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Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981)

Sherri W. Harbin

CASE NOTES

Torts—PRODUCTS LIABILITY—DOCTRINE OF STRICT LIABILITY APPLICABLE IN SECOND COLLISION CASES RESULTING FROM DESIGN DEFECTS—*Ford Motor Company v. Hill*, 404 So. 2d 1049 (Fla. 1981)

I. INTRODUCTION

In *Ford Motor Co. v. Hill*,[1] the Florida Supreme Court was called upon to decide whether the doctrine of strict liability as it exists in Florida is applicable to a second collision case.[2] Additionally, the court was asked to clarify the strict liability issue for design defects in manufacturers' products.[3]

The plaintiff Hill suffered severe injuries when his overloaded tanker truck went out of control on a wet highway and skidded backwards onto the median strip. As the rear wheels of the truck dug into the soft median, the tank tore loose and came to a sudden halt, causing the still-moving cab to slam into it. This collision in turn released two latch hooks that had secured the hinged cab. The cab came loose, snapping open and then shut again, causing the injuries.[4]

The hooks were apparently released by the forced bending of two parallel lever rods that had secured them, the result of the force of contact between these rods and the tank itself when the tank separated from the body.[5] The plaintiff contended the hooks were thus defectively designed since they should have been attached to the lever rods in opposite directions so that only one hook would release in the event of both the rods being bent in the same direction.[6]

In Hill's action against the truck manufacturer, Ford Motor

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1. 404 So. 2d 1049 (Fla. 1981).

2. A "second collision" or "second impact" occurs when an occupant of a vehicle collides with the interior after an initial impact of the vehicle with some other object. Courts use the term interchangeably with "enhanced injury" and "crashworthiness." *See* J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 445 (1981); Comment, *Products Liability—The "Enhanced Injury Case" Revisited*, 8 FORUM 643, 643 n.2 (1973).

3. Whether design defects warrant different treatment than manufacturing defects in product liability cases is a widely debated issue. *See, e.g.*, Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980).

4. 404 So. 2d at 1050.

5. *Id.*

6. *Id.*

Company, the trial court granted judgment for the plaintiff.[7] Ford appealed, but the Fourth District Court of Appeal affirmed.[8] However, since the Florida Supreme Court had never ruled on the issue of strict liability in a second collision situation, the appellate court certified the question to the Florida Supreme Court as one of great public importance.[9] In answer to the certified question, the supreme court unanimously held that strict liability is applicable to a second collision case,[10] and it applies "without distinction as to whether the defect was caused by the design or the manufacturing."[11]

This note will examine the development of products liability law in Florida as it relates to second collision cases resulting from design defects and will then analyze the approach taken by the *Hill* court. This note will also examine some approaches taken by other jurisdictions that set forth guidelines for the jury in the area of design defect cases.

II. PRIOR FLORIDA LAW

The issue of a manufacturer's liability for injuries sustained in a second collision was first presented to the Florida Supreme Court in 1976 in *Ford Motor Co. v. Evancho*.[12] At the time *Evancho* was

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7. *Id.* at 1049. The original complaint was filed before the Florida Supreme Court's decision in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976), in which the court adopted the doctrine of strict liability for Florida. *See infra* note 20 and accompanying text. Although the complaint did not contain a count in strict liability the trial court ruled that because of the *West* decision the standard jury instruction on strict liability would be given. 404 So. 2d at 1050.

8. Ford Motor Co. v. Hill, 381 So. 2d 249, 251 (Fla. 4th Dist. Ct. App. 1979).

9. The Florida Supreme Court has discretionary jurisdiction to review decisions of district courts of appeal that pass upon certified questions of great public importance. FLA. R. APP. P. 9.030(a)(2)(A)(v) (1979). This jurisdiction arises out of FLA. CONST. art. V, § 3(b)(4).

The question certified to the supreme court was: "IS THE COMMON LAW NEGLIGENCE THEORY IN SECOND COLLISION CASES SET FORTH IN *EVANCHO* STILL VIABLE DESPITE THE ADOPTION OF STRICT LIABILITY IN *WEST V. CATERPILLAR TRACTOR COMPANY, INC.*?" 404 So. 2d at 1049. The supreme court rephrased the question as follows: "(1) Does the doctrine of strict liability adopted in *West* apply to a second collision case, or (2) Is a plaintiff limited exclusively to a negligence action by *Evancho*?" *Id.* at 1049-50 n.1. At the time of the *Hill* decision, Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976), was the leading case in Florida on a manufacturer's liability in a second collision situation.

10. 404 So. 2d at 1049-50.

11. *Id.* at 1052 (footnote omitted).

12. 327 So. 2d 201 (Fla. 1976). In *Evancho*, appellee's husband died from injuries sustained in an automobile collision in which he was thrown forward and struck the front seat of the automobile in which he was riding. The front seat then broke loose, exposing sharp and pointed edges of a rail and resulting in further injuries (the "second collision") from which the husband died. Appellee alleged that the fatal injury occurred as a result of a

decided, there were two widely cited cases representing the two opposing viewpoints on the issue. In the first case, *Evans v. General Motors Corp.*,[13] the Seventh Circuit saw the issue as a matter of "intended use" and held "[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."[14]

The other viewpoint was espoused by the Eighth Circuit in *Larsen v. General Motors Corp.*[15] The court in *Larsen* rejected the "intended use" construction as "much too narrow and unrealistic."[16] Recognizing that collisions and the resulting injuries from second collisions are inevitable and foreseeable, the *Larsen* court

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defectively designed track-and-rail mechanism designed to secure the seat to the rail. *Id.* at 202.

13. 359 F.2d 822 (7th Cir.), *cert. denied* 385 U.S. 836 (1966). In *Evans*, the driver of a station wagon suffered fatal injuries when another car struck the driver's door, causing the entire left side of the wagon to collapse. The court held that the automobile manufacturer was under no duty to equip all of its automobiles with perimeter frames. *Id.* at 823, 825.

Evans was followed in only a few jurisdictions. *See, e.g.*, Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D.W. Va. 1971), *aff'd per curiam*, 472 F.2d 240 (4th Cir.), *cert. denied*, 412 U.S. 940 (1973); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969). *Evans* was later overruled in Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977). *Evans* was also highly criticized by the commentators. *See, e.g.*, Nader & Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645 (1967); Note, *Manufacturer's Liability for an "Uncrashworthy" Automobile*, 52 CORNELL L.Q. 444 (1967); Note, *Torts—Liability of Maker of Chattel—Manufacturer Is Not Liable for Failure To Design "Crashworthy" Automobile*, 80 HARV. L. REV. 688 (1966); Note, *Products Liability—Manufacturer Has No Duty to Design an Automobile Frame Which Will Protect Occupants in Case of a Collision*, 42 NOTRE DAME LAW. 111 (1966); Note, *Automobile Design Liability: Larsen v. General Motors and its Aftermath*, 118 U. PA. L. REV. 299 (1969-70). *Contra* Hoenig & Werber, *Automobile "Crashworthiness": an Untenable Doctrine*, 20 CLEV. ST. L. REV. 578 (1971).

14. 359 F.2d at 825.

15. 391 F.2d 495 (8th Cir. 1968). The driver of a Corvair was severely injured in a head-on collision when the steering column was thrust backward, striking the driver's head. *Id.* at 496-97. *Larsen* was a negligence case, but the court noted that the same principles could apply to a strict products liability action, and that each state was "free to supplement common law liability for negligence with a doctrine of strict liability for tort as a matter of social policy expressed by legislative action or judicial decision." *Id.* at 503 n.5. For a list of the many jurisdictions adopting the *Larsen* view, see 565 F.2d at 110-11.

16. 391 F.2d at 502. The *Larsen* court held that the manufacturer would not be liable for a design defect that did not cause the accident, but "for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." *Id.* at 503.

The apportionment of damages was not discussed in *Hill*, but the courts which have passed on this issue have taken the position of the *Larsen* court. *See, e.g.*, Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976); Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) (burden of proving the proper apportionment of damages rests on the plaintiff). *See also* Note, *Apportionment of Damages in the "Second Collision" Case*, 63 VA. L. REV. 475 (1977).

imposed liability on the manufacturer for injuries in a second collision. The Eighth Circuit reasoned that the intended use of an automobile "is to provide a means of *safe* transportation."[17]

The Florida Supreme Court adopted the *Larsen* view, extending a manufacturer's liability to a second collision case and holding that "the manufacturer must use reasonable care in design and manufacture of its product to eliminate unreasonable risk of foreseeable injury."[18] In explaining its decision, however, the Florida court noted that the decision was not based on strict tort liability, but on common law negligence principles.[19]

Five months after the *Evancho* decision, the supreme court decided *West v. Caterpillar Tractor Co.*[20] in which the court adopted the doctrine of strict products liability for Florida in the form of section 402A of the Restatement (Second) of Torts.[21] Section 402A makes a manufacturer strictly liable for selling a product in a "defective condition unreasonably dangerous to the user or consumer" of that product.[22] In the *West* decision, however, the court gave no

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17. 391 F.2d at 502 (emphasis added).

18. 327 So. 2d at 204.

19. *Id.* at 203. Subsequent to the decision in *Evancho*, the Fourth District Court of Appeal upheld a plaintiff's recovery against an automobile manufacturer despite a jury instruction which provided that "[i]mplicit in the duty of a manufacturer of a potentially dangerous commodity to warn of the dangers of its use, is the duty to warn with a degree of intensity that would cause a reasonable man to exercise, for his own safety, precaution commensurate with the potential danger." Ford Motor Co. v. Havlick, 351 So. 2d 1050, 1050 (Fla. 4th Dist. Ct. App. 1977). A vigorous dissent by Letts, J., objected to the instruction as being tantamount to absolute liability for any potentially dangerous product. Thus, the instruction went beyond the negligence standard adopted in *Evancho* and even further than strict liability, which had not yet been adopted in Florida. *Id.* at 1050-51.

20. 336 So. 2d 80 (Fla. 1976).

21. Section 402A states:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
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> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1964).

Section 402A has been widely accepted. Dean Prosser noted that by 1971, § 402A had been adopted by two-thirds of the courts. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 98 (4th ed. 1971).

22. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1964).

indication of the applicability of the strict liability doctrine to second collision or design defect cases.

The *Hill* court addressed the unanswered question of *West* by holding that "[i]t should make no difference whether the injury is caused in a primary collision or a secondary collision, so long as the plaintiff establishes the requisites of *West*."[23] Unfortunately, the supreme court's holding in *West* is a major source of confusion.[24] A close reading of *West* reveals that although the court expressly adopted section 402A,[25] the court still has not defined which view of strict liability is applicable in Florida. At one point in its *West* decision, the "unreasonably dangerous" requirement of section 402A was equated with the concept of unmerchantability in an implied warranty action, and strict liability was equated with negligence *per se*.[26] Additionally, the *West* court, in its summation of its holding, completely eliminated the "unreasonably dangerous" requirement:[27] "We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[28]

To add to the confusion over the adoption of the section 402A standard, the court in *West* ruled that the doctrine of comparative negligence should be applied to a strict products liability action.[29] This was a departure from the section 402A standard, which provides that only assumption of the risk and misuse of the product could be a defense to a strict liability action.[30]

Significantly, the *Hill* court did not discuss the issue of comparative negligence in a situation in which the defect did not cause the accident, but only contributed to the injuries. Although *West* in-

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23. 404 So. 2d at 1051.

24. "This Court recognizes that confusion might have been created by the adoption of strict liability for products liability cases in *West* and the Court's failure to enunciate what effect, if any, *West* would have on secondary collision claims and their theory of recovery." 404 So. 2d at 1050 (footnote omitted). For a thorough analysis of the *West* holding, see Note, *Products Liability in Florida Under Section 402A: New Language or New Law*, 29 U. FLA. L. REV. 398 (1977).

25. 336 So. 2d at 87.

26. *Id.* at 88, 90. *See* J. BEASLEY, *supra* note 2, at 289.

27. The elimination of the "unreasonably dangerous" requirement is similar to the standard adopted in Greenman v. Yuba Power Prod., 27 Cal. Rptr. 697 (1963).

28. 336 So. 2d at 92.

29. *Id.* It is anomalous to speak in terms of comparative fault or negligence, since the determination of a manufacturer's strict liability is in reference to the nature of the product, not the manufacturer's fault, and thus provides no basis for comparison with the plaintiff's actions. *See infra* notes 58-62 and accompanying text.

30. RESTATEMENT (SECOND) OF TORTS § 402A comments h, n (1964).

troduced comparative negligence into the strict liability equation, it would be a mistake to apply the comparative negligence principles to a second collision case. To compare the negligence of the plaintiff with the negligence of the manufacturer is to defeat the purpose of strict liability:

> The conduct of another defendant or of the plaintiff *prior to* the second collision is not relevant in determining the second collision liability of the manufacturer of the defective vehicle or in determining the contributory negligence of the plaintiff. If under the doctrine the manufacturer must foresee the first collision, then it begs the question to blame or to review the conduct bringing about that collision. The true issue is whether the design or the manufacture (the former in the vast majority of these cases) of the vehicle afforded adequate protection against the possible consequences of the initial impact.[31]

III. SECOND COLLISIONS

Simply stated, the issue in a second collision case is whether the manufacturer must recognize that collisions are a foreseeable consequence of using motor vehicles for transportation, and if so, whether the manufacturer must design the product in a manner that is reasonably safe for this environment.[32] In *Evancho,* the determination had been made that a manufacturer would be liable if he negligently designed his product so as to enhance the plaintiff's injuries.[33] The *Hill* court, in light of *West,* had to determine the appropriateness of measuring the design without regard to the negligence of the manufacturer, i.e., strict liability.

This question was affirmatively answered in *Hill* when the court held that refusal to impose strict liability for second collision injuries would create an "illusory distinction" between them and those caused by a primary collision.[34] The court explained that "[i]t would be unreasonable to have the availability of the strict liability theory depend on the cause of the accident rather than the cause of the injury."[35] Thus, the court rightly recognized that the exten-

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31. J. BEASLEY, *supra* note 2, at 453 (emphasis in original).

32. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products,* 27 S.C.L. REV. 803, 834 (1976). *See also* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 253 (1979 & Supp. 1981). *See generally* Annot., 42 A.L.R.3d 560 (1972 & Supp. 1981).

33. 327 So. 2d at 204.

34. 404 So. 2d at 1050-51.

35. *Id.* at 1051.

sion of strict liability to encompass enhanced injuries from a manufacturer's design is consistent with what has been called "prevailing notions of the appropriate scope of responsibility for manufacturing enterprises."[36]

The supreme court noted that the majority of jurisdictions today has applied the strict liability doctrine to second collision cases.[37] This seems to be in recognition of the fact that the doctrine has developed to a point where public policy justifies holding manufacturers responsible for designing their products so they will be reasonably safe in a collision.

There are several policies usually advanced for the strict liability doctrine. First, the manufacturer, by marketing and advertising his product, has induced the consumer to buy a product which he has represented as safe. Second, the manufacturer is in the best position to eliminate defects. Third, the manufacturer is in a better position to spread the risk of injury through the use of liability insurance. Finally, strict liability will provide a healthy incentive to manufacturers to make their products safe.[38]

These strict liability policies are no less applicable in a second collision case than in any products liability case.[39] As one commentator has noted:

> Enhanced injury case plaintiffs would seem in no less need of compensation than their counterparts in other products cases. The manufacturer-defendants in enhanced injury cases would certainly seem no less capable of bearing the loss than manufacturers of other products; indeed, considering that the manufacturing-defendants in enhanced injury cases consistently involve the giants of the industrial world, it would seem that if a less stringent standard of strict liability is to be applied anywhere, it should be applied to the smaller manufacturers involved in products cases of a type *other than* the enhanced injury variety. Finally, there would seem to be no shortage of need in the enhanced injury situation for the incentive toward improvement of product quality—that is, product safety—which strict liability has the potential to provide.[40]

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36. Montgomery & Owen, *supra* note 32, at 835.

37. 404 So. 2d at 1051. For a list of jurisdictions that have adopted strict liability for second collision cases, see 404 So. 2d at 1051 n.3. *But see* Sealey v. Ford Motor Co., 499 F. Supp. 475 (E.D.N.C. 1980); Volkswagen of America, Inc. v. Young, 321 A.2d 737 (Md. 1974).

38. *See generally* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

39. Comment, *supra* note 2, at 683-84; Note, *supra* note 16, at 486-90.

40. Comment, *supra* note 2, at 684 (emphasis in original).

The *Hill* court quotes with approval from the decision of *Huff v. White Motor Corp.*,[41] in which the Seventh Circuit overruled its previous "intended purpose" decision of *Evans* and adopted strict liability for second collision cases:

> There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.[42]

This rationale indicates that the foreseeable collision does not break the causal chain from the defective design to the plaintiff's injury and that the defective design is a proximate cause of the plaintiff's injury.[43] Similarly, although liability in *Larsen* was based on the concept of the manufacturer's duty, the court's comments on "intended use" imply that the defective design is a proximate cause of the plaintiff's injury.[44]

IV. Design Defects: Strict Liability or Negligence?

Although injuries in a second collision case may come about as a result of a manufacturing error, in the vast majority of cases they occur in the context of a design defect.[45] Because of the following distinction between the two types of defects, courts and juries have a more difficult time in defining the elusive concept of "defect" in design cases.[46] The manufacturing error arises when the particular product deviates from all the other products like it in a given product line.[47] In these cases, it is not difficult to identify the defect in

41. 565 F.2d 104 (7th Cir. 1977).

42. 404 So. 2d at 1052 (quoting Huff v. White Motor Corp., 565 F.2d at 109).

43. *See* Comment, *supra* note 2, at 671-73.

44. W. Kimble & R. Lesher, *supra* note 32, § 253.

45. J. Beasley, *supra* note 2, at 454.

46. A. Weinstein, A. Twerski, H. Piehler & W. Donaher, Products Liability and the Reasonably Safe Product: A Guide for Management, Design, and Marketing 43-51 (1978) [hereinafter cited as A. Weinstein].

47. *Id.* at 29. *See also* 2 L. Frumer & M. Friedman, Products Liability § 16 A[4][f][iii] (1960 & Supp. 1981); W. Kimble & R. Lesher, *supra* note 32, §§ 151-55; R. Epstein, Modern Products Liability Law 68 (1980).

the product. Generally, the standard for comparison is internal—the manufacturer's own quality standard based on the blueprint for the product.[48]

On the other hand, in the design cases there is no built-in standard for determining defect.[49] When a plaintiff attacks the design of a product, he is focusing on the conscious choice of the manufacturer; the design meets the standard that the manufacturer has set for himself.[50] Five years prior to the *Hill* decision, *Evancho* established that a manufacturer's liability in negligence extended to defects in design as well as in manufacture. In *Evancho*, the supreme court held that a "manufacturer of automobiles may be liable under certain conditions for a design or manufacturing defect which causes injury but is not the cause of the primary collision."[51]

The issue for the *Hill* court to resolve was whether the strict liability theory is appropriate for a design defect, since there is no internal standard for determining whether a product is defective in design. The defendant, Ford Motor Co., argued that a negligence standard should be applied for design defects, unlike manufacturing flaws for which strict liability should be permitted.[52] Ford contended that the product blueprint is a guide to manufacturing errors and can assist jurors in determining whether a defect exists.[53] In comparison, a design defect involves technical issues too complex for a jury without engineering training or experience in manufacturing.[54]

In response to Ford's arguments, the supreme court reasoned:

> [A]nalysis of whether a product is in a defective condition unreasonably dangerous to the user involves a *negligence analysis* in a "design defect" case, unlike the analysis ordinarily required in a "manufacturing flaw" situation. But this does not mean it is erroneous to apply the doctrine of strict liability to design defect cases.[55]

This language is confusing, and perhaps unfortunate because the court neglected to explain further the analysis to which it alluded.

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48. A. WEINSTEIN, *supra* note 46, at 31.
49. *Id.* at 32.
50. *Id. See also* Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 773-74 (1979).
51. 327 So. 2d at 202.
52. 404 So. 2d at 1051. *See* Birnbaum, *supra* note 3, at 643-49.
53. 404 So. 2d at 1051.
54. *Id.*
55. *Id.* at 1051-52 (emphasis added).

Many commentators today have concluded that the standard for design defect must employ a balancing process.[56] This balancing process involves a weighing of product risk versus the product utility.[57]

The *Hill* court's characterization of the standard for determining design defect as a "negligence analysis," without more, leaves the court vulnerable to the criticism that they have merged the two theories of recovery. The critical distinction which the supreme court failed to note between the balancing involved in negligence and in strict liability is that the strict liability theory is not concerned with the conduct of the manufacturer.[58] Rather, the inquiry focuses on the nature or condition of the product and seeks to determine whether the product is defective, irrespective of *how* or *why* it became defective.[59] Even though the manufacturer has acted reasonably, the product may in fact not be reasonably safe, and thus defective.[60] An action in negligence requires additional proof that there was something unreasonable about the defendant's conduct in allowing the product to be placed on the market: "In strict liability, this is not required; all that the plaintiff must do is show that the product was in the dangerous condition when it left the defendant's control."[61]

Although the supreme court in *Hill* acknowledged that "the better rule"[62] is to apply the strict liability test to all manufactured products, the court failed to define such a test. As noted, the test for determining when a product is defective becomes crucial in the context of an alleged design defect where there is no internal standard by which to measure the product.[63] The critical weakness in the *Hill* opinion, therefore, is the supreme court's failure to set

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56. *See, e.g.*, Birnbaum, *supra* note 3, at 649; Wade, *supra* note 3, at 568-70; Montgomery & Owen, *supra* note 32, at 818.

57. A. WEINSTEIN, *supra* note 46, at 32. *See also* Montgomery & Owen, *supra* note 32, at 818.

58. *E.g.*, The Restatement states that its strict liability rule applies even though "the seller has exercised all possible care in the preparation and sale of his product. . . ." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1964).

59. A. WEINSTEIN, *supra* note 46, at 30. The plaintiff in a strict liability action must prove:

(1) that a defect was present in the product;
(2) that the defect caused the injuries complained of; and
(3) that the defect existed at the time the retailer or supplier parted possession with the product.

2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][e][i] (1960).

60. A. WEINSTEIN, *supra* note 46, at 32.

61. Wade, *supra* note 3, at 553.

62. 404 So. 2d at 1052. *Contra*, Birnbaum, *supra* note 53, at 649.

63. *See supra* notes 45-50 and accompanying text.

forth definite guidelines for determining when a manufacturer's design is defective.

V. JURY INSTRUCTIONS

The jury is the ultimate arbiter of this conflict, and the instructions which the court gives to them must clearly set forth the manner in which to determine whether a manufacturer's product is actionable because of a defect in design. This instruction must take into account the risk/utility analysis involved in order to insure that the manufacturer is not absolutely liable for his products. In addition, it must focus on the defectiveness of the product instead of any unreasonable conduct on the part of the manufacturer.

The *Hill* decision is commendable in that it noted that the standard jury instruction on products liability needs improvement.[64] The court directed the committee on standard jury instructions to "develop and present to this Court an appropriate instruction which adequately addresses the issue and which reflects the holding of the instant case."[65] With no decisional guidance, however, the committee has no precedent with which to define defectiveness.

The current instruction's definition of defective as "unreasonably dangerous" represents an elusive concept; sending the jury off to deliberate with only this bare charge invites it to put emotions above the fact-finding process. Additional instruction explaining the analysis involved is imperative if the jury is to understand its duty in this important area of the law.

The Restatement (Second) of Torts § 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[66] The consumer expectation test, while easy to

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64. 404 So. 2d at 1052 n.4.

65. *Id.* The present standard jury instruction on strict products liability reads in part as follows:

> The issues for your determination on the claim of (claimant) against (defendant) are whether the [product sold or supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss, injury, or damage] sustained by [claimant]. A product is defective if it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition.

FLA. STAND. JURY INSTRUCTIONS § PL (1981).

66. RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1964). For a history of the events leading up to the inclusion of "unreasonably dangerous" in the Restatement formulation, see Wade, *supra* note 38, at 830-31. *See also* Prosser, *Strict Liability to the Consumer*

apply in a manufacturing flaw case, proves more difficult in the case of a design defect. This test is too vague for design defects since the consumer rarely has any expectations of safety regarding some complexly designed products.[67] In addition, the "consumer contemplation" aspect suggests that if the product's dangers are obvious to the consumer, the manufacturer is to be absolved from liability.[68]

Other courts have recognized the inadequacies of the consumer expectation test and have rejected or modified the Restatement standard. These courts have recognized the complexities involved in product litigation and have attempted to articulate the standards they reason are required in defining the design defect concept. The judges rightly see themselves as weavers of the "'rich tapestry' of the developing common law of products liability."[69] While the courts are still struggling in this area, a look at some of the more significant efforts is appropriate here to suggest potential approaches for the Florida courts.

The journey begins, not surprisingly, in California, a prominent trend-setter in many areas of the law, including products liability. In *Cronin v. J.B.E. Olson Corp.*,[70] the California Supreme Court expressly rejected the "unreasonably dangerous" requirement of section 402A of the Restatement. No substantive definition of a defective product was provided in its place, however. In response to concern over the meaning of "defective," the supreme court in *Barker v. Lull Engineering Co.*,[71] developed a two-pronged test for

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in California, 18 HASTINGS L.J. 9, 23-27 (1966). The "unreasonably dangerous" requirement has been widely debated. *See, e.g.*, Keeton, *supra* note 3, at 32; Wade, *supra* note 38, at 832; Birnbaum, *supra* note 3, at 599-649. Some jurisdictions have modified or eliminated it in their view of strict liability. These cases will be discussed in part V, *infra*.

67. *See, e.g.*, Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981), in which the court addressed the applicability of the "unreasonably dangerous" standard to design defects. Although noting that some jurisdictions had abandoned the "unreasonably dangerous" requirement because it was ambiguous, the court reasoned that the standard is easily applied to manufacturing errors. When applied to design defects, however, the standard is vague because the ordinary consumer cannot be said to have *any* safety expectations for many complexly made or designed products: "Our primary concern with the frustration of the ordinary consumer's expectation standard is its indiscriminate application to all types of design defects." *Id.* at 1146. The court did not pursue the formulation of a modified standard because the defect alleged was presumed to be from manufacturing and not from design: "The Restatement standard is particularly appropriate, however, to the facts before us." *Id. See also* Keeton, *supra* note 3, at 37.

68. A. WEINSTEIN, *supra* note 46, at 45-46.

69. Birnbaum, *supra* note 3, at 610. The author advocates the adoption of a pure negligence standard in design defect cases.

70. 104 Cal. Rptr. 433, 443 (1972).

71. 143 Cal. Rptr. 225 (1978). Plaintiff Barker was seriously injured in an accident when he was operating a high-lift loader at a construction site. He alleged, among other things,

design defect liability. The jury is instructed that a product is defective in design if:

> (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[72]

The first prong of the test is essentially the Restatement formulation. The problem, however, that the California court had with the Restatement standard was that it treated ordinary "consumer expectations as a 'ceiling' on a manufacturer's responsibility under strict liability principles, rather than as a 'floor.' "[73] Additionally, the court recognized that because an ordinary consumer does not know how safe the product could be made, these expectations "cannot be viewed as the exclusive yardstick for evaluating design defectiveness."[74] The innovative element of *Barker* lies in its shifting of the burden of proof as part of the second prong. This shift, the court reasoned, would be a way to relieve the plaintiff of the burdens of proof inherent in a negligence action, and thus would significantly distinguish between negligence and strict liability.[75] Additionally, the court reasoned that the defendant is in a better position to know the evidentiary matters that are involved in a risk-benefit standard.[76]

Nevertheless, the shifting of the burden of proof is not necessary in a strict liability case since there is no need to prove any negligence on the part of the defendant.[77] *Barker* is significant, however, in determining when a design case will get to the jury.[78] The court held that once the plaintiff proves that his injury was proxi-

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that the loader was defective because it was not equipped with a roll bar and seat belts. *Id.* at 230.

72. *Id.* at 234 (italics omitted). The Supreme Court of Alaska has adopted the *Barker* test for design defects. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884 (Alaska 1979).

73. 143 Cal. Rptr. at 233 n.7.

74. *Id.* at 236.

75. *Id.* at 237-39.

76. *Id.* at 237.

77. Wade, *supra* note 3, at 573.

78. *Id. But cf.* Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978). The *Wilson* court held that the design issue should not be submitted to the jury "unless the court is satisfied that there is evidence from which the jury could find [that] the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product." *Id.* at 1327.

mately caused by the design, the case can then get to the jury.[79] Thus, the *Barker* standard would presumably allow more cases to reach the jury; if such is the case, liability of manufacturers for defective products would be increased correspondingly.[80]

The decision of the Texas Supreme Court in *Turner v. General Motors Corp.*,[81] is significant for its rejection of a bifurcated jury instruction which arose in the early years of the strict liability doctrine. The bifurcated instruction provided that a product was defective if it would not 1) meet the reasonable safety expectations of the ordinary consumer or 2) be placed on the market by a prudent manufacturer who was aware of the danger involved in its alleged defect.[82] The first prong arose because many courts initially used warranty theories to arrive at strict liability.[83] The second prong was developed because many courts and commentators thought the test should be derived from the law of torts rather than the law of contracts.[84] The Texas court rejected these tests because of the "inclusiveness of the idea that jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside that of their own experiences and expectations."[85] Although the appellate court had substituted a list of four factors to be balanced by the jury in determining liability,[86] the supreme court reversed, holding that the issue was solely whether the product was defectively designed.[87] The court then approved the following definition as part of the instruction: "By the term 'defectively designed' as

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79. 143 Cal. Rptr. at 237.

80. *See* Comment, *supra* note 2, at 674.

81. 584 S.W.2d 844 (Tex. 1979). In *Turner*, the plaintiff was injured when the car's roof caved in as he overturned his car seeking to avoid a collision with a truck. *Id.* at 845-46.

82. *Id.* at 850. *See also* Wade, *supra* note 3, at 554-56.

83. Wade, *supra* note 3, at 555.

84. *Id.* at 556.

85. 584 S.W.2d at 851.

86. *Id.* at 846. The four factors to be balanced in determining liability were:

> (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
>
> (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
>
> (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs;
>
> (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

Id. at 846 (quoting General Motors Corp. v. Turner, 567 S.W.2d 812, 818 (Tex. Civ. App. 1978)).

87. *Id.* at 847.

used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."[88]

Addressing the use of the balancing factors, the court held that "[e]vidence upon the factors of risk and utility such as those enumerated . . . may be admissible . . . . As to this, however, we disapprove the holding . . . that the jury is to be instructed to balance specifically enumerated factors . . . ."[89]

With the exception of the shift in the burden of proof, the *Turner* court's explanation of the balancing process is essentially the same as that used in *Barker*. The *Barker* court, however, held that the jury be specifically instructed to balance certain factors. In fact, many commentators have suggested a list of factors that should be considered in determining whether a product is defective.[90] The *Turner* court correctly refused to provide the jury with a long list of policy factors to be balanced. Indeed, although Dean Wade has promulgated such a list[91] he has acknowledged that providing an abstract list of policy factors to the jury is only likely to confuse them.[92] Instead, the jury should be instructed to consider whether the design could be made safer taking into account the feasibility of design, its costs, and the state of technology at the time of the design.[93]

The Pennsylvania Supreme Court is the only court to have eliminated any sort of risk/utility analysis in its jury instruction.[94] As did the *Barker* court, the Pennsylvania court rejected the "unreasonably dangerous" language of the Restatement as a proper instruction for the jury, noting that "it is primarily designed to provide guidance for the bench and bar."[95] The court held that while "the phrase 'unreasonably dangerous' serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration."[96] The court continued its departure from the norm by hold-

88. *Id.* at 847 n.1. *See generally* Henderson, *supra* note 50, at 773.

89. 584 S.W.2d at 847.

90. For a list of the factors promulgated by some of the leading commentators, see Montgomery & Owen *supra* note 32, at 815-17 nn.43-46.

91. Wade, *supra* note 38, at 837.

92. Wade, *supra* note 3, at 572-73.

93. *Id.*

94. Azzarello v. Black Bros., 391 A.2d 1020 (Pa. 1978). In *Azzarello*, the plaintiff suffered injury when his hand was pinched between two hard rubber rolls in a coating machine manufactured and sold by the defendant. *Id.* at 1022.

95. *Id.* at 1026.

96. *Id.*

ing that: "It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint."[97] In effect, the court recognized the need for balancing risk versus utility,[98] but reserved the task for the judge and not the jury. This is a novel position with which at least one writer has agreed, suggesting that the complicated issues of liability in a product liability case are best handled by the trial judge.[99]

The Pennsylvania court approved the following jury instruction for defective design:

> The [supplier] of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for [its intended] use, and without any condition that makes it unsafe for [its intended] use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for [its intended] use or contained any condition that made it unsafe for [its intended] use, then the product was defective, and the defendant is liable for all harm caused by such defect.[100]

This language is simple, strong, and to the point. Yet it also has the effect of confusing the juror as to what constitutes a "safe" product. Additionally, although the court emphasizes that the manufacturer is not absolutely liable for his product,[101] this charge suggests that the manufacturer is an insurer. Even though Justice Nix defined the term "guarantor" as requiring that "the supplier must at least provide a product which is designed to make it safe for the intended use,"[102] the qualification does not cure the instruction's deficiency, because the definition is not incorporated into the instruction.

VI. CONCLUSION

The court's holding in *Hill* is proper, even though it creates more confusion than it resolves. Extending the strict liability doc-

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97. *Id.*

98. "These are questions of law and their resolution depends upon social policy." *Id.*

99. Fischer, *Products Liability—Functionally Imposed Strict Liability*, 32 OKLA. L. REV. 93 (1979).

100. 391 A.2d at 1027 n.12 (brackets in original).

101. *Id.* at 1024.

102. *Id.* at 1027.

trine to a second collision situation is a natural consequence of providing consumers the maximum protection in the marketplace. A more difficult situation arises in the context of a manufacturer's defective design. Because the instructions to the jury are critically important in this area, the supreme court missed its opportunity to illuminate the differences between the negligence and strict liability theories of recovery in a design defect case and effectuate the strong social policy behind strict products liability. In fact, much of the court's language only serves to confuse the state of the law for products liability in Florida.

It is here urged that the Florida Supreme Court accept the following jury instruction for defining a defect in design:

> In this case, the plaintiff is claiming that the manufacturer's product is defective in design. In order to establish that this product is defective, the plaintiff must prove that the product is in a defective condition unreasonably dangerous to the user or to any foreseeable bystander.
>
> This burden is met when the plaintiff proves that the alleged defective design was the proximate cause of his injury and that there was an alternative design which the defendant could have used that would have eliminated or substantially reduced his injury. If the plaintiff proves this, then the defendant, in order to be absolved from liability, must prove that the plaintiff's alternative is not feasible in light of its costs, practicability to the overall design of the entire product, and current technology.
>
> In deciding whether the respective parties have met their burdens, your task is to measure the utility of the product against the risks inherent in introducing it into the stream of commerce. In doing so, you are reminded that the manufacturer is not absolutely liable for all injuries caused by his product. Some products are sufficiently beneficial to society that the risks inherent in using them are justifiable. You must decide if the benefits of this product outweigh the risks of the design and were justifiable in light of the claimed harm to plaintiff.

This charge illuminates the issue for judge and jury. It places the burden on the plaintiff to prove there was an alternative design which the defendant could have utilized that would have avoided harm to him. If the plaintiff proves the existence of an alternative, then the defendant must prove that this alternative was not practicable in order to relieve him of liability. This is a fairer alternative to the *Barker* standard, yet it still places the burden on the defendant in areas such as cost and technology in which he has the greater knowledge. In addition, the charge sets forth the balancing

standard that the jury must employ in a design defect case. While this instruction does not cover all the aspects that a jury might consider in a design case, it does call the juror's attention to aspects of the case which will help to facilitate their analysis.

SHERI W. HARBIN