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## Products Liability - Restatement (Second) of Torts - Section 402A - Uncertain Standards of Responsibility in Design Defect Cases - After Azzarello, Will Manufacturers be Absolutely Liable in Pennsylvania

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PRODUCTS LIABILITY—RESTATEMENT (SECOND) OF TORTS—SECTION 402A—UNCERTAIN STANDARDS OF RESPONSIBILITY IN DESIGN DEFECT CASES—AFTER AZZARELLO, WILL MANUFACTURERS BE ABSOLUTELY LIABLE IN PENNSYLVANIA?

I. INTRODUCTION

Confusion abounds in the application of section 402A of the *Restatement (Second) of Torts (Restatement)*<sup>1</sup> to cases in which the *design* rather than the *manufacturing* of a product is claimed to be defective.<sup>2</sup> Since the *Restatement* lacks a built-in standard for determining “design defectiveness,”<sup>3</sup> the limits of a manufacturer’s duty in such a case have not been precisely defined;<sup>4</sup> consequently, the outcome of design defect litigation is often unpredictable.<sup>5</sup> As a result of this uncertainty, manufacturers have voiced

1. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides:

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

*Id.*

2. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). In *Roach*, the court recognized “that legal scholars and courts have had substantial difficulty with the theories of negligence and strict liability in defective design cases. The difficulty carries over not only to matters of evidence and proof but also to the instructions to the jury.” 269 Or. at 461, 525 P.2d at 127 (footnotes omitted). This situation is to be distinguished from cases in which the product is alleged to be defective due to a flaw in its *manufacturing* or *construction*. See notes 37-56 and accompanying text *infra*.

3. See notes 51-53 and accompanying text *infra*. In contrast, the *Restatement* has a built-in standard for determining defects in manufacture. See notes 42-50 and accompanying text *infra*.

4. Compare *Schell v. AMF, Inc.*, 567 F.2d 1259 (3d Cir. 1977) and *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974) (manufacturer is held to “quasi-negligence” standard in cases of design defectiveness) with *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) and *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978) (manufacturer’s negligence irrelevant in § 402A design defect cases). For a discussion of the various standards of responsibility to which manufacturers have been held in the design defect context, see notes 51-85 and accompanying text *infra*. See also INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT OF THE LEGAL STUDY vol. 2, at 23-30 (Jan. 1977) [hereinafter cited as TASK FORCE LEGAL STUDY].

5. See DRAFT UNIFORM PRODUCT LIABILITY LAW § 101, 44 Fed. Reg. 2996, 2997 (1979). As the DRAFT UNIFORM PRODUCT LIABILITY LAW indicates, “the rules [for determining a manufacturer’s responsibility] vary from jurisdiction to jurisdiction and are in a constant state of flux, thus militating against predictability of litigation outcome.” *Id.* at 2997, 3003, citing INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT vol. 7, at 15-17 (Nov. 1977) [hereinafter cited as TASK FORCE FINAL REPORT]. For a discussion of the reasons behind this confusion, see notes 37-85 and accompanying text *infra*. For an analysis of the DRAFT UNIFORM PRODUCT LIABILITY LAW, see notes 139-57 and accompanying text *infra*.

fears that products liability insurance premiums<sup>6</sup> will continue to soar,<sup>7</sup> thereby forcing many conscientious producers out of business.<sup>8</sup> Faced with this "crisis of confusion,"<sup>9</sup> courts have been struggling to articulate the standards of responsibility to which manufacturers will be held when the design of a product is allegedly defective.<sup>10</sup>

In *Azzarello v. Black Brothers Co.*,<sup>11</sup> the Supreme Court of Pennsylvania was confronted with this uncertainty for a second time.<sup>12</sup> Although failing to delineate any workable standard for determining design defectiveness,<sup>13</sup> the *Azzarello* court held that the "unreasonably dangerous" language of section 402A was not the appropriate test of a manufacturer's responsibility in products liability cases.<sup>14</sup>

6. One of the findings reported in the DRAFT UNIFORM PRODUCT LIABILITY LAW was that "[i]nsurers have cited uncertainty in products liability law and litigation outcome to justify setting rates and premiums that, in fact, may not reflect actual product risk." See DRAFT UNIFORM PRODUCT LIABILITY LAW § 101, 44 Fed. Reg. 2996, 2997, 3003 (1979), citing TASK FORCE FINAL REPORT, *supra* note 5, vol. 5, at 48-49.

7. See Schwartz, *Products Liability and No-Fault Insurance: Can One Live Without the Other?*, 12 FORUM 130, 130 & n.2 (1976); *Insurance Advertising & Jury Awards*, 65 ABA J. 69, 69 (Jan. 1979); *The Devils in the Product Liability Laws*, BUS. WEEK, Feb. 12, 1979, at 72. A recent survey, conducted by the Pennsylvania Chamber of Commerce, reports that many Pennsylvania product manufacturers have experienced more than a 500% increase in their product liability premiums since 1970. PA. CHAMBER OF COMMERCE, PRODUCT LIABILITY REFORM IN PENNSYLVANIA 3 (1979). Another recent study indicated that among 228 metalworking companies surveyed, the average price of products liability insurance had risen 424% during 1977 alone. See Irving, *Our National Product Liability Crisis and Why You are a Part of It*, IRON AGE 81, (Aug. 1, 1977), cited in Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149, 166 (1978). In 1978, manufacturers and retailers paid approximately \$2.75 billion for products liability insurance premiums compared to an estimated \$1.13 billion in 1975. BUS. WEEK, *supra*, at 72. The DRAFT UNIFORM PRODUCT LIABILITY LAW indicates that such increases have resulted in "[b]usinesses going without product liability insurance coverage, thus jeopardizing the availability of compensation to injured persons." See DRAFT UNIFORM PRODUCT LIABILITY LAW § 101, 44, Fed. Reg. 2996, 2997, 3003 (1979), citing TASK FORCE FINAL REPORT, *supra* note 5, vol. 5, at 48-49.

8. See Schwartz, *supra* note 7, at 130 & n.2.; *The Devils in the Product Liability Laws*, BUS. WEEK, Feb. 12, 1979, at 73. Professor Schwartz, the Task Force Chairman, gives the illustration of a Minnesota manufacturing company which was forced to go out of business, rather than purchase insurance at a rate of 10% of the company's \$2,000,000 annual sales. See Schwartz, *supra*, at 130 n.2.

9. See TASK FORCE LEGAL STUDY, *supra* note 4, vol. 4, at 86. "The current morass has been variously characterized as one of 'confusion,' a 'murky state of affairs,' a 'crisis of confidence,' a state of 'unhealthy ferment,' and involving a 'tremendous amount of uncertainty.'" *Id.* (citations omitted). See also Kircher, *Products Liability—The Defense Position*, 44 INS. COUNSEL J. 276 (1977). It has been posited that products liability law cannot be expanded indefinitely since a finite limitation exists in manufacturers' ability to absorb expanding liability awards. *Id.* Sooner or later, manufacturers will reach a point where they can no longer pass along the cost of those awards to consumers, and when such a limitation is reached, "[t]his cannot help but have a staggering impact upon the economy of this country and the ability of private enterprise to provide jobs." *Id.*

10. See notes 54-85 and accompanying text *infra*.

11. 480 Pa. 547, 391 A.2d 1020 (1978).

12. For the court's first encounter with this uncertainty, see *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); notes 87-92 and accompanying text *infra*.

13. See notes 98-104 and accompanying text *infra*.

14. 480 Pa. at 559-60, 391 A.2d at 1027.

Focusing upon recent developments in Pennsylvania law, this note will examine the policies underlying strict products liability, present the differing applications of section 402A, and analyze the source of the uncertainty which exists in design defect analysis. Consideration will then be given to the proposals that are currently being recommended and implemented throughout the United States in an effort to eliminate the confusion in products liability law.

## II. THE EMERGENCE OF UNCERTAINTY IN THE LAW OF STRICT PRODUCTS LIABILITY

### A. Policies Underlying the Doctrine

The courts developed the doctrine of strict products liability<sup>15</sup> to protect consumers<sup>16</sup> from the dangers and complexities inherent in modern

15. Strict products liability experienced its true coming of age in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). See notes 21-27 and accompanying text *infra*. The law of products liability, in general, traces its existence to the case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). *Winterbottom* developed the principle that the original seller of a chattel is not liable to one with whom he is not in privity of contract. See *id.*; W. PROSSER, *LAW OF TORTS* § 96 (4th ed. 1971). In 1852, the *Winterbottom* rule was altered to allow recovery, even in the absence of privity, for injury caused by negligently made products that were inherently dangerous to human life. *Thomas v. Winchester*, 6 N.Y. 397 (1852).

The manufacturer's duty to a remote vendee was extended in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). *MacPherson* removed the privity barrier if the nature of the product was reasonably certain to cause physical injury to the user when negligently made. *Id.* at 389, 111 N.E. at 1053. *MacPherson*, however, burdened the plaintiff with the difficulty of proving negligent conduct on the part of the manufacturer. *Id.* at 389-90, 111 N.E. at 1053. This problem was partially alleviated when it was held that an automobile manufacturer and retailer could be liable on an implied warranty even without negligence or privity. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). The warranty theory, however, presented a different set of problems for the unwary consumer: the burden of proving reliance, the obligation to give notice, and the possibility of the manufacturers disclaiming liability. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960) [hereinafter cited as *The Assault*]. Eventually, in *Greenman*, "the California Supreme Court cast aside the doctrinal overcast of negligence, privity, and warranty and endorsed a theory of strict liability for defective products." *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 553 n.4, 391 A.2d 1020, 1024 n.4, citing *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

16. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); notes 21-27 and accompanying text *infra*. Prior to the development of strict products liability, nineteenth century courts tended to protect infant industries by shielding them from the catastrophic results of heavy personal injury judgments:

The central concept of tort liability reflected society's favor for production for market. An entrepreneur would not be held accountable for his actions merely because a complainant showed that he had suffered some loss in fact. To hold so would have forced business ventures to proceed at their peril. Instead, the complainant was required to show loss of a kind that lawmakers deemed socially unacceptable; actors first had to be declared legally liable before they were accountable for the cost or loss which their action caused to another. By reducing legal risks through the liability concept, tort law tended to encourage entrepreneurs to venture for productive ends.

Laitos, *Continuities From the Past Affecting Resource Use and Conservation Patterns*, 28 OKLA. L. REV. 60, 83 (1975) (citation omitted). See also Friedman & Ladinsky, *Social Change and the*

technological society.<sup>17</sup> The rationale underlying this development was set forth in Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*,<sup>18</sup> wherein he posited that even when the defendant manufacturer is not negligent, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."<sup>19</sup> The basis for this conclusion was Justice Traynor's belief that the difficulty of proving negligent conduct on the part of the manufacturer would constitute an insurmountable barrier for the injured consumer.<sup>20</sup>

*Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51-58 (1967); Maleson, *Negligence Is Dead But Its Doctrines Rule Us From the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMPLE L.Q. 1, 8 (1978).

17. *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). As the California Supreme Court recently stated:

The technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products. The radical change from a comparatively safe, largely agricultural, society to this industrial unsafe one has been reflected in the decisions that formerly tied liability to the fault of a tortfeasor but now are more concerned with the safety of the individual who suffers the loss.

*Id.* at 434-35, 573 P.2d at 457, 143 Cal. Rptr. at 239.

18. 24 Cal. 2d 453, 150 P.2d 436 (1944). In *Escola*, the plaintiff was injured when a bottle suddenly exploded in her hand. *Id.* at 456, 150 P.2d at 437. Unable to prove any specific acts of negligence, she relied upon the doctrine of *res ipsa loquitur*. *Id.* at 457, 150 P.2d at 438. The majority concluded that an inference of negligence was warranted since the plaintiff had satisfied the prerequisites of *res ipsa loquitur*. *Id.* at 461, 150 P.2d at 440. Furthermore, the court decided that, even though the defendant had presented evidence that it had not been negligent, whether or not the inference had been dispelled was a question of fact for the jury. *Id.*

19. *Id.* at 462, 150 P.2d at 440 (Traynor, J., concurring). Justice Traynor believed that the doctrine of *res ipsa loquitur* was inadequate to protect injured consumers since the manufacturer could displace the inference of negligence by positive testimony of due care. *Id.* at 462-63, 150 P.2d at 441 (Traynor, J., concurring). According to Justice Traynor, the injured plaintiff would experience great difficulty in trying to refute the manufacturer's evidence because he would not be familiar with the manufacturing process. *Id.* at 463, 150 P.2d at 44 (Traynor, J., concurring). In *Escola*, the majority allowed the jury to decide whether the inference had been rebutted. *Id.* at 461, 150 P.2d at 440. Traynor believed that in leaving the issue to the jury, the majority's analysis approached the rule of strict liability since, even though the defendant had exercised all possible care in manufacturing his product, he could still be held liable if the jury decided that the inference of negligence had not been dispelled. *Id.* at 463, 150 P.2d at 441 (Traynor, J., concurring). Criticizing this "needlessly circuitous" application of *res ipsa loquitur*, Justice Traynor maintained that "[i]f public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly." *Id.* (Traynor, J., concurring).

20. 24 Cal. 2d at 463, 467, 150 P.2d at 441, 443 (Traynor, J., concurring). Justice Traynor had perceived that in this present age of mass production and nationwide advertising techniques, consumers no longer have the opportunity to examine products warily but, instead, are forced to rely upon the manufacturer's own representations with respect to the quality and safety of his goods. *Id.* at 467, 150 P.2d at 443 (Traynor, J., concurring). Because the injured plaintiff lacks familiarity with the manufacturing process, it is often impossible for him to identify the cause of the defect. *Id.* at 463, 150 P.2d at 441 (Traynor, J., concurring). See also *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 12-13, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363, 367-8 (1962); 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 1 (1973). It has been recognized that "[m]any of these products are so complicated in design, formula or plan that only the expert can intelligently discuss them or even explain how to use them." *Id.* at 1-2.

Eighteen years later in the landmark decision of *Greenman v. Yuba Power Products, Inc.*,<sup>21</sup> Justice Traynor marshalled the support of the Supreme Court of California for the strict liability principles he had enunciated in *Escola*.<sup>22</sup> Now writing for a unanimous court, Justice Traynor emphasized that the purpose of imposing strict liability on the manufacturer is "to insure that the cost of injuries resulting from defective products are borne by the manufacturers who put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>23</sup> Recognizing the difficulty which a consumer would experience in trying to establish a prima facie case in negligence,<sup>24</sup> the *Greenman* court pronounced an independent cause of action for strict products liability<sup>25</sup> which eliminated the requirement that the "powerless plaintiff"<sup>26</sup> prove negligent conduct on the part of the manufacturer.<sup>27</sup>

In sum, two major policy arguments<sup>28</sup> emerge as the bases for the establishment of strict products liability: 1) the notion that injured consumers should be protected because they are powerless to prove specific negligent conduct on the part of the manufacturer;<sup>29</sup> and 2) the theory that manufacturers should allocate the losses caused by defective products among the public at large as a cost of doing business.<sup>30</sup>

Two years after *Greenman*, the American Law Institute embodied a similar doctrine of strict products liability into section 402A of the *Restatement*.<sup>31</sup> According to one source, "[s]ection 402A has literally swept the

21. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

22. *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

23. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. Underlying this theory was the belief that the manufacturer, by increasing prices and purchasing liability insurance, could best allocate the losses caused by defective products to the public at large. See W. PROSSER, LAW OF TORTS § 97, at 650 (4th ed. 1971).

24. See note 20 and accompanying text *supra*.

25. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. The court stated:

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.

*Id.*

26. See note 20 and accompanying text *supra*.

27. 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. As one commentator has remarked, the significance of this change is that "[t]he plaintiff is no longer required to impugn the maker, but he is required to impugn the product." Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973).

28. Two other public policy justifications for imposing strict products liability have also been advanced: 1) that the manufacturer is in the best position to discover and guard against defects, thereby minimizing the risk of harm; and 2) that the manufacturer will have a greater incentive to design and produce safe products. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d at 462, 150 P.2d at 440-41 (Traynor, J., concurring); Prosser, *The Assault*, *supra* note 15, at 1122-23; Sachs, *Negligence or Strict Product Liability: Is There Really a Difference in Law or Economics?*, 8 CA. J. INT'L & COMP. L. 259, 264-76 (1978).

29. See notes 15-27 and accompanying text *supra*.

30. See notes 18-23 and accompanying text *supra*.

31. For the text of § 402A, see note 1 *supra*.

country,"<sup>32</sup> so that today a substantial majority of American jurisdictions have adopted either the precise formulation or the general theory of strict liability for dangerously defective products.<sup>33</sup> The diverging attempts at interpreting this provision<sup>34</sup> have sparked the products liability imbroglio which currently exists in the United States<sup>35</sup>—and Pennsylvania in particular.<sup>36</sup>

### B. *The Source of Confusion*

In formulating section 402A, the draftsmen of the *Restatement* were focusing on problems relating to adulterated foods or mismanufactured products;<sup>37</sup> they were not directly concerned with problems pertaining to defects in a product's *design*.<sup>38</sup> It is submitted that the uncertainty which exists in applying the doctrine of strict liability to design defect cases<sup>39</sup> has arisen because courts often fail to pay attention to the distinction between defective manufacture and defective design.<sup>40</sup> Judges persistently instruct juries to decide design defect cases under standards which do not incorporate the special social and economic considerations applicable to the design situation.<sup>41</sup>

32. W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 759 (6th ed. 1976).

33. See Maleson, *supra* note 16, at 38-39. As of March, 1978, 29 states had adopted § 402A, 9 states and the District of Columbia had adopted a doctrine of strict liability in tort not expressly based on § 402A, and 3 states had indicated acceptance of a rule of strict liability either in dicta or by federal courts applying state law. See *id.*

34. See notes 51-85 and accompanying text *infra*.

35. See notes 1-10 and accompanying text *supra* and notes 51-85 and accompanying text *infra*.

36. See notes 86-104 and accompanying text *infra*.

37. See DRAFT UNIFORM PRODUCT LIABILITY LAW (Analysis § 104), 44 Fed. Reg. 2996, 3004 (1979).

38. See *id.*; Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 830-32 (1973). Dean Wade, who was present at the A.L.I. proceedings during which § 402A was formulated, indicates that the draftsmen of this rule were concentrating on examples of products which were defective only in the sense that something went wrong in the manufacturing process. *Id.* Indeed, even the illustrations given in Comment *i*, with regard to what constitutes an "unreasonably dangerous" product, indicate that the draftsmen had mismanufacturing defects in mind. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i* (1965). According to Comment *i*, examples of "unreasonably dangerous" products include whiskey that contains a dangerous amount of fusel oil, tobacco mixed with a marijuana-type substance, and butter that is contaminated with poisonous fish oil. *Id.*

39. The following discussion, which deals with design defectiveness, will also be relevant to cases involving failure to warn or to instruct because many of the same problems and policy considerations are present in both situations. See DRAFT UNIFORM PRODUCT LIABILITY LAW §§ 104(B), (C), 44 Fed. Reg. 2997, 2998 (1979).

40. See, e.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970); Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 88, 91 Cal. Rptr. 301, 305 (1970); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 94-95, 337 A.2d 893, 898 (1975); Azzarello v. Black Bros. Co., 480 Pa. 547, 556-60, 391 A.2d 1020, 1025-27 (1978).

41. See, e.g., Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978). For an analysis of *Berkebile* and

When the plaintiff's injury is occasioned by an improperly *manufactured* product, it is relatively easy to embody the two major policy aims<sup>42</sup> underlying section 402A<sup>43</sup> into standards for determining "defectiveness." In such a case, the doctrine of strict products liability assists the "powerless plaintiff"<sup>44</sup> by reducing his burden of proof to a mere showing that the product which caused his injury "deviated from the norm"<sup>45</sup> in a way that made it unsafe for its intended use.<sup>46</sup> If the trier of fact finds that the product was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer,"<sup>47</sup> it will be deemed to have been in a "defective condition unreasonably dangerous to the user."<sup>48</sup> Then, if causation is shown, the manufacturer will be held strictly liable,<sup>49</sup> even in the absence of any negligence or fault on his part.<sup>50</sup> In this way, the two major aims of strict products liability have been satisfied since the "powerless plaintiff" has been protected and the cost of injury can be spread by the manufacturer to the public at large.

On the other hand, with respect to a design defect case, it is considerably more difficult to embody these policy arguments into a workable standard for determining "defectiveness."<sup>51</sup> In contrast to the defectively man-

Azzarello, *see* notes 86-104 and accompanying text *infra*. For a discussion of the special economic and social policy considerations applicable to design defect cases, *see* notes 58-60 and accompanying text *infra*.

42. *See* notes 28-30 and accompanying text *supra*.

43. This situation is to be contrasted with the difficult problem that courts encounter in trying to embody these policy aims into design defect analysis. *See* notes 51-53 and accompanying text *infra*.

44. *See* notes 15-27 and accompanying text *supra*.

45. *See* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 170, 386 A.2d 816, 824-25 (1978); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965). Another commentator has pointed out that "[i]n cases involving manufacturing flaws, of course, the courts are not required to establish standards with which to judge the acceptability of individual products because of the built-in availability in every case of a specific standard—the intended product design—with which to determine whether a given product is flawed and, therefore, defective." Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1547 (1973) (footnote omitted).

46. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment *h* (1965).

47. *Id.*, Comment *i* (1965).

48. *See id.*

49. This conclusion assumes, of course, that the requirements of subsections 402A(1)(a) and (1)(b) have also been met. *See* note 1 *supra*.

50. *See, e.g.*, Bachner v. Pearson, 479 P.2d 319, 329 (Alas. 1970); Larson v. Clark Equip. Co., 33 Colo. App. 277, 278, 518 P.2d 308, 309 (1974); Lee v. Crookston Coca Cola Bottling Co., 290 Minn. 321, 328-29, 188 N.W.2d 426, 432 (1971); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 800 (Mo. 1972); Codling v. Chrysler Corp., 32 N.Y.2d 330, 335, 298 N.E.2d 622, 624, 345 N.Y.S.2d 461, 463 (1973).

51. Some commentators have seriously questioned the ability of judges and juries to determine design defectiveness at all: "[H]ow is the predominance of the legal standard to be asserted when what is called in question is a deliberate decision based on complex economic criteria . . . [and] how is the jury to decide whether or not a managerial decision, choosing safety procedures that made the best economic sense, conformed to the legal standard of reasonable care?" Fleming, *The Role of Negligence In Modern Tort Law*, 53 VA. L. REV. 815, 820 (1967) (emphasis in original). Professor Henderson has concluded that review of a manufacturer's conscious design choice lies beyond the limits of adjudication because of the difficulty



ufactured product which involves a deviation from the manufacturer's expectations, a defectively designed product may be the result of a calculated choice by the manufacturer.<sup>52</sup> Therefore, no built-in norm against which to measure a design defect exists because the defective design is itself the norm.<sup>53</sup> Hence, in searching for an appropriate standard to guide them in determining design "defectiveness," many courts have turned to Comments *g*, *h*, and *i* of section 402A of the *Restatement*,<sup>54</sup> and fashioned guidelines from the phrase "unreasonably dangerous."<sup>55</sup> The courts, however, have not been consistent in their application of this phrase.<sup>56</sup>

involved in evaluating complex technological and social trade-offs. Henderson, *supra* note 45, at 1531. See also Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 651-52 (1978).

52. A distinction must be drawn between "inadvertent design errors" and "conscious design choices." See Henderson, *supra* note 45, at 1542-52. The former are similar to manufacturing flaws in that the product simply does not function as it was intended to function (*e.g.*, a scaffold collapses or a cable snaps due to an engineering mistake). *Id.* at 1548-49. In this area, courts can readily determine defectiveness by comparing the challenged product to the basic design standards developed and universally accepted by the engineering profession—*i.e.*, the "norm." See *id.* at 1550-52; notes 44-46 and accompanying text *supra*. "Conscious design choices," on the other hand, are exactly what they were supposed to be; nevertheless, they cause harm to someone while in the process of doing what they were intended to do (*e.g.*, a lawnmower cuts through grass but also injures plaintiff's foot). Henderson, *supra*, at 1549. It is in this situation that courts have experienced the greatest difficulty in establishing standards for liability. See *e.g.*, *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1029 (1979); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). It is submitted that in these two cases, the Pennsylvania court failed to articulate a workable standard for determining defectiveness in the "conscious design choice" situation. See notes 86-104 and accompanying text *infra*.

53. See, *e.g.*, *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 428-30, 573 P.2d 443, 453-54, 143 Cal. Rptr. 225, 235-36 (1978). See generally *Ross v. Up-Right, Inc.*, 402 F.2d 943, 946-47 (5th Cir. 1968); Henderson, *Manufacturers' Liability For Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625, 626 (1978); Traynor, *supra* note 46, at 367; Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?*, 14 DUQ. L. REV. 25, 32 (1975); Note, *Products Liability—"Unreasonable Danger" Eliminated from the Theory of Strict Liability—The Restatement Restated*, 42 FORDHAM L. REV. 943, 945 (1974). Professor Henderson explains the distinction between manufacturing and design defects in this way:

In cases involving manufacturing flaws, the product design provides a specific, built-in standard against which to measure the legal adequacy of the particular product that injured the plaintiff. However, when the plaintiff attacks the product design itself, in the absence of any express promises or relevant statutory requirements regarding performance or design, no such specific, built-in standard is available. Instead, courts must rely upon the vague tort standard of "reasonableness under all the circumstances" in determining whether or not product designs are defective.

Henderson, *supra*, at 626 (footnotes omitted).

54. RESTATEMENT (SECOND) OF TORTS § 402A, Comments *g*, *h*, & *i* (1965). Comment *g* provides that a product is defective when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.*, Comment *g*. According to Comment *h*, "[a] product is not in a defective condition when it is safe for normal handling and consumption." *Id.*, Comment *h*. Comment *i* explains that § 402A applies only where "the defective condition of the product makes it unreasonably dangerous to the user or consumer" and "the article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." *Id.*, Comment *i*.

55. See cases cited notes 56 & 57 *infra*. See also Henderson, *supra* note 53, at 626.

56. For example, one interpretation has been that the plaintiff must prove *both* that the product was "unreasonably dangerous" and that it was in a "defective condition." See Bruce

In the design defect context, some courts have developed a standard based upon the "unreasonably dangerous" language which is essentially a negligence test.<sup>57</sup> These jurisdictions balance such social and economic policy factors as "the usefulness and desirability of the product to the consumer" against "the likelihood that the product will cause injury and the probable seriousness of the injury."<sup>58</sup> Under this analysis, a product is deemed to be "unreasonably dangerous" if a court finds that a manufacturer would have been negligent in placing the product on the market, had the manufacturer known of the product's propensity to injure.<sup>59</sup> It is submitted that a balancing analysis is essential in design defect cases because the con-

v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976). Another approach maintains that the terms "defective condition" and "unreasonably dangerous" are essentially synonymous in products liability law. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1272 (5th Cir.), cert. denied, 419 U.S. 1096 (1974). A third interpretation eliminates the "defective condition" element and only requires the plaintiff to prove that the product was "unreasonably dangerous." See, e.g., *Ross v. Up-Right, Inc.*, 402 F.2d 943, 946-47 (5th Cir. 1968); *Seattle First Nat'l Bank v. Talbert*, 86 Wash. 2d 145, 152, 542 P.2d 774, 779 (1975). Finally, other courts have ruled out the "unreasonably dangerous" requirement completely, maintaining that proof of "defective condition" is the controlling element in establishing liability for a defective design. See *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976, 978 (D. Alas. 1973); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 603, 304 A.2d 562, 564-65 (1973), overruled in *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 180, 386 A.2d 816, 829 (1978); *Azzarello v. Black Bros. Co.*, 480 Pa. at 559-60, 391 A.2d at 1027. See also *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 95-97, 337 A.2d 893, 899-900 (1975).

57. See, e.g., *Hagens v. Oliver Mach. Mfg. Co.*, 576 F.2d 97 (5th Cir. 1978); *Schell v. AMF, Inc.*, 567 F.2d 1259 (3d Cir. 1977); *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971). *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1973); *Byrns v. Riddel, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 386 A.2d 816 (1978); *Johnson v. Clark Equip. Co.*, 274 Or. 403, 547 P.2d 132 (1976); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974). As Dean Wade points out, in manufacturing defect cases, "the distinction between negligence and strict liability is most significant." Wade, *supra* note 38, at 841. However, in cases of defective design, "[t]here is little difference . . . between the negligence action and the action for strict liability . . . for the manufacturer, who normally either knows of the danger which the design creates or should know (i.e., is negligent in not knowing of it) . . ." *Id.* (footnotes omitted).

58. See Wade, *supra* note 38, at 837. In addition to the utility and safety aspects of a product, Dean Wade asserts that the following factors should also be considered:

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) 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.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Id.* at 837-38 (footnotes omitted). Cf. notes 150-51 and accompanying text *infra*.

59. See *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 174, 386 A.2d 816, 827 (1978); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492, 525 P.2d 1033, 1036-37 (1974); *Roach v. Kononen*, 269 Or. 457, 465, 525 P.2d 125, 129 (1974); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 565-69 (1969); Wade, *supra* note 38, at 839-40.

sequences of condemning an entire product line are more damaging than the consequences of liability for a single mismanufactured product.<sup>60</sup> Hence, in this respect, such an interpretation of the “unreasonably dangerous” criterion has proven helpful insofar as it takes these special social and economic considerations<sup>61</sup> into account.<sup>62</sup> As some courts have noted, “[d]emanding that the defect render the product unreasonably dangerous reflects a realization that many products . . . have both utility and danger.”<sup>63</sup>

Moreover, this balancing approach certainly embodies the two major policy goals underlying section 402A because 1) it shields the “powerless plaintiff” from the necessity of proving negligent conduct since he need not establish that the manufacturer knew or should have known of the defect;<sup>64</sup> and 2) it permits the manufacturer to distribute the loss to the public but only when the balance is in favor of loss distribution—that is, when the manufacturer is *at fault*.<sup>65</sup>

In sharp contrast to this quasi-negligence approach, other jurisdictions have reacted very strongly against the use of the phrase “unreasonably dangerous” in a strict liability suit.<sup>66</sup> Insisting that such a standard burdens

60. See Comment, *supra* note 53, at 32. Unlike the situation in which a manufacturing defect is involved, when the basic design of a product is found to be defective, correction of such a defect may entail much more than merely replacing it with a substitute from the same product line:

Correction requires cancellation of a model's production or the complete replacement of one model with another of different design. Included in this replacement are additional costs such as those for redesigning, advertising, and purchasing of new equipment and different materials, with a strong temptation to reduce quality of workmanship and materials in order to minimize lost profits.

*Id.* (citation omitted).

61. *But cf.* DRAFT UNIFORM PRODUCT LIABILITY LAW, 44 Fed. Reg. 2996, 3005 (1979) (“utility” factor and “consumer expectation” analysis should have no place in the balancing approach); notes 150-51 *infra*.

62. See, e.g., *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 172-75, 386 A.2d 816, 826-27 (1978); *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 849-50 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

63. *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968) (citation omitted). See also *Ross v. Up-Right, Inc.*, 402 F.2d 943, 946 (5th Cir. 1968).

64. See note 59 and accompanying text *supra*; note 112 and accompanying text *infra*. In a strict liability suit, this element of *scienter* is supplied as a matter of law. See note 59 and accompanying text *supra*. All plaintiff need prove is that if the manufacturer had known that the product was defective, it would have been unreasonable to put the product on the market. *Id.*

65. See notes 105-22 and accompanying text *infra*. In contrast to this balancing approach, some courts have tended to overemphasize the “allocation of loss” rationale so as to hold manufacturers liable regardless of whether or not they were at fault. See notes 73-85 and accompanying text *infra*.

66. See, e.g., *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976, 978 (D. Alas. 1973); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 603, 304 A.2d 562, 564-65 (1973), *overruled in Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 180, 386 A.2d 816, 829 (1978); *Azzarello v. Black Bros. Co.*, 480 Pa. at 559-60, 391 A.2d at 1027 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 95-97, 337 A.2d 893, 899-900 (1975). For a discussion of *Azzarello* and *Berkebile*, see notes 86-104 and accompanying text *infra*.

the plaintiff "with proof of an element which rings of negligence,"<sup>67</sup> these courts have eliminated the "unreasonably dangerous" requirement and proclaimed that strict liability should exclude all notions of fault.<sup>68</sup> Recognizing that the words "unreasonably dangerous" may serve the beneficial purpose of preventing the manufacturer from being treated as the *insurer* of his product,<sup>69</sup> these courts have held that "such protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries."<sup>70</sup> Nevertheless, while requiring proof of "defect" does serve usefully to prevent the imposition of absolute liability in a mismanufacturing case,<sup>71</sup> it is submitted that none of these courts has established any workable standard with which to limit the manufacturer's responsibility in the design defect situation.<sup>72</sup>

In groping for a standard, these courts have increasingly emphasized the "allocation of loss" doctrine.<sup>73</sup> Instead of concentrating upon the special

67. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442; *Azzarello v. Black Bros. Co.*, 480 Pa. at 555, 391 A.2d at 1025; *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 96-97, 337 A.2d 893, 900 (1975).

68. *See* cases cited note 66 *supra*. Characterizing negligence concepts as antithetical to strict liability principles, the California Supreme Court has stated that "in a product liability action, the trier of fact must focus on the *product*, not on the *manufacturer's conduct*, and . . . the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail . . ." *Baker v. Lull Eng'r Co.*, 29 Cal. 3d 413, 418, 573 P.2d 443, 447, 143 Cal. Rptr. 225, 229 (1978) (emphasis supplied by the court).

69. *See Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); notes 80 & 99 and accompanying text *infra*; note 92 *infra*.

70. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). *See also Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 93-94, 337 A.2d 893, 898 (1975).

71. *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 170, 386 A.2d 816, 825 (1978); Keeton, *supra* note 27, at 39. The defect concept is a useful standard for limiting liability in the mismanufacturing situation since, in these cases, the "deviation-from-the-norm" test is readily available to determine whether or not the product was defective. *See* notes 44-50 and accompanying text *supra*. Hence, in this situation, the unreasonably dangerous criterion is not necessary to prevent the imposition of absolute liability because the manufacturer will not be held liable unless there was some flaw in the product's fabrication. *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. at 170, 386 A.2d at 825; Keeton, *supra*, at 39.

72. *See Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33 n.16, 501 P.2d 1153, 1162 n.16, 104 Cal. Rptr. 433, 442 n.16 (1972). The *Cronin* court specifically addressed this problem: "We recognize, of course, the difficulties inherent in giving content to the defectiveness standard. However, as Justice Traynor notes, 'there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty law.'" *Id.*, quoting Traynor, *supra* note 45, at 373. Nevertheless, "useful precedents" have not been a panacea, and *Cronin* has been criticized for "providing no useful definition of an actionable defect, particularly in relation to a case of a product of unsafe design." *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 178, 386 A.2d 816, 829, citing Wade, *supra* note 38, at 831-32 and Keeton, *supra* note 27, at 30-32.

73. *See Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 134, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Azzarello v. Black Bros. Co.*, 480 Pa. at 553, 391 A.2d at 1023. Courts which emphasize the "allocation of loss" rationale maintain that manufacturers should bear the total cost of product-related injuries because they are in the best position to allocate the loss to the public at large by increasing prices and purchasing liability insurance. *See id.*; notes 18-23 and accompanying text *supra*.

economic and social considerations applicable to a design defect case,<sup>74</sup> these courts have insisted that, *even when not at fault*,<sup>75</sup> the manufacturer must compensate the victims of product-related injury so that the loss may be spread throughout society.<sup>76</sup> The fault concept, which protected fledgling industries in the nineteenth century,<sup>77</sup> is no longer considered necessary in an age when it is the consumer who requires protection.<sup>78</sup> Nevertheless, while certain giant corporations may be able to cope with loss spreading, it is suggested that many small scale manufacturers could be forced out of business by one large products liability judgment against them.<sup>79</sup>

Thus, even though most courts typically contend that manufacturers are not to be made insurers of their products' safety,<sup>80</sup> it is submitted that courts which emphasize the no-fault "allocation of loss" rationale,<sup>81</sup> while neglecting to provide a clear-cut definition for "design defectiveness,"<sup>82</sup>

74. See notes 58-60 and accompanying text *supra*.

75. See notes 67-70 and accompanying text *supra*.

76. See, e.g., Klimas v. Int'l Tel. & Tel. Corp., 297 F. Supp. 937, 942 (D.R.I. 1969); Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. 1975); Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974); Howes v. Hansen, 56 Wis. 2d 247, 256, 201 N.W.2d 825, 829 (1972). See also Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975). For a discussion of *Berkebile* and *Azzarello*, see notes 86-104 and accompanying text *infra*.

77. See note 16 *supra*.

78. See *Azzarello v. Black Bros. Co.*, 480 Pa. at 553, 391 A.2d at 1023-24. As the Supreme Court of Pennsylvania recently stated: "In an era of giant corporate structures, utilizing the national media to sell their wares, the original concern for an emerging manufacturing industry has given way to the view that it is now the consumer who must be protected." *Id.*

79. See *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 806-07, 395 A.2d 843, 846 (1978); note 10 *supra*. The *Thibault* court stated:

Viewed as a system of spreading the risk, the doctrine of strict liability has had economic consequences . . . .

The "Fortune 500" companies suffer less economically because they can develop adequate statistics, purchase insurance, and employ expensive experts and legal counsel.

For thousands of small manufacturers, the high cost of self-protection or insurance can be prohibitive so as to force them out of business.

*Id.* at 806, 395 A.2d at 846 (citation omitted).

Moreover, the uncertainty which would result from the abolition of the fault concept could produce a devastating effect upon those very consumers whom the "allocation of loss" doctrine is designed to protect. As the Interagency Task Force on Product Liability has noted, "[t]here is a rising fear that, with the increase in products liability claims and amounts of judgments, and the corresponding decrease in availability of products liability insurance at affordable rates, many injured victims of products injuries will be left without an adequate means of compensation." TASK FORCE LEGAL STUDY, *supra* note 4, vol. 7, at 11.

80. See *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 849 (5th Cir. 1967), *cert. denied*, 391 U.S. 913, (1968); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Ford Motor Co. v. Carter*, 141 Ga. App. 371, 374, 233 S.E.2d 444, 447 (1977); *Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co.*, 62 Ill. 2d 77, 85, 338 N.E.2d 857, 861 (1975); *Azzarello v. Black Bros., Co.*, 480 Pa. 547, 553, 391 A.2d 1020, 1024 (1978); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 785 (Tex. 1967); *Dippel v. Sciano*, 37 Wis. 2d 443, 459-60, 155 N.W.2d 55, 63 (1967).

81. See notes 73-79 and accompanying text *supra*.

82. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). All of these cases repudiated the

have drawn dangerously close to the fine line between strict and absolute liability.<sup>83</sup> Elimination of the “unreasonably dangerous” language—or, more precisely, the quasi-negligence approach which accompanies it<sup>84</sup>—has created a vacuum in the design choice area of products liability law.<sup>85</sup> Therefore, until these courts begin to apply the quasi-negligence approach, or some viable alternative thereto, one of the major sources of confusion in products liability will remain.

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“unreasonably dangerous” criterion and emphasized the “allocation of loss” doctrine, but none provided any workable standard with which to limit the manufacturer’s liability in a design defect case. See note 72 and accompanying text *supra*; notes 92 & 96-104 and accompanying text *infra*.

83. See Henderson, *supra* note 55, at 626-27; notes 99-103 and accompanying text *infra*. It is apparent that even some courts which have not specifically ruled out the “unreasonably dangerous” requirement have begun to overemphasize the “allocation of loss” rationale and have, thereby, vastly expanded the manufacturer’s potential liability. See, e.g., *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976); *Moran v. Faberge, Inc.*, 373 Md. 538, 332 A.2d 11 (1975); *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972). See generally Epstein, *supra* note 51. For example, although traditionally a plaintiff’s misuse of the product would bar recovery if his use was not reasonably foreseeable, see *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978), recent cases have tended to permit recovery even where the product has been misused. See, e.g., *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976); *Moran v. Faberge, Inc.*, 373 Md. 538, 332 A.2d 11 (1975); *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972). Some courts achieve this result by enlarging the scope of foreseeability. See, e.g., *Melia v. Ford*, 534 F.2d 795 (8th Cir. 1976) (plaintiff allowed to recover for injuries suffered when thrown from car with defectively designed door-latch, even though she had been speeding, had gone through a red light, had not worn her seatbelt, and had not locked the door); *Moran v. Faberge, Inc.*, 373 Md. 538, 332 A.2d 11 (1975) (15 year-old girl poured cologne over a candle to see if it was scented, causing a fire which burned bystander plaintiff; plaintiff allowed to go to jury on duty to warn theory, and jury’s finding of non-negligence on the part of the 15 year-old girl was left undisturbed). Other courts merely assert that “foreseeability,” because it rings of negligence, has no place in a strict liability suit. See *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972) (two year-old boy injured by a lawnmower permitted to go to jury on theory of strict liability even though he was not a user or consumer, and even though his mother had failed to supervise). See also *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975) (plaintiff allowed to recover after defectively designed helicopter crashed, even though it had been flown with insufficient fuel).

Another traditional bar to recovery was the “patent danger” rule. See, e.g., *Fisher v. Johnson Milk Co.*, 383 Mich. 158, 160-64, 174 N.W.2d 752, 753-55 (1970); *Campo v. Scofield*, 301 N.Y. 468, 472-73, 95 N.E.2d 802, 803-04 (1950). Under this rule, if the hazards associated with the product were open and obvious, defendant would not be liable for plaintiff’s injuries. See, e.g., 383 Mich. at 160-64, 174 N.W.2d at 753-55; 301 N.Y. at 472-73, 95 N.E.2d 802, 803-04; note 155 and accompanying text *infra*. Recently, this defense has been curtailed and, in some cases, completely rejected. See, e.g., *Luque v. McLean*, 8 Cal. 3d 136, 144-45, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 379, 385, 348 N.E.2d 571, 573, 577, 384 N.Y.S.2d 115, 117, 121 (1976) (overruling *Campo v. Scofield*).

84. See notes 57-65 and accompanying text *supra*.

85. As Professor Henderson asserted:

[T]he present system of handling design cases in most jurisdictions is analogous to a roulette game, in which the injured plaintiffs are steadily being allowed to cover more and more numbers on the wheel with larger and larger wagers. Were the courts to cover all the numbers on behalf of the plaintiffs—in other words, were they to embrace absolute manufacturer’s liability for design caused harm—the process would cease being a game of chance. Yet courts have refused, and undoubtedly will continue to refuse, to go this far. Therefore, the common law approach in design cases is, and without statutory intervention will almost surely remain, essentially a lottery.

Henderson, *supra* note 53, at 626-27 (footnote omitted).

## C. Uncertainty in Pennsylvania

It is respectfully submitted that in recent years<sup>86</sup> the Supreme Court of Pennsylvania has contributed to this uncertainty in products liability law. In *Berkebile v. Brantly Helicopter Corp.*,<sup>87</sup> the court attempted to clarify what it termed "a basic confusion concerning the principles of strict liability in tort,"<sup>88</sup> by suggesting<sup>89</sup> that the "unreasonably dangerous" requirement should be eliminated from its formulation of section 402A.<sup>90</sup> In so doing, the court relied upon the theory that such terminology was too steeped in the language of negligence to have any place in a strict liability suit.<sup>91</sup> Nevertheless, it is submitted that *Berkebile* failed to suggest any adequate replacement standard by which a manufacturer's liability might be measured in a design defect case.<sup>92</sup>

86. The Supreme Court of Pennsylvania adopted § 402A in *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966).

87. 462 Pa. 83, 337 A.2d 893 (1975), noted in Note, *Products Liability—Restatement (Second) of Torts—Section 402A—Under Pennsylvania Law Must a Defective Product Be "Unreasonably Dangerous"?*, 21 VILL. L. REV. 794 (1976).

88. 462 Pa. at 92, 337 A.2d at 898.

89. Although the *Berkebile* court stated that, in a strict liability suit, it is "unnecessary and improper to charge the jury on 'reasonableness,'" *id.* at 96-97, 337 A.2d at 900, it is not clear whether the court specifically held that the "unreasonably dangerous" criterion had no place whatsoever in a case brought under § 402A. See *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1272-73 (E.D. Pa. 1975), *aff'd mem.*, 538 F.2d 318 (3d Cir. 1976).

90. 462 Pa. at 95-97, 337 A.2d at 899-90.

91. *Id.* The court emphasized that since § 402A provides for liability *without fault*, the seller may not escape liability by forcing the injured plaintiff to prove negligence in the manufacturing process. *Id.* at 95, 337 A.2d at 899. The court stated: "[w]hat the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory." *Id.* at 94, 337 A.2d at 899. Thus, the court asserted that it was both unnecessary and improper to charge the jury on any aspect of "unreasonableness." *Id.* at 97, 337 A.2d at 900.

92. *Berkebile's* failure to provide a standard for determining design defectiveness may have been caused in part by the court's reliance upon *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). See 462 Pa. at 96, 337 A.2d at 899-900. Unlike *Berkebile*, the *Cronin* case involved a *manufacturing* defect where "deviation from the norm" could supply the test for defectiveness. See notes 43-50 and accompanying text *supra*. For a discussion of "deviation from the norm" and the distinction between *manufacturing* and *design* defects, see notes 37-56 and accompanying text *supra*. *Berkebile*, on the other hand, dealt with a *design* defect situation where the "deviation from the norm" test is inapplicable. See notes 51-53 and accompanying text *supra*. Neglecting to make this distinction, the *Berkebile* court merely asserted that requiring "proof of defect" will prevent manufacturers from being held absolutely liable for *all* injuries caused by their products, even when the product is not defective (as, for example, when a plaintiff develops diabetic shock from eating sugar). 462 Pa. at 93-97, 337 A.2d at 898-900. Nevertheless, while this may be true with regard to a mismanufactured product—because, in such a case, defectiveness is established by simply showing "deviation"—the *Berkebile* court never explained how absolute liability would be avoided in a *design* case. Since no standard was established to determine design defectiveness, it is conceivable that *anytime* a plaintiff proves that he was injured by a product, the manufacturer could be held liable on a design defect theory. For a discussion of how this might occur, see notes 99-103 and accompanying text *infra*.

While criticizing the Pennsylvania court's failure to suggest an adequate replacement standard with which to limit the manufacturer's potential liability, the United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, refused to accord *Berkebile* any precedential value on the ground that only two justices (Nix and Chief Justice Jones) had

In *Azzarello v. Black Brothers Co.*,<sup>93</sup> Pennsylvania joined those jurisdictions which have concentrated heavily upon the no-fault "allocation of loss" rationale.<sup>94</sup> Writing for a unanimous court, Justice Nix asserted that in today's era of consumer protectionism, as a matter of economic policy, the risk of loss for injury resulting from defective products should be borne by the suppliers, since they are better able to absorb the loss by distributing it as a cost of business.<sup>95</sup> Insisting that "the risk of loss must be placed upon the supplier of the product *without regard to fault*,"<sup>96</sup> Justice Nix specifically deleted the "unreasonably dangerous" language relying upon the theory that such terminology "has burdened the injured plaintiff with proof of an element which rings of negligence."<sup>97</sup> The court, however, did not distinguish between defects in manufacture and defects in design, nor did it delineate a precise standard by which design defectiveness could be determined.<sup>98</sup>

Thus, although maintaining that the manufacturer is not the *insurer* of all injuries caused by his product,<sup>99</sup> the *Azzarello* court failed to indicate how the no-fault "allocation of loss" rationale would be contained so as to limit the manufacturer's responsibility.<sup>100</sup> Instead, the court endorsed a

signed the opinion. See *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1276 (E.D. Pa. 1975) *aff'd mem.*, 538 F.2d 318 (3d Cir. 1976). Alarmed at the uncertainty which deleting the "unreasonably dangerous" language would cause, the *Beron* court maintained "that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing from it 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of 'defective condition.'" 402 F. Supp. at 1274.

93. 480 Pa. 547, 391 A.2d 1020 (1978).

94. For a discussion of the manner in which some courts have increasingly emphasized the "allocation of loss" rationale, see notes 73-85 and accompanying text *supra*.

95. 480 Pa. at 553, 391 A.2d at 1023. See also note 78 and accompanying text *supra*.

96. 480 Pa. at 553, 391 A.2d at 1024 (emphasis added) (footnote omitted). See notes 75-79 and accompanying text *supra*. But see also notes 105-22 and accompanying text *infra*.

97. 480 Pa. at 555-56, 391 A.2d at 1025, quoting *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), and citing as in accord, *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973). For a discussion of the rationale underlying *Cronin* and *Glass*, see notes 60-67 and accompanying text *supra*. It should be pointed out that the *Azzarello* court failed to note that, five months prior to the *Azzarello* decision, *Glass* had been overruled by the Supreme Court of New Jersey in *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 180, 386 A.2d 816, 829 (1978).

98. See notes 99-103 and accompanying text *infra*. Three recent federal cases based upon diversity of citizenship have now followed the *Azzarello* decision and given it retrospective effect. See *Bailey v. Atlas Powder Co.*, 602 F.2d 585 (3d Cir. 1979); *Baker v. Outboard Marine Corp.*, 595 F.2d 176 (3d Cir. 1979); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66 (W.D. Pa. 1979). Judge Teitelbaum, in the *Kruse* case, however, seemed to accept the *Azzarello* decision somewhat reluctantly for, in ruling that *Azzarello* was controlling, he stated: "This is not to say that we approve the Pennsylvania view or believe it will be the Pennsylvania future case. We are nonetheless required to apply the current rule in Pennsylvania." *Id.* at 70, quoting *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1227-28 (3d Cir. 1970).

99. 480 Pa. at 553, 391 A.2d at 1024. See note 80 and accompanying text *supra*.

100. The court did, however, state that there should be some balancing of economic and social policy factors, and that these considerations are questions of law for the court to resolve. 480 Pa. at 558, 391 A.2d at 1026. Yet Justice Nix did not specify the factors which are to be weighed, nor did he explain why a judge is any better equipped to make these determinations than a jury.



jury instruction which requires that the product "be provided with every element necessary to make it safe for [its intended] use."<sup>101</sup> It is submitted that such a charge may mislead a jury<sup>102</sup> into speculation about the most remotely imaginable alternative designs, and thus, could leave the manufacturer vulnerable to unlimited liability.<sup>103</sup> Hence, in neglecting to articulate any workable standard of responsibility, *Azzarello* has done very little to untangle the confusion which currently plagues products liability law in Pennsylvania.<sup>104</sup> As a result, the vacuum created by *Berkebile* remains intact.

### III. PROPOSAL TO ELIMINATE THE UNCERTAINTY IN DESIGN DEFECT CASES

#### A. Recognizing the Element of "Fault"

Those jurisdictions which have eliminated the "unreasonably dangerous" language purport to have done so in an effort to "cast aside the doctrinal overcast of negligence."<sup>105</sup> Nevertheless, by focusing exclusively upon the

101. *Id.* at 559, 391 A.2d at 1027 (bracketed material supplied by the court). This proposed charge for defining "defectiveness" provides in full:

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.

480 Pa. at 559-60 n.12, 391 A.2d at 1027 n.12, quoting Pennsylvania Standard Jury Instruction 8.02 (Civil) Subcommittee Draft (June 6, 1976) (bracketed material supplied by the court).

102. See *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978). The *Barker* court stated: "Inasmuch as the weighing of competing considerations is implicit in many design defect determinations, an instruction which appears to preclude such a weighing process under all circumstances may mislead the jury." *Id.*

103. It is suggested that an imaginative plaintiff's attorney, with the benefit of hindsight, will nearly always be able to envisage something the manufacturer might have done to make the product safe for its intended use. For example, under the jury instruction espoused in *Azzarello*, it is conceivable that the manufacturer of a knife could be held liable for not furnishing it with some type of automatic retractable guard. Similarly, a butter or a whiskey producer may be held responsible if someday a chemical is discovered which eliminates the danger of cholesterol or alcohol. Thus, the question of how liability will be avoided in such circumstances remains unanswered after *Azzarello*. In addition, it is submitted that an instruction which states that the product must be free from any condition that makes it unsafe for its intended use may tempt juries to the extreme conclusion that if the plaintiff was injured, *ipso facto*, the product must have been defective.

104. It is submitted that another unfortunate effect of the *Azzarello* decision is that many lower court cases already decided under the "unreasonably dangerous" standard may now have to be reversed due to erroneous jury instructions. See, e.g., *Bailey v. Atlas Powder Co.*, 602 F.2d 585 (3d Cir. 1979); *Baker v. Outboard Marine Corp.*, 595 F.2d 176 (3d Cir. 1979).

105. *Azzarello v. Black Bros. Co.*, 480 Pa. at 553 n.4, 391 A.2d at 1024 n.4. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); notes 67-68, 91 & 97 and accompanying text *supra*.

“allocation of loss” rationale,<sup>106</sup> it is submitted that these courts have become ensnared in doctrinal difficulties of their own.<sup>107</sup> Clinging to the hypothesis that no fault is required under the loss-allocation rationale, judges have automatically eliminated any terminology which connotes a negligence standard.<sup>108</sup> It is suggested, however, that these courts have failed to realize that fault is a necessary element in a design defect case.<sup>109</sup>

In a recent design defect case, it was recognized that the Supreme Court of California’s “pioneering effort in product liability was never intended to abolish considerations of fault; rather it ‘was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . and warranty . . . .’”<sup>110</sup> Thus, it is important to note that the doctrine of strict products liability was intended to remove only certain elements of the traditional negligence cause of action:<sup>111</sup> 1) it relieves the powerless plaintiff from the burden of having to prove that the manufacturer knew or ought to have known of the product’s defect,<sup>112</sup> and 2) it prevents the manufacturer from escaping liability on the grounds that the plaintiff failed to discover the defect in the product, or neglected to guard against the possibility of its existence.<sup>113</sup> In all other respects, the elements of negligence were meant to remain.<sup>114</sup> So

106. See notes 18-23, 73-85 & 94 and accompanying text *supra*.

107. See cases cited note 105 *supra*. For a discussion of how these courts have overemphasized the “no-fault” aspect of strict liability, see notes 72-83 & 93-97 and accompanying text *supra*.

108. See notes 67-68, 91 & 97 and accompanying text *supra*.

109. See, e.g., *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 374, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark and McComb, JJ., dissenting); DRAFT UNIFORM PRODUCT LIABILITY LAW, 44 Fed. Reg. 2996, 3011 (1979); TASK FORCE LEGAL STUDY, *supra* note 4, vol. 4, at 86-92; W. PROSSER, *supra* note 23, at § 96; Wade, *supra* note 38, at 836-37; Note, *Comparative Negligence and Strict Products Liability: Butaud v. Suburban Marine & Sporting Goods, Inc.*, 38 OHIO ST. L.J. 883, 887-88 (1977); notes 110-22 and accompanying text *infra*.

110. *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 374, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark and McComb, JJ., dissenting), quoting *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

111. See *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 374, 551 P.2d 398, 406-07, 131 Cal. Rptr. 78, 86-87 (1976) (Clark and McComb, JJ., dissenting); W. PROSSER, *supra* note 23, § 96. Dean Prosser, the reporter for the RESTATEMENT (SECOND) OF TORTS, maintained that the consideration of design defect “rest[s] primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence.” W. PROSSER, *supra*, § 96, at 644 (footnotes omitted). According to Prosser, manufacturers have a “duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable.” *Id.* at 645 (footnotes omitted).

112. See Wade, *supra* note 38, at 826; Wade, *Strict Tort Liability of Manufacturers*. 19 Sw. L.J. 5, 15 (1965). According to Wade, the theory of strict products liability assumes that the defendant knew the product was defective, thereby eliminating the problem of proof which had made the negligence cause of action so difficult for “powerless plaintiffs.” *Id.* For cases which have so held, see note 57 *supra*.

113. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1096-97 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Johnson v. Clark Equip. Co.*, 274 Or. 403, 408-10, 547 P.2d 132, 137-38 (1976); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). For the policy reasons behind the removal of these two aspects of the traditional negligence cause of action, see notes 15-30 and accompanying text *supra*.

114. See Wade, *Strict Tort Liability of Manufacturers*, *supra* note 112, at 15. Dean Wade insists that in strict products liability, the test for design defectiveness is simply a test of negligence with the element of scienter removed. *Id.* See also Note, *supra* note 109, at 887. It has

long as courts insist that absolute liability is not to be imposed,<sup>115</sup> fault is necessarily inherent in the concept of a defective product.<sup>116</sup> It is submitted that, regardless of its exercise of due care, the manufacturer is *at fault* in subjecting the injured consumer to an unreasonable risk of harm.<sup>117</sup>

If products liability law is to operate according to precise, well-defined standards of responsibility, courts must be cautious to avoid overemphasizing the no-fault, allocation of loss rationale.<sup>118</sup> It is suggested that judges should allow allocation of loss only when the balancing of special economic and social policy considerations—such as the usefulness and social desirability of the product versus the gravity of the probable harm<sup>119</sup>—indicates that such loss-spreading would be justified.<sup>120</sup> It is further submitted that the “unreasonably dangerous” requirement, properly restricted,<sup>121</sup> is an

been noted that “easing the plaintiff’s burden of proof does not necessarily dissociate elements of fault from strict products liability theory. It may remove only the necessity for *proving* fault.” *Id.* at 887 (emphasis in original).

115. See cases cited note 80 *supra*.

116. See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 374, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark and McComb, JJ., dissenting); Note, *supra* note 109, at 887-88. That fault is involved in a strict products liability suit is also shown by the fact that the traditional negligence defenses of misuse and assumption of the risk are still applicable in such a case. See, e.g., *Walker v. Trico Mfg. Co.*, 487 F.2d 595 (7th Cir. 1973); *Johnson v. Clark Equip. Co.*, 274 Or. 403, 547 P.2d 123 (1976); RESTATEMENT (SECOND) OF TORTS § 402A, Comments *h* & *n* (1965); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNSEL J. 39, 42 (1975); Note, *supra*, at 899.

117. See Wade, *supra* note 38, at 836-37. With the admission that fault is a relevant factor in a design defect case, the door is open for application of comparative responsibility principles which would diminish the plaintiff’s recovery in proportion to his fault. Indeed, a growing number of courts and commentators have already adopted such an approach. See, e.g., *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290-91 (5th Cir. 1975); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 683 (D.N.H. 1972); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 43 (Alas. 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 744, 575 P.2d 1162, 1173, 144 Cal. Rptr. 380, 391 (1978); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 393 (Minn. 1977); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 809-14, 395 A.2d 843, 848-50 (1978); V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 12.1-.7 (1974); Feinberg, *supra* note 116, at 52; Schwartz, *Strict Liability and Comparative Negligence*, 47 TENN. L. REV. 171, 179-81 (1974); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 330-31, 339-49 (1977). Although discussion of comparative fault lies beyond the scope of this note, it is suggested that adoption of such principles would serve well to allay manufacturers’ fears that there are no limits to the extent of their liability in the design defect area. See authorities cited *supra*.

118. See TASK FORCE LEGAL STUDY, *supra* note 4, vol. 4 at 94-96; Henderson, *supra* note 53, at 634-35. Professor Henderson has recommended that the theory of strict liability be eliminated as a basis of liability in the design defect context. *Id.* Professor Henderson suggests that it is foolish for courts to insist that manufacturers are being held liable independently of whether their choices were unreasonable, for the proof required of plaintiffs in design choice cases is basically the same as would be required to prove negligence. *Id.*

119. For a list of the other factors which are considered in this balancing analysis, see note 58 and accompanying text *supra*.

120. See notes 103-09 and accompanying text *supra*.

121. See *Cepeda v. Cumberland Eng’r Co.*, 76 N.J. 152, 386 A.2d 816 (1978); Keeton, *supra* note 27, at 32. According to Keeton, “the term, ‘unreasonably dangerous’ needs further elaboration if it is to serve any useful purpose as a guideline for predicting results or as a standard to be used in the varying claims presented for disposition.” *Id.* In the design defect context, the

adequate tool for accomplishing this purpose. This is evidenced by the fact that an increasing number of jurisdictions have now accepted this approach.<sup>122</sup>

### B. Articulating Standards of Design Defectiveness

Recently, two jurisdictions which had previously eliminated the "unreasonably dangerous" criterion<sup>123</sup> have retreated from that position and re-adopted either the "unreasonably dangerous" terminology itself<sup>124</sup> or the balancing approach which the phrase represents.<sup>125</sup> Emphasizing the distinction between defective design and defective manufacture,<sup>126</sup> California and New Jersey, two traditional leaders in the products liability area,<sup>127</sup> now allow for a weighing of the special economic and social policy considerations relevant in the design defect case.<sup>128</sup>

For example, in *Baker v. Lull Engineering Co.*,<sup>129</sup> the Supreme Court of California stated that a product would be considered defective in design if 1) the plaintiff proves that the product failed to satisfy ordinary consumer expectations as to safety in its intended or reasonably foreseeable use; or 2) the plaintiff proves that the product's design proximately caused injury at which point the burden shifts to the defendant 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.<sup>130</sup> It is evident from this two-pronged, design defect analysis that the California court now accepts

quasi-negligence balancing approach to the "unreasonably dangerous" clause would "render the liability of the manufacturer substantially coordinate with liability on negligence principles." *Cepeda v. Cumberland Eng'r Co., Inc.*, 76 N.J. at 172, 386 A.2d at 825. See notes 132-35 and accompanying text *infra*. For a discussion of the quasi-negligence approach, see notes 57-65 and accompanying text *supra*.

122. See cases cited note 57 *supra*.

123. California had eliminated the "unreasonably dangerous" requirement from the strict liability cause of action in *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). New Jersey followed California's lead in *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973), *overruled in Cepeda v. Cumberland Eng'r Co., Inc.*, 76 N.J. 152, 386 A.2d 816 (1978).

124. See *Cepeda v. Cumberland Eng'r Co.*, 76 N.J. 152, 386 A.2d 816 (1978).

125. See *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). For an explanation of this quasi-negligence balancing approach, see notes 57-65 and accompanying text *supra*.

126. For a discussion of this distinction, see notes 37-56 & 60 and accompanying text *supra*. It should be noted that the Supreme Court of California had previously recognized this distinction, yet refused to attach any significance to it for purposes of imposing strict liability. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 134, 501 P.2d 1153, 1162-63, 104 Cal. Rptr. 433, 442-43 (1972).

127. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); notes 15-27 and accompanying text *supra*.

128. For a list of these special policy considerations, see note 58 and accompanying text *supra*.

129. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

130. *Id.* at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.

some of the negligence terminology which it apparently had rejected in *Cronin v. J.B.E. Olson Corp.*<sup>131</sup>

Similarly, in *Cepeda v. Cumberland Engineering Co.*,<sup>132</sup> the Supreme Court of New Jersey asserted that the section 402A criterion of "unreasonably dangerous," although not required in a mismanufacturing case, is an appropriate test in design defect analysis "if understood to render the liability of the manufacturer substantially coordinate with liability on negligence principles."<sup>133</sup> Declaring that it is not necessary for the plaintiff to show that the manufacturer had knowledge of the defect, the court approved a risk-utility balancing analysis whereby the product would be deemed "unreasonably dangerous" if the magnitude of its potential harm outweighed the benefits of its use.<sup>134</sup> Thus, with *Barker* and *Cepeda*, California and New Jersey have joined the growing number of jurisdictions which have adopted a quasi-negligence balancing approach in order to give some much-needed content to their definitions of design defectiveness.<sup>135</sup>

Other states have attempted to unravel their products liability confusion by limiting the scope of the manufacturer's liability through legislation.<sup>136</sup> Utah, for instance, has embodied a similar negligence-based balancing analysis into a statute which defines "unreasonably dangerous" in terms of community standards, generally known propensities, dangers, and uses of the product, as well as the actual knowledge or experience possessed by the particular user.<sup>137</sup> In considering such factors, Utah has espoused negli-

131. See 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); notes 66-70 and accompanying text *supra*. For example, negligence language can be detected in the first prong of the *Barker* analysis which speaks of "ordinary consumer expectations" along with "reasonably foreseeable use." 20 Cal. 3d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234. The second prong also contains notions of negligence since it proposes a balancing of the benefits against the risks. *Id.* Also, in furtherance of the theory that the injured plaintiff should not be required to prove that the manufacturer was negligent, the second prong of the *Barker* approach shifts the burden of proof to the defendant once the plaintiff establishes that the product's design proximately caused his injury. 20 Cal. 3d at 433, 143 P.2d at 456, 143 Cal. Rptr. at 238.

132. 76 N.J. 152, 386 A.2d 816 (1978).

133. *Id.* at 171-72, 386 A.2d at 825 (emphasis added).

134. *Id.* at 173-75, 386 A.2d at 826-27. The *Cepeda* court maintained that, in determining whether the case for liability should be sent to the jury, the trial court should first decide if liability is precluded as a matter of law by balancing the seven factors suggested by Dean Wade. *Id.* See note 58 and accompanying text *supra*. Then, if the case is given to the jury, the judge would include in his charge any of the Wade factors for which there is specific proof and that are of special significance in the case (*e.g.*, the manufacturer's ability to eliminate the unsafe character of the product without impairing its utility or incurring too much expense). 76 N.J. at 174, 386 A.2d at 827.

135. For other courts which have adopted this approach, see note 57 *supra*.

136. See, *e.g.*, ARIZ. REV. STAT. ANN. §§ 12-681 to -686 (Supp. 1978); COLO. REV. STAT. ANN. §§ 13-21-401 to -405 (Supp. 1978); FLA. STAT. ANN. § 95.031(2) (West Supp. 1978); ILL. ANN. STAT. ch. 83, § 22.2 (Smith-Hurd Supp. 1978); IND. CODE ANN. §§ 33-1-1.5-5 to -8 (Burns Supp. 1978); KY. REV. STAT. ANN. §§ 411.300-.350 (Baldwin Supp. 1978); MINN. STAT. ANN. §§ 604.01, .03-.04 (West Supp. 1978); N.H. REV. STAT. ANN. §§ 507-D:1 to -D:5 (Supp. 1978); R.I. GEN. LAWS § 9-1-13 (Supp. 1978); UTAH CODE ANN. §§ 78-15-1 to -6 (1977).

137. See UTAH CODE ANN. § 78-15-6 (1977).

gence principles which will limit a manufacturer's responsibility and, thus, the path to absolute liability is effectively foreclosed.<sup>138</sup>

Perhaps the most comprehensive attempt to delineate workable standards of responsibility for manufacturers is found in the *Draft Uniform Product Liability Law (Draft Law)*,<sup>139</sup> recently proposed by the United States Department of Commerce. Adopting many of the recommendations of the Interagency Task Force on Product Liability,<sup>140</sup> this model act strives to avoid doctrinal problems associated with the "unreasonably dangerous" phrase by focusing upon the practical considerations which courts and juries have looked to in deciding product liability suits.<sup>141</sup> Since each type of defect demands a particular type of analysis,<sup>142</sup> section 104 sets up a distinction between defects in manufacture<sup>143</sup> and defects in design.<sup>144</sup>

With regard to defectively manufactured products, the standard proposed by section 104(A) is basically the same as the "deviation from the norm" approach developed in products liability case law.<sup>145</sup> In this situation, all that the plaintiff need prove is that the product which injured him was flawed in its construction insofar as it did not meet the manufacturer's own production standards.<sup>146</sup>

With regard to design defect cases,<sup>147</sup> however, differences from the traditional case law approach are readily perceivable in the *Draft Law*.<sup>148</sup>

138. Besides articulating standards of design defectiveness, a number of states have attempted to limit the manufacturers' liability potential by enacting "statutes of repose" that begin to run at the time a product is sold and distributed. Thus, statutes in Arizona, Florida, and Illinois set up a period of twelve years after which no liability can attach. See ARIZ. REV. STAT. ANN. § 12-551 (Supp. 1978); FLA. STAT. ANN. § 95.031(2) (Supp. 1978); ILL. ANN. STAT. ch. 83, 22.2(b) (Smith-Hurd Supp. 1978). See also IND. CODE ANN. § 33-1.1.5-5 (Burns Supp. 1976). Utah precludes liability six years after the date of the initial purchase or ten years after the date of manufacture. See UTAH CODE ANN. § 78-15-3(1) (1977). Minnesota has enacted a "useful life statute" which allows the manufacturer to be held liable only for harms caused during the useful sale life of the product. MINN. STAT. ANN. § 604.03 (West Supp. 1978). Colorado and Kentucky have laws which raise a presumption of non-defectiveness if a product conformed to the "state of the art" at the time of manufacture. See COLO. REV. STAT. ANN. § 13-21-403 (Supp. 1978); KY. REV. STAT. ANN. § 411.310(2) (Baldwin Supp. 1978).

139. 44 Fed. Reg. 2996 (1979).

140. See note 4 *supra*.

141. See DRAFT UNIFORM PRODUCT LIABILITY LAW (Analysis § 104), 44 Fed. Reg. at 3004 (1979).

142. *Id.* See also notes 37-53 and accompanying text *supra*.

143. DRAFT UNIFORM PRODUCT LIABILITY LAW § 104(A), 44 Fed. Reg. at 2998 (1979).

144. *Id.* § 104(B), 44 Fed. Reg. at 2998 (1979). Section 104 also establishes standards for determining whether a product is defective because adequate warnings or instructions were not provided. *Id.* § 104(C), 44 Fed. Reg. at 2998 (1979). See note 155 *infra*.

145. *Id.* § 104(A), 44 Fed. Reg. at 2998 (1979). To determine whether a product was defective in manufacture, § 104(A) permits the trier of fact to consider the manufacturer's product specifications and any differences in the allegedly defective product from other units of the same product line. *Id.*

146. *Id.*

147. See *id.* § 104(B), 44 Fed. Reg. at 2998 (1979).

148. Section 104(B) provides the following test for determining the manufacturer's liability in design defect cases:

In determining whether the product was defective, the trier of fact shall consider whether an alternative design should have been utilized, in light of:

While recommending the quasi-negligence balancing approach,<sup>149</sup> section 104(B) eliminates considerations of the "utility"<sup>150</sup> of the product and does not include any type of "consumer expectation" test.<sup>151</sup> Instead, the section requires that the likelihood and seriousness of the harm be balanced against such factors as the technological feasibility of developing a safer product, the relative costs of the alternative design, and any new or additional harms which may result from such a change.<sup>152</sup> Recognizing that unlimited liability is an inherent possibility in design defect cases,<sup>153</sup> section 104(B) insists that liability should be imposed only when the balance indicates that the manufacturer was at fault.<sup>154</sup>

In addition to defining clearer standards of "defectiveness,"<sup>155</sup> the *Draft Law* contains a number of other well-considered proposals,<sup>156</sup> all designed

(1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;

(2) The seriousness of that harm;

(3) The technological feasibility of manufacturing a product designed so as to have prevented claimant's harm;

(4) The relative costs of producing, distributing, and selling such an alternative design; and

(5) The new or additional harms that may result from such an alternative design.

*Id.* § 104(B), 44 Fed. Reg. at 2998 (1979).

149. *Id.* For a discussion of the quasi-negligence approach, see notes 57-65 and accompanying text *supra*.

150. The factor which Professor Wade has labeled "the usefulness and desirability of the product to the consumer," see note 58 and accompanying text *supra*, is deleted from § 104(B) because "[e]conomic analysis suggests that this element would render the balancing test totally subjective and unworkable. Tested by its 'utility,' a whole-grain health food cereal conceivably might be subject to a lower standard of responsibility than one that was heavily sugar-coated (less 'useful' to society as a whole)." *Id.* (Analysis § 104(B)), 44 Fed. Reg. at 3005 (1979).

151. The "consumer expectations" test is not included in the § 104(b) balancing process since "the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Id.*, quoting Wade, *supra* note 38, at 829. For the rationale of the "consumer expectations" test, see RESTATEMENT (SECOND) OF TORTS § 402A, Comments g & i (1965).

152. DRAFT UNIFORM PRODUCT LIABILITY LAW § 104(B), 44 Fed. Reg. at 2998 (1979).

153. *Id.* (Analysis § 104(B)), 44 Fed. Reg. at 3004-05. As the Analysis portion of § 104(B) indicates, "compared to the situation with respect to defect in construction, no court yet has imposed strict liability on product sellers for defects in design appreciating, no doubt, the unlimited liability potential inherent in such cases where it is almost always possible to design a product more safely." *Id.*

154. *Id.*

155. The *Draft Law* also provides standards for determining whether a product is defective because of the manufacturer's failure to provide appropriate warnings. *Id.* § 104(C), 44 Fed. Reg. at 2998 (1979). Instead of imposing the traditional "patent danger" rule, which would automatically shield manufacturers from having to warn of obvious hazards, see, e.g., *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), § 104(C) allows the jury to weigh various practical considerations to determine whether a warning was necessary or adequate. DRAFT UNIFORM PRODUCT LIABILITY LAW § 104(C), 44 Fed. Reg. at 2998 (1979). Thus, in addition to balancing such factors as the likelihood and seriousness of harm against the technological feasibility and cost of a warning, the jury is to consider the experience, education, and knowledge of those who are likely to avail themselves of such warnings. *Id.* (Analysis § 104(C)), 44 Fed. Reg. at 3005 (1979).

156. For example, § 105 limits a manufacturer's liability for products which are unavoidably unsafe. *Id.* § 105, 44 Fed. Reg. at 2998 (1979). Section 106 provides for a possible defense if the product conformed to the "state of the art" at the time of its manufacture. *Id.* § 106, 44 Fed.

to articulate the limits of a manufacturer's responsibility and thereby alleviate the uncertainty which is so prevalent today.<sup>157</sup> It is submitted that many states would do well to reflect upon the recommendations of this scholarly model law in searching for standards with which to provide certainty in the products liability area.

#### IV. CONCLUSION

Although the doctrine of strict products liability as set forth in section 402A may be applied successfully to cases involving defects in *manufacture*, courts and legislatures throughout the United States are coming to the realization that special policy considerations are essential when *design* defects are concerned. As a result, many jurisdictions have begun to elucidate the "design defect" concept in order to better explain this "only partially charted *terra incognita* of the law, known as strict liability in tort."<sup>158</sup>

*Azzarello v. Black Brothers Co.* represents Pennsylvania's latest foray into the uncertainty of *Restatement* section 402A. With *Azzarello*, the Pennsylvania Supreme Court has fallen behind the reformist trend which is now sweeping the nation, and has passed up an excellent opportunity to alleviate much of the obscurity which permeates products liability law in this state. In failing to explicate a workable standard by which a section 402A "design defect" can be defined, *Azzarello* will surely add even more voices to the clamor for reform<sup>159</sup>—a clamor which is likely to grow much too thunderous for Pennsylvania legislators to withstand any longer.<sup>160</sup>

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Reg. at 2998-99 (1979). Section 107 allows for a rebuttable presumption of non-defectiveness if the product complied with certain legislative or administrative standards. *Id.* § 107, 44 Fed. Reg. at 2999 (1979). To ensure that manufacturers are informed at an early date that their product is defective, § 108 imposes penalties for unreasonable delays in notifying the manufacturer of a possible claim. *Id.* § 108, 44 Fed. Reg. at 2999 (1979). Section 109 restricts the length of time during which a manufacturer can be held responsible for harm caused by products. *Id.* § 109, 44 Fed. Reg. at 2999-3000 (1979). Section 110 conditionally precludes liability if the harm would not have occurred "but for" some alteration or modification by a third party. *Id.* § 110, 44 Fed. Reg. at 3000 (1979). If the plaintiff's own conduct was a contributing cause of his injuries, § 111 provides that his recovery will be diminished in proportion to his fault. *Id.* § 111, 44 Fed. Reg. at 3000 (1979). Finally, § 112 permits contribution and indemnity when multiple defendants are involved. *Id.* § 112, 44 Fed. Reg. at 3000-01 (1979).

157. See notes 1-10 & 66-109 and accompanying text *supra*.

158. *Hunt v. Blasius*, 55 Ill. App. 3d 14, 15, 370 N.E.2d 617, 618 (1977).

159. See notes 1-10 and accompanying text *supra*.

160. Products liability legislation has already made its way into the Pennsylvania Legislature. On April 25, 1979, House Bill 1083 was introduced in the General Assembly of Pennsylvania, calling for, *inter alia*: 1) the reinstatement of the "unreasonably dangerous" requirement as an element of a strict liability suit; 2) limitation of the strict liability theory to *manufacturers* only (*i.e.*, strict liability would not apply in actions against wholesalers, distributors, or retailers); 3) the elimination, from jury instructions, of the *Azzarello* language that the manufacturer is a "guarantor of the product's safety," see note 101 *supra*; 4) a twelve year period of repose, barring any products liability actions more than twelve years from the time the manufacturer of



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the final product parted with its possession and control, or sold it, whichever occurred last; 5) a statute of limitations requiring products liability actions, which accrue within the twelve year period of repose, to be brought within two years after the date on which the cause of action accrued; 6) a defense based upon the alteration, modification, or deterioration of the product; 7) a state of the art defense creating a rebuttable presumption that the product was not defective if the product conformed with generally recognized and prevailing standards, designs, or methods of testing or manufacture of the state of the art at the time of manufacture; 8) the application of comparative responsibility principles in products liability suits. H. 1083, P.N. 1209, of 1979. As this comment went to print, House Bill 1083 was undergoing consideration by the House Insurance Committee. Senate Bill 747, P.N. 798, of 1979 is the companion products liability bill in the Pennsylvania Senate.