount of recovery by the employee will be limited.

compensation for any work-related injury or disease,\textsuperscript{32} on the other hand, the employer is absolved from the threat of common-law liability and its attendant costs\textsuperscript{33} in so far as the amount of recovery under workers' compensation is far more limited than under tort law.\textsuperscript{34} The California Labor Code states that workers' compensation is the exclusive remedy of an employee against his employer for work-related injuries.\textsuperscript{35}

\section*{B. Products Liability}

Unlike workers' compensation, the theory of strict products liability is a relatively recent judicial development.\textsuperscript{36} If at the turn of

\begin{itemize}
  \item \textsuperscript{32} The purpose of workers' compensation is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character." \textit{CAL. CONST.} art. XX, \$ 21; \textit{see} \textit{CAL. LAB. CODE} \$ 3201 (West 1971).
  \item \textsuperscript{33} "Where the conditions of compensation exist [\textit{see CAL. LAB. CODE}\ \$ 3600 (West 1971)] the right to recover such compensation, pursuant to the provisions of this division is except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer." \textit{CAL. LAB. CODE} \$ 3601 (West 1971). \textit{See} note 2 \textit{supra}.
  \item \textsuperscript{34} Awards under workers' compensation are much less than damages under tort law. Awards of workers' compensation benefits are designed to provide the employee with an adequate means of subsistence.
  The purpose of the award is not to make the employee whole for the loss which he has suffered, but to prevent him and his dependents from becoming public charges during the period of his disability. In short the award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public.
  \textit{West v. Industrial Accident Comm'n}, 79 Cal. App. 2d 711, 721, 180 P.2d 972, 978 (2d Dist. 1947) (citations omitted); \textit{see also} \textit{Solari v. Atlas-Universal Serv., Inc.}, 215 Cal. App. 2d 587, 600, 30 Cal. Rptr. 407, 414 (1st Dist. 1963): "It has been suggested that workers' compensation benefits cannot be fully compensatory because their only function is to provide the injured worker and his family a reasonable subsistence and to effectuate rehabilitation. Compensation exceeding the satisfaction of these goals might invite fraud and malingering." \textit{See also 2 HANNA, supra} note 17, at \$ 1.05(5); note 17 \textit{supra}. For a discussion of the adequacy of workers' compensation benefits, see Berkowitz, \textit{Workers' Compensation Income Benefits: Their Adequacy & Equity}, in \textit{1 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS} 189 (1973).
  In the summer of 1976, the Machinery and Allied Products Institute conducted a survey among several hundred manufacturers of industrial products. Among the data accumulated was a breakdown of product liability claims in 1975 by the type of claimant. Claims made by insurance companies in subrogation suits for benefits paid to injured employees under workers' compensation averaged $14,000. Claims by injured consumers averaged $168,000. Claims by employees of other companies, \textit{i.e.}, suits against third parties, averaged $93,000. In terms of the percentage of the total average amount of money claimed by the three groups, consumers accounted for 38\%, injured employees accounted for 60\% and subrogation suits by the insurance companies of employers accounted for 2\%. \textit{PRODUCTS LIABILITY, REPORT TO THE CALIFORNIA CITIZENS COMM'N ON TORT REFORM} 237 (1977) (unpublished draft on file at the \textit{UCLA Law Review} office).
  \item \textsuperscript{35} \textit{See} note 33 \textit{supra}.
  \item \textsuperscript{36} The establishment of strict products liability as an independent ground for recovery has traditionally been ascribed to Mr. Justice Traynor's concurring opinion in \textit{Greenman v. Yuba Power Prods., Inc.} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963):

    Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them,
the century the worker had great difficulties in obtaining compensation, the consumer fared no better. With few exceptions, the consumer could look only to his immediate supplier for recovery, and often the immediate supplier was not at fault. Although

the recognition that the liability is not assumed by agreement but imposed by law... and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products... make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

37. See notes 27-29 & accompanying text supra.

38. Whether the consumer sought recovery for product-caused injuries on the grounds of negligence or warranty, the manufacturer of the product was protected by the requirement of privity of contract. The famous case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842), denied recovery to a victim who sought to base the defendant's duty of due care on a contract between the defendant and the third party. Winterbottom was interpreted to mean that a manufacturer or a supplier of goods could not be held liable either in contract or tort for injuries due to defective products by a person not in privity of contract with the manufacturer or supplier, excepting certain circumstances. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903). For a thorough compilation of references on the subject of the consumer's rights against manufacturers, see PROSSER, supra note 9, at 641-56; Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 128-31 nn.39-40 (1958). See generally Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1099-114 (1960).

39. The three exceptions to the privity of contract requirement were set forth in Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903). The first exception was where the defendant supplier knew of the defect, but sold the product anyway. Langdridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (Exch. 1836). The second exception was based on a case where a plaintiff employee was hurt because of a defective rope in a staging provided by the defendant for use on the defendant's premises. The employee's employer had contracted with the defendant to use the latter's premises; The employee was thus treated as a business visitor and the defective rope as part of the real property. Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883). The last exception, and the most important in terms of future developments, dealt with situations where the product was inherently or imminently dangerous. Thomas v. Winchester, 6 N.Y. 396 (1852).

40. The beginning of the end for the privity requirement in actions based on negligence has traditionally been ascribed to MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), where Mr. Justice Cardozo interpreted and considerably broadened the "inherently dangerous article" exception to the privity requirement:

We hold then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.

Id. at 389, 111 N.E. at 1053. The break from the privity requirement in warranty cases has traditionally been ascribed to Henningen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

41. Indeed, given that the immediate supplier is often only an intermediary between the consumer and the manufacturer, and given that he is often in no better position than the consumer to determine the risks of the product or to do anything to minimize risks, the consumer's cause of action against the immediate supplier or retailer was very limited.

It is here that negligence liability breaks down. The wholesaler, the jobber, and the retailer normally are simply not negligent. They are under no duty to test or inspect the chattel, and they do not do so; and when, as is usually the case today, it comes to them in a sealed container, examination be-
various state legislatures and the Congress established compensation systems of enterprise liability for injuries sustained in the course of the manufacture of products, the task of devising an enterprise liability system for injuries sustained as the result of the use or consumption of products was left to the courts. comes impossible without destroying marketability. No inference of negligence can arise against these sellers, and res ipsa loquitur is of no use at all. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1117 (1960) (footnotes omitted). As for warranty, Prosser writes: It is true that against the retailer, the consumer who buys for himself and is injured can rely, in all but a few states, upon the old sales warranties of merchantable quality and fitness for the purpose. But so long as the privity wall stands firm, these warranties are of no avail against the wholesaler; nor do they protect the buyer's wife or child, his employee, his guest, his donee, or his subpurchaser. Id. at 1117-18 (footnotes omitted).

42. Part of the reason why legislatures enacted an enterprise liability scheme for injuries occurring in the course of employment, but not in the course of consumption of the product, has to do with the characteristics of the victim class in both cases. Those who are injured in the production process form a social class in the sense that the members have more or less the same socio-economic status (i.e., working class). Employees were in a particularly poor position as a class to bear the burden of accident costs. The choice of an enterprise liability rule for employees had a lot to do with the distributional goal of preventing the working class from becoming destitute. See notes 17, 27-29 supra; note 64 infra. The distributional goal of protecting the working class is apparent in the workers' compensation act's first formulation of the independent contractor exclusion. Cal. Lab. Code § 3357 (West 1971). As originally adopted, the workers' compensation act defined independent contractor as excluding persons performing manual labor. 1917 Cal. Stats. ch. 586, § 8(b) (repealed 1937). In other words, manual laborers were excluded from one of the largest exemptions to the workers' compensation act. This discrimination was later held unconstitutional in Flickenger v. Industrial Accident Comm'n, 181 Cal. 425, 184 P. 851 (1919).

In contrast to employees, consumers have never been considered a homogeneous socio-economic class. Thus, the burden of bearing accident costs for product injuries did not seem to have any noticeable effect on the welfare of any particular social class.

43. Professor Prosser argued that, even granting the elimination of the privity of contract requirement, negligence and warranty law were not sufficient protection for the consumer. Prosser maintained that warranty was poorly suited to provide injured consumers a cause of action because of its statute of limitations, provisions for disclaimers, requirements of reliance on the part of the consumer and of notice to the warrantor. Negligence also did not provide an adequate ground for recovery because the consumer was ill-equipped to bear the cost of the accident regardless of whether the conduct of the manufacturer was negligent. See Prosser, supra note 9, at 641-74. See also Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 34-35 (1973).

For a history of the emergence of strict products liability from the theories of negligence and warranty, see Prosser, supra note 9, at 641-74; Gillam, Product Liability in a Nutshell, 37 Ore. L. Rev. 119 (1958); Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855 (1963); Noel, Products Liability of Retailers and Manufacturers in Tennessee, 32 Tenn. L. Rev. 207 (1965); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).
The basic requirements for strict products liability as set forth in the Second Restatement of Torts are that the product be defective and unreasonably dangerous, and that the defect exist at the time the product leaves the defendant's hands. The principal affirmative defenses to a cause of action in strict products liability are assumption of the risk and abnormal use of the product. The status of contributory negligence or comparative negligence as a defense to strict products liability remains uncertain.

44. 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.


45. To recover, the injured party must demonstrate in addition that the defect was both the cause in fact and the proximate cause of the plaintiff's damages. See PROSSER, supra note 9, at 236, 244 (chapters on cause in fact and proximate cause).

For a discussion of the appropriate test of causation to be applied in strict products liability cases, see Pollele, The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law, 8 RUT.-CAM. L. REV. 101 (1976). Professor Pollele suggests that the foreseeability test of causation commonly used in negligence cases would infuse strict products liability with unwanted fault and negligence considerations.

46. For a list of some of the newer parties potentially liable under strict products liability, see Rheingold, The Expanding Liability of the Product Supplier: A Primer, 2 HOFSTRA L. REV. 521, 545 (1974).

47. The limitation of the scope of liability imposed under strict products liability remains uncertain. Professor Holford writes that neither the courts nor the commentators have articulated a cogent theory delimiting the scope of strict products liability. "When courts deny recovery, they generally do so on grounds of assumption of risk, product misuse or adequacy of warning, thus avoiding the central question." Holford, The Limits of Strict Liability for Product Design and Manufacture, 52 TEX. L. REV. 81, 81-82 (1973). See also Noel, Defective Products, Abnormal Use, Contributory Negligence and Assumption of Risk, 25 VAND. L. REV. 93 (1972).


50. The present status of contributory negligence in relation to strict products liability is at best uncertain because California has only recently adopted compara-
Strict products liability is not a no-fault system in the same sense as workers' compensation. Manufacturers are not made insurers of their products, nor are they held liable for all losses resulting from the use of their products. An injured party must still prove the existence of a defect in order to recover. The purposes of strict products liability include risk spreading, safety promotional negligence as the governing principle in negligence cases. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In the recent case of Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976), two justices of the California Supreme Court indicated that comparative negligence would apply to strict products liability. Id. at 373-80, 551 P.2d at 405-10, 131 Cal. Rptr. at 85-90 (Clark & McComb, JJ., dissenting). Professor V. E. Schwartz has argued that comparative negligence may be applied to strict products liability cases and that the assumption of risk defense should be subsumed under the rubric of comparative negligence. Schwartz, Strict Liability and Comparative Negligence, 42 Tenn. L. Rev. 171 (1974). In the past, California has followed the Restatement position on the application of contributory negligence to strict products liability cases:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk is a defense under this Section.

Restatement (Second) of Torts § 402A, comment n, at 356 (1965); see Luque v. McLean, 8 Cal. 3d 136, 145 n.9, 501 P.2d 1163, 1170 n.9, 104 Cal. Rptr. 443, 449-50 n.9 (1972); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306, 314 (1st Dist. 1968).

Although it is widely agreed that workers' compensation is a no-fault system, it does not follow that an employee can obtain disability benefits for any and all work-related injuries. Thus, in California, disability benefits are denied where the injury or death, though work-related, is caused by intoxication of the employee or where it is intentionally self-inflicted or where it arises out of an alteration in which the injured employee is the initial aggressor. CAL. LAB. CODE § 3600 (West 1971). The denial of disability benefits in these circumstances is presumably based on the view that such types of injuries are not properly attributable to the employment relation and do not represent costs of production per se. It is apparently this same notion which informs the judgement by the courts in product liability cases that injuries sustained as a result of voluntary encounters of known risks and abnormal use are not properly attributable to the manufacturer's enterprise of production for profit. See Holford, The Limits of Strict Liability for Product Design and Manufacture, 52 Tex. L. Rev. 81, 88-89 (1973).

For a thorough compilation of articles on the "deeper recesses" of the theory of strict products liability, see Montgomery & Owen, supra note 44, at 808 n.12. The basic conceptual framework of strict products liability is still not clearly settled. See note 47 supra. A compilation of various proposed tests for strict products liability is contained in Montgomery & Owen, note 44 supra.

The risk spreading or loss distribution rationale is one of the mainstays of strict products liability doctrine. [Loss distribution . . . holds the manufacturer liable for injuries resulting from use of his product because he is in the best position to distribute those losses. He can test the product, evaluate its potential for harm, and then insure against that harm, passing on the insurance costs through increases in the product's price.]
tion,55 obviation of proof problems in the application of a negligence standard to product cases,56 and protection of consumer expectations.57

C. Products Liability and Workers' Compensation Compared

The similarity of purpose underlying workers' compensation and strict products liability is striking.58 Both workers' compensa-


55. The rationale of "injury reduction, holds the manufacturer liable because he is in the best position to discover and correct the dangerous aspects of his products before any injury occurs." Holford, The Limits of Strict Liability for Product Design and Manufacture, 52 TEX. L. REV. 81, 82 (1973); see also Keeton, Products Liability—Some Observations About Allocation of Risks, 64 MICH. L. REV. 1329, 1333 (1966); Wade, note 54 supra. Contra, Posner, Strict Liability: A Comment, 2 J. LEGAL STUD. 205 (1973). Professor Posner argues that the imposition of a strict liability standard in product injury cases will not, in the long run, lead to higher and more efficient levels of safety. The shift from a negligence to a strict liability standard merely shifts the safety research incentive from consumers to manufacturers. Whereas under a negligence standard consumers bear the brunt of unavoidable accidents, under a strict liability standard the burden of unavoidable accidents is borne by manufacturers. Whichever liability rule is adopted by the courts, either strict liability or negligence, it follows that in the long run whoever bears the cost of unavoidable accidents will organize to reduce the frequency of such accidents where it is economically worthwhile to do so. Professor Posner's analysis depends of course on the controversial assumption that a negligence standard is in fact adequate to make manufacturers compensate consumers for all negligently caused product injuries. If it were true that negligent manufacturers could frequently escape liability under a negligence standard because of difficulties in proving or discovering their negligence, then a strict liability standard might be necessary to force compensation for all negligently caused product injuries. Such a standard would be more efficient to the extent that it succeeded in actually forcing compensation of all negligently caused product injuries. See note 56 infra.

56. See PROSSER, note 9 supra. "A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of the manufacturing or marketing process, yet the difficulties of discovering and proving this negligence are often practicably insurmountable." Montgomery & Owen, supra note 44, at 809. In opposition, it has been suggested that the proof required to maintain a cause of action in strict products liability would also be sufficient to support a cause of action in negligence. Wade, supra note 54, at 836-37. See generally Keeton, note 54 supra; Wade, note 54 supra.

57. "Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community." Montgomery & Owen, supra note 44, at 809. See also Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 IND. L.J. 301, 305-08 (1967); Fischer, Products Liability—The Meaning of Defect, 39 MO. L. REV. 339, 348-52 (1974); Holford, note 54 supra; Keeton, note 54 supra; Keeton, Products Liability—Inadequacy of Information, 48 TEX. L. REV. 398, 399 (1970); Rheingold, What are the Consumer's Reasonable Expectations?, 22 BUS. LAW. 589, 597-98 (1967); Wade, note 54 supra.

58. Professor Larson warns against confusing worker's compensation with strict liability. He demonstrates the functional differences between the strict liability applied in ultrahazardous activities and the type of liability imposed by workers'
tion and strict products liability have been viewed as responses to the depersonalization and specialization of modern industry—social developments which eclipsed consideration of fault and negligence. Neither system regards fault as essential; both are faced by the recognition that the individual victim is in a poor position to bear the costs of injury, and both operate on the

compensation. Larson, supra note 1, at § 2.20. In one system, liability attaches by virtue of the fact that the employee is injured while engaged in a loosely defined employment activity. In the other, liability attaches by virtue of the fact that the victim is injured by exposure to a particular kind of risk inherent in the instrumentality of harm.

Nevertheless, Larson states:

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

Larson, supra note 1, at § 2.20. If this statement is compared with Mr. Justice Traynor's concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), the similarity of purposes between workers' compensation and strict products liability becomes evident.

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Id. at 462, 150 P.2d at 440-41.

59. Jeremiah Smith suggested in 1914 that the appearance of workers' compensation was the result of changes in then modern industry.

Workmen are now frequently employed in large masses, so that the personal supervision of the employer is no longer possible. The danger of serious harm to the workman in some modern undertakings was at first much greater than under the old form of industry; and it was more difficult to prove fault on the part of the employer.


The same sort of social vision is now used to explain the birth of strict products liability. "Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be 'consumed' in order to function in modern society." Montgomery & Owen, supra note 44, at 809.

60. Fault is not essential under workers' compensation, see Cal. Lab. Code § 3600 (West 1971), nor under strict products liability, see note 46 supra.

The most striking aspect of the doctrine [strict products liability] is that liability is imposed without regard to whether the seller was in any way at fault or, conversely, whether he exercised the greatest possible care. The doctrine of strict tort purports to direct attention away from the conduct of the seller, at least according to traditional theory, and to focus it instead upon the injury-producing product in its environment of use.


61. See note 58 supra. Professor Henderson has suggested that the policies underlying workers' compensation have undergone fundamental change. Whereas the original aim of workers' compensation was to compensate employees for work-
assumption that the costs of injuries will and should be passed on to the consumers of the product.62

The one outstanding divergence in the arguments advanced in support of strict products liability and workers' compensation is the overt distributional aim of workers' compensation—keeping the working class above the poverty level.63 The implementation of this distributional goal within the framework of a compensation system can be criticized as both unfair and inefficient.64 Moreover, the goal related injuries, the present policy is to compensate the worker regardless of the origin of the risk. "The unarticulated, but apparently emerging policy, as evidenced by the decisions referred to above, seems to be a desire to provide economic security and medical care for society in general." Henderson, Should Workmen's Compensation be Extended to Nonoccupational Injuries?, 48 TEX. L. REV. 117, 126 (1969).

Professor Franklin likewise sees a shift in the basic policies underlying tort law:

Today one can muster substantial evidence of society's desire to shift the focus from the defendant and his conduct to the victim and his plight. This is revealed, for example, in the way the legal system today handles personal injury cases, especially those cases in which the court have altered the very basis of liability from fault to strict liability. Whether the expansion in the defective product area is viewed as an extension of warranty law or as a development of tort law, the crucial point is that many victims who previously had to prove fault in this important area are now able to recover without such a showing.

Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 VA. L. REV. 774, 785 (1967).

62. See note 58 supra. "The philosophy of workmen's compensation . . . is that losses should be allocated to the enterprise that creates the hazards that causes [sic] the losses, and ultimately distributed among those who consume its products." James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U.L. REV. 537, 538 (1952). It remains questionable whether workers' compensation fulfills this objective.

See Burton & Berkowitz, Objectives Other Than Income Maintenance for Workmen's Compensation, 38 J. RISK & INS. 343 (1971). "But workmen's compensation awards generally understate the actual economic loss. . . . An accident may mean a large loss of human capital and increased costs associated with acquisition of new personnel. These costs may far exceed any insurance penalty imposed by workmen's compensation." Id. at 355.

For a discussion of different types of cost distortion affecting manufacturers and the consuming public, the costs of insurance and litigation, see O'Connell, note 12 supra.

63. See note 29 supra.

64. One may question whether it is the proper function of liability rules to foster distributional goals (such as preventing the impoverishment of the lower classes). See Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 547 n.40 (1972). Professor Fletcher argues that distributional goals concern questions of distributive justice (i.e., the proper or equitable distribution of goods in a given society). Liability rules, however, are part of the sphere of corrective justice (i.e., the proper societal response when an individual violates the principles of equitable distribution, e.g., by stealing or inflicting injury). See also J. RAWLS, A THEORY OF JUSTICE 8 (1971).

If one is concerned with a distributional objective such as preventing poverty, then restructuring liability rules to alleviate the plight of the poor may be neither a fair nor an efficient way to fulfill the objective. It is not fair because liability rules do not increase the wealth of all members of impoverished class; yet, if the distri-
of wealth distribution is a highly debatable normative justification for workers' compensation.\textsuperscript{65}

If one does not accept the distributional goal of workers' compensation as a valid normative consideration, the coincidence of the justifications for strict products liability and workers' compensation makes it difficult to reconcile the varying measures of compensation. The distributional goal is valid, they are equally entitled. It is not efficient in pursuing distributional goals because, generally taxation will effectuate the goal more directly and less expensively. In addition, the grant of a favorable liability rule to an impoverished class may result in a misallocation of resources where those who are protected by the liability rule would rather have some other economic good, such as food or shelter. If the members of the impoverished class prefer an economic good other than a liability rule, they will have to "sell" the liability rule and such sales involve transaction costs: The sellers may not be able to find a buyer easily and the negotiations of the sales themselves may be costly. See generally Calabresi & Melamed, \textit{Property Rules, Liability Rules, and Inalienability: One View of the Cathedral}, 85 Harv. L. Rev. 1089 (1972). See also Demsetz, \textit{When Does the Rule of Liability Matter?}, 1 J. Legal Stud. 13 (1972). The misallocation of resources may be particularly serious when the class member protected by the liability rule cannot sell it: The courts often prevent parties from contracting to avoid the impact of liability rules. A good example is strict products liability—the courts refuse to allow manufacturers to disclaim their responsibility for injuries by appropriate warnings. See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), discussed at note 23 supra.

Professors Calabresi and Melamed have outlined the circumstances in which rules of inalienability, rules preventing the sale of particular types of goods, may be efficient. Calabresi & Melamed, supra. The achievement of efficiency by means of inalienability rules is based on the view that the concept of economic efficiency, as distinguished from Pareto optimality, does not depend on the individualistic premise that individuals know what is best for them. Id. at 1094 n.10. Rules of inalienability may be appropriate for several distinct reasons: paternalism (one party is better able to judge the good of another party), self-paternalism (a party decides to eliminate his short-term freedom of choice in order to secure some long term good) and externalities (the sale of a good imposes tremendous costs on a third party who, because of transaction costs, cannot prevent the seller from selling or the buyer from buying). Calabresi & Melamed, supra, at 1111-15. The implications of these views on the distributional goal of workers' compensation are discussed in note 65 infra.

65. Many writers have attempted to justify workers' compensation by arguing that workers at the turn of the century could not afford the tort system; that indeed the tort system was responsible for the impoverishment of the working class. See, e.g., 2 Hanna, supra note 17, at § 1.05(1); see also notes 17, 27-30 supra. Such a view is oversimplified: If workers at the turn of the century were getting their proper distributional share of the national wealth, they would have been in a position to buy private insurance against the risks of employment and thus would not have been "impoorished" by the tort system. See note 42 supra.

It might be argued in response, however, that no matter how wealthy workers are, they will not invest the appropriate amount of money in accident protection. If this argument is based on the paternalistic assumption that workers are incapable of recognizing their own best interests with respect to accident protection, then it is possible that the tort system did impoverish workers. The argument that workers will not invest the appropriate amount of money in accident protection can also be based on the view that the failure of workers to obtain accident insurance imposes on third parties undesirable externalities such as "crime, insanity, and all other forms of social evils." Nonet, supra note 25, at 18 (citing a Chairman of the Industrial Accident Commission in 1914). See generally note 29 supra. In either
alotted under each system. Thus, there is a resulting tension between the remedies afforded to employees under workers' compensation and those that are available to consumers under strict products liability. This tension manifests itself whenever an employee is injured by a defective product. In attempting to determine whether such an employee should be compensated under workers' compensation, strict products liability, or some combination of the two, there are competing principles of fairness that must be con-

66. Readers would be well advised to regard with skepticism the tendency to accept any expansion of workmen's compensation as a matter for congratulation. Over the years, the statutes have been interpreted to accommodate more and more accidents sustained by more and more people at more and more times and places and under more and more circumstances. This has been a source of pride in the past, but perhaps the time has arrived to question whether it should remain so. Originally, of course, any liberalizing of the intolerable strictures of nineteenth century individualism was welcomed. The purpose of compensation was to obviate the necessity of establishing fault under the complex network of torts doctrines then prevailing. But during the intervening years, the fault requirement has been disintegrating rapidly. Why should the worker surrender the blessings of a full and generous recovery in tort? In short, if bigger and better recoveries do indeed mark the road to progress, the workmen's compensation route may well be one to avoid.

67. Jeremiah Smith identified in 1914 a tension between the establishment of workers' compensation and the fault based common law of torts.

If the fundamental general principle of the modern common law of torts (that fault is requisite to liability) is intrinsically right or expedient, is there sufficient reason why the legislature should make the workmen's case an exception to this general principle? On the other hand, if this statutory rule as to workmen is intrinsically just or expedient, is there sufficient reason for confining the benefit to workmen alone; is there sufficient reason for refusing to make this statutory rule the test of the right of recovery on the part of persons other than workmen when they suffer hurt without the fault of either party?

Can the statutory discrimination in favor of workmen be supported by considerations of justice or expediency, which are applicable to workmen and not equally applicable to some other classes of persons?

Smith, *Sequel to Workmen's Compensation Acts*, 27 *Harv. L. Rev.* 235, 251 (1914). These questions are even more poignant when strict products liability is compared with workers' compensation. Jeremiah Smith questioned the wisdom of applying two different compensation systems based on two different sets of underlying justifications to two different contexts of personal injury. The state of affairs examined in this Comment poses the additional problem that the justifications or social values supporting the two compensation systems coincide. In response to Smith, it was possible to argue that the fault system and workers' compensation sought to foster different social ends and that because they applied to different contexts of personal injury, it was perfectly admissible that the measures of compensation and the standards of liability differed. That line of reasoning cannot
First, employees and consumers should be comparably compensated for similar product injuries. Second, employees should receive equivalent compensation for similar on-the-job injuries. The attempt to follow simultaneously these two principles of fairness leads to contradiction. In any attempt to ascertain the appropriate remedy for an employee injured by a defective product, compensating consumers and employees similarly leads to the conclusion that employees should be allowed a cause of action in strict liability. However, it is possible that the realization of the same social ends or values may require different modes of implementation (e.g., standards of liability and measures of compensation) in different contexts (e.g., work and product consumption). Thus, a meaningful distinction based on the empirical qualities of the workplace as opposed to the empirical qualities of product consumption could explain the convergence of the justifications for the two compensation systems and the simultaneous divergence of their liability rules and measures of compensation. A meaningful empirical distinction has yet to be suggested.

Professor Fleming James suggests that in situations where alternative or cumulative remedies are possible (for instance, tort damage awards under strict products liability and workers' compensation benefits) the number of possible solutions is limited to a few basic patterns.

The basic patterns, it is submitted, are these:

1. abolishing one (or more) of the remedies;
2. compelling claimant to elect one from among the remedies and forego the others;
3. allowing the claimant to have the cumulative benefits of two (or more) remedies;
4. allowing the claimant to pursue both (or all) remedies but limiting his total recovery to the maximum amount he could recover from a single source.

James, supra note 62, at 541. James argues that, generally, the fourth solution is the best. The fourth solution, of course, comports with the present state of the law governing the employee's rights to compensation where he is injured on the job by a defective product.

The second solution is not examined in this Comment because election of remedies frustrates the function of workers' compensation—to provide quick and certain compensation for work-related injuries. See note 32 supra. Compensation at common law brings with it several uncertainties, including the possibility of recovery, the amount, and the defendant's financial status. James, supra note 62, at 543. In addition, election of remedies does not seem to further any of the ends sought by the imposition of strict products liability. The third solution is not explored either since the objections raised against the fourth solution also apply to cumulating remedies. The solution suggested in this Comment involves the abolishment of one of the remedies in certain circumstances. See notes 155-65 & accompanying text infra.

The inequity of allotting different measures of compensation to victims similarly injured was aptly shown in a series of examples which juxtaposed accidents covered under workers' compensation and similar accidents within the domain of a fault-based system of compensation. Smith, Sequel to Workmen's Compensation Acts, 27 Harv. L. Rev. 235, 237-39 (1914). Jeremiah Smith was particularly concerned with the fact that whereas employees might be compensated under workers' compensation, non-employees who had been injured in a similar manner would be barred from compensation under the fault system. Id. at 252.
products liability. On the other hand, if all employees are to receive equivalent compensation for similar on-the-job injuries, it would follow that employees should be denied a cause of action against the third party manufacturer in strict products liability.

The present state of the law, as exemplified by workers’ compensation and tort principles in California, favors the principle that workers and consumers injured by defective products should be compensated similarly rather than the principle that all employees receiving like injuries should receive equivalent compensation.

II. THE EMPLOYEE’S COMMON LAW CAUSE OF ACTION AGAINST THIRD PARTIES: DESCRIPTION AND PURPOSES

A. Present State of the Law

In California, the nature of the liability applied under workers’ compensation is prefaced neither on contract nor tort principles, but rather on the idea of status. The obligation of the employer to provide workers’ compensation benefits and the corresponding right of the employee to obtain those benefits attach by operation of law to the employer-employee relation. In accordance with the predication of workers’ compensation liability on the concept of status, an employee’s right of action against a third party tortfeasor is preserved.

71. This conclusion, of course, assumes that the cause of action in strict products liability will be retained for consumers. The other alternative is to treat all product-caused injuries under a no-fault system similar to workers’ compensation.

72. Alternatively, this principle of fairness could be satisfied by eliminating workers’ compensation altogether. See note 66 supra.


74. "Employer" includes insurer as defined in this division.” CAL. LAB. CODE § 3850(b) (West 1971). ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.” CAL. LAB. CODE § 3850(a) (West 1971).

75. CAL. LAB. CODE § 3852 (West 1971).

In tort actions by the employee against third parties, the question as to whether the employee has received or is entitled to receive workers’ compensation benefits is entirely extraneous to the issue of third party tort liability. In Ferrario v. Conyes, 19 Cal. App. 2d 58, 61, 64 P.2d 975, 976 (1st Dist. 1937), the court states:

Where a workman is injured in the course of his employment by a person other than his employer, he is entitled to bring an action at law against such party and he is not to be prejudiced in such action by the fact that he may be receiving compensation. . . . It is well established in this state that it is prejudicial misconduct in an action of this type for the opposing party to
The employer of the injured employee is also entitled to recover at common law against the tortious third party for damages proximately resulting to the employer from the injury. The employer's cause of action is not derived from the employee's common-law right of action, but is entirely separate. The employer is not subrogated to the right of the employee, but rather his cause of action is in the nature of indemnity from the third party tortfeasor.

Any employer who pays, or becomes obligated to pay compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.

Cal. Lab. Code § 3852 (West 1971). The employer is given an action against the tortious third party for two major reasons. See 2 Hanra, supra note 17, at § 24.01(1); Larson, supra note 1, at §§ 71.00-20. The employer has either incurred a loss in compensating the injured employee under workers' compensation, or he stands to incur such a loss. Id. In addition there is a policy against allowing the employee a double recovery, one from the employer under workers' compensation and the other from the third party tortfeasor at common law. Levels v. Growers Ammonia Supply Co., 48 Cal. App. 3d 443, 121 Cal. Rptr. 779 (5th Dist. 1975); De Meo v. St. Francis Hosp., 39 Cal. App. 3d 174, 114 Cal. Rptr. 380 (2d Dist. 1974); Corley v. Workmens' Comp. Bd., 22 Cal. App. 3d 447, 99 Cal. Rptr. 242 (4th Dist. 1971) (recognizing the policy against double recovery by the employee).

If the employer were not given a cause of action against the third party for recoupment of the workers' compensation benefits he has paid the employee, then the employee would stand to gain a full tort damage award and workers' compensation benefits in addition. Since tort damages purport to make the victim whole for his loss, the employee in obtaining both a tort damage award and workers' compensation benefits would be made more than whole for his loss.


Because the employee and the employer do not always stand on the same footing with respect to recovery from a third party (e.g., the employer may have been contributorily negligent, but not the employee), grave difficulties have emerged in the awarding of damages or in settlement proceedings. See, Note, Recovery from a Third Party Under California Workmen's Compensation: Guidelines for Legislative Change, 18 Hastings L.J. 710 (1966); Note, Workmen's Compensation and Third Party Suits in the Aftermath of Witt v. Jackson, 21 Hastings L.J. 661 (1970); Comment, Workmen's Compensation: The Impact of the Witt v. Jackson Rule on the Law of Third Party Settlements, 17 UCLA L. Rev. 651 (1970). For a recent discussion of the status of a concurrently negligent employer in relation to recovery of compensation payments against a third party, see Mitchell, Products Liability, Workmen's Compensation and the Industrial Accident, 14 Duq. L. Rev. 349 (1976).

Situations where both the employer and the third party negligently cause injury to the employee pose interesting riddles. To exempt the employer from funding any part of the tort damages paid by the third party to the employee may
B. Purposes of Third Party Action in General

Several theoretical justifications have been offered for allowing an employee to recover damages from a third party tortfeasor in an action at common law where that employee is also entitled to benefits under workers' compensation. Because the right of the employee to sue a third party tortfeasor was settled as a matter of statutory interpretation in California very early in the history of the Workmen's Compensation Insurance and Safety Act of 1917, the question has seldom, if ever, been raised by the courts.

Professor Larson advances several justifications for allowing third party actions. He states,

The concept underlying third party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer. . . . Every mature loss-adjusting mechanism must look in two directions: it must make the injured person whole, and it must also seek out the true wrongdoer whenever possible. While compensation law, in its social legislation aspect is almost entirely preoccupied with the former function, it is not so devoid of moral content as to overlook the latter.

It has been suggested that where both the employer and the third party negligently cause injury to the employee, then the common law recovery of the employee from the third party should be reduced by the "percentage of negligence" of the employer. The employee's award of workers' compensation benefits from the employer would likewise be reduced by the percentage of negligence of the third party. For instance, assume that an injured worker is entitled to $4,000 in workers' compensation benefits and $20,000 in tort damages. The employer is 75% negligent and the third party is 25% negligent. In such a case, the injured worker would be entitled to $3,000 in workers' compensation benefits and $5,000 in tort damage awards. Davis, Third-Party Tortfeasors' Rights Where Compensation-Covered Employees are Negligent—Where Do Dole and Sunspan Lead?, 4 HOFSTRA L. REV. 571 (1976).


81. In a recent case, a third party manufacturer argued on appeal that it was error for the trial court to allow an employer who was at fault to recover his loss from payment of workers' compensation benefits from one who was liable without fault pursuant to strict products liability theories. After stating that the obligation of an employer to pay benefits to an employee under workers' compensation does not establish fault on the part of the employer, the court said, "We are given no authority and we see no reason why an employer cannot proceed against a third party on the basis that such party also is liable without fault (i.e. negligence)." Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 585, 97 Cal. Rptr. 798, 808 (2d Dist. 1971).

82. See note 1 supra.

83. LARSON, supra note 1, at §§ 71.00-21.

84. LARSON, supra note 1, at § 71.10.
In this apology for third party actions, there are several components deserving of separate examination.

1. Placing the Costs of Injury on the Responsible Party

One of Larson's arguments for third party actions is that the costs of injury should be placed on the responsible party and that tort actions against third parties presumably fulfill this objective. Standing alone, this policy provides insufficient grounds for allowing an employee to recover tort damages from a third party tortfeasor. To suggest that the costs of the injury should be borne by the responsible party begs the issue unless the parameters of such costs are delimited: The costs of the injury could be measured either in terms of workers' compensation benefits or tort damages. One could argue that placing the costs of injury on the responsible party should entail only that the third party tortfeasor indemnify the employer for his payment of workers' compensation benefits to the injured employee. On such a premise, the costs of injury would indeed be placed on the responsible party, the third party tortfeasor, but he would only be liable to the extent of workers' compensation benefits, not for the full measure of tort damages.

a. The Bargain Trade-Off Model. The basic dilemma that arises when one attempts to determine the costs of an employee's injury can perhaps be clarified by an example. At present, if employee A loses his hand in machinery manufactured by a third party, he may be entitled to recover tort damages from the third party manufacturer. If employee B is injured by his own employer's product, employee B's exclusive remedy will be workers' compensation benefits, despite the fact that the accident produced the identical injury occurring in the same manner from the same type of machinery. Professor Larson would presumably justify this discrepancy on the grounds that while the actual cost of the injury is in either case the full measure of tort damages, employee B had depending, of course, on what measure of compensation is used, tort damages or workers' compensation, the determination of what are the costs of injury will differ.

85. Depending, of course, on what measure of compensation is used, tort damages or workers' compensation, the determination of what are the costs of injury will differ.

86. Professor O'Connell has in fact suggested that a statute be passed making workers' compensation the employee's sole remedy even where the employee is injured by a third party tortfeasor. According to Professor O'Connell's suggestion, the employer would be able to recoup his expenditures in payment of workers' compensation benefits from third party tortfeasors. O'Connell, An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees, with an Employer's Remedy Against Third Parties, 1976 Ins. L.J. 683.

87. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 650, 105 Cal. Rptr. 890, 902 (2d Dist. 1972) (Compton, J., concurring and dissenting). In terms of law, this is an entirely predictable result because § 3601 of the California Labor Code makes workers' compensation benefits the employee's only claim against his employer. But in terms of policy, the result is perplexing since there is no indication that the manufacturer-consumer relation is altered by the fact that the manufacturer is also an employer and that the consumer is his employee. For arguments suggest-
"traded" his claim to full tort damages against the employer for the benefits of a speedy no-fault compensation plan. By contrast, "between the employee and the stranger there has been no such give and take, no such compromise struck." 88

The idea of a bargain trade-off or exchange of rights between employee and employer is frequently used to rationalize the basic no-fault liability rules governing workers' compensation and to delimit the scope of their application. 89 According to this view, the employee exchanges his right to a common-law remedy against the employer for a speedy no-fault compensation plan which imposes certain, albeit limited, liability on the employer.

b. Criticism of the Bargain Trade-Off Model. Workers' compensation attaches by law to the employer-employee relation as a result of the status of that relation. 90 In adopting the no-fault liability rules of workers' compensation, the states have thus designated employers and employees for special treatment. 91 If one seeks to justify the special liability rules applicable to the employment relation, however, it is not sufficient merely to assess the value of the equities exchanged by the employer and employee under workers' compensation; one must also consider the equities of third parties. 92 Allowing the employee's common-law cause of action against third

88. LARSON, supra note 1, at § 71.20.
90. See notes 73-75 & accompanying text supra.
91. See note 67 supra.
92. One would not have to be concerned with the equities of third parties to the same extent if workers' compensation were truly a contract, the result of free bargaining. When two rational parties form a contract, a certain legitimacy to the arrangement created is presumed. The law does not usually ask whether there are any parties missing from the contract arrangement who would rationally have been included or rationally would have wanted to be included. When, however, the state imposes laws to govern a particular relation (such as employee-employer) and when a social contract type of argument is asserted to support these rules, one must be
parties cannot be rationalized on the grounds that no bargain has been struck between the employee and the third party; in terms of social contract reasoning the question is precisely whether the state should "strike" such a bargain when enacting a workers' compensation statute. Thus, the initial weakness of the social contract analogy lies in its a priori assumption that employees and employers are the only parties with an interest in the social contract.

Another objection to the social contract analogy is that once the parties to the "contract" are designated a priori, it is facile to conclude that the exchange of rights accomplished by workers' compensation is fair. The ease with which the social contract analogy can be used to justify the exchange of equities under workers' compensation underscores a second flaw in the social contract argument. The bargain trade off model relies heavily on the intuitive realization that the exchange of equities between employer and employee under workers' compensation is just to both parties. Although the exchange of equities which has occurred under the present workers' compensation system is perhaps just, it cannot be considered the only acceptable exchange. Because a social con-

93. See note 67 supra.
94. See note 92 supra.
95. The crucial step in the bargain trade-off argument is the recognition that the exchange of rights and liabilities between employer and employee effectuated by workers' compensation is a fair exchange. One is perhaps tempted to conclude that the exchange is fair simply by virtue of the fact that both employer and employee have gained as well as relinquished rights and liabilities. Such a conclusion is not justified, however: To say that the exchange is fair, it is necessary to place values on what the employer and employee have gained and what they have lost by the establishment of workers' compensation. It is not readily apparent how this valuation of the equities is to be accomplished.

The language of the bargain trade-off serves to obscure: If truly there had been an exchange between employer and employee regarding rights and liabilities for workplace accidents, the arrangement adopted would have a presumption of legitimacy to the extent the parties voluntarily entered into the exchange. Here, however, the state merely imposed a new set of rights and liability rules for workplace injuries. The bargain trade-off model thus relies on the practice of voluntary contracts to justify a state imposed arrangement—workers' compensation—when in fact no voluntary bargain has been struck between the employer and employee.

96. If one assumes that tort damages function to make the injured victim whole, then the value of incurring an injury and receiving tort damages (administrative costs aside) is equal to the value of not incurring the injury at all. Under workers' compensation, the employee exchanges his right to full compensation in return for a speedy no-fault compensation plan. Once the employee finds he has incurred an injury that would normally (apart from the dictates of workers' compensation) be compensable at common law, the value of incurring the injury and receiving workers' compensation benefits is clearly less than the value of not incurring the injury at all. The employee would by far prefer not incurring the injury. Yet since the "bargain trade-off" of workers' compensation takes place at a
tract perspective can therefore be utilized to justify a number of possible arrangements for workers' compensation, the original bargain trade-off can be reformulated endlessly to accommodate changes in the rights and liabilities of the employee or employer.\textsuperscript{97}

Professor Larson's "social contract" argument has been attacked directly on the grounds that the present policy of allowing employees to sue third parties at common law violates the initial exchange of equities.\textsuperscript{98} Professor O'Connell argues that allowing employees to sue the employer's suppliers at common law in effect subjects the employer to common-law liability; the employer is increasingly forced to defray the costs of such common law liability since a third party product manufacturer, faced with the prospect of suits by or on behalf of injured employees, frequently seeks to recover that cost either directly from the employer by means of indemnity agreements,\textsuperscript{99} or indirectly by passing on the cost of product liability insurance through increased product prices. The result is that "in addition to paying workers' compensation benefits, the employer increasingly pays the equivalent of common-law liability reflected in increased costs of machinery or indemnity agree-

\begin{enumerate}
\item\textsuperscript{97} To give one example of the "reformulation of the initial bargain," in 1959, an amendment was passed in California which restricted the employee's right of action against a negligent co-employee. See CAL. LAB. CODE § 3601 (West 1971). Concerning this employee immunity, Larson writes, The reason for the employer's immunity is the quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts. This reasoning can be extended to the tortfeasor co-employee; he, too, is involved in this compromise of rights. Perhaps, so the argument runs, one of the things he is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault."

\item\textsuperscript{98} O'Connell, supra note 12, at 440-41.

\item\textsuperscript{99} Id.

\item\textsuperscript{100} Under these indemnity agreements the employer contracts to "reimburse the third party manufacturer for the costs of common law liability which the third party incurs as a result of injuries he inflicts on the employer's employees." In Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633 (1944), Mr. Justice Traynor argued that to allow an employee to sue a third party in tort would be contrary to the policy and provisions of workmen's compensation law if the effect of such suit is to indirectly place the burden of common-law damages on the employer. Id. at 218-19; 148 P.2d at 643-44 (Traynor, J., dissenting). For an example of a case where a third party tortfeasor was able to recover from an employer for losses incurred in a tort suit by the employer's employee under an indemnification agreement, see Ryan Stevedoring Co. v. Pan Atlantic SS Corp., 350 U.S. 124 (1956). The Ryan case was
ments with his capital goods supplier.\textsuperscript{101} Accordingly, Professor O'Connell argues that the original bargain trade-off between employer and employee has been broken, at least economically, if not legally.\textsuperscript{102} Apparently, O'Connell focuses his attention on protecting the employer, the third party, and perhaps employees in general at the expense of the employee injured by a third party,\textsuperscript{103} whereas Larson favors protecting the employee injured by the tortious conduct of a third party, and perhaps employees in general, at the expense of the employer and the third party.\textsuperscript{104} Since these two positions conflict and since there is no apparent reason to prefer one over the other, an acceptable principle has yet to be found by which it can be decided whether to impose the limited costs of workers' compensation benefits or more extensive tort damages on the third party tortfeasor.

2. Blameworthiness

One of the suggested rationalia for placing the full costs of a tort damages award on a third party tortfeasor turns on the element of blameworthiness. If the third party is considered to be a wrongdoer, then "to reduce his burden because of the relation between the employer and the employee would be a windfall to him which he has done nothing to deserve."\textsuperscript{105} This view encompasses two posi-

---

\textsuperscript{101} Professor O'Connell argues that because the third party's liability costs are being passed on to the employer, the employer is incurring the costs of common-law liability. In effect, O'Connell suggests that there is a cost equivalency between the employee's recovery against the third party and the increased costs the employer must pay when he purchases from the third party. The fact of a cost equivalency, however, cannot alone demonstrate that the original bargain between employer and employee has been broken. There can be no doubt that allowing the employee to recover a common-law judgment against a supplier of the employee's employer will raise the employer's costs closer to the level of common-law liability. But one can just as easily say that employers in buying defective equipment from capital goods suppliers impose on themselves the costs of common-law liability for product related injuries. Indeed, both interpretations satisfy the "but for" concept of causation. See Prosser, \textit{supra} note 9, at 238-41. Thus, although allowing employee suits against third party suppliers satisfies the "but for" concept of causation with regard to employers incurring the costs of common-law liability, it would seem that satisfaction of the "but for" test is not sufficient for safely concluding that the original bargain has been broken. The only way one can arrive at O'Connell's conclusion that the original bargain has been broken on the basis of the "but for" concept of causation would be to define the original bargain as follows: In return for a no-fault plan, the employee will take no legal action with respect to an injury arising out of and in the course of employment which may raise the costs of the employer by an amount approaching the costs that the employer would incur if the employee were allowed to recover common-law damages from the employer. This is not a terribly convincing formulation of the original bargain.

\textsuperscript{102} See note 86 \textit{supra}.

\textsuperscript{103} See notes 83-84 & accompanying text \textit{supra}.

\textsuperscript{104} See notes 83-84 & accompanying text \textit{supra}.

\textsuperscript{105} Larson, \textit{supra} note 1, at § 71.20.
tions: First, the third party tortfeasor should not escape the full brunt of tort liability cost simply because of the fortuitous circumstance that the injured party happens to be a worker covered by workers' compensation. Second, workers' compensation benefits are not the adequate measure of blame. The characterization of the third party's conduct as blameworthy might in some circumstances justify the transfer of greater costs to the third party than if that party's conduct were not wrongful. Such reasoning, however, is not applicable to third party actions based on strict products liability, since blameworthiness is not an underlying rationale of strict products liability.

3. Deterrence

The concern with granting the third party tortfeasor a windfall, which would result if the employee were precluded from suing the third party in tort, does not stem solely from adherence to the notion of blameworthiness. The concept of deterrence is also relevant.

In contrast to tort damages, workers' compensation benefits do not purport to make the injured employee whole for his loss. If a manufacturer's cost-benefit choice can be described as a choice between incurring the costs of present tort damages or eliminating the accident costs through greater care in production and quality control or further research, it follows that an increase in liability costs will produce a greater incentive to accident avoidance.

106. HANNA, supra note 17, at § 1.05(5).
107. In other words, a finding that the injurious act of the third party was morally wrongful would demand less protection of his interests and more compensation for the victim. It is perhaps on similar grounds that common law suits by employees are allowed against the employer if the employer committed an intentional assault. See LARSON, supra note 1, at §§ 68.00-35. Most workers' compensation statutes allow such common law suits. In California there is allowed an increase in the award under workers compensation by one half the amount of the compensation otherwise recoverable, but not to exceed $10,000. CAL. LAB. CODE § 4553 (West 1971). In State Dept. of Corrections v. Workmen's Comp. App. Bd., 5 Cal. 3d 885, 890, 97 Cal. Rptr. 786, 789, 489 P.2d 818, 821 (1971), the court stated, with regard to § 4553, "[T]he employee does not receive more than full compensation for his injuries. Thus the increased award is not a penalty in the sense of being designed primarily to punish the defendant rather than to more adequately compensate the plaintiff."
108. Strict products liability applies to the seller of a defective product even though "the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965). See notes 46-82 & accompanying text supra.
109. In every legal loss distribution mechanism, there are two things to be accomplished: first to make the victim whole, and second to see to it as far as possible that the ultimate loss falls on the actual wrongdoer, as a matter of simple ethics and as a deterrent to harmful conduct.
LARSON, supra note 1, at § 70.20.
110. LARSON, supra note 1, at § 2.50.
111. Under contemporary economic theory, "[A]n enterprise will take safety measures to avoid accidents only where the cost of such measures is less than the
Conversely, a decrease in liability costs will decrease the incentive to avoid accidents. Therefore, the deterrent value of placing the cost of the injury on a third party would vary depending upon whether the third party were made responsible only for the cost of workers' compensation benefits or for tort damages.

It follows that if the costs of liability for a third party manufacturer are reduced to the value of workers' compensation benefits, the incentive for product safety research and development will have been lessened for third party manufacturers. As will be seen in the following examination of the deterrent effects of denying tort recoveries against third party manufacturers, the reduction of the safety incentive among third party manufacturers is not necessarily undesirable. Because these effects differ depending upon whether the products are industrial goods or consumer goods, separate analysis of such goods is required.\(^\text{112}\)

a. **Industrial Goods.** In relation to industrial goods, the denial of tort recoveries by employees against third parties implies that employees will be exposed to a greater level of risk of injury than if these tort recoveries were allowed.\(^\text{113}\) Because industrial goods impose risks of injury almost exclusively on employees,\(^\text{114}\) it is difficult to determine the desired level of deterrence to impose on the third party tortfeasor.\(^\text{115}\) The risks posed by defective industrial goods are typical of the employment.

---

\(^\text{112}\) The term "industrial goods" refers to those goods typically used in the particular type of employment (e.g., a printing press in publishing, a hammer in carpentry, a car in the taxi business). Note that what might be taken as a consumer good, such as bourbon or scotch, may nevertheless be an industrial good in a certain type of employment—bartending. Although it is perhaps difficult to distinguish between consumer products and industrial goods, such a distinction is not infeasible and the courts have been called upon to make this distinction before. See note 155 infra.

\(^\text{113}\) The proposition holds if it is assumed that the number of suits against third parties remains constant whether the suits are merely employers' suits for the recovery of workers' compensation benefits paid out or for the full extent of tort damages. The proposition is even more convincing when it is realized that a person who stands to recover tort damages is willing to incur greater administrative costs than someone who is seeking indemnity to recover the value of workers' compensation benefits. If workers' compensation payments are sufficiently low, there will be instances where the employer will not want to sue the third party tortfeasor because administrative costs will become prohibitive.

\(^\text{114}\) See note 112 supra.

\(^\text{115}\) The difficulty lies in the fact that the risks posed by defective industrial goods are just as much risks which are part of the employer's enterprise as other risks common to the employer's business, and these other risks are covered exclusively by workers' compensation. Are there any good reasons why risks posed by defective industrial products should be isolated for the application of a tort damages level of deterrence and not other risks common to the employer's business? Indeed, if the justifications for recovery under strict products liability are so similar to the justifications for workers' compensation, why should there be two different ways of measuring the level of deterrence to be applied?
It would seem that there is little reason to deter these risks more than other risks common to employment. It might be decided as a matter of policy that employees as a class should be exposed to the least amount of product-related risks, in which case tort recoveries should be allowed against third parties. But the contrary position could also be advanced on the policy that American enterprise should be protected from burdensome liabilities. Alternatively, the concept of deterrence might be combined with the moral element of blameworthiness, resulting in the interventionistic approach of discouraging blameworthy actions as much as possible by holding the third party manufacturer liable for tort damages. To the extent that the concept of deterrence is associated with that of blameworthiness, it necessarily fails to provide a rationale for third party actions based on strict products liability.

b. Consumer Goods. The search for the appropriate level of deterrence to apply to third party manufacturers is more complex when the employee is injured by a defective consumer product than when he is injured by a defective industrial good. With respect to consumer products used by employees, the denial of employee tort recoveries against third parties would result in both employees and consumers receiving less safety protection than if the product were used solely by consumers. Thus, to the extent that tort recoveries by employees are prohibited, it is likely that consumers (as well as employees) will incur more injuries because it will not be worthwhile for the manufacturer to avoid product related accidents.

116. It might be argued that employees are entitled to be protected from risks posed by defective products to the same extent as consumers. This answer begs the question since workers are in fact not given the same extent of protection as non-employees from a whole series of risks which fall under the exclusive remedy clause of the workers' compensation acts. See CAL. LAB. CODE § 3600 (West 1971). From the perspective of deterrence, the question is whether the risks posed by defective industrial products are more properly dealt with under the level of deterrence afforded by the tort system or by the level of deterrence afforded by workers' compensation. See also text accompanying note 150 infra (Different levels of deterrence applied to the same or similar risks prevent the potential victim from accurately assessing the risks and taking preventive measures. This is a cost which cannot be neglected.).

117. LARSON, supra note 1, at § 72.50.
118. See O'Connell, supra note 12, at 435-441; text accompanying note 103 supra.
119. See notes 105-07 & accompanying text supra.
120. This failure is evident because blameworthiness alone fails to provide a rationale for third party actions based on strict products liability. See notes 54-62 & accompanying text supra.
121. If employees are denied tort recoveries for product injuries, it follows that the deterrent value placed on the third party manufacturer is less than if the only users of the product are consumers who can sue for tort damages. The lessening of the deterrent value placed on the third party manufacturer implies that it will be worthwhile for him to allow more product injuries to occur. See note 122 infra.
122. An increase in product related accidents may be cause for concern if workers' compensation statutes do not provide for benefits sufficient to encourage
the extent that one assumes that damages make the injured party whole, such a result is not problematic from the perspective of consumers since they will still be able to recover such damages.\(^{123}\)

The problem is more acute for employees: From their perspective, a more extensive tort damage level of deterrence to risks posed by defective consumer products is desirable. Defective consumer products present risks which are often uncharacteristic of employment and which the employee, like the consumer, cannot easily avoid or insure against. Accordingly, with respect to employee injuries from consumer goods, it makes sense to treat the employee like a consumer.\(^{124}\)

4. Protection of the Worker

Another argument "in favor of retaining some opportunity for recovery against third persons lies in the fact that the compensation acts are designed to protect the worker and his family."\(^{125}\) According to this view, because workers' compensation benefits are

---

\(^{123}\) The primary notion underlying compensation "is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money." F. Harper & F. James, The Law of Torts § 25.1, at 1301 (1956).

\(^{124}\) The argument relating to industrial goods clearly does not apply to consumer goods. See note 115 supra.

\(^{125}\) McCoid, supra note 3, at 401. The provisions of the workers' compensation act "shall be liberally construed by the courts with purpose of extending their benefits for the protection of persons injured in the course of their employment." CAL. LAB. CODE § 3202 (West 1971).
not designed to make the employee whole, the injured employee should not be restricted to workers’ compensation remedies whenever he can be made whole by a common-law recovery against a third party tortfeasor.\textsuperscript{126}

If, however, the goal sought to be achieved is to protect workers, it may be that the money currently used to finance common law damages for workers injured by third party tortfeasors could be more effectively utilized.\textsuperscript{127} In cases where the third party tortfeasor, for instance, a product manufacturer, passes on the cost of common-law liability to the employer,\textsuperscript{128} a reduction in such costs accompanied by a commensurate increase in the value of workers’ compensation benefits might be more beneficial to workers than simply allowing workers to sue third parties for tort damages.\textsuperscript{129} In other words, it does not follow that the policy of protecting workers dictates that employees be allowed to sue third parties at common law.

The view that a worker should be afforded the protection of a common-law cause of action against tortious third parties seems also

\textsuperscript{126} McCoid, \textit{supra} note 3, at 401-02.

\textsuperscript{127} Professor O’Connell suggests that product liability suits by employees (as well as consumers presumably) are \textit{monstrously} inefficient. See O’Connell, \textit{supra} note 12, at 441-44.

\textsuperscript{128} A product manufacturer who supplies an employer with goods definitely falls within the category of tortfeasors who are able to pass costs on to the employer.

Where the third party tortfeasor has no economic relation to the employer, it may be that allowing employees common-law suits against third parties serves best to protect the interest of workers. In such cases, the third party cannot pass on the costs of common-law liability incurred from employee suits to the employer. For instance, if an employee is injured on the job by a negligent automobile driver, there is no effective way to transfer the damage award for the injured employee to employees in general. In other words, where the third party is commercially unrelated to the employer, the granting of right to employees to sue a third party at common law can have no economic impact upon the measure of workers’ compensation benefits. Where the third party passes the costs of common-law liability to the employer, however, it is possible to reduce damage awards to employees and to use such savings to increase the measure of workers’ compensation benefits for all employees. See note 129 \textit{infra}; see also O’Connell, \textit{supra} note 12, at 435-41.

\textsuperscript{129} Both workers’ compensation and strict products liability are founded in part upon the risk distribution rationale. Thus, it is clear that a manufacturer passes on the costs of both his own employees’ injuries (the cost of workers’ compensation benefits) and the cost of injuries sustained by the users of his product (tort damage awards). See note 12 \& accompanying text \textit{supra}. Since in either case the costs are passed on down the chain of product distribution, it is possible to reduce the liability costs of a manufacturer for product injuries and to use such savings to increase the value of workers’ compensation benefits without increasing the total cost imposed on the manufacturer-employer. If such a plan were implemented it would have the effect of transferring wealth from workers who are injured by defective products to workers who are injured by accident risks covered exclusively by workers’ compensation. In terms of employee protection from risk of injury, this plan would increase the risk of injury from defective products and decrease the risk of injury from those risks attendant to the workplace which are compensated solely by workers’ compensation. \textit{See} notes 115, 122 \textit{supra}.
grounded on the persistent notion that when a worker is injured by an act which can be characterized as tortious, he is more entitled to recover common-law damages than a worker who is injured by non-tortious conduct. This proposition undercuts the enterprise liability basis of workers’ compensation, and tends to favor a social insurance scheme in which all the common-law rights of employees against both employers and third parties would be preserved. Furthermore, if the employee who is injured by tortious conduct is entitled to tort damages from the tortfeasor, then an employee should not be precluded from suing his own employer. But under the present state of the law, an employee is precluded from bringing such a suit. If it is assumed that the employee should not be able to sue the employer at common law, then an employee injured by tortious conduct is not necessarily deserving of greater compensation than an employee who is injured by non-tortious conduct.

III. EMPLOYMENT-RELATED PRODUCT-CAUSED INJURIES: A PROPOSAL FOR REFORM

This Comment has sought to establish the following propositions: The policy that the responsible party should bear the costs of injury does not answer the question of which measure of costs, workers’ compensation benefits or tort damages, should be imposed on that party. Blameworthiness on the part of a tortfeasor suggests that employees be allowed to sue third parties at common law. Strict products liability, however, turns neither upon blame nor wrongdoing; thus blameworthiness does not provide a sufficient reason to allow the employee to sue the third party in strict products liability. Deterrence furnishes an effective rationale for permitting employees to maintain common law suits against third party manufacturers for defective consumer goods, but not for defective industrial goods. The policy of protecting the workers’ interests

---

131. The enterprise liability notion suggests that there are necessary and attendant accident costs to the production process, that these costs should be passed on to the consumer, that the party in the best position to minimize these costs is the employer, and that the traditional tort concepts of wrongdoing and blame have no place in the law of the employment relation. The enterprise liability notion is based on the belief that the identification of the source of injury as negligence of the employee, co-employee, employer, or as some other source should be of no importance for compensation as long as the injury may properly be chargeable to the enterprise. Thus, whenever tort constructs are reintroduced to distinguish certain risks of employment for special treatment from among those risks properly chargeable to the enterprise, the notion of enterprise liability is undercut.
132. See note 2 supra.
133. See notes 85-104 & accompanying text supra.
134. See notes 105-07 & accompanying text supra.
135. See note 108 & accompanying text supra.
136. See notes 109-24 & accompanying text supra.
does not necessarily compel allowing employees common-law suits against third parties.\textsuperscript{137}

These propositions collectively support the conclusion that product-related injuries should not, under all circumstances, entitle the employee to maintain a common-law cause of action for damages on the theory of strict products liability. In contradistinction to this conclusion, it must be recognized that workers should not be disadvantaged vis-à-vis consumers solely because they are covered by workers' compensation. Thus, when the victim of a defective product is an employee covered by workers' compensation, that victim should not categorically be denied the protection of strict products liability.

A coherent solution to the problem raised by these conflicting equity considerations is suggested by Professor Calabresi's analysis of strict liability rules.\textsuperscript{138} In dealing with the doctrine of strict liability, Calabresi has developed two liability rule models for workers' compensation and product injuries. As will be demonstrated, it may make sense to accord different treatment to distinct classes of employee product injuries.

A. \textit{Two Models: Workers' Compensation and Strict Products Liability}

Professor Calabresi suggests that to promote the goal of minimizing accident prevention and accident costs, the burden of liability should be placed on the party to a transaction who is in the best position to "make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." \textsuperscript{139} Thus, if the victim is in the best position to make and implement a cost-benefit analysis, the losses from accident must lie where they fall; whereas if the tortfeasor is in the best position to make the cost-benefit analysis and to act upon it, he should be held to strict liability.\textsuperscript{140}

Calabresi's approach is not limited to placing the costs of injury exclusively on either party. According to Calabresi, strict liability need not be placed entirely on the injurer or on the victim. Rather, the two parties can share the burden of liability for loss. For instance, a court might determine that the victim is in the best position to determine the desirability of avoiding the risks of certain types of harm. But simultaneously, the court might determine that

\textsuperscript{137} See notes 125-32 & accompanying text \textit{supra}.


\textsuperscript{139} \textit{Id.} at 1060.

\textsuperscript{140} See note 138 \textit{supra}.
the injurer is in the best position to make the cost-benefit analysis with respect to the occurrence of the accident and the basic damages flowing from it. According to Calabresi, the system of workers' compensation provides such an example.

1. The Workers' Compensation Model

Presumably because of the nature of the employment relation, Calabresi suggests that the employer is generally in the best position to decide upon and to implement efficient cost-benefit analysis with respect to risk imposition on employees and accident avoidance costs. By contrast, the employee is in the best position to determine the desirability of avoiding a certain type of injury or damage. In support, Calabresi gives the example of a great violinist who works in a steel mill: If his hand is mangled, the extreme mental suffering and accompanying economic loss will be his onus, given the schedules for limited compensation.

2. The Strict Products Liability Model

With respect to product injuries to consumers, the general principle is that the producer is in the best position to formulate and implement a cost-benefit analysis. Calabresi suggests, however, that concern with questions of abnormal use, adequacy of warning, and perhaps contributory negligence demonstrates a lack of judicial certainty underlying the general rule that the producer is the cheapest cost avoider. Thus, in situations where the victim can be identified as a peculiarly risky user, or where the warning seems adequate, the courts will abandon the general rule that the producer is the cheapest cost avoider.

3. The Implications of the Two Models

Calabresi's models for products liability and workers' compensation suggest guidelines for determining which types of product

141. Calabresi, supra note 138, at 669.
142. Workers' compensation, tends to divide the decision of who is better suited to evaluate costs and benefits according to the type of damage rather than type of accident. We are not here concerned with the fact that workmen's compensation schedules are hopelessly out of date, but instead with the very fact that they deal with damages on a scheduled basis. The result is that the measure of damages for dignitary losses and even wage losses is that of the ordinary worker doing that job, instead of being particular to the individual victim. Calabresi & Hirschoff, supra note 138, at 1068-69.
143. This assumes, of course, that the risks of a particular employment can be accurately perceived by the employee. Accordingly, Calabresi's workers' compensation model works best when it is applied to those risks which are typical of the given employment situation.
144. Calabresi & Hirschoff, supra note 138, at 1068-69.
145. Id. at 1068.
146. Id.
147. Id.
injuries should be compensated under workers’ compensation and which should be treated under the common law of products liability.

Those classes of product risks which present the threat of a particular type of loss should be dealt with under the model of workers’ compensation if they are typical risks of employment. With these types of product risks, the employee is in a good position to perceive the risk of a specific injury based upon the kind of injuries that are particular to a given type of employment; and he is also in the best position to determine the desirability of avoiding that injury. Furthermore, the employee is in the best position to act on his cost-benefit analysis by avoiding the risk-creating employment.

If the above guidelines are rejected and product risks typical of the employment relation are compensated under strict products liability, then the employee’s perception of the risks associated with a certain employment would be clouded, because some risks typical of the employment relation would be fully compensated under strict products liability, whereas similar risks would be only partially compensated by workers’ compensation benefits. Those classes of product risks that are atypical of the employment are best compensated under the common law of strict products liability, because the employee is not in the most advantageous position to determine and implement a cost-benefit analysis of the desirability of avoiding a particular injury. Such risks are not typical of the employment and therefore cannot easily be perceived by the employee. In relation to a third party manufacturer, the employee stands in no better position to assess atypical risks than an ordinary consumer.

148. Particular types of loss include, for instance, facial disfigurement, asbestosis, loss of hand, and so on.

149. The voluntariness with which an employee can decide which employment to take and which risks to face, of course, bears on the question of whether he is in the best position to implement the cost-benefit analysis. Thus, if an employee has virtually no choice in deciding which employment to take, there is serious doubt as to whether he is really in the best position to implement the cost-benefit analysis. As Calabresi notes, however, the determination of whether potential victims are in the best position to act upon a cost-benefit analysis is not to be made on an individual basis, but at the more general level of categories. See Calabresi & Hirschoff, supra note 138, at 1070.

In workers’ compensation, the original decision as to who is the cheapest cost avoider was legislatively made. Id. at 1068. Once it is accepted that the employee is in the best position to avoid risks of specific injuries normally compensated under workers’ compensation law, it follows a fortiori that the worker is in the best position to decide whether to avoid certain types of employment which present risks of product caused injuries that are typical of the employment.

150. If the injury from a typical risk is caused by the employer, employee or co-employee, then compensation for the employee would be limited to workers’ compensation benefits. If the source of the risk is a product defect, however, then full tort compensation can be awarded under strict products liability. See note 11 & accompanying text supra.
The distinction between Calabresi’s two models is based on the typicality of the product risk for the given employment situation. It is apparent that those product risks which are typical of an employment are largely those risks associated with the use of industrial goods. Those product risks which are not typical of the industry are generally linked with the use of consumer goods. The typicality of risk argument thus coincides with the earlier conclusion that a tort measure of deterrence is necessary to protect employees from defective consumer goods, but not from defective industrial goods.

B. A Legislative Resolution

A legislative scheme can be devised to implement the “typicality of risk” approach: All employee suits in strict products liability would be barred where the injury is typical of the employment. For the bar to apply, two prongs of the test for typicality must be satisfied. First, the injury causing product must be one which is typically used in the employment situation. Second, the harm which results from the injury must also be typical of the employ-
ment. If either of these conditions fail, the injured employee would be allowed to pursue his cause of action against the third party manufacturer under the doctrine of strict products liability. In any case, the employer must be allowed to recover his expenditures for workers' compensation payments from the third party manufacturer.156

It might be argued against this scheme that the determination of whether an injury is typical of the employment calls for exceedingly complex and arbitrary distinctions. There is no reason to suppose, however, that such determinations are more problematic than other issues faced by the courts in the domain of workplace injuries. The "'typicality of risk'" approach is essentially a judgement of causation. It calls for the determination of whether a given product injury falls within the scope of risks attendant to the workplace. Varying types of causation tests have been developed to perform the function of attributing injuries to enterprises.157 The

the courts will be able to make such a distinction: the recently enacted Magnuson-Moss Warranty Act demands that courts make the determination that a particular good is a consumer good before the substantive warranty provisions of the Act can apply. A consumer product under that Act is defined as one "which is normally used for personal, family, or household purposes." Magnuson-Moss Act of 1974, § 101(1), 15 U.S.C. § 2301(1) (Supp. V 1975). The term "consumer good" is also used in the UCC. U.C.C. § 9-109(1). Many of the so-called "Baby FTC Acts" which prohibit "unfair and deceptive practices" apply exclusively to consumer goods and thus also call for judicial determination of what constitutes consumer goods. See, e.g., IND. CODE § 24-5-0.5-2(1) (1974); OHIO REV. CODE ANN. § 1309.07 (Page 1976); R.I. GEN. LAWS § 6-13.1-7 (1969); UTAH CODE ANN. § 13-11-3(2) (1977 Supp.); VT. STAT. ANN. tit. 9, § 2451(a)-(b) (1977 Supp.).

Nevertheless, it may be difficult for courts to determine whether an injury was engendered by a consumer good or an industrial good. The courts could, of course, make individual determinations of whether particular products fall into the class of industrial goods or consumer goods. The problem with such an approach is that such concrete determinations are expensive in terms of court costs, litigation expenses, and uncertainty as to the state of the law. Cf. Calabresi & Hirschoff, supra note 138, at 1067-69. (applying a general rule minimizes the administrative costs, but imposes other costs in that it may fail to carry out the substantive policy faithfully).

This problem of determining the appropriate level of generality in formulating a liability rule is also present with respect to the determination of the appropriate definition of the employment situation. See note 154 infra. If the courts are forced to engage in particularized determinations of what constitutes an employment community, litigation expenses and uncertainty costs are likely to be great. On the other hand, if sweeping generalizations are utilized to define the employment situation, the rationalia for the "'typicality of risk'" approach may be undermined.

156. The employer must be able to recoup his losses in payment of workers' compensation benefits in order that his employees may be protected by a deterrent to product defects. See notes 115-21 & accompanying text supra. This conclusion would be premised on the view that the third party manufacturer is a better risk and cost avoider than the employer with regard to the basic harms which result to employees from the use of defective products. See note 139-40 & accompanying text supra.

157. The test of causation used to determine whether an employee is entitled to workers' compensation benefits is the "'arising out of and in the course of employment'" requirement. See Larson, supra note 1, at §§ 6.00-42.00; 2 Hanna, supra
fact that courts have developed such tests suggests that the implementation of a new test of causation does not create insurmountable problems.

The test for typicality must insure that the employee be treated, for purposes of compensation, like a consumer in those instances where the employee stands in the same position as a consumer with respect to a defective product.\(^\text{158}\) The test must also guarantee that the injured employee be treated no differently from his co-employees where the risk posed by the defective product does not differ from the kind of risk prevailing in the employment community.\(^\text{159}\)

The advantages of adopting this approach are many. It would free vast sums of money currently spent to finance employee damage awards and to pay personal injury lawyers.\(^\text{160}\) The resulting savings could be used to more fully compensate injured employees who are covered only by workers' compensation.\(^\text{161}\)

\(^\text{158}\) See text accompanying note 69 supra.

\(^\text{159}\) See O'Connell, supra note 12, at 435-40. It has been demonstrated that tort damage awards are far more lucrative than workers' compensation benefits. See notes 5, 34 supra. It follows that if a number of tort damage awards for injured employees are barred, the money previously used to finance such awards can be put to other uses. One such use would be the upgrading of workers' compensation benefits for all employees. See note 128 supra.

\(^\text{160}\) See text accompanying note 69 supra.

\(^\text{161}\) The Report of the National Comm'n on State Workmen's Compensation Laws (1972) concludes that workmen's compensation benefits are drastically inadequate. The same conclusion is reached in Burton & Berkowitz, Objectives Other Than Income Maintenance for Workmen's Compensation, 38 J. Risk & Ins. 343 (1971), and in Berkowitz & Burton, The Income Maintenance Objective in Workmen's Compensation, 24 Indus. & Lab. Rel. Rev. 14 (1970). Indeed, if the money saved by the curtailment of product liability suits by employees is not used to more fully compensate injured employees who are covered only by workers' compensation, the argument for the curtailment of such suits may lose merit. See notes 65-66 & accompanying text supra. The equity considerations of not treating consumers and employees too differently would militate against a curtailment of the employee's rights against third parties if there was not a corresponding increase in the value of workers' compensation benefits. See notes 65-66 & accompanying text supra.
Additionally, this approach would permit employees to assess more accurately the value of the risks in a particular type of employment. The employee's determination of whether he wants to confront a risk depends in large part on the extent of compensation he will receive if the risk materializes into an injury. Under the present state of the law, differing measures of compensation are given for injuries resulting from the same risk. With regard to machinery or other products, there is no reason, however, to suppose that the probability of product defectiveness is greater than the probability that injury will be caused by any of the sources of injury covered exclusively by workers' compensation. In fact, the converse is true: It is more likely that an injury sustained in the operation of a machine will be due to co-employee, employee, or employer negligence, or to an unavoidable consequence of industrial production. This follows because the greater deterrent of tort damages is applied to product defectiveness whereas only the limited financial impact of workers' compensation benefits deter sources of injury such as co-employee or employer negligence. Thus, under the present system, the value of exposure to risk cannot be accurately perceived by the employee because he is faced with a lottery: Depending on the source of the injury, the employee may or may not be able to obtain full tort compensation.

Finally, the proposed test would preserve the protection of strict products liability when the employee needs it most: when he is injured by a consumer product, and when the risk is not typical of the employment situation.

---

162. Suppose that working with a piece of machinery presents a risk of burns to the arms. Under the present law, if the source of injury from the risk is co-employee negligence or employer negligence, the employee is limited to workers' compensation benefits. If the source is a product defect, the employee can obtain the full compensation of tort damages.

163. All things being equal, under the present state of the law, the probability that products used on the job are defective should be less than the probability that a co-employee or an employer will be negligent and cause injury. This follows since the deterrent of tort damages is applied to product manufacturing, whereas the only deterrent to co-employee or employer negligence is the more meager deterrent of workers' compensation benefits. The reason the statement above is qualified by the phrase "all things being equal" is that the probability of injury from product defectiveness depends in large part on product characteristics. Some products may be incapable of being made safe—explosives for example. Such products may thus present high probabilities of causing injury. The fact remains, however, that even if the product is highly dangerous and presents a high probability of injury, the actual source of injury is not more likely to be product defectiveness than careless handling or negligent use.

164. See notes 148-52 & accompanying text supra.

165. It may be thought that the proposed test does not eliminate the dissonance between a worker who can recover tort damages for injuries sustained as the result of a defective consumer good and a worker whose remedies remain confined to the
CONCLUSION

Workers’ compensation was established at the turn of the century when tort law was still much steeped in the ideology of fault and wrongdoing as necessary prerequisites to compensation. This ideology of fault was seen as highly inappropriate for compensation of work-related injuries, and workers’ compensation emerged as a no-fault system of enterprise liability. Tort law, however, did not remain entrapped in the language of fault. In the 1960’s, strict liability emerged as the law governing product injuries. The rationalia and purposes of strict products liability have come to resemble those of workers’ compensation. Yet, paradoxically, the two systems of compensation continue to afford greatly differing measures of compensation. Within the realm of product-caused injuries incurred on the job, this paradox seems particularly apparent. It therefore becomes difficult to determine whether an employee injured by a product on the job should be compensated under workers’ compensation or strict products liability. The proper resolution of the paradox in terms of the employee’s rights against third party manufacturers would be to administer compensation for those product injuries typical of the employment under workers’ compensation and those not typical of the employment under the common law of strict products liability.

PIERRE JOHN SCHLAG receipt of workers’ compensation benefits. In a sense, this is true: There will be employees who suffer injuries caused by co-employee negligence or employer negligence and who are limited to meager workers’ compensation benefits. Other workers who are injured by defective consumer goods may be able to recover tort damages from third party manufacturers. This situation, however, underscores the tension between the level of protection given to consumers as opposed to the level of protection afforded by workers’ compensation. This tension cannot be resolved unless workers’ compensation is scrapped or strict products liability gives way to a no-fault system for product injuries. Meanwhile minor solace can be taken in the recognition that the proposed test treats employees injured by defective products more like consumers, when they occupy the position of consumers, and more like employees, when they occupy the role of employees.

166. See notes 17-30 & accompanying text supra.
167. See notes 36-57 & accompanying text supra.