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THE THIRD REVOLUTION IN PRODUCTS LIABILITY

CARL T. BOGUS*

We are on the threshold of a third revolution in products liability. Only now are we becoming aware that we are at the edge of something significant. The future is always shrouded, and it is by no means certain that we will cross the threshold before us. Voices are exhorting us to turn back. Nevertheless, we are being propelled forward, not so much as a result of a conscious decision, as by the momentum of choices made over the course of a century—by the force of history itself.

The realization that we are on the verge of a revolution in products liability is so recent that there is not even a consensus on what to call it. Among the handful of commentators who have addressed the issue heretofore, the concept has been variously labelled generic liability,¹ generic product risk,² categorical liability,³ and product category liability.⁴ None of these terms is self-explanatory, however, and none of them is as of yet familiar to most lawyers, judges, or even tort scholars.

What is generic liability, and why is it important? A definition can easily be given: Generic liability is strict liability that is imposed upon products that are unreasonably dangerous despite the best possible design, construction, and warnings. It is, in other words, strict liability that attaches to an entire product category—asbestos, handguns, and cigarettes are three of the most notorious possibilities—rather than flawed units or poorly designed models. An explanation of the significance of generic liability cannot be given quite so succinctly,

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however. Because generic liability represents a third revolution in products liability—a revolution that flows from what has gone before—it is best explained in historical context.

**The First Revolution: Strict Liability for Defective Products**

The first revolution in products liability created strict liability for defective products. If we were to fix a date on which it began it would be 1916, when the New York Court of Appeals handed down an opinion in the case of *MacPherson v. Buick Motor Co.* The plaintiff in that case was severely injured when one of the wooden wheels on his new Buick automobile collapsed. Injured consumers had previously been barred from suing manufacturers by the privity rule, which held that manufacturers owed no duty—under either contract or negligence law—to anyone other than the immediate purchaser. In the era of mass produced goods, the immediate purchaser was not the consumer but a distributor or retailer, and thus manufacturers such as Buick had been immune from liability to the ultimate users of their goods. With *MacPherson*, Cardozo launched not only—as he, himself, later described it—an “assault upon the citadel of privity,” but an attack upon a larger fortress: the concept that one may be held accountable to another only if one has so agreed (e.g., by giving a warranty) or has done something wrong (e.g., by acting negligently).

*MacPherson* did not go this far, of course. It was a negligence case and stood only for the modest proposition that a manufacturer of a product that is “reasonably certain to place life and limb in peril when negligently made” is “under a duty to make it carefully.” The manufacturer owed this duty not only to the immediate purchaser but also to anyone who could be reasonably expected to use the product—or, as Cardozo put it, “where danger is to be foreseen, a liability will follow.” Yet we must believe that Cardozo knew where the logic of his decision would run. By placing the fact that the automobile is a “thing of danger” at the center of his rationale, Cardozo fashioned a decision that was clearly analogous to areas where courts were imposing liability regardless of whether the defendant had acted negli-

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5. 111 N.E. 1050 (N.Y. 1916).
6. *See id.*
9. *Id.*
Owners of dangerous animals, both wild and domestic, were subject to liability, for example, and many American jurisdictions imposed strict liability on persons engaging in abnormally dangerous activities.

Someone with less skill and foresight than Cardozo may have considered *MacPherson* a poor weapon for launching an attack on the established legal regime. Plaintiff’s negligence theory was weak. Buick did not make the car’s wheels; it purchased them from a reputable wheel manufacturer. Plaintiff’s argument was that the wheel manufacturer had not used the strongest type of wood. But what had Buick done wrong? Nothing more than relying on the expertise of the wheel manufacturer and not inspecting the wheels itself. This was hardly a powerful theme. It was not patently unreasonable for Buick to rely on a firm that had greater expertise with a particular component than Buick, itself, possessed.

Yet it was the very weakness of the negligence claim that suited Cardozo’s purposes. “We have put aside the notion that the duty to safeguard life and limb, when consequences of negligence may be foreseen, grows out of contract and nothing else,” Cardozo wrote. “We have put the source of obligation where it ought to be. We have put its source in the law.” Though he was careful to expressly include it, the concept of negligence recedes in Cardozo’s opinion. It is considerations of public policy that come to the fore. If we substitute the term “product failure” for “negligence” in the above passage, no harm is done to Cardozo’s reasoning; if anything, it stands on even firmer legs. This, one suspects, was not unintentional, for Cardozo was a master craftsman.

Thus a revolution began. Flying in the face of an ingrained societal norm—that in the absence of an agreement to the contrary, only people who were somehow culpable were to be held accountable to

10. Cardozo refused to confine his reasoning within the previously accepted principle that products that posed an imminent danger to life—such as poisons and explosives—may constitute exceptions to the privity rule. See id.
11. Owners of domestic animals were liable only when the owner knew that a particular animal had dangerous propensities. See William L. Prosser, Law Of Torts 513-17 (3d ed. 1964) and cases collected therein.
12. See id. at 523 n.90, 524-25 nn.10-34 (citing cases from at least ten jurisdictions that by 1916 had adopted the principle set forth in *Rylands v. Fletcher*).
14. See id. at 47.
15. MacPherson, 111 N.E. at 1053.
16. See id.
others—the law was to make one of the most powerful groups in modern society, manufacturers, responsible not for fault but for failure.

Revolutions of this magnitude are not completed overnight. It was half a century later when William Prosser could finally declare that the citadel had fallen. By then, 1966, eighteen states—including the commercial giants of New Jersey, California, and New York—had recently adopted strict liability for defective products, and the American Law Institute had just endorsed the principle in the Restatement (Second) of Torts. In a relatively short time thereafter, every other American jurisdiction followed suit.

There is a tendency to assume that the early concept of defect was roughly equivalent to what we now call manufacturing defects, but that is not precisely accurate. The first revolution was not limited to manufacturing defects. MacPherson's Buick collapsed either because the wheel contained a flaw or because it—and all of Buick's wheels—was made from the wrong kind of wood. And MacPherson is by no means unique in this regard. In Henningsen v. Bloomfield Motors, Inc., a car crashed because of an undetermined problem in the steering mechanism. The power tool in Greenman v. Yuba Power Products, Inc. failed because the set screws were not adequate for the machine's vibration. Each of these cases may have involved a manufacturing defect, a design defect, or some combination of the two. It did not so much matter why the product was defective, only that it was defective.

While no single definition of "defective product" was adequate—section 402A of the Restatement (Second) of Torts lists seven alternative definitions of "defective product"—it is probably fair to say the concept was connected more to result than cause. That is, products

18. See id. at 794-95.
21. Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81 (N.Y. 1963). Goldberg is the least well-known of this trio of decisions. The opinion is ambivalent. On one hand it bills itself as nothing more than the logical result of the "things of danger" doctrine adopted in MacPherson. See id. at 82-83. On the other hand, it cites and seems to stand with Henningsen and Greenman. See id.
22. Restatement (Second) of Torts § 402(A) (1977).
23. 161 A.2d at 75.
24. 377 P.2d at 899.
25. Many early cases make it clear that a product might be defective as a result of either a manufacturing or design defect. See, e.g., Heaton v. Ford Motor Co., 435 P.2d 806, 808 (Or. 1967) ("plaintiff can produce direct evidence of a mistake in fabrication or of a design which is unreasonably dangerous").
were defective if they failed in performance, regardless of the reason for failure. In most first revolution cases, however, products failed on their own, without anything that may have been thought of as an intervening cause.

**The Second Revolution: Strict Liability for Nondefective Products with Unreasonably Dangerous Features**

If MacPherson's Buick illustrates the first revolution, the Ford Pinto exemplifies the second. Intent on producing a subcompact that would weigh less than 2,000 pounds and be priced at less than $2,000, Ford made deliberate design choices that left the gas tank on the Pinto automobile vulnerable in rear-end collisions.\(^\text{27}\) The gas tank was located behind rather than above the rear axle, where it had traditionally been placed to protect it from being ripped open or crushed in accidents.\(^\text{28}\) To limit weight, the rear bumper was nothing more than an ornamental chrome strip and it offered no protection.\(^\text{29}\) In crash tests, Ford engineers discovered that the gas tank had a tendency to explode in low speed accidents.\(^\text{30}\) They suggested a number of solutions such as lining the gas tank with a rubber bladder at a cost of between $5.25 and $8.00 per car or reinforcing the rear-end of the car with side and cross members for $4.20 per car.\(^\text{31}\) But pennies counted in the struggle to keep the car priced below $2,000 and Ford officials rejected all of the proposals.\(^\text{32}\)

MacPherson's Buick and the Ford Pinto both imperilled their occupants, but they did so in different ways. MacPherson's Buick failed on its own accord. It was not mishandled or mistreated in any fashion; it was doing exactly what it was supposed to do—simply driving along—when it collapsed. The Pinto, on the other hand, exploded only when subjected to an external force, another car smashing into the Pinto from behind. Everyone understands perfectly well that cars should not be mistreated in this fashion. The Pinto failed only when its owner or some third party did something wrong,\(^\text{33}\) or, in the lan-

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27. See Bogus, supra note 1, at 77.
28. See id.
29. See id. at 78.
30. See id.
31. See id.
32. See id.
33. The most famous Pinto case represents something of an exception. The Pinto was struck from behind after it stalled on a superhighway, perhaps as a result of some other defect. See Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 2d 348, 359 (Cal. Ct. App. 1981).
guage of negligence law, only when there was an intervening cause.\textsuperscript{34} The problem with the Pinto, therefore, was not that the Pinto was defective, at least in any traditional understanding of that term. The Pinto was not mismanufactured, broken, or faulty; it was built and functioned exactly as intended. It is a large leap from the proposition that manufacturers should be liable for injuries caused by product failure to the proposition that manufacturers should be liable because their products did not protect users from the users' own, or some third party's, negligence.

The crashworthiness doctrine—which holds that vehicles should provide a reasonable degree of protection in accidents—was not embraced easily. A 1966 case,\textsuperscript{35} for example, arose out of an automobile in which a man was killed in a side impact collision. Plaintiff argued that the steel frame of Defendant's station wagon should have been rectangular and contiguous, surrounding, and thus protecting, the cabin and its occupants.\textsuperscript{36} The court wrote:

Plaintiff argues that the defendant's 'X' frame permitted the side of the automobile to collapse against the decedent when his station wagon was struck broadside by another vehicle. Plaintiff does not assert the 'X' frame caused the decedent's automobile to be driven into the path of the striking car or prevented it from being driven out of the path.\textsuperscript{37}

The court held that there was no liability because the car was not unfit for its intended purpose. "The intended purpose of an automobile does not include its participation in collisions with other objects," it wrote.\textsuperscript{38}

This way at looking at things could not last. Although, as previously discussed, it is not strictly accurate to say that the first revolution included manufacturing defects and excluded design defects, it is true nonetheless that manufacturing flaws were clearly included within the concept of defective products while design hazards were doctrinally more ambiguous. Yet the public is exposed to greater risks from products with unsafe features than from those with manufacturing defects. Design hazards make every unit in a product line dangerous

\textsuperscript{34} One may believe that Ford executives acted irresponsibly in selling cars with gas tanks that, they knew, were prone to explode in rear-end collisions. For what it is worth, their defense is that the Pinto was no more dangerous than other American subcompacts at the time—which was true, but only because other subcompacts had their own problems. See Bogus, supra note 1, at 80 n.424.
\textsuperscript{35} See Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).
\textsuperscript{36} See id. at 824.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 825.
while manufacturing defects affect only occasional units, thus the former greatly exceeds the latter. Any doctrine that confronts lesser risks rather than greater ones will inevitably become unstable.

It is not surprising, therefore, that eleven years after the Seventh Circuit Court of Appeals held that the plaintiff who challenged the frame of a station wagon did not state a cause of action, the same court adopted the crashworthiness doctrine.৩৯ “[M]anufacturers must anticipate and take precautions against reasonably foreseeable risks in use of their products,” it held.৪০ And in language diametrically opposed to the reasoning of its earlier opinion, the court noted that “a collision is a foreseeable incident of [a vehicle’s] normal use. Thus, to say that collisions are not within their ‘intended purpose’ is unrealistic.”৪১ The crashworthiness doctrine is now well accepted,৪২ and it has paid large dividends in lower automobile fatality rates.৪৩

Another example of the second revolution are cases involving guards and mechanisms designed to protect machine operators from their own negligence. These cases have involved both consumer products and industrial machinery, but particularly the latter. Courts have recognized that the reality of the work place makes employees work on machines that they did not choose, with coworkers whom they did not hire, under conditions—including time-pressured production schedules—over which they have little control. The earliest cases in this category involved machines without guards or deadman devices,৪৪ but there has also been a second generation of cases where manufacturers provide protection devices, but fail to design their machines in a way that makes it impossible for employers to remove those devices.৪৫ Courts have become savvy. They learned that employers often want to remove guards to speed up production, and that some manufacturers are willing to oblige by selling machines that make this possible.৪৬

39. See Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977). Both Huff and Evans, 359 F.2d 822, were decided under Indiana law.
40. Huff, 565 F.2d at 108.
41. Id.
42. The crashworthiness doctrine has been accepted by the vast majority of jurisdictions, and has applied not only to automobiles, but to airplanes, boats, trucks, snowmobiles, lawnmowers, and many other types of vehicles. See Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1338 (10th Cir. 1989).
43. See, Bogus, supra note 1, at 4 n.9.
Courts have become wise about similar dynamics in other industries as well. They have, for example, become familiar with cases involving pharmaceutical companies who over-promote certain drugs knowing—and since actions speak louder than words, one must believe also intending—that physicians are prescribing them when not indicated or using them for purposes not approved by FDA.

The second revolution has been obscured by nomenclature. There is not truly anything defective about a car with an X frame or a machine that does not have an interlock device so that it will not operate if the guard is removed. The label "design defect" is a misnomer, a remnant of the first generation. These cases involve nondefective products with unreasonably dangerous features. The linchpin of liability is an unreasonably dangerous aspect or feature of the product. In the Ford Pinto case, for example, it was a gas tank vulnerable to explosion.

The continued use of the word "defect" hides the fact that the second revolution represents a radical departure. The first revolution—which was truly defect-oriented—was premised on the idea that the consumer did not get what he bargained for, and hence originally defined "defect" in terms of consumer expectation. The first revolution was principally rooted in contract law. The second revolution was concerned not only with the seller-buyer relationship but also with how products affect society-at-large. The linchpin of liability is not defect, but unreasonable danger and consequently, the risk-utility test has largely replaced the consumer expectation theory. The second revolution, therefore, sprang from tort law.

I have described these two models at greater length elsewhere. I call the contract-based model Abinger's Paradigm after Lord Abinger who wrote the famous 1842 decision in Winterbottom v. Wright. The tort-based model I call Cardozo's Paradigm for, ironically, when Cardozo wrote the opinion in MacPherson v. Buick Motor Co., he started not only the first revolution in products liability but the second as well. As noted above, Cardozo emphasized that the doc-

47. See, e.g., Salmon v. Parke, Davis and Co., 520 F.2d 1359 (4th Cir. 1975).
49. The transition from the first to the second revolutions has been blurred because courts define "defect" in terms of unreasonable danger. For example, "[a] 'defect' does not mean a mere mechanical or functional defect but is anything that makes the product 'unreasonably dangerous.'" Anderson v. M.W. Kellogg Co., 766 P.2d 637, 643 (Colo. 1988).
50. See Bogus, supra note 1, at 9-30.
trine he fashioned did not grow "out of contract and nothing else."\textsuperscript{52} "We have put the source of obligation where it ought to be," he wrote.\textsuperscript{53} "We have put its source in the law."\textsuperscript{54}

Cardozo's vision is very much part of the second revolution, even if the law had to evolve through a first revolution in order to catch up. And perhaps it is part and parcel of the third revolution as well.

**THE THIRD REVOLUTION: STRICT LIABILITY FOR UNREASONABLY DANGEROUS PRODUCTS**

The third revolution in products liability is strict liability that is imposed upon products that are unreasonably dangerous despite the best possible design, construction, and warnings. To many—including Professors James A. Henderson, Jr. and Aaron D. Twerski, the Reporters for the forthcoming *Restatement (Third) of Torts*—that seems like a radical concept.\textsuperscript{55} But in fact the third is the least radical of the three revolutions. After all, if strict liability attaches to products with unreasonably dangerous features how can it not reasonably attach to unreasonably dangerous products?

When one thinks of generic liability, politically controversial subjects such as cigarettes and handguns tend to leap to mind, but it is in prosaic cases where the third revolution is silently underway.

Consider *Shetterly v. Crown Control Corp.*,\textsuperscript{56} a 1989 decision of eight consolidated cases involving plaintiffs who all suffered sprained, twisted, or broken ankles while using a unique type of machine known as a Crown Pallet Truck during the course of their employment in a grocery warehouse. The pallet truck is a motorized vehicle used to collect boxes of groceries from the warehouse floor.\textsuperscript{57} The truck consists of a set of forks upon which rest wooden pallets, which are used as a platform for stacking cartons of groceries.\textsuperscript{58} Unlike a fork lift, which is used to raise and lower objects, the pallet truck is used to collect boxes stored at ground level, and the pallet cannot be raised

\textsuperscript{52} *MacPherson*, 111 N.E. at 1053.
\textsuperscript{53} *Id.*
\textsuperscript{54} *Id.*
\textsuperscript{55} *Restatement (Third) of Torts: Products Liability* § 2 cmt. c, and Reporters' Note at 94-97 (Tentative Draft No. 2, March 13, 1995); Henderson & Twerski, *Closing the Frontier*, supra note 4, at 1314-15.
\textsuperscript{57} See *id.* at 389.
\textsuperscript{58} See *id.*
more than a few inches above floor level. The operator controls the truck by using handles perpendicularly affixed to a control arm at the front end of the vehicle. These handles permit the operator to operate the pallet truck while either riding on the platform or walking alongside the vehicle.

One of the principal features of the pallet truck is a “coast control device,” which allows the truck to coast slowly to a stop. If the operator releases the handle when he is beside an item he wishes to pick up, the vehicle will coast to a stop so that the pallet is right next to that item. By eliminating the need to carry cartons even short distances, the coast control device cumulatively saves great amounts of time. Operators are not injured if they ride on or walk beside the truck. Plaintiffs, however, all released the control handle before they were beside cartons they wished to pick up and walked in front of the vehicle while it was coasting. The pallet truck struck them at ankle height.

The court first considered whether there was a feasible alternative design that would have prevented plaintiffs’ injuries. Experts testified that the control handles could not be made longer without interfering the operator's ability to ride on the vehicle, the platform could not be lowered or equipped with a rubber guard because the vehicle had to clear debris that inevitably litters warehouse floors, and the coast control device could not be eliminated without destroying the pallet truck’s raison d’etre—its great efficiency. Thus, the court concluded there was no feasible alternative design.

Next, the court conducted a risk-utility analysis to determine whether pallet trucks are unreasonably dangerous. It found that pallet trucks have high utility. After the plaintiffs’ firm introduced Crown Pallet Trucks to its operation, the productivity of its assemblers—workers such as the plaintiffs who assemble orders by retriev-

59. See id.
60. See id.
61. See id.
62. Id. at 390.
63. See id.
64. See id.
65. See id. at 391.
66. See id. at 392.
67. See id. at 393-94.
68. See id. at 393-95.
69. See id.
70. See id. 395-99.
71. See id. at 397.
ing cartons of groceries from various locations in the warehouse—increased fifty-three percent.\textsuperscript{72} Pallet trucks reduced assembly costs for this firm by more than two million dollars annually, and the court found these savings ultimately resulted in lower food prices for consumers.\textsuperscript{73} On the risk side of the ledger, the evidence was that the foot injuries for assemblers working on pallet truck occurred at a rate of only one injury per four hundred work years.\textsuperscript{74} Meanwhile, pallet trucks resulted in fewer back injuries, which were more frequent and on average more severe than foot injuries.\textsuperscript{75} The court found, therefore, that pallet trucks were not unreasonably dangerous, and dismissed the action.\textsuperscript{76}

What should not go unnoticed is this: The court did not end its analysis after determining that there was no alternative feasible design; it went on to determine whether the product's risks outweighed its benefits, and presumably would have imposed liability if they had. This is classic generic liability analysis.

\textit{Shetterly} is not an extraordinary case. It is representative of how many courts conduct risk-utility analyses to determine whether a product generically should be deemed unreasonably dangerous and, consequently, subject to strict liability. The same approach may be found in cases involving a host of other products including

\textsuperscript{72} See id.
\textsuperscript{73} See id. at 398.
\textsuperscript{74} See id. at 400.
\textsuperscript{75} See id. at 397.
\textsuperscript{76} See id. at 403.
medical devices, contraceptives, prescription drugs, blood, rat poison, ladders, and all-terrain vehicles, to name a

77. See Tansy v. Dacomed Corp., 890 P.2d 881 (Okla. 1994). This case involved a penile implant that failed less than two years after implantation because of cable fatigue, which was apparently an unpreventable risk. See id. The court stated that a manufacturer has an affirmative defense under comment k to § 402A of the Restatement (Second) Torts—i.e., as unavoidably unsafe product—only when the benefits of the product outweigh its risk. See id. at 885-86. Noting that the implants had a failure rate of between 3.7% and 6%, and that penile implants have high utility because they restored "a degree of normalcy to the lives of those who suffer sexual dysfunction," the court held that the jury could reasonably find that the product's benefits outweighed its risks. Id. at 887; see also Kociemba v. G.D. Searle & Co., 695 F. Supp. 432 (D. Minn. 1988) (involving an intrauterine device).

78. See Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986). This case involved a birth control pill with an extra high dosage of estrogen, which was necessary to prevent breakthrough bleeding in certain women. See id. The court held that there was sufficient evidence for a jury to find that increased risks of adverse reactions outweighed the product's benefits and that, therefore, the product was unreasonably dangerous and subject to strict liability. See id. at 414. The court held the converse was also true: there was enough evidence to warrant a finding that the product's utility greatly outweighed its risks, in which case there would be no liability. See id. at 414-15. This is an unnecessarily confusing method of analysis. There are not truly two questions, only two sides of the same coin. If plaintiff fails to persuade the trier of fact that the product's risks exceed its benefits, plaintiff's case fails, and defendant's affirmative defense under comment k is superfluous.

79. One example of many is Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775 (R.I. 1988). In this case, which involved the drug DES, the Rhode Island Supreme Court wrote: "[W]e reject defendant's specious contention that a prescription drug, a fixed chemical composition, cannot be defectively designed because there are no alternatives to its configuration." Id. at 781. The court continued: "If a trial judge concludes that reasonable minds could not differ in deciding that a drug's benefits exceed its risks, then as a matter of law the trial judge can extend comment k's protection to that drug. If, however, the judge finds that an application of the risk-benefit analysis allows reasonable minds to differ in their conclusions, then the trial judge should submit the issue to the trier of fact." Id. at 782. As discussed in the preceding note, it makes more sense to consider the risk-utility analysis to be a test of liability than a method of establishing an affirmative defense. The Castrignano court more simply could have held that plaintiff is entitled to have its case submitted to the jury only if the court determines that a reasonable person could find that a product's risks exceed its benefits. Nevertheless, Castrignano illustrates that courts sometimes apply generic liability doctrine in pharmaceutical cases, though that is often obscured by the confusion surrounding comment k. See also, e.g., Toner v. Lederle Laboratories, 732 P.2d 297, 306 (Idaho 1987) (instructing that the "weighing process should consider the value of the benefit, the seriousness of the risk, and the likelihood of both"); Gaston v. Hunter, 588 P.2d 326, 340 (Ariz. Ct. App. 1978).

80. See Belle Bonfils Memorial Blood Bank v. Hansen, 665 P.2d 118, 122 (Colo. 1983) (holding that the "product's utility must greatly outweigh the risk created by its use" for defendant to invoke the unavoidably unsafe defense of comment k).

81. See Banks v. ICI Americas, Inc., 450 S.E.2d 671, 675 (Ga. 1994) (stating that "we can no longer accept the position that a manufacturer cannot be liable for injuries proximately caused by a product that functions for its intended use, regardless of the risks associated with the product and its utility to the public or the plaintiff's ability to adduce evidence that a feasible alternative design [exists]").

82. See Smith v. Keller Ladder Co., 645 A.2d 1269, 1271 (N.J. Super. Ct. App. Div. 1994) (noting that in an appropriate case a jury may "find that the risks involved in a product's use outweigh its utility even though there is no reasonably feasible alternative design").

83. See Laing v. American Honda Motor Co., 628 So. 2d 196, 201 (La. Ct. App. 1993) (stating that a product may be unreasonably dangerous if "a reasonable person would conclude that the danger-in-fact . . . outweighs the usefulness of the product.") The court held that the jury's verdict that three-wheel, all-terrain vehicles are unreasonably dangerous was supported by the evidence. See id. at 202. The jury weighed the benefits and the risks of ATV's as farm instru-
few.84

Generic liability has not yet been consciously embraced by courts throughout the land. But claims to the contrary notwithstanding,85 it has not been rejected either.86 Indeed, only one published court opinion expressly refers to generic liability.87 Yet in cases such as Shetterly courts are employing generic liability analysis all the time.

Battles over generic liability are being fought in three arenas. One arena is the American Law Institute, which is in the process of promulgating the *Restatement (Third) of Torts*. The outcome of this battle was preordained when the ALI selected as Reporters for the products liability sections of the *Restatement* the two most vociferous critics of generic liability, Professors James A. Henderson, Jr. and Aaron D. Twerski.88 The proposed *Restatement* eliminates generic liability by making an alternative feasible design a prerequisite for maintaining a design defect claim. The applicable section provides that “a product 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 . . . and the omission of the alternative design renders the product not reasonably safe.”89 The comments state: “The requirement . . . that plaintiff show a reasonable alternative design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all.”90

ments; the evidence regarding their utility as recreational vehicles was excluded. *See id.* This is not inconsistent with the theory of generic liability. Some products may be unreasonably dangerous when sold to the public-at-large but not when sold to a particular class of purchasers. For example, x-ray equipment may be reasonably dangerous when sold to licensed facilities, and handguns may be reasonably dangerous when sold to law enforcement officers, even if such products are unreasonably dangerous when sold to the public-at-large.

84. *See Bogus, supra* note 1, at 37 (describing other cases involving slingshots, above-ground swimming pools, and escalators).


86. *See Bogus, supra* note 1, at 36-64.

87. In the famous *Cipollone* cigarette case, the Third Circuit held that plaintiff’s “generic risk-utility claim” was not retroactively barred by a state tort reform statute and should not have been dismissed by the district court. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 577-78 (3rd Cir. 1990), *rev’d in part on other grounds, aff’d in part*, 505 U.S. 504, 512 n.6 (1992). This issue was not raised on appeal before the Supreme Court. *See id.* The case was voluntarily withdrawn following the Supreme Court’s decision and before the generic liability could be tried. *See* Henry J. Reske, *Cigarette Suit Dropped*, 79 A.B.A. J. 30 (Feb. 1993).


90. *Id.* at cmt. c.
Henderson and Twerski contend that the alternative design requirement "reflects a clear majority of the case law." This claim has been subject to a powerful attack. In a 462-page law review article, John F. Vargo set forth a survey of the law of all fifty states and the District of Columbia. Vargo found that only three states have clearly mandated an alternative design by case law. Five states adopted alternative design requirements in politically driven tort reform legislation, and case law in one state is ambiguous, but Vargo's survey shows that no other state has an absolute alternative design requirement. "[N]ine states do not constitute a majority," Vargo observes.

This battle is probably over; the ALI is not likely to change its position. But some of the most prominent products liability scholars have been strongly critical of the new Restatement—and of the alternative design requirement in particular—and it is not likely that the forthcoming Restatement will command the same degree of respect and acceptance as did section 402A.

A second arena in which the battle over generic liability is being fought is in litigation over controversial products. Strong attempts are now underway to impose liability on manufacturers of handguns, assault weapons, and cigarettes. As of this writing, for example, nineteen states and a dozen municipalities are suing tobacco companies to recover the costs of treating smoking related diseases under

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92. See id.
93. See id. at 537.
94. See id.
95. Id.; see also Frank J. Vandall, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 TENN. L. REV. 1407 (1994) (analyzing case law from jurisdictions that have considered the alternative design issue and concluding that a majority of jurisdictions do not require that plaintiff provide evidence of a reasonable alternative design in order to establish a prima facie case).
98. See Barry Meier, Guns Don't Kill, Gun Makers Do?, N.Y. TIMES, April 16, 1995, at E3.
state Medicaid programs. These cases illustrate that generic liability cases are not always brought by plaintiffs who have elected to take risks, only to complain later about the consequences of their choices. While the only prediction that can be made is that there will be many twists and turns before the end of the road, plaintiffs in cigarette and gun cases are in stronger positions than ever before because manufacturers in these industries have never been held in lower regard.

Cases involving hot issues such as guns and cigarettes will be especially visible, and they will have an impact. But, more than anything else, it is likely to be garden variety cases such as Shetterly that will ultimately decide whether, and when, the third revolution in products liability ultimately succeeds.

**This Symposium**

Because the importance of generic liability is only now starting to be realized, little has been written about it to date. This Symposium doubles the body of existing scholarship dealing expressly with this topic. We are fortunate that so distinguished a group of scholars agreed to participate. They are by no means of one mind on the topic, but their contributions are all provocative.

Peter A. Bell (*Children's Lives, Indonesians' Lives and Generic Liability*) thought about generic liability while on sabbatical in Indonesia and wrote an article in the form of a letter to his two young daughters. What difference would a regime of generic liability make in their lives, he wonders. Would generic liability threaten to deprive them of something they dearly love—ice cream, particularly the high fat kind? Bell's long letter to his children is a carefully developed thought-piece about societal values and whether generic liability will advance or impede them. Bell comes down in favor of generic liability, but argues that a balance of competing concerns would best be struck by having generic liability decisions made only by a special, three-judge federal court. Along the way, Bell presents a compelling challenge to the argument that generic decisions are too polycentric for judicial adjudication.

Joseph A. Page (*Liability for Unreasonably and Unavoidably Unsafe Products: Does Negligence Doctrine Have a Role to Play?*) prefers

negligence doctrine to strict liability for products with generic risks. His concern is not that generic liability will result in courts imposing liability on too many products—quite the opposite. Page argues that generic liability unnecessarily burdens plaintiffs with unnecessary baggage, notably the requirement that plaintiffs establish the existence of a defect. Page prefers negligence because, inter alia, he believes the principal question in a generic case is whether a manufacturer's decision to market a particular kind of product was reasonable. Whether one favors negligence or strict liability as the vehicle for imposing liability on product categories, however, we must answer the question whether such decisions should be made by courts at all. Are legislatures or administrative agencies better equipped than courts to decide whether entire product categories should be marketed or taxed? Are these political questions? Is it undemocratic for courts to be imposing strict liability on cigarettes, handguns, or pallet trucks? In this article Joseph Page gives one of the best responses to this set of questions that one can hope to find.

Jerry J. Phillips (The Unreasonably Unsafe Product and Strict Liability) takes on the Reporters of the products liability sections of the American Law Institute's forthcoming Restatement (Third) of Torts. His article may scorch their fingers. Accusing the Reporters of "a distinctive pro-defense bias,"101 Phillips explains why he believes the Restatement "constitutes a major retreat from strict products liability,"102 and why the "Reporters cannot validly claim that this retreat represents the majority view in this country today."103 "Nor," he argues "can they effectively claim that it represents the better view,"104 Phillips argues that the Restatement's distinction between intended and unintended design flaws is fanciful; that the three kinds of defects exclusively recognized in the Restatement—manufacturing, design, and warning defects—do not comprise the entire universe of inadequacies for which courts impose strict liability; and that the Restatement disingenuously grants drugs and medical devices immunity from products liability law by creating a standard that no real world plaintiff can meet. Phillips, who is the leading contemporary advocate of the consumer expectations test, explains the benefits of consumer expectation and how he believes it should be applied in the field of generic liabil-

102. Id. at 142.
103. Id. at 149 (citing studies by Howard C. Klemme, Frank J. Vandall, and John F. Vargo).
104. Id.
ity. His article, therefore, will be of particular interest to lawyers and judges in jurisdictions employing the consumer expectation test.

William Powers, Jr. (*Is There a Doctrinal Answer to the Question of Generic Liability?*) has written a short but powerful piece. Can a court "render a legitimate decision either for or against generic liability?"\(^{105}\) (i.e., is there a sound doctrinal foundation for either result?) he asks. Powers sees generic liability as a struggle between utilitarianism and the ideology of freedom and consent. Utilitarianism finds its expression in tort law, and in the risk-utility test in particular, while the ideology of freedom and consent is secured by contract law. These competing principles "occur at the very foundation of legal discourse,"\(^{106}\) Powers writes. Is there a normative theory that provides a compelling answer as to which value should trump the other in the context of generic products issues? Powers explains why there is not—why, for example, analyses based in economics or in various conceptions of justice will not do. "Sometimes we just have to choose," he concludes.\(^{107}\) Powers, however, helps us better understand what we are choosing.

In the tradition of Jonathan Swift, Ellen Wertheimer (*Unavoidably Unsafe Products: A Modest Proposal*) makes a modest proposal that is not so modest. Strict products liability should be strict liability—which means, she argues, that strict liability should attach to unavoidably dangerous products regardless of whether they fail a risk-utility test. Indeed, Wertheimer contends that the very reason that products such as vaccines or ladders pass a risk-utility (i.e., that society-at-large benefits from their use) warrants shifting the cost of injuries from individuals on whom they randomly fall to everyone who benefits from the product.

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106. *Id.* at 182.
107. *Id.* at 188.