WHO OWNS THE CHERRY PIT?

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Consider, ladies and gentlemen, the Dannon cherry yogurt. "Caution," it says on the cup. "These are real cherries. Watch for pits." A slightly more elaborate example similar to the Dannon cherry yogurt, or at least its wrapping, is a package insert, such as the one I am now unfolding, that accompanies every package of oral contraceptives. As you can see, it runs about fifteen to twenty pages in normal type and contains a warning of the risks that come with oral contraceptives.[1] This document reads pretty much like a typical product liability law review article and is about as useless and uninformative as one. Interestingly, significant parts of this document are lifted verbatim from state court opinions in litigation involving Ortho Pharmaceutical's product.[2]

One might think that the profusion of words on the oral contraceptive insert, or the simpler and much more useful message on the Dannon yogurt container, creates something in the nature of contract. It is, after all, an effort to warn. It seems to be intended to communicate something from buyer to seller. You are, of course, free not to buy the product. One might think that if you did buy it even after the warning, you did so with a knowledge of the communications, with understanding, and with a tacit acceptance of the risks, and that you somehow therefore fell under the laws of contract. It is alarming and important—indeed, I think it is the only really important thing about modern product liability law—that this warning does not create a contract. Indeed, contract has been emphatically repudiated. This repudiation is both the starting point and ultimately the ending point of modern product liability law.[3]

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1. Ortho Pharmaceutical currently warns users of its oral contraceptive against blood clots, heart attacks, strokes, gallbladder disease, liver tumors, and cancer of the reproductive organs.

2. Ortho Pharmaceutical Corporation has lost a number of product liability actions in state courts for harms arising from use of Ortho's oral contraceptives. *See, e.g.*, Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986); MacDonald v. Ortho Pharmaceutical Corp., 374 Mass. 131, 475 N.E.2d 65 (1985); Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984), *cert. denied*, 469 U.S. 965 (1984); McEwan v. Ortho Pharmaceutical Corp., 270 Or. 375, 528 P.2d 522 (1974).

3. Justice Traynor writes, for example, that a manufacturer's liability for its products "is not . . . governed by the law of contract warranties but by the law of strict liability in

We may start with the fairly obvious. Everything in this world contains pits of one kind or another. Knives, lawn mowers, and coleslaw machines, of course, cut not only cabbages but also the king, or the king's fingers, hands, and limbs.[4] Pesticides and cancer therapies are designed to kill cells, but sometimes they kill the wrong kinds of cells. Ladders and planes raise people to heights, from which they sometimes fall. The question is, in the end, "Who owns the pit?" Who has control over it? Who, in short, has responsibility for its tooth-shattering properties?

Until the last few decades, really until the late 1950s, in my view, the answer to "who owns the pit" was largely, though not exclusively, a matter of property and contract. You and the Dannons of this world could answer such important questions by mutual agreement. Fraud and nondisclosure were, of course, separate matters; but if there were advance disclosure or forewarning, that would generally be dispositive. The sales contract might include warranties, explicit or implied by the course of dealing, promises of safety, or some similar assurance; and, of course, such promises would be enforced. On the other hand, these same promises might be disclaimed expressly or implicitly, and the disclaimers would be enforced too. One way or another, buyer and seller, individually and privately, had the power to decide between themselves who owned the cherry, who owned the pit, and who was responsible for which.

The foundation of modern product liability law is to reject the simple notion of letting buyers and sellers allocate the risks for themselves. The law, simply stated, no longer allows individual buyer and individual seller to deal and to set out the terms of safety on their own and for themselves before the accident. Express contractual terms that address risks are rejected by the courts on theories that they reflect contracts of adhesion, unequal bargaining power, imbalanced information or some similar notion.[5]

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tort." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 61, 327 P. 897, 901, 27 Cal. Rptr. 697, 701 (1963); *see also* RESTATEMENT (SECOND) OF TORTS § 402A, comments a through c at 348-50 (1965); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Keeton, *Products Liability — The Nature and Extent of Strict Liability*, 64 U. ILL. L. REV. 693 (1964); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

4. L. CARROLL, THROUGH THE LOOKING GLASS ch. IV, stanza 11 (1902) (Author's note: This footnote inserted by remarkably diligent law journal editor.).

5. *See, e.g.*, Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960)

If one wants to shoehorn everything into the property title of this conference, this abandonment of contract means, in a manner of speaking, that seller and buyer today must hold the yogurt, the lawn mower, the airplane, and the IUD, as tenants-in-the-entirety. Responsibilities, of course, are correspondingly blurred. You may think that you bought the yogurt, and that it is your yogurt, but as soon as you break your teeth, you will remember that it is still partly owned by Dannon. Indeed, if you are the average consumer, you will proceed to court, remind Dannon of its joint tenancy, and suggest that it contribute to the upkeep and maintenance of the property and your dental bills. If you sue Dannon, you may lose or you may win, but I would guess that in most instances today you will lose. The interesting point, however, is *why* you will probably lose. Not because you had a contract, with fair warning and disclosure, and accepted the rules. But rather because a jury has independently assessed the matters, worked out what it thinks are the fair terms of a contract in these circumstances, and conducted some kind of risk-utility balancing that has no reference whatsoever to your express preferences or to the terms of your contract stated in advance.[6]

Most tort scholars today hate to use the word contract. It has been banished from their lexicon. They talk instead of something called consumer contemplation.[7] The big debate in the

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(landmark case rejecting a contract's limited warranty because of the "unequal bargaining power" of the parties); Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975) (disclaimer clauses can be invalidated upon being declared unconscionable); Collins v. Uniroyal, Inc., 64 N.J. 260, 315 A.2d 16 (1974) (contractual limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable); *see also* RESTATEMENT (SECOND) OF TORTS § 402A, comments a through c at 348-50 (1965); Epstein, *Products Liability: The Gathering Storm*, REGULATION, Sept.-Oct. 1977 at 15; Priest, *supra* note 3; Keeton, *supra* note 3; Prosser, *supra* note 3.

6. The member of the public judged incompetent to make wise choices in the marketplace for himself was now being called upon to make wise choices in the jury box for others. It was a theory of idiot/genius, incapable of dealing with the objects that lay within his own experience, but infinitely capable of errorless flash judgment when it came to the experience of others.

P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 50-51 (1988).

7. W. Prosser and W. Keeton write: "A product is defective in design if it failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 690-92 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 402A, comment i. *See generally* Tillery, *Design Defects: Are Consumer Expectations Unrealistic?*, 45 LA. L. REV. 1313 (1985); Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Rheingold, *What are the Consumer's "Reasonable Expectations?,"* 22 BUS. LAW 589 (1967).

1970s in tort law was how to define product defects.[8] It turns out to be a much more elusive and complicated question than one might think. For a while it looked as though the courts would define product defect by asking: What did this consumer or what did the average consumer contemplate? What did he expect to get? What did she think she was taking on when she bought the yogurt or the contraceptive or whatever? The answers would then define whether the product was defective or not. That approach was largely rejected, however.[9] If you do not get what you had hoped for, you can sue. Consumer contemplation counts when it is *not* realized; but even if you do get exactly what you expected to get and exactly what you were promised, there is still an independent calculation, a second test, which is whether the product meets somebody else's tests of defectiveness, propriety, and suitability.[10]

Many consumers, of course, are inclined to think that this is a good arrangement. After all, if you get the Dannon yogurt without the pits, then, as they say in New York, enjoy. If you get the Dannon yogurt with the pits, then, as they tell you in law school, sue. If you break a tooth, you have a remedy; if you don't break a tooth, you have a yogurt. What could be more congenial?

To coin a phrase, however, "There is no such thing as a free dentist." At the very least, you pay dearly for this right, much more dearly than most people realize. If you buy a football helmet today, it is $100 on a $200 helmet.[11] Indeed, your inalienable right to sue is costing you fifty percent of the cost of the helmet. That same inalienable right to sue is costing you

8. *See generally*, Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L. J. 529, 534-38 (1983); Keeton, *Manufacturer's Liability: The Meaning of "Defective" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

9. *See supra* note 5 and accompanying text.

10. This "second test" is typically referred to as a "risk-utility" or "danger-utility" test. The court or jury makes an independent cost-benefit analysis of the product design to determine whether in its estimation the product is defective. *See, e.g.*, Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (court properly instructed jury that a product is defective if defendant fails to prove that on balance the benefits of the challenged design outweigh the risks of danger inherent in the design); Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir. 1976) (determining whether a product's risk is "unreasonable" requires a "balancing of the probability and seriousness of harm against the costs of taking precautions").

11. *See Insurance a Liability for Many Companies*, N.Y. Times, Mar. 8, 1986, at 35, col. 1.

$11.50 on a $12.00 dose of childhood vaccine,[12] $20,000 on a $60,000 small plane,[13] twenty dollars on a $100 stepladder,[14] and so on. Furthermore, these "litigation surcharges" of more than fifty cents on the dollar are never coming back to any consumer. The money is going into the hands of the intermediaries: the lawyers, the insurance companies, the expert witnesses, and the courts.

Money, of course, is not the only thing you give up in exchange for this non-negotiable right to sue product manufacturers. When government, through its courts, takes over the business of writing contracts and setting out the terms of bargain and sale, things will go wrong sooner or later, especially when these terms are not going to be settled until years after the sale, and then only through a rather erratic and highly unpredictable process. In the worst cases the terms become entirely prohibitive; the absence of certainty shuts down some markets altogether. As a consumer in America today you cannot buy a vaccine from ten of the twelve manufacturers that were doing active research and development on vaccines in the mid-1960s. Those ten have wisely, and, in my view quite rationally, decided that operating within the current product liability climate is simply out of the question.[15] For similar reasons, you can no longer buy a piston engine plane from Cessna. We have just about shut down our small plane industry, notwithstanding the furious objections of private pilots, consumers like me, because the industry simply cannot deal with the uncertainties of ex-post determinations of the terms of purchase and sale. No doubt we are all glad that we can no longer buy a Dalkon shield from A. H. Robbins, but the same system that assured us of that has also assured us that we can no longer buy a Lippes Loop or a Copper-7 IUD from Searle or Johnson & Johnson. For a significant class of patients, those would be superior contraceptive options. Indeed, they would be the best and most reliable options as well.

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12. *See A Comeback for Whooping Cough*, TIME, June 30, 1986, at 78.

13. *See* Insurance Information Institute, *General Aviation Tort Reform Considered*, in THE EXECUTIVE LETTER (Aug. 18, 1986); *see also Business Struggling to Adapt as Insurance Crisis Spreads*, Wall St. J., Jan. 21, 1986, at 1, col. 1.

14. *See* R. Willard, *The Current Professional Liability Insurance Crisis*, Remarks of the Assistant Attorney General, Civil Division, before the American Consulting Engineers Council, Colorado Springs, Colorado (Oct. 25, 1985).

15. For a discussion of the dwindling vaccine development industry, see P. HUBER, *supra* note 6, at 156.

To see how innovation has been stifled throughout the economy, consider that if you manufacture brake linings, gaskets and seals today, you are still using asbestos. That fact surprises most people, but manufacturers of brake linings cannot buy the principal asbestos substitute, calcium sodium metaphosphate, from Monsanto. Why? Because Monsanto realizes, quite correctly in my view, that you would have to be a lunatic to think of introducing a substitute for asbestos in today's product liability system, in which you have absolutely no assurance of the terms under which you are selling your product.[16]

Of course, if you wake up one morning and discover you have entered into a stupid contract, it is a great relief to learn that the law of contract has been abolished, at least insofar as your particular error was concerned. If you had just been stopped for speeding, I suppose you would also be happy to learn that the speeding laws had recently been repealed. But consumers as a group do not benefit from this kind of change. In the end, contract is the right that supports all others, most especially in a technological society that relies, as ours does, on highly diversified, specialized production. It is through voluntary agreement, through contract, that we control our own bodies by choosing medical services and contraceptives and cigarettes and alcohol. It is through willing contract that we control our movements, too, by purchasing automobiles or airline tickets. It is through contract, again, that we control our social universe by taking part in clubs and voluntary associations of all kinds. To the extent that we undercut contract, as modern product liability law relentlessly and deliberately does, we undercut all of these other rights as well.

For purposes of provocation, I shall end with the right of abortion, claimed by some, though not by others, to be guaranteed by the Constitution itself. Whatever the Constitution may say, if it is to mean anything more than a coat hanger or a back alley butchery, the right of abortion obviously depends on the right to get help from others in the mainstream economy. French women today can buy a product called RU 486 which is a chemical abortifacient. You take a pill, you get an abortion. By all accounts, it is cheaper, less traumatizing, and safer than

16. *See* Huber, *Litigation Thwarts Innovation in the U.S.*, 260 SCI. AM. 120 (1989); Wilkinson, *Monsanto Calls a Halt to its Phosphate Fiber*, CHEMICAL WEEK, July 29, 1987, at 15.

going under the knife.[17] Yet it is quite unthinkable that any major diversified pharmaceutical company will sell it in the United States. The principal problem is not opposition from the religious right; that easily could be overcome by the profit incentive. The principal problem is that no sane company will sell any product of this type because the risks of finding out from the courts five years down the line what the real terms of the sale were, are simply too great.

Of course, we would all like to have more of the cherry and less of the pit. We would all like to fly without taking the risk of falling. We would all like to be in love without courting the danger of rejection. The real world simply does not allow such things, and when our courts try to pretend otherwise, we all end up worse off. The question in the end comes down to this: In product liability law, who owns the cherry, who owns the pit, and who is responsible for protecting your teeth while you feed your face?

If you are the same age as my daughter Sophie, who is nine-months-old now, the answer is simple. She is not responsible. Someone else must be. The law has always deprived children of the power to bind themselves fully in contracts, and that is the way it should be. What is uniquely different about our modern product liability law is that it has chosen to extend that same special treatment to all adults. Courts and juries, the law assumes, must operate for the consumer *in loco parentis* now and forevermore. This attitude, in the end, does not promote safety any more than it promotes convenience or affluence or efficiency; it ultimately robs us of our most basic economic freedom, which is the freedom to plan in advance, to make commitments, to arrange deals on terms agreeable not just to

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17. RU 486 is safer than surgical abortion because it avoids the surgical risk of perforating the uterus and the dangers of anesthesia. The drug is approved for use only in the first five weeks of pregnancy. It is not without inconvenience and discomfort:

> The drug works by blocking the actions of progesterone, a hormone that allows the uterine lining to support a developing embryo. Without progesterone, the lining breaks down, and is expelled with the fertilized egg; one patient compared the bleeding and pain to 'a very, very bad period' lasting two days. Two days after a woman takes the pills, she must return to the clinic for an injection of protaglandin, a drug (also sometimes given as a vaginal suppository) that causes uterine contractions and ensures the abortion is complete.

Seligmann, Hager, and Witherspoon, *Abortion in the Form of a Pill; Foes Call it 'Chemical Warfare on the Unborn,'* NEWSWEEK, Apr. 17, 1989, at 61; *see also*, CONFERENCE ON THE ANTIPROGESTATIONAL COMPOUND RU 486, THE ANTIPROGESTIN STEROID 486 AND HUMAN FERTILITY CONTROL (1984).

one side but to both sides. If the consumer can freely insist on the rights of a child after the accident, he will very quickly come to be treated as a child beforehand as well. That is not progress for anyone, least of all for consumers.