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THE UNREASONABLY UNSAFE PRODUCT AND STRICT LIABILITY

JERRY J. PHILLIPS*

INTRODUCTION

The American Law Institute is currently considering a revision of the law of products liability, the Restatement (Third) of Torts: Products Liability (hereinafter, the Restatement (Third))\(^1\), and especially a revision of the strict liability provision of the Restatement (Second) of Torts: Products Liability (hereinafter, the Restatement (Second) section 402A), which is based on consumer expectations as the standard of liability. The Reporters believe that consumer expectations as a test of liability is too vague and open-ended, and that it has bred confusion in the courts. They also think that the scope of liability needs to be sharply restricted.

The consumer expectations test as a unitary basis of liability basically looks to the question of whether a product is unreasonably unsafe—without more. Such a standard, the Reporters believe, would result in category, generic, or per se liability—all very bad things, according to the Reporters. In their opinion, this "subjective" test gives too much discretion to the factfinder to make policy decisions that should be reserved exclusively for the legislature.

The Reporters would divide product defects into three discrete categories: (1) manufacturing flaws, (2) design defects, and (3) inadequate warnings.\(^2\) In a separate provision, they provide for commercial-distributor liability for product misrepresentation.\(^3\) They insist that these categories are mutually exclusive.

The Reporters would retain strict liability for manufacturing flaws and misrepresentation. But for failure-to-warn and design de-

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1. The versions of the proposed RESTATEMENT relied on in this Article are Tentative Draft No. 2 (March 13, 1995) and Preliminary Draft No. 3 (May 18, 1995). A more recent Council Draft No. 3 (November 15, 1995) makes no significant changes relating to the matters discussed in this Article. Nor does the Proposed Final Draft (Preliminary Version) (October 18, 1996).


fects, they place the standard of liability squarely in negligence. A product is defective in design only when the "foreseeable risks of harm" of a product "could have been reduced or avoided" by the seller's adoption of a "reasonable alternative design" at the time of sale or distribution. A product is defective because of inadequate warnings only when the "foreseeable risks of harm" could have been reduced or avoided by the seller's provision of "reasonable instructions or warnings" at the time of sale or distribution. These negligence standards for design and warning liability sit ill with the inclusion of nonmanufacturing sellers within the definition of potential product defendants.

Thus, there are three features that stand out in the Reporters' proposals for the Restatement (Third): (1) consumer expectations should be abandoned as the basic test for determining product defectiveness in design and warning; (2) there should be no strict liability for design or warning; and (3) the general test for determining design defectiveness requires the plaintiff to prove the availability of a "reasonable alternative design" at the time of sale or distribution of the product.

The eye of the controversy centers on design liability, where most of modern products litigation is perceived to be focused. The Reporters propose a negligence standard, with the burden on the plaintiff to prove a reasonable alternative design, in order to recover for design defectiveness. This standard considerably tightens the standard of recovery against the plaintiff and in favor of the defendant.

Much has been written about whether the Reporters' proposed design standards represent the majority view in this country. It is probably fair to say that they do not. But neither did the Restatement (Second)'s section 402A represent the majority view when it was adopted in 1965. The Reporters were not then trying to restate the law, but to direct it in the way they thought it should go. The Reporters are now working towards the same goal. The fundamental issue is not whether the Reporters are accurately restating the law in this case, but whether they are trying to steer the law in the right direction. The proposal fails on this fundamental issue.

5. Id. § 2(c).
6. See id. § 5.
7. Id. § 2(b).
8. See id.
The Reporters are trying to tighten and narrowly define products liability, with a distinctive pro-defense bias applied in the process. Products law, and tort law in general, do not in fact presently reflect such a straitjacket approach, nor should they. The common law in this area is a fact-sensitive, flexible, evolving system that attempts to reflect the complexities of real life. The law should not be restricted by theories that do not reflect reality.

I. DESIGN DEFECT AS A SEPARATE CATEGORY

A. Category Overlap-Manufacturing Flaws

While it is true that courts often pigeon-hole product inadequacies into discrete categories of manufacturing, design, warning, and misrepresentation flaws, these categories are not discretely defined in practice. A distinct-category analysis is artificial, and contrary to the fact-specific approach of tort law.

The Reporters readily concede that liability should be imposed for manufacturing defects “even though all possible care was exercised in the preparation and marketing of the product.” The plaintiff need not prove that a safer preparation and marketing process was possible, and indeed the defendant cannot exonerate itself by showing that such a safer process was impossible.

Most people think the difference between a manufacturing and a design flaw is readily determinable—in much the same way, presumably, as Justice Potter Stewart thought hard-core and soft-core pornography could be readily distinguished. The person on the street would say the manufacturing defect is a random flaw—departing from the manufacturer’s “intended design”, as the Reporters say—while the design flaw affects a whole line of products.

But what is a “whole line” of products? Is it a single batch? Suppose the manufacturer changes her design after an initial production

10. See infra Part II.
11. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (Tentative Draft No. 2, 1995). This is the majority rule. See, e.g., Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3d Cir. 1967). Some courts might make an exception for prescription drugs, see RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1977), or for products that meet the so-called state of the art, see TENN. CODE ANN. § 29-28-105 (1980). The proposed Restatement (Third) makes no such exceptions, however, in the case of manufacturing flaws. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2, 8 (Tentative Draft No. 2, 1995).
of say six or sixteen, or sixty products. Are the before-change products a separate design?

The quantity of defective products produced cannot be the key to the distinction between manufacturing and design flaws, although the Reporters seem to suggest that this is the critical distinction. The implications of design defectiveness are much more far-reaching for the manufacturer; but then, the implications are much more far-reaching for the consumer as well.

The Reporters say that a manufacturing defect is one that departs from the product’s "intended design." They pick up on this idea in section 3, where they state that a product defect may be inferred "without proof of the specific nature of the defect" when the harm is "of a kind that ordinarily would occur only as the result of [a] product defect." In comment b to section 3 they state that the section will "most often apply to manufacturing defects," although "occasionally a product design causes the product to malfunction in a manner identical to that which would ordinarily be caused by a manufacturing defect." Thus, they say, "an aircraft may inadvertently be designed in such a way that, while flying within its intended performance parameters, the wings suddenly and unexpectedly fall off," causing injury. In such a case, "it is not necessary for the plaintiff to prove with precision whether the failure resulted from a manufacturing defect or from a fatal shortcoming in the design of the product."

The relevance of the distinction between an intended and an inadvertent design flaw is one of the most esoteric concepts that the Reporters propose. The distinction obviously is intended to have far-reaching ramifications, since an unintended design flaw is treated like a manufacturing defect: no negligence need be proven, and no alternative, safer process need be shown. In the case of the intended design, however, the plaintiff, in order to recover, must show that the defendant was negligent in failing to adopt a reasonable, alternative, and safer design.

16. Id. § 3.
17. Id. § 3 cmt. b, at 128.
18. Id.
19. Id. at 129.
As stated by Professor Henderson:

Inadvertent design errors are similar to manufacturing flaws in several respects. For one thing, both design errors and flaws are unintended. If the design errors or flaws were discovered, the manufacturer would presumably not market the particular products involved. Moreover, both manufacturing flaws and inadvertent design errors tend to defeat the very purposes for which the products are produced and marketed. Just as a hairline flaw in a soda bottle causes it to explode during intended use, rendering it useless as a container as well as physically dangerous, so the inadvertent design error of employing glass of insufficient thickness or strength to withstand intended use produces the same unhappy result. And inadvertent design errors share with manufacturing flaws the tendency to be hidden from the user or consumer. Finally, neither flaws nor inadvertent design errors are amenable to being made the subject of effective warnings in the marketing of the products.\footnote{James A. Henderson, Jr., Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1548-49 (1973). The suggestion that inadvertent design defects occur only "occasionally" is belied by the variety of inadvertent design cases listed by Professor Henderson. See id. at 1550-51 nn. 73-89, 1564 n. 139.}

The fanciful distinction between intended and unintended design flaws is hard to grasp under the best of circumstances. Should a manufacturer be held liable if it inadvertently designs a soda bottle with "glass of insufficient thickness or strength to withstand intended use," but be relieved of liability if he intentionally chooses such glass? One would think that not only would the manufacturer be liable for compensatory damages in the case of such an intentional choice, but for punitive damages as well.\footnote{See, e.g., Gillham v. Admiral Corp., 523 F.2d 102, 107-09 (6th Cir. 1975).}

Suppose a manufacturer makes a product held together by six screws, and then on an experimental basis begins making one fourth of his products with only five screws. Assume that six screws are adequate, but that five are inadequate, to hold the product together. Assume further that production managers inadvertently increase the five-screw line from one fourth to one third of total production. The plaintiff is injured by a five-screw product that falls apart. Should it make any difference whatsoever whether the injuring product was part of the original experimental production, or part of the inadvertent increase?

her husband died from smoking the defendant’s cigarettes containing pesticides. The court dismissed the case because the plaintiff alleged that all, rather than a random portion, of the defendant’s products contained pesticides. The plaintiff was “essentially” claiming that cigarettes generically are defective. Under Ohio’s tort “reform” statute, the plaintiff could recover only if she showed that the defendant’s allegedly defective product deviated in production from similar units produced by the defendant.

Conceding that most of the time most people can tell the difference between a manufacturing and a design flaw based on regularity of recurrence, one must still confront the fundamental question of whether the distinction makes any difference from a policy perspective. Given the policy reasons put forth by the Reporters for imposing strict liability in the case of production defects, there is no justifiable basis for the distinction. As the Reporters state in comment a to section 2 of the proposed Restatement (Third):

The rule for manufacturing defects stated in § 2(a) imposes liability whether or not the manufacturer’s quality control efforts satisfy standards of reasonableness. Strict liability without fault in this context is generally believed to foster several objectives. On the premise that tort law serves the instrumental function of creating safety initiatives, imposing strict liability on manufacturers for harm caused by manufacturing defects is thought to encourage greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility. Some courts and commentators also have said that strict liability discourages the consumption of defective products by causing the purchase prices of products to reflect, more than would a rule of negligence, the costs of defects. And by eliminating the issue of manufacturer fault from plaintiff’s case, strict liability is thought to reduce the transaction costs involved in litigating that issue.

Several important fairness concerns are also believed to support manufacturer’s liability for manufacturing defects even if the plaintiff is unable to show that the manufacturer’s quality control fails to meet risk-utility norms. In some cases manufacturing defects are in fact caused by manufacturer negligence but plaintiff’s will have difficulty proving it. Strict liability therefore performs a function similar to the concept of res ipsa loquitur, allowing deserv-

24. Id.
25. Id. at 230.
26. See id.
27. But an exception to the rule may undermine the rule itself. Thus, for example, the unexplainable antinomy may undermine one’s faith in the ultimate triumph of logic. See Jerry J. Phillips, Law as Ornamentation, 10 T.M. COOLEY L. REV. 499, 507-09 (1993).
ing plaintiffs to succeed notwithstanding what would otherwise be
difficult or insuperable problems of proof. Flawed products are also
said to disappoint reasonable expectations as to product perform-
ance. Because manufacturers invest in quality control at con-
sciously chosen levels, their knowledge that a predictable number of
flawed products will enter the marketplace entails an element of
deliberation about the amount of injury that will result from their
activity. Finally, many believe that consumers who benefit from
products without suffering harm should share, through increases in
prices charged for those products, the burden of unavoidable injury
costs that result from manufacturing defects.

An often-cited rationale for holding wholesalers and retailers
strictly liable for harm caused by manufacturing defects is that, as
between them and innocent victims who suffer harm because of de-
fective products, the product sellers as business entities are in a bet-
ter position than are individual users and consumers to insure
against such losses. In most instances, wholesalers and retailers will
be able to pass liability costs up the chain of product distribution to
the manufacturer. When joining the manufacturer in the tort action
presents the plaintiff with procedural difficulties, local retailers can
pay damages to the victims and then seek indemnity from manufac-
turers. Finally, holding retailers and wholesalers strictly liable cre-
ates incentives for them to deal only with reputable, financially
responsible manufacturers and distributors, thereby helping to pro-
tect the interests of users and consumers. 28

If one changes the phrase “manufacturing defects” to “design defects”
in this comment, the policy rationales apply with equal force to design
defects.

In the 1918 North Carolina case of Grant v. Graham Chero-Cola
Bottling Co., the plaintiff was injured by an exploding bottle. 29 The
defendant bottler offered proof that it followed the industry’s bottle
production standard. 30 This proof was considered irrelevant by the
judge, particularly because the standard could be characterized as
“reckless,” or unmindful of possible precautions such as the use of
wicker coverings or thicker bottles. 31 “‘Safety first’ for the public,”
the court said, and continued:

[I]f these goods are so inherently dangerous from their frequent ex-
plosion and liability to cause damage, as by putting out the eye of
the plaintiff, that they cannot be made safe, then placing them upon
the market is indictable [and] makes the manufacturers and all ven-
dors liable to actions for any damage accruing. 32

28. Restatement (Third) of Torts: Products Liability § 2 cmt. a, at 13-14 (Tentative
29. 97 S.E. 27, 27 (N.C. 1918).
30. See id. at 28.
31. See id. at 28-29. Today plastic containers might be required.
32. Id. at 29 (citing Ward v. Sea Food Co., 87 S.E. 958, 958 (N.C. 1916)).
The court did not concern itself with whether the defect was one of manufacture or of design. It was not concerned with whether the defendant's conduct was reckless or inadvertent. What was essential to the court was whether the incident was "of a kind that ordinarily would occur only as a result of [a] product defect." The court specifically held that the availability of a safer product was immaterial. The central consideration was that the product was "inherently dangerous," or unreasonably unsafe as we would say today. One may call it a generic defect, a category defect, or whatever one chooses. The product, however described, was defective.

B. Failure-to-Warn

Many people decry the excessive use of warning claims in products liability. Professor Carl Bogus has persuasively argued that failure to warn has been used, for example, in asbestos litigation as a guise for generic defect claims, where liability is based on risk outweighing utility, without more. Whatever the problems associated with products claims based on failure-to-warn—in terms of proof of causation and so forth—it is fair to say that warning liability is here to stay. These claims are not limited to the situation where the product is properly designed but contains a latent danger, such as in the case of poisons. Warning claims are also commonly asserted in tandem with a design defect claim.

Indeed, warning claims have much in common with design claims; much like manufacturing-design claims, warning-design claims occasionally overlap. A backup signal on heavy equipment, for example, serves as a warning although it requires a design or engineering alteration of the product to be implemented.Warnings are supposed to enable the consumer to decide whether or how to use a product, while design changes are supposed to avert the danger altogether without

33. See Restatement (Third) of Torts: Products Liability § 3(a) (Tentative Draft No. 3, 1996).
34. See Grant, 97 S.E. at 28-29.
35. Id. at 29.
36. Professors Henderson and Twerski, Reporters for the proposed Restatement (Third), seem to think terminology in this regard is very important. See James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263, 1298 (1991). The essential question, however, is whether a product is unacceptable, and unacceptability is defined in a variety of ways for purposes of product liability.
the intervention of the consumer’s will. This distinction, however, is misleading, since many safety guards are design devices that require the consumer’s choice in use of the device. Conversely, a warning may be so strong (e.g., a rat poison that induces vomiting in humans as a cathartic if ingested) as to approach a design change which bars access to dangerous exposure.

As with manufacturing and design defects, most people probably think they can distinguish between design and warning claims in general. Because of the interrelation of design and warning defects, however, and because such claims are often brought in tandem, it is useful to compare them.

Warning claims typically do not require expert testimony to establish a warning’s necessity, a warning’s inefficacy, or an injury’s causation, while expert testimony is usually required to establish design defectiveness. More important for purposes of this analysis, in the case of warning claims, courts typically do not require the plaintiff to introduce evidence as to the language of a better warning. The plaintiff must only show that no warning was given and that one was needed, or that the warning given was inadequate; the jury can then infer that a better warning would have averted the plaintiff’s harm without evidence as to exactly what would be a better warning.

The alternative-warning issue is well presented in Ayers v. Johnson & Johnson Baby Products, Co., where a fifteen-month-old child aspirated the defendant’s baby oil, which caused severe brain and locomotor damage. The child’s mother testified that had she been warned of this grave danger, she would have kept the baby oil out of the child’s reach. She offered no evidence, however, as to the language of such a warning:

Johnson & Johnson contends that the Ayerses were required to prove the exact wording of a warning they allege would have been adequate to prevent the injury. This argument is based upon RCW 7.72.030(1)(b), which requires the trier of fact in a failure to warn case to consider whether “the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.” Johnson & Johnson argues that this statute requires a claimant in warnings cases to put before the jury “warnings or instructions which the claimant alleges would have been adequate.” Johnson & Johnson reasons that a jury cannot decide that a warning would have prevented an accident without knowing exactly what that warning is. . . .

40. See id. at 1340-41.
We reject Johnson & Johnson's argument and hold that the language of RCW 7.72.030(1)(b) does not require a claimant to establish the exact wording of the alternative warning. The statute's requirement that "the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate" is satisfied if the claimant specifies the substance of the warning. Here, the Ayerses contend that had they been warned of the dangers of aspirating baby oil, the accident would have been avoided. This suffices to indicate the nature of the warning the Ayerses allege Johnson & Johnson should have provided and therefore satisfies the requirement of RCW 7.72.030(1)(b). Moreover, requiring claimants in failure to warn cases to establish the exact wording of an alternative warning would impose too onerous a burden. The members of the jury might agree that a certain type of warning should have been provided, but they might not agree among themselves as to exactly how that warning should have been worded.\footnote{Id. at 1341-42.}

This aspect of Ayers closely parallels the theory of generic design claims. In these claims the plaintiff shows that the product was more dangerous than useful, without having to show in detail how the product could have acceptably been made less dangerous. Indeed, the members of the jury "might not agree among themselves" as to exactly how the product could have been made less dangerous:\footnote{Id. at 1342.} some may think by alternative design, some by a substitute product, some by warning, and others, as the court suggested in \textit{Chero-Cola},\footnote{Grant v. Chero-Cola Bottling Co., 97 S.E. 27, 29 (N.C. 1918).} by removal of the product from the market altogether.

Professor Bogus' astute observation that warning claims may sometimes serve as a guise for what are in reality generic defect claims can be viewed favorably rather than negatively.\footnote{See Bogus, \textit{supra} note 37, at 44-46.} In a generic defect case the jury, in finding for the plaintiff, is deciding that a product does not meet ordinary consumer expectations. A major part of those expectations is determined by product appearance, getup, presentation and marketing, as well as by customary standards of acceptability.\footnote{See Denny v. Ford Motor Co., \textit{infra} note 147 and accompanying text; see also Greenman v. Yuba Power Products, 377 P.2d 897, 901 (Cal. 1963).} What a product "says" to the ordinary consumer is intimately connected with statements—as well as the absence of statements or warnings—associated with the product.

Another close similarity between design and warning claims is that courts frequently couch both in negligence rather than in strict
liability terms. Using the date of manufacture as the benchmark for
determining design defectiveness, courts often say that the issue is
whether the product could properly have been designed more safely.
If so, then the product should have been, and the manufacturer’s fail-
ure to do so implies the absence of due care on its behalf.

Courts are probably more prone to frame warning claims, as com-
pared to design claims, in terms of negligence because courts have
difficulty conceptualizing a duty to warn about the unknown. This
conceptual block involves a misunderstanding of the nature of strict
liability, which assumes the possibility of infeasibility and eliminates
this consideration as an issue from the case for policy and procedural
reasons.  

Courts widely impose strict liability for manufacturing defects, whose similarity to design defects has already been considered. Courts also widely impose strict liability for misrepresentation, which permeates the law of products liability. The pressure toward strict liability exerted by manufacturing-defect and misrepresentation claims on design and warning claims may eventually enable the courts to understand and accept strict liability in assessing warning and de-
sign claims.

C. Misrepresentation

The Reporters, many courts, and some commentators persist in
asserting that products defects are of three kinds: manufacturing, de-
sign, and warning inadequacies. Why this assertion is made is un-
clear, except perhaps from habit or a tendency to imitate. Clearly,
however, a fourth and very significant category of product defective-
ness arises from misrepresentation.

Misrepresentation is the mirror image of failure-to-warn. Both
are based on inadequate written or oral communications and both
may require some degree of reliance by the consumer or another in
the chain of distribution. They curiously diverge, however, because

47. See supra note 11 and accompanying text.
49. See generally Marshall S. Shapo, A Representational Theory of Consumer Protection, 60
50. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 & § 1 Reporters’ Note,
at 7 (Tentative Draft No. 2, 1995).
51. See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 567-68 (3d Cir. 1990); RESTATEMENT
(SECOND) OF TORTS § 402B cmt. j (1965); U.C.C. § 2-313, cmts. 3 & 7, at 99, 100; Special Project,
Article Two Warranties in Commercial Transactions: An Update, 72 CORNELL L. REV. 1159, 1183
misrepresentation is widely viewed as the basis for a strict liability cause of action (although fault may also be alleged, if present, as an alternative basis of recovery), while a warning failure is widely described as exclusively fault-based. Why should this be? In what ways do the two differ so as to make such a major difference?

Warning defects generally involve a failure to communicate, or to communicate adequately, while misrepresentation involves an affirmative misstatement. The distinction more or less parallels that between errors of omission and of commission. There is, however, no such bright-line distinction. Similar to misrepresentations, inadequate warnings (as opposed to total failure-to-warn) involve an affirmative communication that is incomplete. Hauter v. Zogarts provides a good example of the symbiotic relationship between warning and misrepresentation.\(^\text{52}\) The Hauter defendant marketed a very dangerous “Golfing Gizmo,” designed to aid the user in learning to play golf.\(^\text{53}\) Plaintiff successfully asserted claims for breach of express warranty and innocent tortious misrepresentation based on the defendant’s promotional representation: “COMPLETELY SAFE BALL WILL NOT HIT PLAYER.”\(^\text{54}\) In fact, if the player failed to hit the ball squarely, as the plaintiff did, the club could become entangled in the elastic “Gizmo” and the attached golf ball could strike the player in the head with a disastrous bolo effect.\(^\text{55}\) The misrepresentation in Hauter consisted of an affirmative misstatement, but it was also an inadequate statement since it failed to warn of the bolo-effect risk. One could say that the statement overstated the product’s safety, but conversely one could just as well say it understated the risk.

There are numerous warnings cases where the defendant gives an affirmative, yet inadequate, warning. The inadequacy may result, for example, from failure to warn of potentially grave consequences of not heeding the warning, or for failing to warn of available antidotes or remedies if the warning is inadvertently ignored. The inadequate warning can be viewed as either an understatement of the risk or an overstatement of safety.

Thus, in Boyl v. California Chem. Co. the plaintiff was warned that defendant’s weed killer was highly toxic and that she should “wash thoroughly and destroy” the weed killer container after it was

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\(^{52}\) 534 P.2d 377 (Cal. 1975).

\(^{53}\) Id. at 379.

\(^{54}\) Id. at 381.

\(^{55}\) See id. at 379-80.
empty. She followed the warning, emptying the contents of the rinsed container onto the rough grass in her back yard. Five days later, while sunbathing in the area where she had poured the rinse water, she was badly burned from the residue of the weed killer still on the ground. The warning was inadequate because it failed to warn "of the stable quality and long-lasting contamination propensities of the sodium arsenite" contained in the weed killer. The warning also impliedly overstated the safety of the direction to "wash thoroughly and destroy" the container after completion of use.

The interrelation of product misrepresentation and failure-to-warn parallels that of negligent misrepresentation and nondisclosure in tort law generally. The Restatement (Second)’s section 552 describes a negligent misrepresentation as the supply of false information. Negligent nondisclosure is described in section 551(2)(b) as the failure to disclose matters necessary to prevent a “partial or ambiguous statement” from being misleading. The “uttering of a half truth” is a hybrid of misrepresentation and nondisclosure. Similarly, the inadequate product warning is a hybrid of misrepresentation, and vice versa.

Not only do product warning and misrepresentation claims overlap, but misrepresentation claims often overlap and undergird design claims as well. A claim for product misrepresentation often accompanies a claim for inadequate design. A misrepresentation may counteract a warning. Also, a misrepresentation may support a finding of foreseeable use. An express misrepresentation overlaps with the implied warranty of merchantability, as for example in section 2-314(2)(f) of the Uniform Commercial Code which provides that to be merchantable goods must “conform to the promises or affirmations of

57. See id. at 673.
58. See id.
59. Id.
60. Id. at 672. Arguably this statement was merely an instruction: “Directions and warnings are intended to serve different purposes. The former are designed to assure an effective use of the product; a warning, on the other hand, is intended to assure a safe use.” McCully v. Fuller Brush Co., 415 P.2d 7, 10 (Wash. 1966).
61. See Restatement (Second) of Torts § 552 cmt. a (1965).
62. Id. § 551(2)(b).
fact made on the container or label if any."67 Indeed, as Justice Traynor pointed out in Greenman v. Yuba Power Products, Inc., there is an implicit representation of safety from the mere presence of goods on the market.68

D. The Implications of Product Defect Overlap

The implications of product defect overlap are far-reaching. For one thing, the overlap indicates that proof of a product design defect cannot be neatly pigeon-holed so as to require proof of a "reasonable alternative design," as the Reporters would have it.69 The earlier discussion shows that, for proof of design defect, the section 2 alternative-design requirement and the section 3 ordinary-occurrence requirement of the proposed Restatement (Third) similarly cannot be neatly pigeon-holed.70

The design strictures of section 2 run afoul of negligence and implied warranty concepts. They do not take account of the widespread acknowledgment of risk-utility as a basis for defective design recovery, where an alternative design may be a relevant but not an essential element of proof. The strictures also greatly underplay the importance of consumer expectations for product defectiveness, including defective design. In section 6 the Reporters, contrary to developing law, would essentially eliminate design liability for prescription drugs and medical devices.71

Finally, and probably most disturbing, the proposed Restatement (Third) constitutes a major retreat from strict products liability, which has been the hallmark of the celebrated Restatement (Second) section 402A. The Reporters cannot validly claim that this retreat represents the majority view in this country today. Nor can they effectively claim that it represents the better view. Their position may be that strict liability is not practically workable, but the facts do not bear out this position. Strict liability is probably not well understood by courts, juries, and lawyers. But if it is a good and workable basis of recovery for unsafe products that cause injury—as history and reflection indi-

68. 377 P.2d 897, 901 (Cal. 1963).
69. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Tentative Draft No. 2, 1995).
70. See supra part I.A.
71. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6 (Tentative Draft No. 2, 1995).
cate it is—then the role of the American Law Institute should be to improve, not abandon, the concept of strict products liability.

II. NEGLIGENCE

Professor Oscar Gray was probably the first person to recognize the baleful implications of the alternative-safer-design formula of the proposed section 2(b) of Restatement (Third) as virtually the sole basis of recovery for defective product design. Under this rigid formula, he pointed out, without a "reasonable alternative design," product manufacturers would be able to negligently market products with impunity. Such a twist of interpretation under section 2(b) would constitute a major and far-reaching departure from long-accepted principles of negligence law in this country. Typically the negligence plaintiff only has to prove that the defendant acted without due care, and that such conduct proximately caused the plaintiff's injuries.

A products liability case illustrating this principle is McKee v. Brunswick Corp. There the plaintiffs were injured when their boat, which was manufactured and sold by the defendants, caught fire and exploded. The plaintiffs recovered by showing that the accident occurred because of defective ignition coils, which had been negligently installed "without testing or with inadequate testing." While the proof also indicated negligence in failing to install fuses in the ignition system (an arguably safer alternative design), this proof was not essential to the case. The principal proof was failure to adequately test.

The Reporters recognize negligent conduct as a sufficient basis of recovery in the proposed Restatement (Third) in at least two instances: (1) when there is a statutory violation, and (2) when a nonmanufacturing seller of a prescription drug or medical device "fails to exercise reasonable care" in the sale or distribution of the drug or device.

Concerned with the continued viability of a negligence cause of action without proof of a defect within the meaning of section 2, Councilman John P. Frank and Adviser Robert E. Keeton introduced

73. Id. at 1105.
74. 354 F.2d 577, 579 (7th Cir. 1965).
75. Id. at 582.
76. See id. at 582-83.
77. See id.
78. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 7 (Tentative Draft No. 2, 1995).
79. Id. § 8(e)(2).
at the annual meeting of the American Law Institute in May 1995 the following amendment to comment m of section 2, which the membership passed:

Product-related claims not based on defects at time of sale or distribution are beyond the scope of this Section and § 1. This Restatement covers several such topics, including liability based on misrepresentation (see § 16) and post-sale breach of duty (see §§ 17, 18 and 19). Claims based on allegations of negligent marketing of nondefective products are addressed by provisions of the Restatement of Torts, Second. See, e.g., § 291 (negligence generally) and § 390 (negligent entrustment of products to incompetent persons).\(^80\)

This comment may well not accomplish its purpose, however, because of the statements that only products claims "not based on defects at time of sale or distribution" and claims based on "negligent marketing of nondefective products" are beyond the scope of sections 1 and 2 of the proposed Restatement (Third).

For examples of claims "not based on defects at the time of sale or distribution," the proponents of the amendment cite sections 16-19 of the proposed Restatement (Third). Section 16 involves misrepresentation, a basis of recovery where the only necessary defective condition is the misrepresentation itself.\(^81\) Sections 17 and 18 deal with post-sale duties to warn and recall,\(^82\) respectively, where a defective condition of manufacture, warning or design (and perhaps also of misrepresentation)—either existing at the time of sale or arising post-sale—\(^83\)—is a predicate to recovery. Section 19 deals with successor corporation liability, which is predicated on the existence of a defect in a product when it is sold by the predecessor corporation.\(^84\) Thus, with the exception of section 16, which is based on misrepresentation and is sui generis, the cited sections deal with liability based on proof of defect. If that alleged defect is one of design, for example, then presumably the proof requirements of section 2(b) must be met, the hortatory

80. 72nd Annual Meeting, supra note 14, at 215-16 (comments of President Wright).
81. See Restatement (Third) of Torts: Products Liability § 16 (Preliminary Draft No. 3, 1995).
82. Section 18 imposes liability for failure to recall or repair a product "only when a duty to recall or repair is required by statute or regulation." See id. § 18. This is a restriction of existing law, where a common law duty to recall or repair may be imposed. See Balido v. Improved Mach., Inc., 105 Cal. Rptr. 890, 900-01 (Ct. App. 1972); Gracyalny v. Westinghouse Elec. Corp., 723 F.2d 1311, 1318 (7th Cir. 1983).
84. See id. § 19.
statement of the first sentence of the amendment—"not based on defects"—notwithstanding.

The critical portion, however, is the last part of the amendment which deals with "negligence" and "negligent entrustment"—sections 291 and 390, respectively, of the Restatement (Second).\textsuperscript{85} The amendment unequivocally states that these sections deal with the "negligent marketing of nondefective products."\textsuperscript{86} If the product is putatively defective, then the plaintiff may be put to her proof under section 2, regardless of whether negligent marketing or entrustment is alleged.\textsuperscript{87}

Negligent entrustment often involves nondefective products that are carelessly placed in the hands of an incompetent or ill-informed person. But negligent entrustment may also involve defective products. Let us assume, for example, that cigarettes are considered defective or unreasonably dangerous. One who sues another for negligently entrusting this product in the hands of a minor might be put to her proof of showing that the product was defective, and absent such proof the claim might fail.

Similarly, negligent marketing in general may or may not involve a defective product. In \textit{McKee v. Brunswick Corp.}, the ignition coil may have been negligently designed or manufactured.\textsuperscript{88} Would the plaintiff in such a case be put to the burden of showing that there was no design defect or manufacturing flaw before she could recover for "negligence generally"?

The proponents of the amendment contemplated that the plaintiff could elect to prove \textit{only} negligence, thus sidestepping section 2. Unfortunately, the amendment does not clearly support such a power of

\textsuperscript{85} Restatement (Second) of Torts §§ 291, 390 (1965).

\textsuperscript{86} 72nd Annual Meeting, \textit{supra} note 14, 215-16 (comments of President Wright) (emphasis added).

\textsuperscript{87} A similar problem may exist under § 3 of the proposed Restatement (Third). In order to recover under that section the harm must be the result of an incident "of a kind that ordinarily would occur only as a result of product defect." \textit{Restatement (Third) of Torts: Products Liability} § 3 (Tentative Draft No. 2, 1995) (emphasis added). Thus, the plaintiff may be required to prove both product defect within the meaning of section 2 \textit{and} ordinariness of the incident in order to recover under section 3.

Comment b to section 3 states that it is "not necessary for the plaintiff to prove with precision" whether the accident was caused by a manufacturing or a design defect, and that the plaintiff "need not specify the type of defect responsible for the product malfunction." \textit{Id.} § 3 cmt. b, at 128-29. But the illustrations to this comment, e.g., 1 and 6, indicate that the plaintiff will be required to show with precision the defects that may have existed, and will only be relieved of the burden of showing which defect was the precise cause where one of several defects may have existed. \textit{See id.} § 3 cmt. b, illus. 1, 6, at 129-30, 131. Thus, section 3 may not lighten the section 2 burden, just as the amendment to comment m of section 2 may not lighten the section 2 burden either.

\textsuperscript{88} 354 F.2d 577, 579 (7th Cir. 1975).
election, since its effect is triggered only when the claim is "not based on defects at time of sale or distribution," or when it is based on the "negligent marketing of nondefective products." 

The potential trap of this comment is illustrated by the abnormal danger case of Indiana Harbor Belt R.R. v. American Cyanamid Co. There the plaintiff recovered in strict liability for abnormally dangerous activity against the manufacturer and shipper of a flammable toxic liquid that leaked from a railway tank car, causing the plaintiff railroad to incur extensive cleanup costs. The court of appeals, per Judge Posner, reversed and remanded for a new trial on the issue of negligence, because the court found that negligence on the part of the defendant was likely present in the maintenance of the tank car. Courts and the Restatement (Second) recognize that strict liability for an abnormally dangerous activity can apply even though negligence is or may be present. But Judge Posner rejected this position. If the case has elements of negligence, he would put the plaintiff to her proof on the issue even though she might ultimately fail to establish negligence and thus lose the case.

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89. 72nd Annual Meeting, supra note 14, at 215-16 (comments of President Wright).
91. See id. at 315.
92. See Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174, 1179-80 (7th Cir. 1990). Judge Posner also made a risk-utility analysis of the classical economic variety:

The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest year for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation.

It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic. Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living.

Id. at 1180-81. Judge Posner jumps to the conclusion that liability would require relocation of the railyard, rather than using the traditional economic analysis that a manufacturer-shipper (not the railyard) should pay the costs of unreasonable dangers created by its activities. Sic utere tuo ut alienum non laedes is a maxim of fairness that is apparently inapplicable to economic analysis.

94. Compare Posner's position to the res ipsa loquitur doctrine, where some courts say if the plaintiff introduces specific acts of negligence, then the doctrine does not apply. See e.g., Widmyer v. Southeast Skyways, Inc., 584 P.2d 1, 11 (Alaska 1978). By analogy, here if the evidence supports an inference of a section 2 defect, then the amendment to comment m may not apply.
Similarly, a Posner-type of court might put the plaintiff to proof of defect under section 2 if the case includes a possible defect, even though the plaintiff alleged negligence as the basis of her claim. This result is particularly likely in view of the “not-based-on-defects” and “nondefective” language of the amendment to comment m of section 2. If the plaintiff failed to prove a section 2 defect, she would lose even though evidence of negligence preponderated.

For products liability cases, the importance of preserving a negligence claim without the necessity of proving a defect—particularly defective design—is apparent not only for the reasons presented by Professor Gray. Negligence uses a risk-utility balancing test presented in terms of fault which a jury is especially well-equipped to assess. Moreover, negligence is the basis of liability for the vast range of tort law, and products liability should not be treated differently from tort law in general when fault is present.

Negligence uses a generic risk-based approach to product defectiveness which may well be the most suitable analysis for products liability in general. That is, the jury decides that had the defendant acted with care, it would probably never have marketed the product in such a dangerous condition. If the defendant acts negligently, it should pay the cost of injuries resulting from its negligence. Those costs may result in a rise of price for the product, thus making the product non-competitive with similar or substitute products. That is how the marketplace works and how it should work.

Negligence law has been a crucible for the development of common law. That crucible should not be destroyed in the important area of products liability. The hallmark of negligence law is a balancing of risk against utility. If fault is removed as a critical factor of that test, then the inquiry becomes the essence of much of modern products liability law.

III. THE RISK-UTILITY TEST

The other major body of strict tort law in America, liability for abnormally dangerous activities, uses a risk-utility test to determine

95. 72nd Annual Meeting, supra note 14, at 215-16. Interestingly, the “nondefective” term is deleted from this comment as set forth in RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n, at 78-79 (Proposed Final Draft (Preliminary Version), 1995), but apparently with no intended change of meaning.

96. See supra note 72.
liability. See Restatement (Second) of Torts §§ 519-20 (1977); In re 101 California St. Bldg., No. 959316 (Cal. App. Dep't Super. Ct. 1995) (negligence and abnormal danger strict liability claims stated against manufacturer of assault weapon used in law office mass killing).


99. See Roach v. Kononen, 525 P.2d 125, 128-29 (Or. 1974) (citing Dean Wade, Strict Tort Liability of Manufacturing,., 19 Sw. L.J. 5 (1965); Dean Wade, On the Nature of Strict Tort Liabilities for Products, 44 Miss. L.J. 825 (1973)).

100. See Restatement (Third) of Torts: Products Liability § 2 cmt c, at 19-21 (Tentative Draft No. 2, 1995).

101. See id. § 2(c).

102. See id. § 2(b).

103. Id. § 2, cmt. e, at 25.
produce. It is unclear when a barrier to recovery under section 2(b) will be considered "artificial and unreasonable," and when it will not.

Richards v. Michelin Tire Co. provides an example of how onerous the proof of alternative design can be.\textsuperscript{104} The Richards court found that the plaintiff failed to present proof of a safer tire bead design, even though he presented evidence that other manufacturers had produced a stronger bead that would have prevented a tire explosion in a mismatched mounting of the sort involved in the case.\textsuperscript{105} The plaintiff failed, the court wrote, to show "that a tire utilizing a stronger bead wire that can better withstand overinflation when mismatched is of greater overall safety than the Michelin tire in question."\textsuperscript{106}

The Reporters state in their Notes to section 2 of the proposed Restatement (Third): "Very substantial authority supports the proposition that plaintiff must establish a reasonable alternative design in order for a product to be adjudged defective in design."\textsuperscript{107} Professor Howard Klemme's preliminary research indicates that this statement is not correct.\textsuperscript{108} Thorough analyses of the case law in articles by Professor Frank Vandall and by Attorney John Vargo confirm Professor Klemme's findings.\textsuperscript{109}

The courts tend to use a risk-benefit analysis without requiring proof of an alternative design. Such proof is permissible, by either side, but not required.\textsuperscript{110} Consumer expectations considerations blend into this analysis.\textsuperscript{111}

A good example of risk-benefit analysis is LaGorga v. Kroger Co.,\textsuperscript{112} where the plaintiff, a small child, was severely burned when his cotton fabric jacket was exposed to a spark from a metal trash barrel. The jacket burned rapidly, and the fire could virtually not be extin-

\textsuperscript{104} 21 F.3d 1048 (11th Cir. 1994).
\textsuperscript{105} See id. at 1056-57.
\textsuperscript{106} Id. at 1056 (emphasis added). See also Reporter Henderson's sharp criticism of the plaintiff's design evidence based on "theoretical alternatives." Henderson, \textit{supra} note 20 at 1568-71.
\textsuperscript{107} \textit{Restatement (Third) of Torts: Products Liability} § 2 cmt. c, Reporters' Note, at 50 (Tentative Draft No. 2, 1995).
\textsuperscript{110} See, e.g., Vandall, \textit{supra} note 109, at 1410, 1411, 1412, 1413-18.
\textsuperscript{111} See, e.g., Vargo, \textit{supra} note 109, at 944, 945, 947.
\textsuperscript{112} 275 F. Supp. 373, 377-78 (W.D. Pa. 1967).
While there was "evidence that 80%-90% of cotton fabric is treated with flame retardant substances, but the cotton outer shell of this jacket was not so treated," there is no indication that this evidence was critical to sustaining the plaintiff's verdict. The court said: "We think it is no answer to say that the burning characteristics of [plaintiff's] jacket were generic to all other jackets made for children by various sellers. . . . It is established in Pennsylvania that a manufacturer has a duty to make a product 'safe for ordinary, foreseeable circumstances.'"

_Hauter v. Zogarts_, considered previously, is another such risk-utility suit. Although the case was primarily tried on a misrepresentation claim, the court also found that defendant's "Golfing Gizmo" was not reasonably safe under a strict liability analysis. "At trial, plaintiff demonstrated how a person using the Gizmo under normal conditions is likely to injure himself by entangling his club in the cord attached to the ball, a significant danger not inherent in the game of golf." There was no discussion as to whether the golf-training device involved in the case could have been made safer by a reasonable alternative design. The product was simply defective because it was unreasonably dangerous for its intended or foreseeable use.

The Reporters provide a very small window for pure risk-benefit analysis of design defectiveness in comment d to section 2:

*d. Design defects: possibility of manifestly unreasonable design.*

Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of § 2(b). Toy guns that do not produce injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if consideration is limited to toy guns that are capable of causing injury, then no reasonable alternative will, by hypothesis, be available. In that instance,
the design feature that defines which alternatives are relevant—the capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, it could conclude that liability should attach without proof of a reasonable alternative design. The court would condemn the product design as defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product.\textsuperscript{119}

The comment is restricted to products with an "extremely high degree of danger" and with "negligible utility."\textsuperscript{120} The only example given is a "toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children."\textsuperscript{121} Such a toy gun is hardly a mainline product. Even so, the Reporters suggest reasonable alternative designs for this product, namely, "guns that project ping pong balls, soft gelatin pellets, or water."\textsuperscript{122} The Reporters are not content to leave even such a dangerous product with negligible utility to a simple risk-benefit analysis.

Comment d does not represent the way in which the risk-utility test is actually applied by the courts. The test is applied to mainline products, with the issue being whether risk or utility preponderates—not whether the risk greatly outweighs the benefit. A good example of the proper application of the risk-benefit test is found in \textit{Bowman v. General Motors Corp.}\textsuperscript{123} The plaintiff claimed that the gasoline tank on defendant's Toronado automobile was unreasonably designed, exposing the operator to burn injuries in the event of a rear-end collision.\textsuperscript{124} In sustaining the plaintiff's verdict, the court rejected Reporter Henderson's conclusion that the determination of concious design defectiveness is beyond the scope of juries.\textsuperscript{125}

The jury was instructed in arriving at its verdict to consider the likelihood and seriousness of potential injury, the ability of the manufacturer "to eliminate any unsafe characteristics" of the vehicle "without impairing the usefulness or significantly increasing its cost," and to "consider whether the vehicle was dangerous to an extent beyond that

\textsuperscript{119} \textit{Restatement (Third) of Torts: Products Liability § 2 cmt. d, at 21-22 (Tentative Draft No. 2, 1995).}
\textsuperscript{120} \textit{Id. at 22.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{124} \textit{See id. at 235.}
\textsuperscript{125} \textit{See id. at 241-42.}
which would be contemplated or expected by the ordinary user."¹²⁶

The court instructed the jury that in applying these factors it could find:

Some cut one way—toward unreasonable danger—and some the other—away from that conclusion. It is for you, the jury, to evaluate them in light of the facts as you find them in the case, and to determine where the correct balance lies. You may of course find there to be other factors which appear from the evidence to shed light on whether the Toronado's design was defective, and if so you may consider them.¹²⁷

The court recognized the similarity between negligence and strict products liability for purposes of determining risk-utility. But, the court said:

We believe... that our charge is not a negligence charge which focuses upon fault, but a products liability charge which focuses on the product. We concede that the ratio decidendi of a case thus submitted to the jury may be similar to that of the same case submitted on negligence theory, and that it may be forcefully argued that some of the ingredients in the balancing formula are akin to considerations involved in negligence cases. On the other hand, let us posit a conscious design choice § 402A case where the manufacturer: (1) after exhaustive study and testing has adopted a given design which is slightly less safe than an alternative design but one which has slightly greater utility and can be sold at a slightly lower price; and (2) after considering the countervailing societal values has concluded that the public, in inflationary times, is concerned about "saving a dollar" and about a more useful product, and would prefer the slightly less safe product in return for the price and utility advantage. In a products liability lawsuit brought by someone injured by the product we believe it appropriate for a jury to apply the unreasonably dangerous risk-utility balancing formula which we have explicated to determine the presence or absence of liability.¹²⁸

The Reporters' concern with imposing product design liability generally on the basis of a risk-utility analysis, without requiring the plaintiff to prove a reasonable alternative design, is stated in comment c to section 2:

The requirement in § 2(b) 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. Thus common and widely distributed products such as alcoholic beverages, tobacco, firearms, and above-ground swimming pools may be found to be defective only upon proof of the requisite conditions in § 2(a), § 2(b), or

¹²⁶. Id. at 244-45.
¹²⁷. Id. at 244 (emphasis added).
¹²⁸. Id. at 245 (emphasis added).
§ 2(c). If such products are defectively manufactured or sold without reasonable warnings as to their danger when such warnings are appropriate, or if reasonable alternative designs could have been adopted, then liability under §§ 1 and 2 may attach. Absent proof of defect under those Sections, however, courts do not impose liability based on a conclusion that an entire product category should not have been distributed in the first instance. That is, courts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited.¹²⁹

What the Reporters fail to point out is that such category or generic product liability has been imposed by several courts,¹³⁰ although reversed by the intense lobbying of tort-reform legislation proponents.¹³¹

The continued treatment of cigarettes in this country as nondefective may be coming to an end due to common law litigation.¹³² Both handguns and alcoholic beverages may someday suffer the same fate. It should be remembered that liability for such products does not

¹³¹. See Bogus, supra note 37, at 38, 56, 63-64.
¹³². After dismissal of the federal smoking-addiction class action in Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996), the Civil Justice Digest reported:
[A] group of 60 plaintiff lawyers filed suits in New York State court seeking class action certification for all nicotine-addicted smokers in the state and damages for all money expended by the plaintiffs either to purchase cigarettes or to try to overcome their addiction. The cases name tobacco companies individually and rely solely on New York law. The suits allege fraud by the companies in concealing the addictive power of nicotine, false advertising, violations of the state's consumer protection laws, and conspiracy in an attempt to overcome weaknesses that led to the Castano ruling. Cases seeking class action certification are pending in state courts in at least 11 other states, including Louisiana, Maryland, and New Mexico, and the District of Columbia.


The National Law Journal reported:
A lawsuit filed by flight attendants claiming they were sickened by secondhand smoke can go forward as a national class action, the 3d U.S. Circuit Court of Appeals ruled Jan. 3. Miami lawyer Stanley Rosenblatt first filed the complaint in 1991 with 30 non-smoking flight attendants. Accused of fraud, negligence, conspiracy and misrepresentation are American Brands, American Tobacco, Brooke Group, Loews, Liggett Group, Lorillard, R.J. Reynolds and Philip Morris. The companies said they plan to seek a rehearing.


According to the Civil Justice Digest, supra at 6, sixteen states have sued “the tobacco industry to recoup Medicaid costs.” Los Angeles and San Fransisco “appear to be first municipalities to do so.” Id. at 7.
mean that a product category should be "prohibited," as the Reporters suggest, but merely that a product and its users should bear the cost of the unreasonable dangers the product imposes on society.

It is a lame excuse to say that issues of social desirability or undesirability of a product are better left to the legislatures. Social policy decisions of major significance are regularly made by juries, not just in products liability litigation but across the spectrum of social concerns. The legislatures have reversed some of these decisions, and may reverse more. But when such reversals come as a result of intense, big-business, political lobbying, the propriety of such reversals is subject to serious question.

Another area in which the Reporters would move dramatically to restrict risk-benefit analysis in design litigation is that of prescription drugs and medical devices. Section 8(c) of the proposed Restatement (Third) states:

A prescription drug or medical device is not reasonably safe due to defective design when the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits so that no reasonable health care provider, knowing of such foreseeable risks and therapeutic benefits, would prescribe the drug or medical device for any class of patients.

This section would impose a well-nigh impossible standard for the plaintiff to meet, since, presumably, to defeat a prescription drug or medical device design claim a defendant would only need to produce a single health care provider to testify that he would prescribe the drug or medical device for a "class of patients" while knowing of its "foreseeable risks and therapeutic benefits."

Presumably, the issue of

135. 72nd Annual Meeting, supra note 14, at 277.

As one commentator has noted:

Extension of this broad immunity to medical devices is enigmatic. The Reporters' comments proclaim that both medical devices and prescription drugs are currently judged by negligence standards, yet they cite only eight decisions from six jurisdictions as authority—clearly not a majority position. Given the ubiquity of medical devices in current products liability litigation, the proposed Restatement (Third) would effectively squelch the chances of recovery for those harmed by medical devices such as silicone breast implants, the Bjork-Shiley heart valve, and the Dalkon Shield. More careful consideration is required before medical devices are added to a list of immunized product manufacturers . . .

Along the same lines, one must wonder why the liability immunization line is drawn at prescription drugs. If the argument is based upon unforeseeable consequences of interaction with the human body, is it not true that over-the-counter (OTC) drugs may have equally unforeseeable hazards? Indeed, the line between many pre-
design defectiveness could never arise in this context until the dangers were actually known by the health care provider (not the manufacturer), since until such time the type of evidence that would make the issue litigable would not be available. This section presents the spectrum of negligence, or even fraud, on the part of the manufacturer with no potential of design liability because the danger is unknown to health care providers.

The Reporters’ Notes to section 8(c) recognize that “in recent years many courts have imposed limited judicial review [of the reasonableness of design] on this special category of products,” but they choose to disregard this developing trend. The rationale given is that section 8(c) “shows appropriate deference to the regulated market, where the FDA and learned intermediaries select which drugs should


At the annual meeting of the American Law Institute, May 18, 1995, Professor Howard A. Latin moved that the “no reasonable health care provider” language of § 8(c) be changed to read “reasonable health care providers... would not.” 72nd Annual Meeting, supra note 14, at 276. Mr. Karl E. Seib, Jr. objected because the amendment would “allow a jury to overrule the Food and Drug Administration merely by proving that more than one reasonable health care provider would not prescribe the drug for any class of patients.” Id. Professor Richard N. Pearson also objected on the ground that there “might be a circumstance where reasonable health care providers would disagree—that is, some would not prescribe, some would prescribe—and under this version that would be enough.” Id. Professor Latin replied: “All I wanted to do was make clear that it should be an objective standard, not an individual subjective standard. I didn’t intend to change the general drift, so—” Id. at 277.

Then the following colloquy took place between the Director and Professor Latin:

DIRECTOR HAZARD: Why don’t we treat that as a suggestion for the Reporters. They understand the substance of your point, Mr. Latin.

PROFESSOR LATIN: Fine.

DIRECTOR HAZARD: They understand the problem of locution, and I direct the Reporters to reexamine this language with both of those considerations in mind, and I think that will take care of that part.

PROFESSOR LATIN: It will for me.

SECOND VICE PRESIDENT TRAYNOR: Then you would not require a vote on your proposal?

PROFESSOR LATIN: Not on that phrase, no, as long as they are willing to rethink the language, and then there will be a later opportunity to discuss it.

Id. Thus a matter of major consequence was apparently reduced to a “problem of locution.”

be available.”137 This rationale gives much greater credence to safety regulatory effect provided by the FDA and learned intermediaries than many persons would be willing to give, and shows much more reliance on those entities than is justified by existing and developing law.

Section 8(c) is a risk-benefit analysis without the requirement of a reasonable alternative design, but the analysis is tilted heavily in favor of the manufacturer. The Reporters have stated their reason for this skewing of the playing field:

Unlike most products, which confer essentially the same benefits to all users, prescription drugs and medical devices have the capacity to do great harm or great good depending on the patient. Accordingly, liability will attach only if the design cannot be justified for any class of patients.138

This statement is questionable on a couple of grounds. First, most products do not confer “essentially the same benefits to all users,” nor do they confer the same harms. Under traditional risk-benefit analysis, one looks to the overall risk and benefit, and not to the risk or benefit to subcategories of society. Second, by using a reasonable alternative design approach—which is curiously rejected here—a product that is useful to a subclass of patients may be of even greater use to that class if redesigned. One can only speculate as to whether there are other reasons why the Reporters believe that prescription drug and medical device manufacturers should receive most favored treatment in design litigation.

The risk-benefit test as applied to products generally has its drawbacks. As Professor Marshall Shapo has well pointed out, the average jury cannot apply the test with any identifiable degree of precision (which is presumably a desideratum of the Reporters), because the jury has no meaningful way of assessing the amount of potential fu-

137. Id. at 227. Compare id. § 7(b), where product compliance with a statute or regulation is “some evidence” of nondefectiveness “but does not necessarily preclude as a matter of law a finding of product defect.” A Reporters’ Note to this section states:

The overwhelming majority of jurisdictions hold that compliance with product safety regulation is relevant and admissible on the question of defectiveness, but is not necessarily controlling.

Id. § 7(b), Reporters’ Note, at 205.

The Reporters cite cases involving FDA compliance in support of this proposition. See id. at 205-06; cf. Hill v. Searle Labs, 884 F.2d 1064, 1071 (8th Cir. 1989) (“[W]e think that in the case of IUDs, prescribing physicians do not make an individualized medical judgment.”). The learned intermediary doctrine may have outlived its usefulness. See Nancy Plant, The Learned Intermediary Doctrine: Some New Medicine For an Old Ailment, 81 IOWA L. REV. 1007 (1997).

ture risks from a product. Also, even if those risks could be fairly accurately estimated, the test has an ugly aspect of appearing to weigh economic costs against human lives. It is for these reasons that the consumer expectations test, correctly applied, fills a significant void left by risk-utility analysis.

IV. CONSUMER EXPECTATIONS

The consumer expectations standard for determining products liability reflects the "ordinary purposes" basis of the implied warranty of merchantability. It is also the standard widely used as the basis for products liability in strict tort under section 402A of the Restatement (Second). It is the standard which the Reporters of the proposed Restatement (Third) are anxious to lay to rest, at least as the controlling standard for determining products liability and, especially, design liability. As they say in comment f to section 2:

That concept does not take into account whether the proposed alternative design could be implemented at reasonable cost, or

140. Professor Bogus, supra note 37, at 78-79, discusses how Ford Motor Company performed a cost-benefit analysis of potential rollover accidents for its Pinto vehicle. Specifically, he says:

At Ford's urging to quantify safety benefits so proposed safety regulations could be subjected to a cost-benefit analysis, NHTSA accountants had previously valued the "societal cost" of human life at $200,725. This was a sum of twelve components, including, inter alia, $132,000 for direct productivity losses, $41,300 for indirect productivity losses, $4,700 for insurance administration, $10,000 for victim's pain and suffering, and $900 for a funeral. This, clearly, is a calculation only economists, accountants, and auto executives can appreciate.

Id. at 79 n.417.

In Cippollone v. Liggett Group, Inc., the court held that the plaintiff could try a design defect case against a cigarette manufacturer with a risk-utility test based on "a comparison of the utility of the product with the risk of injury that it poses to the public." 644 F. Supp. 283, 287 (N.J. 1986) (quoting O'Brien v. Muskin Corp., 463 A.2d 298, 304 (N.J. 1983)). In making this comparison, the manufacturer would not be permitted to introduce evidence of the product's profitability and the fact that "such profitability will be endangered if legal liability is found," since such evidence would "undermine the goals of greater overall economic efficiency and product safety." Id. at 289.

The Reporters pick up on this Cippollone reasoning in comment e to section 2: "[I]t is not a factor under § 2(b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry." Restatement (Third) of Torts: Products Liability § 2 cmt. e, at 24 (Tentative Draft No. 2, 1995).

It makes especially good sense to deny consideration of lost profits when determining the costs of imposing products liability, where a product defect stems in significant part from a defendant's marketing of an unreasonably dangerous product in order to increase profits. Taking into account the loss of such profits in a risk-utility analysis would result in rewarding the defendant for its reprehensible conduct of increasing profits by not incurring the costs necessary to make the product reasonably safe.

142. See Restatement (Second) of Torts § 402A cmts. g & i, at 351-52 (1977).
whether an alternative design would provide greater overall safety.\textsuperscript{143}

They would retain consumer expectations as the controlling test only for cases of "foreign matter" in food, since the test "in this context relies upon culturally defined, widely shared standards that food products ought to meet."\textsuperscript{144}

Recognizing that their proposed reasonable alternative design standard of section 2(b) will prove to be only a Maginot Line if plaintiffs can still bring an action for breach of implied warranty of merchantability based on ordinary consumer expectations, the Reporters attempt to foreclose this possibility by stating in comment m to section 2:

The rules in this Section are stated functionally rather than in terms of the classic common law categorizations. Claims based on product defect at time of sale or other distribution must meet the requisites set forth in § 2(a), § 2(b), or § 2(c). As long as these requisites are met, the traditional doctrinal categories of negligence, strict liability, or implied warranty of merchantability may be utilized in doctrinally characterizing the claim.\textsuperscript{145}

In other words, a design claim for breach of the warranty of merchantability can be brought, but only if the reasonable alternative design requirements of section 2(b) are met. Note that this comment also subjects negligence claims to the section 2 proof requirements.

Warranty of merchantability design claims have been brought on a variety of bases, including alternative design, a risk-utility balancing, and ordinary consumer expectations.\textsuperscript{146} The New York Court of Appeals recently affirmed the warranty consumer expectations test as a separate basis from risk-utility for product design liability in \textit{Denny v. Ford Motor Co.}\textsuperscript{147} In \textit{Denny} the plaintiff recovered $1.2 million in a New York federal diversity case for rollover injuries she suffered while driving defendant's Bronco II vehicle.\textsuperscript{148} She claimed the vehicle was defectively designed because the vehicle "had a low stability index attributable to its high center of gravity and relatively narrow

\textsuperscript{143} \textit{Restatement (Third) of Torts: Products Liability} § 2 \textit{cmt. f}, at 29 (Tentative Draft No. 2, 1995).
\textsuperscript{145} \textit{Restatement (Third) of Torts: Products Liability} § 2 \textit{cmt. m}, at 40 (Tentative Draft No. 2, 1995).
\textsuperscript{146} See generally Vargo, \textit{supra} note 109.
\textsuperscript{147} 662 N.E.2d 730 (N.Y. 1995).
\textsuperscript{148} See \textit{id.} at 731-33.
track width."149 She also contended that "[t]he vehicle's shorter wheel base and suspension system were additional factors contributing to its instability."150 The defendant contended these design features "were necessary to the vehicle's off-road capabilities."151 "The rollover occurred when the plaintiff slammed on her brakes in an effort to avoid a deer that had walked directly into her motor vehicle's path" on the highway.152

The plaintiff tried her case on breach of implied warranty of merchantability and in strict tort; the jury found for her on the first claim, but against her on the second.153 On appeal, the United States Court of Appeals for the Second Circuit certified to the New York Court of Appeals the question of whether these claims were identical under New York law.154 The New York Court of Appeals answered that they were not identical, and that under New York law "it is possible to be liable for breach of implied warranty even though a claim of strict products liability has not been satisfactorily established."155

The court noted that the strict tort claim was tried on a risk-utility standard, apparently without reasonable alternative design being a necessary factor.156 Under this standard, the court wrote, the jury may have found "that the Bronco II's utility as an off-road vehicle outweighed the risk of injury resulting from rollover accidents."157 At the same time, the court found that the jury could have reasonably determined that the vehicle was not "merchantable" or fit for the "ordinary purpose" of "daily driving for which it was marketed and sold. . . . Importantly, what makes this case distinctive is that the 'ordinary purpose' for which the product was marketed and sold to the plaintiff was not the same as the utility against which the risk was to be weighed."158

The court describes "this case" as "distinctive,"159 but its distinction may be shared by many, if not most, product design cases. For

149. Id. at 732.
151. Denny, 662 N.E.2d at 732.
152. Id. at 731.
153. See id. at 733.
155. Denny, 662 N.E.2d at 731. Specifically, the court remanded the case for a determination of whether the jury verdict "was reconcilable . . . in accordance with . . . Rule 59(a) of the Federal Rules of Civil Procedure." Id.
156. See id. at 738.
157. Id.
158. Id. at 738-39.
159. Id. at 738.
example, the known utility of asbestos was as an insulation, while its risk was that it might not effectively serve that purpose. (Surely the seller would not admit that the expected risk was that the product was carcinogenic.) The user, however, expected that the product was safe to work with, as it was marketed to be. Similarly, the defendant, Yuba Power, in *Greenman* likely thought that the utility of its shopsmith, a combination power tool, outweighed its relative cost as compared to similar products and to its complexity of use.\(^\text{160}\) (Surely Yuba Power did not think the risk was one of injury from inadequate set screws.) Greenman, however, expected the product to be safe for its ordinary purposes "as a saw, drill, and wood lathe."\(^\text{161}\) Indeed, "[i]mplicit in the machine's presence on the market . . . was a representation that it would safely do the jobs for which it was built."\(^\text{162}\) The utility of a drug is weighed against its relative cost and effectiveness, but the consumer expects it to do its job safely: not to cause vaginal cancer, blindness, teeth discoloration, and so forth.

One reason the implied warranty of merchantability has been relatively eclipsed by strict tort as a consumer remedy in products liability is that warranty, when viewed as a *statutory remedy*, may be subject to a number of strictures such as notice, disclaimers, privity, and a statute of repose. Such restrictions, however, need not inhere in warranty, when treated as a *common law remedy*. Indeed, *Greenman* itself recognized that the statutory notice of breach should not be required for a consumer warranty remedy,\(^\text{163}\) but then went on to recharacterize the remedy as one in strict tort presumably in order to avoid any confusion between the consumer and the statutory remedy.\(^\text{164}\) Many cases recognize a common law warranty basis of recov-

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161. *Id.* at 897.
162. *Id.* at 901.
163. As the *Greenman* court stated:
   Like other provisions of the uniform sales act. . .section 1769 deals with the rights of the parties to a contract of sale or a sale. It does not provide that notice must be given of the breach of a warranty that arises independently of a contract of sale between the parties.
   *Id.* at 899.
164. See *id.* at 901.
165. Comment m to section 402A of the Restatement (Second) of Torts (1965), recognized that common law implied warranty was essentially the same thing as the strict tort liability described in section 402A. But, in order to resolve possible confusion between statutory and common law warranty theories, the Restatement chose the new term of strict tort liability:

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.


167. In Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W.2d 828, 829 (Tex. 1942), the court recognized the widespread breakdown of the privity requirement in food cases involving breach of warranty:

We think the manufacturer is liable in such a case under an implied warranty imposed by operation of law as a matter of public policy. We recognize that the authorities are by no means uniform, but we believe the better reasoning supports the rule which holds the manufacturer liable. Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life. It is a well-known fact that articles of food are manufactured and placed in the channels of commerce, with the intention that they shall pass from hand to hand until they are finally used by some remote consumer. It is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. Since it has been packed and placed on the market as a food for human consumption, and marked as such, the purchaser usually eats it or causes it to be served to his family without the precaution of having it analyzed by a technician to ascertain whether or not it is suitable for human consumption. In fact, in most instances the only satisfactory examination that could be made would be only at the time and place of the processing of the food. It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.

The UCC has approved the breakdown of the privity requirement in varying degrees, depending on which version (A, B, or C) of § 2-318 is adopted. See U.C.C. § 2-318A to 2-318C (1977).

168. The ineffectiveness of disclaimers in common law implied warranty also came to be widely accepted:

It is generally recognized that implied warranty is more properly a matter of public policy beyond the power of the seller to alter unilaterally with disclaimers and inconsistent express warranties. . . . Where there is implied in law a certain duty to persons not in contract privity, it seems preposterous that the seller should escape that duty by inserting into a non-contractual relationship a contractual disclaimer of which the remote injured person would be unaware. Even as between parties to a contract, where the law would imply in a sale the reasonable fitness of the product for ordinary purposes, it seems unconscionable that the seller should by disclaimers avoid the duty of
to comment m to section 2 of the proposed Restatement (Third) cite favorably a case where a warranty cause of action was allowed even though the tort statute of limitations barred the tort claim. 169 The consumer remedy of implied warranty rests upon "the demands of social justice" rather than on the intricacies of the law of sales. 170

A number of criticisms have been leveled against the consumer expectations test. One judge dissented in Denny, contending that the test was commercial in nature and depended on a subjective standard. 171 Others have raised the criticism that the consumer can have no expectations of safety when the product danger is obvious. 172 Conversely, some say the consumer can have no expectations of safety when the product is complex. 173

It is too late to contend that warranty law is exclusively a commercial remedy. The books are full of consumer products liability cases based on breach of warranty. 174 Moreover, the consumer expectations test is no more subjective than that of the reasonable person

selling merchantable products or shift the risk of defect, unless the total circumstances of the transaction indicate the buyer's awareness of defects or acceptance of risk. This warranty imposed by law, irrespective of privity and based on public policy, is more aptly called "strict liability." Greeno v. Clark Equip. Co., 237 F. Supp. 427, 431 (N.D. Ind. 1965).


171. Denny v. Ford Motor Co., 661 N.E.2d 730, 743 (N.Y. 1995) (Simons, J. dissenting). According to the Reporters, the consumer expectations test "suffers from . . . extreme subjectivity. . . . It is very difficult to rebut the contention that a consumer's expectations were disappointed." Henderson & Twerski, supra note 36, at 1295.

For an example of "the extreme subjectivity" of this test, the Reporters cite Campbell v. General Motors Corp., where the plaintiff without expert testimony was permitted to show that defendant's product failed to meet "the juror's own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." 649 P.2d 224, 232-33 (Cal. 1982). Compare Soule v. General Motors Corp., where the court said the consumer expectations test should not be charged where the issue of design defect is "one of technical and mechanical detail." 882 P.2d 298, 310 (Cal. 1994). But, said the court:

[O]rdinary consumer expectations are not irrelevant simply because expert testimony is required to prove that the product failed as marketed, or that a condition of the product as marketed was a 'substantial', and therefore 'legal', cause of injury. We simply hold that the consumer expectations test is appropriate only when the jury, fully apprised of the circumstances of the accident or injury, may conclude that the product's design failed to perform as safely as its ordinary consumers would expect." Id. at 309 n.6. See note 185 infra and accompanying text. The thrust of the opinion seems to be that ordinary consumer expectations must be informed by expert testimony in a complicated case.


standard. Indeed, the ordinary consumer expectations test closely parallels the reasonable person standard and draws much of its vitality from that standard.

The clear modern trend is to hold that obviousness of danger is but one factor to consider in determining whether a product is defective or unreasonably dangerous. Obviousness of danger may also be relevant in determining comparative fault. It is a misconception to say that the consumer can have no expectations of safety regarding an obviously dangerous product. A worker can surely expect that a punch press, for example, should have safety guards even though it obviously does not. Persons might reasonably expect cigarettes to be safe, especially when they are extensively marketed as such.

In fact, the risk may overlap and contradict consumer expectations, not only with regard to obvious dangers, but in general. The risk—or burden, in Learned Hand terms—may involve increased costs, but it may also involve dangers. The Denny court said the risks included "the risk of injury resulting from rollover accidents," whether off-road or on-road. Nevertheless, a jury could find the vehicle was not "merchantable" because it was not fit for the "'ordinary purpose' of daily driving for which it was marketed."

Expert testimony can inform consumer expectations. Indeed, typically such testimony is required in design litigation and may be used to establish a reasonable alternative design. It may also serve to establish the degree of danger, as was apparently the case in Denny, and in many medical malpractice informed consent cases.

180. Id.
181. See id. at 732.
182. See e.g., Largey v. Rothman, 540 A.2d 504, 507 (N.J. 1988); see also Karns v. Emerson Elec. Co., 817 F.2d 1452, 1459 (10th Cir. 1987) (an expert may testify that a product is "unreasonably dangerous beyond the expectation of the average user"); Mireles v. Broderick, 872 P.2d 863, 866 (N.M. 1994) (holding that expert testimony may be used to establish res ipsa loquitur).
The advantages of the consumer expectations test are manifold. The test reflects community values and customs, marketing practices, express and implied representations, ordinary expectations, and a sense of fairness. It soundly avoids the potential aridity of economic analysis under a risk-utility test. The consumer expectations test permits the jury to do what the jury is best at doing: resolving questions of fairness.

V. STRICT LIABILITY

The primary thrust of the proposed Restatement (Third) is a frontal assault on strict liability, for which section 402A of the Restatement (Second) stands. The proposed Restatement rejects consumer expectations as the controlling standard because that standard judges the product itself rather than the conduct of the manufacturer. The proposed Restatement rejects presumed seller knowledge, which mirrors consumer expectations, because that standard is one of strict liability focusing on the product itself. It also rejects the date of trial as the relevant time for determining defectiveness, even though reasonable expectations cannot be determined until the product has been tested by consumer use. Finally, it rejects a substitute product standard—and rigidly requires proof of a reasonable alternan-


185. As one court stated:

We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.


186. See Restatement (Third) of Torts: Products Liability § 2 cmt. a, at 16 (Tentative Draft No. 2, 1995). But see Brooks v. Beech Aircraft Corp. 902 P.2d 54, 63 (N.M. 1995), which contains a clear statement of the reasons for using date of trial as the time for determining design defectiveness.


187. The unreasonable danger of a drug such as DES, for example, and consumer expectations regarding that danger, could not be determined until years after the drug was marketed, when that danger first began to appear.
tive design—as the basis for determining design defectiveness\textsuperscript{188} because a substitute product standard suggests that the indicted product should never have been marketed at all.

The burden of proof is the factor at stake in strict liability. Should the plaintiff be required to show that the defendant knew or should have known of the danger, and could have prevented it, at the time of manufacture? Or should the defendant be required to show that it should not have known, or could not have prevented, the danger?\textsuperscript{189} Or should the defendant's putative knowledge of or ability to prevent the danger be irrelevant, since these issues unnecessarily complicate the trial process,\textsuperscript{190} favor the defendant with its superior knowledge and financial capabilities to litigate,\textsuperscript{191} and distract from the central question of whether a product has proved to be socially unacceptable because it is unreasonably unsafe?

Courts have struggled with trying to understand and apply strict liability since section 402A was first promulgated by the American Law Institute in 1965. Attorneys have not been particularly helpful in this regard because they traditionally think in terms of fault liability. Regressive legislation and special interest lobbying have substantially hindered the development of strict liability. Now, reflecting the con-

\textsuperscript{188} See \textit{Restatement (Third) of Torts: Products Liability} § 2 cmt. c, at 19-20 (Tentative Draft No. 2, 1995). Cf. \textit{Wade, supra} note 184, at 17 (substitute product is expressly made a basis for determining design defectiveness). \textit{But see} Richard L. Cupp, Jr., \textit{Defining the Boundaries of "Alternative Design" Under the Restatement (Third) of Torts: The Nature and Role of Substitute Products in Design Defect Analysis}, 63 \textit{Tenn. L. Rev.} 329 (1966) (arguing that alternative design and substitute design meld into each other, and that market demand and other economic considerations determine whether one product is an acceptable alternative or substitute for another.).

\textsuperscript{189} At the annual meeting of the American Law Institute on May 17, 1995, Anthony Z. Roisman stated: "At root . . . tort law, § 402A as now written, is designed to decide who should bear an unavoidable risk." \textit{72nd Annual Meeting, supra} note 14, at 193. On the following day, Lee C. Swartz stated:

Proof of alternative design undermines the very nature of strict liability, which permits a consumer to be on an even footing with a manufacturer by not requiring that the purchaser undertake the burden of proving the specific nature of the defect, the information of which the manufacturer has superior knowledge. Section 402A has acted as a burden-shifting device in this regard. It recognizes the superior resources and knowledge of a manufacturer with respect to its products.

\textit{Id.} at 204-05. Recognizing that California has shifted the burden of proof to the defendant in design defect litigation, Reporter Henderson said later that day: "I think we make it clear in the comments that this draft wants no part of that." \textit{Id.} at 248. \textit{See also} Henderson & Twerski, \textit{supra} note 36, at 1292-94 (the Reporters again make clear their adamant rejection of any burden-shifting approach to proving design defect).

\textsuperscript{190} For one of the clearest statements of this proposition, see \textit{Beshada v. Johns-Manville Prods. Corp.}, 447 A.2d 539, 548 (N.J. 1982).

\textsuperscript{191} \textit{See}, e.g., \textit{Barker v. Lul Eng'g Co.}, 573 P.2d 443, 455 (Cal. 1978); \textit{Bogus supra} note 37, at 55.
conservative mood of the times, the American Law Institute joins the attack on the tide of strict products liability.

But there are a number of holes in the dike of retrenchment that conservatism may not be able to contain. There is strict liability for misrepresentation\textsuperscript{192} and manufacturing flaws.\textsuperscript{193} There is products liability for harm "of a kind that ordinarily would occur only as a result of [a] product defect"\textsuperscript{194} and liability for products with an "extremely high degree of danger" and "negligible utility."\textsuperscript{195} There is liability for abnormally dangerous products,\textsuperscript{196} as well as for products that fail to meet ordinary consumer expectations of merchantability,\textsuperscript{197} whether defined in terms of risk-benefit balancing or in terms of basic fairness. All of these standards point toward strict products liability and threaten to engulf the efforts at retrenchment.

It should not be assumed that juries cannot understand or apply strict products liability. After all, the principle is not that difficult to understand: an unreasonably unsafe product should pay its way, or else not be marketed. If they are properly instructed on the principle, they can understand it. As Judge Becker said in \textit{Bowman v. General Motors Corporation}:

> Our faith in the jury system is considerable. We have seen as many defendant's verdicts as plaintiff's verdicts in products liability cases over the past several years, buttressing our conclusion that juries are as impartial as they are intelligent. In view of their broad community base they seem to us well-equipped to perform the fact-finding and judgmental tasks involved.\textsuperscript{198}

\textbf{Conclusion}

In 1995 Professor Bogus wrote an article on the issue of determining design defectiveness in products liability. The article began:

A war is underway. Battles are being fought in courthouses and statehouses, universities and institutes, editorial offices and corporate boardrooms. The stakes are, quite literally, incalculable. They include money and lives—no one can count how much or how many—and even more, for the war will profoundly affect our funda-

\textsuperscript{192} See \textit{Restatement (Third) of Torts: Products Liability} § 16 (Council Draft No. 3, 1995).
\textsuperscript{193} See \textit{Restatement (Third) of Torts: Products Liability} § 2(a) (Tentative Draft No. 2, 1995).
\textsuperscript{194} \textit{Id.} § 3(a).
\textsuperscript{195} \textit{Id.} § 2 cmt. d, at 22.
\textsuperscript{196} See \textit{Restatement (Second) of Torts} § 519 (1977).
\textsuperscript{197} See discussion \textit{supra} Part IV.
mental beliefs about the role of courts and the common law in democratic society.199

The average person—perhaps even the average lawyer—does not appreciate the complexities of the legal issue involved. Ordinary persons can, however, appreciate the basic goals of fairness that are at stake. A standard of consumer expectations that looks to generic product defectiveness comes nearer to implementing those goals than do negligence or risk-utility standards of products liability. A standard of consumer expectations certainly comes nearer to achieving fairness than does a restrictive standard that requires plaintiffs to prove that a reasonably safer alternative design exists as a prerequisite to recovery for product design defectiveness.

199. Bogus, supra note 37, at 2.