Whatever the merits of the author’s decisions on when the history of various defences should end, such reviewer’s cavilling must not detract from a very well-written and interesting book. It deserves to be read as a whole, and there are thought-provoking arguments throughout, although the present reviewer would single out the chapters on damages (above), and “second publishers” (Ch.6) as especially rewarding. It is sad that legal history is seen as a minority pursuit, when much of the modern law cannot be properly understood without it. For the tort of defamation, there can be no excuses for such historical ignorance, with the advent of Paul Mitchell’s fine book. Every serious student of the law of torts should read it.

JONATHAN MORGAN.*


In this splendid, monumental and magisterial work, Professor David Owen lays out the complex liability issues that arise in the United States when a party sues a commercial supplier of a product for the physical damage that it caused to that party. At the outset, Owen gives separate treatment to four “theories of recovery”: negligence, by which he means negligent conduct; “tortious misrepresentation” which covers deceit, negligent misstatement and “strict liability in tort for misrepresentation”, a close analogue of contract liability for breach of an express warranty (see pp.153 to 154); contractual warranty under the Uniform Commercial Code, Art.2; and “strict liability in tort”. Since it is this last basis of liability that Europe broadly attempted to follow in the 1985 Product Liability Directive, this review will focus on this material.

During the 1960s the common law jurisdictions of the United States adopted a new tort. This was “restated” in §402A of the Restatement (Second) of Torts (1965) as:

“(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 . . . 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 . . .

(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

* Christ’s College, Cambridge.
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”

Note the similarities between §402A and the 1985 Directive: neither differentiates between allegations of defectiveness to do with design, information or manufacture; neither attempts a definition of defect; and neither makes any special accommodation for particular product types such as prescription drugs. Yet, as Owen carefully explains, after four decades of intense litigation most U.S. courts now: formally differentiate defect allegations and the test to be applied to each allegation; use relatively intricate tests for defectiveness; and have accorded special treatment to several classes of product, specifically prescription drugs and medical devices (pp.548 to 560, 604 to 620), food (pp.460 to 479) and repaired or used products (pp.1038 to 46).

Owen explains how U.S. courts approached the defect notion and why their initial attraction to a sociological standard based on whether the product was “dangerous to an extent beyond that which would be contemplated by the ordinary user” (p.54) turned sour (pp.292 to 301, 487 to 492). First, this actual-consumer-expectations standard of product safety, derived from the standard of product quality used for the warranty of merchantability, was found inadequate for all but the simplest products. In relation to most products, consumers have no expectations. For example, in the case of automobiles consumers have “no meaningful expectations as to the extent to which a vehicle may, or may not be compromised in the event of a collision at high speed” (p.491). Secondly, since any expectations [that are present] will encompass obvious dangers, the consumer expectations test “perniciously rewards manufacturers for failing to adopt cost-effective measures to remedy obvious dangers” (p.490). Thirdly, since the relevant expectations are those at the time of supply, the test is highly problematic in the case of durable products such as airplanes. When a plane, supplied in 1950, crashed in 1970, the test required the fact-finder to guess what consumer expectations might have been in 1950.

In my opinion the greatest of the many virtues of Owen’s book for foreigners is its careful exploration of the myriad issues that decades of intense litigation in the products field have thrown up. For example, when allegations concern the adequacy of product information, what factors are used to assess adequacy? Who should receive the warning? Need a sophisticated user be warned? What if a product is delivered in bulk? Or consider design allegations: what should be the effect on the claim of proof that the manufacturer had safer models in the product range? Of what relevance is it that a safety device was optional or removable? On these core matters of U.S. products liability law, there is no better treatment or finer resource available today than Owen’s book.
Certain features of this area of U.S. law are of particular note for foreigners. One factor that contributed to the immense impact that the creation of the new tort in §402A had on civil litigation in the U.S. is the “sole remedy rule”. U.S. lawyers are well aware of this rule and the dynamic it generates, so Owen’s treatise, which is primarily directed at that audience, does not emphasise it. However, some readers of this journal may not be aware that most US employees injured at work are unable to sue their employer because workers’ compensation is their “sole” remedy. Once the emergence of the rule in §402A provided employees with a route to tort-level damages, they began to point to some product with which they worked and to allege that its “defective” condition caused their injury. Any commercial supplier in the chain of supply from the manufacturer to the workplace could then be held liable in tort under §402A, regardless of whether that supplier had been careful. Although Owen, like most American lawyers, does not dwell on the resultant distortions, they seem extraordinary to the foreign eye. Thus, for example, where an employer buys an unguarded cutting machine and later his employee is severely injured by the blade, the employer escapes any tort sanction. The loss either remains on the victim (this is the result in jurisdictions that evaluate design defect using consumer expectations, see pp.296 and 490) or is shifted to one of the, perhaps entirely innocent, suppliers in the chain of supply of the machine (on the basis that the removability of the guard meant the machine’s risks outweighed its utility, see pp.302 and 315).

A second factor that fuelled U.S. plaintiffs’ interest in the new tort was the pro-consumer rhetoric with which it was accompanied—chiming as it did with the burgeoning U.S. consumer-rights movement in the 1960s. Although the Second Restatement described the new tort merely as a “special liability” on commercial suppliers of products, the tort rapidly became known in the United States as “strict products liability”. There was never any doubt that §402A imposed genuine strict liability on mere, that is non-manufacturing, suppliers: even if such a supplier could prove that he used all reasonable care this would be no answer to a §402A claim. The same is true of the liability of mere suppliers under the Directive. But the rhetoric was also used with respect to the liability of manufacturers under §402A so the question must be asked: were U.S. courts ever prepared to impose genuine strict liability on product manufacturers in this new tort? Do they now do so?

The most reliable litmus test for whether a liability is strict is whether a defendant can be liable for a risk that was not foreseen or reasonably foreseeable by him at the relevant time. Probably the most important class of products subject to such undiscoverable risks is that of prescription drugs, where there is a significant chance that deleterious side-effects will only emerge in statistically significant numbers after the product has been licensed for the market. So from his formidable knowledge and
understanding of the vast case law in the field (the Table of Cases runs to over 100 pages and contains thousands of cases), what does Professor Owen conclude? He concludes that strict liability for design defects has been imposed only extremely rarely on manufacturers. In the past few decades he has found only three such cases (p.700, fn.167). None involved a pharmaceutical. The same is true of allegations of defective product information brought against manufacturers under §402A: when in 1982 the New Jersey Supreme Court imposed strict liability in such a case, in effect for the manufacturer’s failure to warn of an undiscoverable danger in its product, virtually all U.S. jurisdictions, including New Jersey itself, swiftly repudiated strict liability and announced that claims of defective product information under §402A would be determined on the basis of negligence (pp.414, 571, 692 to 697). In short, as Owen eloquently explains and European lawyers should note, when push came to shove, U.S. courts refused to require manufacturers to conform to impossible standards in relation to design and product information allegations made under the rule in §402A. He states “the two pillars of modern products liability law in America” are “that manufacturers must guard against risks only if they are foreseeable, and that manufacturers must guard against those risks only by precautions that are reasonable” (p.38).

Yet, although I completely agree with this statement as it applies to the U.S. case law on the rule in §402A (and of course to claims in negligence), it is certainly not true where the claim is brought by a buyer against a seller for breach of the warranty of merchantability: see, e.g. Vlases v Montgomery Ward & Co, 377 F.2d 846 (3d Cir.1967) (under the Uniform Commercial Code, human inability to discover latent disease in chickens does not relieve the seller of its breach of implied warranty). Owen’s apparently broader claim illustrates a problematic ambiguity in his otherwise outstandingly lucid work. Under the rubric of “products liability”, Owen apparently sets out to deal with all claims that might be made against a commercial seller of products relating to harm caused by the condition of the product; but almost immediately he notes that “products liability law generally includes only claims for personal injury, death and property damage” (p.1). This renders ambiguous later key claims about “products liability”, such as that cited above from p.38.

A second concern I have with the book is the odd relation of its coverage to its structure. Owen does not separately address each potential cause of action exhaustively, but instead merely introduces each in Pt I. Thereafter, he deals with issues such as product defectiveness (Pt II) across all causes of action. To the foreign eye still wedded to cause-of-action as the primary classification system, this results in a very strange sequence of discussion. Thus, within the treatment of product defectiveness we get a discussion of an allegation of manufacturing error when made in negligence, then when made in a warranty claim and then when made in a special products tort
claim (pp.440 to 444). The arrangement becomes even more complex when the discussion shifts to allegations relating to the design of a product. Owen states that

“manufacturers and other sellers are subject to liability for defective design under each of the major theories of liability [negligence, warranty and special products tort].”

He then discusses the consumer expectations and risk-utility tests for “defect”. Here Owen seems to adopt the approach of Restatement (Third) of Torts: Products Liability (1998) which controversially restated products liability rules “functionally rather than in terms of traditional doctrinal categories” (§2, comment “n”). In my view this conflation of the distinct standards under the different causes of action (negligence, unmerchantability and defectiveness) was a mistake. It submerges issues and sometimes makes Owen’s text hard to use, even for the cognoscenti. For example, Owen’s arrangement suggests that a jurisdiction could choose to assess the standard in negligence, namely breach of the standard of care, by consumer expectations. But surely this is impossible. On the one hand “barring state-of-the-art evidence is logical under a pure consumer expectations test for defectiveness” (p.682), yet this runs counter to the indisputable fact that state-of-the-art evidence is always admissible in U.S. negligence claims. Moreover, by separating, say, the discussion of design allegations in negligence from the discussion of product information allegations in negligence, we do not get a clear picture of the important inter-dependence of those allegations within the cause of action.

A third problem with the book’s structure, related to the first two, is that “limitations on defectiveness” such as the obviousness of the danger and arguments based on compliance with the state of the art are dealt with separately (Ch.10). As a result, the discussion becomes difficult to unravel, at least for foreign lawyers dealing with domestic descendents of §402A, who want answers specific to those particular causes of action. We are eager, for example, to hear the story about how U.S. courts refused to implement the rhetoric of strict liability for design and product information claims under §402A. Similarly, we want to understand the technique by which jurisdictions that embraced the consumer expectations standard for design allegations under §402A were, nonetheless, able to shield prescription drug manufacturers from liability. Although most of the answers to such questions are in Owen’s book, they are not as readily accessible as a different structure would have made them.

But these reservations about the book’s structure must be seen in the context of a different legal culture. U.S. courts have been considerably more adventurous with doctrine and with the boundaries between causes of action in this area than non-U.S. common law courts have been. Indeed,
the new tort recorded in §402A arguably began in Mazetti v Armour & Co, 135 P. 633 (Wash. 1913), when a single trial judge simply abandoned the doctrine of privity and successfully decided that a commercial buyer of food should be able to sue the distant seller in warranty. Today, just as the various state enactments of the Uniform Commercial Code have made the U.S. law on warranty hugely complex, so too state versions of the rule in §402A are riddled with variables, e.g. one jurisdiction might apply the consumer expectations standard to design allegations under §402A, while applying risk-utility to product information claims under that rule. Thus, my reservations about Owen’s chosen structure are tempered by an acknowledgement that no single structure would have enabled all his astute points to be made with maximum impact.

There are some other minor reservations that a foreigner might point to: there is surprisingly scant attention to the major doctrinal innovations that the asbestos disaster has provoked from U.S. courts; and British lawyers will not find a clear account of certain profound issues currently confronting its appellate courts such as how tort law should handle the pleural plaques cases. Yet, overall, there is no better modern account of U.S. products law than Owen’s work: it is a terrific achievement. Every torts professor should have this by his or her elbow when teaching U.S. products liability: I certainly do. Non-U.S. lawyers with an interest in the field would also do well to acquire this rewarding work.

JANE STAPLETON.*


Tort liability for public authorities lies on the crossroads of public and private law. The interaction of tort law, administrative law and constitutional rights makes it a complex area. Lord Browne-Wilkinson, reflecting upon the decision in X (Minors) v Bedfordshire CC and M (A Minor) v Newham LBC [1995] 2 A.C. 633 said, extra-judicially, that the judge determining whether a common law duty of care occurs in a statutory framework is in “a nightmare world”.

To the inherent complexity of tort liability for public authorities in the common law and Lord Browne-Wilkinson’s “nightmare”, one has to add the impact of the European Human Rights Convention (“ECHR”) and the Human Rights Act 1998. This is not yet (and probably never fully will be) worked out. The European Court of Human Rights has accepted, at least for now, that the incremental common law method does not entail an immunity which would be prohibited under the ECHR. The volume of case

* Australian National University; University of Texas.

Keywords to follow