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# Dangerous Products and Injured Bystanders

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## INTRODUCTION

Dangerous products injure two distinct categories of people: consumers and bystanders. Products liability law has been dominated by concern for the consumer. Courts have often placed greater limitations on bystander recovery than on consumer recovery, but several factors may justify extending a broader right of recovery to bystanders than to consumers.[1] Unlike consumers, bystanders generally do not benefit from the product, do not benefit from any cost savings that a dangerous product design creates, have had no opportunity to bargain for greater safety, have had no opportunity to determine the dangers of the product, and have not chosen to expose themselves to the dangerous characteristics of the product.

Products liability law has failed to recognize these differences between consumers and bystanders. Many of the limitations on recovery in strict products liability law are based on its warranty roots,[2] and may not be justified when the plaintiff is a bystander. These limitations include the consumer expectations test,[3] the inherent characteristics rule,[4] and the patent danger rule.[5] Even the requirement that the plaintiff establish that the product is defective may be a function of products liability law's consumer focus. When the injured plaintiff is a consumer, these limitations may be justified. There is, however, substantially less justification for these limitations when the injured party is a bystander,

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[1] As the California Supreme Court urged in Elmore v. American Motors Corp., 451 P.2d 84, 89 (Cal. 1969), one of the first cases to allow bystander recovery in strict products liability:

> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

*Id.*

[2] During the early stages of strict products liability in tort, there was some doubt as to whether injured bystanders would be entitled to any recovery, but courts have now generally placed bystanders on an equal footing with consumers. See cases cited *infra* note 25.

[3] *See infra* text accompanying notes 30-32.

[4] *See infra* text accompanying notes 33-56.

[5] *See infra* text accompanying notes 57-66.

and several good reasons for allowing recovery. This Article will consider the directions in which strict products liability law may expand if freed from its consumer focus, including the possibility that courts might allow bystanders to recover for injuries from dangerous, but nondefective, products.[6]

When a bystander is injured by a nondefective, dangerous product that a substantial portion of the population does not use, the case for recovery from the manufacturer of the product is probably the strongest. Manufacturers and consumers who create a market for such products subject bystanders to unreciprocated risks, i.e., risks to which bystanders do not expose manufacturers and consumers.[7] Imposing liability in such cases would compensate bystanders for their losses and spread the costs of such injury to the consumers who help to create the risk.[8]

If bystanders do not recover for their injuries, these losses are external costs–the losses are not included in the cost of the products and do not affect the decisions of manufacturers and consumers. These external costs create economic inefficiency. If courts imposed liability, the cost of bystander injury would be internalized in the cost of the products, and the price would more accurately reflect the costs that they create.[9] This would place pressure on manufacturers to take cost-justified safety steps.

The argument is not that the risks of dangerous products outweigh their benefits. Explosives, guns, cigarettes, alcohol, snowmobiles, power boats and all-terrain vehicles serve important purposes. Nevertheless, manufacturers and, through them, those who purchase dangerous products, should bear the risk that those products pose to others.

When a bystander is injured by a dangerous product, abnormally dangerous activity liability may be a more appropriate precedent for courts to look to than warranty law. Courts developed warranty law in cases involving purchasers and consumers; they developed abnormally dangerous activity liability in cases involving injured bystanders and

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[6] Professors James Henderson and Aaron Twerski make a strong argument that courts will not and should not extend liability to manufacturers of nondefective products. *See* James A. Henderson & Aaron Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991). This Article will suggest that the arguments against extending recovery for injury from nondefective dangerous products are substantially weaker in cases of bystander injury, and that there are significant justifications for extending recovery to bystanders. For a discussion of Professors Henderson and Twerski's arguments, see *infra* text accompanying notes 111-21.

[7] *See infra* text accompanying notes 70-77.

[8] *See infra* text accompanying notes 79-88.

[9] *See infra* text accompanying notes 89-121.

defendants who benefit from dangerous activity.[10] In both the abnormally dangerous activity cases and the dangerous product cases, the plaintiffs are injured bystanders and the defendants are parties that benefit from activity that puts the bystanders at risk.

Part I of this Article discusses the limitations that products liability law has placed on bystander recovery. Part II explores whether courts should impose strict liability on manufacturers of dangerous, but nondefective, products for bystander injury. Part II also examines the possibility of applying such a rule to manufacturers of cigarettes, alcohol and firearms.

## I. THE BYSTANDER: NEGLECTED VICTIM OF PRODUCTS LIABILITY

### *A. The Warranty Roots of Products Liability and the Assault on the Privity Citadel*

The question of whether manufacturers would be subject to liability for bystander injury first arose under a negligence theory. Courts initially denied bystanders the right to recover from manufacturers that negligently caused them injury; plaintiffs had to show that they were in privity with the manufacturer.[11] Justice Cardozo, however, rejected the privity limitation in *MacPherson v. Buick Motor Co.*[12] Other jurisdictions quickly followed, and today injured bystanders can recover against negligent manufacturers.[13]

Strict products liability initially developed as a warranty cause of action.[14] Whereas the privity limitation made little sense in a negligence cause of action, the limitation has some justification in a warranty cause of action. The warranty cause of action is based on the theory that a defect in the product violates an express or implied warranty between the manufacturer and the purchaser.[15] Initially, only the purchaser could bring a warranty cause of action.[16] In 1960, in *Henningsen v. Bloomfield Motors, Inc.*,[17] the New Jersey Supreme Court extended warranty protection

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[10] *See infra* text accompanying notes 122-39.

[11] The classic case is Winterbottom v. Wright, 152 Eng. Rep. 402, 404 (H.L. 1842). Although *Winterbottom* involved injury to a user, rather than a bystander, it established the privity doctrine that barred bystanders from recovery.

[12] 111 N.E. 1050, 1054 (N.Y. 1916).

[13] The *MacPherson* decision "found immediate acceptance, and at the end of some forty years is universal law in the United States . . . ." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 683 (5th ed. 1984) (footnote omitted).

[14] *See* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

[15] KEETON ET AL., *supra* note 13, § 95A, at 679.

[16] *Id.* § 97, at 690-91.

[17] 161 A.2d 69 (N.J. 1960).

to the wife of the purchaser of an automobile.[18] Today most states have extended bystander recovery in a warranty cause of action to one "who is in the family or household of [the] buyer or who is a guest in his home."[19]

Beginning in the early 1960s, the Restatement (Second) of Torts and most courts recognized a strict products liability cause of action sounding in tort.[20] Manufacturers became subject to strict liability for injuries that their defective products cause. The Restatement acknowledged that strict liability in tort evolved from warranty law[21] and that courts had not "gone beyond allowing recovery to users and consumers."[22] The Restatement, however, took no position as to whether bystanders should be allowed to recover under strict liability in tort.[23] Though several courts initially denied recovery in strict liability to bystanders,[24] most courts have rejected a privity

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[18] *Id.* at 81.

[19] U.C.C. § 2-318 (1987); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-2, at 457 (3d ed. 1988).

[20] *See, e.g.*, Greenman v. Yuba Power Prods., 377 P.2d 897, 900 (Cal. 1963) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes injury to a human being."); RESTATEMENT (SECOND) OF TORTS § 402A (1977) (approved by the American Law Institute in 1964).

To recover in strict products liability, a plaintiff must show that the product is defective. Plaintiff's theory may be that the product was defectively manufactured, had a defective warning or had a defective design. Under a manufacturing defect theory, plaintiffs must show that the product turned out differently than the manufacturer intended. In miswarning cases, the plaintiff must show that the product failed to include a reasonable warning, in light of what the manufacturer knew or should have known.

In design defect cases, most jurisdictions have adopted either a consumer expectations test, a benefit/risk test, or some combination of the two. Under the consumer expectations test, the plaintiff must show that the product was more dangerous than the ordinary consumer would have expected. *See infra* note 35 and accompanying text. Under the benefit/risk test, a product is defective if its costs outweigh its benefits. Some courts, in strict products liability cases, consider not the risk that the manufacturer knew or should have known at the time of manufacture, as in negligence cases, but the risk that is known at some time after manufacture, either at the time of sale, *see* John J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834 (1973), or the time of trial, *see* W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973). In Barker v. Lull Eng'g Co., 573 P.2d 443, 456 (Cal. 1978), the California Supreme Court allowed the plaintiff to use either the benefit/risk test or the consumer expectations test and as to the benefit/risk test, placed the burden on the defendant to show that the burden of using an alternative design was greater than the risks of the product. The Supreme Court of Alaska adopted the *Barker* approach in Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884 (Alaska 1979).

[21] Comment b to Section 402A of the Restatement discusses the history of strict products liability:

> In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer [as the basis of products liability], either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1977).

[22] *Id.* § 402A cmt. o, at 356.

[23] *Id.* at 357.

[24] *See* William L. Prosser, *Strict Products Liability and the Bystander*, 64 COL. L. REV. 916, 916

limitation in strict products liability and have placed bystanders on an equal footing with consumers.[25] The remainder of this Article considers whether bystanders should be preferred to consumers in strict products liability cases.

### *B. Remnants of the Privity Citadel*

Though courts purport to have done away with the privity requirement in strict products liability, they continue to limit the rights of bystanders with rules that are based on warranty law's purchaser/seller relationship. These rules include: (1) the consumer expectations test, under which a product is defectively designed only if it is more dangerous than the ordinary consumer would expect;[26] (2) the inherent characteristics rule, under which a product is not defective if the dangerous aspect of the product is one of its inherent characteristics;[27] and (3) the patent danger rule, under which some states hold that a manufacturer is not liable if the dangerous aspect of the product is obvious to the consumer.[28] Though these rules make sense in a products liability cause of action brought by a purchaser or consumer, they are not justified in a cause of action brought by a bystander. As was said of earlier limitations on bystander recovery, these rules are "the distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem as a commercial one between traders, rather than as part of the accident problem."[29] This section discusses each of these rules, and concludes that they should not limit bystander recovery.

#### 1. *The Consumer Expectations Test*

Under the Restatement (Second) of Torts, to show that a product is defectively designed, a plaintiff must show that the product is dangerous beyond the expectations of the ordinary consumer.[30] Thus, if the

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n.3 (1964) (discussing cases denying bystander recovery in strict products liability).

[25] *See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288 (3d Cir. 1980) (applying Illinois law); Passwaters v. General Motors Corp., 454 F.2d 1270, 1274 (8th Cir. 1972) (applying Iowa law); Wasik v. Borg, 423 F.2d 44, 47 (2d Cir. 1970) (applying Vermont law); Elmore v. American Motors Corp., 451 P.2d 84, 88 (Cal. 1969); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 16 (Iowa 1977); Ethicon, Inc. v. Parten, 520 S.W.2d 527, 533 (Tex. Ct. App. 1975); Howes v. Hansen, 201 N.W.2d 825, 828 (Wis. 1972).

[26] *See infra* text accompanying notes 29-32.

[27] *See infra* text accompanying notes 33-55.

[28] *See infra* text accompanying notes 57-66.

[29] 2 FOWLER J. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.16, at 1572 n.6 (1956).

[30] A manufacturer is subject to strict liability under 402A of the Restatement (Second) of Torts

ordinary consumer is aware of the danger posed by a product, the manufacturer is not subject to liability. This is basically the same test that is applied under the Uniform Commercial Code's implied warranty of merchantability.[31]

When purchasers or consumers of a product sue the manufacturer, it may be appropriate to limit their right to recover to the extent that the ordinary consumer would have understood the risks created by the product. The consumer has had the opportunity to inspect the product for safety and has benefited from any cost savings or other benefits of the design. It is difficult, however, to see why the expectations of the ordinary consumer should limit bystander recovery. Bystanders have no ability to check the product for safety and do not benefit from the product's function nor from any cost savings resulting from the product's design.[32]

### 2. *The Inherent Characteristics Rule*

Many jurisdictions prohibit courts from imposing strict liability on the manufacturer of a dangerous product when the dangerous aspect of the product is one of its inherent characteristics.[33] Under this rule, a

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if the product is "in a defective condition unreasonably dangerous to the user or consumer or to his property." RESTATEMENT (SECOND) OF TORTS § 402A (1977). Comment i to Section 402A states: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowlege common to the community as to its characteristics." *Id.* § 402A cmt. i.

[31] U.C.C. § 2-314 (1987). Under section 2-314 of the Uniform Commercial Code, sale of a product by a merchant carries with it an implied warranty of merchantability. A warranty of merchantability was also implied under the Uniform Sales Act. Uniform Sales Act § 15(2) (1906). The test for merchantability appears to be the same as the consumer expectations test that is applied in strict products liability in tort cases. A product is merchantable if it would "pass without objection in the trade under the contract description." U.C.C. § 2-314(2). This standard looks to the expectations of those in the trade, which would be the same as the expectations of the ordinary consumer, unless the expectations of consumers and producers in the trade differed. White and Summers report that in most cases in which courts have found breaches of the warranty of merchantability, the products "either did not work properly or were unexpectedly harmful." WHITE & SUMMERS, *supra* note 19, at 412.

White and Summers further acknowledge that, except for the fact that the strict products liability portion of the Restatement does not normally apply to economic losses, a breach of the warranty of merchantability under the U.C.C. and a defect under section 402A of the Restatement are "nearly synonymous" and they "would expect a court to hold that any automobile which was not merchantable was also in a defective condition unreasonably dangerous." *Id.* at 416.

[32] A later section of this Article considers whether courts should allow injured bystanders to recover from manufacturers of dangerous products without requiring them to show that the product is defective. *See infra* text accompanying notes 68-142.

[33] *See, e.g.*, Delvaux v. Ford Motor Co., 764 F.2d 469, 474 (7th Cir. 1985) (applying Wisconsin law); Kelley v. R.G. Indus., 497 A.2d 1143, 1148 (Md. Ct. App. 1985); Pemberton v. American

manufacturer is not subject to liability, no matter how great the inherent risks of a product. In order to recover, plaintiffs must show that the product could have been designed in a safer manner.[34] Courts and commentators have interpreted comment i to section 402A of the Restatement (Second) of Torts as advocating the inherent characteristics rule.[35] The recent Reporters' Study on Enterprise Responsibility for Personal Injury prepared for the American Law Institute (the body that adopts the Restatements) also appears to advocate the inherent characteristics rule.[36]

Several justifications may underlie the inherent characteristics rule. First, when consumers are aware of a product's inherently dangerous characteristics, they have chosen to expose themselves to such risks and it may be that they should bear the responsibility for the losses they

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Distilled Spirits, 664 S.W.2d 690, 692 (Tenn. 1984). *Contra* O'Brien v. Muskin Corp., 463 A.2d 298, 304-05 (N.J. 1983); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 545 (N.J. 1982); *cf.* Kotler v. American Tobacco Co., 926 F.2d 1217, 1224-25 (1st Cir. 1990) (applying inherent characteristics rule to a warranty claim against cigarette manufacturer), *vacated*, 112 S. Ct. 3019 (1992).

[34] *See, e.g., Kotler*, 926 F.2d at 1225; Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1310-11 (Mass. 1988); Uloth v. City Tank Corp., 384 N.E.2d 1188, 1193 (Mass. 1978).

[35] Comment i states:

> i. Unreasonably dangerous. [Strict products liability] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977). Though comment i suggests that the nondefective products listed in it are merely examples of products that have risks that are not beyond the expectations of the ordinary consumer, William Prosser, the Reporter of the Second Restatement, interpreted comment i to mean that strict liability will not be imposed on the manufacturers of products that have inherently dangerous characteristics unless the danger is unreasonable. William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966); *see also* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972) (citing Prosser for the proposition that a manufacturer is not strictly liable for all the harm his product could do as a result of its inherently dangerous characteristics unless such danger is unreasonable).

[36] AMERICAN LAW INSTITUTE REPORTERS' STUDY, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 48-56 (1991) [hereinafter ENTERPRISE RESPONSIBILITY].

incur. Consumer responsibility may be at the root of comment i to section 402A of the Restatement. Comment i provides four examples of products with inherent dangers that it suggests should not subject the manufacturer to strict liability: sugar, whiskey, tobacco, and butter.[37] These products all expose consumers to risks of which consumers are commonly aware. Even when comment i mentions alcohol, a product that creates great and obvious risks to bystanders, it mentions only the risks to the drinker: "Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . ."[38]

If consumers are or should be aware of the risks of a product, it may be reasonable to deny them recovery.[39] The loss is arguably their responsibility.[40] The consumer's assumption of inherent risks, however, does not justify limiting the recovery of bystanders. The knowledge of the consumer should have no effect on the bystander's ability to recover for losses sustained.

Dean William Prosser has suggested a second justification for the inherent characteristics rule. According to Prosser, comment i was added to the Restatement to foreclose the possibility that the manufacturer of products with an inherent risk of harm, such as sugar, whiskey, tobacco, and butter, would be held "automatically responsible for all the harm that such things do in the world."[41] Such responsibility would be too costly for manufacturers of such products to bear. In light of the developments that have taken place in products liability law, however, Prosser's concern was unjustified. For instance, even if courts reject the inherent characteristics rule, the defect requirement and defenses based on the plaintiff's conduct would greatly limit the responsibility of manufacturers for their products' inherent risks.[42] If courts were to reject the inherent character-

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[37] *See supra* note 35 (quoting in full RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977)).

[38] RESTATEMENT (SECOND) OF TORTS § 403A cmt. i (1977).

[39] In negligence actions, the law traditionally denied recovery on this basis through the contributory negligence and assumption of the risk defenses. PROSSER & KEETON, *supra* note 13, § 68, at 481-82.

Some of the defenses that strict products liability law recognizes also limit recovery based on the plaintiff's responsibility. Some jurisdictions deny recovery if the plaintiff is both negligent and assumes the risk, while others apply comparative fault. *Id.* § 102, at 711-12.

[40] *See* David G. Owen, *The Moral Foundations of Products Liability: Toward First Principles*, 68 NOTRE DAME L. REV. (forthcoming 1993) (manuscript at 75-76, on file with the KENTUCKY LAW JOURNAL).

[41] Prosser, *supra* note 35, at 23; *see also* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972) ("Although the seller should not be responsible for all injuries involving the use of its products, it should be held liable for all injuries proximately caused by any of its products which are adjudged 'defective.'").

[42] Butter and sugar would not be defective under either the consumer expectations or benefit/risk

istics rule in cases of bystander injury, as advocated herein,[43] this would create a much smaller extension of liability than if courts rejected the inherent characteristics rule in all cases.

The final argument in favor of the inherent characteristics rule is that if the consumer is aware of the risks that accompany a product, courts should defer to the consumer's decision that the benefits of a product are greater than its risks. The rationale for this is that the consumer is in a better position than a jury to balance the benefits and risks of a product.[44] For example, the American Law Institute Reporters' Study states:

> The risk-utility [defect test, without an inherent characteristics limitation] apparently permits juries to over-rule buyers when deciding whether a product has sufficient social utility. This is an error because a product has sufficient social utility if informed consumers are willing to purchase it given its costs, including accident costs.
>
> Under these circumstances the appropriate decision maker is the buyer, not the jury. An open-ended risk-utility test, however, permits juries in adjudicating the legality of designs to presume that necessities provide more social utility than luxuries. In fact, the value of a particular product design is typically measured by the consumers' willingness to pay for the product so designed; so when consumers are adequately informed about risks, tort law should rely on markets to decide what product designs should be produced.[45]

This argument is valid only to the extent a product creates risks solely to the consumer. In the bystander cases, however, such deference to consumer choice carries with it the same problems as the consumer expectations test.[46] It may be that informed consumers are in the best position to balance the risks that products create to consumers against the benefits they create for consumers, but courts should not leave to

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theory, even if there were no inherent characteristics rule. However, without the inherent characteristics rule, whiskey and tobacco manufacturers might be liable to consumers for part of the harm that they cause to consumers. If a jurisdiction applies a consumer expectations test, whiskey and tobacco would not be defective. If they were found to be defective under a benefit/risk test, the assumption of the risk/contributory negligence, or comparative fault defenses may limit recovery. *See supra* note 39. Cigarette manufacturers might be liable to those who incur diseases due to second-hand smoke. Manufacturers of alcohol might be subject to liability for the risks that it causes to bystanders, but this liability might not be too great if responsibility is shared with misusing consumers.

[43] *See infra* text accompanying notes 68-164.

[44] *See, e.g.*, 2 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 48-49.

[45] *Id.*

[46] *See supra* notes 30-32 and accompanying text.

consumers the task of defining the scope of a product manufacturer's responsibility for injury to bystanders.[47]

A footnote to the above-quoted portion of the American Law Institute Reporters' Study states:

> This claim [that "tort law should rely on markets to decide what products should be produced"] assumes that firms internalize risks to third parties and consequently reflect these risks in prices. Firms are now required to internalize third-party risks through the bystander liability doctrine, which allows parties outside the chain of distribution to sue the manufacturers of defective products.[48]

This argument incorrectly assumes that all bystander losses are internalized under current bystander rules. As the quoted portion of the footnote states, bystanders may "sue the manufacturers of *defective* products," but bystanders generally have no products liability cause of action when they are injured by a product that is not defective or that is dangerous because of inherent risks.[49] The study correctly recognizes that reliance on consumer choice to determine the optimal level of safety will yield the correct result only if bystander losses are internalized in the cost of products,[50] but advocates a rule that would not internalize the costs of bystander injuries that result from inherent product dangers.[51]

Manufacturers will internalize the inherent risks of products to bystanders only if they are subject to liability for these injuries. If courts or legislatures do not impose liability on manufacturers for injuries that products cause to bystanders, these injuries become "external costs," i.e., costs to society that are not reflected in the cost of the product.[52] The argument that manufacturers of dangerous products should be subject to liability for injuries to bystanders so that these costs will be internalized is developed in a later section.[53]

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[47] It may be that a consumer who uses a product that causes unreasonable risk to a bystander should be subject to liability, but that should not necessarily relieve the manufacturer of liability to the bystander. A later section discusses the responsibility of the manufacturer and the misusing consumer. *See infra* text accompanying notes 96-100.

[48] 2 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 49 n.26.

[49] *Id.* (emphasis added).

[50] *See infra* text accompanying notes 100-06.

[51] 2 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 56.

[52] On the other hand, the price will reflect the risks to the consumers because, in determining whether to use a product, the consumers take into consideration the risks that use of the product creates to themselves.

[53] *See infra* text accompanying notes 101-06.

The argument that juries would have difficulty balancing all of the costs and benefits of a product has merit. As the Reporters' Study acknowledges, when a jury is asked to apply a cost/benefit analysis to an entire category of products, it "is asked to act in the same manner as a well staffed regulatory agency, but without the latter's perspective, information and expertise."[54] Juries may be unwilling to balance risks to life against dollars, a task that is essential in a cost/benefit analysis.[55] It would be particularly difficult for juries to calculate the benefits of an entire category of products, because of the difficulty of determining the value of consumer surplus.[56] Courts generally should rely on the consumer's judgment that the benefits of a product outweigh its costs, but courts should ensure that the cost that consumers consider when purchasing a product includes the risks that the product imposes on bystanders. Courts could impose the losses suffered by innocent bystanders on manufacturers of dangerous products irrespective of whether or not the costs of the product outweigh its benefits. There would then be no need for the jury to balance the costs and benefits. Bystander recovery would cause manufacturers to internalize the costs of that recovery. These costs would be reflected in the product's market price, leaving the cost/benefit decision to the consumer. Manufacturers of inherently dangerous products should not be exempt from liability to bystanders just because the risks that the products create are inherent.

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[54] 2 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 53-54. This concern was expressed by Justice Schreiber of the New Jersey Supreme Court. He dissented from the majority's decision to allow juries to determine whether the manufacturer of a product could be subject to liability based on the product's inherent characteristics, "because the jury will not be cognizant of all the elements that should be considered in formulating a policy supporting absolute liability [and] because it is not satisfactory to have a jury make a value judgment with respect to a type or class of product . . . ." O'Brien v. Muskin Corp., 463 A.2d 298, 310 (N.J. 1983) (Schreiber, J., dissenting). Justice Schreiber advocated that the question of whether the manufacturer of a product should be subject to strict liability for the product's inherent characteristics should be resolved by the court, rather than the jury. *Id.* at 312 (citing the RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (1977)). This Article concludes that manufacturers of dangerous products should be subject to strict liability for injuries to innocent bystanders, without requiring the plaintiff to show that the product is defective. Justice Schreiber did not limit his proposal to cases in which bystanders are injured.

[55] 2 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 54.

[56] Consumer surplus is the difference between what consumers pay and what they would be willing to pay. The price that concerns pay for products does not reflect individual consumers' value of the product. However, what a consumer is willing to pay for a particular product is typically a good measure of the product's benefits to the consumer. Understandably, consumer benefit is difficult to accurately measure. *See* Alan Schwartz, *Proposals for Product Liability Reform: A Theoretical Synthesis,* 97 YALE L.J. 353, 386-88 (1988) (discussing the practical difficulties juries encounter when attempting to valuate consumer surplus).

### 3. *The Patent Danger Rule*

The patent danger rule has its roots in warranty law and limits bystander recovery in some strict products liability cases.[57] Under that rule, if the plaintiff's injuries are the result of a dangerous aspect of the product that is obvious, the manufacturer is excused from liability.[58]

The application of the patent danger rule may be justified in a claim brought by a consumer. If the risk of injury is apparent, the consumer generally either has been contributorily negligent in failing to notice the risk or has assumed the risk. Consumers can substantially reduce the risk to themselves by taking steps for their safety in light of the obvious risk.[59] However, this rule is not justified in a case brought by a bystander who has not behaved negligently, has not assumed the risk and has not had an opportunity to affect the risk.[60] Nevertheless, some courts have applied the patent danger rule to bystanders.[61]

Though the patent danger rule makes sense in cases of consumer injury, the majority of courts have rejected it in both bystander and consumer cases,[62] based on the argument that it would be unfair to

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[57] *See, e.g.*, Delvaux v. Ford Motor Co., 764 F.2d 469, 474 (7th Cir. 1985) (denying passenger recovery for injuries arising from the obvious risks of convertible type automobiles). For a list of additional recent cases sustaining the viability of the patent danger rule, see Theresa L. Kruk, Annotation, *Products Liability: Modern Status of Rule that There Is No Liability for Patent or Obvious Dangers*, 35 A.L.R. 4th 861, 866-71 (1985 & Supp. 1992).

For general discussions of the patent danger rule, see *id.*; Stanton G. Darling II, *The Patent Danger Rule: An Analysis and A Survey of its Vitality*, 29 MERCER L. REV. 583 (1978); Patricia Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973).

[58] *See* Marschall, *supra* note 57, at 1066.

[59] *See* Campo v. Scofield, 95 N.E.2d 802 (N.J. 1950); Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 474 (1987).

[60] *See* Marschall, *supra* note 57, at 1110.

The California Supreme Court rejected the patent danger rule in bystander cases in Pike v. Frank G. Hough, 467 P.2d 229, 231 (Cal. 1970), emphasizing its unfairness when applied to a bystander. In *Pike*, plaintiff's decedent was killed when struck by a paydozer that plaintiff alleged failed to provide the operator with adequate ability to see behind the vehicle. *Id.* at 229. The court explained that

> it is not necessarily apparent to *bystanders* that the machine operator is incapable of observing them. . . . The danger to bystanders is not diminished because the purchaser of the vehicle is aware of its deficiencies of design. The manufacturer's duty of care extends to all persons within the range of potential danger.

*Id.* at 234.

[61] *See* Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108, 111 (7th Cir. 1976); Schemel v. General Motors Corp., 384 F.2d 802, 805 (7th Cir. 1967); Stovall & Co. v. Tate, 184 S.E.2d 834, 839 (Ga. Ct. App. 1971); Murphy v. Cory Pump & Supply Co., 197 N.E.2d 849, 854 (Ill. App. Ct. 1964).

[62] *See* cases cited in Kruk, *supra* note 57, at 872-80 & Supp. 77-80.

relieve the manufacturer of responsibility for an unreasonably dangerous product.[63] Rejection of the patent danger rule has also been justified on the grounds that the defenses of contributory negligence and assumption of the risk take appropriate account of the plaintiff's culpability.[64]

Richard Epstein advocates the continued application of the patent danger rule on the grounds that it is a bright line test and it supports markets and private ordering; if there is no patent danger rule, courts reevaluate the risk/utility choice of consumers.[65] It may be that in products liability cases brought by consumers it is appropriate to rely on the risk/utility choice of the consumer, but the bystander's recovery should not be limited just because the dangers are obvious to the consumer. Imposing liability on the manufacturer for bystander injuries would support market disciplines by internalizing bystander losses in the cost of products and the consumer would have to consider the costs that a product creates to others when deciding whether to purchase it.[66]

## II. BYSTANDER RECOVERY FOR INJURY FROM NONDEFECTIVE DANGEROUS PRODUCTS

Early in the development of products liability, courts cited Justice Traynor[67] as suggesting that "liability might be imposed as to products whose norm is danger."[68] Courts have not followed this interpretation

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[63] *See* Luque v. McLean, 501 P.2d 1163, 1169 (Cal. 1972); Micallef v. Miehle Co., 348 N.E.2d 571, 577 (N.Y. 1976).

[64] *See Pike*, 467 P.2d at 234.

[65] Epstein, *supra* note 59, at 475. According to Epstein:

> The latent defect tests reinforce market disciplines. The risk/utility test is a massive, if unintended, assault on markets and private ordering, for defendants are now required to *justify independently* every decision that they and their customers have made with respect to a product's use . . . . [I]t becomes necessary to go behind the consent of consumers . . . .

*Id.* Epstein also supports the patent danger rule because it "gives a clear, cheap, and correct answer in most cases," whereas the risk/utility test is very difficult to apply. *Id.* at 474. The difficulty in applying the risk/utility test is certainly a valid concern. However, courts might just as easily impose strict liability for all bystander injuries that dangerous products cause, and thereby avoid this difficulty. *See infra* note 126.

[66] *See infra* text accompanying notes 89-121.

[67] Justice Traynor wrote the majority opinion in Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963), which adopted strict products liability in California. Justice Traynor first articulated holding manufacturers strictly liable for injuries caused by their products in Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). This is regarded as "[t]he most important early judicial effort to articulate a strict form of liability for product-caused injuries. . . ." MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY § 7.01[2], at 7-3 (2d ed. 1990).

[68] Jiminez v. Sears, Roebuck & Co., 482 P.2d 681, 684 (Cal. 1971) (citing Roger J. Traynor, *The*

and generally require that there be a defect in the product. It is appropriate that courts have not imposed strict products liability solely on the basis of the dangerousness of the product when the injured party is a consumer,[69] but it may be that this limitation should not apply to injured bystanders.

This section explores whether manufacturers of dangerous but nondefective products should be subject to strict liability to injured bystanders. It concludes that courts should impose liability for bystander injury on manufacturers of dangerous products that are not used by the vast majority of citizens. The following rationales support this conclusion: manufacturers and consumers who enjoy the benefits of dangerous products that are not enjoyed by others expose bystanders to unreciprocated risk; imposing liability would compensate bystanders for their losses and spread the risk of such injury to the consumers who aid in the creation of the risk; imposing liability would internalize the cost of bystander injury in the price of products, encouraging manufacturers to take cost-justified safety steps and consumers to purchase the cost-justified number of products. Furthermore, when a bystander is injured by an inherently dangerous product, abnormally dangerous activity liability law provides an appropriate precedent for allowing bystander recovery.

### *A. Fairness and the Bystander*

#### 1. *Unreciprocated Risk*

The concept of unreciprocated risk may justify extending strict products liability for bystander injury to manufacturers of dangerous products that are not used by a substantial portion of the population.[70] Professor George Fletcher argued that "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant–in short, for injuries resulting from nonreciprocal risks."[71]

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*Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965)); Barker v. Lull Eng'g Co., 573 P.2d 443, 455 n.10 (Cal. 1978) (quoting *Jiminez*, 482 P.2d at 684). Justice Traynor, however, at the page the court cites, states that the product must be defective. *See* Traynor, *supra*, at 367.

[69] *See* Gary T. Schwartz, *Forward: Understanding Products Liability*, 67 CAL. L. REV. 435, 488-93 (1979).

[70] *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972).

[71] *Id.*

According to Fletcher, there is no compelling logic for imposing liability in cases of reciprocated risk, when the defendant merely exposes the plaintiff to a risk that is similar to the risk to which the plaintiff exposes the defendant. Reciprocated risks are "the background risks that must be borne as part of group living."[72] In cases of unreciprocated risk, however, courts should impose liability, based on the rationale that those who expose others to unreciprocated risk for their own purposes, even if justified, should pay for losses suffered.[73]

Of course, if courts impose strict liability on manufacturers of dangerous products for bystander injury, then manufacturers will either pass much of their liability costs to purchasers or discontinue some product lines altogether. Accordingly, purchasers and potential consumers will suffer loss because some dangerous products will cost more and others will no longer be available. It is appropriate, however, that purchasers and consumers of dangerous products bear some of the liability costs that dangerous products create, because the purchasers and consumers of these products, as well as the manufacturers, create unreciprocated risk to bystanders.[74] This risk should be spread to all who benefit from the product.

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[72] *Id.* at 543.

[73] As argued in a later section, the concept of unreciprocated risk is one of the major justifications for the imposition of strict liability for abnormally dangerous activity. *See infra* text accompanying note 129.

[74] As to recovery for bystander injury from defective automobiles, Fletcher observes that

> the ultimate issue is whether the motoring public as a whole should pay a higher price for automobiles in order to compensate manufacturers for their liability costs to pedestrians. The rationale for putting the costs on the motoring public is that motoring, as a whole, imposes a nonreciprocal risk on pedestrians and other bystanders ....

Fletcher, *supra* note 70, at 570, *quoted in* Marschall, *supra* note 57, at 1075. Fletcher's analysis would equally apply to bystander injuries from nondefective dangerous products. Accordingly, users of dangerous products, who impose on bystanders an unreciprocated risk, would absorb the costs of liability as manufacturers pass this cost on to them. As for automobiles, they are so common within our society that almost everyone benefits from them; therefore, the unreciprocated risk theory probably does not justify the imposition of strict liability for all injuries caused to bystanders by automobiles.

Patricia Marschall suggests that the unreciprocated risk theory justifies imposing strict liability on manufacturers for injuries arising from all products, on the ground that the manufacturer is also exposing the consumer to an unreciprocated risk. Marschall, *supra* note 57, at 1074. Such an extension, however, fails to account for the fact that consumers are exposing themselves to the risk as much as the manufacturer.

As the above quote illustrates, Fletcher's concept of unreciprocated risk is not inconsistent with risk spreading. When a group of consumers creates an unreciprocated risk to another group, liability should be imposed, and the risk spread to the consumers. Manufacturers and consumers of guns, cigarettes and alcohol and other dangerous products that a significant portion of the population does not use expose others to unreciprocated risk. Therefore, both consumers and manufacturers should bear the costs of such unreciprocated risks. For a discussion of risk spreading, see *infra* text accompanying notes 79-88.

Some of the losses created by dangerous products occur because of irresponsible use on the part of consumers. For instance, the greatest danger to bystanders from alcohol occurs when consumers drink and drive. Likewise, the greatest danger to bystanders from guns occurs when criminals use them for illegal purposes. Some might argue that it is unfair to impose on responsible users the costs created by irresponsible users. A later section discusses the responsibility of the misusing consumer and argues that manufacturers should have an indemnity cause of action against the highly culpable consumer.[75] This leaves pressure on the consumer to use products responsibly. The misusing consumer, however, is often unable to reimburse the manufacturer, and if liability is imposed on manufacturers, they will pass much of the unreimbursed liability costs to responsible consumers. Despite this seeming inequity, however, it is appropriate that responsible consumers share some of the cost of bystander injury since they create the demand for dangerous products.

The strongest case for liability based on unreciprocated risk is one in which the bystander has never used the dangerous product that causes the injury. In that case, the bystander has not helped to create the risk that has caused his or her injury and has not exposed others to such a risk. In such cases, the manufacturer and consumers have exposed the bystander to an unreciprocated risk.

Although injured bystanders who have never used a particular product present the strongest case for bystander recovery based on unreciprocated risk, it does not necessarily follow that bystanders who have used a product should be denied recovery.[76] Bystanders who use the product contribute to the funds used to pay bystander liability costs when they purchase the product. Furthermore, their degree of contribution is directly proportional to the amount of purchases that they make.[77] Bystanders who have been heavy users of the product would have made substantial contributions to the funds that manufac-

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[75] *See infra* text accompanying notes 95-100. That section also discusses the economic effect of imposing liability on manufacturers for bystander injuries. *See infra* text accompanying notes 101-06.

[76] In one type of bystander cause of action, prior bystander use would create another problem. Bystanders in second-hand smoke cases would, of course, bear the responsibility of showing that their loss was caused by the second-hand smoke and not by any tobacco that they had smoked. This might create a substantial barrier for plaintiffs who occasionally smoke or who have smoked in the past, but the barrier is created by the causation requirement, not by their responsibility for creating risk to others. For a discussion of the possibility of a second-hand tobacco cause of action, see *infra* text accompanying notes 140-45.

[77] This risk spreading argument could, of course, be extended to justify recovery by consumers that are injured while using the product, but the other justifications for bystander recovery would not apply to them.

turers use to pay liability costs. Bystanders who use the product only occasionally create much less of the risk and contribute less to the liability fund. Besides, a rule denying recovery to bystanders who had used the product would be difficult to implement because it would be difficult, in many cases, to identify plaintiffs that had used a product.

### 2. *No Benefit from the Product or Any of Its Cost Savings*

Bystander recovery may also be justified because manufacturers, purchasers and consumers benefit from dangerous products, and they do so at the expense of bystanders that are placed at risk. In the early days of strict products liability, some courts justified consumer recovery on the ground that manufacturers had made the product in order to generate profit, i.e., for their own benefit.[78] In cases brought by consumers, a weakness in this argument is that consumers, as well as the manufacturers, benefit from the product. Manufacturers and consumers are on an equal footing in this respect because both benefit from the product that caused the injury. However, the early courts' benefits reasoning does apply when dangerous products injure bystanders, since bystanders have generally not benefited from the product that caused their injury. Manufacturers, purchasers and consumers bear some responsibility for bystanders' injuries because each has enjoyed the benefits of the product and, in doing so, has placed the bystander at risk.

The argument that courts should provide preferential treatment to bystanders, who have not benefited from the product, over consumers is even more compelling in the many cases in which the manufacturers and consumers have benefited from the very aspects of the product that make it dangerous. Dangerous products often cost less to produce. Assume, for example, that a manufacturer of a power boat fails to install an expensive stopping mechanism. Some of these savings will result in higher profits for the manufacturer and, under pressure of a competitive market, others will be passed on to the consumer in the form of a lower product price. Hence, the manufacturer gets higher profits and the consumer pays less for the product *because* the product is more dangerous. This arrangement is fair enough if consumers are merely exposing themselves to risk. It is unfair, however, for manufacturers and consumers to benefit from

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[78] *See, e.g.*, Suvada v. White Motor Co., 210 N.E.2d 182, 186 (Ill. 1965).

risks to which they expose bystanders, unless they also compensate bystanders for their losses.

### *B. Spreading the Risk of Bystander Injury: Court-Imposed Third Party Insurance*

If courts impose liability on manufacturers for product injury to any group of plaintiffs, manufacturers will raise the price of the product and spread the risk of the loss to purchasers.[79] Justice Traynor of the California Supreme Court offered risk spreading as a justification for strict products liability in what is widely regarded as the first opinion to propose strict products liability: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[80] This justification for imposing strict products liability has been adopted by many courts.[81]

The theory of risk spreading recognizes that strict products liability works in some respects like an insurance system. That is, if courts impose liability for product injury, manufacturers will raise the cost of the product. All consumers, therefore, pay a bit more for the product. This additional amount acts like an insurance premium. When people are injured, their losses are covered. Those who favor risk spreading argue that it is better for many consumers to bear a small loss than for those who are injured to suffer a devastating loss.[82]

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[79] The risk spreading argument is not divorced from the unreciprocated risk argument made previously. *See supra* text accompanying notes 70-77.

[80] Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[81] *See, e.g.*, Lippard v. Houdaille, Indus., 715 S.W.2d 491, 502 (Mo. 1986); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982); Allen v. Heil Co., 589 P.2d 1120, 1126 (Or. 1979).

[82] Guido Calabresi justifies risk spreading with the following arguments:

> (a) that taking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary or avoidable losses, than taking a series of small sums from many people, and (b) that even if the total economic dislocation is the same, many small losses are preferable to one large one, simply because people feel they suffer less if 10,000 of them lost $1 than if one loses $10,000.
>
> While the first of these propositions is an empirical generalization not too difficult to accept, the second is in its precise terms a variant of the economist's theory of the diminishing marginal utility of money.

Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517 (1961).

There are difficulties with the argument for spreading the risk of *consumer* injuries.[83] For instance, if courts consistently followed risk-spreading theory, there would be almost no limits to strict liability; that is, liability would be imposed in almost any suit brought against an enterprise.[84] Expanded products liability would limit consumer choice in several ways. Manufacturers would withdraw some products from the market because production would no longer be profitable. Manufacturers would add "insurance premiums" to the price of other products, resulting in higher prices. Consumers who would prefer to pay lower prices and assume the risk of injury or to rely on their own insurance plans would be unable to do so. Furthermore, some consumers would be unwilling to pay higher prices and poor consumers might be unable to pay higher prices.[85] Although it might be argued that consumers need the protection of the insurance system that strict liability imposes, this argument is excessively paternalistic. Consumers should be able to choose whether to purchase this protection.

The argument for spreading the risk of *bystander* injury from dangerous products is stronger than the argument for spreading the risk of consumer injury. When courts impose liability for consumer injury, they impose on consumers a first party insurance system, a system that provides compensation to the payor (the first party) when the payor is injured. When they impose liability for bystander injury, they impose on consumers a third party insurance system, a system that provides compensation to others (the third parties) when they are injured.

The paternalism objection to spreading the risk of consumer injury (courts should not impose on consumers the duty to protect themselves) does not apply to bystander injury. When courts impose liability for bystander

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[83] See Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153, 191-92 n.107 (1976); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703-07 (1980).

[84] In almost all situations, a commercial enterprise will have a better ability to spread the risk than an individual plaintiff. Manufacturers will have a better ability to spread the risk, whether or not the product is defective, since the liability expense will be added to the cost of the product.

This concern with risk spreading's boundless expansion of strict products liability may have caused Justice Traynor to emphasize other justifications for strict products liability in Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963), which adopted strict products liability in California. Likewise, several courts have taken pains to emphasize that strict products liability is not absolute liability and that under strict products liability the manufacturer is not the insurer of those injured by the product. *See, e.g.*, Daly v. General Motors Corp., 575 P.2d 1162, 1166 (Cal. 1978); Cronin v. J. B. E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972); Dippel v. Sciano, 155 N.W.2d 55, 63 (Wis. 1967).

[85] *See* James M. Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970).

injury, they are requiring consumers to purchase third party insurance to protect others from the losses caused by consumers' use of dangerous products. Bystanders do not have the same opportunities to protect themselves from product risks. Whereas consumers can purchase insurance in light of the risks created by the products that they use, bystanders are likely to undervalue or be unaware of the risk that other people's products pose to them.[86] Even if bystanders know of the risks that dangerous products create,[87] bystanders should not have to pay for the risks created for the consumers' benefit.[88]

### *C. Safety, Efficiency, and Internalizing the Cost of Bystander Injury*

One reason that courts often give for imposing liability on manufacturers is that to do so will encourage the production of safer products.[89] This section explores the effects that imposing liability for bystander injury upon the manufacturers of dangerous, nondefective products would have on safety and efficiency.

Professor Calabresi has argued that to yield both the greatest level of safety and the highest level of efficiency obtainable from a liability rule, liability should be imposed on the person that can avoid the loss at the cheapest cost.[90] As to safety, the argument is that a rational, profit-maximizing party, on whom courts impose liability, will incorporate the safety precaution as long as the safety cost is less than the accident cost.[91] The

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[86] *See* Note, *Strict Liability and the Bystander*, 64 COLUM. L. REV. 916, 935 (1964); Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625, 638 (1971).

[87] For instance, bystanders are likely to know of the risk of injury from guns in high crime areas and from drunk driving on the highways.

[88] An analogy can be drawn to legislative proposals to require individuals to purchase health (first party) insurance and proposals to require them to purchase automobile liability (third party) insurance. Whereas requiring individuals to purchase health insurance is subject to continuing debate, almost all jurisdictions require individuals to purchase automobile liability insurance. *See* Ian Ayers & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 744 n.54 (1992).

[89] *See, e.g.*, Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1041 (Or. 1974).

[90] *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-85 (1975).

[91] In the case of consumer injury, there has been a substantial debate as to whether the cheapest cost avoider is generally the manufacturer or the consumer. Some argue that consumers who are informed of the risks of a product generally will be the cheapest cost avoiders, because they can use the products in a safe manner and the costs of safe use may be much less for the consumer than the costs of a different design for the manufacturer. *See* Buchanan, *supra* note 85, at 71-72; Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 24-56 (1970). Others argue that the manufacturer has greater expertise than the consumer and is generally better able to calculate the costs and benefits of safety steps. *See* Guido Calabresi & Kenneth C. Bass III, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74,

cheapest cost avoider is, by definition, the party for whom the safety cost would be the least.[92]

As for maximizing efficiency, imposing liability on the cheapest cost avoider will yield the lowest sum of accident costs and safety costs.[93] The cheapest cost avoider determines whether the safety costs are worth the savings in liability costs. Imposing liability on the cheapest cost avoider will not lead that party to adopt all safety measures–no liability system could do that–but it will encourage the cheapest cost avoider to create only cost-justified risks.[94]

Safety and efficiency generally justify imposing liability on the manufacturer for bystander injury, because the manufacturer will generally be a cheaper cost avoider than a bystander. Bystanders generally are not in a position to take steps to avoid injuries arising from dangerous products. Bystanders are merely engaged in the activity of ordinary life, and would have to cease normal activity to avoid risks created by dangerous products.[95] Manufacturers, on the other hand, have some control over safety. They can market products more safely, take care to sell to those that will use products safely, and wage campaigns to

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76-89 (1970).

Though Calabresi has suggested that manufacturers are generally the cheapest cost avoiders, *see id.*, he and Professor Hirschoff have argued that courts should determine in each case who is the cheapest cost avoider and impose liability on that party. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972). However, as Patricia Marschall has argued:

> Although theoretically appealing, the test is impractical and inefficient because of the difficulties involved in locating the best decisionmaker. Judges and juries are not trained to draw multibranched decision trees. To compare the decision-making abilities of a manufacturer at one point in time with those of a consumer at another raises questions too complex and uncertain of outcome for the real world of negotiation and trial practice. The Calabresi and Hirschoff system would necessitate more lawyer, judge and jury hours to settle or try each case. Its extreme flexibility would make predictions of trial outcomes more speculative than under existing tests of strict liability. Its adoption therefore would result in more trials and fewer settlements.

Marschall, *supra* note 57, at 1101. This, of course, is the objection that Epstein and others raise to the benefit/risk design defect test. *See supra* note 65 and text accompanying note 47. This Article proposes that manufacturers of abnormally dangerous products be subject to liability for bystander injury, without requiring plaintiff to show either defect or that the manufacturer is the cheapest cost avoider, and thereby avoids the difficulties of an indeterminate rule. In most cases, this would be consistent with the cheapest cost avoider theory, because as between a bystander and the manufacturer, the manufacturer will almost always be the cheapest cost avoider. *See infra* text accompanying notes 94-95.

[92] Calabresi, *supra* note 90, at 84-85.

[93] *Id.* at 84.

[94] Of course, an administrative regulation or criminal law could demand higher (and inefficient) levels of protection.

[95] *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 140-41 (2d ed. 1977) (suggesting that this argument justifies abnormally dangerous activity strict liability).

encourage safer product use. If the costs of bystander loss are sufficiently great, a manufacturer can avoid the risk of loss by ceasing to manufacture a product.

While as between the manufacturer and the bystander, the manufacturer is likely to be the *cheaper* cost avoider, the consumer may often be the *cheapest* cost avoider.[96] The consumer can often reduce the risk to bystanders at a very small cost by using the product more carefully. For example, consumers can use guns with greater care and only for legitimate purposes, they can smoke cigarettes only when they are alone, and they can consume alcohol only when they are at home or are being chauffeured. Likewise, blasters can use explosives in ways that are less likely to cause injuries to others. When the consumer is the cheapest cost avoider, to the extent possible courts should impose costs of bystander injury on the consumer. Courts already allow bystanders to recover against consumers who are negligent[97] and consumers who engage in abnormally dangerous activity.[98]

Unfortunately, however, users of dangerous products may not be affected by the risk of liability. For instance, the risk of tort liability has little effect on those that use guns for criminal activity. Likewise, cigarette smokers are likely to believe that the risks created by the little bit of smoke that they blow in the direction of others is too trivial to cause any injury.[99] Consumers of alcohol may not be the rational, profit-maximizers posited by economic theory; some are addicted, and the judgment of those that have had even one or two drinks may be impaired. In addition, the risk of liability may not affect those consumers who would be unable to pay for losses to injured bystanders.

Courts must continue to maintain pressure on consumers to use products in a safe manner, but they can do so without denying bystander recovery from manufacturers. Courts can maintain consumer accountability while allowing bystanders to recover from manufacturers for injuries caused by dangerous products by giving manufacturers an indemnity cause of action against consumers who could have avoided the loss at a cheaper cost.[100]

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[96] *See* discussion *supra* note 91.

[97] *See* KEETON ET AL., *supra* note 13, §§ 30-33.

[98] *See id.* § 78.

[99] As to bystander injuries that result from the cumulative effect of exposure to a dangerous product's use by numerous consumers, such as cancer from second-hand smoke, injured bystanders would be unable to bring suit against all of the consumers who have caused their loss and would have substantial problems proving cause in fact.

[100] In an indemnity cause of action, a party who has paid a judgment is reimbursed in full by another party. *See* KEETON ET AL., *supra* note 13, § 51, at 341.

If courts impose liability on manufacturers of dangerous products for injuries to bystanders, manufacturers will internalize the cost of bystander injury. In other words, manufacturers will choose the most efficient combination of safety steps and price increases in order to cover bystander loss, and the price paid by the consumer for the product, through some combination of increased safety costs and liability costs, will reflect the bystander's loss.

Before looking at the effect that internalizing bystander losses will have on the safety of products, consider how the free market, through bargaining, provides pressure toward the efficient level of protection *for consumers*, irrespective of whether courts impose liability on manufacturers for consumer injury. If consumers are informed of the risks created by products, they will take into consideration the risk of accidents to themselves as a part of the cost/benefit determination that they make when they purchase products. They internalize those risks. Unlike bystanders, consumers have the ability to take steps for their safety; they can purchase safer products, purchase products only from reputable manufacturers, or bargain for what they perceive to be the appropriate level of safety. The market, therefore, encourages manufacturers to produce products that have the most efficient level of consumer safety, i.e., products that provide what consumers believe to be the best combination of consumer safety and cost savings. Whether courts impose liability for consumer injury on the manufacturer or leave losses with consumers may not have a great effect on product safety.[101]

There is, however, no possibility of bargaining between the manufacturer and the bystander, and, therefore, bargaining cannot lead to the efficient result. The free market, by itself, provides no incentive for manufacturers or consumers to consider the safety of bystanders. If courts did not impose liability on either consumers or manufacturers for injury to bystanders, those costs would be external costs, i.e., the price of the product would not reflect the risk to bystanders. Accordingly, manufacturers would not take those costs into consideration when deciding what safety steps to take or when setting the price of a product, and consumers would not take these costs into consideration when purchasing or using a product.

When courts impose liability on manufacturers for injuries to bystanders resulting from manufacturer negligence or from defective products, it forces the manufacturer to internalize the risk of these injuries; hence, the safety and price of products reflect these risks. When courts impose liability on

[101] This argument is developed in 1 ENTERPRISE RESPONSIBILITY, *supra* note 36, at 398-402.

consumers for injuries to bystanders resulting from their negligence or their use of abnormally dangerous products, this internalizes the risk of many of these bystander injuries; the potential liability is reflected in the price that the consumer is willing to pay for the product.

The current system of manufacturer liability for defective products and consumer liability for consumer negligence and abnormally dangerous activity does not internalize all of the risks to bystanders. Hence, there is no incentive for manufacturers to consider risk to bystanders from products that are not defective, and there is no incentive for consumers to consider risk to bystanders from products that they do not use negligently or in abnormally dangerous activity. Manufacturers will overproduce and consumers will overuse products that create risks to bystanders. Consider, for example, the risk of injury to bystanders in hunting accidents. Assuming that the gun is not defective and there is no negligence on the part of the party using the gun, injured bystanders get no recovery. The consumer need not consider the risk of nonnegligent injury to bystanders when deciding to purchase a gun. If liability were imposed on the manufacturer for such accidents, the cost of the gun would reflect this added risk.

In addition to the fact that, unless liability is imposed, consumers need not consider the risks of nonnegligent injury to bystanders when making purchases, there is also a great danger that consumers will not give sufficient consideration to the risk that they will cause negligent injury to bystanders. They are unlikely to care as much for the bystander's safety as they care for their own.[102] Some consumers will simply overlook the risks that their activity will cause to others. Even a consumer who considers the risk of liability is not as likely as a manufacturer to be affected by it, since consumers are not as likely as manufacturers to be able to pay the damages of a seriously injured victim.[103]

If courts impose liability on manufacturers for bystander injury, manufacturers will internalize the risk in the cost of the product. They will take additional safety steps and/or raise the price of the product in light of bystander risks.[104] Manufacturers will not take every possible

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[102] There is, of course, an argument that consumers will not give adequate consideration to the risks that products will create to themselves. However, consumers are generally the best judge of whether the benefits of a product outweigh the risks to themselves. *See* Epstein, *supra* note 59, at 475.

[103] *See* Philip M. Kinkaid & William J. Stunte, Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1137 (1983).

[104] As Judge Adams of the Third Circuit Court of Appeals said in a case extending strict liability for defective products to manufacturers for bystander injury:

safety step, but will instead determine the combination of safety costs and liability costs that will yield the least overall cost.

To the extent that they can do so, manufacturers will pass these costs, whether liability or safety costs, to consumers. The price of products will more accurately reflect the costs that the products create to society, and consumers will be forced, through the higher prices, to take into consideration the losses that products cause.[105] If the price of a product goes up so much that the price exceeds its value to a consumer, it will not be purchased; its costs to society are greater than the benefits that it provides. Consumers are making a cost/benefit decision every time they purchase a product, and if the market is to work efficiently, the costs of the product should reflect the risks to bystanders, as well as the other costs of the product.[106]

Though including the cost of bystander injuries in the price of a product would aid the cause of efficiency, it would also create inefficiencies of its own. Some inefficiencies accompany any system of products liability. Inefficiencies arise when courts impose products liability on manufacturers of durable goods because consumers pay liability costs on a per purchase basis, rather than a per use basis. As argued above, one goal of spreading the risk to purchasers of products is that the price of the product includes the costs the product will impose on society;[107] then the consumer can make the cost-justified choice. However, if the risk of liability is to have the most efficient impact on safety, courts should impose liability on a per use basis rather than a per sale basis, because risk is created by each use of the product, rather than each sale.[108] With respect to durable goods, when liability costs are spread on a per purchase basis, the cost imposed will not reflect the risk that each purchaser creates;[109] each purchaser pays the same liability "premium" with the purchase, but

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> Inasmuch as the defective product may well injure persons who have not purchased the product or in any way dealt with the manufacturer, there is no price mechanism by which to insure such persons against the risk of loss. . . . The imposition on manufacturers of strict liability for defective products accomplishes the cost internalization that the price mechanism cannot achieve by placing the complete cost of the injuries on the manufacturer.

Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288 (3d Cir. 1980). His argument is equally applicable to bystander injuries from nondefective products.

[105] *See* Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158-61 (1976).

[106] *See infra* text accompanying notes 109-13.

[107] *See supra* notes 84-87 and accompanying text.

[108] *See* Henderson & Twerski, *supra* note 6, at 1312.

[109] *Id.* at 1313-14.

those who use the product less often subsidize those who use the product more often.[110]

James Henderson and Aaron Twerski argue that when the law leaves losses on injured users and consumers, this market distortion is avoided: "[T]he substantial majority of individual product *users and consumers* who cannot prove the existence of a defect generally *do* bear accident costs roughly in proportion to their levels of product usage and their contributions to the risks of injury."[111] If courts do not impose liability on the manufacturer for consumer injury, the risk of loss is placed on the consumer on an efficient, per use basis. Note, however, that this efficiency exists only as to risks to "consumers and users."[112] Though consumers and users have an incentive to consider the risk that product use creates to themselves on a per use basis, they have no such incentive to consider the risk that the nonnegligent use of products creates to bystanders.[113]

Imposing liability on manufacturers of dangerous products for injuries to bystanders would create some distortion, because the risk of loss from dangerous durable products (such as firearms) would be spread to consumers on a per purchase rather than a per use basis. This distortion, however, may be less than the distortion under the current system, in which consumers have no incentive to avoid the nonnegligent use of products that create risk to bystanders. Courts might impose strict liability for bystander injury on consumers of dangerous products, and thereby impose on them "accident costs roughly in proportion to their levels of product usage and their contributions to the risks of injury,"[114] but this would fail to spread the risk of bystander loss as under a manufacturer liability system. In cases in which both durable and nondurable dangerous products cause a loss, courts could impose liability on the manufacturer of the nondurable product, and thereby spread the risk of bystander loss to consumers on a per use basis. For example, courts could impose liability for bystander injuries from firearm accidents on bullet manufacturers rather than gun manufacturers.

Imposing liability on manufacturers also creates additional distortions, "what economists refer to as 'second best' problems: targets of burden-

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[110] *See id.* Note that this distortion is not as great with nondurable goods. For example, if courts impose liability on manufacturers of cigarettes for consumer injury, as manufacturers spread the risk to consumers, the consumer would pay a liability "premium" with each *use* of the product.

[111] *Id.* at 1313 (emphasis added).

[112] *See id.*

[113] The risk of liability would, of course, create an incentive to safely use products if the consumer normally engaged in negligent conduct.

[114] Henderson & Twerski, *supra* note 6, at 1313.

some governmental regulation, when possible, will seek to escape the burdens by substituting unregulable (and in this context, possibly riskier) modes of behavior."[115] For example, imposing liability on manufacturers of durable products encourages consumers to use older (and possibly more dangerous) products.[116] Imposing liability on manufacturers also encourages the development of unregulable black markets.[117] Henderson and Twerski suggest that if courts imposed liability on manufacturers for injuries caused by nondefective products, black markets would develop and create a great increase in the number of injuries from contaminated tobacco and alcohol products.[118]

Of course, the degree to which an expansion of products liability will create "second best" problems, such as the continued use of used products and the development of black markets, will depend on the amount of the increase in costs that increased liability will create. Henderson and Twerski criticize arguments in favor of imposing liability on manufacturers of nondefective products for consumer and bystander injury on the basis that such liability would raise the price of products substantially and create significant "second best" problems.[119] The possibility discussed in this Article of imposing liability on manufacturers for bystander injury would have a much smaller impact on the price of most products than across-the-board manufacturer liability, because most products cause substantially fewer bystander injuries than consumer injuries.[120] The

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[115] *Id.* at 1310.

[116] Henderson and Twerski also argue that this would encourage the development of markets for used products that would not bear the "tax" of the new products. *Id.* at 1290. However, the cost of used products would go up as demand increased.

[117] *See id.* at 1289. These "second best" problems, of course, can occur whenever products liability is expanded or any type of product safety regulation is adopted.

[118] *Id.* at 1312.

[119] *Id.* at 1310-14.

[120] Consider a few examples that Henderson and Twerski discuss. *Id.* at 1312. Henderson and Twerski suggest that imposing liability on manufacturers of cigarettes for injuries to consumers would cause a $2 to $3 increase in the cost of a pack of cigarettes and argue that if all injured parties could recover from cigarette manufacturers, "black-marketeering is inevitable." *Id.* at 1311 n.176. The impact of bystander recovery for second-hand tobacco smoke injury, however, would have a much smaller impact on tobacco prices. Whereas tobacco causes approximately 300,000 consumer deaths a year, Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 271 (1977) (citing HAROLD S. DIEHL, TOBACCO AND YOUR HEALTH: THE SMOKING CONTROVERSY 33-34 (1969)), it causes only between 2,490 and 5,160 bystander deaths each year, David B. Ezra, Note, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1065 (1990).

Approximately one-third of the 23,000 people killed each year in alcohol-related traffic deaths are bystanders. *Compare* DOROTHY P. RICE ET AL., THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985, 118 (1990) (finding that in 1985 alcohol consumption caused 23,190 traffic deaths) *with* Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 J. AM. MED. ASS'N 1604, 1608 (1989) (finding that 7400 of those killed in alcohol related accidents in 1985 had not consumed alcohol) (citing U.S. DEPT. OF TRANSPORTATION,

distortions that might be created by imposing liability for bystander injury would probably be minor compared with the distortions that currently exist when no liability is imposed for bystander injury.[121]

### *D. Abnormally Dangerous Activity Liability as Precedent for Bystander Recovery*

As a previous portion of this Article demonstrated, warranty law has had a great impact on the development of strict products liability in tort.[122] Warranty law may be the proper precedent when a purchaser or consumer is injured since the suit is between those who benefit from the transaction. But when a dangerous product injures a bystander, abnormally dangerous activity liability is probably the more appropriate precedent.[123]

Under abnormally dangerous activity liability, defendants are subject to strict liability for damages caused by their dangerous and in some way unusual activity.[124] Though the defendant who engages in an abnormally

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NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION: DRUNK DRIVING FACTS 23 (1986)).

A higher percentage of those killed by other dangerous products, such as handguns, may be bystanders. If courts allowed bystander recovery and the legislature found that the distortion as to some products was too great, it could exclude their manufacturers from liability.

[121] *See supra* text accompanying notes 101-06.

Henderson and Twerski acknowledge that bystander losses create market distortions, noting that "to the extent that smoking and drinking generate externalities or involve addictive behavior, society confronts potentially significant market failure," but they suggest that courts leave this problem to the legislature. Henderson & Twerski, *supra* note 6, at 1330. Legislatures are unlikely, however, to pay much attention to bystanders. The plight of bystanders that are injured by any one product is unlikely to generate much public interest. Advocacy groups may attempt to limit the use of dangerous products such as alcohol or tobacco, but these groups have not advocated recovery for injured bystanders. Therefore, if the risks of bystander injury are to be internalized in the price of dangerous products, it is likely that this will have to be the work of the courts. If the distortions created by bystander recovery are so great respecting some products that exemption from liability is justified, the legislatures could create an exemption for such products.

[122] *See supra* text accompanying notes 15-66.

[123] Though abnormally dangerous activity liability has not had as great an impact on strict products liability law as warranty theory, it has had some impact. The Restatement (Second) of Torts adopts the abnormally dangerous activity rule concerning contributory negligence: "Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524 [the abnormally dangerous activity section]) applies." RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1977).

John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 531 (1983), suggests that courts might extend abnormally dangerous activity liability to impose liability on manufacturers of nondefective dangerous products in cases involving all categories of injured parties. However, as argued *infra* at text accompanying notes 129-33, traditional strict liability *is* bystander liability. Extension of abnormally dangerous activity strict liability to all categories of plaintiffs would go far beyond its present limitations.

[124] *See, e.g.*, Rylands v. Fletcher, 3 L.R.-E.&I. App. 330, 338 (H.L. 1868); RESTATEMENT

dangerous activity may have acted reasonably, the defendant's activity must pay its way.[125] At the trial of an abnormally dangerous activity case, the court decides as a matter of law whether an activity is subject to strict liability.[126]

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(SECOND) OF TORTS §§ 519, 520 (1977); KEETON ET AL., *supra* note 13, § 78, at 551. Section 520 of the Restatement states:

> In determining whether an activity is abnormally dangerous, courts are to consider the following factors:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

[125] *Id.* § 519 cmt. d (1977).

[126] Comment l to section 520 of the Restatement (Second) of Torts provides:

> *Function of court.* Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. . . . This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

*Id.* § 520 cmt. l.

Likewise, in a bystander's cause of action based on the danger presented by a product, the court, rather than the jury, might determine whether the manufacturer of a product is subject to liability. The court might impose liability if it determines that the product creates unreciprocated risks to a substantial portion of the population. This would avoid the difficulties that arise in the ordinary design defect case in which the jury must determine whether a product is defective. It is very difficult for a jury to apply a risk/benefit test. They must compare risks (such as the danger of death) and benefits (such as efficiency) that are very difficult to compare. *See supra* note 65 and accompanying text. People differ greatly in the way that they draw a risk/benefit analysis and the jury will often be second-guessing a balance that was drawn by the customer who purchased the product. *See supra* note 65 and accompanying text. Different juries are likely to reach different results with the same facts. It is therefore difficult for manufacturers to predict when they will be subject to liability for a product's design.

The proposal for bystander recovery suggested herein is in some respects like that suggested by Justice Schreiber of the New Jersey Supreme Court. He suggested, in a case in which the plaintiff was injured when he dived into an above-ground swimming pool, that a court might find, based on the Restatement's abnormally dangerous activity factors, *see supra* note 124, that the manufacturer of a product should be subject to strict liability for the inherent dangers of a product. *See* O'Brien v. Muskin Corp., 463 A.2d 298, 312-13 (N.J. 1983) (Schreiber, J., concurring). Justice Schreiber is critical of the majority in *O'Brien* for allowing the jury to determine whether the manufacturer of a product should be subject to liability based on the product's inherent characteristics. *Id.* He advocates that the judge determine whether a nondefective product should be subject to strict liability, as in the abnormally dangerous activity cases. *Id.* at 314-15. Justice Schreiber's proposal differs from that advocated herein in that he would allow liability when there is injury to consumers, as well as bystanders. Dangerous products cases are substantially more similar to dangerous activity cases when

Abnormally dangerous activity liability is bystander liability. As the Alaska Supreme Court explained in imposing abnormally dangerous activity liability on defendants for the storage of explosives, "[a]s between those who have created the risk for the benefit of their own enterprise and those whose only connection with the enterprise is to have suffered damage because of it, the law places the risk of loss on the former."[127] In this respect, manufacturers and consumers of dangerous products are like defendants in the abnormally dangerous activity cases. Manufacturers and consumers of dangerous products benefit from the production of the products and it may be that they should be responsible to bystanders who are injured by such products.

Commentators have differed over the justification for abnormally dangerous activity strict liability.[128] George Fletcher argues that liability is based on fairness in that the defendants in such cases expose others to unreciprocated risk.[129] Other commentators justify abnormally dangerous activity liability based on economic efficiency:[130] the defendant is generally the cheapest cost avoider in such situations, because plaintiffs, who are merely engaged in the ordinary activities of life, would find it difficult to adjust their lives to avoid abnormal risks.[131] Defendants can more easily make cost-justified changes in their activities to avoid the risks. A third group of commentators suggest that compensation and risk spreading justify abnormally dangerous activity liability.[132] Previous

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a bystander is injured than when a consumer is injured.

[127] Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1212 (Alaska 1978). Similarly, comment d to section 519 of the Restatement (Second) of Torts states that, abnormally dangerous activity liability "is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur." RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977). Accordingly, courts deny recovery to those who engage in the abnormally dangerous activity. *See id.*

[128] It appears that the early cases, such as Rylands v. Fletcher, 3 L.R.-E.&I. App. 330 (H.L. 1868), were based on the unexpected nature of the risks. In England at that time, people expected to be exposed to risks from mining operations, but not from water held in artificial ponds. *See id.* at 338.

[129] Fletcher, *supra*, note 70, at 543-56. Fletcher maintains that "[i]f uncommon activities are those with few participants, they are likely to be activities generating nonreciprocal risks." *Id.* at 547. Professor Fletcher also sees unreciprocated risk as the underlying basis for the law of intentional torts and negligence. *See id.* For a discussion of the unreciprocated risk justification for liability, see *supra* text accompanying notes 70-77.

[130] *See, e.g.*, POSNER, *supra* note 95, at 140-41.

[131] *See id.*; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 24 (1980).

[132] *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 395 (1951); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 292-93 (citing Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203, 1208 (E.D. Cal. 1976)). For a discussion of the risk spreading rational, see *supra* text accompanying notes 84-94. Risk spreading, however, does not explain the limitations of

sections of this Article have found support in each of these justifications for a bystander cause of action against manufacturers of dangerous products.[133]

The economic justification for a bystander cause of action against manufacturers of nondefective dangerous products is not as strong as that against the party that engages in the dangerous activity, because generally the party that engages in the dangerous activity will be the cheapest cost avoider. For example, users of dynamite or alcohol are probably the parties that can most easily take steps that would make their activities safe. As argued above,[134] however, as between the manufacturer and the bystander, the manufacturer is most likely to be the cheaper cost avoider, and courts can maintain pressure on users by giving manufacturers a right of indemnity against users.

The Restatement (Second) of Torts lists the "extent to which the activity is not a matter of common usage" as one of six factors that can justify imposing abnormally dangerous activity strict liability.[135] Of course, many products that expose bystanders to risk, such as cigarettes, alcohol and firearms, probably are "matter[s] of common usage." Though the Restatement does not require that an activity be "not a matter of common usage" before it is subject to liability, it may be that even including this trait as a factor for the courts to consider could lead a court unjustifiably to deny recovery. Abnormally dangerous activity's unreciprocated risk justification would suggest the need to impose liability for a broader range of dangerous activities. If a substantial portion of the population does not benefit from an activity, those who engage in the activity expose others to an unreciprocated risk. In some cases, for instance, courts have extended dangerous activity liability to crop-dusting, even though it was a common activity in the area in which the defendant engaged in it.[136] Under this broader view of abnormally

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ultrahazardous activity liability. Indeed, if a court were to build a liability system around risk spreading, it is difficult to see any limits to the liability of an enterprise for injures that it causes. *See* Owen, *supra* note 83, at 704.

[133] *See supra* text accompanying notes 70-77 (unreciprocated risk argument), 79-88 (risk spreading argument), and 89-121 (cheapest cost avoider argument).

[134] *See supra* text accompanying notes 94-95.

[135] RESTATEMENT (SECOND) OF TORTS § 520(d) (1977); *see supra* note 124.

[136] *See, e.g.*, Loe v. Lenhardt, 362 P.2d 312, 316-18 (Or. 1961); Langan v. Valicopters, Inc., 567 P.2d 218, 223 (Wash. 1977). The Restatement states that the manufacture of explosives is "carried on by only a comparatively small number of persons and therefore [is not a matter] of common usage." RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977). This appears to be inconsistent with the Restatement's argument, within the same comment, that automobiles are not subject to strict liability because they are commonly used. *Id.* Of course, there are very few manufacturers of either automobiles or explosives.

dangerous activity strict liability, courts might impose strict liability on activities (and on manufacturers of dangerous products) that do not benefit a substantial portion of the community.

With a few exceptions,[137] courts have not applied abnormally dangerous activity liability to manufacturers of dangerous products.[138]

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[137] *See, e.g.*, Chapman Chem. Co. v. Taylor, 222 S.W.2d 820, 827 (Ark. 1949) (holding creation of pesticides that caused injury to plaintiff's cotton to be an ultrahazardous activity); *see also* Andrew O. Smith, Note, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 384-85 (1987) (discussing *Chapman* and other cases that suggest that the manufacture of some dangerous products might be subject to ultrahazardous activity liability).

The comments to the Restatement can be read to suggest that a manufacturer might be subject to abnormally dangerous activity liability. For instance, comment i to section 520 argues that "the manufacture, storage, transportation and use of high explosives" are carried on by a small number of persons, and therefore are uncommon activities subject to strict liability. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977). The comment, however, may merely suggest that if the explosives go off during manufacture, the manufacturer will be subject to liability.

[138] Some courts have limited abnormally dangerous activity liability to dangerous activity on the defendant's land. *See, e.g.*, Kelley v. R.G. Indus., 497 A.2d 1143, 1147 (Md. 1985) (refusing to impose liability unless the activity is abnormally dangerous with respect to the place where it occurs); Yommer v. McKenzie, 257 A.2d 138, 141 (Md. Ct. App. 1969) (discussing the critical importance of an activity being abnormally dangerous with respect to its surroundings). *Contra* Chapman Chem. Co. v. Taylor, 222 S.W.2d 820, 827 (Ark. 1949) (holding that the frequency of aerial spraying of pesticide in a given location does not warrant finding the activity not extrahazardous); Loe v. Lenhardt, 362 P.2d 312, 316-18 (Or. 1961) (holding aerial spraying extrahazardous activity in a community where widely used); Langan v. Valicopters, Inc., 567 P.2d 218, 221-23 (Wash. 1977) (holding defendant liable for damage resulting from the common practice of crop-dusting); Siegler v. Kuhlman, 502 P.2d 1181, 1184-85 (Wash. 1972) (holding defendant liable for injuries sustained from gasoline trailer overturning despite a finding that hauling gasoline in that manner is not unusual), *cert. denied*, 411 U.S. 983 (1974). Comment e to section 520 of the Restatement (Second) explicitly rejects a limitation of abnormally dangerous activity liability to activities that occur on defendant's land. RESTATEMENT (SECOND) OF TORTS § 520 cmt. e (1977). Both the Blackburn (lower court justice) and the Cairns (appellate court justice) opinions in Rylands v. Fletcher, 3 L.R.-E.&I. App. 330 (H.L. 1868), state their rule in terms of defendant doing something on his land. Blackburn imposes liability on the person who "brings on his lands . . . any thing likely to do mischief," 143 Rev. Rep. 611, 621 (Ex. Ch. 1866), and Cairns imposes liability on defendants whose "use of their close" is "non-natural," 3 L.R.-E.&I. App. 330, 339 (H.L. 1868). The language in each of the opinions may have merely described the activity of the defendant in *Rylands*, rather than stating a requirement of the rule adopted.

The Restatement states that the "inappropriateness of the activity to the place where it is carried on" is a factor to be considered in determining whether an activity is subject to strict liability. RESTATEMENT (SECOND) OF TORTS § 520(e) (1977). Dangerous products, of course, create risks in any place that consumers might use them. Two recent Washington Supreme Court decisions, purporting to apply the Restatement, appear to ignore the "inappropriateness to the place" factor. The Washington Supreme Court found the hauling of gasoline, Siegler v. Kuhlman, 502 P.2d 1181, 1184-85 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1974), and crop-dusting in an area where crop-dusting was prevalent, Langan v. Valicopters, Inc., 567 P.2d 218, 221 (Wash. 1977), to be ultrahazardous. In those cases, the court found the activity to be ultrahazardous, in spite of the fact that roads seem to be the appropriate place to haul gasoline and a valley where crop-dusting occurs seems to be the appropriate place to crop-dust. Virginia Nolan and Edmund Ursin argue that these cases ignore the last three factors of section 520 of the Restatement, *see supra* note 124, and stand "for the proposition that the Restatement (Second) is not the proper focus for strict liability analysis." Nolan

The U.S. Court of Appeals for the Seventh Circuit refused to extend abnormally dangerous activity liability to the manufacture of handguns in part because of a fear that this would create too great a burden on manufacturers of dangerous products. According to the court, such an extension "would require that manufacturers of guns, knives, drugs, alcohol, tobacco and other dangerous products act as insurers against all damages produced by their products."[139] As suggested above, however, the abnormally dangerous activities rule justifies manufacturer liability only in cases of bystander injury. The extent of liability that such a rule would create would not be as great as that suggested by the Seventh Circuit because most of the risks that knives, drugs, alcohol, tobacco and other dangerous products create are to consumers.

The basis of abnormally dangerous activity liability is that those who engage in dangerous activity for their own benefit should pay for losses that they cause to bystanders; the activity should pay its way. It may be that likewise, manufacturers (and through them consumers) who benefit from dangerous products should pay for losses that such products cause to others.

### *E. Dangerous Products that Create Risks to Bystanders*

Previous portions of this Article have suggested that fairness and efficiency may justify bystander recovery from the manufacturers of a dangerous product if there is a substantial portion of the population that does not benefit from the product. This section will briefly consider the causes of action that bystanders might bring against the manufacturers of cigarettes, alcohol and firearms.

#### 1. *Second-Hand Tobacco Smoke*

Many consumers have tried to recover for diseases caused by tobacco, but so far they have generally been unsuccessful.[140] Smokers, and the

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& Ursin, *supra* note 132, at 274-78.

Other courts have refused to apply abnormally dangerous activity liability to manufacturers of dangerous products because they do not consider the production of products to be an activity. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265 n.43 (5th Cir. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984).

[139] *Martin*, 743 F.2d at 1204. This argument echoes William Prosser's justification for products liability's inherent characteristics rule. *See supra* notes 41-43 and accompanying text.

[140] *See* Mary Griffin, Note, *The Smoldering Issue in* Cipollone v. Liggett Group, Inc.*: Process Concerns in Determining Whether Cigarettes are a Defectively Designed Product*, 73 CORNELL L. REV. 606, 606 n.2 (1988).

beneficiaries of their estates, will find little help in the cause of action suggested herein. Smokers obviously are consumers, not bystanders. Those who are injured because of second-hand smoke, however, may be able to recover under a bystander theory.[141]

Cigarette manufacturers would be subject to liability under the rule suggested herein because cigarettes are dangerous and a substantial portion of the population does not smoke. Recent studies provide clear evidence that second-hand smoke causes lung cancer to bystanders.[142] One study found that 2,490 to 5,160 nonsmokers a year die as a result of second-hand smoke.[143] "[T]he percentage of American adults that smoke declined from 42% in 1967 to 32% in 1987."[144] Manufacturers and those who smoke cigarettes expose a significant number of people to unreciprocated risk. It may be that tobacco manufacturers (through liability) and consumers (through higher prices) should be responsible for the risks that they cause to others.

It is especially important for victims of second-hand smoke that courts adopt the cause of action suggested herein. Whereas many bystanders who are injured by dangerous products can bring suit against the users of the products that cause their injury under a negligence or abnormally dangerous activity theory, victims of second-hand smoke have no such option. Typically, they have been subjected to a lifetime of second-hand smoke by many smokers. Responsibility for this loss might be placed on manufacturers and spread to all smokers through higher prices. It will, of course, generally be impossible to identify one manufacturer who is responsible for a second-hand smoke injury, but this may be an appropriate case for courts to apply market share liability.[145]

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[141] *Cf.* Ezra, *supra* note 120, at 1085-1100 (arguing that involuntary smokers should be able to recover damages under a battery cause of action); Bradley M. Soos, Note, *Adding Smoke to the Cloud of Tobacco Litigation--A New Plaintiff: The Involuntary Smoker*, 23 VAL. U. L. REV. 111, 128-44 (1988) (arguing that an involuntary smoker should be able to recover from a manufacturer under the enterprise theory of tort liability); Morley Swingle, Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 474-75 (1980) (predicting a revival of product liability actions by nonsmokers for injury caused by second-hand smoke as evidence of the dangers of second-hand smoke increases).

[142] A recent Environmental Protection Agency report found that second-hand smoke accounted for 3,000 lung cancer deaths a year. Steven Long, *Smoking up a Storm*, HOUSTON CHRONICLE, Jan. 7, 1993, at A1. The Agency also announced that it would classify second-hand smoke as a "Class A" carcinogen, which includes such substances as benzene, asbestos and arsenic. *Id.*

[143] *See* Ezra, *supra* note 120, at 1065.

[144] *Id.* at 1062 (citing *"No Smoking" Sweeps America*, BUS. WK., July 27, 1987, at 40).

[145] Under market share liability, a manufacturer is liable for a pro rata share of the plaintiff's damages based on the manufacturer's share of the relevant market. *See, e.g.*, Sindell v. Abbot Lab.,

### 2. *Alcohol-Related Accidents*

The Department of Transportation estimates that in 1985, 7,400 people who were not drinking were killed in alcohol-related automobile collisions.[146] One-third of American adults do not consume alcoholic beverages.[147] Courts might impose responsibility for these injuries on the manufacturers of alcohol, which would result in higher prices for consumers. Such liability could be based on the unreciprocated risk that those who consume alcohol pose to those who do not.

Additional characteristics of alcohol create additional justifications for imposing liability on manufacturers for bystander injury. Whereas the consumer of most products has an opportunity to make a reasonable risk/benefit calculation before using a product, alcohol diminishes the consumer's reasoning ability, both in the short-run and the long-run. Consumers of alcohol are subject to diminished marginal reasoning ability. They may initially intend to consume only a few drinks, but after a few drinks they are likely to believe that they can consume a few more. In addition, alcohol is addictive, and addicts require higher and higher doses to satisfy their addiction, creating even greater risks of drunk driving and injuries to bystanders.

Traditionally, courts did not impose liability on those who negligently served excessive amounts of alcoholic beverages.[148] They found the intoxicated driver to be a superseding cause of the loss.[149] In recent years, however, courts have recognized that it is not only the drinker that is responsible for his or her intoxicated condition.[150] Accordingly, courts have increasingly imposed liability on bars and social hosts on the basis that it is negligent to serve excessive amounts of alcohol to one who might foreseeably cause injury.[151]

The Restatement (Second) of Torts takes the position that defendants that engage in abnormally dangerous activity should be subject to liability even if the harm is also caused by the activity of a negligent or reckless third person.[152] As in the alcohol server cases and the abnormally

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607 P.2d 924, 937 (Cal. 1980).

[146] U.S. DEPT. OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION: DRUNK DRIVING FACTS 23 (1986), *cited in*, Manning, *supra* note 120, at 1608.

[147] *See* Elizabeth M. Whelan, *To Your Health*, 25 ACROSS THE BOARD 49, 49 (1988).

[148] *See* John R. Ashmead, Note, *Putting a Cork on Social Host Liability: New York Rejects a Trend*, 55 BROOKLYN L. REV. 995, 997 (1989).

[149] *See id.*

[150] *See id.* at 1002-04.

[151] *See, e.g.*, Klein v. Raysinger, 470 A.2d 507, 510 (Pa. 1983) (listing recent cases that have imposed liability on bars and social hosts).

[152] RESTATEMENT (SECOND) OF TORTS § 522 (1977).

dangerous activity cases, it may be that the foreseeable culpability of the intervening misuser should not prevent the manufacturer of alcoholic beverages from being held liable to injured bystanders.

### 3. *Firearms*

Guns are another class of dangerous products that cause injury to a substantial number of bystanders. The Maryland Court of Appeals recognized a cause of action that is similar in some respects to the proposal discussed herein, when it allowed an innocent bystander injured during the commission of a crime to recover from the manufacturer of a "Saturday Night Special" handgun.[153] The court held that abnormally dangerous activity liability did not apply because the activity did not occur on the defendant's land,[154] and that strict products liability did not apply because the risk of injury from crime is one of the inherent risks of these guns.[155] The court did, however, adopt a new strict liability cause of action on the grounds that the risks of "Saturday Night Specials" outweigh their benefits to society, their criminal use is foreseeable, and as between a totally innocent victim and the manufacturer that makes a product that will be used most commonly in criminal activity, the manufacturer is more at fault.[156] Others have advocated such a cause of action against the manufacturers of automatic assault weapons.[157] Under the cause of action discussed herein, bystanders injured in hunting accidents might also obtain a recovery, because guns for hunting are dangerous products that are not used by a substantial portion of the population.

Manufacturers of guns will argue that guns serve important functions in society. For instance, guns can be used for self-protection. Imposing liability on manufacturers of guns would raise the price of guns for those who want to use them for self-protection, as well as for those who want to use them for pleasure and criminal activities. The cheap "Saturday Night Special," for which the Maryland Court of Appeals created a strict liability cause of action, may be the only weapon that some people can afford.

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[153] Kelley v. R.G. Indus., 497 A.2d 1143, 1159 (1985).

[154] *Id.* at 1147.

[155] *Id.* at 1149.

[156] *Id.* at 1154-59; *see also* Smith, *supra* note 137, at 384-85 (arguing that manufacturers of handguns should be subject to abnormally dangerous activity liability).

[157] *See* Joshua M. Horwitz, Kelley v. R.G. Industries*: A Cause of Action For Assault Weapons*, 15 U. DAYTON L. REV. 125, 138-39 (1989).

Under the Restatement's abnormally dangerous activity liability rule, in determining whether to apply strict liability, the court considers the benefits the activity provides to the community as well as its risks.[158] The court is to consider external benefits, i.e., benefits beyond those provided to the one who engages in the activity. Arguably, guns provide benefits to the community beyond the benefits that they provide to individual consumers. The awareness that there is a risk that they may be shot by someone who has a gun probably helps to deter some prospective criminals from committing crimes. It may be that the added cost to guns that bystander liability would create would deter more law-abiding citizens than criminals from owning guns. The drafters of the Bill of Rights protected the right to bear arms[159] because they saw guns as a protection against an overintrusive government.[160] If courts use the Restatement's abnormally dangerous activity rule as a guide in bystander dangerous product cases, they might find that the benefits of guns tip the scale in favor of not imposing liability.

A bystander who is injured by a gun during the commission of a crime may face an additional difficulty in recovering from the manufacturer. In these cases, there is a highly culpable intervening actor–the criminal. As noted in the prior section, the Restatement (Second) of Torts takes the position that plaintiffs should be subject to abnormally dangerous activity liability even if the harm is also caused by the activity of a negligent or reckless third person.[161] The Restatement, however, explicitly takes no position as to whether an intervening actor who intends to cause harm should cut off liability.[162] Many courts have held that an intervening criminal actor cuts off liability in negligence cases.[163] If manufacturer liability is cut off by an intervening intentional tortfeasor, this would deny recovery to many who are injured by guns used in criminal activity.

If courts impose liability on gun manufacturers, courts could maintain whatever pressure the risk of tort liability places on criminals by giving the manufacturer an indemnity cause of action against the misusing consumer.[164] Furthermore, imposing liability on the manufacturer would

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[158] RESTATEMENT (SECOND) OF TORTS § 520 (1977).

[159] U.S. CONST. amend. II.

[160] *See* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (refusing to find handgun manufacture to be an ultrahazardous activity, based in part on the Illinois Constitution's protection of the right of private citizens to bear arms).

[161] RESTATEMENT (SECOND) OF TORTS § 522 (1977). *See supra* text accompanying note 152.

[162] *Id.*

[163] *See* KEETON ET AL., *supra* note 13, § 33, at 201, § 44, at 313.

[164] *See* Smith, *supra* note 137, at 377-79.

encourage manufacturers and sellers to see that guns are not purchased by persons that are likely to commit crimes.[165]

## CONCLUSION

It may be that when there is a substantial portion of the population that does not benefit from a dangerous product, the manufacturer should be subject to strict liability for injuries to injured bystanders. The cost of liability would ultimately be passed on to consumers in the form of higher prices, but it is appropriate that those who benefit from dangerous products pay a bit more so that injured bystanders–who do not benefit from the product–may be compensated. The price of dangerous products should include the losses that they cause to bystanders.

[165] *See id.*