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Torts of Electric Utilities: Can Strict Liability be Plugged In

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TORTS OF ELECTRIC UTILITIES: CAN STRICT LIABILITY BE PLUGGED IN?

I. INTRODUCTION

Electricity, as well as the hazards of electricity, is a fact of life in the United States. Indeed, accidents involving electricity run the gamut of one's imagination from the commonplace to the bizarre. Fire caused by electric sparks is an annual occurrence during the California dry season and many homes are lost yearly due to electricity related accidents. Less common occurrences may have even more tragic results. Not long ago, an individual, standing on a fire escape, attempted to unscrew a light bulb in a street lamp because it had been disturbing his sleep. He was electrocuted.

Moreover, there has been no scarcity of personal injury/property damage tort litigation involving electric utilities. Thus, one might expect the issue of strict liability in tort as applied to electric utilities to have been broached by the California courts long ago. Surprisingly, neither the appellate courts nor the state supreme court have ever addressed this subject. However, varying approaches to this issue have recently appeared in the superior courts of California. In Orange

1. Figures derived from National Safety Council statistics show an increasing number of accidental deaths nationwide caused by electric shock. For example, electric shock was the cause of 1088 deaths in 1972, 1149 in 1973, 1157 in 1974, and 1224 in 1975 (latest figures available). The 1975 figure of 1224 deaths caused by electric shock was broken down into four categories: (a) home wiring and appliance—258; (b) industrial wiring and appliance—158; (c) other electric current—662; and (d) unspecified electric current—146. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 12 (1977).

These figures, of course, do not take into account personal injuries not resulting in death or property damage caused by electrical accidents. Moreover, there is no way to determine how many of these deaths were attributable to a utility company.


5. The terms "products liability" and "strict liability" are differentiated in this article. Products liability encompasses many different tort theories which permit recovery for injuries caused by defective products. Strict liability holds the manufacturer or retailer of a product liable for defective products in the absence of fault. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(1)-(2) (1978). In California, although not in all other jurisdictions, the terms are often used synonymously.
County, the superior court overruled a demurrer to a count of strict liability where a resident suffered burn injuries while attaching a citizen's band radio antenna to the roof of his house. The antenna had come in contact with (or was close to) the utility wires near the roof, resulting in an electrical arc. A demurrer to strict liability allegations was similarly overruled in litigation arising from the devastating Santa Barbara fire of 1977, allegedly caused by sparks resulting from the contact of a kite with various electric utility wires. However, in two actions arising out of the crash of a helicopter into utility wires, the courts of two counties refused to entertain the notion that utilities could be held strictly liable for the placement of their wires.

The purpose of this comment is to discover whether this "grass roots" movement in respect to electric utility liability in California is foreshadowing an expansion of strict liability to electric utilities; and if so, whether such expansion constitutes a basic misunderstanding of strict liability principles. An analysis of strict liability law and policy favors this contention.

7. Utility companies prefer to label their power lines as "conductors" rather than wires.
8. Baumgartner v. Southern Cal. Edison Co., Civ. No. 118854 (Santa Barbara County Super. Ct., filed Aug. 25, 1977). But see Firemen's Fund Inc. v. Southern Cal. Edison Co., Civ. No. 120880 (Santa Barbara County Super. Ct., filed Jan. 23, 1978). This latter action was instituted as a result of the same fire as in Baumgartner; however, the strict liability claim was dismissed without leave to amend.
10. See note 104 infra and accompanying text. Plaintiffs seek to invoke the doctrine of strict liability and defendants attempt to avoid its use, because under strict liability, a plaintiff's chance of recovery in a personal injury/property damage cause of action is greatly enhanced. When using strict liability, a plaintiff does not have to prove that the defendant acted in an unreasonable manner either in the manufacture of the specific product in question or in the defendant's manufacturing process in general. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Until very recently, California plaintiffs relying upon a strict liability cause of action had the additional advantage of not being accountable for their own negligence; however, that is no longer true. Daly v. General Motors Corp., 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978).
11. The opposing considerations involved in expanding strict liability to electric utilities have been described as follows: "Novelty, of itself, does not foreclose consideration of plaintiff's contentions in this field of developing tort law. . . . Neither does it justify a headlong leap to impose strict liability unless, based on proper policy considerations and reason, such liability should be found." Magrine v. Krasnica, 94 N.J. Super. 228, 229, 227 A.2d 539, 540 (Hudson County Ct. 1967) (citation omitted), aff'd sub nom. Magrine v. Specter, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968) (per curiam), aff'd, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam).
II. DEVELOPMENT OF ELECTRIC UTILITY TORT LIABILITY IN CALIFORNIA

In California, litigation involving utilities based on personal injury or property damage claims has always been governed by the law of negligence. In Giraudi v. Electric Improvement Co.,\textsuperscript{12} one of the earliest California cases addressing the liability of a utility company for damage caused by electricity, the California Supreme Court stated that “[d]efendant [utility] was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property.”\textsuperscript{13} The negligence rule became so well entrenched that in 1933 a California appellate court could state that “[t]he rule has oftentimes been expressed that defendant electric company is not liable unless it could reasonably have anticipated the danger.”\textsuperscript{14}

Although courts have described electricity as a “dangerous quantity of electric fluid”\textsuperscript{15} which is carried by “deadly wires,”\textsuperscript{16} the supplying of electricity in California has never been held to be an ultrahazardous activity.\textsuperscript{17} This result is probably due to the requirement that an ultrahazardous activity not be a matter of common usage.\textsuperscript{18} The ultrahazardous activity rule is not applied where the person harmed by the activity “has reason to know of the risk which makes the activity ultrahazardous and . . . takes part in it, . . . [or is] a member of the public entitled to the services of a public utility carrying on the activi-

\textsuperscript{12}107 Cal. 120, 40 P. 108 (1895).
\textsuperscript{13}Id. at 124, 40 P. at 109 (emphasis added).
\textsuperscript{15}Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 184, 106 P. 587, 588 (1910).
\textsuperscript{17}Even though a fireman was killed when he came in contact with a live wire, the court in Pennebaker came to the conclusion that wires carrying only 260 volts were not “deadly.” Id.
\textsuperscript{18}Luthringer v. Moore, 31 Cal. 2d 489, 498, 190 P.2d 1, 7 (1948). Liability for an ultrahazardous activity is not to be confused with strict liability. One is “absolutely” liable for injuries caused by his performance of an ultrahazardous activity. Id. at 492, 190 P.2d at 3. The terms “absolute” and “strict” liability were used interchangeably in 1948. Id. However, the absolute liability attached to the performance of ultrahazardous activities is more stringent than “strict liability.” While both forms of liability attach liability without fault, a defendant possesses narrower defenses when he has performed an ultrahazardous activity. See generally id. at 495-96, 190 P.2d at 7; compare 4 Witkin, SUMMARY OF CALIFORNIA LAW §§ 802 (8th ed. 1974) (ultrahazardous activity) with id. §§ 835-840 (strict liability).
While California utilities have always been governed by the laws of negligence, the standard of care imposed has not been consistently defined. An appellate court, in *Holmes v. Southern California Edison Co.*, permitted the use of a jury instruction which imposed “the highest or utmost degree of care in the construction, maintenance and operation of said wire.” However, *Polk v. City of Los Angeles* gives perhaps the best definition: “Among the circumstances [to be considered] are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes . . . . Hence the care used must be commensurate with and proportionate to that danger.”

These still viable liability standards set for California utilities were defined well before the historic decision of *Greenman v. Yuba Power Products, Inc.* which established the doctrine that manufacturers should be held strictly liable for injuries caused by their products. Of course, most products automatically fall under the *Greenman* doctrine. However, in the past, utility service had always been classified as just that, a service, and hence has escaped the *Greenman* doctrine. Until recently, traditional negligence liability standards were in effect and

19. 31 Cal. 2d at 499, 190 P.2d at 7 (quoting Restatement of Torts § 523, Comment d (1938)).
20. The development of utility tort liability in California has generally paralleled its development in the great majority of jurisdictions which also base such liability on the laws of negligence. One interesting exception to the general pattern occurred in Maryland where, for a time, strict liability was imposed on electricity pursuant to the rule of *Rylands v. Fletcher*, 19 L.T.R. (n.s.) 220 (H.L. 1868). The concept was applied as follows:
   The basic concept underlying the rule [of *Rylands v. Fletcher*] is that a person who elects to keep or bring upon his land something which exposes the adjacent land or its owner or occupant to an added danger should be obliged to prevent its doing damage. So, it follows that if the escape be of oil, gas, electricity . . . and damage is done to an adjacent property, the occupier is within the rule.
   However, Maryland has discontinued use of this theory, and its utilities are governed by the laws of negligence at this time. See generally Southern Md. Elec. Co op. v. Blanchard, 239 Md. 481, 212 A.2d 301 (1965).
   In California, the *Rylands* doctrine of ultrahazardous activity (as applied to electric utilities) was dismissed by *McKenzie v. Pacific Gas & Elec. Co.*, 200 Cal. App. 2d 731, 736, 19 Cal. Rptr. 628, 631 (1962) and has not been seriously considered by subsequent cases.
22. Id. at 55, 177 P.2d at 39.
23. 26 Cal. 2d 519, 159 P.2d 931 (1945).
24. Id. at 525, 159 P.2d at 934.
26. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
not questioned.28

A. Product or Service?

The logical beginning for this discussion is to determine whether a utility supplies a product cognizable in strict liability. The distinction between product and service is crucial; providers of services are not held strictly liable for defects in their performance.29 Since no California case has ever defined electricity as either a product or a service, discussion and application of traditional product/service criteria is necessary.

The extremes on the California product/service continuum stand out fairly well. In Allied Products v. John A. Blume & Associates30 the defendant was hired to conduct a study of the engineering feasibility of constructing a small boat pier in front of the plaintiff's hotel. For various reasons the engineering study was defective, and the pier was of little use to the hotel's patrons. The court had no difficulty in coming

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28. Two post-Greenman cases, Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972) and Scally v. Pacific Gas & Elec. Co., 23 Cal. App. 3d 806, 100 Cal. Rptr. 501 (1972), decided issues which determined the liability of electric utilities for injuries proximately caused by the supply of electricity without mentioning strict liability. See also Williams v. Detroit Edison Co., 63 Mich. App. 559, 572, 234 N.W.2d 702, 709 (1975), wherein the court stated that "California continues to hold its electric power line companies to the standard of reasonable care under the circumstances."

29. Gagne v. Bertran, 43 Cal. 2d 481, 487, 275 P.2d 15, 20 (1954); Swett v. Gribaldo, Jones & Assoc., 40 Cal. App. 3d 573, 575-76, 115 Cal. Rptr. 99, 101 (1974). Actions brought on the theory of strict liability in tort look to the pre-Greenman case of Gagne for authority that a supplier of services will not be held liable for injuries suffered in connection with those services in the absence of fault. Although the Gagne case was decided with respect to implied warranty and not strict liability in tort, it is clear that the somewhat similar theories employ the same criteria in determining whether a particular transaction is the transfer of a product or the supplying of a service. Thus, Allied Properties v. John A. Blume & Assoc., 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259, 263 (1972) could speak of warranty and strict liability in the same breath while stating that services were not meant to be included in either doctrine. Other courts are in agreement with the Allied Properties view:

Under California law, whether plaintiff brought her suit against [defendant] on the theory of breach of implied warranty or strict liability, "the basic elements to be proved [under either theory] are the same." This Circuit has similarly held that "under either approach [breach of implied warranty or strict liability] the elements remain the same." Thus "[t]he difference is largely one of terminology."


to the conclusion that engineering studies were pure services and employed the well settled rule in California "that where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply." One of the clearest illustrations of the dichotomy between product and service in California is illustrated by *Stuart v. Crestview Mutual Water Co.* There, the developer of tract homes installed a defective water system and was held strictly liable, but the engineer designing the system was not subject to liability in the absence of negligence. Thus, in those situations where the product element clearly predominates over the service element in producing an injury, the courts will find the tort-feasor within the bounds of strict liability. For example, an owner of a laundromat providing a clothes cleaning "service" to the public was liable as a licensor for injuries resulting from defective products furnished to the public for their use.

Arthur Dunne, writing on strict liability in California, views the product/service precedents as falling into three main categories, namely: (1) where purely professional or advisory services are performed; (2) where a product is used by the supplier in the performance of a service; and (3) where in the course of supplying a service, the customer is given a product to use. The probability that a court will find that a product exists for the purposes of strict liability increases as the factual situation travels the continuum from category one to three. For example, an engineering study belongs in category one; the use of a defective needle in the performance of medical services illustrates category two; and the supply of furniture by a landlord is an example of the third.

A more liberal means of analyzing the product/service problem, favored by some courts and numerous writers, is the application of strict

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31. *Id.* at 855, 102 Cal. Rptr. at 264. See note 34 infra and accompanying text.
33. *Id.* at 811, 110 Cal. Rptr. at 549.
34. *See* Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973); Newmark v. Gimbel's, Inc., 54 N.J. 585, 246 A.2d 11 (1968). In the latter case a hairdresser was held strictly liable for an injury which resulted when he used a defective shampoo in the performance of his "service."
37. *Id.*
liability where the transfer or use of a harmful product has occurred, even though there is also a strong "service" element in the overall transaction. It has been reasoned that when a product changes hands within a commercial relationship, "[t]he additional element of service should not logically preclude the application of a warranty."41

Professor Reynolds, an advocate of this latter method of analysis, used electricity to demonstrate the point: "Thus, if unmerchantable electricity is supplied by a utility, breach of implied warranty may be found. In such a case, the essence—perhaps the entirety—of the 'service' performed consists of transfer of a product."42 This analysis appears to represent the current trend of thought on the product/service issue.43

Nevertheless, there is much authority in California that the mere transfer of a defective product while performing a service will not automatically make one strictly liable in tort. A doctor who prescribes a drug which is alleged to be defective will not be held liable on a strict liability theory.44 A hospital which supplies blood to a patient will not be held strictly liable for supplying defective blood.45 However, a key factor in the court's decision in the latter instance which is missing when applied to utilities is the fact that "a hospital is not engaged in the business of distributing blood to the public and does not put the blood on the market in order to profit therefrom."46 While, like a hospital, the business of an electric utility is cloaked in the public interest,47 a utility's business consists solely of selling electricity to the public.

It is difficult to escape Professor Reynolds' conclusion that "the essence—perhaps the entirety—of the 'service' performed consists of the transfer of a product."48 The services performed by the utility are inci-

42. Reynolds, supra note 41, at 308.
46. Id. at 611, 109 Cal. Rptr. at 135 (emphasis in original). While it is true that CAL. HEALTH & SAFETY CODE § 1606 (West 1970) played a large role in the court's decision, it would be a mistake to ignore the excellent product-service analysis in the court's opinion. 33 Cal. App. 3d at 609-11, 109 Cal. Rptr. at 133-35.
48. Reynolds, supra note 41, at 308.
dental and supplemental to the transfer of electricity. Usually the consumer has personal contact with the utility only when utility linemen come to restore the supply of electricity when lines have been damaged, or to start and stop the flow of electricity to his residence. Thus, the furnishing of electricity is unlike the benefit performed by engineers, doctors, architects and others, who if using a "product" at all, do so only as incidental to their personal efforts.

Furthermore, "[i]n recent years there has been a marked trend toward the placement of 'hybrid' product service transactions in the no-fault category."\(^{49}\) While it is true that electricity has always been characterized as a service, that characterization has merely been assumed. It has never been significant until now that such a characterization had been made, as the law of negligence covered both concepts. Before making a final conclusion on whether furnishing of electricity is a service or a product in California, it would be beneficial to see how other jurisdictions have treated this issue.

An Indiana case, *Helvey v. Wabash County REMC*,\(^ {50} \) held that electricity was a "good" subject to the Uniform Commercial Code. After determining that electricity was "(1) a thing; (2) existing; and (3) movable"\(^ {51} \) the court concluded that "[l]ogic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and movable requirements of goods."\(^ {52} \) It is interesting to note that *Helvey* relied on two very old California cases\(^ {53} \) in coming to its conclusion. However, those cases have never been cited by a modern California court for the proposition that electricity is a "good" or a product subject to implied warranty or strict liability laws.

*Helvey's* applicability to strict liability actions was assured by the later Indiana case of *Petroski v. Northern Indiana Public Service Co.*\(^ {54} \) Defendant had conceded that electricity, once it reached the con-


\(^{50}\) 151 Ind. App. 176, 278 N.E.2d 608 (1972).

\(^{51}\) *Id.* at 179, 278 N.E.2d at 610.

\(^{52}\) *Id.*

\(^{53}\) *Id.*

Electricity is a product which can be sold within the meaning of § 402A... Furthermore, a literal “sale” of goods is not necessary for application of § 402A... the test is not whether there has been a technical sale but rather whether the product has been placed in the stream of commerce.

Williams v. Detroit Edison Co., a Michigan appellate case, took a different approach. In that case the boom of a back hoe struck and felled a power line which then electrocuted the deceased. The court analyzed the product/service issue in this manner:

At the outset of our discussion, we note that the “product” involved in this case is not a tangible item like an automobile, punch press or Coca-Cola bottle. Rather, it is a form of energy which in this case consisted of 7600 volts traveling in an uncovered line about 28 feet above the ground. Electricity is a service rather than a “good,” but the doctrine of implied warranty has been held to apply to its sale.

The court concluded that “the doctrine of implied warranty in tort applies to a ‘products’ liability case involving electricity.” In the final analysis the Williams court refused to apply implied warranty be-
cause there was no transfer of the product from the manufacturer into the stream of commerce.\textsuperscript{60}

All other cases which have refused to apply strict liability to the torts of electric utilities have done so on grounds other than a belief that utilities provide a service rather than a product.\textsuperscript{61} Most cases simply assume that electricity is a product of sorts and base their analysis on other grounds.\textsuperscript{62}

Adding the decisions of outside jurisdictions which have not had much difficulty in determining that electricity is a "product," or at least will be treated as such, to the previous analysis of product/service transactions in California, it appears likely that the California courts will construe the delivery of electricity as a "product" transaction. However, the classification of electricity as a product is most certainly not the end of this discussion. There still remain the questions concerning the nature of "defective" electricity and the point in the distribution process at which electricity enters the stream of commerce and becomes a product.

\textbf{B. What is "Defective" Electricity?}

Formulating a workable definition of "defective electricity" is an obstacle to the imposition of strict liability in tort for injuries caused by electricity. However, it is an obstacle that can be overcome.

In August of 1971, a football coach in a southern Texas school district attempted to erect football goal posts for the upcoming season. The goal posts were constructed of iron pipe and had been welded together some distance from their intended placement. In order to get the goal posts to the field, the football coach and five other persons began "walking" the "H" shaped goal post to the field. In so doing,

\begin{itemize}
\item \textsuperscript{60} Id. at 567-68, 234 N.W.2d at 707. See notes 96-109 infra and accompanying text.
\item \textsuperscript{61} See, e.g., Genaust v. Illinois Power Co., 62 Ill. 2d 456, 463, 343 N.E.2d 465, 469 (1976) ("Assuming, arguendo, that electricity is a 'product' . . . ."); Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 353, 355 (Tex. Ct. App. 1974) ("Even if it be assumed that the doctrine of products liability extends to the sale of electricity . . . .").
\item \textsuperscript{62} For the most part, analogous utilities such as natural gas suppliers and water districts have not considered whether their commodities should be classified as a service or a product and generally are not liable in the absence of fault. See 29 CAL. JUR. 3d Electricity, Gas and Steam §§ 26-32 (1976); Annot., 20 A.L.R.3d §§ 1-3 (1968) (The doctrine of Rylands v. Fletcher is applicable in only a few states.). But see Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Ct. App. 1975) in which a water utility was held strictly liable for contamination of its water supply. Telephone companies are presumed to supply a service not cognizable under the doctrines of strict liability and implied warranty. See generally Gaultier v. General Tel. Co., 234 Cal. App. 2d 302, 44 Cal. Rptr. 404 (1965).
\item Although the scope of this comment only includes electric utilities, the concepts expressed herein would for the most part apply to other utilities.
\end{itemize}
one of the uprights came in contact with an uninsulated wire. The
coach and one other person were killed, and the remaining four men
were burned in varying degrees.63 A wrongful death action was filed
against the local utility, the complaint alleging in part:

(1) The . . . "electrical product in question in this case . . ." was defec-
tive in that the " . . . wires were too low." (2) The product was also de-
fective because defendant failed to warn the public in general, and the six
men who were moving the goal posts in particular, of the dangers in-
volved in " . . . coming within the zone of danger of the product."64

The court held: "Even if it be assumed that the doctrine of products
liability extends to the sale of electricity, it was incumbent on plaintiffs,
if they seek the protection of the doctrine embodied in Section 402A of
the Restatement . . . to show a defect in the electricity."65

The allegations concerning the wires fared no better in the court's
opinion: "Again the unreasonable risk of injury was created, not as a
result of any alleged defect in the wire, but, according to the petition,
by the fact that the wire was not placed high enough above the
ground."66

The problem in formulating an adequate definition for the term "de-
fective product," as evidenced by the case above, is a problem that has
plagued all courts attempting to set guidelines for the imposition of
strict liability. Perhaps a workable, all-encompassing definition of de-
fect will never be achieved.67 Yet, such a definition is the foundation
of all strict liability. "The predication of the manufacturer's liability
on a defect in the product precludes compensation for injuries from the
use of non-defective products. Thus the manufacturer's liability de-
pends on what is meant by defective."68

Consideration of the common definitions of "defect" and their appli-
cation to the generation of electricity reveals several criteria for deter-

64. Id. at 355.
65. Id. at 355-56.
66. Id. at 356.
67. Although a substantive definition of defect may be difficult to arrive at, the procedu-
ral allegations are well known in California. A plaintiff need only allege that a defective
product proximately caused his injury. Hauter v. Zogarts, 14 Cal. 3d 104, 121, 534 P.2d 377,
387, 120 Cal. Rptr. 681, 691 (1975). A plaintiff need not allege that he was unaware of the
defect nor does the defect have to be one that subjects the user or a bystander to an unrea-
sonable risk of harm. Id. See also Luque v. McClean, 8 Cal. 3d 136, 501 P.2d 1163, 104
Cal. Rptr. 443 (1972) (plaintiff not required to prove lack of awareness of defect).
68. Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn.
mining defectiveness. Deviation from the norm of safety is a frequently used definition. If an item is poorly constructed or missing a vital part and thereby causes injury, the particular product deviates from the norm of safety evidenced by properly constructed products. However, this criterion has been criticized as over-inclusive, since the product can deviate from the norm and still not be defective, depending on the level of standards set for the "norm of safety."

Another well-known definition states that a defective product is one "unfit for its ordinary purpose or use." This theory is somewhat limited in its application because of the inherent requirement that the product be used in a foreseeable manner at the time of the injury. This test requires a judgment by the jury with respect to the knowledge that the manufacturer should have had with respect to potential uses of the product and any injuries likely to result from such use.

The application of the "unfit for use" theory is obviously limited when applied to the supplying of electricity. The "product" is being used only when it reaches the consumer's residence or business. This theory cannot encompass those accidents which happen prior to the time of the electricity's intended use.

Arthur Dunne has attempted to state an exhaustive definition of a defective product in California. The elements of this definition are: (a) the condition of the product must cause harm to person or property when properly used; (b) the condition of the product has an unsafe aspect which could be eliminated or made safer without affecting the planned use of the product; (c) the defect can stem from material, workmanship, design; (d) the defect need be one which renders a product unreasonably dangerous; (e) no elements of negligence need be present; and (f) the defect may be created after the product leaves the supplier by the supplier's failure to perceive possible conditions which make the product unsafe.

Two allegations are generally made which attempt to fit the supply of electricity into these traditional definitions: one, that the electricity

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69. "Defect becomes a fiction, however, if it means nothing more than a condition causing physical injury." Id. at 372 (emphasis in original).
70. Id. at 367.
71. This theory has been borrowed from the doctrine of implied warranty of merchantability. Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 384, 482 P.2d 681, 684, 93 Cal. Rptr. 769, 772 (1971).
73. Dunne, supra note 36, at § 47.
per se is defective; or, more commonly, that the instrumentalities supplying the electricity are defective. The former allegation is limited to those rare instances where the current supplied is either so abnormally powerful or so weak that damage results to property. This type of defect allegation fits easily into the "deviation from the norm" definition but its use would appear to be so limited by the rarity of the condition and minimal resulting damage as to not warrant further discussion here. Furthermore, this type of allegation precludes strict liability for "black-outs." There is nothing defective about the electricity during a blackout; if liability can be imposed at all, it is because some aspects of the utility's operations are deficient.

Most injuries and property damage caused by electricity occur in situations where the electricity has merely conformed to the laws of nature. The allegation that the wires or poles are defective for having allowed the electricity to "escape" usually fails. Generally, the utilities are not the entities which have manufactured these items for sale; indeed if they have manufactured them at all, it has only been for their own use. The courts, in order to uphold such allegations, would either have to view the power lines as the "packaging" of the electricity or rationalize that items such as the power lines are so necessary to supplying electricity that for all practical purposes the power lines and the electric force are the same item.

Holding a manufacturer liable for injuries caused by the packaging of his product is not an uncommon theory. However, one out-of-state electric utility case which dealt with a packaging theory, Genaust v. Illinois Power Co., rejected that theory summarily as illogical and distorting the meaning of "package" beyond any ordinarily understood meaning. Even the liberal California judicial system would be reluctant to stretch the clear meaning of the word "package" to encompass situations involving utility wires. On the other hand, the idea that the power lines and electrical force constitute the same item might be slightly more palatable in California. Although this premise is scientifically inaccurate, the California courts are not adverse to creating legal fictions to serve practical purposes. If California courts were willing to go this far, some of the standard definitions of defect would

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75. See cases listed in Annot., 81 A.L.R.2d 350 (1962).
76. 62 Ill. 2d 456, 343 N.E.2d 465 (1976).
77. Id. at 464, 343 N.E.2d at 470.
78. An employer's imputed negligence under the doctrine of respondeat superior is a good example of this practice; constructive trust is another. See Hinman v. Westinghouse
be applicable to situations where electricity causes an injury. For example, if an injury was caused by a lack of insulation or faulty insulation on a distribution wire, the courts could very well apply a theory based on deviation from the normal insulation of distribution wires.

Two standards used in determining whether a product is defective remain to be analyzed. In certain situations failure to warn of a dangerous condition will constitute a product defect and in other situations a defective design is a basis for strict liability.

The "failure to warn of a dangerous condition" theory works well when applied to traditional products but is not practical when applied to utilities. For example, adequate warning is required of a drug manufacturer so that his product does not cause injurious side effects to persons who would have used the drug correctly or abstained from its use had they known of its potential danger. This warning is required whenever the manufacturer knows or should have known about the danger. Of course, it can hardly be disputed that utility personnel know that their "product" is potentially dangerous to people who happen to be close to a source of electric current. Is a warning required upon penalty of strict liability, for example, that the charge "stored" in uninsulated power lines may arc if a conductive material comes within a specified distance? Cases which have dealt with the subject when attempting to determine the applicability of strict liability have held that such a danger is common knowledge. At present, California does not require a manufacturer to warn of potential dangers which are generally known and recognized in a product. Therefore, strict lia-


81. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 710-11, 60 Cal. Rptr. 398, 414 (1967). The court further commented: "But where the facts disclose that the drug has not been properly prepared or has been placed upon the market and sold without adequate and proper warning, strict liability for resulting injury may be found." Id Toole involved a situation where the manufacturer knew of dangerous side effects, yet gave no warning.

82. Id. at 710, 60 Cal. Rptr. at 413. The negligence concept expressed in the text can be recognized immediately. This concept has been engrafted onto the doctrine of strict liability for a failure to warn and remains to this day. Midgley v. S.S. Kresge Co., 55 Cal. App. 3d 67, 73, 127 Cal. Rptr. 217, 221 (1976).


bility for failure to warn appears useful only when imposed for a defective method of warning. 85

The decision as to whether or not a duty to warn exists is determined by a policy judgment which applies equally to negligence and strict liability. 86 Once the policy decision is made that all dangerous conditions created by the transmission of electricity must be warned against, only then is strict liability of importance in determining whether or not to hold the utility liable in the absence of fault. The duty to warn imposed on manufacturers of products is one which is inherent in the doctrine of strict liability; manufacturers have an obligation either to provide safe products or bear the losses for failing to do so. 87 However, no such universal duty has been imposed on the suppliers of electricity; for example, electric utilities are not under a duty to insulate their transmission and distribution lines in all areas at all times. 88 Thus, the question of duty as applied to dangerous conditions created by electric utilities must be made on a case-by-case basis. An adequate definition for defective electricity cannot find its roots in the "failure to warn" theory.

There still remains the question of defective design. Plaintiffs could be expected to set forth various allegations concerning defective design. For example, a claim might be made that underground placement of (1976).

But see Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 178, 496 P.2d 1276, 1281, 101 Cal. Rptr. 908, 913 (1972) where the court in a negligence action indicated that utilities have a duty to warn persons of the danger of coming in contact with the light bulb on a utility light pole.


A rule imposing an obligation upon a manufacturer (or seller) to give a suitable warning and a rule conditioning liability upon the fact of knowledge or reason to acquire knowledge are rules fixing duties of care. Since violation of a duty of care has always been an element in the definition of negligence, the rules expressed in comment j of the new Restatement [Torts, § 402A], although stated as an adjunct to "strict" liability are merely well stated rules already a part of the law of negligence. 86. Id. at 72, 127 Cal. Rptr. at 220 (quoting and relying on Oakes v. E.I. DuPont de Nemours & Co., 272 Cal. App. 2d 645, 650 n.4, 77 Cal. Rptr. 709, 713 n.4 (1969).

86. Id. See note 85 supra.


88. Scally v. Pacific Gas & Elec. Co., 23 Cal. App. 3d 806, 815-16, 100 Cal. Rptr. 501, 507 (1972). Thus, the statement in Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 53, 46 Cal. Rptr. 552, 558 (1965) "that a product, although faultlessly made may nevertheless be deemed 'defective' under the rule and subject the supplier thereof to strict liability if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. . ." is only applicable when a duty to provide a safe product under all foreseeable circumstances has been assumed. Midgley v. S.S. Kress Co., 55 Cal. App. 3d 67, 72, 127 Cal. Rptr. 217, 220 (1976).
dangerous power lines is a feasible design alternative. If California desired not to follow the Genaust theory, a plaintiff might assert that the electrical product was contained in a defectively designed “package.”

The California Supreme Court has recently restated its definition of design defect. A design is defective:

(1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or

(2) if the plaintiff proves that the product’s design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

The first definition is of little use for electrical accidents which occur outside the home or business, since by its terms the definition applies only to a “used” product. However, the second definition does not depend on use and analytically could be applied to any situation in which electricity is considered a product if one also considers such items as conductors and poles as part of the product or its packaging. Because the power lines and other instrumentalities used in the transmission of electricity are not intended for public use, they realistically cannot be considered products themselves. As stated above in the discussion of the Genaust case, Illinois has rejected the packaging theory as a possible means of establishing product defect; the theory gains no more credence when employed in the area of design defect. However, it is arguable that the California Supreme Court might consider the electricity itself and the instrumentalities used in its transmission to be so interrelated as to be one and the same item for liability purposes. Thus, a defect in the design of one would comprise a de-

89. See text following note 148 infra.
90. See notes 76-77 supra and accompanying text.
91. Barker v. Lull Eng’r Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978). The “relevant factors” referred to by the court include:

[i]t the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
93. See notes 76-77 supra and accompanying text.
94. At this point, one can only predict such a holding. However, given the “expansionist” mood of the California Supreme Court, it would not be beyond their reasoning to create a “scientific” fiction for liability purposes. Strict liability in tort has been continuously expanded in scope and definition since its inception in Greenman. See, e.g., Price v. Shell
fect in the other. Therefore, under the "non-use" theory of design defect, judgment could be had upon a showing that a proper or more feasible design would have mitigated dangerous conditions in the utility's delivery system. Such a holding would have a great effect on electric utility liability especially since a utility was formerly held liable only upon proof of negligent construction or misplacement of wires.95

C. Stream of Commerce

Having established that electricity may be considered a product and possibly a defective one, the crucial issue in determining whether strict liability can be imposed, and perhaps the insurmountable barrier to its imposition in most cases, is the determination of the time at which electricity becomes a product for the purpose of strict liability. That is, when does it enter the stream of commerce? Possible answers can be found at various stages: the time of generation at the plant; subsequent to the last distribution substation; or after it reaches the meter and enters the consumer's home or place of business. Only the last alternative meets the requirements of traditional strict liability law. With one possible exception,96 the courts willing to call electricity a product have been unwilling to determine that it is a product until it reaches the point of intended consumption.97 The reasons for this are twofold:

Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (expansion of strict liability to lessors of personal property); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (bystanders injured by a product being used by another allowed to allege a strict liability theory). For the recent definitional expansion of strict liability occurring in Barker v. Lull Eng'r Co., see note 91 supra and accompanying text. Once a plaintiff has demonstrated the product caused his injury, the defendant now has the burden of proving that there was no feasible design alternative, or the plaintiff can demonstrate that the product failed to perform according to an ordinary consumer's expectations when used in a foreseeable manner. 20 Cal. 3d at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. But see Daly v. General Motors, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978) where a divided court contracted a plaintiff's recovery by mandating that a plaintiff's comparative fault reduce his recovery.

95. See notes 12-20 supra and accompanying text.
first, until passing through the meter, the electricity has not been released from its conductors for its intended use; second, the poles and wires are instrumentalities being used by, and in the control of, the utility and not in the stream of commerce.

The Michigan case of *Buckeye Union Fire Insurance Co. v. Detroit Edison Co.* explicitly stated that electricity is not a product for implied warranty (strict liability) purposes until it flows through the meter. Wisconsin also rejected the application of strict liability on the same grounds where a boy was electrocuted when wires attached to a model airplane came in contact with uninsulated power lines.

Such reasoning is not contrary to the logic of strict liability in or out of California. Suppose an analogous utility, a water utility, constructs a dam for the storage of water. Some years later a boy walks on part of the dam and falls into the water and drowns. Certainly, the stored water is the utility's "product" when it reaches the consumer. But it is not rational to call the stored water into which the boy fell a product "in the stream of commerce" merely because it probably will be a product at some time in the future. The water was not intended for use in this manner; indeed, it was not being used at all. Hence, any action filed against the utility would have to be based on the negligence theory of "attractive nuisance".

Indiana reaches the same result as Michigan and Wisconsin but with a slight twist in reasoning. In a case where a fourteen year-old boy climbing a tree was injured when he touched a live wire running through the upper branches, the appellate court held:

Technically, until the electricity reaches its destination in a home or factory, it is transmitted by equipment over lines under the exclusive control of NIPSCO [electric company]. The electric company's transmission and distribution lines are not a part of the end product which reaches the consumer as in the case of bottles and cans which are a part of the finished product. Since NIPSCO had not yet placed its product in the stream of commerce, a judgment [adverse to plaintiffs] on the evidence on the issue of strict liability is proper in the case at bar.

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99. Id. at 330 n.4, 196 N.W.2d at 318 n.4.
102. Id. at 747.
Clearly, the "defect" which the plaintiff brought to the court's attention was merely the misplacement of power lines. The court viewed the lines as instrumentalities by which the electricity is transmitted, and which are never intended to be placed in the stream of commerce. As such, the lines are not products.\textsuperscript{103} Using the water utility analogy developed previously, suppose the boy fell into the water due to a defectively constructed concrete walkway which collapsed. The concrete which partially gave way, although defective, was only an instrumentality used \textit{by} the water utility in connection with its business. The walkway itself certainly is not in the stream of commerce.

One recent Michigan case, however, has digressed from the view that electricity becomes a product only at the meter.\textsuperscript{104} An appellate court decision, \textit{Kulhanjian v. Detroit Edison Co.},\textsuperscript{105} decided after \textit{Buckeye Union} (which had expressed its opinion that implied warranty (strict liability)\textsuperscript{106} would not attach until the electricity had entered the meter),\textsuperscript{107} expanded the area and held that Detroit Edison had impliedly warranted the manner in which wires had been installed above private property.\textsuperscript{108} This holding gave virtually no emphasis to the stream of commerce argument espoused by \textit{Williams}.\textsuperscript{109} Indeed, from the way the opinion is worded, it appears that an electric utility would be strictly liable for injuries caused by the \textit{manner} in which all wires passing over private property were \textit{installed}. Therefore, \textit{Kulhanjian} ap-

\textsuperscript{103} \textit{Id.} It is important to note that the courts' decisions in these cases are not based on the fact that a bystander rather than an intended user is the person injured. Like California (Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969)), Indiana does not require that "a literal 'sale' of goods is necessary for application of section 402A [of the Restatement 2d of Torts]."\textsuperscript{354 N.E.2d at 747. \textit{See} notes 54-56 supra and accompanying text. Similarly, the court in \textit{Williams v. Detroit Edison Co.}, 63 Mich. App. 559, 566 n.1, 234 N.W.2d 702, 706 n.1 (1975), was expressly aware that its implied warranty (strict liability) laws allow bystanders to recover.

\textsuperscript{104} Electricity will certainly have entered the stream of commerce once it reaches and flows through the consumer's meter. In at least one case, a utility appears to have conceded the point. \textit{Troszynski v. Commonwealth Edison Co.}, 42 Ill. App. 3d 925, 256 N.E.2d 926 (1976). \textit{See note 97 supra.}

\textsuperscript{105} 73 Mich. App. 347, 251 N.W.2d 580 (1977). Courts speak of a flow of electricity through the meter. While this might be a useful analogy for liability purposes, one should keep in mind that electricity does not flow in a manner identical to water. Electron movement in the conductor creates the force which drives electrical appliances. The amount of force used is measured by the utility's meter. Electrons, of course, are not consumed in this process.

\textsuperscript{106} \textit{See} note 59 supra.

\textsuperscript{107} 38 Mich. App. at 330 n.4, 196 N.W.2d at 318 n.4.

\textsuperscript{108} 73 Mich. App. at 356, 251 N.W.2d at 584.

\textsuperscript{109} 63 Mich. App. at 567, 234 N.W.2d at 707.
pears directly at odds with its predecessors, *Buckeye Union* and *Williams*.

California requires that a product be placed into the stream of commerce before strict liability becomes applicable.110

Where the product has not yet been released for its intended use, the situation is different. Not only is the prospective supplier as to whom the use is wrongful the party directly wronged but the factors on which the *Greenman* rule rests have not been brought into operation as to anyone in the chain of supply.111

Users of products in their businesses, whether the products are sold or leased, are not strictly liable for injuries to others which occur from the use of the product.112 While the strict liability originally applied to a manufacturer has been expanded to retailers,113 lessors,114 bailors,115 and licensors,116 it has never been applied to users.

An illustrative example of the requirement for having the product placed in the stream of commerce appeared in the case of *Shook v. Jacuzzi*.117 There a manufacturer designed and constructed a machine for use on its premises. Two workmen were injured by this machine and claimed that its design and construction were defective. Although the court held that worker's compensation laws barred recovery, it noted that the "[defendant] did not sell the machine or in any way place it in the stream of commerce . . . . Its design and construction of this machine was but auxiliary to its principal manufacturing operation. As such, it does not subject [the defendant] to products liability to its employees,"118 or presumably to anyone else.119

111. DUNNE, supra note 36, at § 42.
114. 2 Cal. 3d at 253, 466 P.2d at 727, 85 Cal. Rptr. at 183 (1970).
115. Id.
118. Id. at 981, 129 Cal. Rptr. at 498. California cases holding the designer or installer of a product placed in a home strictly liable for defective installation are not analogous here. In those cases, a product not defective in its original manufactured state becomes defective when installed in a location likely to lead to injury. See, e.g., Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973). In essence, the defective installation makes the larger product, for example, a residence, defective in design. In the case of utilities, there is no "larger product" which is then sold to the public, as electricity is the only commodity supplied.
119. However, as soon as utility poles or wires become products in their own right, even if these products are sold for uses identical to those of the utility, under a recent California
The use of conductors, poles, and other apparatus by utilities appears analogous to the principle enunciated by *Shook*. The poles, wires, and transformers are not sold to the public. They are merely used in the conduct of the utilities' business, the supply of electricity. In this respect, California would seem to fall squarely within the holdings of *Petroski*,120 *Buckeye Union*,121 and the other out-of-state authorities which refuse to apply strict liability until the electricity has actually reached its intended distribution point. As a result, only those accidents which occur subsequent to the passage of electricity through the meter would subject the utility to strict liability, assuming proximate cause could be proved.122

However, strict liability will only become important to society and the utilities if the distribution point is placed further back than the time at which the electricity flows through the meter, as in *Kulhanjian*.123 Analytically, such a holding evades traditional strict liability law. Although electricity can be termed a "product" and possibly a "defective product," it simply does not enter the stream of commerce and become a product until the electricity passes through the meter. Injuries caused by electric conductors and poles prior to the time that the ele-

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120. See notes 101-03 *supra* and accompanying text.
121. See note 98 *supra* and accompanying text.
123. See notes 106-09 *supra* and accompanying text.
Electricity enters the meter should not be cognizable in traditional strict liability law. Due to these substantial difficulties, any legal fictions created to fit injuries caused by electricity within a strict liability standard would require substantial policy reasons.

III. STRICT LIABILITY POLICY CONSIDERATIONS AND ELECTRIC UTILITIES

In refusing to extend strict liability to electric companies in *Wood v. Public Service Co.*, the New Hampshire Supreme Court stated that "[n]o compelling reason of policy or logic has been advanced to apply strict liability to electric companies." This statement leaves one with the distinct impression that should compelling policy or logical reasons be advanced, strict liability would be applied. Although there are serious legal obstacles to the imposition of strict liability for injuries caused by electric utilities, the law in that area is flexible enough to accommodate those obstacles. In the final analysis, policy arguments will decide whether to allow claims in strict liability against the electric utilities. It will be seen that the considerations favoring strict liability do not measure up to the considerations weighing against the imposition of strict liability.

A. Traditional Policy Considerations

Since *Greenman v. Yuba Power Products, Inc.* and the adoption of strict liability in tort, California courts have been willing to expand the doctrine, continually attempting to make it easier for injured plaintiffs to be assured of compensation. The application of traditional strict liability policies without consideration of the unique position of electric utilities would probably end the question in favor of attaching strict liability. The *Greenman* strict liability theory, which has been labeled as the "deep pockets theory" by a later appellate court decision, remains the primary reason given for expansion of strict liability in Cali-

125. Id. at 189, 317 A.2d at 579-80. Unfortunately, a short statement was the extent of the court's thought on the subject. No mention was made of the policy arguments which were considered.
126. "If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly," *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).
fornia. Courts should “insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” The strict liability imposed upon manufacturers soon became “enterprise liability” imposed upon the entire marketing enterprise. The idea that anyone involved in the enterprise is in a better position to insure against the cost of injuries has been the focal point of expansion for strict liability.

Another important policy consideration in favor of strict liability is the need in our technical society to make a plaintiff’s task of proving a case easier. Assuming that a manufacturer’s overall operations are not negligent, it becomes next to impossible to prove that the one-millionth product which came off the assembly line was negligently manufactured. In addition, there is a strong policy in California in favor of protecting bystanders from injury when the product is being used by another person. In fact, the bystander is entitled to more protection because he has less power to protect himself than one who is able to inspect the product for defects, or one who has at least some control over use of the product. Finally, some courts believe that strict liability is an incentive to improve product safety and induce the realloca-

129. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (1963).
130. See notes 113-16 supra and accompanying text.
132. See Barker v. Lull Eng’r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (reversing verdict for defendant manufacturer on basis of erroneous instruction requiring proof that product was unreasonably dangerous); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (hassp manufacturer held strictly liable for defective product).
134. The Elmore court stated:
If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of bystanders. Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.
tion of resources toward safer products.\textsuperscript{135} The rationale of this conclusion suffers somewhat on analysis. If a product is defective through no fault of the manufacturer, what is the manufacturer going to do to make the product safer?

Obviously, the arguments set forth above could be applied to injuries proximately caused by electric utilities. Theoretically, these arguments apply to \textit{any} business transaction which might become involved in personal injury or property damage tort litigation, and in reality have become almost useless for any distinctive analysis. More useful and less plaintiff-biased guidelines are needed which will focus the court's attention upon the effect that the imposition of strict liability on an enterprise has upon society in general, as well as upon an individual plaintiff.\textsuperscript{136}

\textbf{B. Economic Effects of Strict Liability in Tort}

One of the unbiased criteria used in analyzing strict liability closely examines economic effects.\textsuperscript{137} When imposing strict liability on a business entity, courts are fond of the rationale that the manufacturer, retailer, or lessor is in the best position to absorb or pass on the cost of injury.\textsuperscript{138} While this is undoubtedly true in the great majority of cases, it is unfortunate that the courts' analysis stops at that point. There are burdensome side effects on society when business entities are subject to the application of strict liability.

A symposium on the economic effects of the then new doctrine of strict liability in tort was conducted in 1967. Several economists were asked to present their views on the effects to be expected from the imposition and expansion of strict liability. The sophisticated economic

\begin{itemize}
\item\textsuperscript{135} McDonald v. Sacramento Medical Foundation Blood Bank, 62 Cal. App. 3d 866, 874, 133 Cal. Rptr. 444, 448 (1976).
\item\textsuperscript{136} See Montgomery & Owen, \textit{Reflections on the Theory and Administration of Strict Tort Liability for Defective Products}, 27 S.C.L. REV. 803 (1976). The authors' suggested policy considerations are as follows:
\begin{enumerate}
\item The cost of injuries attributable to the condition of the product about which the plaintiff complains—the pertinent accident costs.
\item The incremental cost of marketing the product without the offending condition—the manufacturer's safety cost.
\item The loss of functional and psychological utility occasioned by the elimination of the offending condition—the public's safety cost.
\item The respective abilities of the manufacturer and the consumer to (a) recognize the risks of the condition, (b) reduce such risks, and (c) absorb or insure against such risks—the allocation of risk awareness and control between the manufacturer and the consumer.
\end{enumerate}
\item\textsuperscript{137} Id. at 818.
\item\textsuperscript{138} But see notes 156-58 infra and accompanying text.
\end{itemize}
arguments, differing in methods and analyses, were published in 1970. The only point of absolute agreement among all of the economists seemed to be that the cost of products would rise. Arguments were presented both in favor of and against the imposition of strict liability. An argument sympathetic to concerns about the economic impact of imposing strict liability was expressed by James Buchanan, Professor of Economics, Virginia Polytechnic Institute. Professor Buchanan set up hypothetical situations to illustrate the effects of strict liability, one in which the risk of accidents caused by a product was more likely and one in which such accidents were much less likely. In both cases, it was found that the cost of the product would rise, the availability of the product would decrease, and the long range impact would be to deprive those unwilling or unable to pay for the increased cost of use of the product. In the words of Professor Buchanan: “The effects on economic welfare are clear and unambiguous. The change in liability arrangements reduces economic welfare generally, and this reduction is concentrated on the poor.”

Justices must be sensitive to the fact that strict liability is a two-edged sword. Not only does it facilitate a plaintiff’s recovery, but it is also one of the most regressive “tax systems” imposed in the United States. Those in our society who can least afford it bear the brunt of higher product prices.

141. Id. at 65-67.
142. Id. at 67 (emphasis added).
143. A “regressive tax” is not based on ability to pay. A “progressive tax” applies higher rates as income increases. Regressive taxes were initially popular in our country; the founding fathers came to the rather ironic and callous conclusion with respect to sales and excise taxes that “[t]he poor can protect themselves [from the tax] by refusing to buy.” L. Eisenstein, THE IDEOLOGIES OF TAXATION 17 (1961). See generally R. Paul, TAXATION IN THE UNITED STATES 12-14, 737-38 (1954).
144. Of course, the adverse effect is felt by the economy as a whole. Decreased profits, however, do not stop with the manufacturer. He distributes them to the shareholders of his corporation, just as he distributes increased prices to the consumers of his product. Moreover, decreased profits do not stop with the shareholders. Rather, in more or less attenuated form, they pass on to other, broader classes. The major distribution of decreased profits occurs when shareholders switch their investment to other, more profitable enterprises. When this happens, the liability-bearing manufacturer’s enterprise loses its ability to attract investment capital, resulting in decreased industrial activity. This decreased activity results in losses to several categories. First, the consumer will feel the loss because the manufacturer’s ability to produce a better, safer product will diminish. Second, reduced industrial activity will affect labor. Severely diminished profits may force the manufacturer out of business. Even less drastic reductions, however, could reduce the number of new jobs. Finally, re-
C. Economic Role of Electric Utilities and the Impact of Strict Liability

Turning our attention specifically to electric utilities, it is arguable that the imposition of strict liability is not worth the cost to society. In any event, a substantial study of this matter is required, a study which should go beyond opposing appellate briefs in private litigation. Consider initially the economic role of public utilities in our society. Not only do they provide jobs, pay wages, and purchase land, among other things, but in general can also be considered “social capital overhead,” providing services essential to economic growth and development regardless of political structure or stage of development. Effective transportation, good communications and flexible and reliable power sources form the foundation without which comfort and economic growth cannot exist.

Focusing specifically on the production of electricity, we are dealing with a source of power without which our economy would come to a grinding halt; witness the infamous Northeast blackout of several years ago. Undeniably, every home, factory, business, school and hospital is dependent upon the production of electricity at a reasonable rate. Any change in the rate charged or the availability of electricity would affect every member of our society directly, through increased rates for usage, and indirectly through increased product costs, as manufacturers pass the cost of production on to consumers. Professor Buchanan has observed that the people least able to afford the increased cost would bear the brunt of the courts’ shortsightedness. Those earning $25,000 a year or more might well be able to bear a substantial increase in the cost of electricity. The same cannot be said of a social security pensioner who might find that electricity and products whose manufacture depend heavily on electricity were rapidly becoming a luxury item in his budget.

duced economic activity will affect the entire society, in a more or less attenuated form, through lower tax revenues, lower wages, and lower profits for distribution. Holford, The Limits of Strict Liability for Product Design and Manufacture, 52 Tex. L. Rev. 81, 87 (1973) (emphasis added), quoted in Shepard v. Superior Court, 76 Cal. App. 3d 16, 28, 142 Cal. Rptr. 612, 620 (1977) (dissenting opinion).

145. The judiciary has recently suggested that perhaps other branches of government with a greater capacity for research into tort problems and their effect on society should be in the forefront of social change in the tort system. American Motorcycle Ass’n v. Superior Court, 20 Cal. 3d 578, 617, 574 P.2d 763, 787, 143 Cal. Rptr. 692, 716 (1978) (Clark, J., dissenting).


147. Buchanan, supra note 140, at 67.

148. See note 144 supra. The fact that an electric utility can purchase liability insurance
Other traditional strict liability policy arguments such as the “inducement to create safer products” likewise need long study in order to see if they are applicable to electric utilities. The most likely safety goal sought by the courts would be to force electric companies to insulate each and every line transmitting electricity, since the cause of most injuries appears to be the result of some form of contact with uninsulated power lines. Insulating all lines would itself substantially increase rates and make new service connections less likely as electric companies sought to limit their liabilities. Worse yet, some courts might regard the underground placement of all power lines as the only feasible design alternative. Should such a policy be created in the form of judicially imposed strict liability on electrical utilities, the cost would be astronomical. Realistically, such goals could not be accomplished in the foreseeable future. As a result, electric utilities would have strict liability imposed with all its attendant cost but without any viable safety goal.149

IV. OTHER POLICY CONSIDERATIONS

A. Electric Utilities Are Distinct From Those Business Entities Upon Which Strict Liability Has Been Imposed

The public function of electric utilities creates a form of business entity which does not easily fit into strict liability concepts. Although our traditional preference in business has been toward a laissez-faire or free enterprise system, certain areas of dominant public interest have caused the public to intervene through government to protect that interest. Public utilities fall within one of those areas; they are governed by stringent regulations not applicable to ordinary manufacturers and

is not a decisive “policy reason” for imposing strict liability. Even the “father” of strict liability, Prosser, recognized this fact.

What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group should bear them in the first instance—and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes. Even the distribution of the losses through insurance may be a process that has its flaws.

Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1121 (1960). It is naive to believe that the increase in insurance cost is not passed on to the consumer.

149. Perhaps under Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), electric utility companies could avoid such a result: “[A] product may . . . be found defective in design if the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish . . . that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.” Id. at 432, 573 P.2d at 453, 143 Cal. Rptr. at 235.
may be thought of as falling mid-way between total social control (governmental agencies) and no social control (free enterprise manufacturers).\textsuperscript{150}

1. Controlled Entry

In California, a company wishing to produce electricity must apply to the Public Utilities Commission (PUC) for a certificate and "[n]o . . . electrical corporation, . . . shall begin the construction of a . . . plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction."\textsuperscript{151} Thus, a private corporation wishing to supply electricity may not simply open up a business, solicit customers through advertising, and freely engage in the business of producing electricity. Unless public convenience and necessity require such production, no certificate will be granted, and a public utility acts at its own peril in expanding its plant without prior Public Utilities Commission approval.\textsuperscript{152}

The California Public Utilities Code\textsuperscript{153} regulates the grant of franchises by local governments, again restricting the entrance of private corporations into the business of supplying electricity. The public function of utilities distinguishes them from other private businesses which are free to establish their businesses and sell their products without the necessity of certification by a public commission like the PUC. Business licenses and corporate charters, while regulations in a techni-

\begin{footnotesize}
\begin{enumerate}
\item CAL. PUB. UTIL. CODE § 1001 (West 1975).
\item See generally CAL. PUB. UTIL. CODE §§ 6001-6017 (West 1965 & Supp. 1978).
\end{enumerate}
\end{footnotesize}
The public duty of public utilities is a well settled principle:

As its name indicates, the term “public utility” implies a public use and service to the public; and indeed, the principle determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities.156

No other manufacturer of a “product” is subjected to such a legal duty or controlled by such regulation. As such, the obligations of public utilities and other manufacturers can be significantly differentiated. Thus, the utility cannot implement the types of business decisions made by ordinary businesses to mitigate the effects of strict liability. For example, suppose the power lines which serve the town of X, population 309, must run fifty miles through an area prone to fires. Through no fault of the utility company their equipment has been the cause of numerous fires resulting in substantial damage. If liability were imposed irrespective of fault, the utility might well make the decision that utility service to X was too risky and not worth the cost. In the alternative, the electric utility might wish to encourage greater use of its elec-


The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.


156. 64 Am. Jur. 2d, Public Utilities § 1 at 549 (1972) (emphasis added). See also id. § 16.
tricity so that it could expand its operations, and make service to X worth the risk. The law with respect to public utilities precludes either action, at least without costly and time-consuming public hearings and red tape. Hence, the utility is not able to take the “protective” measures adopted by private manufacturers when strict liability is imposed.

3. Rate Regulation

Unlike the ordinary manufacturer who can raise its product price at will (based upon business judgments as to what the market will bear), public utilities are required to obtain approval of the Public Utilities Commission for any increase in rates. This approval is given only after an elaborate and time-consuming procedure, which includes a public hearing. The complexity of the procedure alone distinguishes public utilities from other manufacturers. Given the attitude of the public and the increased cost of living in our society, it is highly unlikely that the public would endorse a rate increase. This third factor, the inability to raise “prices,” like the first two factors discussed in this section, evidences the inability of an electric utility to function adequately in a strict liability world. Perhaps administrative procedures could be developed in order to allow for loss distribution; however, the legislature would have to implement the administrative process.

In addition, public utilities are limited in their profits to a “reasonable return.” However amorphous the term “reasonable return” may be, no other manufacturer is subject to the review of a public commission as to the amount of its profit. Likewise, public utilities are subject to review by the Public Utilities Commission as to the expenses that will be considered reasonable operating expenses for inclusion in the rates charged for electricity.

Clearly, public electrical utilities cannot freely pass on the inevitable cost increases resulting from the imposition of strict liability. This result is directly contrary to one of the basic principles underlying strict liability, spreading the cost throughout society by insurance and/or an increased price of the product. Courts should be wary of applying lia-

bility doctrines which, although applicable to the typical business concern, may not be appropriate to a public utility.

B. Creation of a Dual Standard Through Strict Liability: Sovereign Immunity

Although the precise issue has not been litigated in California, available authority points to the conclusion that publicly owned utilities are by statute liable for their torts only when their negligence is a proximate cause of the injury. No California statute authorizes a claim based on strict liability against a public entity, and although no California cases have expressly precluded or affirmed such a claim, the United States Supreme Court decisions of *Laird v. Nelms* and *Dalehite v. United States*, interpreting similar immunity provisions, held that the Federal Tort Claims Act does not permit the imposition of strict liability of any sort upon the United States.

The privately and publicly-owned utilities provide exactly the same service/product and perform almost identical functions in our society. There is ample material to distinguish a public or private utility from a private manufacturer and to suggest that a utility performing a service that would otherwise be provided by the state should not be held to a


At common law the distinction between purely governmental functions and proprietary functions of public entities was recognized as a basis for determining immunity or nonimmunity from tort liability. Under that test the function of maintaining and operating jails and prisons was recognized as a governmental function.

However, in recent times, the immunities attaching to governmental functions has progressively eroded as a result of special legislation and court interpretations of ameliorative statutes, culminating in the case of *Muskopf v. Corning Hospital Dist.* which virtually abrogated the doctrine of governmental immunity in California. Following that decision and relying largely on the study and report by the California Law Revision Commission, the Legislature enacted the California Tort Claims Act of 1963. The result is that today there is no common law governmental tort liability in this State and *except as otherwise provided by statute* there is no liability on the part of a public entity for any act or omission of itself, a public employee or any other person. (Citations omitted).

The legislative comment to Cal. Gov't Code § 815 (West 1966) states in pertinent part:

This section abolishes all common law or judicially declared forms of liability for public entities . . . . In the absence of a constitutional requirement, public entities may be held liable only if a statute . . . . is found declaring them to be liable . . . .

. . . . In other codes there are a few provisions providing for the liability of governmental entities, E.g., Vehicle Code Section 17001 et seq. and Penal Code Section 4900. But there is no liability in the absence of a statute declaring such liability . . . .

164. 406 U.S. at 802-03; 346 U.S. at 45.
more stringent form of liability than state agencies performing that function. To hold otherwise would be tantamount to creating a wholly irrational and unexplainable distinction between publicly-owned and privately-owned electric utilities.

V. Conclusion

There has long been an assumption on the part of many that the doctrine of strict liability is ever-expandable at no cost to the public. Commentators hail the fall of negligence “citadels” at every turn without ever stopping to think that the citadel might be very valuable to society as a whole.

In “The Fall” Prosser acclaims the conquest of the citadel of privity. But he reveals his foreboding that irrational sequellae may tarnish a worthy victory:

“The rest is the story of sack and slaughter, of riot, rape and rapine, that has added an evil luster to the names of Moglebury and Bada-joz, along with ancient Troy.”165

While this metaphor may overstate the implications of strict liability as applied to the torts of electric utilities, it certainly appears that both law and public policy favor the negligence status quo. Even in those few situations where injuries occur due to a defective electrical product subsequent to the passage of the electricity through the meter, where there is at least no insurmountable legal obstacle to the imposition of strict liability, the policy considerations discussed here weigh against attachment of the strict liability doctrine and should preclude its use altogether.

Gregory G. Hollows

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