Toward the Search for the Proper Liability Rule for Harms Resulting from Sources of Risk: A Different Approach to the Choice between Strict Liability and Fault-Based Regime

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TOWARD THE SEARCH FOR THE PROPER LIABILITY RULE FOR HARMS RESULTING FROM SOURCES OF RISK:

A DIFFERENT APPROACH TO THE CHOICE BETWEEN STRICT LIABILITY AND FAULT-BASED REGIME

Wen-Hsuan Yang

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Date of Dissertation Defense – November 14th, 2016
For My Parents

Chien-Lung Yang and Yu-Chin Lee
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Wen-Hsuan Yang

TOWARD THE SEARCH FOR THE PROPER LIABILITY RULE FOR HARMS RESULTING FROM SOURCES OF RISK: A DIFFERENT APPROACH TO THE CHOICE BETWEEN STRICT LIABILITY AND FAULT-BASED REGIME

An important issue in Taiwan today concerns the rising tension between strict liability and negligence. Article 191-3 of the Civil Code of Taiwan imposes a fault-based standard of liability on persons conducting dangerous activities. On the other hand, the majority of scholars believe that to afford greater protection, this rule should be changed into a strict liability rule.

Traditionally, three arguments make it preferable to impose strict liability under certain circumstances. First, strict liability induces more safety incentives on the part of the defendant. Second, fairness requires that one who benefits from conducting dangerous activities should bear the risk of loss. Finally, the defendant is better able to spread the loss to the general public. However, based on the analysis of each justification, this Dissertation finds that all of these arguments fail. Accordingly, this Dissertation argues that intermediate liability, a variation under negligence principles, is a proper standard of liability when high risk of harm is involved;—i.e. Article 191-3 is proper in imposing fault-based liability to dangerous activities—for the following
three reasons: 1) intermediate liability provides additional safety incentives by shifting the burden of proof to the defendant; 2) it conforms to fairness; and 3) it does not consider tort law as a means of insurance.
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Introduction

A. The Difficult Choice Between Strict Liability and Fault-based Regime

In Taiwanese law today, an important issue concerns the rising tension between traditional strict liability and negligence.¹ The Civil Code of Taiwan,² mostly derived from the German Civil Code,³ recognizes Gefährdungshaftung, or “risk liability,” a broader concept of liability regime than the American doctrine traditionally associated with abnormally dangerous activities. Significantly, however, the majority of commentators in Taiwan assume that risk liability and the doctrine of strict liability are synonyms.⁴ Moreover, they argue that strict liability is a “superior rule” to negligence principles.⁵ As a result, the tension between strict liability and negligence arises because it becomes difficult for the legal system to draw a line between the so-called superior rule and the inferior negligence principles. To solve the issue, this

¹ In American common law, the recurrent tension between strict liability and negligence is also observable. See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 645 (9th ed. 2008). For a definition of traditional strict liability, see Williams v. Amoco Prod. Co., 734 P.2d 1113, 1121 (1987). Under this Dissertation’s view, implicit in the traditional strict liability is the concept of “absolute liability.” See infra 130.
² Unless otherwise specified, statutes or regulations to which this Dissertation will refer in the following text are rules of Taiwan. For a full English version of the CIVIL CODE (Taiwan), please refer to: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=B0000001.
³ For an introduction to German tort liability, see C. C. VAN DAM, EUROPEAN TORT LAW 73-92 (2nd ed. 2013).
⁴ Wang Tzejian, Chin Chuan Hsing Wei Fa (Tort Law) 663-64 Taipei: San Min Book Co., Ltd., 2011.
⁵ Put simply, most scholars believe that strict liability is a superior rule for resolving legal conflicts and encouraging safety. See generally: Liu Cheuntang, Pan Jie Min Fa Jai Bian Tze (Case Analysis on General Prov. of Obligation of the Civil Code) 127-28 Taipei: San Min Book Co., Ltd., 2001 [hereinafter cited as Case Analysis on General Prov. of Obligation of the Civil Code].
Dissertation first argues that risk liability is best understood as a superordinate concept waiting for the supplement of an applicable doctrine, which arguably should be “intermediate liability.”

Under the doctrine of intermediate liability, tort liability is determined by the following three criteria:

- First, once an accident has occurred, there is a rebuttable presumption of negligence on the part of the defendant.
- Second, the defendant bears the burden of proof to rebut the inference of negligence.
- Third, some version of contributory negligence is recognized as a defense.

Thus, “intermediate” liability is so-called because it is more rigorous to defendants than negligence principles, while remaining less rigorous than traditional strict liability.

Table 1: The Concept of Risk Liability and Resulting Categories of Tort Liability in Taiwan

<table>
<thead>
<tr>
<th>The Concept of Risk Liability</th>
<th>Traditional View</th>
<th>Proposed View</th>
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<tbody>
<tr>
<td>Risk Liability =</td>
<td>Strict Liability</td>
<td>Risk Liability = Intermediate Liability</td>
</tr>
</tbody>
</table>

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6 See below for Table 1.
### Resulting Categories of Tort Liability

<table>
<thead>
<tr>
<th></th>
<th>1. Intentional Torts</th>
<th>1. Intentional Torts</th>
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</thead>
<tbody>
<tr>
<td>3. Risk Liability</td>
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</tbody>
</table>

### Notes:

- Under this Dissertation’s view, intermediate liability does not change its status as a fault-based liability rule because it only shifts the burden of proof regarding negligence to the defendant. Hence, the new risk liability, fulfilled by intermediate liability, is only a variation under negligence principles.
- It should be noted that although under the proposed view the concept of risk liability is fulfilled by the principle of intermediate liability, intermediate liability refers to broader situations in which the shifting of burden of proof is required by law, and does not necessarily equate to risk liability. For example, the second paragraph of Article 184 is an intermediate liability rule traditionally not associated with the concept of risk liability.

With risk liability fulfilled by the principle of intermediate liability, this Dissertation further argues that traditional strict liability is untenable and that reforms must take place of several rules currently governed by this so-called superior doctrine. In this way, the Taiwanese legal system can best accommodate the rising tension between strict liability and negligence.

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8 See above for Table 1.
9 The distinction between traditional strict liability and risk liability lies on whether the rule recognizes some version of contributory negligence defense. Because risk liability recognizes such a defense, it should, as this Dissertation argues, be reinterpreted as the principle of intermediate liability.
10 See *supra* 1.
Finally, this Dissertation not only suggests that current rules governed by strict liability be changed into rules of intermediate liability but also answers five questions raised by Taiwanese legal scholarship. These questions include:

- What is the scope of Article 191-3 of the Civil Code of Taiwan and how does it relate to Article 191?\(^{11}\)
  Because the plain meanings of the two Articles render themselves rules of intermediate liability to govern certain activities, these rules may possibly overlap. \(^{12}\) However, this Dissertation argues that they are distinguishable.\(^{13}\)

- What are the defenses to risk liability?\(^{14}\)
  Since this Dissertation argues in favor of substituting strict liability for intermediate liability as the operative rule for risk liability,\(^{15}\) defenses available to negligence, such as comparative negligence and assumption of risk, are also available to intermediate liability.\(^{16}\)

- Does the legislature need to add limitations on the maximum amount of compensation or on damages for emotional distress for risk liability?\(^{17}\)
  This argument traditionally serves to alleviate the defendant’s burden under strict liability. Arguing that intermediate liability should be the rule for risk liability, this Dissertation suggests that there is no need to keep these limitations.

- Is a different statute of limitation available to risk liability?\(^{18}\)
  Since intermediate liability, rather than strict liability, is the primary rule of risk liability, the applicable statute of limitation under negligence law is also available to risk liability.\(^{19}\) Hence, there is no need to adopt a

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\(^{12}\) Id.

\(^{13}\) See infra 165-166.

\(^{14}\) See supra note 4 at 720.

\(^{15}\) Intermediate liability does not change its status as a fault-based liability rule for accidental harms. See supra 3 for explanations in Table 1.

\(^{16}\) See infra 192.

\(^{17}\) See supra note 4 at 720-21.

\(^{18}\) Id. at 721.

\(^{19}\) In Taiwan, the applicable statute of limitation for negligence is a two-year limitation, as the first paragraph of Article 197 of the CIVIL CODE provides that:
  The claim for the injury arising from a wrongful act shall be extinguished by prescription, if not exercised within two years from the date when the injury and the person bound to make compensation became known to the injured person. The same rule shall be applied if ten years have
different statute of limitation. However, liability under the Highway Act, damages arising out of nuclear disasters, and product-related injuries are each subject to special treatments.  

- What is the role of equitable liability under this Dissertation’s propositions?  

Even though this Dissertation argues that liability should be determined in accordance with the fault of the actor, it recognizes that special policy considerations may require the imposition of tort liability irrespective of fault—an insurer-like liability. Accordingly, under this Dissertation’s propositions, the German doctrine of equitable liability (or the so-called Billigkeitshaftung) is the only recognizable strict liability principle. However, such a no-fault doctrine should be absorbed into negligence principles as a secondary variation only.

B. Methodology

To finish the tasks, this Dissertation will review statutory regulations, judicial decisions, law review articles, and other secondary authorities to analyze the principle of strict liability. Additionally, it will compare cases and scholarly works in Taiwan with resources in the United States. Since the issues of strict liability have been discussed more in the United States than in Taiwan—particularly the policy debates over the feasibility and economic analysis of this principle—further reviews on those

\[20\] See infra 194.
\[21\] The principle of equitable liability forces one who has the better financial capacity to compensate the innocent victims for the injuries even if he is not liable. Although Taiwanese scholars call this principle equitable liability, it has nothing to do with common law equity. See the second paragraph of Article 188 of the CIVIL CODE for example.
\[23\] See infra 52-56 for discussions of equitable liability.
\[24\] See infra 160.
American resources will provide different insights for analyzing the doctrine of strict liability. For example, some commentators in the United States have come up with abundant analysis arguing that strict liability should be abandoned in product cases or that it is unjustifiable in general.25 This Dissertation borrows the analysis from the United States, and argues that several strict liability rules in Taiwan should be changed into intermediate liability rules, 26 including liability for product manufacturers,27 liability for transportation providers,28 liability for mass rapid transit system operators,29 liability for aircraft owners,30 and liability for nuclear facility operators.31

C. Chapter Summary

Chapter One articulates the importance of this research and explicates the issue of the rising tension between strict liability and negligence. Specifically, this

26 See supra 3.
Dissertation argues not only that the liability rule matters in terms of economic efficiency but also that further research into reforms of the liability rule provides different insights into societal changes and meets the interests of the general public. During early years, tort law was not concerned with the fault of the wrongdoer until the close of nineteenth century, and in the modern era strict liability revived in specific fields of law to regulate liability for certain activities. Strict liability plays an important role in the development of modern tort laws by affording greater protection to the general public. In this regard, analyzing and critiquing strict tort liability not only allow contemporary legal scholars to examine social development but also shed some light on future tort reform. Additionally, this chapter distinguishes the modest difference between risk liability and strict liability and addresses the rising tension between strict liability and negligence in Taiwanese law. Lastly, this chapter provides illustrations adapted from recent incidents to show that resolving the issues of strict liability serves the interests of the general public.

*Chapter Two* outlines the primary functions of Taiwanese tort law, introduces Taiwanese negligence principles and their variations, and elaborates the majority’s rationales for preferring strict liability to negligence as the rule to regulate certain activities and how strict liability is incorporated in Taiwanese legal system. First, it

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33 Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 128.
dwells on the rules dealing with damages and punishment, and articulates the difference between the tort liability and criminal liability to emphasize that tort law should primarily serve as a catalyst of accident avoidance. In addition, it follows a historical review of tort liability in Taiwan in order to demonstrate the transition from negligence to strict liability and, most importantly, it outlines the similarities between Taiwanese law (which maintains strict liability to regulate certain activities) and American common law (which initiated a strict products liability revolution during the 1960s). When Taiwan inherited its legal system from foreign jurisdictions, negligence had already been the dominant law of liability at the time, and a mature tort system surrounded by negligence principles had been established. \(^{34}\) During recent years strict liability has been applied in several fields of law, such as liability for nuclear facility operators and products liability. \(^{35}\) Hence, the historical development of laws of civil liability in Taiwan represents a transition from negligence to strict liability. Finally, this chapter re-emphasizes the issue of the rising tension between strict liability and negligence, suggesting that further research into the policy considerations of strict liability provides the keystone to solve this issue.

\(^{34}\) When talking about the legislative history of Taiwan, this Dissertation refers to the legislative history of the Republic of China, which still occupied mainland China at the time when it inherited legal systems from foreign jurisdictions. However, the political issue between China and Taiwan is beyond the scope of this Dissertation.

\(^{35}\) See supra note 31 for liability for nuclear facility operators and supra note 27 for Taiwanese strict products liability.
Chapter Three introduces American tort liability and critiques made by American scholars. To provide in-depth analysis, this part begins with the general structure of American civil liability and refers to tests for strict liability offered by distinguished commentators. Following the general review, this chapter turns to scholarly comments that endorse a retreat from strict liability. For example, commentators in the area of strict products liability argue that: 1) there is no apparent difference in distinguishing strict liability from negligence;\(^{36}\) 2) the assumptions on which strict liability relies are faulty and this doctrine should be abandoned, at least in products liability;\(^{37}\) and 3) strict liability does not evoke higher levels of safety precautions.\(^ {38}\) Finally, this chapter introduces practical reforms that took place in the modern era, such as the revitalization of negligence principles in design defect and failure to warn cases.

Chapter Four shows that analysis of American common law is instrumental to the study of Taiwanese strict liability. Although one may doubt the fitness for introducing common law analysis, considering Taiwan inherited most of its civil liability from Germany and other Civil Law countries, this Dissertation argues that


\(^{37}\) A Modest Proposal to Abandon Strict Products Liability, supra note 25.

Taiwan should not necessarily follow the same reasoning as they do, and that common law analysis, especially the economic approach of tort law, provides Taiwan with a different perspective of understanding tort liability. To achieve this goal, this chapter will do comparative works on tort law, policy justifications for strict liability, and the difference in the areas of law to which this principle applies.

The second part of this chapter distinguishes the difference among strict liability, intermediate liability, and res ipsa loquitur. The third part of this chapter introduces how absolute liability fell and how contributory negligence or comparative negligence became a valid defense in strict liability actions. Specifically, this Dissertation argues that because contributory negligence or comparative negligence is a valid defense to strict liability, replacing strict liability with intermediate liability will not sacrifice the level of precaution or accident avoidance.

Finally, this chapter responds to the tests for strict liability and argues that strict liability is hardly justifiable as an independent liability regime. Rather, it is intermediate liability that satisfies the same test and should be the rule of risk liability.

Chapter Five demonstrates how intermediate liability could replace strict liability as the rule of risk liability and answers several collateral issues. First, Chapter Five analyzes the proper standard of liability for Article 191-3.\(^\text{39}\) Although the

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\(^{39}\) The rule is an intermediate liability rule according to its plain meaning. See infra 22.
majority of scholars favor strict tort liability as the rule for people engaging in
dangerous activities, this Dissertation prefers intermediate liability to traditional strict
liability, arguing that there is no need to revise the rule. In addition, this Dissertation
argues that Article 191-3 and Article 191 are distinguishable. Thirdly, by proving
that there is no compelling evidence suggesting that strict liability helps improve
safety precaution or accident avoidance, this Dissertation argues that other Taiwanese
strict liability rules also need to be modified to intermediate liability rules. Fourthly,
to provide deeper evaluation, this chapter addresses the issue as to the standard for
recovery for pure economic loss under intermediate liability, suggesting that pure
economic loss is not recoverable under this principle.

Finally, this chapter answers the remaining collateral issues including the
available defenses to risk liability, ceilings on liability, and issues regarding the statute
of limitations. Most importantly, by interpreting risk liability as the principle of
intermediate liability, the propositions of this Dissertation not only alleviate the rising
tension between strict liability and negligence, but also establish a new framework of

\[\text{See supra 4.}\]
\[\text{See supra note 27-31 for examples of these rules.}\]
\[\text{This collateral issue is relevant to my previous research in which I framed the solution as a standard for recovery for pure economic loss in “unintentional torts” to cover both situations under negligence and those under strict liability. By rejecting the principle of strict liability in Taiwanese legal system, my claim may be reigned as a standard for recovery for pure economic loss in “fault-based regime.”}\]
\[\text{See supra 4-5.}\]
Taiwanese tort liability comprising of only intentional torts, negligence principles, and negligence variations.\textsuperscript{44}

\textsuperscript{44} See infra 196 for Chart 1.
Chapter One:  

The Importance of Liability Rule and the Origin of Its Issue

Synopsis

- Legal liability matters in terms of efficiency.
- The content of tort law has a close connection with social changes and development.
- Resolving the issue on tort liability helps law practitioners deal with everyday problems.
- Risk liability is a liability regime under Taiwanese law traditionally associated with strict liability.
- The rising tension between strict liability and negligence can be demonstrated in the debate over Article 191-3 in Taiwan’s Civil Code, leading to the quest to find the proper liability rule to regulate dangerous activities.
- Issue highlighted: Is strict liability a superior rule to negligence?
1.1 Liability Rule Matters

Liability rule matters, for one of the primary concerns of tort law has been whether one whose actions harm another should be required to pay compensation for the harm done.45 Professor Ronald Coase illustrated the importance of legal liability in his famous article The Problem of Social Cost46 with an example in which a cattle-raiser and a farmer who raises crops own neighboring lands in a world of zero transaction costs.47 When the cattle wander onto the farmer’s land and destroy some of the crops, the issue arises as to who should bear the loss.48 Assuming the farmer has the entitlement to be free from crop damage, the cattle-raiser will be liable for the damage and adopt the strategy that permits the highest level of cattle production at the lowest costs.49 Conversely, if the cattle-raiser has the entitlement to run his cattle on the farmer’s land without any liability for the damage to the crops, the farmer will bear the costs and adopt the lowest-cost solution,50 including not cultivating certain strips of his land.51 The only difference between these two situations is whether the farmer will have to absorb the damage costs himself; however, in a world of zero

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47 Id. at 2-5.
49 DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW & ECONOMICS 90-91 (2nd ed. 2011).
50 Id. at 91.
51 See supra note 46 at 4.
transaction costs, the ultimate result in either case will always be efficient through bargaining.\textsuperscript{52} In other words, in the absence of transaction costs, the parties would bargain to the efficient allocation of resources regardless of the initial placement of legal liability.\textsuperscript{53} However, in the real world, the transaction costs are positive and never zero, and the resources are scarce.\textsuperscript{54} Furthermore, tort compensation is predicated on whether the defendant in a tort action is liable for the plaintiff’s harm.\textsuperscript{55} Thus, legal liability always matters in terms of efficiency.\textsuperscript{56}

In addition, tort reform has a strong interaction with social changes, and the discussions of legal liability and of its reform matter in terms of social development and interest to the general public. During early years, the legal community followed principles more akin to strict liability, and a tortfeasor was responsible for the resulting damages, irrespective of fault.\textsuperscript{57} During the Industrial Revolution at the close of the nineteenth century, the social belief that industries would thrive if they were not burdened with all the losses that they caused fostered fault or negligence law, even though industrialization enhanced the chances of accidents.\textsuperscript{58} Legislators theorized that the imposition of excessive liability might have driven out growing

\textsuperscript{52} See supra note 49 at 91-92.
\textsuperscript{54} See supra note 49 at 96-97 and at 2-3.
\textsuperscript{55} See supra note 4 at 11.
\textsuperscript{56} Id.
\textsuperscript{58} Id.
businesses, detrimentally affecting the economy;\textsuperscript{59} thus emerging industries and enterprises flourished under the protective cover of negligence principles.\textsuperscript{60} Fault concepts coincided not only with the social desire of the Industrial Revolution but also with the nineteenth century individualism underlying the \textit{laissez faire} political philosophy of the time.\textsuperscript{61} Until the mid-twentieth century, the societal need for the expansion of tort liability to afford greater protection to the general public enabled strict liability to revive specific fields of law to govern certain activities.\textsuperscript{62}

Historically, strict liability not only plays an important role in the development of tort law but also affords greater protection to the general public when societal need of such protection arises. For this reason, the analysis of tort liability not only inspires tort reform but also makes sure that tort law keeps up with social changes and development.

Finally, there are practical merits from resolving the issues of liability rule, because liability rule deals with the everyday problems that law practitioners frequently encounter. The world in which we live is one full of risks and harms.\textsuperscript{63} For example, mine explosions, workers’ occupational diseases, automobile collisions,

\textsuperscript{60} See supra note 57.
\textsuperscript{61} \textit{Id.} at 1201-02.
\textsuperscript{62} \textit{Id.} at 1202.
\textsuperscript{63} See supra note 4 at 1.
aviation accidents, waste pollution incidents, oil spills, product-related injuries, and professional malpractices are all daily accidents governed by tort liability.\textsuperscript{64} According to the statistics published by Taiwanese authority in 2008, the total payments from labor insurance to all occupational accident victims were up to 51 trillion dollars in 2007.\textsuperscript{65} Those accidents led to astoundingly huge amounts of monetary damages and the waste of resources.\textsuperscript{66}

On the other hand, the primary function of tort law is to provide each individual protection against unlawful harm, affording proper remedies to the injured individual and holding the tortfeasor liable for his tortious conduct.\textsuperscript{67} In this way, tort law protects both individual autonomy and individual dignity.\textsuperscript{68} The research of tort liability helps systematically explicate when a person should be held liable and pay for damages done to victims, making sure that tort law serves its important function as a mechanism for society to deter future accidents and reduce wastes resulting from potential accidents.\textsuperscript{69} Consequently, tort liability matters, and this Dissertation contributes enormously to the future development of Taiwanese tort law.

\textsuperscript{64} Id.
\textsuperscript{65} Id. at 2. The exact number the author cited is NT$ 1,614,687,217,857,610.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 42.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 5.
1.2 Defining Risk Liability and Pinpointing the Issue

As noted in the very beginning of this chapter, liability rule always matters. However, among several possible issues of liability rule, this Dissertation focuses on only one of them: risk liability. Before illustrating the issue, this Dissertation has to define risk liability and provide the general background to this rule, since risk liability might be an unfamiliar term in American legal scholarship.

A. The Modest Difference Between Risk Liability and Strict Liability

In Taiwanese law, negligence is the default rule for unintentional torts. However, in certain areas of law, *Gefährdungshaftung* or “risk liability” is the operative rule. The concept of this liability rule is the product of inheritance from Germany’s legal system. Risk liability, as demonstrated by its name, is a liability regime which attributes one’s legal responsibility to the source of risk of harm. In other words, the imposition of liability under risk liability is not predicated on whether a person intentionally or negligently caused injuries to others; rather, the basis of its attribution lies on the fact that the actor owns, manages, or controls the source of risk.

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70 See supra 14.
71 See Article 184 of the CIVIL CODE (Taiwan).
72 See supra note 41.
73 See supra note 4 at 669.
75 *Id.*
It is when the source of risk results in injuries to others that the person who owns, manages, or controls the source has to compensate the injured victim because under these circumstances that person is the one who is better able to control the risk and to spread the loss, and he is also the one who benefits from conducting risky activities.76

Because risk liability holds a person liable regardless of the person’s fault, it is a rule traditionally associated with the concept of strict liability or with liability without fault in the American common law.77 However, although risk liability can be identified as a rule of strict liability, such conceptualization cannot run backwards. That said, although risk liability is a liability regime governed by strict liability, not all strict liability rules are risk liability rules.78 This is because some forms of liability imposed in negligence seem more like strict liability.79 For example, equitable liability (or Billigkeitshaftung) is a strict liability rule which holds an employer liable in whole or in part for damages done by the employee’s negligence within the scope of employment, even if he exercised due care in supervising the employee’s works,80 but it is not a rule of risk liability as its basis of attribution lies on the ground of fairness and on the consideration of the parties’ financial conditions rather than on the

76 Id.
77 See supra note 4 at 664 and supra note 1 for traditional strict liability.
78 See supra note 74 at 128.
80 See the second paragraph of Article 188 of the CIVIL CODE.
source of the risk. In so defining, although the Dissertation will use strict liability to
describe the concept of risk liability in the following context, readers are encouraged
to bear in mind the modest difference between the two concepts.

B. The Issue of Risk Liability: The Rising Tension Between Strict Liability and Negligence

So far this Dissertation has defined the meaning of risk liability and identified
the difference between risk liability and strict liability. In this section, this
Dissertation raises the issue of the rising tension between strict liability and
negligence within liability rule.

As noted previously, negligence is the default rule for unintentional torts in
Taiwan. However, the societal need for the expansion of tort liability to afford
greater protection to the general public enables strict liability to revive in specific
fields of law to govern liability for certain activities during the modern era. The
basis of this trend is perhaps predicated on the recognition of negligence principle’s
weakness: negligence’s failure to deal with accidents derived from high risks of
harm. Thus several legislative changes have taken place, and many strict liability

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81 See supra note 74 at 128-29.
82 See supra 18-20.
83 See supra 18.
84 See supra 16.
85 Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 128.
rules have been established, including liability for product manufacturers,\(^{86}\) liability for transportation providers,\(^{87}\) liability for mass rapid transit system operators,\(^{88}\) liability for aircraft owners,\(^{89}\) and liability for nuclear facility operators.\(^{90}\)

In 1999, Article 191-3 established general liability rule for dangerous activities; however, it has evoked serious debates over Taiwanese legal scholarship. The rule also originated from the recognition of high risks of harm and the need to afford greater protection to injured victims within modern society.\(^{91}\) In modern society, the complexity of carrying out businesses or activities makes it more difficult for the injured to prove the defendant’s negligence, and the demanding requirements of negligence law become obstacles to the ability of the injured to seek recovery.\(^{92}\) For example, the process of production becomes more complex with the rise of mechanization, making it difficult for a victim to prove the negligence of the owner of the enterprise in an occupational accident.\(^{93}\)

In addition to fairness considerations, three other factors justify a special treatment of liability for dangerous activities:

\(^{86}\) See supra note 27.  
\(^{87}\) See supra note 28.  
\(^{88}\) See supra note 29.  
\(^{89}\) See supra note 30.  
\(^{90}\) See supra note 31.  
\(^{92}\) See supra note 4 at 644.  
\(^{93}\) See supra note 85.
1) The operators of dangerous activities are the producers of the sources of risk;

2) Only the operators of dangerous activities control the risks; and

3) Those operators benefit from carrying out dangerous activities.  

Under these considerations, Article 191-3 imposes tort liability on those carrying out dangerous activities, and the injured who seek recovery under Article 191-3 need not prove the defendant’s negligence and causation between risk of harm to the damages.

[T]he person, who runs a particular business or does other work or activity, shall be liable for the injury to another if the nature of the work or activity, or the implement or manner used might damage to another. Except the injury was not caused by the work or activity, or by the implement or manner used, or he has exercised reasonable care to prevent the injury.  

This rule also is the product of inheritance from a foreign legal system. However, although most Civil Code rules were inherited from Germany, this rule was specifically inherited from Italy. Article 2050 in the Italian Civil Code provides that:

[W]hoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.

However, the three justifications for this rule are identical bases for risk liability. In Germany, risk liability rules are found in individual areas of law, and there are no

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94 See supra note 92.
95 Id. at 645.
96 Article 191-3 of the Civil Code.
97 Codice civile [C.c.] art. 2050 (It.).
98 MAURO BUSSANI & VERNON V. PALMER, PURE ECONOMIC LOSS IN EUROPE 174 (2003).
99 See supra note 4 at 645 and supra 18.
generalized risk liability rules to govern liability for dangerous activities. On the contrary, Article 2050 in the Italian Civil Code provides a generalized risk liability rule, but its standard for distinguishing dangerousness and non-dangerousness is unclear, thereby making the rule useless and hardly applicable.

Similarly, Article 191-3 in the Civil Code of Taiwan is subject to heavy criticism. In addition to the criticism that the generalized rule has the same predicament as its Italian origin in providing the standard for dangerousness, Professor Tzejian Wang argues that most of the rules in Civil Code of Taiwan were inherited from Germany, and it is highly questionable whether it is appropriate for Taiwan to adopt an Italian rule about which Taiwan has little knowledge. Significantly, this rule is a risk liability rule, and it is strict liability rather than negligence that should be the rule for risk liability because it is strict liability that provides better protection to the injured victims. Although Article 191-3 shifts the plaintiff’s burden of proving negligence to the defendant and relieves the plaintiff of burden of proving causation, shifting or relieving the burden of proof does not change the rule’s negligence characteristics. By recognizing that negligence fails to deal with high risks of harm, the majority of scholars propose that Article 191-3 should be interpreted as or changed into a rule of

100 See supra note 4 at 646.
101 Id. at 647.
102 Id. at 648.
103 Id. at 645.
104 See supra 3 for explanations in Table 1.
strict liability.\textsuperscript{105}

The first two questions regarding the definition of dangerousness and the appropriateness of inheriting Italian law do not concern the liability rule, and are of secondary importance to this Dissertation. On the other hand, the last question raises an issue that deserves more scholarly attention: the rising tension between strict liability and negligence. Put simply, strict liability is widely recognized as a superior rule to afford greater protection to the victims, but the question remains on how strict liability works in that way. To answer the question and argue that strict liability is the proper standard of liability for Article 191-3, the scholarship has to analyze the legal bases of strict liability so as to find the justifications for this principle’s “superiority.” In addition, if strict liability is a “superior” rule to negligence in affording greater protection to the victims, more questions arise: why is strict liability still limited to small numbers of areas of the law?\textsuperscript{106} Is it possible to expand strict liability to other areas of law? More broadly, can strict liability be the default rule for unintentional torts? As readers will discover later, this Dissertation argues that strict liability is not a superior rule to negligence and that its revival during the modern era originated from the underestimation of negligence principles.\textsuperscript{107} For the present, it is more helpful to

\textsuperscript{105} See generally: supra note 7 at 123-30, supra note 11, and supra note 74 at 129-131.
\textsuperscript{106} See supra note 41.
\textsuperscript{107} See infra 150.
emphasize the practical merits from solving the issue of strict liability by illustrating the types of accidents that are currently governed or arguably should be governed by this so-called superior principle.

1.3 Illustrations

In Taiwan, strict liability governs few areas of law. In other words, strict liability is the operative rule for only a few categories of accident, including product-related injuries, common-carrier accidents, aviation incidents, and nuclear-facility disasters. In addition to those accidents, this section will also provide examples of incidents applicable to Article 191-3, since the majority of scholars argue that Article 191-3 should be a strict liability rule. For the present, it is enough for readers to know that these accidents will be the materials for later analysis.

108 See supra note 41.
109 See supra note 27.
110 See supra note 28 and supra note 29.
111 See supra note 30.
112 See supra note 31.
113 See infra 166-182.
A. Product-related Injury

1) Manufacturing Defect

a. Poisonous Milk Case\textsuperscript{114}  

On October 18, 2009, Ms. Sung bought from a retailer a can of powdered milk manufactured by Mead Johnson, and opened it immediately. On October 26, 2009, her 5-month old child consumed the milk, and suffered dropsy and fever for three days. The mother then discovered some unknown crystals in the powered milk, and sent it for examination. The examination showed that the powdered milk contained excessive sodium and melamine, and concluded that the consumption of excessive sodium and melamine was the cause of the infant’s dropsy, fever, and reduction of urine in the following days. The physician furthered noted that the consumption would result in long-term kidney malfunction. Ms. Sung brought a suit against Mead Johnson on the theory of manufacturing defect.

b. Exploding Bottle Case\textsuperscript{115}

\textit{C Company} delivered several cases of soda to a restaurant, placing them on the floor behind the counter where the cases of soda remained for several hours. \(W\) is a waitress in the restaurant, and one day she picked up a case and set it upon a nearby

\textsuperscript{114} Taiwan Taipei Difang Fayuan, 99 Nian Hsiao Zi No. 21 (Hsiao Zi No. 21 by Taiwan Taipei District Court in 2010).

\textsuperscript{115} Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).
ice cream cabinet in front of the refrigerator. She then proceeded to take the bottles
from the case and put them into the refrigerator. However, when she moved the fourth
bottle about 18 inches from the case, it exploded in her hand, causing severe injuries
to her. Testimony from her colleagues revealed that the bottle did not bang either the
case or the anything else when it exploded. W brought suit against C Company,
arguing that the exploded bottle was flawed.

2) Design Defect: Defective Ladder Case

S worked as a technician for L Company, which provided cable television service
for L district. L Company purchased the extension ladder and hook assembly used
during works. One day, S was assigned a routine repair job that required him to rest
against a cable strand located several feet off the ground. S placed the cable line inside
the U-shaped hooks that extended from the top of the ladder and rested the ladder
against the cable. The base of the ladder was on the ground near a utility pole to
which the overhead cable was attached. S climbed the ladder without securing the
ladder to the pole or any other stationary object, planning to secure himself to the
ladder with his safety belt when he reached the top of the ladder, where he would use
a hand line to attach the ladder to the utility pole. However, after S climbed to the top
of the ladder, his weight shifted while he reached for his safety belt, causing the

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116 Smith v. Louisville Ladder Co, 237 F.3d 515 (5th Cir. 2001).
ladder to slide sideways from some distance with $S$ hanging onto the ladder. When the ladder reached a position near the low point of the line between two utility poles to which it was attached, one of the hooks came off the line, and the ladder twisted and came to an abrupt halt, causing $S$ to fall to the ground and suffer serious injuries. $S$ brought suit against the manufacturer of the ladder arguing that the ladder was defectively designed.

3) **Insufficient Warning:** Defective Cleaner Case

$O$ is a bricklayer foreman. One day, $O$ spotted a fifteen-gallon drum of mortar cleaner sitting on the ground. To prevent the cleaner drum from freezing to the ground, he picked it up and moved it to a nearby pallet. When $O$ dropped the drum on the pallet, the bung closure popped out of the drum, splashing hydrochloric acid based cleaner into his eyes. $O$ eventually lost sight in one of his eyes. The mortar cleaner was manufactured and packaged by $P$. The fifteen-gallon drum into which $P$ packaged the cleaner was manufactured by $D$, and the bung closure used in the fifteen-gallon drum was manufactured by $R$. However, because $O$ settled with $D$ and $R$, his only action is against $P$, grounded under the theory of failure to warn.

B. Common-carrier Accident

1) Freight Transportation Case\textsuperscript{118}

\textit{T Company} imported a machine from the Netherlands. Upon the machine’s arrival at the airport, \textit{T Company} hired \textit{W Express} for delivery. However, at the time of unloading, an employee-driver of \textit{W Express} not only failed to recognize that he parked the truck on a ramp, but also moved it with the back door opening. The machine slipped out of the truck, and was entirely damaged.

2) Carriage of Passenger Case\textsuperscript{119}

On November 21, 2003, \textit{P} took the bus operated by \textit{S Bus Company} heading for K train station. However, while en route on the Freeway 1, a third party, \textit{C}, collided with a vehicle in front of him and lost control of his car. \textit{C}’s vehicle subsequently struck the bus on which \textit{P} was riding, and \textit{P} suffered severe injuries.

3) Mass Rapid Transit Station Case\textsuperscript{120}

On May 5, 2001, \textit{M} took an escalator in a MRT station to travel from the platform to the lobby. At the end of his ride, he stumbled over a metal cover and fell. Though \textit{M} felt a subtle headache, he did not go to the hospital. Afterwards, \textit{M} suffered

\textsuperscript{118} Taiwan Hsinchu Difang Fayuan, 91 Nian Su Zi. 725 (Su Zi No. 725 by Taiwan Hsinchi District Court in 2002).

\textsuperscript{119} Taiwan Hsinpei Difang Fayuan, 93 Nian Su Zi No. 1262 (Su Zi No. 1262 by Taiwan New Taipei District Court in 2004).

\textsuperscript{120} Taiwan Taipei Difang Fayuan, 93 Nian Su Zi No. 2671 (Su Zi No. 2671 by Taiwan Taipei District Court in 2004).
chronic headache; however, he thought he just caught a cold and took pain-killers. On June 16, 2001, $M$ had a severe headache and was sent to the hospital. He died of cerebral hemorrhage on July 2, 2001. Further investigation revealed that at the time of taking the escalator, the decedent turned around to talk to his spouse, thus not noticing that he was close to the end of the trip and falling backwards when he stumbled. However, the decedent’s spouse argued that the installment of the escalator was improper because there were no signs warning against the risk of taking the escalator and because there was no staff advising elders to take the elevator instead.

C. Aviation Incident

1) C-Air Flight 711 Incident\textsuperscript{121}

*C-Air* flight 711 took off on the sunny afternoon of May 25, 2002, and was scheduled to arrive at the H Province Airport within ninety minutes. All on the flight crew were highly experienced pilots, but about half an hour after taking off, presumably while the plane was still climbing, the flight was lost. All of the crew members and passengers onboard died in the accident.

After three hours of searching for flight 711, the Coast Guard located the wreckage. Further investigation found that twenty years prior to the accident, when

the same aircraft landed at the H Province Airport, its tail struck the ground and scraped along the runway because the pilot landed it with the nose too high. Even if C-Air conducted a permanent repair after the incident, the repair was not carried out properly because the workers did not follow the instructions in the aircraft manufacturer’s structural repair manual. According to the instructions, any damaged plate has to be replaced and the new plate must be large enough to cover more than thirty percent of the damaged area. However, the repair crews failed to replace the damaged plate; rather, they simply covered the area with a plate the same size as the damaged area. Because of the improper maintenance, the damaged part of the aircraft was gradually weakened as a consequence of metal fatigue, and finally broke on the date of the accident.

2) T-Air Flight 555 Incident\textsuperscript{122}

On the evening of July 23, 2014, T-Air flight 555 took off in the rain, and was scheduled to arrive at the P City Airport within an hour. On that day, there were heavy rains at the destination because of an approaching typhoon. While the aircraft was landing, it deviated from its course and lost altitude. In an effort to land for a second time, the aircraft crashed into two houses a few seconds later, causing the deaths of 48

out of 58 people on board and inflicting ground injuries on 5 people. Further investigation concluded that the aircraft lost control because of extreme weather conditions.\footnote{For a complete investigation report of TransAsia Airways Flight 222 Incident, please refer to http://www.asc.gov.tw/main_en/docaccident.aspx?uid=342&pid=296&acd_no=182 (last visited Oct. 7, 2016).}


On March 11, 2011, a 9.0 magnitude earthquake occurred near J Island. A nuclear power plant on J Island consisted of three units of nuclear reactors. All reactors were automatically shut down at the time the earthquake was detected. However, the situation worsened after a tsunami hit the power plant, severely damaging the power supply facilities and crashing the emergency-cooling system. Subsequently, fuel rods in the reactors melted, causing several explosions and the release of radioactive materials.
E. Dangerous Activities

1) The Gasoline Leaks Case\textsuperscript{125}

\textit{C Petroleum Co.} is famous for manufacturing and exporting a selection of high quality gasoline, and owns an oil refinery in K City. On April 24, 1999, an oil tanker owned by \textit{W Inc.} was anchored at the pier of the K City refinery, preparing to load the gasoline ready for export. \textit{C Petroleum} provided the petroleum pipelines to transmit the gasoline onto the cabin of the tanker from its gasoline storage facilities. Five minutes after the transmission, one of the pipelines exploded, and the oil leakage polluted the marine area around a neighboring pier owned by \textit{H}.

2) Electricity Overload Case\textsuperscript{126}

On April 13, 2002, a fire occurred at \textit{B}'s office and consumed a neighboring house owned by \textit{A}. Fire investigation revealed that a short circuit was the cause of the fire, which resulted from long-term usage of electricity at \textit{B}'s office.

\textsuperscript{125} Taiwan Kaohsiung Difang Fayuan, 90 Nian Chung Su Zi No. 317 (Chung Su Zi No. 317 by Taiwan Kaohsiung District Court in 2001).

\textsuperscript{126} Taiwan Gaodeng Fayuan 92 Nian Chung Shang Zi No. 587 (Chung Shang Zi No. 587 by Taiwan High Court in 2003).
Chapter Two:

Laws of Tort Liability in Taiwan

Synopsis

- Tort law serves to compensate the victim for injuries and to deter future accidents, not to punish the injurer.
- The Civil Code of Taiwan adopts negligence as the default liability rule for unintentional torts.
- Negligence is the breach of duty of care of a good administrator or a reasonable person.
- Legislature provides variations of negligence (i.e. intermediate liability and equitable liability) to afford greater protections.
- Although negligence protects freedom of action and induces efficient level of care, it is believed to be an inferior option when the risk of harm is high.
- Strict liability is the operative rule for several high-risk activities, e.g. liability for common carriers, liability for nuclear facility operators, liability for civil aviation, and products liability.
- Issue Revisited: What is the proper liability rule for Article 191-3 of the Civil Code—intermediate liability or strict liability?
2.1 Overview

In the first chapter, readers already got general ideas about the importance of legal liability, the rising tension between strict liability and negligence, and the practical merits from solving the issue of strict liability. The following two chapters will introduce the tort liability rules of both Taiwan and the American common law. The purpose of these two chapters serves to give the readers more ideas about the similarities and differences on tort liability rules from separate entities, which are important for later analysis.

In this chapter, this Dissertation focuses on Taiwanese rules, outlining the purpose of tort liability, the default liability rule for unintentional torts, and the transition from negligence to strict liability.

2.2 The Primary Purposes of Tort Law

Liability for wrongful acts is addressed either by criminal law or tort law, and together, criminal law and tort law establish a binary structure to regulate people’s behaviors.\(^\text{127}\) Tort law and criminal law share some similarities, since both deal with acts that injure a third party.\(^\text{128}\) However, tort law and criminal law serve different purposes; while tort law covers civil wrongs, concerning itself with harm against a

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\(^{127}\) Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 75.

\(^{128}\) Id.
person’s private rights or property as a result of a tortfeasor’s act,\textsuperscript{129} criminal law concerns crimes, or wrongs against both the victim and society.\textsuperscript{130} Significantly, the primary function of criminal law is to punish the perpetrator for violating public interests.\textsuperscript{131} In so doing, criminal law indirectly inhibits crimes and protects society against criminal offenses.\textsuperscript{132} Additionally, criminal liability concerns offenses against society while tort liability cares about the relationship between private parties.\textsuperscript{133} Thus, in a society where criminal law and tort law separately play their roles, tort law does not focus on punishment but rather the following purposes.\textsuperscript{134}

A. Protecting Freedom of Action and Private Interests

Tort law serves to balance freedom of action and private interests, focusing on regulating under what circumstances and for what types of damage the tortfeasor has to be held liable in order to compensate the injured victim.\textsuperscript{135}

\textsuperscript{129} \textsc{black’s law dictionary} 1717 (10th ed. 2014).
\textsuperscript{130} See \textit{supra} note 49 at 339.
\textsuperscript{132} \textit{Id.} at 38.
\textsuperscript{133} \textsc{William burnham, introduction to the law and legal system of the united states} 403 (2nd ed. 1999).
\textsuperscript{134} See also: \textit{supra} note 7 at 9-10.
\textsuperscript{135} See \textit{supra} note 4 at 7.
B. Compensation

Traditionally, compensation or reparation is a main function of tort law.\textsuperscript{136} According to Article 184 of the Civil Code—the statutory basis for tort causes of action in general—a tortfeasor is bound to compensate the injured when liability is imposed. Specifically, the rule provides that:\textsuperscript{137}

A person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom; the same rule shall be applied when the injury is done intentionally in a manner against the rules of morals.

A person, who violates a statutory provision enacted for the protection of others and therefore prejudice to others, is bound to compensate for the injury, except no negligence in his act can be proved.

The purpose of the duty to compensate is not to punish the tortfeasor, for determination of tort liability does not consider the tortfeasor’s motives.\textsuperscript{138} In addition, the amount of compensation under tort liability is irrelevant to the seriousness of one’s fault.\textsuperscript{139} Rather, the duty of compensation derives from the notions of fairness and justice, and the purpose of this duty is to enable the injured to receive complete and prompt redress.\textsuperscript{140} Through compensation, the victim can shift his loss to the tortfeasor who is responsible for the harm.\textsuperscript{141}

\begin{footnotes}
\item[136] \textit{Id.}
\item[137] Article 184 of the \textit{Civil Code}.
\item[138] See \textit{supra} note 135.
\item[139] See \textit{supra} note 4 at 7-8.
\item[140] \textit{Id.} at 8.
\item[141] \textit{Id.}
\end{footnotes}
C. Accident Avoidance

Accident avoidance is more important than compensation.\textsuperscript{142} As tort law regulates under what circumstances a tortfeasor is liable for the harm to the victim and has to pay for the damages, it establishes a norm of behavior which everyone in a society has to follow; the threat of compensation achieves the goal of deterrence.\textsuperscript{143} The Supreme Court of Taiwan also emphasizes the role of deterrence in tort law.

For example, in Tai Shang Zi No. 1682 of 2001,\textsuperscript{144} a man offered a sacrifice to the god at a fishing port. After the sacrifice, he failed to put out the fire and poured the flaming remains into the sea. The flames mixed with the floating oil and extended the fire to a nearby fishing boat, thereby destroying the boat entirely. The court reasoned that the primary purpose of tort law is to deter future accidents and that anyone who invites risk has a duty to prevent harm.\textsuperscript{145} Additionally, in Tai Shang Zi No. 1758 of 2003,\textsuperscript{146} a fire occurred in the defendant’s house and destroyed a neighboring house owned by the plaintiff. In reasoning that the defendant has a duty to exercise care in

\begin{flushleft}
\textsuperscript{142} *Id.* at 10.
\textsuperscript{143} *Id.*
\textsuperscript{144} Zuigao Fayuan, 90 Nian Tai Shang Zi No. 1682 (Tai Shang Zi No. 1682 by Supreme Court of Taiwan in 2001).
\textsuperscript{145} *Id.*
\textsuperscript{146} Zuigao Fayuan, 92 Nian Tai Shang Zi No. 1758 (Tai Shang Zi No. 1758 by Supreme Court of Taiwan in 2003).
\end{flushleft}
maintaining the electric wires, the court reasoned that the purpose of tort law is to prevent accidents.\textsuperscript{147} Thus, the primary function of tort law is accident avoidance.\textsuperscript{148}

2.3 Fault-Based Liability—Laws of Negligence

In principle, the imposition of liability requires proof of the defendant’s fault. In other words, negligence is the default liability rule for unintentional tort in the Civil Code of Taiwan, and the plaintiff bears the burden of proof in a lawsuit. The first paragraph of Article 184 permits two causes of action in tort premised upon harms to rights or to interests,\textsuperscript{149} and under this rule the plaintiff has to prove the following facts.\textsuperscript{150}

A. Unlawful Acts

Acts refers to conscious moves, including omissions. That said, such moves include situations where the defendant proactively hurts the plaintiff, the defendant uses another person to hurt the plaintiff, and the defendant is under a duty to act but fails to do so, harming the plaintiff. In Taiwan, the duty to act derives from legal rules, contractual relationships, public policies, and morals. Furthermore, since society values

\textsuperscript{147} Id.
\textsuperscript{148} See supra note 142.
\textsuperscript{149} See supra 37.
\textsuperscript{150} Unless otherwise annotated, the following text about elements of the first paragraph of Article 184 is cited and modified from Chiu Tsungchih, Hsin Ting Min Fa Chai Bian Tung Tze–Shang (New Edited General Prov. of Obligation of the Civil Code–vol. 1) 154-80 Taipei: Law Publication Series, Textbook No.1, Fu Jen School of Law, 2003. Please refer to it for more details.
liberty and individualism, no one could be held liable for the actions of another person.\(^{151}\)

In addition, to justify the imposition of liability on the tortfeasor, the act should be unlawful or satisfy the requirement of illegality. In determining whether or not an example of conduct is unlawful, the court looks to whether the defendant establishes affirmative defenses such as self-defense, plaintiff’s consent, or permissible risk, each of which may justify the defendant’s conduct under certain circumstances.\(^{152}\) For example, a nurse can draw blood from a patient for a test as long as the patient consents. However, the plaintiff’s consent is subject to limitation from public policy and morals. That said, a person could not grant permission to another to break his arm or to kill him.

Similarly, permissible risk asks society to tolerate dangers in conducting certain activities when those activities are useful and beneficial to the general public. For instance, a factory is allowed to emit a limited amount of waste gas. However, although permissible risk makes it lawful for a person to create dangers in conducting certain activities, the actor still has a duty to exercise reasonable care during the

\(^{151}\) An exception to individualism in tort law is vicarious liability, the responsibility of the superior for the acts of their subordinate. For example, an employer shall be jointly liable for his employee’s negligence pursuant to Article 188 of the CIVIL CODE.

\(^{152}\) Article 149 provides that:

“a person acting in defense of his own rights or the rights of another against immediate unlawful infringement thereof is not liable to compensate for any injury arising from his action. But if anything is done in excessive of what is required for necessary defense, he is still liable to make a reasonable compensation.”
course of the activities. In Tai Shang Zi No. 56 of 1997, the court reasoned that permissible risk is an affirmative defense to liability only if the defendant complies with the regulations of relevant activities and exercises due care in conducting them. Since the physician in Tai Shang Zi No. 56 of 1997 violated the duty of disclosure under Article 46 in the Medical Care Act and was presumed negligent, the court denied the physician’s affirmative defense arguing that the plaintiff’s retroverted uterus posed permissible risk to the surgery.

B. Harm to Private Rights or Interests

Actions for harm to private rights are regulated under the first part of the first paragraph of Article 184, whereas actions for harm to private interests fall under the second part of the provision. This distinction is practical because whether a victim can bring a negligence action depends on whether or not the injury constitutes harm to private rights. Under the first part of the first paragraph of Article 184, only when the injury is a recognizable harm to private rights can a victim bring an action either in intentional tort or in negligence. However, if the plaintiff suffers harm to private interests, he is only allowed to bring an intentional tort action. In this regard,

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153 Zuigao Fayuan, 86 Nian Tai Shang Zi No. 56 (Tai Shang Zi No. 56 by Supreme Court of Taiwan in 1997).
154 At the time of the decision, the duty of disclosure was imposed under Article 46 of the old MEDICAL CARE ACT. Under the current version, such duty is moved to Article 63. See http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?pcode=L0020021 for details.
155 See supra 37 for text.
156 Id.
defining private rights and private interests is important for applying the first paragraph of Article 184. Generally, private rights are those recognized under the existing legal system, including property rights, publicity rights, and family status rights; private interests, on the other hand, are not recognized under the existing legal system, but are protected by public policies and morals. For example, a person’s opportunity to make a contract with others is protected by public policies and morals, thus protected only under the second part of the first paragraph of Article 184.

C. Damages

As mentioned previously, one of the basic functions of tort law is to compensate the injured. If no one is harmed by the defendant’s acts, there should be no recovery. Tort damages include pecuniary damages and non-pecuniary damages. For pecuniary damages, Article 216 in Civil Code provides that:

Unless otherwise provided by the act or by the contract, the compensation shall be limited to the injury actually suffered and the interests which have been lost. Interests which could have been normally expected are deemed to be the interests which have been lost, according to the ordinary course of things, the decided projects, equipment, or other particular circumstances.

157 The existing legal system encompasses statutes, customs, jurisprudence, and case laws. See supra note 150 at 158.
158 Id.
159 Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 79.
160 See supra 37.
161 Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 80.
In this way, pecuniary damages include positive harms and passive harms, and both are measured on the basis of decrease in value. In situations where the exact decrease in value is hardly ascertained, the court is allowed to exercise discretion in measuring the amount of recovery on the basis of totality of circumstances. 162 Common examples for positive harms are losses of property rights or medical expenses, while passive harms are lost interests that the victim specifically expected to have gained as the result of the ordinary occurrence. As for non-pecuniary damages, they include lost intangible interests and pain and sufferings. For instance, Article 194 provides that:

In case of death caused by a wrongful act, the father, mother, sons, daughters and spouse of the deceased may claim for a reasonable compensation in money even if such injury is not a purely pecuniary loss.

Finally, it should be noted that recovery for non-pecuniary loss is permitted only if statutes provide such recovery. 163

D. Adequate Causation (Zurechnungszusammenhang)

In a tort action, the relationship between the defendant’s tortious act and the actual damage has to be established. 164 Adequate causation is the common theory for determining whether liability should be imposed and the extent to which the coverage of recovery should be. In Tai Shang Zi No. 2210 of 2005, 165 the court reasoned that

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162 Zuigao Fayuan, 86 Nian Tai Shang Zi No. 416 (Tai Shang Zi No. 416 by Supreme Court of Taiwan in 1997).
163 See supra note 4 at 224.
164 BETTINA HEIDERHOFF & GRZEGORZ ŻMIJ, TORT LAW IN POLAND, GERMANY, AND EUROPE 6 (2009).
165 Zuigao Fayuan, 94 Nian Tai Shang Zi No. 2210 (Tai Shang Zi No. 2210 by Supreme Court of
adequate causation is a two-prong test comprising of a conditional relation test and an adequacy test. A conditional relation test analyzes whether the accident would not have occurred but for the defendant’s tortious act. For example, if the defendant did not punch the plaintiff, the defendant would not have died. By contrast, an adequacy test relies upon whether a reasonable person would have foreseen the possibility of the damages under the circumstances. If the answers to the two tests are positive, the relation is established between the defendant’s tortious act and the actual damages.

E. The Defendant’s Fault

The imposition of liability generally requires proof of defendant’s fault. A person is not liable for a victim’s injuries unless he intentionally or negligently harmed the victim. In this way, negligence is the default liability rule for unintentional torts. The Civil Code does not define negligence, so courts and scholars traditionally refer to the Criminal Code. Article 14 of the Criminal Code provides that:166

A conduct is committed negligently if the actor fails, although not intentionally, to exercise his duty of care that he should and could have exercised in the circumstances.

A conduct is considered to have been committed negligently if the actor is aware that his conduct would, but firmly believes it will not, accomplish the element of an offense.

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In this way, negligence is defined as a failure to exercise the duty of care, and the imposition of liability depends on whether the defendant could have been aware of the injuries and exercised care to avoid them. However, since criminal law focuses on punishing the actor’s evil mental attitude, criminal negligence has to inquire into the deficiency in the state of mind of the individual actor. That is, the individual criminal defendant is liable only if he could have been aware of the injuries and avoided them.

Tort law, on the other hand, serves different purposes from those of criminal law, and the test for tort negligence is also different.\(^\text{167}\) To achieve the goal of compensation and accident avoidance, an objective standard for tort negligence is preferable to a subjective test for criminal negligence.\(^\text{168}\) That said, although the both tests for negligence in tort and in criminal actions focus on whether a person exercises due care to prevent injury, the due care in a tort action should be measured on an objective standard of care of a good administrator rather than on whether the individual actor could have foreseen and avoided the harms.\(^\text{169}\) In Tai Shang Zi No. 703 of 2015,\(^\text{170}\) Supreme Court of Taiwan supported such distinction. In that case, the court reasoned that civil liability is different from criminal liability, and whether a defendant is negligent in a civil case for defamation depends on whether he breached his duty of

\(^{167}\) See supra 36.
\(^{168}\) See supra note 4 at 309.
\(^{169}\) Id.
\(^{170}\) Zuigao Fayuan, 104 Nian Tai Shang Zi No. 703 (Tai Shang Zi No. 703 by Supreme Court of Taiwan in 2015).
care as a good administrator. If the defendant failed to exercise care as a good administrator in verifying the allegations, harming the plaintiff’s reputation, he might be held civilly liable for negligence even if he was found not guilty of offenses against reputation.

F. Legal Capacity

The final requirement of a tort action concerns legal capacity. However, it does not come directly from Article 184 but rather from the first paragraph of Article 187 in which the rule provides that:

A person of no capacity or limited in capacity to make juridical acts, who has wrongfully damaged the rights of another, shall be jointly liable with his guardian for any injury arising therefrom if he is capable of discernment at the time of committing such an act. If he is incapable of discernment at the time of committing the act, his guardian alone shall be liable for such injury.

Under this test, whether one has the capacity to make juridical acts depends on whether the defendant is capable of discernment at the time he acts. If at the time of accident a defendant has the capacity to understand that he will be held answerable under law, he satisfies the requirement of legal capacity and is liable for the injuries.

2.4 Variations Under Negligence Principles

According to Article 277 in the Code of Civil Procedure, unless otherwise provided by law or where the circumstances render it manifestly unfair, the burden of

proof lies on the party who alleges facts in his favor. Under negligence law, it is the plaintiff who bears the burden of proof in relation to negligence, and liability is imposed only when the defendant’s fault has been established. However, to afford greater protection to the victims, the legislature is allowed to provide different variations by either shifting the burden of proof related to negligence or even holding the defendant liable regardless of fault.

A. Intermediate Liability

Under the Civil Code, five special provisions are intermediate liability rules. The common characteristic of these rules is that the defendant can escape liability by proving that he has exercised reasonable care to prevent injuries. However, shifting the burden of proof in relation to negligence does not change those rules’ characteristics as liabilities for negligence.

<table>
<thead>
<tr>
<th>Table 2: Intermediate Liability v. Negligence</th>
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<tr>
<td><strong>Types of Liability</strong></td>
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See supra 39.

Unless otherwise annotated, the following text about intermediate liability rules is cited and modified from Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 79-80 and 97-114. Please refer to it for more details.

See supra note 150 at 204.
The Party Bearing the Burden of Proof in Relation to Negligence

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Plaintiff</th>
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1) Statutory Violation

The second paragraph of Article 184 provides a liability rule based on the presumption of negligence.\textsuperscript{175} Taiwanese scholarship calls it “intermediate liability,” for it is more rigorous to defendants than traditional negligence, yet less rigorous than traditional strict liability.\textsuperscript{176} Under intermediate liability, a defendant’s liability is not based on proven fault, but rather on his failure to rebut the presumption of fault.\textsuperscript{177} For an action under the second paragraph of Article 184, the plaintiff has to not only prove five out of six elements for an action under the first paragraph of Article 184,\textsuperscript{178} but he must also prove the defendant’s act of statutory violation. Significantly, two of these elements call for special attention.

a. Harm to Private Rights or Interests

Although the first part of the first paragraph of Article 184 holds that a victim can bring an action in negligence only if the injury is a recognizable harm to private

\textsuperscript{175} See supra 37.
\textsuperscript{176} See supra note 7.
\textsuperscript{177} See supra note 3 at 305.
\textsuperscript{178} These elements include 1) unlawful acts, 2) harm to private rights or interests, 3) damages, 4) adequate causation, and 5) legal capacity. See supra 39-44 and 46.
the second paragraph of Article 184 dismisses this requirement. In other words, the second paragraph expands its protection to both private rights and interests as long as such protections are intended by a statutory provision. However, it should be noted that to impose liability under the second paragraph of Article 184, the plaintiff must be the class of persons who suffer the class of harms protected by the statutory provision.

b. The Meaning of “Statute”

The meaning of “statute” under the second paragraph of Article 184 should include all statutory regulations, customs, ordinances, and directive rules. A common example of statutory violation is violation of the Road Traffic Management and Penalty Act. Hence, if the defendant was speeding at the time of the accident, he was presumed negligent for injuries to bystanders under the second paragraph of Article 184.

2) Liability for Animals

Article 190 of the Civil Code imposes intermediate liability on the possessor of an animal if the animal kept by the possessor causes harm to the victim. More
specifically, it provides that:

If injury is caused by an animal, the possessor is bound to compensate the injured person for any injury arising therefrom, unless reasonable care in keeping according to the species and nature of the animal has been exercised, or unless the injury would have been occasioned notwithstanding the exercise of such reasonable care.

The possessor may claim for reimbursement against the third party, who has excited or provoked the animal, or against the possessor of another animal which has caused the excitement or provocation.

Within this rule, “reasonable care” is in the defendant’s favor, and according to Article 277 of the Code of Civil Procedure he bears the burden of proof in relation to negligence.\(^\text{184}\) Because the possessor is presumptively negligent, Article 190 is a rule of intermediate liability. To escape liability, the defendant has to prove that he has exercised reasonable care in keeping the animal or the injury would have occurred irrespective of the exercise of reasonable care.\(^\text{185}\)

3) Liability for Work Pieces

Article 191 of the Civil Code imposes intermediate liability on the person who privately owns a building or work piece when a victim is injured by the building or work piece. Specifically, the rule provides that:

The injury, which is caused by a building or other work on privately owned land, shall be compensated by the owner of such building or work, unless there is no defective construction or insufficient maintenance in such building or work, or the injury was not caused by the defectiveness or insufficiency, or the owner has exercised reasonable care to prevent such injury.

\(^{184}\) See supra note 171.

\(^{185}\) In this way, causal link is also presumed under Article 190. However, shifting the burden of proof in relation to “causal link” is not necessarily the feature of intermediate liability. See supra note 4 at 577.
In the case of the preceding paragraph, if there is another person who shall be responsible for the injury, the owner making compensation may make a claim for reimbursement against such person.

According to this rule, the defendant can prove facts in his favor to escape liability, including 1) there is no defective construction or insufficient maintenance in the building or work piece; 2) the injury was not caused by the defectiveness or insufficiency; or 3) the owner has exercised reasonable care to prevent such injury. The second defense is about the causal link, whereas the first and the third defenses are rebuttals to liability. Because it is the defendant that bears the burden of proof to rebut negligence, Article 191 is an intermediate liability rule.

4) Liability for Products

Article 191-1 of the Civil Code imposes intermediate liability on the product manufacturer and importer if the victim suffers injuries arising out of the ordinary use or consumption of the merchandise by providing that:

The manufacturer is liable for the injury to another arising from the common use or consumption of his merchandise, unless there is no defectiveness in the production, manufacture, process, or design of the merchandise, or the injury is not caused by the defectiveness, or the manufacturer has exercised reasonable care to prevent the injury.

The manufacturer mentioned in the preceding paragraph is the person who produces, manufactures, or processes the merchandise. Those, who attach the merchandise with the service mark, or other characters, signs to the extent enough to show it was produced, manufactured, or processed by them, shall be deemed to be the manufacturer.

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186 *Id.*

If the production, manufacture, process, or design of the merchandise is inconsistent with the contents of its manual or advertisement, it is deemed to be defective.

The importer shall be as liable for the injury as the manufacturer.

This rule was amended in 1999. The first paragraph of Article 191-1 establishes the liability rule for the product manufacturer. Under this rule, the defendant bears the burden of proof in relation to negligence and causation, and Article 191-1 is an intermediate liability rule.\(^{188}\)

5) Liability for Motor Vehicles

Article 191-2 is the liability rule for a driver of a motor vehicle if the driver causes injuries to another. Specifically, it imposes intermediate liability on the driver by providing that:

If an automobile, motorcycle or other motor vehicles which need not to be driven on tracks in use has caused the injury to another, the driver shall be liable for the injury arising therefrom, unless he has exercised reasonable care to prevent the injury.

Under this rule, the defendant bears the burden of proof in relation to negligence.

Hence, this rule also is an intermediate liability rule.

**B. Equitable Liability (Billigkeitshaftung)\(^ {189}\)**

The principle of equitable liability, a second variation under negligence principles inherited from the German legal system, forces one who has the better

\(^{188}\) See *supra* note 59 at 73-74.

\(^{189}\) Unless otherwise annotated, the following text about equitable liability rules is cited and modified from Case Analysis on General Prov. of Obligation of the Civil Code *supra* note 5 at 89-96. Please refer to it for more details.
financial capacity to compensate the innocent victims for the injuries even if he is not liable. Although liability under this principle is imposed regardless of fault, its justification is different from that of traditional strict liability. Rather, this principle is justified solely on the fairness ground, and is sometimes called “richerse oblige” or “liability of the rich.” Finally, although Taiwanese scholars call this principle “equitable liability,” it has nothing to do with common law equity.

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<tr>
<th>Types of Liability</th>
<th>Equitable Liability</th>
<th>Negligence</th>
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<tr>
<td>Types of Liability</td>
<td>No-fault</td>
<td>Fault-based</td>
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<tr>
<td>The Party Bearing the Burden of Proof in Relation to Negligence</td>
<td>None</td>
<td>Plaintiff</td>
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1) Guardian’s Liability

The first equitable liability rule is incorporated within Article 187 of the Civil Code, which sets up a guardian’s tort liability in situations where a minor wrongfully

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190 See supra note 21.
191 See supra note 4 at 500.
192 Id.
193 See supra note 21.
damages the rights of another. Specifically, the rule states that:

A person of no capacity or limited in capacity to make juridical acts, who has wrongfully damaged the rights of another, shall be jointly liable with his guardian for any injury arising therefrom if he is capable of discernment at the time of committing such an act. If he is incapable of discernment at the time of committing the act, his guardian alone shall be liable for such injury.

In the case of the preceding paragraph, the guardian is not liable if there is no negligence in his duty of supervision, or if the injury would have been occasioned notwithstanding the exercise of reasonable supervision.

If compensation cannot be obtained according to the provisions of the preceding two paragraphs, the court may, on the application of the injured person, take the financial conditions among the tortfeasors, the guardian and the injured person into consideration, and order the tortfeasors or his guardian to compensate for a part or the whole of the injury.

The provision of the preceding paragraph shall apply mutatis mutandis to cases where the injury has been caused to a third party by a person other than those specified in the first paragraph in a condition of unconsciousness or of mental disorder.

The second paragraph of Article 187 allows the guardian to escape liability by proving that he was not negligent in his duty of supervision or that the injury would have occurred even if he had exercised reasonable care in supervision. Under Article 277 of the Code of Civil Procedure, the burden of proof in relation to negligence and causation lies on the guardian, because under Article 187, those facts are in the plaintiff’s favor. Therefore, the guardian’s liability is intermediate liability.

However, a person of no capacity or limited in capacity to make juridical acts is usually an infant, at least below the age of 20, as Article 13 of the Civil Code

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194 See supra 46-47.
195 See supra note 4 at 488.
196 According to Article 12 of the CIVIL CODE, majority is attained upon reaching the twentieth years.
provides that:

The minor, who has not reached their seventh year of age, has no capacity to make juridical acts.
The minor, who is over seven years of age, has a limited capacity to make juridical acts.
The married minor has the capacity to make juridical acts.

Because an infant typically has limited financial capacity, the third paragraph plays a special role in affording greater protection to a victim by holding a guardian liable who could have escaped liability under the second paragraph. Additionally, the court is permitted to take the guardian’s financial conditions into account in determining the amount of compensation. Liability under the third paragraph is imposed regardless of fault, and the purpose of equitable liability is to achieve the goal of distributive justice by holding the one who has the better financial capacity responsible for compensating the innocent victim.

2) Employer’s Liability

Article 188 of the Civil Code, within which a second equitable liability rule is incorporated, establishes the liability of an employer when the employee wrongfully damages the rights of another:

The employer shall be jointly liable to make compensation for any injury which the employee has wrongfully caused to the rights of another in the performance of his duties. However, the employer is not liable for the injury if he has exercised
reasonable care in the selection of the employee, and in the supervision of the
design performance of his duties, or if the injury would have been occasioned
notwithstanding the exercise of such reasonable care.
If compensation cannot be obtained according to the provision of the preceding
paragraph, the court may, on the application of the injured person, take the
financial conditions of the employer and the injured person into consideration, and
order the employer to compensate for a part or the whole of the injury.
The employer who has made compensation as specified in the preceding
paragraph may claim for reimbursement against the employee committed the
wrongful act.

The first paragraph renders Article 188 a rule of intermediate liability, since the
employer is permitted to escape liability if he establishes that he has exercised
reasonable care or if it can be demonstrated that the injury would have occurred
notwithstanding the exercise of reasonable care. However, the second paragraph holds
an employer liable who could have escaped liability under the first paragraph. Hence,
Article 188 also is an equitable liability rule.

2.5 Risk Liability

As noted previously, negligence is the default liability rule for unintentional
torts. However, to afford greater protections, the legislature provides risk liability
or strict liability rules in certain areas of law.

199 See supra 18.
200 Most of the time risk liability and strict liability are interchangeable. Please refer to supra 18-20 for
the subtle difference between the two terms.
A. The Advantages and Disadvantages of Negligence

Negligence protects freedom of action, so that a person need not worry about excessive liability. For example, if liability is imposed regardless of fault, a person with a strong sense of responsibility will have little incentive to carry out activities, thus impeding social development. On the contrary, a person with little sense of responsibility will indulge himself, thus bringing about more accidents. In this way, negligence induces an efficient level of care to protect individual rights, for liability will be imposed only if the burden of taking precaution is less than the product of the magnitude of accident loss and the probability of the accident.

However, with negligence fostering Industrial Revolution and social development, the risk of harm becomes far greater for conducting certain activities in a modern society. The costs of preventing those high-risk accidents might be too high, and the defendant could avoid his liability under negligence. Moreover, upmost care accompanied with the best technology at hand might fail to prevent certain high-risk accidents. Secondly, the complexity of carrying out businesses or activities in a modernized society sometimes makes it more difficult for an innocent victim to prove a tortfeasor’s negligence, and the demanding requirements of negligence law become

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201 Unless otherwise annotated, the following comments on negligence are cited and modified from Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 127-28. Please refer to it for more details.

202 A Theory of Negligence, supra note 38 at 32.
obstacles to the victim’s ability to seek recovery.\textsuperscript{203} With the above reasons, negligence is believed to be an inferior option when the risks of harm are high and when the victim encounters hardship in burden of proof\textsuperscript{204} and strict liability meets the societal need in affording greater protection.

\textbf{B. Rise of Strict Liability}\textsuperscript{205}

In Taiwan, strict liability is the governing rule for several high-risk activities, including liability for common carriers, liability for nuclear facility operators, liability for civil aviation, and liability for products.\textsuperscript{206}

1) Liability for Aviation Incident

In 1953, the Civil Aviation Act introduced the first strict liability rule in Taiwan to regulate damages arising out of aviation incidents. According to Article 89 of the Civil Aviation Act:\textsuperscript{207}

Where casualties or damage to property occur as a result of aircraft accident, the owner of the aircraft shall be liable for compensation regardless of whether such accident is due to willful action or negligence. Such an owner of the aircraft shall also be liable for damage caused by force majeure. The same also applies to damage caused by falling or dropping of objects from the aircraft.

\textsuperscript{203} See supra 21.
\textsuperscript{204} See also: supra note 4 at 326-27.
\textsuperscript{205} Unless otherwise annotated, the following text about Taiwanese strict liability rules is cited and modified from supra note 4 at 667-721. Please refer to it for more details.
\textsuperscript{206} See infra 58-67.
\textsuperscript{207} In the 1953 version, this rule was in Article 77 with similar language. See LIFAYUAN GONGBAO (Official Gazette of Legislative Yuan of the Republic of China) Vol. 42 No. 11 70-71 for Sitting Records of Article 77 of the 1953 CIVIL AVIATION ACT (Chinese Source ONLY).
Moreover, Article 91 in the same Act regulates the liability of an aircraft operator when the passenger incurs harm in the aircraft or while embarking or disembarking the aircraft, as well as the aircraft operator’s liability for delay. Specifically, the rule provides that:

The aircraft operator shall be liable for accidental death or injury of passengers in the aircraft or while embarking or disembarking the aircraft. But if such death or injury is attributed to the passenger’s fault, such liability may be exonerated or reduced.

The aircraft operator shall be liable for causing damage to passengers because of flight delay, provided that the aircraft operator can prove the delay is caused by force majeure. The liability shall be limited to the necessary extra expense incurred to the passengers through the flight delay.

Liability under Article 89 is “absolute liability,” for the owner of the aircraft is liable not only regardless of fault but also for the damage caused by unexpected and uncontrollable events. As for Article 91, it is a strict liability rule. However, there is a ceiling on the liability under Article 91, since Article 3 in Regulations of Compensation for Damage Caused to Air Passengers and Freight provides that:

The aircraft operator or consignor, as held liable to each and every passenger for damage under the first paragraph of article 91 of This Act, shall adhere to the standards below for making compensation. Nevertheless, if the victim can prove damage was much greater, he or she may request compensation beyond the set amount:

1) Death: NT$3,000,000.
2) Severe injury: NT$1,500,000.

208 In the 1973 amended version, this rule was in Article 69 with similar language.
209 “This Act” means CIVIL AVIATION ACT because REGULATIONS OF COMPENSATION FOR DAMAGE CAUSED TO AIR PASSENGERS AND FREIGHT are enacted in accordance with the first paragraph of Article 93 of the CIVIL AVIATION ACT.
If damage did not cause death or severe injury, compensation shall be commensurate with actual harms done, but not exceeding NT$1,500,000 at the highest.

The so-called severs injury conforms in meaning to Item 4, Article 10 of the Criminal Code.

The ceiling on the liability will disappear if the damage to the passenger or freight resulted from willful or major neglect or wrongdoing on the part of the aircraft operator, consignor, or their employee or representative in the execution of duties.\textsuperscript{210}

Furthermore, the Civil Aviation Act does not preempt the plaintiff’s tort cause of action under the Civil Code, and an aircraft owner or consignor will be liable for full compensation if the plaintiff pursues his cause of action under Article 184 of the Civil Code. However, if the damage results from the intentional act or negligence of a crew or a third party, the owner, lessee or borrower of the aircraft has another cause of action against such crew or third party.\textsuperscript{211} Finally, aircraft owners and civil air transport enterprises are mandated to purchase liability insurance.\textsuperscript{212}

2) Liability for Nuclear Disaster

Article 18 of the Nuclear Damage Compensation Law imposes strict liability on the operator of a nuclear facility in cases of nuclear accidents by providing that:

The operator of a nuclear installation shall, in accordance with this Law, be liable for nuclear damages arising from the occurrence or expansion of a nuclear incident regardless of whether it is caused intentionally or through negligence,

\textsuperscript{210} Article 6 of the Regulations of Compensation for Damage Caused to Air Passengers and Freight.
\textsuperscript{211} Article 92 of the Civil Aviation Act.
\textsuperscript{212} Article 94 of the Civil Aviation Act.
except when the nuclear incident is caused directly by international armed conflicts, hostilities, domestic rebellion, or grave natural calamity.

Liability under this rule is strict liability. However, the operator is not an insurer to a nuclear disaster, and is permitted to escape liability by proving that the nuclear incident is caused directly by international armed conflicts, hostilities, domestic rebellion, or grave natural calamity. Moreover, comparative negligence is a valid defense. 213 Third, Article 24 of this Law provides a ceiling on the liability, and the liability of a nuclear installation operator for nuclear damages arising out of each single nuclear incident is limited to NTD 4,200,000,000, not including interest and costs of litigation. 214 Fourth, a nuclear installation operator is mandated to maintain liability insurance or financial guarantee unless the operator is the Central Government, provincial or municipal government or their research organizations. 215 Finally, special statutes of limitation are applicable to causes of action arising under this Law:

a. Article 28 of this Law provides that:

Claims of compensation for nuclear damage shall be extinguished if an action is not brought within three (3) years after knowledge of the damage and of the nuclear installation operator liable for the damage; however the period shall in no case exceed ten (10) years from the date of the nuclear incident.

b. Article 29 of this Law provides that:

Where the nuclear material causing a nuclear incident is stolen, lost, jettisoned or abandoned, the statute of limitations of the right to claim compensation shall be governed by the preceding Article. However, when making a claim for

213 Article 19 of the NUCLEAR DAMAGE COMPENSATION LAW.
214 Article 24 of the NUCLEAR DAMAGE COMPENSATION LAW.
215 See Article 25, 26, and 31 of the NUCLEAR DAMAGE COMPENSATION LAW.
compensation against the original nuclear installation operator of the said nuclear material, the claim shall be made within twenty (20) years from the time the nuclear material is stolen, lost, jettisoned or abandoned.

3) Liability for MRT Accident

According to the first paragraph of Article 46 of the Mass Rapid Transit Act, the operation organization of a mass rapid transit system is strictly liable for personal death or injury of passengers and for damage or loss caused by trains or other rail accidents such as derailments. Similarly, the operator is mandated to maintain liability insurance.

4) Liability for Common Carrier

Article 64 of the Highway Act holds a transportation provider strictly liable for traffic accidents by providing that:

In the case of traffic accidents causing injury or death to passengers or other people, or damage or loss to money or property, automobile or trolley transportation providers shall be liable for the damage and compensate for it. However, the providers are not liable to pay damage compensation if it can be proven that the accident was due to force majeure or fault of the shipper or recipient of carried goods. Damage compensation of damaged or lost goods under this article shall [equal] up to NTD 3000 per piece unless the shipper has declared and stated clearly about the quality and value of the goods, on the carry agreement before shipping. The rule of damage compensation applicable to the injury or death of passengers or other people will be separately determined by the MOTC.

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216 Article 46 of the MASS RAPID TRANSIT ACT.
217 See also: supra note 4 at 689.
218 Article 47 of the MASS RAPID TRANSIT ACT.
219 Article 64 of the HIGHWAY ACT.
This rule was amended in 2000. Under the first paragraph of the rule, automobile or trolley transportation providers are strictly liable for the damage to passengers or other people. However, if the accident resulted from an act of God, the transportation providers might escape liability. In addition, the second paragraph provides a ceiling on the liability for damaged or lost goods, and the third paragraph refers to a rule separately determined by the Ministry of Transportation and Communications regarding the ceiling on the liability for harms to persons or properties. Finally, Article 65 in the same Act requires the transportation providers to purchase liability insurance by stating that:

Automobile owners should have liability insurance under this article. Trolley owners should have liability insurance before applying to highway authorities for the issuance of license plates, under rates provided by the MOTC. Insurance premiums are set by the MOTC. Automobile or trolley transportation providers should have liability insurance for passengers, and the minimum insurance coverage set by the MOTC may be exempted from the liability insurance under this article. Transportation providers that fail to pay insurance premiums shall be fined at least NTD 100,000 but not more than NTD 500,000.

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220 For more details (Chinese Source ONLY) about this rule, see http://law.moj.gov.tw/LawClass/LawAllIf.aspx?PCode=K0040026.  
221 Article 65 of the HIGHWAY ACT.
5) Liability for Products

Article 7 of the Consumer Protection Law is a special provision governing the liabilities for a manufacturer of commercial product and for a service provider. The rule imposes strict liability by providing that:222

Business operators engaging in the design, production or manufacture of goods or in the provisions of services shall ensure that goods and services provided by them meet and comply with the contemporary technical and professional standards of the reasonably expected safety prior to the sold goods launched into the market, or at the time of rendering services.

Where goods or services may endanger the lives, bodies, health or properties of consumers, a warning and the methods for emergency handling of such danger shall be labeled at a conspicuous place.

Business operators violating the two foregoing two paragraphs and thus causing injury to consumers or third parties shall be jointly and severally liable therefor, provided that if business operators can prove that they are not guilty of negligence, the court may reduce their liability for damages.

In contrast to the products liability provision under the Civil Code,223 Article 7 of the Consumer Protection Law holds a manufacturer strictly liable for damages caused by product defects. Together they establish a dual system to regulate product-related accidents, and both premise liability upon the defect of the product.224 However, some distinctions are worth mentioning.

First, although both Article 191-1 of the Civil Code and Article 7 of the Consumer Protection Law regulate liability for product-related injuries, the former

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222 Article 7 of the Consumer Protection Law.
223 See supra 51-52.
224 The concept of defect encompasses manufacturing defect, design defect, and warning defect. See supra note 4 at 704-05.
rule imposes intermediate liability on product manufacturers, whereas the latter one holds product manufacturers strictly liable. This could be demonstrated by the third paragraph of Article 7 of the Consumer Protection Law, for the court may reduce rather than exempt the manufacturer’s liability when the manufacturer proves that he was not negligent.\textsuperscript{225} As for liability for retailers, the first paragraph of Article 8 of the Consumer Protection Law imposes intermediate liability on them because they may escape liability if they have exercised due care to prevent the injury or if the injury would still have occurred even though they had exercised due care.\textsuperscript{226} On the other hand, since Article 191-1 of the Civil Code does not extend to the liability for retailers, intermediate liability does not apply and the plaintiff bears the burden of proof related to negligence in an action brought under the Civil Code.\textsuperscript{227}

Second, Article 191-1 of the Civil Code protects “everyone” from harm caused by a defective product. On the other hand, Article 7 in Consumer Protection Law protects “consumers and third persons” only.\textsuperscript{228} According to the first provision of Article 2 of this Law, the term “consumers” means those who enter into transactions, use goods, or accept services for the purpose of consumption.\textsuperscript{229} “Consumers” under Article 7 of this Law are those not intending to use the products for manufacturing or resale but are

\textsuperscript{225} Id. at 700.
\textsuperscript{226} See the first paragraph of Article 8 of the CONSUMER PROTECTION LAW for text.
\textsuperscript{227} See supra 37 for the first paragraph of Article 184 of the CIVIL CODE.
\textsuperscript{228} See supra note 4 at 707-08.
\textsuperscript{229} Article 2 of the CONSUMER PROTECTION LAW.
rather “end users.” As for “third parties” under Article 7 of this Law, they are limited to foreseeable victims injured in the course of an end user’s consuming behaviors. For example, a pedestrian injured in a car accident resulting from tire blow may bring an action under Article 7 of this Law against the tire manufacturer. The linchpin of an action under Article 7 of the Consumer Protection Law is whether an end user’s “consuming behaviors” causes harm.

Third, while Article 191-1 of the Civil Code does not regulate liability for service providers, Article 7 of the Consumer Protection Law imposes strict liability on them if harm to consumers or third parties is adequately attributed to defective services. However, medical services are excluded from this rule. Finally, punitive damages are not available in a product-related action under the Civil Code, whereas they are available under the Consumer Protection Law because Article 51 of this Law provides that:

In a litigation brought in accordance with this law, the required consumer may claim for punitive damages up to 3 times the amount of actual damages as a result of injuries caused by the willful act of misconduct of business operators; however, if such injuries are caused by negligence, a punitive damage up to one time the amount of the actual damages may be claimed.

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230 See supra note 4 at 707.
231 Id. at 708.
232 Article 82 of the MEDICAL CARE ACT.
However, since the primary function of tort law is accident avoidance, the availability of punitive damages in a products liability action is subject to criticisms.233

Table 4: Manufacturer Liability Under Civil Code v. Manufacturer Liability Under Consumer Protection Law234

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C. Issue Revisited: The Rising Tension Between Strict Liability and Negligence—Article 191-3 of the Civil Code

With the introduction about Taiwanese strict liability rules, readers may discover that while negligence is still the default liability rule for unintentional torts, strict

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233 See supra note 7 at 10.
234 See supra note 150 at 263 for a more detailed comparison.
liability becomes the operative rule for certain activities.\textsuperscript{235} In Taiwan, the expansion of tort liability represents a transition from negligence to strict liability. In situations where the risks of harm are high and when the victim encounters hardship in bearing the burden of proof, strict liability is considered to be preferable to negligence.\textsuperscript{236} It stands to reason that the proper liability rule for dangerous activities should be strict liability.\textsuperscript{237} However, Article 191-3 of the Civil Code contradicts this logic and imposes intermediate liability on persons conducting dangerous activities.\textsuperscript{238} This logical discrepancy raises scholarly debates and draws attention to the tension between strict liability and negligence. To solve the issue and choose the proper liability rule for Article 191-3, this Dissertation needs to analyze whether and under what circumstances strict liability is a superior option.

\textsuperscript{235} See supra 18.
\textsuperscript{236} See supra 58.
\textsuperscript{237} See supra 23.
\textsuperscript{238} See supra 22.
Chapter Three:  

Laws of Tort Liability in the American Common Law

Synopsis

- In the American common law, negligence also is the default liability rule for unintentional torts. 
- Negligence is breach of duty of care of a reasonable person. 
- In the American common law, strict liability applies to animals, abnormally dangerous activities, and products. 
- American commentators not only provide in-depth analysis on whether and under what circumstances strict liability is a superior option but also challenge the policy justifications for strict liability theory.
3.1 Overview

As mentioned in Chapter One, the early common law followed principles more akin to strict liability, and “fault-based” liability marked the legal progress of the late nineteenth century by benefiting the emerging industry of that time.239 After the 1960’s, the American products liability revolution revitalized strict liability and initiated the modern expansion of liability without fault.240 Hence, laws of liability in the American common law and the scholarly analysis of strict liability are instrumental for this Dissertation to find whether and under what circumstances strict liability is a superior option.

3.2 Negligence

A. General Principle

In the United States, negligence also is the default liability rule for unintentional torts. Take automobile accidents for instance: in Hammontree v. Jenner,241 while driving home from work, the defendant suffered an epileptic seizure and became unconscious, thereby crashing through the plaintiffs’ bicycle shop and hurting the

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239 See supra 15 and supra note 32.
plaintiffs. Plaintiffs Hammontree and her husband sued the defendant for personal injuries and property damages arising out of the automobile accident. In refusing to hold the defendant liable for the accident, the court reasoned that the liability of a driver in an automobile accident rests on principles of negligence.

In general, the burden of proof in an action for negligence lies with the plaintiff unless circumstances suggest that the court alleviate such burden. In Brown v. Kendall, the defendant raised his stick to interfere with the fighting between his dog and the plaintiff’s but accidently struck and injured the plaintiff. The court reasoned that if the act of hitting the plaintiff was unintentional on the part of the defendant, and done while performing a lawful act, then the defendant was not liable unless it was done in the want of exercise of due care adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff’s case, and the burden of proof was on the plaintiff to establish it. Thus, in an action for negligence, the plaintiff has to prove the following facts: breach of duty, causal connection, and damages.

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242 Id. at 530.
243 Id. at 529-30.
244 Id. at 531.
245 For example, where a person was struck by a barrel falling from a window of a house next to a street, such facts suggest prima facie evidence of negligence on the part of the owner of the house. See Byrne v. Boadle, 2 H. & C. 722 (1863).
246 60 Mass. 292 (1850).
247 Id. at 297.
248 RESTATEMENT (SECOND) OF TORTS §328A (1965) states that:
   In an action for negligence the plaintiff has the burden of proving...
1) Duty: Standard of Care

All people in society owe a duty to refrain from conduct that creates unreasonable risk of harm.\textsuperscript{249} A person must act as an ordinarily careful person or a reasonably prudent person under similar circumstances.\textsuperscript{250} As stated by Professor William Prosser:\textsuperscript{251}

In negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. For instance, an ordinary individual knows that when a tire is worn through to the fabric, its further use is dangerous and it should be removed.\textsuperscript{252}

However, no one has any duty to guard against unforeseeable or extraordinary peril. In \textit{Adams v. Bullock}, a 12-year-old child swung an 8-feet-long wire while crossing a bridge, and his wire came into contact with a nearby overhead wire used by the defendant for its trolley system.\textsuperscript{253} The child was shocked and burned.\textsuperscript{254} The court reasoned that ordinary caution did not involve forethought of this extraordinary peril and refused to hold the defendant liable.\textsuperscript{255} Additionally, although no one has any

\begin{itemize}
  \item (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
  \item (b) failure of the defendant to conform to the standard of conduct,
  \item (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
  \item (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.
\end{itemize}

\textsuperscript{249} See supra note 133 at 409.
\textsuperscript{250} Jones v. Chicago HMO Ltd. of Illinois, 191 Ill. 2d 278, 295, (2000).
\textsuperscript{251} W. PROSSER, LAW OF TORTS §53, at 324 (4\textsuperscript{th} ed. 1971).
\textsuperscript{252} Delair v. McAdoo, 188 A. 181 (Pa. 1936).
\textsuperscript{253} 125 N.E. 93 (1919).
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
duty to act or help under general circumstances, a person has a duty to avoid any affirmative actions which may make a situation worse. If the defendant does attempt to aid a person, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff’s interests.

As for means to establish the required standard of care, although expert testimony is not required in a usual case, it is generally necessary when the case comes to that of professional malpractice. Specifically, to establish the duty of care owed by the professional, the plaintiff has to offer expert testimony unless the alleged negligence is so obviously shown that the trier of fact could recognize it without expert testimony. Such expert testimony is necessary to establish the relevant standard for the trier of fact because professional standards are often beyond the knowledge of the average person.

Another way to delineate the standard of care of a professional is to apply the locality rule. For example, in an accountant malpractice case the plaintiff has to establish the standard of care of the accountant. This may include the general

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257 Id.
258 Id.
260 Id. at 1086.
expectation that the accountant will render his services with certain degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession in the particular locality.\footnote{Kemmerlin v. Wingate, 261 S.E.2d 50 (1979).} Accordingly, in a professional malpractice case, the “locality rule” requires the professional to act with ordinary and reasonable care in accordance with the customs or practices of professionals from a particular geographic region. Such standard can be the same community standard,\footnote{Noll v. Rahal, 219 Va. 795, 250 S.E.2d 741 (1979).} a regional standard\footnote{Shipley v. Williams, 350 S.W.3d 527 (Tenn. 2011).} or a national standard,\footnote{Nwaneri v. Sandidge, 931 A.2d 466 (D.C. 2007).} depending on what law the state court applies.\footnote{The standard of care applicable to accountants is the same as that applied to doctors and other professionals furnishing skilled services for compensation; that standard requires reasonable care and competence therein. See Gammel v. Ernst & Ernst, 72 N.W.2d 364, 365 (1955).}

2) Breach of Duty

A plaintiff in a negligence action must establish breach of duty. Often a duty is based on the reasonable person standard.\footnote{See supra note 250.} The test for breach of duty is whether the defendant failed to do what a reasonable person would do under similar circumstances. In \textit{United States v. Carroll Towing},\footnote{See supra note 38 for case citation.} a barge, without a bargee on board, broke adrift and crashed through a tanker.\footnote{\textit{Id.} at 171.} The tanker’s propeller broke a hole in the barge, and the barge sank, with its cargo lost.\footnote{\textit{Id.}} In holding the barge’s owner liable under
negligence, the court reasoned that it was reasonable to expect the barge owner to have had a bargee on board to prevent the risk of the barge breaking adrift from the moorings under the circumstances of the incident.\(^{270}\) Thus, the barge owner’s failure to have a bargee on board without any reasonable excuse was breach of duty of reasonable care; in other words, the barge owner failed to do what a reasonable person would do under similar circumstances.\(^{271}\)

3) Causation

With the establishment of breach of duty, the plaintiff must also prove a causal connection between the defendant’s negligence and the plaintiff’s injuries, offering both factual cause and proximate cause. The plaintiff first must prove the “but for” causation (i.e., \textit{but for} the defendant’s negligence, the plaintiff would not have suffered injuries).\(^{272}\) However, where there are two or more causes of harm to the plaintiff and either of the causes alone would have been sufficient to bring about harm, the “substantial factor” test applies for the first causal determination (i.e., where each of several defendants was a substantial factor in causing injury).\(^{273}\)

\(^{270}\) Id. at 174.
\(^{271}\) Id.
\(^{272}\) The “but-for” test of negligence is the appropriate test for actual causation in majority of circumstances. \textit{Vincent by Staton v. Fairbanks Mem'l Hosp.}, 862 P.2d 847, 851 (Alaska 1993).
\(^{273}\) Because under such circumstances a strict application of the “but-for” test “would allow each tortfeasor to avoid liability, courts made the policy decision to nevertheless impose liability ‘if [the defendant's conduct] was a material element and a substantial factor in bringing [the event] about.’” \textit{Gerst v. Marshall}, 549 N.W.2d 810, 815 (1996).
After establishing factual causation, the plaintiff next must prove proximate cause. Proximate cause concerns under what circumstances the law will recognize liability and involves the question of the scope of duty. Thus, the foreseeability of the plaintiff’s injury is relevant. In *Palsgraf v. Long Island R.R. Co.*, the plaintiff was standing on a platform at the defendant’s railroad, waiting for a train. At the same platform, another train was leaving and two men were running forward to catch it. One of them got on the train, but another man with a small package seemed unsteady when jumping onto the car. A guard on the car reached forward to help the second man in, and another guard on the platform pushed him from behind. Instantly, the package fell and its contents exploded, striking the plaintiff at the other end of the platform. Because nothing in the appearance indicated that the package contained fireworks, the court held that the risk of harm to the plaintiff was not reasonably foreseeable to the ordinarily prudent eye and that the defendant was not liable. In other words, liability should not attach if the risk of harm to a person was not within the zone of danger in the eyes of a reasonable person. Thus, even if an act of God comes

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274 See *supra* note 133 at 412.
275 *Id.*
276 162 N.E. 99 (1928).
277 *Id.*
278 *Id.*
279 *Id.*
280 *Id.*
281 *Id.*
282 *Id.* at 99-100.
283 *Id.*
into play, a defendant may still be held liable for the injury resulting from it as long as it is foreseeable.\textsuperscript{284}

4) Damages

There is no liability for negligence in the absence of damages to the plaintiff.\textsuperscript{285} Damages include many perspectives: financial losses, personal injuries, harm to property, increased risk of disease, and fear.\textsuperscript{286} In general, there are two types of damages available to a plaintiff in a tort action: compensatory damages and punitive damages.\textsuperscript{287} Compensatory damages include both economic and non-economic losses resulting from personal injuries or property damages.\textsuperscript{288} Compensatory damages are the primary instrument of recovery in tort, and they seek to restore the plaintiff to the status quo before suffering harm by paying an amount equal to the value of interests diminished or destroyed.\textsuperscript{289} On the other hand, punitive damages are awarded only for particularly egregious behavior.\textsuperscript{290} Sometimes punitive damages can properly be awarded in strict liability actions.\textsuperscript{291} However, although punitive damages do punish the tortfeasor, the primary purpose of punitive damages is to create additional

\textsuperscript{284}See supra note 274.
\textsuperscript{285}See supra note 49 at 263.
\textsuperscript{286}Id.
\textsuperscript{287}See supra note 133 at 429.
\textsuperscript{288}Id. at 430.
\textsuperscript{289}ARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 609 (2003).
\textsuperscript{290}See supra note 133 at 431.
deterrence where an actual damages remedy is deemed insufficient to induce an efficient level of deterrence.  

B. Liability for Common Carriers

In Taiwan, liability for common carriers is subject to special treatment. However, in the American common law, negligence still is the liability rule for common carriers. In *Bethel v. New York City Transit Authority*, the plaintiff boarded a bus operated by the defendant and was injured when the “wheelchair accessible seat” collapsed upon his sitting down. The trial court instructed the jury that a common carrier has a duty to use the highest degree of care in the maintenance of its vehicles and equipment, but the New York Court of Appeals held that the single, reasonable person standard is sufficiently flexible by itself to allow the court to instruct the jury to fully take into account the ultrahazardous nature of a tortfeasor's activity. Specifically, the court reasoned that:

There is no empirical or policy basis why, in the case of common carriers, the reasonable care standard is not similarly sufficient to permit triers of fact to take into account all of the hazardous aspects of public transportation in deciding whether due care was exercised in a particular case.

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292 See *supra* note 49 at 270-71.
293 See *supra* note 28-30 for examples.
295 *Id.* at 1215.
296 *Id.* at 1217.
297 *Id.*
For this reason, the court concluded that the rule of a common carrier's duty of extraordinary care is no longer viable.\(^{298}\)

Similarly, in *Andrews v. United Airlines, Inc.*,\(^{299}\) the plaintiff was a passenger on a United Airlines flight; upon the plane’s arrival at the gate, a briefcase fell from an overhead compartment, seriously injuring the plaintiff.\(^{300}\) The court reasoned that the degree of care and diligence which the common carrier must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of its business.\(^{301}\) Under this rule, a common carrier is not an insurer of its passenger’s safety, and the negligence principle applies.\(^{302}\) However, in the situation of ground damages resulting from an aviation activity, Section 520A of the *Restatement (Second) of Torts* imposes strict liability on the operator or the owner of an aircraft by providing that:\(^{303}\)

If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft,

(a) the operator of the aircraft is subject to liability for the harm, even though he has exercised the utmost care to prevent it, and

(b) the owner of the aircraft is subject to similar liability if he has authorized

\(^{298}\) *Id.* at 1218.

\(^{299}\) 24 F.3d 39 (9th Cir. 1994).

\(^{300}\) *Id.* at 40.

\(^{301}\) *Id.*

\(^{302}\) *Id.* However, some courts occasionally applied “res ipsa loquitur” against common carriers as a rule of policy which goes beyond the probative effect of circumstantial evidence and requires the defendants to explain the event or be liable, for in cases of carriers and passengers the former have undertaken a special responsibility toward the latter. See comment b. on *Restatement (Second) of Torts* §328D (1965). For discussions about the doctrine of res ipsa loquitur, see *infra* 125-127.

\(^{303}\) *Restatement (Second) of Torts* § 520A (1977).
or permitted the operation.

3.3 Strict Liability

Strict liability is liability without fault—liability imposed upon the defendant even if he neither intentionally acted nor failed to exercise reasonable care.304 Because this doctrine is extremely ancient, there is no clear demarcation of the emergence of this principle in the context of historical development of common law.305 Typically, strict liability is available in three categories of cases: liability for animals, abnormally dangerous activities, and products liability.

A. Liability for Animals

One of the earliest forms of strict liability in common law involves those who possess, confine, and manage animals that are capable of causing harm both to persons and property when they escape confinement.306 In *McKee v. Trisler*,307 the plaintiff brought an action against the defendant to recover damages for the killing of

305 See supra note 45 at 507.
306 See supra note 289 at 488.
307 143 N.E. 69 (1924).
one mule and injury to another mule by the defendant’s trespassing bull. The court reasoned that:\footnote{308}{Id. at 71.}

It was the rule of the common law that the owner of domestic animals such as cattle was bound at his peril to keep them off the lands of other persons or respond in damages for their trespasses. No man was bound to fence his close against an adjoining field, but every man was bound to keep his cattle in his own field at his own peril, and it made \textit{no difference} that he was guilty of \textit{no} actual negligence in not properly guarding them or that they escaped against his will and \textit{without} such negligence.

Thus, the keeper of animals of a kind likely to roam and harm others is strictly liable for their trespass under traditional common law.\footnote{309}{See supra note 251 §76, at 496.}

In other situations, the cases involve wild animals. Generally, courts impose strict liability on the possessors of livestock and wild animals, but they hold possessors of domestic animals liable only if the plaintiff proves that the defendant knew that the animal had vicious propensities.\footnote{310}{Id.} In \textit{Lewis v. Great Southwest Corp.},\footnote{311}{473 S.W.2d 228 (Tex. Civ. App. 1971).} the plaintiff purchased a ticket and entered the defendants’ petting zoo with her son and her grandchildren.\footnote{312}{Id. at 229.} Although there was no harassment of the animals and nothing had occurred which would be calculated to cause excitement to the animals, one of the goats in the petting zoo struck the plaintiff in the knee, knocking her down.\footnote{313}{Id. at 230.}

Because there was no evidence 1) of prior knowledge on the part of the defendants as to
danger; 2) that the defendants should have been on notice of danger; and 3) that the
domestic goats in question were not by law “naturally” dangerous, the court refused to
impose strict liability on the defendants.\textsuperscript{314}

In the case of wild animals, courts tend to apply strict liability. \textit{In Marshall v.
Ranne},\textsuperscript{315} the plaintiff and the defendant owned neighboring farms.\textsuperscript{316} The
defendant’s hog escaped from the farm and entered the plaintiff’s farm several weeks
before the incident.\textsuperscript{317} One day the plaintiff went to feed his hog and saw the
trespassing hog a hundred yards behind the barn.\textsuperscript{318} On the plaintiff’s way back home,
the defendant’s hog attacked him.\textsuperscript{319} The court held that a suit for damages caused by
vicious animals should be governed by principles of strict liability.\textsuperscript{320}

The common law rules of liability for animals were then synthesized in the
\textit{Restatements of the Law} published by the American Law Institute.\textsuperscript{321} In the latest
edition, the rules for animals are provided in the following three provisions.

1) Section 21 in the \textit{Restatement (Third) of Torts: Liability for Physical and Emotional
Harm} holds a possessor of livestock or other animals strictly liable when his livestock

\textsuperscript{314} Id. at 233.
\textsuperscript{315} 511 S.W.2d 255 (Tex. 1974).
\textsuperscript{316} Id. at 256.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 257.
\textsuperscript{320} Id. at 258.
\textsuperscript{321} See various sources: RESTATEMENT (FIRST) OF TORTS § 504 (1938); RESTATEMENT (FIRST) OF
TORTS § 507 (1938); RESTATEMENT (FIRST) OF TORTS § 509 (1938); RESTATEMENT (SECOND) OF TORTS
§ 504 (1977); RESTATEMENT (SECOND) OF TORTS § 507 (1977); and RESTATEMENT (SECOND) OF TORTS
or animals intrude upon the land of another and cause injuries. Specifically, the rule states that: 322

An owner or possessor of livestock or other animals, except for dogs and cats, that intrude upon the land of another is subject to strict liability for physical harm caused by the intrusion.

2) Section 22 in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm imposes strict liability on a possessor of a wild animal by providing that: 323

(a) An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.
(b) A wild animal is an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.

3) Section 23 in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm imposes strict liability on the possessor of an animal if he knows or reasonably should know that the animal has certain dangerous propensities: 324

An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.

B. Abnormally Dangerous Activities

In the contemporary world, the traditional animal rules are of trivial consequence. Rather, a more important common law doctrine of strict liability concerns the liability for ultrahazardous activities. This rule emerged from an early English case addressing non-natural use of land: *Rylands v. Fletcher.* In that case, the plaintiff was a tenant mining coal under agreement with the landowner; and the two defendants were operating a cotton mill on a nearby land. The defendants erected a reservoir on their land. However, the water broke out of the reservoir and flooded into both the abandoned mining shafts beneath the defendants’ land and into the adjoining coalmines owned by the plaintiff. The House of Lords affirmed the judgment of the Court of Exchequer Chamber, holding that because the defendants engaged in non-natural use of their land, they were strictly liable for the injuries to the plaintiff resulted from the escape of water. Justice Blackburn, for the Court of Exchequer Chamber, wrote that:

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326 Id.
328 See supra note 45 at 507.
329 Id. at 508.
330 Id.
331 See supra note 327.
332 [1866] L.R. 1 Ex. 265, 279-80. See also: supra note 45 at 509.
The true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

Given the qualifications stipulated by the House of Lords, the emphasis was thus shifted to the abnormal and inappropriate character of the defendants’ reservoir in coal mining country rather than the mere tendency of all water to escape.333

The American doctrine of strict liability for hazardous activities developed when courts began to embrace strict liability theory proposed by Rylands.334 The doctrine was enlisted in the first edition of the Restatements of Torts335 and was expanded in the second edition, with a change of label from “ultrahazardous activities” to “abnormally dangerous activities.” Section 519 in the Restatement (Second) of Torts imposes strict liability on a person carrying on an abnormally dangerous activity by providing that:336

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

333 See supra note 251 §78, at 505-06.
335 See RESTATEMENT (FIRST) OF TORTS § 519 (1938) and RESTATEMENT (FIRST) OF TORTS § 520 (1938).
When determining whether an activity is “abnormally dangerous,” Section 520 of the Restatement (Second) of Torts writes that the following six factors must be considered:\(^{337}\)

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

In the latest edition of the Restatements of Torts, the two sections in the Restatement (Second) of Torts are combined into Section 20 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm:\(^{338}\)

(a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

2) the activity is not one of common usage.

\(^{337}\) Restatement (Second) of Torts § 520 (1977).

The typical cases for abnormally dangerous activities involve the storage of explosives or inflammable liquids, blasting, the accumulation of sewage, the emission of creosote fumes, or pile driving, which causes excessive vibration.\textsuperscript{339}

Recently, the doctrine has extended to nuclear incidents. In \textit{Cook v. Rockwell Intern. Corp.},\textsuperscript{340} plaintiffs brought an action against the defendant who operated a nuclear weapon manufacturing facility—the Rocky Flats Nuclear Weapons Plant—under government contract.\textsuperscript{341} This action arose under the \textit{Price–Anderson Act}\textsuperscript{342} because it was an action in which the plaintiffs sought to impose liability arising out of a nuclear incident—releases of plutonium and other hazardous substances from the plant.\textsuperscript{343} The court reasoned that the existing \textit{Price–Anderson} system rests on the assumption that courts would apply “legal principles akin to those of strict liability in the event of a serious nuclear incident.”\textsuperscript{344} To accomplish this goal, Congress required participants in the nuclear industry to waive certain defenses to liability including any issue or defense based on the fault of the nuclear actor and the conduct of the injured party.\textsuperscript{345} Furthermore, Congress explicitly reiterated that strict liability be the standard

\textsuperscript{339} See \textit{supra} note 251 §78, at 507.  
\textsuperscript{340} 273 F. Supp.2d 1175 (D. Colo. 2003).  
\textsuperscript{341} \textit{Id.} at 1178.  
\textsuperscript{343} See \textit{supra} note 340 at 1179.  
\textsuperscript{344} \textit{Id.} at 1183-84.  
\textsuperscript{345} \textit{Id.} at 1184.
of care for ENOs when it reauthorized the waiver requirements in the 1988 Price–Anderson Amendments Act with the imposition of “federal strict liability or ‘no-fault’ standard” for any extraordinary nuclear occurrence. As for non-extraordinary nuclear occurrence, Congress also expressed its intent that strict liability would apply to non-ENO nuclear incidents.

C. Products Liability

Modern expansion of strict liability doctrine began with the products liability revolution during the 1960s. Justice Traynor is a pioneer in the process because of his concurring opinion in *Escola v. Coca Cola Bottling Co.* In that case, the plaintiff waitress suffered injuries when a bottle of Coca Cola broke in her hand and she brought an action arguing that the defendant company was negligent in selling bottles containing a carbonated beverage, which was dangerous and likely to explode on account of excessive pressure of gas or by reason of some defect in the bottle. The majority opinion held that because the defendant had exclusive control over both charging [the bottles with pressurized gas] and inspecting them, the plaintiff was entitled to rely on the doctrine of res ipsa loquitur to supply an inference of negligence.

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346 “ENO” represents “extraordinary nuclear occurrence.”
347 See *supra* note 340 at 1193.
348 *Id.*
349 See *supra* note 115.
350 *Id.* at 437.
on the defendant’s part.\footnote{Id. at 440.} However, Justice Traynor suggested that a manufacturer incur an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.\footnote{Id.} Specifically, Traynor reasoned that:\footnote{Id. at 441-42.}

It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market…The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection or unknown causes that even by the device of res ipsa loquitur cannot be classified as negligence of the manufacturer...[In the \textit{MacPherson} case,]\footnote{MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).} Judge Cardozo's reasoning recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product \textit{even when there is no negligence}.\footnote{377 P.2d 897 (1963).}

In \textit{Greenman v. Yuba Power Products, Inc.},\footnote{Id. at 898.} the plaintiff brought an action for damages against the retailer and the manufacturer of a combination power tool.\footnote{Id. at 440.} The plaintiff received the power tool from his wife as a present, and at one time he used the tool as a lathe for turning a large piece of wood he wished to make into a chalice.\footnote{Id.}
After he had worked on the piece of wood several times without difficulty, a part of the machine suddenly flew out, striking him on the forehead and inflicting serious injuries. Justice Traynor delivered the opinion of the court and held that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

The purpose of imposition of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Under this doctrine, to establish the manufacturer’s liability it was sufficient that the plaintiff proved that he was injured while using the power tool in the way it was intended to be used, as a result of a defect in design and manufacture of which the plaintiff was not aware, that rendered the power tool unsafe for its intended use.

Greenman marked an important step of the products liability revolution and the Restatement (Second) of Torts further adopted this case’s strict liability rationale in

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358 Id.
359 Id. at 900.
360 Id. at 901.
361 Id.
1965. Under Section 402A of the Restatement (Second) of Torts:362

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

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

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

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

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

Comment a. on Section 402A of the Restatement (Second) of Torts explicitly states that the rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.363 Thus, a manufacturer can be held liable even if it maintained reasonable quality control and there was no negligence in the design process, and a retailer can be held liable even though it was not involved in the manufacturing or design process.364

After the United States initiated the strict products liability scheme, the liability revolution expanded to Europe when the European Economic Community adopted the Products Liability Directive in 1985.365 In 1994, strict products liability was further

362 See supra note 133 at 417.
363 See supra note 240. The Directive was later amended in 1999. See Directive 1999/34/EC, of the
introduced to Taiwan under Article 7 of the Consumer Protection Law.\textsuperscript{366}

3.4 Tests for Strict Liability

The common law liability rule does not suggest a transition from negligence to strict liability. Rather, common law followed a liability rule akin to strict liability before the invention of negligence.\textsuperscript{367} However, although strict liability is an old common law doctrine, its legal justifications have evolved over time. Specifically, legal scholars of different generations provided distinct insights into this doctrine, and the next part of this Dissertation will introduce the different tests for the doctrine of strict liability.

A. Posner’s Comments on Strict Liability

Richard Posner analyzed strict liability under economic theories. In \textit{Strict Liability: A Comment},\textsuperscript{368} he argued against using the principle of strict liability to resolve legal conflicts over resource use.\textsuperscript{369} In addition, he argued that the economic goal of liability rules in an accident is to maximize the joint value of the interfering

\begin{footnotesize}
\begin{itemize}
\item See supra 64.
\item See supra 15.
\item 2 J. Legal Stud. 205 (1973).
\item Id. at 205.
\end{itemize}
\end{footnotesize}
activities, and the value-maximizing solution involves changes by both parties in their present behavior, or by one or another only, or by neither. Significantly, negligence approach, with a contributory negligence defense, will lead to an efficient solution by invoking cost-justified precautions. On the other hand, a principle of strict liability, without a defense of contributory negligence, would not lead to an efficient solution in cases where the efficient solution is for the plaintiff alone to take avoidance measures and where the efficient solution consists of precautions by both parties. To induce the plaintiff to take cost-justified precautions, we need to pair strict liability with a contributory negligence defense. Accordingly, under economic theory, there is no preference for negligence or for strict liability, provided that some version of contributory negligence defense is recognized.

However, there are differences in economic effect. First, under negligence a defendant will not be held liable for unavoidable accidents, whereas under strict liability he will be. Yet the imposition of strict liability on the defendant gives the plaintiff no incentive to change his activity level despite the fact that the plaintiff’s

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370 Id. at 205-06, Posner illustrated this point with an example involving railroading and farming.
371 Id.
372 Id. at 206-07.
373 Id. at 207.
374 Id.
375 Id. at 221.
376 Id. at 208. Efficiency requires unavoidable accidents to be permitted to occur because the cost either to injurer or to victim of taking precautions exceeds the expected accident cost.
change of activity will eliminate damages at zero cost.\textsuperscript{377} Second, strict liability expands the universe of claims and encourages more monetary expenses on the litigation by increasing the scope of liability.\textsuperscript{378} Third, strict liability permits the loss to be spread more widely.\textsuperscript{379} If the cost of insuring is lower for the defendant than for the plaintiff, there is a ground to prefer strict liability.\textsuperscript{380} Additional considerations come into play where there is a buyer-seller relationship between the victim and the injurer.\textsuperscript{381} If the buyers are risk-preferring, they may be unwilling to pay for a safety improvement, and a higher level of safety is not optimum in the economic sense because it is higher than consumers want it to be.\textsuperscript{382} Moreover, in circumstances where consumers lack knowledge of product safety or even neglect small hazards or great but otherwise unknown risks, sellers may be discouraged from advertising, marketing, or even adopting safety improvements because they may lose to their rivals by disclosing to consumers that the products contain hazards of which they may not have been aware or may have been only dimly aware.\textsuperscript{383} In this regard, even if we hold the sellers strictly liable, the sellers still will adopt cost-justified precautions to

\begin{flushright}
\textsuperscript{377} Id. at 209.
\textsuperscript{378} Id.
\textsuperscript{379} Id. at 210.
\textsuperscript{380} Id.
\textsuperscript{381} Id.
\textsuperscript{382} Id. at 210-11.
\textsuperscript{383} Id. at 211.
\end{flushright}
minimize liability to injured consumers.\textsuperscript{384} Even if we assume producers in other industries will stand to gain from exposing an unsafe product, the gain is possibly small if their products are not close substitutes for the unsafe product.\textsuperscript{385} In summary, whether a general substitution of strict liability for negligence will improve efficiency seems to be conjectural.\textsuperscript{386}

In \textit{Indiana Harbor Belt R. Co. v. Am. Cyanamid Co.},\textsuperscript{387} the defendant loaded 20,000 gallons of liquid acrylonitrile, a toxic chemical, into a railroad tank car to be shipped to a Cyanamid plant in New Jersey.\textsuperscript{388} The car arrived at the Blue Island yard owned by the plaintiff on the morning of January 9, 1979.\textsuperscript{389} Several hours after its arrival, the toxic fluid cargo broke out of the bottom outlet of the car.\textsuperscript{390} The Illinois Department of Environmental Protection ordered the plaintiff to take decontamination measures, and the plaintiff brought an action to recover the expenses alleging that 1) the defendant was negligent in maintaining the tank car and 2) the transportation of acrylonitrile in bulk through the Chicago metropolitan area is an abnormally dangerous activity.\textsuperscript{391}

\begin{thebibliography}{99}
\bibitem{384} \textit{Id.}
\bibitem{385} \textit{Id.}
\bibitem{386} \textit{Id.} at 212.
\bibitem{387} \textit{Id.} at 212.
\bibitem{388} \textit{Id.} at 212.
\bibitem{389} \textit{Id.}
\bibitem{390} \textit{Id.}
\bibitem{391} \textit{Id.}
\end{thebibliography}
As a judge of the United States Court of Appeals for the Seventh Circuit, Posner delivered the opinion of the case. In this case, he spent considerable time discussing the choice between negligence and strict liability. Specifically, he reasoned that:\textsuperscript{392}

The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful, there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less, or by reducing the scale of the activity in order to minimize the number of accidents caused by it. By making the actor strictly liable … we give him an incentive … to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing … the activity giving rise to the accident. The greater the risk of an accident and the costs of an accident if one occurs, the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability … [I]f an activity is extremely common … it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.

The analysis encompassed all elements of Section 520 of the \textit{Restatement (Second) of Torts} to determine whether an activity is abnormally dangerous.\textsuperscript{393} In short, Judge Posner suggested that strict liability is preferable only if negligence is inadequate in deterring accidents—for example, in situations where changes in activity level are desired as the means of accident avoidance. In this case, the leak was not caused by the inherent properties of acrylonitrile but rather was caused by carelessness, and such

\textsuperscript{392} \textit{Id.} at 1177.
\textsuperscript{393} See \textit{supra} 86.
accidents are adequately deterred by the threat of liability for negligence. Moreover, the plaintiff failed to show that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create incentives to relocate the activity to non-populated areas, or to reduce the scale of the activity, or to switch to transporting acrylonitrile by road rather than by rail. In fact, Judge Posner argued that the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile, but it is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical. Hence, he suggested this not be the case for strict liability.

B. Calabresi’s Cheapest Cost Avoider Test for Strict Liability

Guido Calabresi (now Senior Judge) suggested that the principal function of accident law be to reduce the sum of accident costs and accident avoidance costs. In Toward a Test for Strict Liability in Torts, he and Professor Jon Hirschoff rejected the cost-benefit analysis under the Hand test because it entails impractical assumptions that injurers had the requisite foresight with regard to costs of accident

394 See supra note 387 at 1179.
395 Id. at 1181.
396 Id.
397 Id.
399 81 Yale L. J. 1055 (1972).
Avoidance. Rather, they proposed that the proper test for liability is the cheapest cost avoider test. Put simply, the court just needs to find out whether the injurer (at a category level) or the victim (at a category level) was in better position to make the cost-benefit analysis and to act on it. The question for the court reduces to a search for the cheapest cost avoider. For example, strict products liability is preferable when the manufacturer (as a category) is in a better position to compare the existing accident costs with the costs of avoiding a certain type of accident by developing either a new products or a test which would serve to identify the chance of risk.

Similarly, in determining whether to impose strict liability on the injurer for conducting ultrahazardous activities or to discharge the injurer’s liability through the doctrine of assumption of risk, the courts in effect express judgments as to whether the injurer (as a category) or the victim (as a category) is in a better position to avoid the risk by altering his behavior. Therefore, the shift to the strict liability test is premised partly upon a desire to accomplish better primary accident reduction because strict liability, with the test to search for the cheapest cost avoider, is better

\[\text{Id. at 1057-59.}\]
\[\text{Id. at 1060.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at 1062. See also: Id. at 1072-73 for situations where the victim is in the best position to choose the optimal defendant and should be induced to do so.}\]
\[\text{Id. at 1066.}\]
able to accomplish a minimization of the sum of accident costs and of accident avoidance costs.\textsuperscript{406}

In addition, strict liability is a more approachable test than the Hand test that requires calculus of fault.\textsuperscript{407} Finally, other considerations will often predominate in determining liability rules and should be taken into account, including the preference of loss spreading or of a given distribution of wealth (e.g. better wealth equality or compensation of maltreated castes) and a desire to instead further dynamic efficiency goals by favoring the entrepreneurs in a society.\textsuperscript{408} Nevertheless, all of them, together with the efficiency notion of minimizing the sum of accident and accident avoidance costs, are part of what is at times called “justice.”\textsuperscript{409} Thus, the move away from the Hand test toward a test of strict liability can be explained by articulating the different distributional effects and goals between the two.\textsuperscript{410}

C. Schwartz on the Ethics of Strict Liability

Professor Gary Schwartz demonstrated similarities between negligence and strict liability, arguing that the ethics of strict liability are not so hostile to the negligence

\textsuperscript{406} Id. at 1074-75.

\textsuperscript{407} Id. at 1075-76.

\textsuperscript{408} Id. at 1078.

\textsuperscript{409} Id.

\textsuperscript{410} Id. at 1082-84.
First, he found that the developments of the strict liability regime were either simply consistent with some forms of reasonableness tests or immaterial to the proposal for additional strict liability rules. For example, liability for ultrahazardous activities bears some inquiries of reasonableness, such as the cost-benefit analysis. Furthermore, modern design defect determination requires risk-benefit analysis. The same features also are available in workers’ compensation schemes in which the injured employee is a participant in the tort system and employer’s negligence still plays an important role in determining the ultimate liability; a question arises concerning how convincing the arguments on strict liability’s behalf are.

Second, the ethics of strict liability are similar to negligence features. Significantly, the purely ethical arguments in favor of strict liability seem to frequently encounter difficulties of a sort that encourage their supporters to seek the assurance of negligence-like positions. In *Siegler v. Kuhlman*, the defendant drove a truck with loaded gasoline in the truck tank and the trailer tank. While

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411 See *supra* note 325 at 963-64.
412 *Id.* at 970-77.
413 *Id.* at 970. See also: *supra* 86.
414 *Id.* at 971-72.
415 *Id.* at 973-77.
416 *Id.* at 977-1005.
417 *Id.* at 1003.
419 *Id.* at 1182.
running downgrade on the off-ramp of a highway interchange, the defendant felt a jolt and found that the trailer disengaged and crashed through a highway fence, landing upside down on the road.\textsuperscript{420} An explosion ensued, killing the plaintiff when her vehicle encountered a pool of the spilled gasoline.\textsuperscript{421}

After analyzing the concurring opinion in \textit{Siegler}, Schwartz found that the concurrence demonstrates the plain persistence of the negligence idea (i.e. the court’s effort in inquiring into the cause of the jolt, its willingness to apply res ipsa loquitur with respect to the cause of the jolt, and its proposition that strict liability applies only if the explosion occurred without the apparent intervention of any outside force beyond the control of the manufacturer, the owner, or the operator of the truck).\textsuperscript{422} In this regard, only when an inquiry into the accident ends up in complete frustration (e.g. evidence regarding proof of negligence was destroyed during explosion) does the imposition of strict liability on the activity itself become acceptable as a fallback solution.\textsuperscript{423}

In summary, Schwartz argued that it is negligence rather than strict liability that plays a substantial role in a tort system.\textsuperscript{424} Thus, in a society where only rarely can

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{supra} note 325 at 1001-02.
\item \textit{Id.} at 1001.
\item \textit{Id.} at 1005.
\end{enumerate}
\end{footnotesize}
human activities directly result in harms even when nothing goes wrong,\textsuperscript{425} whatever ethical notions relate to the simple factor of causation will plainly not suffice to justify any major new proposals for strict liability.\textsuperscript{426}

D. Priest’s Historical Review of Strict Enterprise Liability

Professor George Priest provided the most commonly cited justifications for the doctrine of strict liability in Taiwan. In \textit{The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law},\textsuperscript{427} he analyzed how strict enterprise liability was invented by introducing 1) Francis Bohlen’s benefit theory and the theory’s relevance to internalization and risk distribution rationales; 2) Fleming James’ advocacy of the centrality of risk distribution and his effort to extend the internalization concept to automobile accidents; and 3) Friedrich Kessler’s studies on the unequal bargaining power resulting from the monopoly of large enterprises and from their uses of standardized contract, the renunciation of freedom of contract, and the need to protect the consumers by direct efforts.\textsuperscript{428} Together, their works constitute the basis of the theory of strict enterprise liability and contribute to the outbreak of strict products liability during the 1950s and the 1960s.\textsuperscript{429}

\textsuperscript{425} Id. at 998.
\textsuperscript{426} See supra note 424.
\textsuperscript{427} 14 J. Legal Stud. 461 (1985).
\textsuperscript{428} Id. at 465-95.
\textsuperscript{429} Id. at 495-505.
Additionally, Priest demonstrated why the movement toward strict products liability was successful.\(^{430}\) After thirty years of scholarship, cases such as *Henningsen v. Bloomfield Motors, Inc.*\(^ {431}\) and *Greenman v. Yuba Power Products, Inc.*\(^ {432}\) along with Section 402A of the *Restatement (Second) of Torts*\(^ {433}\) contribute to the wide recognition of the strict enterprise liability founded on the rising consensus of that time regarding the advantages of internalization and risk distribution and on the need to protect the relatively powerless consumers.\(^ {434}\) Moreover, strict enterprise liability appoints the judge an agent of the modern state.\(^ {435}\) In contrast to negligence or warranty law, which focus on the one specific incident of product use before the court, strict enterprise liability charges the judge to internalize costs, to distribute risks, and to aid the poor.\(^ {436}\) By incorporating a conception of a stronger judicial role in a complex governing state, strict enterprise liability gained quick acceptance within the judicial system.\(^ {437}\)

To summarize, Priest believed that the development of strict enterprise liability was premised upon three presuppositions: 1) relatively greater power of the

\(^{430}\) Id. at 505-18.

\(^{431}\) The court held that disclaimers or limitations of the obligations that normally attend a sale are not favored and are strictly construed against the seller. See 161 A.2d 69, 77-78 (1960).

\(^{432}\) See supra note 355.

\(^{433}\) See supra 91.

\(^{434}\) See specifically: supra note 427 at 505, 507, 511, and 517.

\(^{435}\) Id. at 519.

\(^{436}\) Id.

\(^{437}\) Id.
manufacturer to control product safety; 2) manufacturer’s ability to spread loss through a small insurance premium in the price charged for the product; and 3) the benefit of internalization in encouraging safety investments. 438

3.5 Retreat From Strict Liability?

Strict liability is not bulletproof after its mid-twentieth century expansion. Specifically, the six-factor test for abnormally dangerous activities and product-related actions premised upon defective design and failure to warn raise intractable questions for the doctrine of strict liability. The following discussions present important critiques to strict liability, which in effect, reflects a general concern over the widely-applauded “superior doctrine.”

A. Scholarly Comments

1) Abnormally Dangerous Activities

As Schwartz observed, strict liability for abnormally dangerous activities bears some inquiries of reasonableness and raises the concern as to how convincing the arguments in favor of strict liability are. 439 The imposition of strict liability under the

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438 Id. at 520.
439 See supra 100.
second version of the *Restatement of Torts* is premised upon the determination of whether an activity is abnormally dangerous. To determine whether an activity is abnormally dangerous, the test under Section 520 of the *Restatement (Second) of Torts* includes the following six factors: 1) the existence of a high degree of risk of some harm to the person, land or chattels of others; 2) the likelihood that the harm that results from it will be great; 3) the inability to eliminate the risk by the exercise of reasonable care; 4) the extent to which the activity is not a matter of common usage; 5) the inappropriateness of the activity to the place where it is carried on; and 6) the extent to which its value to the community is outweighed by its dangerous attributes. The Section 520 test involves cost-benefit evaluation with respect to the reasonableness of a specific activity. Hence, applying the Section 520 test, the courts unavoidably conduct negligence determinations if all six factors are to be considered, as Judge Posner did in *Indiana Harbor Belt R. Co. v. Am. Cyanamid Co.* For example, the fifth element under the test is essentially a test of negligence. Additionally, the sixth element within the test calls for a balancing of the costs and benefits of an activity, and courts are capable of conducting such analysis well under a

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440 See supra 85. The latest version of the *Restatement of Torts* also adopts the same rule. See supra 86 for Subsection (a) of the *Restatement (Third) of Torts: Phys. & Emot. Harm* § 20 (2010).
441 See supra 86.
442 See supra note 325 at 970. The cost-benefit analysis derived from the Hand test is an economic meaning of negligence. *A Theory of Negligence*, supra note 38 at 32.
443 See supra note 387.
rule of negligence, thereby eliminating the need to shift from negligence to strict liability.\textsuperscript{445}

Furthermore, for disputes under strict liability to be adjudicable, the boundaries of the liability must be relatively specific and must not depend on fact-sensitive risk-utility calculations.\textsuperscript{446} In other words, the court cannot rely on the reasonableness test under Section 520 of the \textit{Restatement (Second) of Torts} to define abnormally dangerous activities and to impose strict liability on the defendant for harms resulting from dangerous activities.\textsuperscript{447} Otherwise, the bases of strict liability are better interpreted under negligence theory by asking whether the injurer made reasonable decisions about activity based matters, thus reducing the doctrine of strict liability to an unjustified and superfluous doctrinal container for addressing unintentional torts.\textsuperscript{448} In that case, strict liability is better absorbed within negligence.\textsuperscript{449}

2) Products Liability

The situations are more difficult for strict liability in product cases. Schwartz made the following comments about the matter:\textsuperscript{450}

[Products liability law] largely comprises merely an intelligent rounding off of the rights independently available under a mature negligence system...[T]o say that a product is “defective” is to say that the product is “wrong” or “faulty” in

\textsuperscript{445} Id. at 1928.
\textsuperscript{447} Id.
\textsuperscript{448} \textit{The Death of Strict Liability}, supra note 25 at 246.
\textsuperscript{449} Id.
\textsuperscript{450} See supra note 325 at 971.
some significant respect, and product fault is almost always associated with some negligence for which the manufacturer properly can be held responsible.

More particularly, strict products liability does not function very well in design defect and failure to warn cases. In *Potter v. Chicago Pneumatic Tool Company*, the plaintiffs brought a design defect action for injuries incurred from using pneumatic hand tools manufactured by the defendants, claiming that the tools were defectively designed because they exposed the plaintiffs to excessive vibration. In imposing strict liability on the defendants, the court reasoned that:

> [W]e emphasize that our adoption of a risk-utility balancing component to our consumer expectation test does not signal a retreat from strict tort liability. In weighing a product's risks against its utility, the focus of the jury should be on the product itself, and not on the conduct of the manufacturer.

However, this product-conduct distinction is illusory, for in effect the court held the defendant liable for failure to adopt a cost-justified safer design, which was a conduct-oriented determination. Perhaps the courts simply refused to acknowledge that the doctrine of negligence truly is the legal standard to be applied in risk-utility determinations of design defect cases.

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694 A.2d 1319 (1997).

Id. at 1324-25.

Id. at 1334.


Secondly, although courts talk about the manufacturer’s liability for failure to warn as though strict liability applies,\textsuperscript{456} such liability actually rests on negligence because it identifies the important aspects of product use and consumption that manufacturers can and should control through their marketing and renders them adjudicable by insisting on credible and technically legitimate evidence regarding how the manufacturers could have reduced generic product risks at acceptable costs.\textsuperscript{457} As a matter of fact, some courts openly apply negligence for failure to warn rather than stick to the doctrine of strict liability. In \textit{Olson v. Prosoco, Inc.},\textsuperscript{458} the plaintiff suffered injuries as a result of the splashing of hydrochloric acid based cleaner because the bung closure of the drum storing the cleaner popped out of the drum while he was moving it.\textsuperscript{459} He and members of his family brought a failure to warn action against the defendant.\textsuperscript{460} The court explicitly held that the correct submission of instructions regarding a failure to warn claim for damages falls under a theory of negligence and the claim should not be submitted as a theory of strict liability.\textsuperscript{461}

\textsuperscript{456} A manufacturer will be held liable under a theory of strict products liability where the product is defective and the defect may include a mistake in manufacturing, an improper design or the absence or inadequacy of warnings. See \textit{Belling v. Haugh’s Pools, Ltd.}, 126 A.D.2d 958, 959 (1987).

\textsuperscript{457} See \textit{supra} note 446 at 403-04. The phrase “generic product risks” embraces design defect and warning defect because in both categories every product unit designed and marked in the same way shares the same risk potential. On the other hand, in manufacturing defect, the plaintiff condemns only the single unit which is flawed. See James A. Henderson, Jr. & Aaron D. Twerski, \textit{Products Liability Problems and Process} 179 (2011) [hereinafter cited as \textit{Products Liability Problems and Process}].

\textsuperscript{458} See \textit{supra} note 117.

\textsuperscript{459} \textit{Id.} at 286.

\textsuperscript{460} \textit{Id.}

\textsuperscript{461} \textit{Id.} at 289.
Thirdly, comment j. on Section 402A of the Restatement (Second) of Torts illustrates the importance of knowledge in failure to warn cases:462

Where … the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.

Once the court requires proof of knowledge as a necessary element of failure to warn in applying Section 402A of the Restatement (Second) of Torts, the strict liability action begins to look much like its negligence counterpart.463 This argument could fairly be demonstrated by the text of Section 388 of the Restatement (Second) of Torts:464

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

In other words, the analysis for strict liability failure to warn is virtually identical to negligent failure to warn, which requires proof of defendant’s knowledge and involves

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462 Comment j. on the RESTATEMENT (SECOND) OF TORTS § 402A (1965).
463 See supra note 454 at 1515.
464 RESTATEMENT (SECOND) OF TORTS § 388 (1965).
risk-utility test to determine whether a warning is required; under either theory the reasonableness of the manufacturer’s conduct effectively becomes the determinative factor. 465

When product cost is a factor in the risk-utility test for determining defectiveness, “strict” products liability is merely a reflection of the burdens of the manufacturing process, thereby making the distinction between defectiveness and negligence unnecessary. 466 In this way, when “strict” products liability requires the plaintiff to prove defectiveness to make the defendant liable, it is very much like negligence liability because the concept of defectiveness is so close to negligence that a distinction is not worth the effort to maintain. 467 Finally, although strict liability is desired for affording greater protection to the victim through inducing more care on the part of the potential injurer, this argument is illusory. 468 Even though the proposition of greater safety is practicable, it fails to explain the selective application of strict liability to product cases only. 469 Therefore, while strict liability is widely considered a huge step of progress in the Taiwanese legal system, American scholars identified several predicaments in applying this doctrine. A question to be answered is whether strict liability is a superior option to negligence in any respect.

465 See supra note 454 at 1517.
466 A Modest Proposal to Abandon Strict Products Liability, supra note 25 at 658-59.
467 Id. at 651-52.
468 THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 64.
469 A Modest Proposal to Abandon Strict Products Liability, supra note 25 at 645.
B. Practical Reforms

As mentioned previously, aviation is considered an abnormally dangerous activity under Section 520A of the Restatement (Second) of Torts, and the operator or owner of an aircraft is subject to strict liability for ground damages resulting from aviation activities.\textsuperscript{470} However, according to a special note by the Reporter under comment k. on Section 20 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, aviation is no longer an abnormally dangerous activity.\textsuperscript{471} Specifically, the note states that:\textsuperscript{472}

\[ \text{[T]he majority opinion in} \quad \text{Crosby v. Cox Aircraft Co.} \text{\textsuperscript{473} is correct in concluding that aviation does not fit the formal Restatement criteria for an abnormally dangerous activity. The risk of serious ground damage when all reasonable care is exercised is very small; and given both the number of flights and the percentage of the population that travels by air, commercial aviation is in common usage. Nevertheless … one rationale for strict liability relates to the defendant's exclusive control over the instrumentality of harm, and this rationale is impressively applicable in aviation ground-damage cases … Even so, the doctrinal argument against strict liability—that almost all airline crashes are due to negligence—confirms that the strict-liability issue is no longer one that has major practical significance.} \]

Similar reforms took place in the Products Liability Restatement. Section 2 in the Restatement (Third) of Torts: Products Liability applies a reasonableness test to

\textsuperscript{470} See supra 79-80.
\textsuperscript{471} Comment k. on RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 20 (2010).
\textsuperscript{472} Id.
\textsuperscript{473} 746 P.2d 1198 (Wash. 1987).
determine whether a product is defectively designed or whether a warning of a product is insufficient.\textsuperscript{474}

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility.\textsuperscript{475}

Subsection (b) adopts a “risk-utility balancing” test as the standard for judging the defectiveness of product designs.\textsuperscript{476} Specifically, the test determines whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not

\textsuperscript{474} \textsc{Restatement (Third) of Torts: Products Liability} § 2 (1998).
\textsuperscript{475} Comment \textit{a}. on the \textsc{Restatement (Third) of Torts: Products Liability} § 2 (1998).
\textsuperscript{476} Comment \textit{d}. on the \textsc{Restatement (Third) of Torts: Products Liability} § 2 (1998).
reasonably safe. 477 In so interpreting, consumer expectations do not play a
determinative role in judging the defectiveness of product designs because consumer
expectations alone do not take into account whether the proposed alternative design
could be implemented at reasonable cost, or whether an alternative design would
provide greater overall safety. 478 Nonetheless, consumer expectations about product
performance and the dangers attendant to product use still affect how risks are
perceived and relate to foreseeability and frequency of the risks of harm. 479 As for
warning defect, Subsection (c) also adopts a reasonableness test for judging the
adequacy of product instructions and warnings. 480 The rule thus parallels Subsection
(b), which adopts a similar standard for judging the safety of product designs. 481

477 Id.
478 Comment g. on the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).
479 Id.
480 Comment i. on the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).
481 Id.
Chapter Four:

Analysis of Risk Liability

Synopsis

- Common law and Civil law share similar laws of negligence.
- Common law and Civil law share similar policy justifications for strict liability, thereby justifying the introduction of common law analysis to discuss Taiwanese strict liability rules.
- Although the areas of law to which strict liability applies are different between the Taiwanese legal system and the American legal system due to socioeconomic differences, American laws are still instrumental to Taiwan.
- Intermediate liability is a variation under negligence principles which shifts the burden of proof to the defendant; in this regard, it also is different from res ipsa loquitur under which the burden of proof still remains on the plaintiff.
- Implicit in traditional strict liability is absolute liability under which any form of contributory negligence is not a valid defense.
- Availability of comparative negligence in strict liability, in effect, cripples the traditional strict liability, but it adequately adjusts the doctrine to induce safety incentives from both parties.
- Strict liability does not provide greater accident avoidance than negligence does.
- Benefit theory cannot justify the selective application of strict liability.
- Loss spreading alone should NOT be the paramount policy of tort because tort is an inferior way of insurance.
- Intermediate liability is superior to strict liability in regulating highly risky activities.
4.1 Overview

In this chapter, this Dissertation proposes that intermediate liability be the operative rule for risk liability. First, it shows several comparisons to demonstrate how analysis in the American common law is instrumental for Taiwan, including the similarities between negligence laws in Taiwan and those in the United States, as well as the similarities between their policy justifications for strict liability. Furthermore, it compares how strict liability works differently in the two legal systems. Although the areas to which strict liability applies are different in the two legal systems, such distinction is moderate and does not cripple the usefulness of the American law. Second, it identifies the differences among intermediate liability, res ipsa loquitur, and strict liability. Third, it analyzes how strict liability was reduced from an absolute liability principle to a negligence-like doctrine. Fourth, it responds to the tests for strict liability mentioned in Chapter Three, and argues that strict liability fails to justify itself on those grounds as an independent liability regime. In contrast, the only practicable strict liability rule is the doctrine of equitable liability. Finally, it argues that intermediate liability satisfies the tests for strict liability and is superior to strict liability as the operative rule for risk liability.

Equitable liability is a variation under negligence principles. See supra 52-56.
4.2 Comparative Tort Laws

Although Taiwan inherited its Civil law system from Germany and developed its legal theories under the influence of Japanese law, American law influenced the rising subjects of torts, such as strict products liability, privacy laws, and the concepts of wrongful birth and informed consent.\footnote{\textsuperscript{483}} Moreover, the negligence principles between Taiwan and the United States are similar.\footnote{\textsuperscript{484}} The following comparisons demonstrate that although Taiwanese tort law and American tort law are different in certain ways, both share some common characteristics and American tort law is still instrumental.

A. Comparing Laws of Torts

1) Differences

a. Sources of Negligence Law

In Taiwan, negligence is based on the first part of the first paragraph of Article 184.\footnote{\textsuperscript{485}} Under this rule, the plaintiff must prove six statutory elements to recover.\footnote{\textsuperscript{486}} On the other hand, negligence in the United States is established by case law.\footnote{\textsuperscript{487}} Thus, a primary distinction between negligence laws of the two systems lies on the sources of law: Taiwan establishes its rule by statute, whereas the United States adopts case

\footnotetext{\textsuperscript{483}} See supra note 4 at 43.  
\footnotetext{\textsuperscript{484}} See infra 118-119.  
\footnotetext{\textsuperscript{485}} See supra 37.  
\footnotetext{\textsuperscript{486}} See supra 39-46.  
\footnotetext{\textsuperscript{487}} See supra note 4 at 63-64.
b. Structures of Tort Law

The American legal system distinguishes tort law from contract law, but in a Civil law system both contractual and non-contractual civil wrongs fall under the heading of laws of obligations.\textsuperscript{488} In Taiwan, tort and contract rules are parts of the Civil Code, and the primary tort causes of action are based upon Article 184 of this Code.\textsuperscript{489}

2) Similarities

a. Functions of Torts

While Taiwanese tort law and American tort law come from different sources, both share similar characteristics. First, both try to balance individual freedom of action and the protection of individual rights.\textsuperscript{490} Section 767 in the \textit{Restatement (Second) of Torts} illustrates the balancing test:\textsuperscript{491}

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor’s conduct,

(b) the actor’s motive,

(c) the interests of the other with which the actor's conduct interferes,

\textsuperscript{488} See \textit{supra} note 133 at 403.
\textsuperscript{489} See \textit{supra} 37.
\textsuperscript{490} See \textit{supra} note 4 at 7.
\textsuperscript{491} \textit{RESTATEMENT (SECOND) OF TORT} §767 (1979) (emphasis added).
(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Second, both tort laws in Taiwan and in the American common law ask the tortfeasor to compensate for actual loss.\footnote{492} Article 184 of the Civil Code explicitly requires the tortfeasor to carry out justice by compensating the victim for injury arising out of tort.\footnote{493} The same concern is found in American common law in which compensatory damages are the primary instrument of recovery in tort in order to restore the plaintiff to the status quo before suffering harms.\footnote{494} Finally, both Taiwanese tort law and American tort law serve to deter future harms.\footnote{495} By establishing clear rules about what a person could and could not do, tort law facilitates deterrence.\footnote{496}

b. Definitions of Negligence

Negligence is defined as breach of duty of care in both Taiwan and the United States. More specifically, in Taiwan, negligence occurs when a defendant fails to exercise duty of care of a good administrator.\footnote{497} On the other hand, in American...
common law, negligence is breach of duty of care of a reasonably prudent person under similar circumstances.\textsuperscript{498} Although the terms are different, the meanings are similar.\textsuperscript{499}

c. Causal Theories

Both Taiwanese tort law and American tort law relies on a two-prong test of causation. Significantly, Taiwan adopts the theory of adequate causation, which comprises a conditional relation test and an adequacy test.\textsuperscript{500} A conditional relation test analyzes whether the accident would not have occurred but for the defendant’s tortious act,\textsuperscript{501} which is the same test applied under the “but-for” causation in American common law.\textsuperscript{502} An adequacy test relies upon whether a reasonable person would have foreseen the possibility of the damages under the circumstances,\textsuperscript{503} which is the same test applied under the proximate cause limitation of American tort law.\textsuperscript{504} Thus, this Dissertation argues that although Taiwanese tort law and American tort law are different in terms of sources and structures, both share common characteristics in primary functions, definitions of negligence, and causal theories.

\textsuperscript{498} See supra 74.
\textsuperscript{499} The terms “care of a good administrator” and “reasonable care” are interchangeable. See, for instance, supra 50 for text of the first paragraph of Article 190 of the CIVIL CODE.
\textsuperscript{500} See supra 43-44.
\textsuperscript{501} See supra 44.
\textsuperscript{502} See supra 75.
\textsuperscript{503} See supra 44.
\textsuperscript{504} See supra 76.
B. Comparing Policy Justifications for Strict Liability

In Taiwan, strict liability is justified on the following grounds. First, certain enterprises or owners of dangerous facilities have control over sources of danger and thus are better able to avoid harms by taking precautions. In addition, those enterprises and owners benefit from the exploitation of the sources of danger, and holding them strictly liable satisfies the notion of justice. Finally, strict liability assists loss spreading because enterprises are usually those who conduct dangerous activities and they are better able to shift the losses through pricing mechanisms or insurance. Thus, three justifications speak on behalf of strict liability, including accident avoidance, justice, and loss spreading.

In the United States, strict liability rules are those involving extraordinary risks whose existences call for a special responsibility in which tort defendants are held liable even though they are not negligent or otherwise at fault for the plaintiff’s harm. As mentioned previously, modern strict liability doctrine is premised upon three presuppositions: 1) the defendant’s relatively greater power to control risks; 2) the defendant’s ability to spread loss through a small insurance premium in the price charged for the product; and 3) the benefit of internalization in encouraging safety.

\[505\] See supra note 4 at 672.
\[506\] Id.
\[507\] Id. at 672-73.
\[508\] See supra note 49 at 289.
investments. In this way, both Taiwan and the United States share the same policy justifications for the doctrine of strict liability, thereby justifying this Dissertation’s introduction of common law analysis to discuss Taiwanese strict liability rules.

**Table 5: Comparative Policy Justifications for Strict Liability**

<table>
<thead>
<tr>
<th></th>
<th>Taiwan</th>
<th>United States</th>
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</thead>
<tbody>
<tr>
<td>Defendant’s Ability to</td>
<td>✔</td>
<td>✔</td>
</tr>
<tr>
<td>Control Risks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Safety Incentives</td>
<td>✔</td>
<td>✔</td>
</tr>
<tr>
<td>Loss Spreading</td>
<td>✔</td>
<td>✔</td>
</tr>
</tbody>
</table>

**C. Comparing Areas to Which Strict Liability Applies**

Both Taiwan and the United States have strict liability rules within their legal systems; however, the areas of law to which strict liability applies are different because of the distinctions in social economics and legal institutions. Please refer below to Table 6 for detailed comparisons.

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509 See supra 103-104 and supra note 133 at 417-18.
510 See supra note 4 at 668.
Table 6: Comparative Strict Liability Rules

<table>
<thead>
<tr>
<th></th>
<th>Taiwan</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default Rule</td>
<td></td>
<td></td>
</tr>
<tr>
<td>for Unintentional Torts</td>
<td></td>
<td>Negligence</td>
</tr>
<tr>
<td>Common Carriers</td>
<td>Absolute Liability(^{511})</td>
<td>Negligence</td>
</tr>
<tr>
<td></td>
<td>Strict Liability(^{512})</td>
<td></td>
</tr>
<tr>
<td>Abnormally Dangerous Activities</td>
<td>Intermediate Liability</td>
<td>Strict Liability</td>
</tr>
<tr>
<td>Animals</td>
<td>Intermediate Liability</td>
<td>Strict Liability</td>
</tr>
</tbody>
</table>

\(^{511}\) Article 89 of the CIVIL AVIATION ACT.

\(^{512}\) See Article 91 of the CIVIL AVIATION ACT, Article 46 of the MASS RAPID TRANSIT ACT, and Article 64 of the HIGHWAY ACT.
4.3 Distinguishing Strict Liability, Intermediate Liability, and Res Ipsa Loquitur

The doctrine of strict liability is straightforward. Under strict liability, a person is held liable regardless of his fault.\textsuperscript{513} Because strict liability does not consider the defendant’s fault, it admits fewer issues than negligence.\textsuperscript{514} More particularly, there are just three considerations to take into account in any strict liability case: 1) whether the defendant caused the plaintiff’s harm; 2) the extent of harm; and 3) whether the plaintiff acted reasonably.\textsuperscript{515} As a result, the relative certainty of the defendant’s liability under

\textsuperscript{513} See supra 19.
\textsuperscript{514} See supra note 49 at 304-05.
\textsuperscript{515} \textit{Id}.
strict liability reduces the rate of litigation by encouraging pre-litigation settlements.\footnote{Id.}

In other words, a defendant subject to strict liability should be more likely to settle out of court, thereby significantly reducing the costs of administering the tort system.\footnote{Id. at 305.}

Moreover, the average administrative costs of resolving strict liability claims are likely to be lower than the costs of resolving negligence claims, because under negligence principles, the court has to calculate the cost and effectiveness of different levels of care that might have reduced the probability or magnitude of harm.\footnote{Id.}

In contrast, the doctrine of intermediate liability still works under a fault-based liability regime, since the common characteristic of intermediate liability rules is that the defendant bears the burden of proof regarding the exercise of reasonable care.\footnote{See supra 47.}

Put simply, the principle of intermediate liability is only a variation under negligence principles by shifting the burden of proof in relation to negligence to the defendant. Accordingly, the court also has to conduct the calculus of fault, and the average administrative costs of resolving intermediate liability claims are higher than the costs of resolving strict liability claims.\footnote{See supra note 49 at 305.}
The same is true for the doctrine of res ipsa loquitur. Because the doctrine’s primary function is to permit an inference or raise a presumption of negligence, res ipsa loquitur is also a rule under negligence principles. Consequently, unlike the clear demarcation between strict liability and fault-based liability, the distinction between intermediate liability and res ipsa loquitur is vague and deserves more discussion.

According to Section 328D of the Restatement (Second) of Torts:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
   (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
   (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
   (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.
(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Res ipsa loquitur is a Latin phrase meaning “the thing speaks for itself.” This concept originated from an old English case, Byrne v. Boadle. Under the majority rule, the doctrine of res ipsa loquitur is merely a rule of evidence, permitting the jury to draw, from the occurrence of an unusual event, the conclusion that it was the

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521 BLACK’S LAW DICTIONARY 1503 (10th ed. 2014).
522 RESTATEMENT (SECOND) OF TORTS § 328D (1965).
523 Comment a. on the RESTATEMENT (SECOND) OF TORTS § 328D (1965).
524 See supra note 245.
In *McDougal v. Perry*, the plaintiff was driving behind a tractor-trailer driven by the defendant. As the defendant drove over some railroad tracks, the 130-pound spare tire came out of its cradle underneath the trailer and fell to the ground. The trailer's rear tires then ran over the spare tire, causing the spare tire to bounce into the air and collide with the windshield of the plaintiff’s vehicle. The spare tire was housed in a cradle underneath the trailer and was secured by a chain that was wrapped around the tire and was secured to the body of the trailer by a latch device. The court held that the spare tire escaping from the cradle underneath the truck, resulting in the tire ultimately becoming airborne and crashing into the plaintiff’s vehicle, is the type of accident which, on the basis of common experience and as a matter of general knowledge, would not occur but for the failure to exercise reasonable care by the person who had control of the spare tire. Specifically, the court reasoned that:

[Res ipsa loquitur] is a rule of evidence that permits, but does not compel, an inference of negligence under certain circumstances. The doctrine is merely a rule of evidence. Under it an inference may arise in aid of the proof … Essentially the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that

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525 See supra note 523.  
526 716 So.2d 783 (Fla. 1998).  
527 Id. at 784.  
528 Id.  
529 Id.  
530 Id.  
531 Id. at 786.  
532 Id. at 785-86.
would not, in the ordinary course of events, have occurred without negligence on the part of the one in control … The plaintiff is not required to eliminate with certainty all other possible causes or inferences … All that is required is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not.

In this way, the doctrine of res ipsa loquitur is very similar to the concept of prima facie proof (Anscheinsbeweis), which is also a procedural doctrine that alleviates the plaintiff’s burden of proof in cases where the occurrence of an event, on the basis of common experience, allows the court to infer the defendant’s negligence.533 For example, the fact that a truck driver drove onto a sidewalk permits the court to infer that the driver was negligent in driving.534 The primary function of prima facie proof (Anscheinsbeweis) is to enhance the judge’s ability to determine the facts by free evaluation.535 This concept has nothing to do with the placement of burden of proof but rather concerns the appraisal of evidence (Beweiswürdigung).536 Accordingly, under both res ipsa loquitur and prima facie proof (Anscheinsbeweis) the burden of proof always remains on the plaintiff.537 From this point of view, strict liability, intermediate liability, and res ipsa loquitur are distinguishable. The common

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534 Id.
536 Id.
characteristic of the three principles is that all of them, to some degree, relieve the plaintiff’s burden of proof in relation to the defendant’s negligence. However, strict liability completely discards the negligence inquiries, whereas intermediate liability and res ipsa loquitur still require the calculus of fault, with different placements of burden of proof.

Table 7: Distinguishing Strict Liability, Intermediate Liability, and Res Ipsa Loquitur

<table>
<thead>
<tr>
<th></th>
<th>Strict Liability</th>
<th>Intermediate Liability</th>
<th>Res Ipsa Loquitur</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liability Regime</td>
<td>No-Fault</td>
<td>Fault-Based</td>
<td>Fault-Based</td>
</tr>
<tr>
<td>Placement of Burden of Proof in Relation to Fault</td>
<td>None</td>
<td>Defendant</td>
<td>Plaintiff</td>
</tr>
</tbody>
</table>
4.4 The Fall of Absolute Liability

A. Absolute Liability: Defendant Held as an Insurer

Strict liability holds a defendant liable regardless of his fault.\textsuperscript{538} Given such heightened responsibility, it is difficult to assess the plaintiff’s proper share of the overall liability when a claim is litigated.\textsuperscript{539} Take products liability, for instance. Early on in the products liability revolution, courts struggled with the question of whether one could compare fault with defect.\textsuperscript{540} To answer the question, the presuppositions of strict enterprise liability are illustrative, including: 1) relatively greater power of the manufacturer to control product safety; 2) manufacturer’s ability to spread loss through a small insurance premium in the price charged for the product; and 3) the benefit of internalization in encouraging safety investments.\textsuperscript{541} As stated by Professor Fleming James:\textsuperscript{542}

[A] system of absolute liability tends to increase the pressure towards accident prevention on large groups and enterprises, where we have seen it will do the most good, rather than on the individual, where it will do relatively little good. This is so for three reasons: 1) large units are involved in many accidents and appear often as defendants, rare as claimants; 2) even where the accident is caused by an individual while acting for himself, in his aspect as potential defendant he is increasingly becoming covered by liability insurance, so that the

\textsuperscript{538} See supra 19.
\textsuperscript{539} PRODUCTS LIABILITY PROBLEMS AND PROCESS, supra note 457 at 483.
\textsuperscript{540} Id. at 493.
\textsuperscript{541} See supra 103-104.
\textsuperscript{542} Fleming James, Jr. & John J. Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769, 780 (1950).
pressure of increased liability is put in the first instance on the insurance company; and 3) abolition of the defense of contributory negligence—which usually accompanies a shift to absolute liability—clearly adds a further incentives to safety on the part of perennial defendants, and if there is a corresponding loss of incentive it is on the part of the individuals who are potential accident victims.

The implication of the three presuppositions is absolute liability, which means that any form of contributory negligence is not a valid defense in a strict liability action.\textsuperscript{543} Under James’ belief, absolute liability is preferred over a system of liability based on fault wherever there is an enterprise or activity that benefits society but also takes a more or less inevitable (if accidental) toll on human life and limb, as strict enterprise liability helps to cut down accidents and minimize administration costs.\textsuperscript{544} Significantly, absolute liability totally rejects defenses of any kind, including defenses that negate causation, defenses that inculpate the plaintiff, and defenses that exonerate the defendant.\textsuperscript{545} For example, under Article 89 of the Civil Aviation Act, the owner of the aircraft is liable not only regardless of fault but also for the damage caused by force majeure.\textsuperscript{546} Because a defendant is liable for the injury resulting from an act of God as long as it is foreseeable,\textsuperscript{547} the term “force majeure” under Article 89 of this Act should be interpreted as “an act of God” or events that are unexpected and

\textsuperscript{543} See supra note 427 at 527.
\textsuperscript{544} Fleming James, Jr., General Products—Should Manufacturers Be Liable without Negligence?, 24 Tenn. L. Rev. 923 (1957).
\textsuperscript{546} See supra 59.
\textsuperscript{547} See supra 77.
uncontrollable. \textsuperscript{548} In so defining, Article 89 of the Civil Aviation Act is an absolute liability rule which satisfies the three presuppositions of strict enterprise liability.\textsuperscript{549} The same is true for strict products liability, as Justice Traynor wrote in his concurring opinion for \textit{Escola v. Coca Cola Bottling Co}.\textsuperscript{550} Specifically, he wrote that: \textsuperscript{551}

\begin{quote}
In my opinion it should now be recognized that a manufacturer incurs an \textit{absolute liability} when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.
\end{quote}

By insuring against unavoidable accidents as well, strict liability has a larger insurance component,\textsuperscript{552} and under this doctrine there was no room for the court to assess the plaintiff’s share of the overall liability.\textsuperscript{553}

\textbf{B. The Availability of Comparative Negligence}

The early absolute liability rule was not free from criticism. Turning back to Coase’s example of cattle raising and farming,\textsuperscript{554} the starting point of Coase’s analysis is that both activities are reciprocal.\textsuperscript{555} The presence of both cattle raising and farming is a prerequisite to any damage to either, so that avoiding harm to one

\textsuperscript{548} See also: Reijiro Mochizuki, Ying Mei Fa (Anglo-American Law) 227 (Kuo Chien trans., Wu-Nan Culture Enterprise 2004).
\textsuperscript{549} See supra 59.
\textsuperscript{550} See supra note 115.
\textsuperscript{551} \textit{Id.} at 440.
\textsuperscript{552} \textit{The Economic Structure of Tort Law}, supra note 38 at 66.
\textsuperscript{553} Contributory negligence was not a defense to a strict liability action. \textit{Young v. Up-Right Scaffolds, Inc.}, 637 F.2d 810, 814 (D.C. Cir. 1980).
\textsuperscript{554} See supra 14.
\textsuperscript{555} See supra note 48.
party necessarily harms the other.\textsuperscript{556} The idea of reciprocity of harm leads to the rationale that inquires into the plaintiff’s contributory negligence.\textsuperscript{557} In other words, if Coase is right about the reciprocal nature of harm, and it is possible that the plaintiff, often enough, would prove to be the cheapest cost avoider, then it becomes important to take into account the plaintiff’s role in creating or avoiding accidents subject to strict liability.\textsuperscript{558}

However, under absolute liability the plaintiff has no incentive to take precautions that might reduce or eliminate the expected accident costs.\textsuperscript{559} Specifically, under absolute liability the potential victim knows that even if he takes no care, the injurer will be liable if an accident occurs.\textsuperscript{560} Additionally, there are no ways that the injurer can escape liability unless he prevents the accident.\textsuperscript{561} Knowing all this, the potential victim has no incentive to spend anything on preventing the accident.\textsuperscript{562} Consequently, a principle of absolute liability is not efficient in cases where the efficient solution is for the victim alone to take avoidance measures and where the efficient solution consists of precautions by both injurers and victims.\textsuperscript{563} On the other hand, contributory negligence serves an essential allocative purpose in a strict liability

\textsuperscript{556} Id.
\textsuperscript{557} A Theory of Negligence, supra note 38 at 59.
\textsuperscript{558} See supra note 49 at 295.
\textsuperscript{559} Id.
\textsuperscript{560} THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 80.
\textsuperscript{561} Id.
\textsuperscript{562} Id.
\textsuperscript{563} See supra note 368 at 206.
regime by inducing safety incentives from the potential victim.\textsuperscript{564} From an economic point of view, the plaintiff’s contributory negligence should be a valid defense in a strict liability action and a defendant cannot be an insurer against all possible types of accidents and injuries.\textsuperscript{565} Accordingly, years after \textit{Escola v. Coca Cola Bottling Co.},\textsuperscript{566} Justice Traynor supported the view that the manufacturer is not an insurer for all injuries caused by its product.\textsuperscript{567}

As stated previously, the question that baffled early case law was whether one could compare fault in a strict liability action.\textsuperscript{568} Under the traditional approach, contributory negligence is not a defense to strict liability. In \textit{McCown v. International Harvester Co.},\textsuperscript{569} the plaintiff sued the defendant under a strict products liability theory for injuries sustained while driving a tractor manufactured by the defendant.\textsuperscript{570} Specifically, the plaintiff struck a guardrail adjoining a shoulder with the right front tire of the tractor when driving it.\textsuperscript{571} The collision caused the steering wheel to spin rapidly in the direction opposite to the turn, and the spokes of the spinning steering wheel

\textsuperscript{564} \textit{The Economic Structure of Tort Law}, supra note 38 at 80.
\textsuperscript{565} Strict tort liability does not transform manufacturers into insurers, nor does it impose absolute liability. See supra note 451 at 1328.
\textsuperscript{566} See supra note 115.
\textsuperscript{568} See supra 129.
\textsuperscript{569} 342 A.2d 381 (1975).
\textsuperscript{570} \textit{Id.}
\textsuperscript{571} \textit{Id.}
struck the plaintiff’s right arm, fracturing his wrist and forearm. The court explicitly rejected contributory negligence as a defense to actions grounded under strict products liability.

However, the traditional rule is obsolete. After the invention of comparative negligence under which the plaintiff’s recovery would not be completely barred, courts have opted for the apparent justice of making each party to an accident bear responsibility for the losses attributable to that party’s breach of good behavior. In Daly v. General Motors Corp., the decedent crashed his vehicle onto a metal divider fence. After the initial impact between the vehicle and the fence the vehicle spun counterclockwise, the driver’s door was thrown open, and the decedent was forcibly ejected from the car and sustained fatal head injuries. The decedent’s widow and three surviving minor children sued the defendants under the theory of strict products liability. In holding that comparative negligence applies to a strict liability action, the court reasoned that:

[Pr]inciples of comparative negligence … apply to actions founded on strict products liability, thereby reducing plaintiff's recovery only to the extent that his own act of reasonable care contributed to his injury … Application of comparative

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572 Id.
573 Id. at 382.
575 575 P.2d 1162 (Cal. 1978).
576 Id. at 1164.
577 Id.
578 Id.
579 Id. at 1164-72.
principles to strict products liability actions treats alike defenses to both negligence and strict products liability actions; in each instance, defense, if established, will reduce but not bar plaintiff's claim … [The] reason for extending full system of comparative fault to strict products liability is that it is fair to do so … (remaining text omitted.)

The recognition of comparative negligence in a strict products liability action was further realized by the *Products Liability Restatement*. Under Section 17 of the *Restatement (Third) of Torts: Products Liability*, 580

(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

Having recognized the availability of comparative negligence in a strict liability action, courts still need to justify their approaches in comparing apples and oranges. 581

In *Duncan v. Cessna Aircraft Co.*, 582 the decedent died in a crash of an airplane manufactured by the defendant. 583 His widow brought an action against the defendant alleging that design and manufacturing defects in the legs of the cockpit seats caused

581 See supra note 574.
582 665 S.W.2d 414 (Tex. 1984).
583 *Id.* at 418.
the seat legs to break during the crash, thus causing the decedent’s death. In discussing the availability of comparative negligence in an action grounded under strict liability, the court reasoned that:

Many courts and commentators have labeled this type of loss allocation system comparative fault. We choose comparative causation instead because it is conceptually accurate in cases based on strict liability ... in which the defendant's “fault,” in the traditional sense of culpability, is not at issue ... Under comparative causation, Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict ... [T]he product supplier's incentive to eliminate or to reduce product hazards should remain intact.

Under this rationale, comparative negligence sneaks up in the proximate cause evaluation as a causal defense. This reasoning might work perfectly when the court applies contributory negligence to strict liability, since a plaintiff’s misconduct is considered a superseding cause of the injury under the principle of contributory negligence, which justifies a complete bar to his recovery. However, when comparative negligence applies to strict liability, the primary function of this principle is to apportion responsibility between or among the parties. To accomplish this task, the principle considers determinative factors that include the plaintiff’s

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584 Id.
585 Id. at 427-28.
587 For example, Section 17 in the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY is under the heading of “Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others.”
misconduct, causation, and damages. That said, comparative negligence neither compares the parties’ fault only, nor does it merely explore the percentage of cause assigned to the plaintiff. The apportionment of liability should rest on the combined evaluation of the determinative factors rather than on a single element of an accident, since any single element alone cannot justify the imposition of liability on a chosen party. Similarly, negligence holds a person liable only when there is “negligent conduct” that “causes harm.” Because the principle of comparative negligence in effect compares the plaintiff’s overall responsibility for failure to exercise care, it is a rule of liability defense rather than a causal defense.

Assuming, in an accident governed by strict liability, the plaintiff was liable for his own misconduct for 30% of his injuries, and assuming the defendant could establish the plaintiff’s comparative negligence, the defendant’s proof of comparative negligence demonstrated two things: 1) 30% of the injuries resulted from the plaintiff’s fault and 2) the defendant was not liable in negligence for the 30% injuries. From a theoretical point of view, requiring the defendant to prove that he was not negligent is exactly how the doctrine of intermediate liability works. The distinction between strict liability and intermediate liability lies on the 70% of the...
plaintiff’s injuries, for under strict liability the defendant was nonetheless liable, but under intermediate liability he was able to escape liability by proving that he was not negligent in causing the injuries. The bottom line is that while the availability of comparative negligence in a strict liability action is important on the ground of economic efficiency, it cripples the principle’s character as a rule of absolute liability and makes it similar to intermediate liability. In other words, strict liability with a defense of comparative negligence is closely analogous to negligence per se. 592 Thus, Schwartz was right that modern strict liability bears negligence characteristics and that strict liability and negligence are hardly distinguishable. 593

In Taiwan, comparative negligence is the only recognized form of contributory negligence. Under Article 217 of the Civil Code: 594

If the injured person has negligently contributed in causing or aggravating the injury, the court may reduce or release the amount of the compensation. If the reason of a grave injury was unknown to the debtor and the injured person has omitted to call the attention of the debtor beforehand, or to avert, or mitigate the injury, the injured person will be deemed to be negligently contributed in the injury. The provisions of the preceding two paragraphs shall apply mutatis mutandis to the situation when the agent of the injured person or the person performing the obligation for the injured person has negligently contributed to the injury.

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592 See supra note 582 at 426.
593 See supra note 416.
594 Article 217 of the CIVIL CODE.
Similar rules also are available in the Nuclear Damage Compensation Law\(^\text{595}\) and in the Civil Aviation Act.\(^\text{596}\) Different from the struggles in American case law, courts in Taiwan widely accept the availability of comparative negligence in an action grounded under strict liability. In Tai Shang Zi No. 2734 of 1990,\(^\text{597}\) the Directorate General of Telecommunications brought a suit against a defendant for recovery because during construction work the defendant cut the cables that deliver electricity to telecommunications facilities. At the same time, the defendant argued that the plaintiff was at fault in changing the original plan and placing the cables beneath his land without informing him of this fact. According to the second paragraph of Article 45 of the Telecommunications Act,\(^\text{598}\) compensation shall be made in the event of damages to telecommunications facilities arising from repairs or construction of buildings, roads, irrigation ditches, or the laying of underground pipes, cables or other projects.\(^\text{599}\) Because compensation under this rule is not premised upon the fault of the defendant, it is a strict liability rule. In holding that the appellate court erred in failing to address the plaintiff’s fault, the Supreme Court of Taiwan reasoned that comparative negligence also is an available defense in a strict liability action. With comparative negligence also is an available defense in a strict liability action. With comparative

\(^{595}\) Article 91 of the NUCLEAR DAMAGE COMPENSATION LAW.

\(^{596}\) Article 19 of the CIVIL AVIATION ACT.

\(^{597}\) Zuigao Fayuan, 79 Nian Tai Shang Zi No. 2734 (Tai Shang Zi No. 2734 by Supreme Court of Taiwan in 1990), http://mywoojda.appspot.com/j5m/j5m?id=107 (last visited on Oct. 20, 2015).

\(^{598}\) Article 45 of the TELECOMMUNICATIONS ACT.

\(^{599}\) At the time of the decision, the cited statute was the 1977 version and the rule was in the second paragraph of Article 26 with similar language. Please refer to LIFAYUAN GONGBAO (Official Gazette of Legislative Yuan of the Republic of China) Vol. 66 No. 3 11 for details (Chinese Source ONLY).
negligence holding up as a valid defense in a strict liability action, strict liability in Taiwan also bears negligence characteristics.

**C. Proximate Cause as a Limitation to Liability**

In the early days of the products liability revolution, in an effort to distinguish the then-new strict products liability from negligence, some courts and commentators sought to eliminate the proximate cause limitation of negligence law.\(^{600}\) However, this effort proved futile, and proximate cause is alive and well as an element of claims for strict products liability.\(^{601}\) Because the relevant issue for proximate cause is the scope of duty,\(^ {602}\) the court in a strict liability action still needs to conduct a negligence inquiry, thus undermining the claim that strict liability is cheaper to administer compared with negligence.\(^ {603}\) The same is true for Taiwanese law because both Taiwan and the United States adopt similar causal theories.\(^ {604}\) Accordingly, the distinction between strict liability and negligence is not worth the effort to maintain.\(^ {605}\)

\(^{600}\) See supra note 574 at 362.

\(^{601}\) Id. at 362-63.

\(^{602}\) See supra 76.

\(^{603}\) See supra 123.

\(^{604}\) See supra 119.

\(^{605}\) See supra 110.
4.5 Responses to Tests for Strict Liability

Because so much has been written about the economic choice between negligence and strict liability, to examine whether the courts employ negligence where it is more efficient than strict liability, and vice-versa, this Dissertation does not need to go through that topic in detail. Rather, in the following section this Dissertation will respond to the tests for strict liability mentioned in Chapter Three.

A. Learned Hand Test v. Cheapest Cost Avoider Test

Before addressing Calabresi’s cheapest cost avoider test, this section has to briefly discuss the Hand test mentioned in United States v. Carroll Towing. Under the Hand test, if the probability be called P; the injury L; and the burden B; then liability depends upon whether B is less than L multiplied by P (i.e., whether “B<PL”). Under this test, if B is greater than PL, a reasonable person may not take the precaution. If, however, B is less than PL, legal liability may be imposed to induce the party to prevent accidents, thereby avoiding damages in a civil judgment equal to

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608 See supra 92-104.
609 See supra note 38 for case citation.
610 Id. at 173.
611 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 214 (8TH ed. 2011).
Hence, assuming a victim can do nothing to prevent the accident, a potential injurer is negligent if \( B \) is less than \( \text{PL} \).

The Hand Formula works on two assumptions. First, it assumes that risks are neutral. Second, it assumes that calculable risks exist. However, where risks cannot generally be estimated, courts usually justify the exemption of duty with \( B \) and \( L \) where \( B \) is extremely high and \( L \) is only moderate. One may argue that it is unrealistic to expect a layperson to calculate whether \( B \) is less than \( \text{PL} \) before he acts; Judge Hand himself admitted that the calculus of fault under the Hand test is rarely possible. In *Moisan v. Loftus*, the plaintiff guest passenger brought an action in negligence against the defendant driver for injuries sustained during the ride, and Judge Hand wrote the following text:

[The difficulties in applying the \( B<\text{PL} \) test] arise from the necessity of applying a quantitative test to an incommensurable subject matter; and the same difficulties inhere in the concept of “ordinary” negligence. It is indeed possible to state an equation for negligence in the form, \( C = P \times D \), in which the \( C \) is the care required to avoid risk, \( D \), the possible injuries, and \( P \), the probability that the injuries will occur, if the requisite care is not taken. But of these factors care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even
approximate ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory; and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.

However, when applying the Hand test, courts typically estimate the accident avoidance costs of the average person in each party’s situation and rely on rough judgments only. Applying an average person standard to determine whether B is less than PL not only conforms to the layperson’s experience but also prevents courts from incurring higher costs in administering the legal system. Secondly, the Hand test corresponds to the economic model of individual choices premised upon the assumption that people rationally take precautions that would generate greater benefits in avoiding accidents than the precautions would cost. Where B is less than PL, a rational individual will prevent the accident to avoid damages in a civil judgment equal to PL under the threat of legal liability. Finally, active insurance markets play a critical role in supplying much of the information to the tort system about the expected values of the costs of accidents and accident avoidance measures, thereby making the calculus of risk possible under the Hand test.

620 See supra note 611 at 218 and supra note 49 at 306.
621 See supra note 611 at 218.
622 McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987).
623 See supra note 612.
As mentioned previously, the reason that Calabresi chose the cheapest cost avoider test for legal liability, rather than the cost-benefit analysis under the Hand test, is that the latter entails impractical assumptions that injurers had the requisite foresight regarding costs of accidents. However, as this Dissertation has argued, in a practical sense the Hand test never expects perfect foresight from the injurer but rather rough judgments as a reasonable person could have made prior to the accident. The burdens of required foresight and choices of behavior under the Hand test are the same in degrees as what the negligence law requires a reasonable person to do under certain circumstances, and not more. Additionally, applied to a strict products liability scenario, Calabresi’s approach will almost eliminate the incentive of the potential victim—the user—to adopt a more economical method of preventing the injury, because liability is almost always imposed on the manufacturer, who is in the better position to make the cost-benefit analysis and to act on the decision. By rejecting any kind of cost-benefit analysis, Calabresi’s liability rule is the traditional absolute liability, which does not recognize any form of contributory negligence as a valid defense. Finally, because Calabresi’s approach presumes that

625 See supra 97-98.
626 See supra note 620.
627 The requirement of strict compliance with the standard of reasonable care makes negligence more like strict liability, for a defendant nonetheless is held liable when he lacks the ability to exercise reasonable care. See supra note 79 at 283.
628 See supra note 368 at 213-14.
629 See supra 130.
every accident is worth preventing, placing legal liability on the party who is the cheapest cost avoider (but fails to prevent the accident), it is doubtful that “the cheapest cost avoider” nevertheless will take any precautionary measure when $B$ is greater than $PL$ or will simply forgo accident avoidance under such circumstances.\footnote{This argument is related to the deterrence effect of strict liability. See infra 146.}

B. Incentives for Accident Avoidance

1) Increased Level of Care v. Due Care

Many judges and commentators believe that strict liability would induce potential injurers to be more careful than they would be under a negligence standard.\footnote{THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 64.} For instance, Justice Traynor wrote the following text in his concurring opinion for {	extit{Escola v. Coca Cola Bottling Co}}.\footnote{See supra note 115 at 440-41.}

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. However, such belief is illusory because a defendant at most will exercise due care—the point where the burden of taking care equals the expected cost of liability—under either negligence or strict liability.\footnote{THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 64.} The Hand test,\footnote{See supra 141-142.} though

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announced in a negligence case, could properly be applied to this issue.635 Assuming B—the cost of accident avoidance—is less than PL, the defendant will be liable for failure to avoid the accident under either negligence or strict liability.636 Because the most desirable option for the defendant to avoid legal liability is to take due care, due care is induced.637 In contrast, where B is greater than PL, the defendant will not be liable for failure to avoid the accident under negligence but nonetheless will be liable under strict liability. By definition, at any level of care greater than the level of due care, the cost of the marginal unit of care to the defendant is greater than the expected reduction in his liability for the plaintiff’s injuries.638 Similarly, if the defendant takes the care below the level of due care, another unit of care will cost him less than the reduction in his expected cost of liability does.639 Accordingly, the defendant’s net income is greater at the level of due care than at any other level of care, and he will choose due care even if he is held strictly liable for the plaintiff’s injuries.640 Indeed, there are situations where the defendant’s expected cost of liability is less than the cost of accident avoidance, and under such circumstances the defendant is better off not taking any precaution.641 The bottom line is that strict liability will not induce a

636 See supra note 611 at 226.
637 Id.
638 The Economic Structure of Tort Law, supra note 38 at 64.
639 Id.
640 Id.
641 See supra note 636.
higher level of care than the care level induced by negligence.  

2) Effect on Activity-level

Many legal analysts think that strict liability invokes greater accident avoidance by encouraging an individual to reduce the level of an activity rather than by simply inducing more care. Judge Posner specifically addressed this point in Indiana Harbor Belt R. Co. v. Am. Cyanamid Co. In short, Judge Posner argued that strict liability is superior to negligence because it induces both due care and changes in activity level, whereas negligence could only induce due care. Where the accident cannot be prevented by taking care, but can be avoided by 1) shifting the activity in which the accident occurs to another location where the risk or harm of an accident will be less, or 2) reducing the scale of the activity in order to minimize the number of accidents, the case is strong for strict liability.

Indeed, changes in activity level bring about accident avoidance. However, an issue arises as to whether legal liability should be predicated upon an individual’s

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642 It is true that under a strict liability regime the defendant will have an incentive to invest in research and development efforts designed to develop a cost-justified method of accident avoidance, for such a method would lower the cost of complying with a rule of strict liability. However, the same incentive will also exist under a negligence standard. The only difference is that under negligence the incentive comes from the victim, whereas under strict liability such incentive is shifted to the defendant. See supra note 368 at 209.

643 THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 66.

644 See supra note 387.

645 Id. at 1177.

646 Id.
activity-level decisions. If strict liability’s avoidance mechanism works on the premise that, under this doctrine, an individual has an incentive to abandon or to reduce the frequency of an activity, legal liability, in effect, is predicated on the individual’s decisions to conduct the activity—the activity-level decisions—rather than on whether the individual did something wrong in conducting the activity.\footnote{The doctrine of strict liability \ldots can address “activity-level decisions” that are not captured by the reasonableness standard, \textit{The Death of Strict Liability, supra} note 25 at 297.} From the standpoint of freedom of activity, legal liability should not be imposed on the activity-level decisions because society does not expect or require an individual to evaluate such decisions, especially those about how frequently an activity should be undertaken.\footnote{\textit{Id.} at 255-56.} This argument is particularly effective against the doctrine of strict liability because strict liability imposes liability on both those who make reasonable activity-based decisions and those who make unreasonable ones.\footnote{\textit{Id.} at 270-71.} If legal liability needs to be placed on activity-level decisions to prevent abuse of freedom of action, it should be placed solely on unreasonable activity-based decisions because it is unjust to impose liability on the exercise of personal freedom that is reasonably undertaken.\footnote{\textit{Id.} at 278 for text in “Footnote 75.”}

When the reasonableness of activity-level decisions comes into play, the calculus of fault is relevant to the imposition of liability and the issue can easily be identified
and addressed under negligence.\textsuperscript{651} For example, when the value of an activity is so low and the risks of the activity so high that the activity ought to be forgone, the decision to engage in such activity is unreasonable.\textsuperscript{652} As such, the existence of reasonable and safe alternatives for uprooting a tree makes a person’s decision to get rid of it by blast unreasonable.\textsuperscript{653} Furthermore, the inquiry into activity-level decisions (i.e. about method, time, or location) is the same as the inquiry into reasonable care, for both ask what the defendant could have done differently and what impact any different decisions on the defendant’s part would have had on the victim.\textsuperscript{654} In fact, courts often use rule-based negligence (e.g. statutory negligence per se, customs, or judge-made rules about reasonableness of activity-level decisions) to regulate activity levels.\textsuperscript{655} \textit{Comment a. on Section 297 of the Restatement (Second) of Torts} illustrates this point with the following text.\textsuperscript{656}

The act of driving a car along a well-paved road is commonly regarded as not dangerous in itself, although the road is bordered by ditches, trees, or telegraph poles. Driving along such a road may be made dangerous if the driver does not look where he is going, if he drives at too high rate of speed, if he is a beginner who does not know how to control the car, if the car has a defective brake, or if he fails to sound his horn before coming to intersecting roads. On the other hand, there are many mountain roads which may properly be regarded as dangerous no matter how careful and skillful the driver may be and no matter how perfect his car,

\begin{footnotes}
\item[651] Id. at 285.
\item[652] Id. at 287.
\item[653] Sullivan v. Dunham, 161 N.Y. 290 (1900).
\item[654] \textit{The Death of Strict Liability}, supra note 25 at 289.
\item[656] Comment a. on the \textsc{Restatement (Second) of Torts} § 297 (1965).
\end{footnotes}
or which at the least are dangerous unless unusual care is exercised by an unusually skillful driver, with a car in perfect condition. A reasonable man would recognize that there is an inescapable risk in driving down a narrow and illkept mountain road, winding along precipices unguarded by walls or railings, particularly if rain, snow, or ice has rendered the road slippery. The mere use of such a route under the circumstances described may be negligent unless the utility of the route is very great.

Thus, courts are able to entertain unreasonable (e.g. extraordinarily high risk) activity-level claims, whereas commentators often underestimate the capacity of negligence by defining it only in terms of care and excluding from it any possibility of activity-level consideration. When only unreasonable activity-level decisions are the targets of the legal system and negligence is able to address the reasonableness of activity-level decisions, the argument for strict liability is untenable.

C. Fairness: The Benefit Theory

In Beshada v. Johns-Manville Prods. Corp., plaintiffs brought strict products liability actions against manufacturers and distributors of asbestos products for injuries resulting from their exposure to asbestos for varying periods of time. In holding that product manufacturers or distributors are strictly liable for failure to warn even if the

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657 See supra note 655 at 341.
659 As a factor bearing on the choice between negligence and strict liability, activity levels may be less important than has previously been thought. See supra note 655 at 362.
660 447 A.2d 539 (1982).
661 Id. at 542.
risks are unknowable at the time of manufacture or distribution, the court reasoned that. 662

One of the most important arguments … for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from it. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product. This can best be accomplished by imposing liability on the manufacturer and distributors. Those persons can insure against liability and incorporate the cost of the insurance in the price of the product. In this way, the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use. It should be a cost of doing business that in the course of doing that business an unreasonable risk was created.

According to this rationale, anyone who benefits from engaging in an activity should rightly bear the costs associated with that activity. 663 However, benefit theory cannot justify the selective application of strict liability to limited cases (like product cases). 664 Particularly, benefit theory has also been used to justify the imposition of “negligence liability.” For example, a driver benefits from the activity of driving because driving brings about convenience to him. However, the liability of a driver in an automobile accident rests on principles of negligence rather than strict liability. 665

Significantly, even where the cases involve financial gains to the actors, most of the time the actors are subject to negligence liability rather than strict liability—for

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662 Id. at 547.
663 See supra note 79 at 281.
664 Fairness fails to demonstrate why product cases are so special as to be singled out of other personal injury cases. A Modest Proposal to Abandon Strict Products Liability, supra note 25 at 647-48.
665 See supra 71.
instance, innkeepers are liable in negligence for failure to protect their guests from unreasonable risks of harm. 666 Finally, benefit theory fails to explain why enterprises should be held strictly liable to their customers, who are both beneficiaries and potential victims of enterprise activity. 667

D. Loss Spreading Effects

The last policy justification for strict liability is that this doctrine broadly spreads the risk of loss. 668 Again, Justice Traynor addressed this point in his concurring opinion for Escola v. Coca Cola Bottling Co. by providing that: 669

The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Loss spreading, through manufacturers of products or large enterprises, may be viewed as little more than a form of judicially mandated liability insurance. 670 By imposing strict liability on product manufacturers or large enterprises, the tort system properly shifts losses from innocent victims to those who are better able to distribute

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667 See supra note 79 at 281.
668 The only difference between negligence and strict liability as tort standards was that the latter provided a form of accident insurance. OLIVER W. HOLMES JR., THE COMMON LAW 94-96 (1881).
669 See supra note 115 at 440-41.
670 See supra note 455 at 177.
losses among society through pricing mechanisms.\(^{671}\)

Loss spreading policy may have provided the most powerful argument for the doctrine of strict liability, especially for its applicability to product cases. However, two issues arise as to 1) what the primary function of tort law is; and 2) whether loss spreading should be the paramount policy for the imposition of strict liability.\(^{672}\) Because the 1960s strict products liability revolution originated from the accumulative effect of previous legal reforms,\(^{673}\) it is helpful to understand the historical background before the year 1960.

Health insurance was not widely available in the United States until the 1950s.\(^{674}\) Before then, the choice for most consumers who purchased products was between seller-provided tort insurance and little or no insurance.\(^{675}\) During this period, consumer expectations supported the insurance rationale for tort liability.\(^{676}\) Accident injuries were often financially ruinous for individuals in this era, thus making it doubtful whether consumers actually preferred to be uninsured or underinsured.\(^{677}\) Moreover, while product sellers were not offering guaranteed compensation for

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\(^{671}\) See supra note 427 at 520.


\(^{673}\) See supra 88-91.

\(^{674}\) MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 53 (2006).

\(^{675}\) Id. at 53-54.

\(^{676}\) Id. at 54.

\(^{677}\) Id.
injuries caused by non-defective products, ordinary consumers presumably preferred
to have this insurance. As a result, consumer expectations justified the imposition
of legal liability so that the sellers would be forced to provide insurance or tort
compensation for injuries caused by non-defective products. Consistently with this
rationale, tort commentators in the first half of the twentieth century suggested that
tort compensation be justified as a mode of insurance.

Accordingly, implicit in loss spreading policy is the belief that the primary
function of torts is compensation. However, as this Dissertation has consistently
argued, the primary function of tort law is accident deterrence rather than
compensation. First, the tort system is an expensive—and generally
unsuitable—mode of social insurance, since it entails high administrative costs and
litigation costs. Second, in the contemporary world, market insurance is readily
accessible and both accident and liability insurance are available to prospective
victims of accidents and injurers alike. If people who want insurance and are
willing to pay for it can obtain insurance in the insurance market or some informal
substitute, there is no reason to use the tort system to provide insurance. In other
words, the ability of individuals to purchase insurance that will provide them with

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678 Id.
679 Id.
680 Id.
681 Id.
682 Id.
683 Id.
684 Id.
685 Id.
protection (should an accident occur) makes the compensation function of tort law less essential. 686

Even if insurance becomes the primary concern of tort law, several problems suggest insurance might not function well in the form of torts. As was stated by Judge Posner, if the cost of insuring was lower for the defendant than for the plaintiff, there is a ground to prefer strict liability. 687 Significantly, under negligence the consumers could insure themselves against uncompensated accident injuries, thus distributing accident costs among customers of commercial insurance carriers. 688 On the other hand, under strict liability the manufacturers would pass on the losses to a group of consumers through pricing mechanisms. 689 However, because it is uncertain whether the defendant-manufacturers are the lower cost insurers than the plaintiff-consumers, there are no strong reasons to believe that strict liability is a superior rule to achieve loss spreading. 690

Even though manufacturers indeed are more efficient insurers, another issue arises as to insurability. As was argued by Professor James Henderson, for any

681 See supra note 427 at 470.
682 See supra 39.
684 THE ECONOMIC STRUCTURE OF TORT LAW, supra note 38 at 57.
685 Id.
687 See supra 94.
688 See supra note 36 at 273.
689 Id.
690 Id.
insurance system to be viable, the risks insured against must be ascertainable and quantifiable ahead of time. 691 For example, the prices of goods—the premiums—should proportionally reflect the contributions of the insureds to the relevant risk pools by classifying the risks involved. 692 However, since the premiums charged are uniform across insureds under strict liability without adequate classification, the insurance pools will disproportionally attract high-risk insureds, thereby threatening the viability of the pools. 693 Additionally, when strict liability requires enterprises to function as insurers, it must be able to prevent moral hazard. 694 For example, the manufacturer’s liability may be limited to the defect presented at the original time of distribution, or the enterprises are not held liable for harm to the victims when victims deliberately place themselves at risk. 695 However, such a condition is difficult for strict liability to satisfy. 696 Even if defenses such as contributory negligence, product misuse, or product modification are available to product manufacturers (who are subject to strict liability), such defenses could never adequately accommodate the variety of post-distribution product uses and modes of consumption that would remarkably affect an enterprise’s exposure to liability. 697

691 See supra note 446 at 392.
692 Id.
693 Id. at 392-93.
694 Id. at 393.
695 Id. at 398-99.
696 Id. at 393.
697 Id. at 400.
Finally, loss spreading cannot justify the selective application of strict liability to limited cases.\textsuperscript{698} If it is desirable that tort law distributes losses widely, strict liability should also spread the losses from other accidents currently governed by negligence—for example, automobile accidents.\textsuperscript{699} Perhaps a more efficient approach is to incorporate in the tort system a mechanism of mandatory insurance\textsuperscript{700} or completely replace the tort system with a more comprehensive no-fault accident insurance scheme.\textsuperscript{701} In summary, this Dissertation argues that the primary function of tort law is accident avoidance and that loss spreading should not be the paramount policy of tort law to justify the choice of strict liability over negligence.

4.6 Afterwards—The New Role of Strict Liability

A. The Net Distinction Between Strict Liability and Negligence

With several justifications for strict liability undermined, the remaining issue concerns whether there are other reasons to justify this doctrine. From the plaintiff’s perspective, under strict liability he need not prove the defendant’s negligence

\begin{footnotes}
\textsuperscript{698} A Modest Proposal to Abandon Strict Products Liability, supra note 25 at 645-46.
\textsuperscript{699} Id. at 646.
\textsuperscript{700} See supra note 212, supra note 215, supra note 218, and supra note 221.
\textsuperscript{701} For a brief discussion about New Zealand’s no-fault accident insurance system, see supra note 49 at 333-37.
\end{footnotes}
because strict liability holds a person liable regardless of the person’s fault.\textsuperscript{702} In other words, a major distinction between strict liability and negligence is that strict liability improves the plaintiff’s position by no longer requiring that the right to compensation depends on the plaintiff’s proof of the defendant's negligent conduct.\textsuperscript{703} However, the plaintiff encounters another difficulty in satisfying his burden of proof in an action grounded under strict liability. For example, in a strict products liability action the plaintiff has to prove the defect of the product and such a task is almost equal in difficulty to the proof of negligence.\textsuperscript{704}

Similarly, intermediate liability, though grounded under negligence, shifts the burden of proof in relation to negligence to the defendant.\textsuperscript{705} From the plaintiff’s standpoint, he also need not prove any negligent conduct on the defendant’s part. Accordingly, this Dissertation argues that the plaintiff’s relief in proof of fault does not provide tort law with a strong reason to switch to a strict liability regime, since shifting the burden of proof related to negligence could accomplish the task.\textsuperscript{706}

\begin{flushleft}
\textsuperscript{702} See supra 19.
\textsuperscript{703} See supra note 3 at 298.
\textsuperscript{704} See supra note 36 at 263.
\textsuperscript{705} See supra 47.
\textsuperscript{706} Placing the burden of proof in relation to negligence on the defendant almost equals imposing quasi-strict liability on the defendant. See supra note 150 at 187.
\end{flushleft}
B. The Alternative Policy Consideration of Strict Liability

Another distinction between strict liability and negligence is that the former ensures the plaintiff’s recovery.\textsuperscript{707} In this regard, an alternative justification for strict liability may possibly lie on the defendant’s financial capacity. In Taiwan, equitable liability is a no-fault variation under negligence principles rather than an independent liability regime.\textsuperscript{708} The doctrine of equitable liability gives the court discretion to force one who has the better financial capacity to compensate the innocent victims for part or all of the injuries even if he is not liable.\textsuperscript{709} When applying equitable liability, the court considers the parties’ financial conditions only.\textsuperscript{710} Put simply, the only policy justification for this no-fault doctrine lies on the defendant’s superior capacity, compared with that of the plaintiff, to afford the costs of harm.\textsuperscript{711} Thus, strict liability indeed can be justified upon the “deep pockets” rationale.\textsuperscript{712}

However, because the alternative deep pocket policy alone is insufficient to justify strict liability as an independent liability regime,\textsuperscript{713} this Dissertation argues that strict liability should be incorporated in the form of equitable liability as a

\textsuperscript{707} See supra note 668.
\textsuperscript{708} See supra 52-56.
\textsuperscript{709} See supra 52-53.
\textsuperscript{710} See supra 53.
\textsuperscript{711} See supra note 49 at 293.
\textsuperscript{712} Id.
\textsuperscript{713} Picking a liability regime (i.e. negligence or strict liability) that will control the particular class of accidents in question most effectively is different from finding the deepest pocket and placing liability there. See supra note 387 at 1181-82.
fallback variation only. More specifically, this Dissertation does not oppose adopting any no-fault rule to ensure the plaintiff’s recovery, but rather argues that such a rule should be absorbed into negligence principles as a secondary variation only, since compensation is not the paramount consideration of tort law.\footnote{714}{See supra 38.}

C. Intermediate Liability Tested

So far this Dissertation has demonstrated that strict liability cannot justify itself to be an independent liability regime.\footnote{715}{See supra 160.} To further argue that intermediate liability is a superior option to strict liability in regulating highly risky activities, this Dissertation has to examine intermediate liability through the tests for strict liability mentioned previously.\footnote{716}{See supra 92-104.} First, intermediate liability induces greater accident avoidance and reduces administration costs. Under intermediate liability, the defendant has to bear the costs of proof related to negligence and the increased burden provides the defendant with additional incentives to avoid litigation costs, either by preventing accidents through exercising due care or through making reasonable activity-level decisions, or by settling tort claims out of court. On the other hand, such incentives will almost be the same under either negligence or strict liability, for the defendant does not bear the costs of proof in relation to negligence under either
liability regime.\textsuperscript{717}

Second, intermediate liability is fairer because 1) it places the burden of proof in relation to negligence on those who have superior knowledge and ability to prevent accidents and 2) it works under a fault-based regime that imposes liability only when the defendant fails to take cost-justified precautions. Accordingly, although Taiwanese commentators consider strict liability a huge step of progress in the legal system,\textsuperscript{718} this Dissertation argues that the imposition of intermediate liability is sufficient to afford greater protection to innocent victims.

Finally, under intermediate liability, loss spreading is not the paramount policy of tort law and equitable no-fault liability comes into play as a fallback measure only.\textsuperscript{719} Specifically, even if the defendant could escape liability by proving that he was free from negligence, equitable liability authorizes the court to require one who has the better financial capacity to compensate the innocent victims in whole or in part, thus ensuring the plaintiff’s recovery.\textsuperscript{720} Therefore, the doctrine of intermediate liability is a superior option to strict liability in regulating highly risky activities.

\textsuperscript{717} However, strict liability indeed provides the defendant with greater incentives to settle out of court than negligence does. See supra 124.
\textsuperscript{718} The fancy toward the doctrine of strict liability is probably derived from the fact that Taiwan did not have strict liability rules until after the 1950s. See supra 58.
\textsuperscript{719} See supra 159-160.
\textsuperscript{720} See supra 52-53.
Chapter Five:

Proposed Revisions and Collateral Issues

Synopsis

- Several rules currently governed by strict liability should be modified into intermediate liability rules.
- Pure economic loss is not recoverable under risk liability.
- Defenses available to negligence are all available to risk liability.
- No cap on amount of compensation is necessary for risk liability.
- A regular two-year statute of limitation is applicable to risk liability.
5.1 Overview

As of this point, this Dissertation has made the following seven averments in response to the traditional policy justifications for strict liability, demonstrating its preference for intermediate liability:

- Traditional strict liability without any form of contributory negligence is unjustifiable.\(^{721}\)
- Either form of contributory negligence not only cripples the effect of traditional strict liability but also turns modern strict liability into a negligence-like doctrine.\(^{722}\)
- There is no compelling evidence suggesting that strict liability invokes greater accident avoidance.\(^{723}\)
- Fairness cannot justify the imposition of strict liability.\(^{724}\)
- Loss spreading is not the paramount policy of tort law.\(^{725}\)
- Strict liability should be reduced to a fallback variation under negligence principles.\(^{726}\)
- Intermediate liability, though also a variation under negligence principles,\(^{727}\) is superior to strict liability in regulating highly risky activities.\(^{728}\)

In this chapter, this Dissertation specifically addresses how current strict liability rules should be revised. Because this Dissertation presumes that the current strict liability rules reflect the legislature’s intent that these specific types of accident call for special responsibility, choosing intermediate liability rather than regular negligence should be preferable to these areas of law.

\(^{721}\) See supra 132.
\(^{722}\) See supra 138.
\(^{723}\) See supra 145-150.
\(^{724}\) See supra 150-152.
\(^{725}\) See supra 152-157.
\(^{726}\) See supra 159-160.
\(^{727}\) In other words, intermediate liability is also not an independent liability regime, and under this Dissertation’s view tort liability shall only comprise intentional torts and negligence. See supra 124.
\(^{728}\) See supra 161.
5.2 Proposed Revisions and Their Applications to Real Accidents

A. Argument for Preserving Dangerous Activities Intermediate Liability

Under Article 191-3 of the Civil Code, a person’s liability in negligence is presumed if the nature of the work or activity performed, or the implements or manner used in performing the work or activity, is dangerous.\(^{729}\) To escape liability, the defendant has to prove that he exercised reasonable care to prevent the injury to the victim.\(^{730}\) Consequently, Article 191-3 is an intermediate liability rule under which the defendant bears the burden of proof in relation to negligence. Although the majority of commentators suggested that this rule be changed into a strict liability rule,\(^{731}\) this Dissertation argues that the rule is proper in adopting the doctrine of intermediate liability and that Taiwanese legislature need not revise it.

However, an issue arises as to the scope of Article 191-3. The liability under Article 191-3 is predicated upon whether the work or activity, or the implements or manner used, is dangerous. Yet danger is everywhere. Accordingly, this rule fails to provide clear guidance with regard to what degree of danger would call for special responsibility under this rule. To establish a proper guideline for applying Article 191-3, this Dissertation argues that the reasonableness test under Section 520 of the

\(^{729}\) See supra 22.
\(^{730}\) Id.
\(^{731}\) See supra note 4 at 645.
Restatement (Second) of Torts is instrumental, as Article 191-3 is also a fault-based rule. Consistently with this proposition, the rule shall apply only when 1) the work or activity is unusual, excessive, bizarre, and non-natural,\textsuperscript{732} or 2) the value of the work or activity, or benefit of using the implements or manner in performing the work or activity, is too low and the risk of harm too high.\textsuperscript{733} In other words, Article 191-3 shall only apply to the abnormally dangerous work or activity or to the situation where the implements or manner used in performing the work or activity is abnormally dangerous.\textsuperscript{734}

A more complicated issue concerns the relationship between Article 191-3 and Article 191 of the Civil Code. While Article 191-3 applies whenever the work or activity performed, or the implements or manner used, is abnormally dangerous, Article 191 applies where the victim’s injury is caused by a building or work piece on privately owned land.\textsuperscript{735} The two rules may overlap where the cases involve the storage of extremely dangerous materials on a privately owned land, such as the storage of gasoline or chemicals.\textsuperscript{736} However, this Dissertation argues that the two rules are distinguishable. Because liability under Article 191-3 is predicated upon whether the nature of the work or activity, or the implements or manner used, is abnormally dangerous.

\textsuperscript{732} See supra note 251 at 507.  
\textsuperscript{733} See supra 149.  
\textsuperscript{734} See also: supra note 4 at 652.  
\textsuperscript{735} See supra 50-51.  
\textsuperscript{736} See supra note 11 at 196.
dangerous, the rule shall be prioritized in cases involving abnormally dangerous activities even though the construction or maintenance of buildings or work pieces is also at issue. In contrast, Article 191 shall apply where the construction or maintenance of buildings or work pieces has nothing to do with abnormally dangerous activities. It is true that before Article 191-3 was enacted in 1999, courts often applied Article 191 where the construction or maintenance of buildings or work pieces also involved abnormally dangerous activities. However, after the enactment of Article 191-3, the distinction between the two rules should rightly be made.

Thus, in the Gasoline Leaks Case, because the storage of gasoline is an unusual, excessive, bizarre, and non-natural activity and because the risk of harm is great when a petroleum pipeline explodes, Article 191-3 shall apply. Under Article 191-3, C Petroleum is presumed negligent and has to prove that it exercised reasonable care in the maintenance of petroleum pipelines that transmitted the gasoline onto W’s tanker. On the other hand, in the Electricity Overload Case, because the fire resulted from the long-term usage of electricity at B’s office, which had nothing to do with abnormally dangerous activities but rather concerned the general danger inherent in

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737 See supra 165.
738 See also: supra note 4 at 654.
739 Id. at 609.
740 See supra 33.
741 See supra note 734.
742 See supra 33.
the improper maintenance of the wiring system of a building, Article 191 shall apply.

Under Article 191, B bears the burden to prove that he exercised reasonable care in maintaining the wiring system of the building to rebut the presumption of negligence.

B. Proposed Revisions & Comparisons, Notes, and Illustrations

In the following text, this Dissertation specifically demonstrates how the strict liability rules mentioned in *Chapter Two* could be modified into intermediate liability rules and compares the suggested revisions with the current statutes.

1) Civil Aviation Act

a. Article 89: Liability for Aircraft Accident

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<td>Where casualties or damage to property occur as a result of aircraft accident, the owner of the aircraft shall be liable for compensation regardless of whether such accident is due to willful action or negligence. Such an owner of the aircraft shall also be liable for damage caused by force majeure. The same also applies to damage caused by falling or dropping of objects from the aircraft.</td>
<td>Where casualties or damage to property occur as a result of aircraft accident, the owner of the aircraft shall be liable for compensation, regardless of whether such accident is due to willful action or negligence. Such an owner of the aircraft shall also be liable for damage caused by force majeure, <em>except where he has exercised reasonable care to prevent the injury</em>. The same also applies to damage caused by falling or the dropping of objects from the aircraft.</td>
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743 See *supra* 58-67.
i. Notes

The current rule imposes absolute liability on the owner of an aircraft. To change the rule into intermediate liability, this Dissertation argues that exercise of reasonable care should be a valid defense for the defendant to establish. Moreover, the text “regardless of whether such accident is due to willful action or negligence” and “also be liable for damage caused by force majeure” should be deleted, since under intermediate liability the defendant is liable only if he was at fault for the plaintiff’s injuries.

ii. Application of the Rule

In the C-Air Flight 711 Incident, the accident resulted from negligent repairing; the repair crews failed to replace the damaged plate but rather covered the damaged area with another plate the same size as the area. Hence, under the proposed rule C-Air could hardly prove that it exercised reasonable care in preventing the incidents, because it failed to conduct proper supervision of the performance of its repair crews’ duties. Moreover, even if C-Air could escape liability under the proposed Article 89 of Civil Aviation Act by proving that it was not negligent in supervision, it may still be held liable under the theory of equitable liability because Article 89 of the Civil Aviation Act

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744 See supra 59.
745 See supra 30-31.
does not preempt causes of action under the Civil Code.\footnote{746}{See supra 37 and supra 55-56 for the text of Article 184 of the Civil Code and Article 188 of the Civil Code respectively.}

On the other hand, in the T-Air Flight 555 Incident,\footnote{747}{See supra 31-32.} T-Air could escape liability by proving that it exercised reasonable care to prevent the injury but nonetheless could not avoid the accident because of the extreme weather conditions. However, T-Air would have a difficult time rebutting the presumption of negligence if the court finds that T-Air was negligent in failing to cancel the flight when facing an approaching typhoon and that T-Air could have foreseen that an accident would occur in such extreme weather conditions; that said, the extreme weather conditions were a foreseeable act of God. Similarly, even if T-Air escapes liability by rebutting its negligence under the proposed Article 89 of Civil Aviation Act, it could still be held liable under the theory of equitable liability.\footnote{748}{See supra note 746.}

By so demonstrating, this Dissertation argues that 1) the imposition of intermediate liability in civil aviation incidents, accompanied by equitable liability as a fallback solution under the Civil Code, does not leave passengers with inferior protection compared with that offered by strict liability, and that 2) the Taiwanese legal system lacks compelling reasons to switch to strict liability for resolution.
b. Article 91: Liability for Accidental Harms

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<tr>
<td>The aircraft operator shall be liable for accidental</td>
<td>The aircraft operator shall be liable for</td>
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<td>death or injury of passengers in the aircraft or while</td>
<td>accidental death or injury of passengers</td>
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<td>embarking or disembarking the aircraft. But if such</td>
<td>in the aircraft or while embarking or</td>
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<td>death or injury is attributed to the passenger’s fault,</td>
<td>disembarking the aircraft, except where he has exercised reasonable care to</td>
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<td>such liability may be exonerated or reduced.</td>
<td>prevent the injury. But if If such death or injury is attributed to the passenger’s</td>
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<td>The aircraft operator shall be liable for causing</td>
<td>fault, such liability may be exonerated or reduced.</td>
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<td>damage to passengers because of flight delay, provided</td>
<td>The aircraft operator shall be liable for</td>
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<td>that the aircraft operator can prove the delay is</td>
<td>causing damage to passengers because of flight delay, provided that the aircraft</td>
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<td>caused by force majeure. The liability shall be</td>
<td>operator can prove the delay is caused by force majeure. The liability shall be</td>
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<td>limited to the necessary extra expense incurred to the</td>
<td>limited to the necessary extra expense incurred to the passengers through the flight</td>
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<td>passengers through the flight delay.</td>
<td>delay.</td>
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i. Notes

The current rule imposes strict liability on the aircraft operator. To change the rule into intermediate liability, the Dissertation suggests that the defendant’s exercise of reasonable care be a valid defense. As for the aircraft operator’s liability for delay under the second paragraph of this rule, it is a question of breach of contractual duty and is beyond the scope of this Dissertation.\(^{749}\)

\(^{749}\) More specifically, because the second paragraph of Article 91 of the CIVIL AVIATION ACT uses similar language to Article 654 of the CIVIL CODE, it is a rule regulating liabilities arising out of breach.
ii. Application of the Rule

The first paragraph of the proposed Article 91 of the Civil Aviation Act shall apply when passengers suffer injuries or death in the aircraft or while embarking or disembarking the aircraft, as was the situation in *Andrews v. United Airlines, Inc.*

2) Article 18 of the Nuclear Damage Compensation Law: Liability for Nuclear Disaster

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<td>The operator of a nuclear installation shall, in accordance with this Law, be liable for nuclear damages arising from the occurrence or expansion of a nuclear incident regardless of whether it is caused intentionally or through negligence, except when the nuclear incident is caused directly by international armed conflicts, hostilities, domestic rebellion, or grave natural calamity.</td>
<td>The operator of a nuclear installation shall, in accordance with this Law, be liable for nuclear damages arising from the occurrence or expansion of a nuclear incident regardless of whether it is caused intentionally or through negligence, except where the operator has exercised reasonable care to prevent the injury or when the nuclear incident is caused directly by international armed conflicts, hostilities, domestic rebellion, or grave natural calamity. If compensation cannot be obtained according to the provision of the preceding paragraph, the court may, on the application of the injured person, take the financial conditions of the operator and the injured person into consideration, and order the operator to compensate for a part or the whole of</td>
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a. Notes

The current rule imposes liability on the operator of a nuclear facility regardless of fault, and allows the defendant to offer certain defenses. Under this Dissertation’s view, this rule should be modified into an intermediate liability rule, and the text “regardless of whether it is caused intentionally or through negligence” should be deleted. Additionally, since risk of harm from nuclear disaster is enormous and often financially ruinous for innocent victims, the proposed second paragraph directly incorporates equitable liability into this rule and authorizes the court to force the defendant to compensate for a part or the whole of the injury even though the defendant is not liable.

b. Application of the Rule: Nuclear Facility Incident

In the Nuclear-facility Disaster,751 if the disaster was foreseeable and the defendant was negligent in maintaining the facility, the defendant would have a difficult time rebutting the presumption of its negligence. For example, it might be foreseeable that the power supply facilities would be damaged should a tsunami hit the

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751 See supra 32.
power plant, thereby making it foreseeable that the emergency-cooling system would fail and the fuel rods would melt as a result. By contrast, if the defendant proves that it exercised reasonable care in preventing the injury, it could escape liability under the proposed first paragraph of Article 18 of the Nuclear Damage Compensation Law. However, under the proposed second paragraph, the court has discretion to impose equitable liability and require the defendant to compensate the victims in whole or in part. As with civil aviation incidents, nuclear-facility disasters do not offer compelling reasons for the Taiwanese legal system to switch to strict liability for resolution.

3) Article 46 in the Mass Rapid Transit Act: Liability for MRT Accident

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<tr>
<td>1. The operation organization of a mass rapid transit system shall be responsible for personal death or injury of passengers, and damage or loss caused by trains or other accidents.</td>
<td>1. The operation organization of a mass rapid transit system shall be responsible for personal death or injury of passengers, and damage or loss caused by trains or other accidents, except where it has exercised reasonable care to prevent the injury.</td>
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<td>2. The operation organization of a mass rapid transit system shall pay for, at its discretion, consolation or medical aid subsidy for death or injury victims, even when the operation organization is not responsible for the train accident referred to the preceding paragraph. However, the above mentioned circumstance does not apply if the</td>
<td>2. The operation organization of a mass rapid transit system shall pay for, at its discretion, consolation or medical aid subsidy for death or injury victims, even when the operation organization is not responsible liable in negligence for the train accident referred to in the</td>
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accident is caused by the victim intentionally.

3. The regulations for the payment for consolation and medical aid subsidy referred to the preceding paragraph shall be prescribed by the central competent authority.

preceding paragraph. However, the above mentioned circumstance does not apply if the accident is caused by the victim intentionally.

3. The regulations for the payment for consolation and medical aid subsidy referred to in the preceding paragraph shall be prescribed by the central competent authority.

a. Notes

The first paragraph is modified to permit the defendant to escape liability provided that the defendant establishes their exercise of reasonable care in accident avoidance. The revised text “liable in negligence” in the proposed second paragraph serves to emphasize that intermediate liability is a variation under negligence principles.

b. Application of the Rule

In the MRT Station Case,\textsuperscript{752} because Article 46 of the Mass Rapid Transit Act applies in cases of injuries from trains or other rail accidents such as derailments,\textsuperscript{753} the plaintiff would not recover under the rule. Rather, the plaintiff might rely on causes of action grounded under the Civil Code. For example, the first paragraph of Article 41 of the Mass Rapid Transit Act provides that:\textsuperscript{754}

\textsuperscript{752} See supra 29-30.
\textsuperscript{753} See supra 62.
\textsuperscript{754} Article 41 of the MASS RAPID TRANSIT ACT.
The operation organization of a mass rapid transit system shall properly manage and maintain the carriages, route, depot and station facilities, and shall prepare emergency escape equipments and facilities necessary for passengers’ safety. The inspection and maintenance of carriages and devices must be implemented strictly in compliance with regulations.

The rule is a statutory provision enacted for the protection of others, and the plaintiff could bring a suit under the second paragraph of Article 184 of the Civil Code against the MRT operator for injuries resulting from violation of the first paragraph of Article 41 of the Mass Rapid Transit Act.

4) Article 64 of the Highway Act: Liability for Common Carrier

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<td>1) In the case of traffic accidents causing injury or death to passengers or other people, or damage or loss to money or property, automobile or trolley transportation providers shall be liable for the damage and compensate for it. However, the providers are not liable to pay damage compensation if it can be proven that the accident was due to force majeure or fault of the shipper or recipient of carried goods. 2) (Paragraph Omitted)</td>
<td>1) In the case of traffic accidents causing injury or death to passengers or other people, or damage or loss to money or property, automobile or trolley transportation providers shall be liable for the damage and compensate for it. However, the providers are not liable to pay damage compensation if it can be proven that the transportation providers have exercised reasonable care to prevent the injury or the accident was due to force majeure or fault of the shipper or recipient of carried goods. 2) (Paragraph Omitted)</td>
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See supra note 4 at 688.

See supra 37.

See supra 62 for text of the omitted paragraphs which are related to the ceiling on liability.
a. Notes

Under the proposed first paragraph, the defendant transportation provider could escape liability by proving that it exercised reasonable care to prevent traffic accidents. By so changing, the proposed rule is an intermediate liability rule rather than a strict liability rule.

b. Application of the Rule

In the Freight Transportation Case,758 because the damage was not incurred in a traffic accident, Article 64 of the Highway Act shall not apply. Rather, the plaintiff shall pursue an action grounded under Article 184 and Article 188 of the Civil Code.759 In other words, the plaintiff has to bring an action under the Civil Code against the employee-driver and W Express. On the other hand, in the Carriage of Passenger Case,760 because P suffered injuries as a result of a traffic accident occurring at a highway, Article 64 of the Highway Act shall apply.761 The current version is a strict liability rule, but this Dissertation suggests that it be modified into an intermediate

758 See supra 29.
759 See also: supra note 118.
760 See supra 29.
761 See also: supra note 119.
liability rule. Under the proposed rule, *S Bus Company* could escape liability by proving that it exercised reasonable care to prevent *P*'s injuries. Moreover, it could escape liability by proving that its driver was not negligent at the time of the accident and that the accident was caused totally by the fault of *C*, the third party. Given the proposed changes, the court in the Carriage of Passenger Case may reach a fairer result than that derived from applying the principle of strict liability.

5) Article 7 in Consumer Protection Law: Liability for Products

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<td>Traders engaging in designing, producing or manufacturing of goods or in the provisions of services, shall ensure that goods or services provided meet and comply with the contemporary technical and professional standards with reasonably expected safety requirements when placing the goods into the stream of commerce, or at the time rendering services. All safety warnings and emergency response manuals shall be marked or labeled conspicuously on the goods or services provided which may cause harm to the lives, bodies, health or properties of consumers. Traders shall be jointly and severally liable in violating the foregoing</td>
<td>Traders engaging in the designing, producing or manufacturing of goods or in the provisions of services, shall ensure that goods or services provided meet and comply with the contemporary technical and professional standards with reasonably expected safety requirements when placing the goods into the stream of commerce, or at the time rendering services. All safety warnings and emergency response manuals shall be marked or labeled conspicuously on the goods or services provided which may cause harm to the lives, bodies, health or properties of consumers. Traders shall be jointly and severally liable in violating the foregoing</td>
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paragraphs and thereby causing injury or damage to consumers or third parties, provided that if traders can prove that they have not been negligent, the court may reduce damages.

a. Notes

The current rule imposes strict liability on a product manufacturer. However, according to the third paragraph of Article 7 in Consumer Protection Law, the court may reduce the manufacturer’s liability if the latter proved that it exercised reasonable care. Accordingly, the current rule is not a pure strict liability rule under which the defendant shall pay the victim full compensation regardless of fault. Nevertheless, under this Dissertation’s view, the third paragraph of Article 7 should be modified to allow the manufacturer to escape liability if it established that it is not negligent. By so changing, the manufacture’s liability belongs to a fault-based regime.

Moreover, this Dissertation argues that a revision toward intermediate liability will not affect the degree of protection enjoyed by product consumers. First, because the product manufacturer holds itself out as a specialist in producing a superior product and induces a special trust held by consumers, it is subject to a heightened

duty of care rather than that of ordinary reasonableness.\textsuperscript{763} In addition, according to Article 7-1 of this Law,\textsuperscript{764}

Trader shall bear the burden of proof where he claims that the goods or services provided meet and comply with the contemporary technical and professional standards of reasonably expected safety requirements when placing the goods into the stream of commerce, or at the time rendering services. Goods or services cannot be considered non-compliance [\textit{sic}] with the safety requirements described in the previous paragraph for the sole reason that safer goods or services are subsequently available.

The issue under Article 7-1 of this Law is whether the contemporary technical and professional standards at the time of distribution of a product could have foreseen the risk of harm and avoided the injuries to consumers. If the answer is affirmative, a product is considered defective when it fails to meet and comply with the contemporary technical and professional standards of reasonably expected safety requirements. Under the American products liability law, the issue concerning the relationship between accident avoidance and the technology available at the time of product distribution is related to the concept of “state of the art.”\textsuperscript{765} Different from the American products liability law under which “state of the art” is a defense, Article 7 of the Consumer Protection Law turns the concept of “state of the art” into one of the elements of defectiveness, as defectiveness under Article 7 of this Law is defined as

\textsuperscript{764} Article 7-1 of the \textit{CONSUMER PROTECTION LAW}.
\textsuperscript{765} See \textit{supra} note 574 at 309-12.
failure to meet or comply with the contemporary technical and professional standards with reasonably expected safety requirements when placing the goods into the stream of commerce.\textsuperscript{766} Because “state of the art” is actually a test about fault,\textsuperscript{767} in effect, Article 7 of this Law considers the manufacturer’s liability under a fault-based standard. Therefore, modifying Article 7 of this Law into an intermediate liability rule will not seriously affect the degree of protection offered to product consumers.

b. Application of the Rule

Pursuant to Article 7 and Article 7-1 of the Consumer Protection Law, the plaintiff has to prove that:\textsuperscript{768} 1) there is a commercial product;\textsuperscript{769} 2) there is a business entity which engages in the designing, producing, or manufacturing of goods; 3) the business entity distributed the product into the market; 4) the plaintiff suffered injuries while engaging in the reasonably anticipated use of the product;\textsuperscript{770} and 5) there is adequate causation establishing the link between the plaintiff’s injuries and the product defect. In contrast, the manufacturer is subject to strict liability and has to

\textsuperscript{766} See supra note 4 at 705.
\textsuperscript{767} A Modest Proposal to Abandon Strict Products Liability, supra note 25 at 663.
\textsuperscript{768} See supra note 4 at 709.
\textsuperscript{769} See also: Article 4 of the ENFORCEMENT RULES OF CONSUMER PROTECTION LAW.
\textsuperscript{770} Article 5 of the ENFORCEMENT RULES OF CONSUMER PROTECTION LAW provides that:
“Goods or services provided meet and comply with the contemporary technical and professional standards with reasonably expected safety requirements” as referred in Paragraph 1, Article 7 of the Law shall be considered based on the following matters:
1. The information labels on the goods or services;
2. The reasonably expected use or acceptance of the goods or services; and
3. The point of time when placing the goods or rendering the services into the stream of commerce.
satisfy its burden of proving that the product was not defective in order to escape its liability. 771

With the proposed revision to the third paragraph of Article 7 of the Consumer Protection Law applied, a product manufacturer is no longer strictly liable to consumers but rather has an additional way of escaping its liability—by rebutting the presumption of its negligence—whereas the five elements a plaintiff needs to prove remain unchanged. Significantly, in the Poisonous Milk Case, 772 Mead Johnson could escape liability by proving that the powered milk was not defective. Even if the milk was defective, under the proposed rule Mead Johnson could rebut its negligence if it established that it exercised reasonable care in production and quality control procedures. Similarly, in the Exploding Bottle Case, 773 C Company could escape liability by proving either that the bottle was not defective or that C Company exercised reasonable care in production and quality control procedures. Thirdly, in the Defective Ladder Case, 774 because the plaintiff’s action is grounded under the theory of defective design, the manufacturer of the ladder bears the burden of proof in arguing that the ladder was not negligently designed. Finally, in the Defective Cleaner

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771 See supra note 27 and supra note 764.
772 See supra 26.
773 See supra 26-27.
774 See supra 27-28.
Case, since the plaintiff sued the defendant $P$ under the theory of failure to warn, $P$ needs to prove that it exercised reasonable care in providing safety warnings in order to rebut its liability.

**C. Additional Notes on Costs of Reforms**

Having suggested several revisions of current strict liability rules, this Dissertation still leaves a question open regarding whether the costs of the proposed reforms will yield net social benefits. Indeed, all the proposed reforms are not cost-free. More significantly, Article 64 in the 1984 version of Highway Act was an intermediate liability rule, thereby making it more complicated to anticipate that the legislature would admit its “mistake” in taking this rule toward the realm of strict liability and restore this rule to its original status. However, although the issue of costs of institutional changes is beyond the scope of this Dissertation, this Dissertation believes that the overall suggested revisions are worthwhile because intermediate liability, a variation under the fault-based liability regime, is better able to reach more efficient results than strict liability. At minimum, this Dissertation offers a solution to the scholarly debate over the proper liability standard for Article 191-3 in the Civil

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775 See supra 28.
776 See supra note 49 at 319.
777 Id.
778 See supra note 4 at 680.
Code and its relationship with Article 191 of the Civil Code. Under the proposed theory, the current Article 191-3 is proper in preserving its current status as an intermediate liability rule and Taiwanese legislature need not revise its liability standard. If the proposed revisions regarding strict liability rules are rejected for the reason of costs of institutional changes, the proposed solution for preserving the status of Article 191-3 should be found favorable on the same basis.

5.3 Recovery for Pure Economic Loss

A. The Issue of Pure Economic Loss

Pure economic loss refers to pecuniary loss that does not flow from physical harm to a victim’s person or property. Although no issues of recovery for pure economic loss arise in intentional torts because the scienter of the tortfeasor satisfies the requirement of foreseeability of harm to particular victims, recovery for pure economic loss in accidental harms is more controversial. Professor Wang argues that pure economic loss is not recoverable in negligence. He relies upon the

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779 See supra 164 and supra 165-166.
interpretations of the first paragraph of Article 184 in the Civil Code. More particularly, Wang made a distinction between the first part of the rule and the second part: the first part protects one’s individual rights from harm, whereas the second part protects one’s interests. Defining pure economic loss as the harm to interests rather than individual rights, Wang argues that pure economic loss is not recoverable as of right under the first part of first paragraph of Article 184. Additionally, he argues that because pure economic loss can be recovered in contract law (which provides a more efficient way to protect economic interests), recovery for pure economic loss under negligence principles is unnecessary. Taiwanese courts are divided on the issue. While some court opinions follow Wang’s approach, the majority holds that pure economic loss is recoverable as of right under Article 184.

In theory, it is possible to recognize economic loss under the “rights” category of Article 184. For example, pure economic loss is recoverable, in limited cases, in the American common law where a professional negligently performs services knowing a
limited group of parties intend to rely on his work (and do, to their detriment).\textsuperscript{788}

Indeed, if parties are in privity of contract, indeterminate liability in tort may devour the law of contract.\textsuperscript{789} However, if a plaintiff not in privity suffers pure economic loss, such as the negligent misrepresentation case mentioned above, imposing a tort liability may be a better alternative.\textsuperscript{790} Under the current approach, a victim’s recovery for pure economic loss is considered on an all-or-nothing basis grounded upon the interpretations of Article 184. If the court declines to allow pure economic loss to be recovered as of right, the result may sometimes be unfair and unjust to the victims because the magnitude of economic harm to them may sometimes be too large to absorb.\textsuperscript{791}

The Supreme Court of Taiwan specifically addressed the issue in the Second Decision of 19\textsuperscript{th} Civil Case Convention of 1988.\textsuperscript{792} The case involved an employee who breached his duty and misrepresented the financial status of another. Based on this representation, his employer made a loan and suffered pure economic loss. The employer then sued the employee to recover pure economic loss as of right under

\textsuperscript{788} Nycal Corp. v. KPMG Peat Marwick LLP, 668 N.E.2d 1368 (1998).
\textsuperscript{789} GRANT GILMORE, THE DEATH OF CONTRACT 87-94 (1974).
\textsuperscript{790} The accountant’s liability for negligent misrepresentation under Article 20 of the SECURITIES AND EXCHANGE ACT of Taiwan is also a tort liability to third parties.
\textsuperscript{791} In arguing against recovery for pure economic loss in accidental harms, Professor Wang takes pure economic loss suffered through the interruption of electricity for example and suggests that such harm is usually minor. See supra note 781 at 296.
\textsuperscript{792} Zuigao Fayuan, 77 Nian 19 Tze Minschi Di Er Chuehyi (Supreme Court of Taiwan, The Second Decision of 19\textsuperscript{th} Civil Case Convention, Nov. 01, 1988) CHUEHYI HUIBIAN vol. 1, 1040 (2001).
Article 184. The decision by the Court implied recovery for pure economic loss is permitted under the first part of the first paragraph of Article 184, and that pure economic loss is recoverable under negligence principles.

This Dissertation consents with the Supreme Court’s approach, and further argues that 1) economic interest is a recognized right under the first part of the first paragraph of Article 184 and pure economic loss is recoverable as of right, and 2) whether pure economic loss is recoverable under certain circumstances is a matter of coverage of recovery.

In Taiwan, the primary goal of compensation is to restore the status quo before the harm to an injured party. Article 213 of the Civil Code provides that:

Unless otherwise provided by the act or by the contract, a person who is bound to make compensation for an injury shall restore the injured party to the status quo before the injury.

If the restoration of the status quo ante shall be paid in money, interest shall be added from the time of the injury.

Under the circumstances of the first paragraph, the creditor may claim the necessary expenses for restoration instead of the restoration.

Therefore, damages beyond restoring the victim to the status quo are possible only when the law or the contract provides otherwise. For tort actions, four methods of

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793 See also: *Biakanja v. Irving*, 49 Cal. 2d 647 (1958).
794 Case Analysis on General Prov. of Obligation of the Civil Code, *supra* note 5 at 152-53.
795 *Id.* at 152.
recovery are specifically available.\textsuperscript{796} None, however, explicitly refer to recovery for pure economic loss in tort.

Moreover, Article 216 of the Civil Code provides a default rule of coverage by stating that:

Unless otherwise provided by the act or by the contract, the compensation shall be limited to the injury actually suffered and the interests which have been lost.

Interests which could have been normally expected are deemed to be the interests which have been lost, according to the ordinary course of things, the decided projects, equipment, or other particular circumstances.

This rule adopts the principle of full recovery. The coverage of recovery includes two spheres.\textsuperscript{797} First, the tortfeasor must compensate the victim for harm to property or interests existing at the time of injury.\textsuperscript{798} Second, the tortfeasor also must pay for interests the injured should have received but for the tort.\textsuperscript{799} Furthermore, these expected interests are valued in accordance with the ordinary course of things, the decided projects, equipment, or other particular circumstances.\textsuperscript{800}

The general principle established by both Articles 213 and 216 is qualified with “unless otherwise provided by the act or by the contract.” However, none of the rules in the Tort Chapter explicitly mention recovery for pure economic loss in tort.

\textsuperscript{796} Id. at 119-23.
\textsuperscript{797} Id. at 155.
\textsuperscript{798} Id.
\textsuperscript{799} Id. at 156.
\textsuperscript{800} See the second paragraph of Article 216 of the \textsc{Civil Code}.
actions. As a result, the current state of law in Taiwan is uncertain concerning tort recovery for pure economic loss. The current rules either fail to clarify whether pure economic loss is recoverable as of right under Article 184 or fail to stipulate whether pure economic loss is included within coverage of recovery. Although courts usually find recovery for pure economic loss available as of right under Article 184, they fail to provide a clear standard. Accordingly, recovery for pure economic loss under negligence principles is an all-or-nothing result—either it is recoverable in no cases for negligence or it is recoverable in all kinds of negligence cases. The same concern also arises in an action under Article 191-3 of the Civil Code and in other risk liability cases.

B. The Standard for Recovery

To solve the issue, this Dissertation argues that it is instrumental to refer to the pure economic loss rule of American common law. Unlike the all-or-nothing approach in Taiwan, American law considers the pure economic loss rule under a category-by-category basis. Because relevant causes of action under intermediate

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801 Tort Chapter covers from Article 184 to Article 198 of the CIVIL CODE.
802 See supra note 787.
803 See supra note 4 at 659.
804 Article 1 of the CIVIL CODE provides that:
   If there is no applicable act for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to the jurisprudence.
liability are those grounded under products liability and public nuisance, the following discussion will only address recovery for pure economic loss under the two scenarios. When a person suffers pure economic loss because of a defective product, parties often are in privity of contract, and contract law or warranty law could adequately address the issue. Despite this, the victim often bases his recovery on strict products liability rather than breach of contract or warranty claims because he would not have to prove either privity of contract or be subject to disclaimers. Whether pure economic loss is recoverable in a products liability action is an open question. Recently, the Supreme Court of the United States answered this question in the negative. In East River Steamship, charters of four tankers brought suit against the defendant Delaval for damages suffered because turbines manufactured by Delaval were negligently designed, manufactured, and installed in their tankers. In finding no recovery for economic harm, the Court distinguished between contract and tort remedies. When a product injures only itself, the Court reasoned, the victim

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805 Generally, all offenses one suffers in public nuisance involve interference with the interests of the community at large—interests that were recognized as rights of the general public entitled to protection. State v. Lead Indus., Ass'n, Inc., 951 A.2d 428, 444 (R.I. 2008). See also: RESTATEMENT (SECOND) OF TORTS §821B (1979).
806 PRODUCTS LIABILITY PROBLEMS AND PROCESS, supra note 457 at 619.
807 Id.
809 Id.
810 Id. at 2297.
811 Id. at 2302-03.
could bring suit in contract law for redress.\textsuperscript{812} In turn, the tort concern with safety is reduced when an injury is only to the product itself because the users stand to undergo the loss of the value of products, unsatisfied expectation,\textsuperscript{813} or increased costs in using the products.\textsuperscript{814} Until then, pure economic loss is considered not recoverable in strict products liability, and Section 21 of the \textit{Products Liability Restatement} also adopts the rule from \textit{East River Steamship}.\textsuperscript{815}

For purposes of the Restatement, harm to persons or property includes economic loss if caused by harm to (a) the plaintiff’s person; (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff’s property other than \textit{the defective product itself}.\textsuperscript{816}

On the other hand, when a person suffers pure economic loss because of public nuisance,\textsuperscript{817} an action in tort is expected because privity of contract rarely exists between a victim and a tortfeasor. For example, a company negligently blocks a bridge and cuts off traffic between islands, thereby causing business interruption in nearby areas.\textsuperscript{818} Like in products liability cases, pure economic loss here generally cannot be recovered unless there has also been physical harm to the plaintiff.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{812} \textit{Id.}
\item \textsuperscript{813} The court held that such harm should be understood as warranty claim rather than as tort. \textit{Id.} at 2302.
\item \textsuperscript{814} \textit{Id.}
\item \textsuperscript{815} \textit{PRODUCTS LIABILITY PROBLEMS AND PROCESS, supra note 457 at 627}.
\item \textsuperscript{816} \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 21 (1998).
\item \textsuperscript{817} See \textit{supra} note 805.
\item \textsuperscript{818} See also: \textit{Kinsman Transit Co. v. City of Buffalo}, 388 F.2d 821 (2d Cir. 1968).
\end{itemize}
\end{footnotesize}
victims. At the same time, it seems unfair to deny damages here because—unlike product liability cases—the plaintiff here has no way to seek contractual remedies. A case from the New York Court of Appeals may help to clarify this rule and its policy concerns. In *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, a commercial tower collapsed as a result of the defendant’s negligence and caused nearby areas to close for at least two weeks. The owners of nearby stores brought a tort action to recover for lost profits arising out of the interruption of their business. The court denied recovery, reasoning if the presence of members of public or other people traveling nearby was fortuitous, any economic loss they suffered would be unpredictable. To avoid indeterminate liability and to avoid unfairness between geographically similar plaintiffs, the court limited recovery to plaintiffs who suffered personal injury or property damage. Accordingly, pure economic loss is not recoverable in products liability because contract law and warranty law governs harm to the product itself. Similarly, pure economic loss is not recoverable in public

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819 See also: RESTATEMENT OF THE LAW THIRD TORTS: LIABILITY FOR ECONOMIC HARM §8 (Preliminary Draft No.2, 2013) in which the rule permits the recovery for pure economic loss within a public nuisance scenario only when a plaintiff suffered loss distinct from that suffered by the public at large.


821 Id. at 1099.

822 Id. at 1099-1100.

823 Id.

824 Id. at 1103.

825 See supra 189-190.
nuisance cases for fear that the defendant may be subject to indeterminate liability.\textsuperscript{826} Consistently with this standard, this Dissertation argues that pure economic loss is irrecoverable in an action grounded under Article 191-3 of the Civil Code or in other risk liability cases.

5.4 Other Collateral Issues

A. Defenses to Negligence Also Applicable to Intermediate Liability

With risk liability interpreted as the concept of strict liability, an issue arises as to what the available defenses are in an action grounded under strict risk liability.\textsuperscript{827} More particularly, the issue concerns whether the legislature needs to stipulate defenses specifically designed for strict risk liability.\textsuperscript{828} However, when intermediate liability steps into the shoes of strict liability, a defendant’s liability is evaluated under a fault-based standard and all the defenses available to negligence are also available to risk liability, including any form of contributory negligence and assumption of risk.\textsuperscript{829}

\textsuperscript{826} See supra 190-191.
\textsuperscript{827} See supra note 4 at 720.
\textsuperscript{828} Id.
\textsuperscript{829} In Taiwan, there is no separate concept recognized as “assumption of risk.” Rather, the related issue is possibly tried under the issue of comparative negligence, since comparative negligence intends to address all the situations in which the plaintiff could have avoided the injuries arising out of the defendant’s negligence but nonetheless failed to do so. Case Analysis on General Prov. of Obligation of the Civil Code, supra note 5 at 158.
B. Ceilings on Liability Are Not Required for Intermediate Liability

A second issue concerns ceilings on liability when the defendant is subject to strict risk liability. Caps on liability are not essential to strict liability. Rather, the purpose of limitation on liability is to prevent excessive liability from driving out activities which are highly dangerous but beneficial to society. With strict liability imposed, the current version of the Civil Aviation Act, Nuclear Damage Compensation Law, and Highway Act all adopt caps on the defendant’s liability. However, when intermediate liability becomes the operative rule of risk liability, this Dissertation argues that a fault-based standard could sufficiently prevent excessive liability and the caps in the above-mentioned three statutes should be removed.

C. Extended Statute of Limitation for Nuclear Damage Compensation Law and Consumer Protection Law

Finally, the current version of the Nuclear Damage Compensation Law provides an extended statute of limitation for actions under this Law. Considering that product-related accidents bear similar characteristics to nuclear-related incidents in that both involve a long latency period before injuries manifest, the Dissertation

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830 See supra note 4 at 721.
831 Id. at 694.
832 See LIFAYUAN GONGBAO (Official Gazette of Legislative Yuan of the Republic of China) Vol. 86 No. 20 36 for Sitting Records of the first paragraph of Article 24 of the NUCLEAR DAMAGE COMPENSATION LAW (Chinese Source ONLY).
833 See supra 59-60.
834 See supra 61.
835 See supra 62.
argues that an extended statute of limitation for products liability actions grounded under Consumer Protection Law is preferable. For example, the rule could provide that: 838

The claim for the injury arising from products liability shall be extinguished by prescription, if not exercised within THREE years from the date when the injury and the person bound to make compensation became known to the injured person. The same rule shall be applied if ten years have elapsed from the date when the product was delivered.

As for other accidents involving common carrier’s liability, this Dissertation argues that unless otherwise specified by a statutory provision, 839 a regular two-year statute of limitation under the first paragraph of Article 197 of Civil Code shall apply. 840

836 See supra 61-62.
837 See supra note 4 at 697.
838 See supra note 59 at 105.
839 Article 54 of the HIGHWAY ACT.
840 See also: supra note 4 at 718.
Conclusion

The propositions of this Dissertation are simple and straightforward: 1) strict liability is no panacea to accident avoidance; and 2) intermediate liability, as a variation under negligence principles, is sufficient to protect innocent victims and to be the operative rule for risk liability. More particularly, this Dissertation regards risk liability as only a superordinate concept not necessarily equated to the principle of strict liability but rather waiting for the supplement of a doctrine. However, if Taiwanese legal scholarship would rather insist that risk liability always be equated to the doctrine of strict liability, then this Dissertation will suggest complete abandonment of the concept of risk liability.

As had previously been noted by Justice Holmes, people should not be made to pay for accidents which they could not have avoided. In other words, accident loss should lie where it falls, and there should be no liability without fault. With strict liability reduced to a fallback variation under negligence principles—i.e., the concept of equitable liability—the newly proposed tort liability framework comprises

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841 See supra 1-2.
842 See supra note 4.
843 See supra note 668 at 149.
844 Id. at 94.
845 See supra note 74 at 127.
only intentional torts, negligence, and variations under negligence, as Chart 1 demonstrates in the following.

**Chart 1: The Newly Proposed Framework of Taiwanese Tort Liability**

Given the newly proposed tort liability framework, this Dissertation not only articulates the proper liability rule—intermediate liability—for Article 191-3, but also alleviates the rising tension between strict liability and negligence.

Finally, because this Dissertation addresses general policy considerations for the doctrine of strict liability and proposes reforms to this principle, this Dissertation’s
analysis may possibly shed light on legal systems outside of Taiwan, and its propositions may even be applicable to legal systems other than the Taiwanese legal system.
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  Wang Tzejian, *Chin Chuan Hsing Wei Fa (Tort Law)* Taipei: San Min Book Co., Ltd., 2011

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   CIVIL CODE (Taiwan),

   CONSUMER PROTECTION LAW (Taiwan),

   ENFORCEMENT RULES OF CONSUMER PROTECTION LAW (Taiwan),

   HIGHWAY ACT (Taiwan),

   THE MASS RAPID TRANSIT ACT (Taiwan),
CIVIL AVIATION ACT (Taiwan),

REGULATIONS OF COMPENSATION FOR DAMAGE CAUSED TO AIR PASSENGERS AND FREIGHT (Taiwan),

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http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?pcode=L0020021

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TAIWAN CODE OF CIVIL PROCEDURE,
http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?pcode=B0010001

TELECOMMUNICATIONS ACT (Taiwan),

SECURITIES AND EXCHANGE ACT (Taiwan),


RESTATEMENT (FIRST) OF TORTS § 504 (1938)

RESTATEMENT (FIRST) OF TORTS § 507 (1938)

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RESTATEMENT (SECOND) OF TORTS §767 (1979)

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RESTATEMENT (Third) of Torts: Products Liability § 17 (1998)

RESTATEMENT (Third) of Torts: Products Liability § 21 (1998)

RESTATEMENT of the Law Third Torts: Liability for Economic Harm §§ 1-6 (Tentative Draft No.1, 2012)

RESTATEMENT of the Law Third Torts: Liability for Economic Harm § 8 (Preliminary Draft No.2, 2013)

Codice civile [C.c.] art. 2050 (It.)


5. Others

Black’s Law Dictionary (10th ed. 2014)

Wen-Hsuan Yang

EDUCATION

Indiana University Maurer School of Law, Bloomington, IN
Doctor of Juridical Science, May 2017
- Doctoral Dissertation: Toward the Search for the Proper Liability Rule for Harms Resulting from Sources of Risk: A Different Approach to the Choice Between Strict Liability and Fault-based Regime

Indiana University Maurer School of Law, Bloomington, IN
Master of Laws, Dec. 2014, GPA: 3.90/4.0
- Master’s Thesis: Reconstructing the Taiwanese Rule on Pure Economic Loss: Establishing a General Standard for Recovery for Pure Economic Loss in Unintentional Torts

School of Law, Fu Jen Catholic University, Taipei, Taiwan
Bachelor of Laws, June 2010, GPA: 3.72/4.0 Rank: 1/65
- Special Performance: Passed National Examination of Judiciary Clerks, 2009

EXPERIENCE

Middle Way House, Inc., Bloomington, IN
Legal Volunteer, Oct. 2015 – Nov. 2016, Total: 87.5 Hours
- Prepared daily court calendars for legal advocates
- Researched cases related to domestic violence and sexual offenses and filled out case notes for subsequent filing
- Organized and preserved Abuser Database that lists identities of perpetrators of domestic violence and sexual crimes

MILITARY SERVICE

Ministry of National Defense R.O.C.
Reserve Officer, Oct. 2010 – Sept. 2011
Xinda Fishing Port Inspection Office, Coastal Patrol Corps 5-2, Southern Coastal Patrol Office, Coast Guard Administration, Executive Yuan, Kaohsiung, Taiwan
- Directed vessel security inspections and shoreline patrol
- Assisted in marine salvage tasks: kept contact with Duty Command Center and maintained order of the scene
• Led section of security inspection management: compiled import/export records, generated Chinese fishermen’s data, and analyzed intelligence information of suspicious vessels

HONORS
2012 CALI Award, Civil Procedure (Fall 2012)
2010 Member of The Phi Tau Phi Scholastic Honor Society (R.O.C.)
• Awarded to the top one percent of graduating students every year
2010 Graduate Delegate of Fu Jen Catholic University School of Law
2010 Fu Jen Law School Award, Fu Jen Catholic University
• Awarded to the top graduate in the law department every year
2007-10 Book Aroma Award, Fu Jen Catholic University
• Awarded to the top three students of the class every semester

PROFESSIONAL TRAINING
Lexis Advance® Legal Research Skills Certified – Fall 2016
Westlaw Next® Certification – Fall 2014

BAR ADMISSIONS
State of New York (2016)