Montana Law Review

Volume 38
Issue 2 *Summer 1977*

Article 1

7-1-1977

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ARTICLES

A FRAMEWORK FOR ANALYSIS OF PRODUCTS LIABILITY IN MONTANA

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> The essential rationale for imposing the doctrine of strict liability in tort is that such imposition affords the consuming public the maximum protection from dangerous defects in manufactured products by requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products.[1]

In *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*,[2] the Montana Supreme Court adopted the doctrine of strict liability without fault to govern actions for injuries caused by defective products.[3] While the court recognized that this was a "major change in Montana's tort law by way of judicial decision,"[4] it found that the "trend seems to be to adopt the theory of strict liability and it has now been adopted by a majority of the states."[5]

Indeed, adoption by the American Law Institute of the theory of strict liability, embodied in section 402A of the Restatement (Second),[6] and the simultaneous expression of the policies underlying section 402A by Justice Traynor in *Greenman v. Yuba Power Products, Inc.*,[7] were instrumental in forging "the most rapid and

1. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 517, 513 P.2d 268, 275 (1973).

2. *Id.* at 506, 513 P.2d at 268 (1973).

3. Products liability is the name given currently to the liability of a manufacturer, seller, or other supplier for harm caused by an unreasonably dangerous product. *See generally* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 546 (1975); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641 (4th ed. 1971).

4. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 515, 513 P.2d 268, 273 (1973).

5. *Id.* at 513, 513 P.2d at 272.

6. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

7. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

altogether spectacular overturn of an established rule in the entire history of the law of torts."[8] By 1971, two years before *Brandenburger*, Dean Prosser was able to state that "the simple ground of 'strict liability in tort' is accepted and applied by some two-thirds of the courts."[9]

The overwhelming number of courts adopting some form of strict liability in tort has made that doctrine now the paramount ground for recovery in product injury cases, but this rapid development has also produced considerable confusion and what one commentator has called a "crisis of confidence"[10] within the legal profession. That "crisis" results from conflicts between the relatively restrictive language of section 402A and judicial efforts to expand the scope of liability by returning to, and reasoning from, the core concepts expressed in *Greenman*. Lawyers can no longer predict with any certainty the range of results in cases requiring an appeal because, while courts have verbalized their decisions in the language of section 402A, they have relied most heavily on the sometimes conflicting philosophies underlying strict liability in reaching those decisions.[11]

The professional confusion accompanying this crisis of confidence originates in three sources: first, the historical development of three distinct, but intertwining and overlapping, theories—negligence, warranty and strict liability in tort—under which, alone or in combination,[12] products liability may be imposed; second, frequent failure to distinguish factually between products which are unreasonably dangerous because of hidden flaws in the manufacturing process and those which are unreasonably dangerous because of the way in which they are designed and marketed;[13] and third, failure to treat in a distinct way legally such different classes of products.[14]

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8. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-94 (1966).

9. W. PROSSER, *supra* note 3, § 98, at 657-58. Indeed, today section 402A "is the law for strict liability for products in virtually all jurisdictions in the United States." Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's "The Common Law Tradition,"* 24 DEPAUL L. REV. 914, 915 n.6 (1975).

10. Kiely, *supra* note 9, at 916-20, 946-48.

11. Although the language of section 402A was an appropriate verbalization of the idea of strict liability when drafted, it collides directly now with judicial desire to expand the scope of liability. *See generally* Kiely, *supra* note 9, at 927-28. Examples of this collision are discussed more fully in part II of this article. *See* pp. 248-53 *infra*.

12. These distinct theories will be discussed more extensively in part II of this article. *See* pp. 232-74 *infra*.

13. J. HENDERSON & R. PEARSON, *supra* note 3, at 546.

14. A recurring theme of this article is that courts continue to use negligence terminology and concepts when dealing with strict liability. *See, e.g.*, pp. 233-34, 236-38, 271-74 *infra*.

Because the Montana Supreme Court relatively recently adopted section 402A's theory of strict liability, Montana lawyers and judges have had little exposure to section 402A products litigation. But this paucity of litigation may be fortunate in that the profession may escape the confusion attendant to such litigation in other States[15] if the supreme court can clarify the direction which products liability is to take in this State. This article seeks to serve the needs of the Montana bench and bar by addressing the issues likely to be raised in products liability litigation. It will describe the history of products liability nationally and in Montana and will analyze major issues by examining current directions in case law. Finally, it will offer a framework for legal analysis of products liability to assist courts and counsel in avoiding some of the pitfalls encountered in development of products liability in other jurisdictions.

I. The History, Background and Development of Products Liability

A. *United States - Overview*

The history, background and development of products liability law in the United States need be recounted only briefly. The rule derived from the English case *Winterbottom v. Wright*,[16] that the seller of defective goods was liable only in negligence for damages caused to his immediate buyer, or to one in privity with him, became the general rule in the United States in the nineteenth century.[17] Judicially developed exceptions gradually eroded the general rule, causing considerable confusion,[18] and in 1916, Judge Cardozo's landmark opinion in *MacPherson v. Buick Motor Co.*[19] finally abolished the requirement of privity. The rule that ultimately has evolved from *MacPherson* holds the seller "liable for negligence in the manufacture or sale of any product which may reasonably be

15. "Products liability law in other states developed through judicial activism. Courts, faced with legislative silence, adapted the traditional forms of the common law of tort and breach of warranty to impose liability upon manufacturers of injury-causing products. This grudging battle to develop products liability through judicial decision and without legislative aid was not without its toll upon the common law, and the result is a state of law which is in a large measure irrational and incomprehensible." Maraist & Barksdale, *Mississippi Products Liability - A Critical Analysis*, 43 Miss. L.J. 139, 143 (1972).

16. 152 Eng. Rep. 402 (1842).

17. W. Prosser, *supra* note 3, § 96, at 641.

18. *Id.* at 642.

19. 217 N.Y. 382, 111 N.E. 1050 (1916). As Prosser notes, "Cardozo's opinion struck through the fog of the 'general rule' and its various exceptions and held the maker liable for negligence." W. Prosser, *supra* note 3, § 96, at 642.

expected to be capable of inflicting substantial harm if it is defective."[20]

The movement toward imposition of strict liability under the rubric of warranty coincided with post-*MacPherson* development of the negligence doctrine. From the early twentieth century until the late 1950's, this movement, confined to the area of food and drink, progressed slowly but steadily.[21] The first real break from food and drink came in 1958 when a Michigan court found a warranty, without privity and without negligence, for defective cinder blocks.[22] That case was followed closely by the New Jersey decision, *Henningsen v. Bloomfield Motors, Inc.*,[23] which permitted the wife of the buyer of an automobile to recover against the automobile manufacturer and dealer on an implied warranty of safety, derived from the food cases and grounded in considerations of public policy. After *Henningsen* came a "deluge of cases in other jurisdictions following the lead of New Jersey, and finding an implied warranty of safety as to a wide assortment of products."[24]

Use of the warranty concept was haunted, however, by many problems from the past, including continued judicial reliance on traditional concepts of contract law such as notice and disclaimer - both of which are included in the Uniform Sales Act and the Uniform Commercial Code, its successor. Such problems led the courts in many jurisdictions to abandon the theory of warranty for the rule of strict liability in tort.

This movement was fostered by twin forces: the draftsmen of section 402A of the Second Restatement of Torts, who issued their final draft in 1965,[25] and the California Supreme Court led by Jus-

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20. W. PROSSER, *supra* note 3, § 96, at 643.

21. "The extension of the implied warranty beyond food and drink for human consumption began with animal food, and what might be called products for intimate bodily use, such as cosmetics." *Id.* § 97, at 654.

22. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

23. 32 N.J. 358, 161 A.2d 69 (1960).

24. W. PROSSER, *supra* note 3, § 97, at 655.

25. Prosser, who was the Reporter for the drafting group, states in his treatise, *id.* § 98, at 657, that they discarded the warranty term in the definition of section 402A and drafted Comment *m*, quoted below, to explain their view of warranty under section 402A:

> The liability stated in this Section does not rest upon negligence. It is strict liability. . . . The basis of liability is purely one of tort.
>
> A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty". . . . In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which

tice Traynor, which decided the *Greenman* case in 1962. Nearly every State now has adopted some form of strict liability in tort, which joins negligence and warranty in the arsenal of recovery theories available to injured plaintiffs.

B. Montana - Overview

1. Development Prior to Brandenburger

Prior to 1970, there was little of compelling importance in products liability law in Montana. There was an occasional warranty case,[26] and as early as 1919 in Montana strict liability had been imposed in a food case under the Pure Food and Drug Act,[27] but decisional law was otherwise quite meager.

Justice John C. Harrison traced the court's prior consideration of strict liability in tort in the *Brandenburger* opinion. He remarked that the court considered the issue in *Jangula v. United States* Rubber Co.,[28] but deemed it inapplicable under the facts presented. Then he discussed three recent cases cited by appellants for the proposition that the court already had rejected the doctrine. He concluded that "in each instance the case was decided on grounds other than strict liability."[29] In *Knudson v. Edgewater Automotive Division*,[30] appellants had charged that a particular instruction improperly implied that strict liability applied to manufacturers. Justice Harrison observed that the supreme court there "held that the trial court did not insert strict liability into the case under the

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would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the warranty is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

26. *See* Brock v. Rothwell, 154 Mont. 144, 461 P.2d 6 (1969); Ryan v. Ald, Inc., 149 Mont. 367, 427 P.2d 53 (1967); Harrington v. Montgomery Drug. Co., 111 Mont. 564, 111 P.2d 808 (1941). All of these cases were governed by pre-UCC warranty statutes.

27. Kelley v. John R. Daily Co., 56 Mont. 63, 181 P. 326 (1919). The decisionmaking process employed in *Kelley* was reaffirmed by the supreme court in Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939). *But see* Larson v. United States Rubber Co., 163 F. Supp. 327 (D. Mont. 1958), in which the Montana federal district court, purporting to apply Montana law, found that strict liability would not extend to rubber boots, but that lack of privity would not bar an action for injuries sustained due to negligence of the manufacturer.

28. This case was the subject of two opinions by the supreme court. In Jangula v. United States Rubber Co., 147 Mont. 98, 410 P.2d 462 (1966), the opinion rendered after rehearing reversed the judgment for the plaintiff and ordered a new trial. Subsequently, Jangula v. United States Rubber Co., 149 Mont. 241, 425 P.2d 319 (1967), involved an appeal from the district court's dismissal of the action for want of prosecution after remand.

29. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 510, 513 P.2d 268, 271 (1973).

30. 157 Mont. 400, 486 P.2d 596 (1971).

instructions given."[31] As for *Duchesneau v. Silver Bow County*,[32] the Justice stated that the "case was argued on negligence and not strict liability"[33] but he noted that Justice Haswell had alluded to the doctrine in *Duchesneau*.[34] Justice Harrison disposed of *Ford v. Rupple*[35] by merely excerpting pertinent language from the opinion wherein the court avoided resolution of the issue of applicability of strict liability in Montana.[36]

While these cases were being decided by the Montana Supreme Court, products litigation was proceeding apace in the Montana federal courts. As Justice Harrison noted in *Brandenburger*, "both the federal district court of Montana and the Ninth Circuit Court of Appeals [had] considered Montana case law and [had] anticipated action by this Court, in cases heard in those courts recently."[37] He cited an opinion by United States District Court Judge Russell E. Smith that had noted how federal courts sitting in diversity cases had "looked to and adopted as the applicable rule of law in Montana the Restatement of Torts, Second, and the strict liability rule announced therein,"[38] and he observed that the Ninth Circuit had made a similar choice.[39]

Prior to *Brandenburger*, the Ninth Circuit had rendered two

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31. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 510, 513 P.2d 268, 271 (1973).

32. 158 Mont. 369, 492 P.2d 926 (1971).

33. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 511, 513 P.2d 268, 271 (1973).

34. *Id.*, quoting the following language: "The foregoing testimony indicates the power steering unit was purchased in 1967 from Mack Trucks and if it was in fact negligently designed, there is a possible basis for strict products [*sic*] liability against Mack Trucks." Duchesneau v. Silver Bow Company, 158 Mont. 369, 379-80, 492 P.2d 926, 932 (1971).

35. 161 Mont. 56, 504 P.2d 686 (1972).

36. In retrospect, it probably is fortunate that the court decided *Ford* as it did, thus providing for the opportunity seized by the court in *Brandenburger*. This is faint praise, for the decision is certainly no model of clarity. There are other cases decided by the court in which it alludes to strict liability but merely notes that it had not been adopted in Montana. *See, e.g.*, Rauh v. Jensen, 161 Mont. 443, 446-47, 507 P.2d 520, 522 (1973).

37. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 512, 513 P.2d 268, 272 (1973). Indeed, the action taken by those courts probably provided much of the impetus for the ultimate decision of the Montana Supreme Court to adopt section 402A in *Brandenburger*.

38. *Id.* (quoting Hornung v. Richardson-Merrill [*sic*], Inc., 317 F. Supp. 183, 184 (D. Mont. 1970)).

39. *Id.* In Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 127 (9th Cir. 1968), the Ninth Circuit stated as follows:

> [W]e choose to assume that Montana would follow the majority of other states in finding that liability can attach to the sale of drugs, in either tort or warranty, despite lack of privity, and would adopt the views set forth below on the manufacturer's duty to warn of dangers in "nondefective" but potentially harmful products. . . . The clearest statement of the law as it exists today is in our view that set forth in the Restatement (Second) of Torts (1965). Relevant to our case are Section 402A and comments j and k. . . .

other products liability decisions, purporting to apply Montana substantive law, which received no comment in the opinion. *Jacobson v. Colorado Fuel and Iron Corp.*[40] is a "duty to warn"[41] case in which the Ninth Circuit approved the district court's adoption, as the law of Montana, of the Restatement (Second) section 388 and its comment *k*, referring to circumstances in which warning of defects is unnecessary. The court added that, based on section 402A and *Davis v. Wyeth Laboratories, Inc.*,[42] Montana law would require that the manufacturer/supplier be found strictly liable in tort for any resultant damage in the absence of such warning, if one were required.[43] Interpreting section 402A, the court distilled from *Davis* a rule which "does away with the Restatement requirement that a product be defective" in those situations where a manufacturer has a duty to warn of dangers in potentially harmful but non-defective products.[44]

In *Tomicich v. Western-Knapp Engineering Co.*,[45] the plaintiff contended that defendants had a duty to design a safe product and were strictly liable for breach of that duty. The court chose to rely instead on a rule derived from a "general consensus in other jurisdictions," that "manufacturers are under no duty to guard against or warn of obvious dangers . . . ."[46] The court appeared to recognize that assumption of risk, but not contributory negligence, continues to be a valid defense to a strict liability claim.

2. *Brandenburger*

In *Brandenburger*, Justice John C. Harrison, writing for a four to one majority, acknowledged that the court had "not previously squarely faced the proposition as to whether or not strict liability is the applicable law in Montana."[47] After reviewing the relevant case

40. 409 F.2d 1263 (9th Cir. 1969).

41. *See generally* discussion of liability for inadequate warnings, pp. 262-67 *infra*.

42. 399 F.2d 121 (9th Cir. 1968).

43. Jacobson v. Colorado Fuel & Iron Corp., 409 F.2d 1263, 1270 (9th Cir. 1969).

44. *Id.* at 1271. The court went on to state that since the purchaser of the product and its supervising personnel, who employed plaintiff's deceased husband, had full knowledge of the fact that the particular use being made of defendant's product was extremely hazardous and potentially harmful, the manufacturer had no duty to warn under the Restatement (Second) of Torts sections 388 and 402A, and Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968). *Id.* at 1273.

45. 423 F.2d 410 (9th Cir. 1970).

46. *Id.* at 412. While acknowledging that the "Montana court might extend liability under such a doctrine," the court observed that such extension "would not help Tomicich" since "he voluntarily exposed himself to the known danger of the machine and was injured." *Id.* at 413.

47. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 510, 513 P.2d 268, 271 (1973).

law and noting that federal courts in the Ninth Circuit had anticipated the supreme court's adoption of strict liability,[48] he stated that "the trend seems to be to adopt the theory of strict liability" and that "it has now been adopted by a majority of the states."[49] He concluded, therefore, that the court would "adopt the definition as other jurisdictions have, set forth in 2 Restatement of Torts 2nd § 402A . . . ."[50]

Justice Harrison referred to the policies expressed by Judge Jacobson in his concurring opinion in *Lechuga, Inc. v. Montgomery*.[51] Commitment to these policy grounds for adopting strict liability was confirmed later in the opinion when Justice Harrison stated:

> The essential rationale for imposing the doctrine of strict liability in tort is that such imposition affords the consuming public the maximum protection from dangerous defects in manufactured products by requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products.[52]

Although the opinion never explicitly delineates the elements which must be established in a strict liability action, the court presumably meant to adopt the elements contained in section 402A's definition by adopting the language of section 402A as other jurisdictions have done.[53]

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48. *Id.* at 512-13, 513 P.2d at 272.

49. *Id.* at 513, 513 P.2d at 272.

50. *Id.* at 512, 513 P.2d at 272.

51. 12 Ariz. App. 32, 37-38, 467 P.2d 256, 261-62 (1970), *cited in* Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 514-15, 513 P.2d 268, 273 (1973).

52. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 517, 513 P.2d 268, 275 (1973).

53. The section reads as follows:

§ 402A Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

a) the seller is engaged in the business of selling such a product, and

b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

a) the seller has exercised all possible care in the preparation and sale of his product, and

b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The section contains 3 caveats and 17 comments. It is unclear whether adoption of the section implies adoption of the comments. Most courts have used the comments as a starting point in reaching their decisions but have not relied exclusively on them to support their holdings. *See, e.g.*, Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968). Dean Green notes that in many ways the comments revert to negligence notions of liability, possibly because

In *Brandenburger*, the court also adopted the presently emerging majority position regarding the "second collision" issue.[54] Liability for second collision defects means that manufacturers will be responsible for enhancement of injuries resulting from defects in their products in the event of a crash or collision, even though the injury-producing defect did not cause the original collision. The court also found that this liability could be imposed for injury caused by "the manufacturer's failure to use reasonable care in *design*,"[55] as well as for injury caused by manufacturing flaws or poor materials.

Regarding the proof required in a products liability case, Justice Harrison found that "adoption of the doctrine of strict liability does not relieve the plaintiff from the burden of proving his case" and that "vital to that proof is the necessity of proving the existence of a defect in the product and that such defect caused the injury complained of."[56] He rejected, however, defendants' contention that proof should be limited to direct evidence in product cases. Imposition of such a requirement would mean that "the supposed benefit of the theory of strict liability would be lost to the consuming public."[57] The court held that the "better rule is to permit proof of defect to be established by circumstantial evidence and inferences therefrom, as well as by direct evidence."[58]

3. *Development Subsequent to Brandenburger*

A surprising lull in litigation followed the court's revolutionary decision in *Brandenburger*; few Montana Supreme Court opinions rendered in 1974 or 1975 dealt with strict liability.[59] The court de-

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of the drafters' insecurity with the broad scope of their newly developed theory of liability. Green, *Strict Liability under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1205 (1976).

54. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 516, 513 P.2d 268, 274 (1973).

55. *Id.* (emphasis added).

56. *Id.* at 515, 513 P.2d at 274.

57. *Id.* at 517, 513 P.2d at 275. In taking this position, Justice Harrison relies upon Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 639 (8th Cir. 1972).

58. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 517, 513 P.2d 268, 274 (1973). Justice Harrison purports to adopt a standard of proof as to the "type of evidence to be used by a plaintiff to prove a defect . . . in a strict liability case" taken from Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 76, 470 P.2d 240, 243 (1970). 162 Mont. at 517-18, 513 P.2d at 275. The court reaffirms the rule as to circumstantial evidence in McGuire v. Nelson, 167 Mont. 188, 196-97, 536 P.2d 768, 773 (1975), and Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 397 (1976).

59. McGuire v. Nelson, 167 Mont. 188, 536 P.2d 768 (1975), reaffirmed the use of circumstantial evidence to prove a strict liability claim and discussed the role of expert witnesses in a strict liability case, but did little else to further strict liability jurisprudence. Oltz v. Toyota Motor Sales, U.S.A., Inc., 166 Mont. 217, 531 P.2d 1341 (1975), dealt with the same accident as *Brandenburger*. *See* note 342 *infra*.

cided two cases raising strict liability issues in 1976; however, only *Barich v. Ottenstror*[60] is significant.

In *Barich*, plaintiff sought damages on negligence, warranty and strict liability grounds for injuries sustained when a cardboard wardrobe constructed by defendant ripped as she was lifting it, causing her to fall backward breaking her wrist.[61] In analyzing the plaintiff's claim, the court turned to Prosser as authority for determining the necessary elements of proof in a products liability case[62] and explicitly adopted the elements it impliedly had set out in *Brandenburger*.[63] Then, it reiterated the rule in *Brandenburger* that the proof of defect could be circumstantial.[64]

In the opinion, Justice Harrison focused on the requirement that the defect in the product exist at the time the defendant was in possession or control of it. The court noted that the plaintiff has this burden of proof and found that the plaintiff failed "to come forward with proof overcoming the inference" derived from the defendant's proof that the "product had been used for a considerable length of time following its manufacture and sale."[65] Evidence indicated the cardboard product had been utilized twice in cross country moves and had been subject to temperature variations over its

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60. ___ Mont. ___, 550 P.2d 395 (1976). Reeves v. Ille Electric Co., ___ Mont. ___, 551 P.2d 647 (1976), was brought on a strict liability theory, but the court treats only the question of applicability of the statute of limitations.

61. Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 396-97 (1976).

62. *Id.* at 397-98, quoting Dean Prosser's discussion of the elements that must be established before recovery can be had in a products liability action:

> The proof required of a plaintiff seeking to recover for injuries from an unsafe product is very largely the same, whether his cause of action rests upon negligence, warranty, or strict liability in tort.
>
> On any of the three bases of liability, the plaintiff has the initial burden of establishing three things. The first is that he has been injured by the product. . . . The second is that the injury occurred because the product was defective, unreasonably unsafe. . . . The third is that the defect existed when the product left the hands of the particular defendant.

W. PROSSER, *supra* note 3, § 103, at 671-72.

63. The court seems to reject any suggestion that a distinction can be made between the elements required when proceeding under strict liability rather than negligence or warranty when it states that these "elements are requisite proof in products liability cases regardless of the theory of liability advanced." Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 398 (1976).

64. *Id.* at 397, stating that the court had "previously established that proof of the defect may be made through inferences drawn from circumstantial evidence, as well as by direct evidence."

65. *Id.* at 398. In fleshing out the requirement as to proof regarding defectiveness at the time the product leaves the manufacturer, the court notes that the rule that a "specific defect need not be shown where the evidence tends to negate injury producing causes which do not relate to a defect . . . cannot be applied unless the evidence also negates the misuse or mishandling of the product by the plaintiff." *Id.* The court derived this proposition from Franks v. National Dairy Prods. Corp., 414 F.2d 682 (5th Cir. 1969).

two year life. The court found that "a manufacturer or seller is not required, under the law, to produce or sell a product that will never wear out."[66]

Jackson v. Coast Paint & Lacquer Co.[67] is the only substantive decision rendered by a Montana federal court subsequent to *Brandenburger*.[68] The Ninth Circuit found that instructions given by the trial court on duty to warn and contributory negligence in the context of strict liability were improper. The court relied on *Davis* for the proposition that presence of a manufacturing defect is not required in those situations where a properly manufactured product is rendered unreasonably dangerous through failure to warn of its dangerous characteristics.[69] The court found the duty-to-warn instruction erroneous in three respects: 1) it suggested that liability is based on negligence rather than strict liability; 2) it presented the question of plaintiff's actual knowledge, rather than what generally is known and recognized, as being determinative of whether the absence of warning rendered the product unreasonably dangerous; and 3) it stated that the requirement of duty to warn of the danger would be discharged by informing the employer alone rather than the user of the product.[70] Regarding the contributory negligence instruction, the Ninth Circuit recognized that the defense described in comment *n* of section 402A, which "passes under the name of assumption of risk,"[71] applies only when the plaintiff himself, the "user or consumer," is aware of and unreasonably embraces the danger.[72]

II. THEORIES OF RECOVERY

The Montana Supreme Court and members of the bar in this State must ensure that products liability litigation does not create the confusion which has plagued other jurisdictions. Attorneys can promote clarity in the law by educating themselves and by presenting issues to the courts in this complex, new area in a lucid and concise manner. The bench can foster such clarity by educating

66. Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 398 (1976).

67. 499 F.2d 809 (9th Cir. 1974).

68. The facts presented in Lehtonen v. E. I. DuPont de Nemours, Inc., 389 F. Supp. 633 (D. Mont. 1975), certainly raise product liability issues; however, the case was dismissed on procedural grounds.

69. Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 811 (9th Cir. 1974).

70. *Id.* at 812-14.

71. *Id.* at 815. This assumption of risk "must be subjective, conscious and personal to the plaintiff. . . . Therefore, any knowledge plaintiff's employer may have had concerning the hazard which resulted in plaintiff's injury is irrelevant where the employer did not in fact communicate any superior knowledge to plaintiff prior to the accident." *Id.* at 815.

72. *Id.*

themselves, by requiring the bar to present clearly the issues for resolution, and by writing accurate and precise opinions.

A major source of confusion in other states is the existence of three distinct but overlapping legal theories - negligence, warranty and strict liability - on which to premise liability.[73] Courts have shown little inclination to delineate clearly, and to keep separate, these three theories of recovery.[74] Attorneys have added to the confusion by failing to plead carefully their claims and by intermingling the three theories in trying cases.[75]

A. Negligence

Negligence was the theory first used to seek recovery in products liability, but development of the theory was stifled by *Winterbottom v. Wright*[76] and the interpretation placed on that opinion by courts in the nineteenth century. By the time manufacturer/supplier/seller liability to the ultimate consumer had been firmly established in negligence after *MacPherson*, warranty already had become important as a possible alternative basis for recovery. Moreover, negligence poses certain difficulties for the plaintiff, especially as to proof, not presented either by strict liability in warranty or in tort. Thus, while negligence was the first of the three theories to be used and while it continues to be used in many products liability cases, it has never been a very effective theory for plaintiffs.

While ascendence of liability based on the warranty and strict liability in tort theories has caused a corresponding decline in the

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73. *See* J. HENDERSON & R. PEARSON, *supra* note 3, at 546. *See generally* W. PROSSER, *supra* note 3, ch. 17.

74. This problem is exemplified by the following language from Hornung v. Richardson-Merrill [*sic*], Inc., 317 F. Supp. 183, 184 (D. Mont. 1970): "[T]he difference between warranty and strict liability in tort is in terminology and the elements of the liability are the same." *See also* Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 126 (9th Cir. 1968).

75. "The development and recognition of strict liability has had a natural tendency to reduce the number of actions founded on negligence; but it continues to have a great deal of importance, if only because counsel for the plaintiff, for reasons readily understandable, have continued to plead and endeavor to prove it." W. PROSSER, *supra* note 3, § 96, at 644. The reasons that Prosser gives for continuing reliance on negligence are the "relative unfamiliarity of counsel with the strict liability, and the rules to be applied to it, so that they tend to fall back upon a second string to the bow" and "the possible effect upon the jury of evidence of negligence, in determining the size of the verdict." *Id.* § 96, at 644 n. 39. Prosser's first reason is correct as far as it goes; counsel will plead and attempt to prove warranty as well because they may be more comfortable with it, because it adds a third arrow to the quiver, and because warranty may be easier to prove than negligence. There also may be substantial risks to plaintiffs' counsel in relying solely on a strict liability theory of recovery. *See* discussion pp. 270, 273-74 *infra*. Finally, design defects and inadequate warnings, though grounds for strict liability, are treated quite often by the courts, counsel, and commentators in terms of negligence. W. PROSSER, *supra* note 3, § 96, at 644-49.

76. 152 Eng. Rep. 402 (1842).

number and importance of actions founded on negligence, the negligence theory continues to have substantial vitality.[77] Moreover, negligence language and concepts have shown a marked tendency to creep into strict liability trial court litigation and appellate court analysis.

The Montana Supreme Court employed negligence language and concepts as a basis for recovery for defective goods in a 1919 decision, *Kelley v. John R. Daily Co.*[78] The holding in *Kelley* was reaffirmed in 1939 in *Bolitho v. Safeway Stores, Inc.*;[79] however, few if any suits which could be labeled products actions were brought in state courts on a negligence theory between 1939 and the late 1960's.[80]

The Montana federal district court in *Larson v. United States Rubber Co.*,[81] offered telling comment about negligence-based products liability actions in Montana. The court phrased the question as "whether a manufacturer of an article may be held responsible for his negligence in manufacturing such article to the user of the article injured as a result of such negligence, where there is no privity between the manufacturer and user." The court observed that "there is no Montana Statute [*sic*] or decision which covers the precise question."[82] The court then traced the historical development of the negligence theory, discussing the "*Winterbottom* rule," exceptions thereto, and *MacPherson* and its widespread acceptance. It concluded that liability under the rule of *MacPherson* "would likewise be accepted by the Supreme Court of Montana" and "that the Montana court would . . . permit the manufacturer's liability for negligence to depend upon the doctrines of the law of negligence, and not upon whether privity of contract existed between the negligent manufacturer and the consumer of the product who was injured by such negligence."[83] A manufacturer's liability in negligence to a remote consumer is based on the social policy reason that it is "more productive of justice in the twentieth century society in which we live"[84] and on the realities of the modern market

77. W. PROSSER, *supra* note 3, § 96, at 644.

78. 56 Mont. 63, 181 P. 326 (1919).

79. 109 Mont. 213, 95 P.2d 443 (1939).

80. *Cf.* Zimmer v. California Co., 174 F. Supp. 757 (D. Mont. 1959). The case involved an action brought by an employee of an independent contractor who was injured "while working on the installation of a housing unit over the pump of an oil well owned by defendant." The court characterized defendant's duties as those of a landlord rather than a manufacturer or supplier of the product which injured the plaintiff. *Id.* at 759.

81. 163 F. Supp. 327 (D. Mont. 1958).

82. *Id.* at 328.

83. *Id.* at 329.

84. *Id.*

place.[85] The manufacturer's duty not to injure users of its product "arises not out of contract, but out of the general human duty not to injure another through disregard of his safety."[86] The court added that imposition of liability in negligence will not "work any undue hardship or injustice on manufacturers . . . ."[87]

Since the mid-1960's, the Montana Supreme Court has decided several product cases brought on negligence theories. In *Jangula v. United States Rubber Co.*,[88] plaintiff alleged that he was injured by defendant's negligently manufactured product. Although he prevailed at the trial court level, the Montana Supreme Court found that certain expert testimony was improper and returned the case to the district court for a new trial. The court acknowledged in *Knowlton v. Sandaker*[89] that a cause of action exists in Montana for negligent failure to make a chattel safe for use or to discover and warn users of defects, referring to section 392 of the Second Restatement as supporting authority.[90]

The supreme court dealt with the question of alleged negligence in *design* of a product in *Knudson v. Edgewater Automotive Division*,[91] finding that a manufacturer is liable if he is negligent in designing a product and the design defect causes injury to a con-

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85. In this regard, the court observed:

> The [privity] rule was formulated in 1842, and may have been appropriate at that time in a society where our modern methods of mass production and distribution of products were unknown; where in most instances the consumer dealt directly with the manufacturer, and the products purchased were generally simple, and as susceptible to inspection and understanding by the purchaser and retailer as to the manufacturer. Today, however, in our society of mass production and distribution, manufacturing processes are far more complex, defects in a product caused by negligence may be highly dangerous to life or limb, no matter what the product is, and yet not discernible to either the retailer or consumer. . . . Then, too, modern mass production manufacturers produce their products with the ultimate user in mind; these products are not produced for the use of the jobber or retailer who may be in privity with the manufacturer.

Id. at 329-30.

86. *Id.* at 330.

87. *Id.*

88. 147 Mont. 98, 410 P.2d 462 (1966).

89. 150 Mont. 438, 436 P.2d 98 (1968).

90. *Id.* at 445, 436 P.2d at 102, quoting the section as follows:

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

RESTATEMENT (SECOND) OF TORTS § 392 (1965).

91. 157 Mont. 400, 486 P.2d 596 (1971).

sumer.[92] That portion of the opinion dealing with the trial court's instructions is particularly informative. The court upheld an instruction that the "manufacturer of a product that is reasonably certain to be dangerous if negligently made has a duty to exercise reasonable care in the design, testing, inspection and manufacture of such product" and that "a failure to fulfill that duty is negligence."[93] The court also approved instructions that a "manufacturer *does not have the status of an insurer as respects the design of his product since it is obvious that virtually any article . . .* is capable of producing injury when put to particular uses or misuses" and that a manufacturer has no duty to "furnish a machine that will not wear out."[94] Furthermore, the court sustained instructions regarding intended and proper use by plaintiff and duty to warn on the part of a manufacturer of dangerous products.[95]

In another action, *Ford v. Rupple*,[96] brought for alleged negligent design, the court considered whether it would hold an automobile manufacturer liable for injuries arising out of negligent failure to make an automobile crashworthy. The court viewed the issue as one of foreseeability and duty, and decided after considerable discussion of other negligence principles that the manufacturer's duty was not as extensive as urged by the plaintiff.[97] The court thus had analyzed and rejected the theory of second collision liability prior to its eventual adoption in *Brandenburger*. The cases are distinguishable, however, because *Ford* was pleaded, tried, and reviewed as a claim in negligence only, whereas in *Brandenburger*, there was little reason to continue to preclude second collision liability once the court had abandoned exclusive reliance on negligence as the theory of recovery. Because foreseeability and proximate cause are negligence concepts and because foreseeability is, therefore, of limited applicability and proximate cause is of no applicability under strict liability, they should not now be allowed to prevent recovery as they did in *Ford*.

In *Duchesneau v. Silver Bow County*,[98] the supreme court exhibited the linguistic confusion endemic to products litigation which has plagued courts in other jurisdictions.[99] In one breath the

92. *See also* further discussion of this case pp. 259-60 *infra*.

93. Knudson v. Edgewater Automotive Div., 157 Mont. 400, 414, 486 P.2d 596, 604 (1971).

94. *Id.* at 414-15, 486 P.2d at 604.

95. *Id.* at 415, 486 P.2d at 604.

96. 161 Mont. 56, 504 P.2d 686 (1972).

97. *Id.* at 65, 504 P.2d at 691.

98. 158 Mont. 369, 492 P.2d 926 (1971).

99. *See, e.g.*, Hauter v. Zogarts, 14 Cal.3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). *Cf.* Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974) (court cites numerous cases discuss-

court found it unnecessary to determine whether strict liability under section 402A should be adopted in Montana[100] because on the facts it appeared that the gist of the claim was for *negligent* design and manufacture; in the next breath, it commingled the language of strict liability and negligence stating "if [the product] was in fact *negligently* designed, there is a possible basis for *strict products liability* against [the manufacturer]."[101] This is exactly the kind of linguistic and conceptual imprecision which has resulted in confusion in other jurisdictions and which must be avoided here. Fortunately, the language in *Duchesneau* was merely dicta, and the case was remanded on other grounds.

Commingling of negligence theories by counsel with other liability theories occurred in another recent case, *McGuire v. Nelson*.[102] Plaintiff sued originally in negligence, for the sale of an improper size tire for his motorcycle which allegedly caused him to crash. Just prior to trial he amended his complaint to encompass a warranty theory as well as negligence. The court delineated the mutual exclusiveness of the two theories: "[N]egligence, either on the part of defendant or plaintiff, has no place in an action for an alleged breach of warranty" and "similarly, warranty theories are irrelevant to a negligence case."[103] The court showed laudable concern about possible confusion of the jury and ordered a new trial because of improper mixing of theories in the instructions to the jury.[104]

These cases and others[105] demonstrate that both lawyers and judges in Montana still seem to be relying on combinations of negligence and strict liability theories, and often on warranty as well. It appears that counsel have not always thoroughly evaluated the

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ing differences between negligence and strict liability before effectively distinguishing the theories).

100. Duchesneau v. Silver Bow County, 158 Mont. 369, 378, 492 P.2d 926, 931 (1971).

101. *Id.* at 380, 492 P.2d at 932 (emphasis added).

102. 162 Mont. 37, 508 P.2d 558 (1973). The case was remanded to the district court for a new trial. The opinion rendered in an appeal from a directed verdict entered at the retrial is McGuire v. Nelson, 167 Mont. 188, 536 P.2d 768 (1975).

103. McGuire v. Nelson, 162 Mont. 37, 42, 508 P.2d 558, 560 (1973). The following excerpt explains the unusual fact situation presented in the case and the court's resolution of some of the problems thereby presented:

> What plaintiff actually suggests is not that the tire itself was defective, but the sale of the tire to the plaintiff's agent was defective. But, such suggestion only further confuses the issue. To say the sale was defective necessarily implies the sale was negligent. We find little support for the theory that an allegedly negligent act is a defect. All cases facing the issues properly indicate that the defect must be in the product itself.

Id. at 43-44, 508 P.2d at 561.

104. *Id.* at 46, 508 P.2d at 562.

105. *See, e.g.*, Hornung v. Richardson-Merrill [*sic*], Inc., 317 F. Supp. 183 (D. Mont. 1970).

theories of recovery in advance of commencing litigation. In several cases counsel have amended complaints to add strict liability and/or warranty theories[106] and even new parties,[107] and characterization of the theories[108] relied upon leaves doubt as to counsel's comprehension of the issues.

B. Warranty

A movement toward imposition of strict liability under a warranty theory for certain defective products developed at the turn of the century simultaneously with the evolution of judicially imposed negligence liability without privity.[109] Courts have posited various policy arguments for imposition of strict liability. Prosser condenses these into three, which may be summarized as follows:

> 1) The public interest demands maximum protection from defects in products used by consumers who cannot protect themselves.
> 2) The manufacturer by placing his goods on the market represents to the public that they are suitable and safe for use.
> 3) The manufacturer could be held liable anyway by resort to a series of actions beginning with the retailer and then seeking indemnification from successive parties in the distribution chain; therefore, economies of time, money, and effort justify direct suits against the manufacturer.[110]

Warranty liability, which orginated in tort and is allied with concepts of fraud and misrepresentation, has been termed a hybrid of contract and tort.[111] It arises out of the relationship between buyer and seller and depends upon the failure of the goods sold to meet the expectations of the buyer. Liability under warranty comprises two discrete classes — express warranty made by the manufacturer directly to the consumer and implied warranties running with the goods.

1. Express Warranty

Liability for express warranty originated with *Baxter v. Ford*

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106. *See, e.g.*, Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 396 (1976); McGuire v. Nelson, 167 Mont. 188, 190-91, 536 P.2d 768, 770 (1975).

107. *See* McGuire v. Nelson, 167 Mont. 188, 190-91, 536 P.2d 768, 770 (1975).

108. *See* Tomicich v. Western-Knapp Eng'r, Co., 423 F.2d 410, 411 (9th Cir. 1970). The court said that "Tomicich's theory is that the defendants had a duty to design a safe product and were strictly liable for a breach of that duty. . . ." *Id.*

109. The latter culminated with Judge Cardozo's landmark opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

110. W. PROSSER, *supra* note 3, § 97, at 650-51.

111. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

Motor Co.[112] in 1932. The defendant manufacturer had advertised in promotional literature that the glass in its windshields was "shatterproof." Based on that express representation, the Washington Supreme Court held that the manufacturer was strictly liable to persons buying cars, for injuries resulting from shattered glass, and that no privity of contract between the manufacturer and the consumer was required. Today it is clear that the rule of the *Baxter* case is established firmly;[113] the rule, however, is subject to certain limitations: 1) there must be some positive misrepresentation of fact, 2) the misrepresentation must be made by the defendant or chargeable against him, 3) the misrepresentation must be made with the intention or expectation that it will reach the plaintiff or a class of persons including him, 4) the plaintiff must show that he knew of, and relied on, the misrepresentation of the defendant.[114] These limitations mean that the rule of strict liability based upon an express warranty, although clear, often has less applicability and effect than implied warranties.

2. *Implied Warranties*

The movement toward imposition of implied warranties centered on liability for manufacture of adulterated food and drink[115] and was a judicial response to widespread social agitation for reform.[116] The new strict liability for such products arose out of what courts labeled an implied warranty by the manufacturer that the goods were fit for consumption.[117] Initially, courts grounded liability simply on public policy grounds.[118] Based on the contract origins of warranty, some courts found the theoretical underpinnings for implied warranties in the idea of an implied warranty running with the goods, and the cause of action for breach was couched in contract terms. Over time, however, courts recognized that the warranty did

112. 168 Wash. 456, 12 P.2d 409 (1932), *aff'd on rehearing*, 168 Wash. 465, 15 P.2d 1118 (1932). On a second appeal of the case, the court found for the plaintiff on a theory of strict liability for innocent misrepresentation. Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934).

113. W. PROSSER, *supra* note 3, § 97, at 652.

114. *Id.* at 653.

115. *E.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

116. *See, e.g.*, U. SINCLAIR, THE JUNGLE (1906). *See also* Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3 (1933). Unwholesome food and drink traditionally came under special judicial scrutiny. W. PROSSER, *supra* note 3, § 97, at 653; R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 26 (1951); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 8-9 (1919).

117. Prosser, *supra* note 111, at 1124-26.

118. *Id.* at 1124.

not depend upon the existence of a contract and imposed liability in tort.[119]

Extension of implied warranties beyond food and drink to drugs, animal foods and products for intimate bodily use, such as cosmetics, progressed slowly until mid-century.[120] The breakthrough did not come until 1960 with *Henningsen v. Bloomfield Motors, Inc.*[121] in which the New Jersey Supreme Court recognized that the realities of modern merchandising and the resultant unfair bargaining position between consumers and certain types of manufacturers, such as automobile makers, justified charging those manufacturers with an implied warranty of safety.[122]

Courts and commentators recognized after *Henningsen* that use of implied warranty as a theory for products liability was quite problematic. Prosser described warranty as a "freak hybrid, born of the illicit intercourse of tort and contract."[123] Although originating in a consensual relationship, it sounded in tort and was closely allied to traditional liability for deceit or misrepresentation. In 1960, he argued that this illicit hybridization would result in considerable difficulty because the term had become associated in the minds of judges and attorneys with contract law.[124] As such, they presumed that contract rules would apply even though those rules burdened plaintiffs' causes of action and undercut the policies behind the creation of the liability. Thus, impediments to suit were created unwittingly by courts which continued to search for some kind of consensual relation between the parties and to require some proof of reliance by the plaintiff. Moreover, contract rules limiting damages, allowing disclaimers and narrowing the scope of interests protected precluded liability.[125] Prosser contended:

> "[W]arranty," as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications, and is leading us down a very thorny path . . . . If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.[126]

Prosser's criticisms and pleas for adoption of strict liability in

119. W. PROSSER, *supra* note 3, § 97, at 654 (citing, *e.g.*, Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942)).
120. W. PROSSER, *supra* note 3, § 97, at 653-54.
121. 32 N.J.358, 161 A.2d 69 (1960).
122. *Id.* at 384, 161 A.2d at 84.
123. Prosser, *supra* note 111, at 1126.
124. *Id.* at 1133-34.
125. *Id.* at 1127-32.
126. *Id.* at 1133-34.

tort were answered in 1962 by Justice Traynor, writing for the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*.[127] Justice Traynor, an early advocate of this approach to products liability,[128] rejected the defendants' reliance on the plaintiff's failure to give timely notice of the defect required by warranty law, and on prior California case law limiting warranty without privity to food and drugs; he expressly stated that defendants' liability was not based on warranty but on strict liability in tort.[129] He reasoned that warranty rules, developed to meet the needs of commercial transactions, should not be invoked to govern liability for persons injured by defective products. "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 that causes injury to a human being."[130]

In 1965, the American Law Institute published section 402A of the RESTATEMENT (SECOND) OF TORTS which enunciated strict tort liability for products placed on the market in a defective condition unreasonably dangerous.[131] The drafters in that section purported to establish a theory of liability for inadequate, injurious products distinct from either warranty or negligence, unencumbered by the traditional deficiencies of either theory.[132]

In Montana, the legislature adopted a Pure Food and Drug Act[133] in 1911 presumably in response to the same social pressures which led to judicial development of implied warranties elsewhere. In an early case involving a civil cause of action for damages resulting from consumption of bad pork, the Montana Supreme Court construed the Act as creating a broad duty in sellers of food to the public.[134] Read together with another statutory warranty,[135] the Act imposed a form of strict liability; any violation of the statutory duty was deemed negligence per se[136] because the seller was made an "insurer of the purity of food products."[137] The court referred to both negligence and warranty, but said that it was "immaterial whether

127. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

128. *See* Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

129. Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

130. *Id.*, 377 P.2d at 900, 27 Cal. Rptr. at 700.

131. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

132. W. PROSSER, *supra* note 3, § 98, at 656-58; RESTATEMENT (SECOND) OF TORTS § 402A, Comment *m* (1965).

133. 1911 MONT. LAWS, ch. 130 (repealed 1967).

134. Kelley v. John R. Daily Co., 56 Mont. 63, 181 P. 326 (1919).

135. 1895 Civ. C. § 2382 (repealed 1963).

136. Kelley v. John R. Daily Co., 56 Mont. 63, 74, 181 P. 326, 329 (1919).

137. *Id.*

the foundation is laid in negligence or warranty."[138] A subsequent food case simply reaffirmed the principles set out in the first case.[139]

During this same period, the Montana Supreme Court was less willing to impose any legal duties upon sellers of defective non-food products, despite statutory provision for warranties on certain sales and exchanges.[140] As long as a consumer, prior to purchase, saw the goods he ultimately received, there was no liability to the seller, even though the goods were not as the seller represented them.[141] Contracts for sale did not necessarily imply any warranty and no express warranty arose from a statement that a product "worked." Only when a buyer relied on the seller's judgment and the seller knew of that reliance did any warranty arise.[142] Although statutes imposed certain warranties on sales and exchanges[143] which became part of the contract, those terms were to be viewed in light of express terms; and thus, failure to comply with express terms, precluded reliance on any statutorily imposed terms.[144] Notably, no warranty case, except for the food cases, came before the court in which the plaintiff sought recovery for physical injury resulting from a defective product.

The court's reluctance to find any warranty-based liability for defective products continued through the 1960's. In one case, the court rejected arguments by plaintiff's counsel regarding implied warranties of fitness, finding that the seller who was not a manufacturer was not subject to an implied warranty of fitness for intended use.[145] Subsequently, the court refused to find any liability for damages resulting from a blow-out of a recapped tire, holding that no warranties applied.[146] In one case, at least one member of the court acknowledged that an implied warranty from the manufacturer might exist, but the plaintiff's failure to plead implied warranty precluded the court's consideration of that issue.[147] The majority found that no express warranty could arise when the product in question was distributed nationally.[148] In 1973, the Montana Su-

138. *Id.*

139. *See* Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939).

140. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 74-310 to 320.

141. Kircher v. Conrad, 9 Mont. 191, 23 P. 74 (1890) (winter wheat instead of spring wheat).

142. Jones v. Armstrong, 50 Mont. 168, 145 P. 949 (1915) (defective plow).

143. R.C.M. 1947, §§ 74-310 to 320.

144. Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 P. 316 (1921).

145. Ryan v. Ald, Inc., 149 Mont. 367, 427 P.2d 53 (1967).

146. Brock v. Rothwell, 154 Mont. 144, 461 P.2d 6 (1969).

147. Jangula v. United States Rubber Co., 147 Mont. 98, 115, 410 P.2d 462, 470 (1966) (Harrison, J., concurring).

148. *Id.* at 110, 410 P.2d at 468.

preme Court joined the great majority of American jurisdictions by adopting section 402A.[149]

3. *Uniform Commercial Code*

It is unclear how warranty liability for defective products provided by the Uniform Commercial Code (UCC) will interface with strict tort liability under section 402A. The UCC specifically provides for manufacturer liability for defective products as a breach of an implied warranty of merchantability,[150] and permits recovery of consequential damages for breaches, including damages for physical injury to person and property.[151] Thus, the UCC would appear to cover much the same ground as section 402A. The distinctions between the UCC's provisions for defective products and strict liability in tort under section 402A derive from the UCC's grounding in commercial law governing consensual transactions. As such, the UCC allows disclaimer of any implied warranty,[152] provides for limitation or exclusion of damages,[153] and bars all liability unless the buyer gives notice of the defect within a reasonable time.[154] Furthermore, one comment to the official draft of the UCC indicates that contributory negligence may be raised as a defense in a warranty action.[155]

Faced with cases in which plaintiffs have pleaded in the alternative, courts have responded erratically. Some have dismissed implied warranty entirely,[156] while others have simply found that actions in tort were preferable.[157] By failing to effectively distinguish between the nature of the liability under each theory, courts have also reached distinct and inconsistent conclusions regarding procedural questions, such as statutes of limitations, applicable to a given cause of action.[158]

Many commentators have argued that, because the UCC is a comprehensive legislative scheme which provides specific remedies

149. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973). *See generally* discussion pp. 228-30 *supra*.

150. R.C.M. 1947, § 87A-2-314.

151. *Id.* § 87A-2-715.

152. *Id.* § 87A-2-316.

153. *Id.* § 87A-2-719.

154. *Id.* § 87A-2-607.

155. UNIFORM COMMERCIAL CODE § 2-715, Comment 5.

156. *E.g.*, Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972).

157. *E.g.*, Caruth v. Mariani, 11 Ariz. App. 188, 192, 463 P.2d 83, 87 (1970).

158. *Compare* Hornung v. Richardson-Merrill [*sic*], Inc., 317 F. Supp. 183 (D. Mont. 1970) *with* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). In the former, a tort statute of limitations was found applicable, while in the latter the UCC statute controlled.

for defective products, it should preempt concepts of strict liability in tort developed judicially and under section 402A.[159] Some have felt that the Restatement section had no case support prior to its adoption, that the UCC draftsmen intended to provide a legislative solution to the problem, and that principles of legislative supremacy should therefore control.[160] Their argument is that legislatures adopting the UCC expressly limited manufacturers' additional liability and in doing so they deprived courts of the authority to create law in the area.[161]

One commentator, Professor Shanker, contends that those elements of the UCC's warranty scheme which might otherwise prevent consumer recovery such as privity, notice, and exclusions of remedies, can be mitigated effectively by careful judicial creativity in construing those sections and their accompanying comments.[162] He points to one of the comments to the privity section which suggests that courts are not entirely tied to the Code rules in all situations.[163] Then he shows how the notice requirements do not necessarily apply to remote parties.[164] He concludes, however, by acknowledging that a manufacturer may effectively exclude all warranties.[165]

On the other side of the question, forceful and convincing authorities have advocated the demise of UCC warranty in cases where deficient products result in physical injury. In reply to Professor Shanker, one commentator noted that the path Shanker would have courts follow to arrive at equivalent protecton for injured plaintiffs under the UCC was "tortuous and full of pitfalls,"[166] echoing earlier

159. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Dickerson, *The ABC's of Products Liability - With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965).

160. *See, e.g.*, Titus, *supra* note 159, at 718. He points out that code § 2-318 read with the comments eases privity, that § 2-719(3) bars limitation of remedies for personal injury, that § 2-316 imposes strict procedural requisites for disclaimers, and that § 2-607 and its comments afford consumers sufficient time to give notice. Therefore, he argues, because the code has provided such a comprehensive scheme of consumer protection, principles of legislative supremacy should control.

161. This argument is summarized though not advocated in Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 124 (1974).

162. Shanker, *supra* note 159, at 24-30.

163. UNIFORM COMMERCIAL CODE § 2-318, Comment 2.

164. *Id.* § 2-607, Comment 5.

165. Shanker, *supra* note 159, at 31.

166. Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 W.RES. L. REV. 10, 18 (1966).

concerns of Dean Prosser. He suggested that the basic problem was that the UCC was directed to the "wrong milieu."[167] Warranties occur in the context of consensual transactions, but in the modern market the consumer-manufacturer relationship is hardly consensual. Tort law imposes duties as a matter of law, based on social and public policy, whereas contract and commercial law depend upon the bargaining-consensual nature of the underlying transaction.

Policies of freedom of contract and bargain undergird the sales article of the UCC. Adherence to Professor Shanker's route to consumer protection under the Code by excising notice, privity, and disclaimers, would gut the Code's commercial foundation. Whereas contract law seeks to protect the expectations of the parties, to give them the benefit of their bargain, tort law obligations are imposed because the party's activities have created risks to others. The intrinsic differences between a UCC breach of warranty action and a section 402A strict-liability-in-tort action manifest themselves when one compares their respective approaches to damages. Action under section 402A is specifically dedicated to providing restitution for physical injury, both to person and to property. In contrast, a warranty action seeks damages primarily for the lost value of the deficient goods and only secondarily for consequential harm to person and property.[168]

Moreover, Professor Wade has effectively refuted the arguments of legislative preemption by analyzing the drafting history of the Code.[169] In the 1940's, Karl Llewellyn, the Reporter for the UCC article on sales, had proposed an entirely new basis for imposition of liability on manufacturers, the gravamen of which was the act of placing defective goods on the market.[170] He foresaw an implied warranty without privity running with the goods as a natural development of the law. In the final version of the Code, due to internal opposition and fear that such a far-reaching alteration of existing law would never be accepted by all the states, thereby jeopardizing the uniformity of commercial law desired by the drafters, that new basis of liability was deleted.[171] "Thus any attempt to absorb the negligence law of products liability into the UCC was consciously and deliberately abandoned."[172]

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167. *Id.*
168. R.C.M. 1947, § 87A-2-714.
169. Wade, *supra* note 161, at 131-33.
170. *Id.* at 133-36.
171. *Id.* at 135.
172. *Id.* at 136. In a recent Maryland case, the court expressly rejected the defendants'

C. *Strict Liability in Tort—Section 402A of the Restatement (Second) of Torts*

In the early 1960's, the drafting group for the Second Restatement of Torts, which was encountering "great difficulty in stating a new Section, without running afoul of the statutory limitations on 'warranty,' "[173] finally decided to discard the term and eventually submitted the following section approved by the American Law Institute in 1965:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[174]

During this same period, the California Supreme Court judicially imposed strict liability in that State.[175] Justice Traynor brushed aside all difficulties presented by the warranty theory, finding instead that it was not a question of warranty at all, but simply one of strict liability *in tort*.[176] Sweeping nationwide change ensued as courts in other jurisdictions seized upon that decision and the Restatement section as the solution to their problems with the warranty theory.[177]

More than a decade has passed since adoption by the American Law Institute of section 402A; it has been incorporated into the law

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contention that the passage of the UCC in that State had preempted strict liability in tort for defective products. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955, 962 (1976). *See also* Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976).

173. W. PROSSER, *supra* note 3, § 98, at 657 (footnote omitted). Prosser notes that during that period the change in the law was so rapid that the section was drafted three times: "As first submitted to the American Law Institute, it was limited to food and drink. It was then extended to 'products for intimate bodily use,' and finally to all products." W. PROSSER, *supra* note 3, § 98, at 657 n. 51.

174. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

175. Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

176. *Id.* 377 P.2d at 900, 27 Cal. Rptr. at 700.

177. W. PROSSER, *supra* note 3, § 98, at 657.

of almost every State; and thousands of cases have applied the doctrine of strict liability in tort. Although some issues, such as the availability of contributory negligence as a defense, now seem settled,[178] numerous other issues remain unresolved. Any attempt to summarize the present state of strict liability in tort is doomed to frustration. The entire field is simply too much in flux; however, some attempt must be made to outline how the controversial issues are being treated and to suggest how they should be treated in the future.

1. *Underlying Policies And Express Language of Section 402A*

The policies and purposes which support imposition of strict liability in tort have been expressed in various ways, but they can be summarized easily. The principal and least questioned purpose "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[179] That is, the manufacturer through pricing, is better able to "spread the risk" created by his product; the product must pay its own way. Injury reparation should be "a cost of production."[180] Moreover, because injuries are a risk of marketing and producing the product, manufacturers can protect themselves by acquiring liability insurance.[181] Consumers are less able to protect themselves because they cannot fully insure against such losses, acquire information about products prior to use, adequately inspect many complex products, or effectively bargain with manufacturers.[182]

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178. *See generally* discussion pp. 270-80 *infra*.

179. Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); *accord*, Suvada v. White Motor Co., 32 Ill.2d 612, 619, 210 N.E.2d 182, 186 (1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 81 (1960).

180. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *c* (1965). The full comment expresses the drafters' conception of the policy basis of the section:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

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

182. *E.g.*, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 443 (1944)

Another oft-cited reason for strict liability is the difficulty, if not impossibility, of showing the manufacturer failed to exercise due care.[183] Even though *res ipsa loquitur* may aid the injured party, he may not have sufficient evidence even to warrant the invocation of that doctrine and to get his case to the jury.

Justice Harrison in *Brandenburger* referred to other considerations justifying imposition of strict liability. They include: 1) the superior ability of the manufacturer to anticipate some hazards and guard against their occurrence, 2) public interest in deterring distribution of dangerous products, and 3) recognition that a consumer does not always have the ability to investigate the soundness of a product.[184]

The express language of section 402A often hinders realization of the core policies underlying strict liability. One commentator suggests: "Today . . . as litigants continue to urge the courts to further expand the *idea* of strict liability for products, all parties concerned are experiencing increasing frustration at the apparent limits set to the task of prosecution or defense by the *language technic* constraints of Section 402A."[185]

The gap between language and underlying philosophy often causes strained judicial reasoning as courts attempt to reach results consistent with the core philosophy of strict liability but not explicitly covered by the language of section 402A. The most problematic language is the phrase used to describe the product as one in a "defective condition unreasonably dangerous." This section 402A language can be applied with relative ease and clarity to those situations where the individual unit of the product in question, though properly designed, is flawed in manufacture,[186] and causes physical

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(Traynor, J., concurring). In his concurrence, Justice Traynor foreshadowed the adoption of strict liability in 1965. The concurring opinion forcefully and thoroughly details the policy reasons which justify imposition of liability without proof of negligence. On the issue of the relationship between the consumer and the manufacturer, Justice Traynor argued:

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product. . . .

Id.

183. *E.g., id.* at 441. *See also* Wade *supra* note 181, at 826.

184. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 514-15, 513 P.2d 268, 273 (1973).

185. Kiely, *supra* note 9, at 928. Professor Kiely uses the term *language technic* as it was first used by Dean Leon Green to describe the verbalization of a legal idea and the accompanying process of reasoning from, and relying on, that language to reach decisions. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1018 (1928).

186. *See, e.g.*, Findlay v. Copeland Lumber Co., 265 Ore. 300, 509 P.2d 28 (1973) (misaligned rivet hole in ladder); Cronin v. J. B. E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153,

injury to the plaintiff.

More difficulty arises in those cases where there is no manufacturing flaw or "defect," but instead there is some deficiency in the design of the entire line of goods which has endangered persons using it. There, while it may be difficult to say that the product was in a defective condition,[187] the product nonetheless may be unreasonably dangerous because of unsafe design or failure to warn users of potential dangers. Despite the apparent constraints of section 402A's language, courts have had little difficulty finding strict liability in such situations.[188] Dean Prosser preferred to classify such cases under the negligence theory,[189] and others have agreed with Prosser that the elements of proof submitted in a strict liability design case may be the same as in a negligence case;[190] yet many courts have chosen to treat these cases under strict liability even though great differences exist between the two theories.

Two examples illustrate how courts have struggled with the language of section 402A to reach results which are consistent with their perceived notions of the policies and concepts underlying strict liability. In the first example, *Cronin v. J.B.E. Olson Corp.*,[191] the California Supreme Court effectively abolished the term unreasonably dangerous as an element of strict liability. While recognizing "that the words 'unreasonably dangerous' may serve the beneficial purpose of preventing the seller from being treated as the insurer of its products," the *Cronin* court found that the language has "burdened the injured plaintiff with proof of an element which rings of negligence."[192] The court objected to the "negligence complexion" of the phrase and observed that the "unreasonably dangerous" re-

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104 Cal. Rptr. 433 (1972) (pitted, weakened metal in tray shelf hasp); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969) (defective hammer). *Cf.* Barich v. Ottenstror ___ Mont. ___, 550 P.2d 395 (1976) (allegedly defective cardboard wardrobe). In such cases the product is defective because it fails to conform to the design specifications of the manufacturer.

187. When the product has no flaws in manufacture and meets the intended design specifications of the manufacturer, there is no objective standard for evaluating the "defectiveness" of the product. *See* Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955, 959 (1976); *See also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4], at 3-320 (1976).

188. *See, e.g.*, Seattle-First National Bank v. Tabert, 86 Wash.2d 145, 542 P.2d 774 (1975); Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

189. W. PROSSER, *supra* note 3, § 96, at 644-46.

190. *E.g.*, Wade, *supra* note 181, at 836-38, 841.

191. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

192. *Id.* 501 P.2d at 1162, 104 Cal. Rptr. at 442. The court noted that the "very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence. . . ." *Id.*

quirement "represents a step backward in the area pioneered by this Court."[193] The court saw "no difficulty in applying the *Greenman* formulation to the full range of products liability situations, including those involving 'design defects' ".[194]

In justifying abolition of the "unreasonably dangerous" requirement and in countering the contention that this made the manufacturer an insurer, the court found that manufacturers were protected by "the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries."[195] In abolishing the requirement for design defects as well as manufacturing flaws, the court relied on *Greenman* and reasoned that the "unreasonably dangerous" qualification should not impose upon plaintiffs different burdens of proof which are dependent upon often unclear distinctions between manufacturing flaws and design errors.[196]

Thus, the court would read inadequate warnings and bad design into the language of defect and, to satisfy its perceptions of the core philosophy of strict liability, would ignore the language "unreasonably dangerous." Notably, however, Comment *g* of section 402A defines "defective condition" in terms of the dangerousness of the product, not in terms of any isolable flaw.[197] The problem is that the court eliminated unreasonably dangerous but then failed to give any substantive content to the term "defective condition," especially, when it is applied to situations involving inadequate warnings or design defects.[198] Under Dean Wade's analysis, the court's logic breaks down and the lack of content it gives to the defect notion is accentuated. He concludes that in design defect cases the "phrase 'defective condition' has no independent meaning and the attempt to use it is apt to prove misleading."[199] He argues that the "only real problem is whether the product is 'unreasonably dangerous,' because 'defective condition,' if it is to be applied

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43. The court recognized that applying strict liability to design defects which plague entire product lines would be more damaging to the manufacturer, but it decided that "the potential economic loss to a manufacturer should not be reflected in a different standard of proof for an injured consumer." *Id.*

197. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *g* (1965) ("The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, *which will be unreasonably dangerous to him*." (emphasis added)).

198. The court itself acknowledged that there were inherent difficulties in "giving content to the defectiveness standard." Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 1162 n.16, 104 Cal. Rptr. 433, 442 n.16 (1972).

199. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965).

at all, depends on that."[200]

Moreover, in rejecting the term "unreasonably dangerous" because it rings of negligence, the court failed to distinguish between unreasonable *conduct*, which is truly a negligence concept, and unreasonably *dangerous*, which is merely a measure of the safety of the product. Reasonableness necessarily entails a balancing or weighing of factors, but use of a balancing process does not automatically mean that the court is improperly relying on negligence concepts rather than strict liability. In negligence, the balancing measures the defendant's conduct; in strict liability the balancing measures the product itself.

In the other example, *Davis v. Wyeth Laboratories, Inc.*,[201] plaintiff sued on theories of negligent manufacture, failure to warn, strict liability in tort, and breach of implied warranty of fitness after he contracted polio from a vaccine manufactured by the defendant. The court began by rejecting any claim of negligent manufacture, finding that the product was precisely what the manufacturer intended.[202] The court looked instead to Comment *j* of section 402A, which provides that "where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."[203]

In *Davis*, the Ninth Circuit regarded "failure to warn, where the circumstances of sale imposed that duty, as exposing the vendor to trict [*sic*] liability in tort. . . ."[204] The court rejected defendant's contention that section 402A applies "only where unreasonable danger results because of an ascertainable 'defect' or 'impurity' in the product."[205] Instead, "the true test in a case of this kind is whether the product was unreasonably dangerous."[206]

The court then considered Comment *k*,[207] regarding unavoid-

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200. *Id.*

201. 399 F.2d 121 (9th Cir. 1968).

202. *Id.* at 126.

203. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *j* (1965).

204. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 127 (9th Cir. 1968) (footnote omitted).

205. *Id.* at 128.

206. *Id.* (footnote omitted).

207. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *k* (1965). The Comment reads in part:

> *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidably high degree of

ably unsafe products, and noted that strict liability is avoided with such products only where their sale is accompanied by proper warnings. The court stated that "in one sense, the lack of adequate warning is what renders the product 'defective.' "[208] Full disclosure of the existence and extent of the risk involved is part of the manufacturer's obligation in putting the product on the market. As soon as the danger becomes apparent, a duty to warn attaches. The court concluded that failure of the manufacturer to meet its duty to warn "rendered the drug unfit in the sense that it was thereby rendered unreasonably dangerous" with the result that "strict liability then attached to its sale in absence of warning."[209] The Ninth Circuit thus was able to find defendant liable despite the absence of any clearly defective condition in the product by going behind the language of section 402A to reason from policies adduced from the commentary to that section. In so doing, the court departed from the explicit language of section 402A and effectively deleted the requirement of defect in order to achieve a result consistent with its perception of the core policies of strict liability.

It is reasoning such as this which leads to the crisis of confidence previously noted.[210] Lawyers in States where section 402A has been incorporated expressly into tort law may not safely predict the outcome of any given case since courts manifest such a marked tendency to circumvent section 402A's articulation of the rule of

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risk which they involve. Such a product properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. . . .

Virus infected blood which transmits serum hepatitis presents a classic example of an "unavoidably unsafe product." Almost all of the courts which have considered the problem have rejected liability - the early decisions on the tenuous basis that a transfusion was a "service" rather than a "sale" of blood and the more recent decisions, while admitting that transfusion involved a product, on the basis that the danger was unavoidable. *See, e.g.*, Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075 (1974). This overwhelming majority position was departed from in Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d. 443, 266 N.E.2d 897 (1970), where the Illinois Court held that the "unavoidably unsafe" exception was inapplicable because hepatitis inflected blood is "impure." *Cunningham* has been criticized severely by commentators and courts in other jurisdictions, and the Illinois legislature even passed legislation the purpose of which was to reassert the validity of the "unavoidably unsafe products" exception. *See* 1971 Ill. Laws, ch. 91, §§ 181-84 (renewed 1975 Ill. Legis. Serv. No. 4, at 778). The Montana legislature has responded to this problem by declaring that furnishing and transfusion of blood is a service rather than a sale and by expressly precluding strict liability "for injuries resulting from the furnishing or performing of such services." R.C.M. 1947, § 69-2203. This statute only applies to blood supplied by a hospital, long-term care facility or doctor, and does not preclude liability for blood banks if the blood bank has been negligent. R.C.M. 1947, 69-2204 (Supp. 1975). *See also* Hutchins v. Blood Services of Montana, 161 Mont. 359, 506 P.2d 449 (1973).

208. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 129 n. 12 (9th Cir. 1968).

209. *Id.* at 130.

210. *See* discussion p. 223 *supra*.

strict liability in favor of their perceptions of its underlying values, even while speaking its language. This is not necessarily a negative phenomenon, but it does mean that lawyers can no longer feel secure in relying solely on the language of section 402A. While section 402A may work quite well in those situations for which it was drafted originally, it should be recognized for what it is.[211] It is a foundation, a starting point, upon which the law can develop. But it should not be permitted to restrict judicial expansion of the scope of strict liability protection.

A solution to the linguistic problems of section 402A, and in particular, the significance of the phrase "defective condition unreasonbly dangerous," may be sought by examining the nature of the liability imposed. Here strict liability must be contrasted with liability based on negligence. Both derive from duties imposed by tort law on a person's conduct when that conduct creates risks of physical injury to other members of society and their property.

The distinction between strict liability and negligence is in the conduct upon which the duty is imposed. In negligence, liability results from the manufacturer's failure to exercise the care of a reasonable person in making and marketing his products. In strict liability, the manufacturer is liable not for failing to exercise due care, but simply for "placing a product in the stream of trade in an unreasonably dangerous defective condition."[212] In negligence, breach is determined by application of the objective, reasonable man standard, whereas in strict liability breach is based simply on the actual sale in fact of the risk-creating product.

Keeping that distinction in mind aids examination and analysis of the language "defective condition unreasonably dangerous." This language tends improperly to imply that the defective condition of the product constitutes the breach of the seller's duty. Dean Leon Green has criticized the persistence of the idea that plaintiff must prove a specific defect to show that the seller violated its duty. He contends that this tendency has distorted the issues in a strict liability case.

> [I]t is the conduct of the seller in placing the product in the stream of trade to which the consumer's injury must be causally connected. Proof that the product was in a "defective condition unreasonably dangerous to the user" establishes the violation of

211. The drafters originally intended section 402A to apply only to adulterated food and drink, and thus much of the language of the section and accompanying commentary does not readily conform to many of the varied fact situations in which the section is now being invoked. It is to be expected then that courts often struggle with this section's twelve-year-old verbalization of a legal doctrine which was only nascent when the section was adopted.

212. Green, *supra* note 53, at 1200.

> duty that imposes liability. The proof of a specific defect is very helpful, but it is not a requisite of a seller's liability. . . . Since "defective" is only an adjective qualifying "condition," and "defective condition" is only a qualifying phrase of unreasonably dangerous, *"dangerous" is the term of climactic importance in characterizing the product.* The singling out and isolation of "defective" from its context distorts the conduct condemned.[213]

The commentary to section 402A makes it clear that liability is based upon the "special responsibility" a seller assumes "by marketing his product for use and consumption."[214] "Selling the product in 'a defective condition unreasonably dangerous to the user' *is* the violation of the seller's duty. The specific defect is only an evidentiary fact in the proof of the violation of the duty."[215] Or, as Dean Keeton has described it: *"[I]f the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow."*[216]

Even though the "defective" condition of the product does not constitute the breach of the seller's duty, the condition of the product *in fact* will determine whether the sale subjected anyone to an unreasonable risk. Instead of impugning the conduct of the defendant—the defendant is strictly liable for his conduct—plaintiff must impugn the product[217] and show that it exposed him to unreasonable danger. How section 402A language applies in practice when evaluating the dangerous condition of the product can be seen best by establishing a framework based upon the specific deficiency of the product in question. Product deficiencies are divided into two categories: 1) products which are unsafe because of flaws in manufacturing or materials and, 2) products which are unsafe because of faulty design.[218] Products with faulty designs are divided in turn into

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213. *Id.* at 1207 (emphasis added). He notes that in a large number of cases a product has been found to be in an unreasonably dangerous defective condition even though no specific defect could be identified. Summers v. Interstate Tractor Equip. & Co., 466 F.2d 42 (9th Cir. 1972); Greco v. Bucciconi Eng'r. Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); Alaska Rent-a-Car, Inc. v. Ford Motor Co., 526 P.2d 1136 (Alas. 1974); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). *Cf.* Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 398 (1976).

214. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *c* (1965).

215. Green, *supra* note 53, at 1207-08 (emphasis added).

216. Keeton, *Product Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 409 (1970).

217. Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973). "It is the unreasonableness of the condition of the product, not the conduct of the defendant that creates liability." Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974).

218. Many commentators have found a third category of product deficiencies: products unsafe because of the manufacturer's failure to give adequate warnings about the use and hazards of the product. *See, e.g.*, Keeton, *supra* note 217, at 33-34; Wade, *supra* note 181, at

the following subcategories: a) inadvertent design mistakes and, b) conscious design choices.[219]

2. *Manufacturing Defects*

A manufacturing defect is an inadvertent and undetected imperfection or flaw in a particular unit of an otherwise acceptable run of products.[220] Analysis of liability for injuries arising from this type of defect falls most readily into the original Restatement scheme of protection. The term "defect" most clearly applies to describe this condition of the product. It is easier to show a flaw in the manufacture of the product than a defect in its design.[221] The plaintiff merely must prove that the product was not manufactured according to the standard intended by the manufacturer and that the flaw created risk of harm.[222]

Section 402A's qualifying term "unreasonably dangerous," will be less important in this type of case, because the balancing which inheres in the language of reasonableness usually will result in a decision favorable to the plaintiff.[223] As Dean Keeton described the manufacturing defect in *Cronin*:

> Danger was reasonably foreseeable, and there was no redeeming feature - no beneficial purpose to be served by having metal that

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830, 841-42; Vetri, *Products Liability: The Developing Framework for Analysis*, 54 ORE. L. REV. 293 (1975). The authors believe, however, that this category may be subsumed in most cases into the second category of deficiencies in design, conscious design choice. *See* Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033, 1035 (1974). Professor Vetri would appear to recognize this dual categorization. In a footnote he stated that: "An inadequate warning may be considered a design defect." Vetri, *supra* at 293 n.3. In a later article he says that "[w]arning deficiencies are in fact a particular species of design deficiency." Vetri, *Products Liability: The Prima Facie Case*, 11 THE FORUM 1117, 1118 (1976). In that article, he adds a fourth category of "indeterminate defects" to describe those situations where it is difficult to pinpoint the exact nature of the defect and the design and manufacturing flaw categories tend to merge. *Id.* at 1118-19.

219. The source of this subcategorization is Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

220. *See* examples cited note 186 *supra* and related discussion in text. Professor Wade says that in manufacturing flaw cases the adjective "defective" is both meaningful and useful in describing the product. Wade, *supra* note 181, at 841.

221. *See id.*

222. Vetri, *Products Liability: The Prima Facie Case*, *supra* note 218, at 1121; *See also* Wade, *supra* note 199, at 14.

223. The holding in *Cronin* discussed 249-51 *supra*, abolishing the requirement that the defective condition be "unreasonably dangerous", is supportable when it is a manufacturing defect which caused the plaintiff's injury. Evaluation of the unreasonableness of the danger necessarily entails a balancing of the likelihood and gravity of the risk created against the value or functional utility of the product as marketed. There is simply no "reasonableness" in selling a product which does not even meet the design specifications of the manufacturer if there is any substantial risk created by the defective condition of the product. Therefore the risk - utility balancing will result almost automatically in a finding that the flawed product was unreasonably dangerous.

was porous, containing holes, pits and voids. *Therefore, the product was unreasonably dangerous as a matter of law and this would be true of virtually any fabrication or construction defect.*[224]

Barich v. Ottenstror,[225] is the only manufacturing defect case decided in Montana since *Brandenburger*. The court held that plaintiff had the burden of showing that the alleged defect existed when the product left the defendant's hands. Evidence presented which showed that the product had been used extensively over two years created a logical inference that the alleged defect in the product resulted from normal wear and tear, and plaintiff failed to overcome that inference. The court concluded that: "A manufacturer or seller is not required, under the law, to produce or sell a product that will never wear out."[226]

The court discussed the condition of the product, a cardboard wardrobe, primarily in terms of the language of defect. It repeated the holding in *Brandenburger* that circumstantial evidence may be used to draw inferences regarding the existence of the defect, and it recognized that "a specific defect need not be shown where the evidence tends to negate injury producing causes which do not relate to a defect. . . ."[227] Nonetheless, the language in the opinion indicated that the court was not distinguishing between defect and dangerousness in its analysis. The court, at one point, said that it was well established that "in the absence of proof that the instrumentality in question was *defective* or *dangerous*" in the hands of the defendant, there could be no liability.[228] In this case, and in most manufacturing defect situations, this distinction is not important; such a defect naturally will be unreasonably dangerous because there is no utility which counterbalances the risks created.[229] However, in design defect situations the bench and bar must remember that the term "unreasonably dangerous" is critical.

3. *Design Defects*

A design defect is an error in design or marketing common to all units in a given product run. Design defects resist categorization under the defect language of section 402A because there is nothing per se wrong with the product. In such instances, the concepts "defective condition" and "unreasonable danger" merge; if the de-

224. Keeton, *supra* note 217, at 39 (emphasis added).
225. ___ Mont. ___, 550 P.2d 395 (1976).
226. *Id.* at 398.
227. *Id.*
228. *Id.* (emphasis added).
229. *See* discussion note 223 *supra*.

sign created an unreasonable risk of danger, the product is also defective.[230]

Whether the design did create an unreasonable risk of danger requires an evaluation of the design through a balancing of factors which is often highly complex. The balancing process naturally resembles the balancing courts employ in determining whether given conduct is negligent.[231] The difference is that in negligence, courts examine the reasonableness of the defendant's actions, while in strict liability, courts are evaluating the condition of an article which is designed in a certain way.[232] "The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article."[233]

Factors relevant to the balancing process for evaluating the dangerousness of a product design have been enumerated by Dean Wade and others.[234] In essence, the required balancing compares the risks created by the design with its broad functional utility. Functional utility is a measure of how well the product does the task it is intended to do. If the utility of the given design outweighs the risks created, no liability can result because the product is deemed not unreasonably dangerous.

How this balancing is effected depends upon which of two further subclassifications of design defects—inadvertent design errors or conscious design choices—[235] is at issue. The former refers to

230. *See* Vetri, *Products Liability: The Developing Framework for Analysis, supra* note 218, at 295 (citing Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974)). In Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 811 (9th Cir. 1974), the court said: "It is not essential to strict liability that the [product] be defective in the sense that it was not properly manufactured. If the product is unreasonably dangerous that is enough." *See generally* Wade, *supra* note 181. Additional support for the proposition that the "defectiveness" is determined by the danger is derived from the language of Comment *g*. *See* note 197 *supra*.

231. The classic statement of balancing in the context of a negligence action is found in Judge Hand's opinion in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). To evaluate the defendant's duty, it is necessary to balance (1) the probability that an event will occur, (2) the gravity of the resulting injury if it does occur, and (3) the burden of taking precautions.

232. *See, e.g.*, Roach v. Kononen, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974). *See also* Green, *supra* note 53, at 1186.

233. Roach v. Kononen, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974).

234. Wade, *supra* note 181, at 837-38, *cited in* Roach v. Kononen, 269 Ore. 457, 463-64, 525 P.2d 125, 128-29 (1974), and *discussed critically in* Vetri, *Products Liability: The Developing Framework For Analysis, supra* note 218, at 302-04.

235. These terms represent polar opposites. Most product designs will fall somewhere between the two extremes. Their proximity to either extreme will affect the method of analysis that courts will be able to use in evaluating those designs to determine whether to impose liability for risks created.

"risks of harm which originate in the inadvertent failure of the design engineer to appreciate adequately the implications of the various elements of his design, or to employ commonly understood and universally accepted engineering techniques to achieve the ends intended with regard to the product."[236] The latter refers to "risks of harm which originate in the conscious decision of the design engineer to accept the risks associated with the intended design in exchange for increased benefits or reduced costs which the designer believes justify conscious acceptance of the risks."[237]

This subclassification parallels that used by Professor Henderson, but the conclusion reached is different. Henderson argues that adjudicative processes in general and courts in particular are not well suited for independent review of design decisions and imposition of liability on manufacturers for those decisions. He says that conscious design cases present issues which are too polycentric;[238] they involve courts in a very complex process of weighing multiple, interdependent variables for which the courts are ill-equipped.[239] Henderson contends product design and safety standards should be set by negotiation and managerial and administrative processes;[240] the safety of a product is only one factor among many which the engineer has to consider in designing a product. Other interdependent and interrelated variables include price, utility, aesthetics, marketability, and modes of production.[241] But, courts do not need to engage in such polycentric decisionmaking to impose liability for hazardous designs; they can make such determinations by engaging in a simpler balancing analysis.

a. Inadvertent Design Errors

Products having inadvertent design errors resemble those with manufacturing flaws. In both, the product is not in the condition

236. Henderson, *supra* note 219, at 1548.

237. *Id.*

238. The term polycentric originated with Michael Polyani. M. POLYANI, THE LOGIC OF LIBERTY 170-84 (1951). It was borrowed by Professor Fuller who employed it in analyzing the nature of the process of adjudication. *See, e.g.*, Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y. INTL. L. 1; Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3. Professor Henderson, *supra* note 219, at 1536, describes the term as follows:

> [P]olycentric problems are many centered problems, in which each point for decision is related to all others as are the strands of a spider web. If one strand is pulled, a complex pattern of readjustments will occur throughout the entire web. If another strand is pulled, the relationships among all the strands will again be readjusted. A lawyer seeking to base his argument upon established principle and required to address himself in discourse to each of a dozen strands, or issues, would find his task frustratingly impossible.

239. Henderson, *supra* note 219, at 1539-42.

240. *Id.* at 1538, 1574-77.

241. *See id.* at 1540.

intended by the manufacturer, and the defect tends to defeat the purpose for which the the product is manufactured.[242] Unlike conscious design choices where the inherent dangers of the design are usually apparent, the dangers of inadvertent design errors and manufacturing flaws often are hidden from the user or consumer, as well as the manufacturer.[243]

As with manufacturing flaws, these characteristics of inadvertent design errors simplify the determination of dangerousness of such products; for, as Professor Henderson has shown, courts faced with inadvertent design error cases generally do not need to engage in any complicated, multiple-factor balancing to evaluate the unreasonableness of the danger created by a manufacturer's chosen design.[244] Courts have two means of judging the quality of products placed on the market in these cases. First, the particular design decision made by the manufacturer can be evaluated by comparing it to externally developed, well-accepted standards of the government, industry, and the engineering profession, and thus, courts need not test the condition of the product in a vacuum.[245] Secondly, courts can balance the utility value, which is minimal or nonexistent because the product fails in its essential purpose, against the risks actually created and thereby find the manufacturer liable for having placed the unreasonably dangerous product on the market. Examples include airplanes that do not fly,[246] products that explode[247] or collapse[248] during use, safety devices that malfunction,[249] and brakes that fail.[250]

The facts in *Knudson v. Edgewater Automative Division*[251] exemplify the type of situation where courts may readily impose strict liability for inadvertent design error. Plaintiff, a mechanic, received serious injuries when a roll pin, intended to keep an automotive jack from over-extending, failed, causing a car to fall on him. The manu-

242. *Id.* at 1548.

243. *Id.* at 1549.

244. *Id.* at 1550.

245. *Id.*

246. *See, e.g.*, Manos v. Trans World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971); Noel v. United Aircraft Corp. 342 F.2d 232 (3d Cir. 1964).

247. *See, e.g.*, Moore v. Jewel Tea Co., 46 Ill.2d 288, 263 N.E.2d 103 (1970) (can of drain cleaner).

248. *See, e.g.*, Knudson v. Edgewater Automotive Div., 157 Mont. 400, 486 P.2d 596 (1971) (automotive jack).

249. *See, e.g.*, Rider v. Hartford Accident & Indemnity Co., 241 So.2d 61 (La. App. 1970) (safety belt latch).

250. *See, e.g.*, Schield Bantum Co. v. Grief, 161 So.2d 266 (Fla. App. 1964).

251. 157 Mont. 400, 486 P.2d 596 (1971). Although based on negligence, the case demonstrates the type of fact situation which would be adjudicated easily on a theory of strict liability.

facturer designed the roll pin as a safety device, but testimony from an engineer trained in analysis of stress on metals showed that the pin was not designed to withstand stresses incurred during normal use. The design of the jack, with that inadequate pin, thus made the product "unreasonably dangerous."[252]

The jack as designed created unreasonable risks to unsuspecting users, and the inadequate size of the roll pin had no functional utility to counterbalance those risks. The stress engineer testified that even a simple nail would have had greater utility and safety than the roll pin chosen by the manufacturer.[253] Moreover, uncontradicted testimony of the stress engineer showed that the design of the pin entirely failed to meet the standards of the engineering profession. Thus, the court would have had no difficulty applying the doctrine of strict liability in tort for defective design because the risks clearly outweighed the utility of the product and the safety roll pin failed to satisfy accepted engineering standards. This illustrates both means courts may use in evaluating the dangerousness of the product's design.

Similarly, in *Brandenburger*, the deficiency of the product arguably could be classified as inadvertent design error. The alleged defect was in the design of the roof of a Toyota Land Cruiser which was made of fiberglass and lacked reinforcing structural members. Uncontradicted testimony of the plaintiff's expert engineer showed that because of that design, "when a force, such as was applied during the accident, hit the roof panel, the roof would not tend to crumple, as in the case of a steel roof, but would simply blow up and out, either shearing or pulling the rivets through the roof."[254] The reinforcing members in a steel top would absorb the impact energy of the blow to enable that kind of top to withstand greater force than a fiberglass top.[255] The expert based his testimony on inspection of tops of vehicles similar in functional utility to the Toyota Land Cruiser. In evaluating the design of the top, the court did not have to establish its own design standards in a vacuum, but could look to relatively clear extrajudicial industry standards which the Toyota failed to meet. Moreover, because the top as designed failed in its essential protective purpose there was little utility value in the design to counterbalance the risks created. Thus, the second

252. *Id.* at 405, 486 P.2d at 599.

253. *Id.*

254. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 519, 513 P.2d 268, 276 (1973). An eyewitness testified that in the actual accident the top *"flew up in the air."* *Id.* at 520, 513 P.2d at 276.

255. *Id.* at 519, 513 P.2d at 276.

approach to evaluating inadvertent designs also could apply to justify imposition of liability.

b. Conscious Design Choices

Whereas inadvertent design errors often can be evaluated easily because they are usually either self-defeating, in that the product does not perform as intended, or deficient when measured by established standards of engineering, cases involving design decisions consciously made by engineers cannot be resolved so simply. When an engineer decides that a product will work better, cost less, and sell more if it is designed a certain way, even though it may expose some users to risk of injury, it is more difficult to label the product *unreasonably* dangerous and thereby impose strict liability on the manufacturer. In designing a product, the engineer may decide to accept certain risks in exchange for increased functional utility or decreased production costs. In such cases, the utility and cost values of the chosen design may well counterbalance the risks created so that it cannot be said that the dangers of the product are unreasonable.

Professor Henderson argues that courts and juries are not capable of evaluating such conscious designs, and he points to numerous cases where courts have explicitly or implicitly recognized this incapacity.[256] He proposes that standard setting and liability for dangerous designs which are the result of conscious choices should be left to marketplace negotiations.[257] He maintains that only where the risk created by the product is not obvious to the consumer and no warnings about the risks have been given to the consumer should the manufacturer be liable for any resultant injuries.[258]

This argument ignores the principal policy reasons which were the stimuli for adoption of strict liability in tort.[259] In the modern national marketplace, consumer bargaining power is either minimal or non-existent, and consumer decisions to purchase products are

256. Henderson, *supra* note 219, at 1560-62 nn. 123, 124, 126-29.

257. *Id.* at 1559-60. Reliance on marketplace negotiation means that if a manufacturer consciously designs a product which creates risks to users in order to cut costs or increase efficiency it must warn adequately of the dangers if those dangers are not apparent. The consumer then may decide for himself what trade-offs he wants to make - whether to buy a hazardous but cheaper product or buy a more expensive, safer one. Products which are "unreasonably dangerous" will eventually be removed from the market because people will choose not to buy them.

This thesis rests upon an unjustifiable and unrealistic conception of the modern marketplace. *See* discussion p. 262 *infra*. *See also* Keeton, *supra* note 216. *Cf.* Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring).

258. Henderson, *supra* note 219, at 1560.

259. *See* discussion pp. 247-48 *supra*.

limited by a dearth of suitable alternatives, lack of information about the product and individual financial constraints.[260] Even Professor Henderson acknowledges that in some cases the value of marketplace negotiation in protecting consumers decreases and that courts will impose liability for conscious design decisions.[261] But, other commentators have shown that this approach is highly unrealistic and partakes of warranty and contract concepts, not strict liability in tort.[262] Any return to reliance on marketplace negotiation to set standards to protect consumers from unsafe products substantially undercuts the policy foundations of strict liability in tort.[263]

c. Warnings

Courts are not wholly unequipped to evaluate conscious design decisions; one way they make such evaluations is by determining initially whether the manufacturer provided adequate warnings or instructions regarding safe use of a product. If a manufacturer designs a product which exposes users to risk of injury and then fails to warn users of the risks created, most courts have had little difficulty in imposing liability for the failure to warn.[264] In the context of section 402A phraseology, the manufacturer may be deemed strictly liable for placing the product on the market because, without adequate warnings, the product is unreasonably dangerous. As in other design defect cases, when the manufacturer has failed to warn of inherent dangers in its product, the "defectiveness" requirement of section 402A merges with the element "unreasonably dangerous."[265] If a warning would have been effective in reducing the

260. Many courts have recognized these difficulties. In Henningsen v. Bloomfield Motors, Inc., 32 N.J.358, 161 A.2d 69, 83 (1960), Judge Francis described the modern marketplace:

> Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery.

261. Henderson, *supra* note 219, at 1566-67.

262. Twerski, Donaher, Weinstein & Piehler, *The Use and Abuse of Warnings in Products Liability - Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 513 n. 46 (1976).

263. *See* discussion pp. 247-48 *supra*.

264. Liability for *negligent* failure to warn of dangers associated with use of a product is well established. *See, e.g.*, Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); Gall v. Union Ice Co., 108 Cal. App.2d 303, 239 P.2d 48, 54 (1952); Tingey v. E. F. Houghton & Co., 30 Cal.2d 97, 179 P.2d 807, 811 (1947). *See generally* Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings*, 19 Sw. L.J. 43 (1965); Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

265. Vetri, *Products Liability: The Developing Framework for Analysis*, *supra* note 218, at 295.

dangerousness of the product's design and no warning was given, then the product is deemed unreasonably dangerous and a court may avoid further evaluation of the chosen design by imposing liability solely for the failure to warn. By compelling manufacturers effectively to inform users about potential hazards associated with their products, courts may indirectly force off the market many products which are dangerous to users and thus advance the overall products liability goal of reducing the risks of injury to consumers.[266]

The issue of liability for failure to warn, however, is not always entirely straightforward. In certain instances, the presence or absence of warnings alone should not be determinative because the warning might have little effect on reducing the risks created by use of a product whereas economical, minor design changes would reduce substantially those risks. This is true despite comment *j* of section 402A which seems to suggest that a warning alone may insulate a product from being found unreasonably dangerous.[267] In such warning cases, courts must engage in more complex analysis of the relationship between the chosen design of the product and any warnings given or omitted.

The first question courts must consider here is whether a warning would be effective. Where it is foreseeable that users who are too young to understand a warning or casual bystanders will be exposed to risks from the product, a warning may well have little value in reducing the unreasonableness of the danger.[268] Furthermore, some products may remain unreasonably dangerous because the user, even with warnings, may not always be able to protect himself against the risks created.[269] Warnings effectively reduce risks only when users can be attentive to them. If there is a feasible design modification which reduces the danger, the manufacturer should be compelled to do more than just give a warning.[270] At this juncture,

266. In order to be effective, a warning may have to be extremely conspicuous and describe in great detail the hazards of the product. When such a warning accompanies a product, it will often deter consumption. *See* Twerski, Donaher, Weinstein & Piehler, *supra* note 262, at 502-05.

267. The Comment states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS § 402A, Comment *j* (1965).

268. *See, e.g.*, Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972) (bystander injured by baseball pitching machine); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (infant burned when she overturned steam vaporizer).

269. In Patten v. Logemann Bros. Co., 263 Md. 364, 283 A.2d 567 (1971), the plaintiff was injured when he tripped and inadvertently placed his hand into a lubrication and maintenance opening on a paper baling machine. The court denied recovery because the obviousness of the danger constituted a warning to the plaintiff. However, under the circumstances, that warning was clearly of little benefit to the plaintiff.

270. Thus in *Patten*, a very simple and inexpensive guard over the hole would have

design evaluation necessarily merges with the warning issue. Just as measurement of the unreasonableness of the danger of a product requires a balancing of the risk created against the functional utility of the design, the effectiveness of the warning must be balanced against the feasibility of alternatives in design.

Although the mere presence of a warning should not preclude automatically imposition of liability, its absence should not always be the sole reason for finding the manufacturer liable. If a warning regarding the use of a given product would be ineffective, then the absence of a warning in that situation should be only one factor in the court's evaluation of the dangerousness of the product.[271] Courts in this situation should consider the unreasonableness of the design itself, in light of feasible, safer alternatives.

Phillips v. Kimwood Machine Co.,[272] a recent Oregon case, demonstrates this tendency of courts to rely on the lack of warnings as a basis for imposition of liability, despite the questionable effectiveness that a warning, if given, would have had. Plaintiff was injured when a sanding machine which had not been readjusted ejected a sheet of plywood which was slightly thinner than other sheets which he had been feeding into the machine. The manufacturer had failed to warn of the danger of not readjusting the machine. Following an extensive, well-considered discussion of the applicability of strict liability in a design defect case, the court grounded liability on the basis that the machine was dangerously defective due to the absence of a warning. The court said that it was "therefore unnecessary for us to decide the questions that would arise had adequate warnings been given."[273]

The court thus avoided inquiry into the effectiveness a warning might have had, if given. If the differential in thickness of the sheets was slight, would the operator have been able to detect the change and take precautions? It may have been difficult to detect and, in the environment of use of the machine, it would have been unreasonable to expect the operator to physically measure each sheet, especially if the likelihood of a thin sheet becoming mixed with thicker sheets was minimal. Moreover, evidence at trial indicated that the manufacturer provided smaller models of similar machines

effectively eliminated the danger and would have prevented the plaintiff's injury. *Id.*

271. For instance, in Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975), the court found that because the cost of giving a warning was minimal, balancing that cost against the risks of the product would "almost always weigh in favor of an obligation to warn of latent dangers." *Id.* at 544, 332 A.2d at 15. This holding ignored the possibility that the warning would have been ineffective to guard against the very remote risk in question.

272. 269 Ore. 485, 525 P.2d 1033 (1974).

273. *Id.* at 497, 525 P.2d at 1039.

with an inexpensive safety device which prevented the type of occurrence which injured the plaintiff, that the plaintiff's employer installed such devices on its machines after the accident, and that the devices in no way reduced the efficiency of the machinery.[274] Therefore, on these facts, even if a warning had been given, the court should not allow the manufacturer to avoid liability, for any warning would have had limited effect, whereas slight design modificiations would have reduced greatly the inherent risks of the product.

Three federal cases dealing with product-related injuries suffered in the State of Montana illustrate the intricacies of reasoning courts use to impose liability for failure to adequately warn consumers. The first, *Davis v. Wyeth Laboratories, Inc.*,[275] is the most problematic. The plaintiff sued the manufacturer of Sabin Type III polio vaccine when, after taking the vaccine, he contracted polio and became paralyzed from the waist down. He grounded his claim in negligence, failure to warn, strict liability in tort, and implied warranty. The court first rejected any claim of negligent manufacture, finding the product to be precisely what was intended.[276] The court next decided that it was not necessary to distinguish between strict liability in tort or in warranty because it felt the difference was largely one of terminology.[277] The court stated explicitly that duty to warn is a strict liability concept:

> While appellant alleged negligent breach of a duty to warn as an independent claim, we regard failure to warn, where the circumstances of sale imposed that duty, as exposing the vendor to trict (*sic*) liability in tort . . . .[278]

At the outset, the Ninth Circuit adopted the reasoning of Dean Wade, holding that liability may attach despite the lack of any "impurity" in the product because "the true test in a case of this kind is whether the product was unreasonably dangerous."[279]

The court rejected the defendant's contention that the risk was so trifling in comparison to the potential benefits that it should not be found liable. It found instead that the defendant owed the plaintiff a duty to fully and effectively inform him of the risks involved in taking the vaccine and that "the failure to meet this duty rendered the drug unfit in the sense that it was thereby rendered unrea-

274. *Id.* at 489, 525 P.2d at 1035.
275. 399 F.2d 121 (9th Cir. 1968).
276. *Id.* at 126.
277. *Id.*
278. *Id.* at 127.
279. *Id.* at 128 (footnote omitted).

sonably dangerous."[280]

Although the result appears fair and accords with the policies of strict liability, one group of writers has pointed to a significant deficiency in the court's reasoning.[281] The court decided that it was the failure to warn which made the product "defective"; however, even if there had been a warning, it would not have made the drug any less dangerous to the user. A warning would not have reduced the inherent incidence of risk in taking the drug, but would have enabled the plaintiff to make an informed choice. Thus, the manufacturer's liability should be viewed under the rubric of informed consent. By failing to inform the plaintiff of the probability of harm in taking the drug and the probability of contracting polio without the drug, the manufacturer did not obtain the plaintiff's informed consent.[282] Nonetheless, the court's philosophy was sound when it reasoned that failure to warn of inherent risks involved with use could make a product unreasonably dangerous and thereby justify imposition of strict liability.

The facts in the two other cases which followed *Davis* more closely fit into the normal framework of strict liability for inadequate warnings. In *Jacobson v. Colorado Fuel & Iron Corp.*,[283] the court expressly relied on *Davis*, saying:

> *Davis* distills the essence of the rule to be that the manufacturer is under a duty to warn of dangers in "nondefective" but potentially harmful products . . . . [I]f the product is unreasonably dangerous and a warning should be given but is not given, then the product is automatically defective . . . .[284]

The court, however, found that the manufacturer had no duty to warn the plaintiff's decedent if his supervisory personnel had sufficient knowledge of the danger.[285]

The question of who must receive the warning was also of critical import in *Jackson v. Coast Paint & Lacquer Co.*[286] The plaintiff in *Jackson* was using defendant's spray paint inside a railroad tank car when the fumes ignited and severely burned him. The paint cans

280. *Id.* at 130.

281. Twerski, Donaher, Weinstein & Piehler, *supra* note 262, at 517-21.

282. Notably, the language in the opinion suggests that the court had merged the principle of informed consent with the adequacy of warning issue. In discussing the manufacturer's duty to the consumer, the court said that no person should be obliged to submit himself to experimentation with new drugs unless it is "by his *voluntary and informed choice* or a choice made on his behalf by his physician." Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 129 (9th Cir. 1968) (emphasis added).

283. 409 F.2d 1263 (9th Cir. 1969).

284. *Id.* at 1271.

285. *Id.* at 1273.

286. 499 F.2d 809 (9th Cir. 1974).

contained warnings to use the product with adequate ventilation, but testimony at trial showed that the plaintiff and his coworkers understood those warnings to mean that there was danger from breathing toxic vapors, not from fire.[287] Other testimony indicated that plaintiff's employers knew of the danger, and the defendant relied on *Jacobson* for the proposition that a warning to the ultimate user was unnecessary; but, the court distinguished *Jacobson* and held that where a product such as paint would be used without direction or supervision by technicians or engineers, the warning must be given to the ultimate user.[288]

Courts should attempt to decide any conscious design case by initially evaluating the dangerousness of an otherwise unflawed product through analysis of the adequacies of any warnings given. In so doing, courts must focus on the actual or potential effectiveness of the warning in light of the environment of use of the product, the value of that warning in reducing the risks associated with use of the product, and the feasibility of design modifications which would reduce the risks without affecting functional utility of the product. If resolution cannot be accomplished through this process, courts must then engage in a somewhat more complicated balancing process.

d. Risk-Utility Balancing in Design Cases

Often the court ultimately is required to evaluate the relative safety of the chosen design and the feasibility of safer alternatives. When that occurs, the court must balance the risks created by the particular design against the product's functional utility.[289] At that point, Professor Henderson would preclude courts from adjudicating the issue of the manufacturer's liability for marketing the product with the particular design chosen.[290]

Other commentators, however, have noted several reasons why these questions still properly belong within the judicial bailiwick.[291]

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287. *Id.* at 811.

288. *Id.* at 812-14.

289. *See, e.g.*, Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972). In *Bexiga*, the plaintiff was injured when the ram of a punch press accidentally descended and hit his hand. The plaintiff presented expert testimony which described two types of safety devices which could have been incorporated into the machine. The court held:

> [W]here there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purpose.

Id. at 285.

290. *See* discussion pp. 258, 261-62 *supra*.

291. *See* Twerski, Donaher, Weinstein & Piehler, *supra* note 262, at 525-28.

First, judicial evaluation of a conscious design focuses on one specific aspect of that design, safety. All other factors which an engineer uses in choosing the design, such as aesthetics, cost, and marketability, are secondary. The court "reexamines the design, taking into account all the factors that the design engineer must account for, with one difference: in this forum, they are viewed in light of their ultimate impact on safety."[292]

Second, courts are not actually setting design standards when they evaluate the dangerousness of a product. Courts are not substituting their judgment for that of the engineer in choosing the precise design that a product must have; they are only saying that the design chosen is not good enough. They simply are deciding that the product as so designed does not meet a minimum, reasonably acceptable level of safety.[293] One way for courts to make that type of decision is to consider the feasibility of alternative designs. If feasible alternatives exist which would provide a greater level of safety and which would have reduced the risks and prevented injury to the plaintiff, without unreasonably affecting the functional utility of the product, then the court should find that the manufacturer is strictly liable for any injuries to users of the product.[294] At that point, courts return to the balancing of risk versus utility which inheres in the notion of unreasonable danger. When the functional utility of the product would not be affected or would be only slightly affected by safer alternative designs, then the manufacturer is strictly liable for injuries to the consuming public which result from placing such a product on the market. By contrast, in some rare situations:

> [T]he utility of the article may be so great, and the change of design necessary to alleviate the danger in question may so impair the utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale.[295]

To fully effectuate this balancing, courts should consider the following factors among those enumerated by Dean Wade and recently approved by the Oregon Supreme Court:

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292. *Id.* at 527.

293. *Id.*

294. *See, e.g.*, Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974), *discussed at* pp. 264-65 *supra*; Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972), *discussed at* note 289 *supra*.

295. Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033, 1038 (1974). In such a case, the manufacturer would still be liable if it had not provided clear and conspicuous warnings regarding the hazards of using the product, so that the consumer would know of the risks and be able to take adequate precautions should he decide to encounter those risks.

1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
2) The safety aspects of the product - the likelihood that it will cause injury and the probable seriousness of the injury.
3) The availability of a substitute product which would meet the same need and not be as unsafe.
4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.[296]

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296. Roach v. Kononen, 269 Ore. 451, 464, 525 P.2d 125, 128 (1974) (citing Wade, *supra* note 181, at 837-38). The court and Dean Wade enumerate three other factors:

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

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

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

The authors believe Professor Vetri's analysis of these three factors is correct. He criticizes (5) because it rings of contributory negligence which is inappropriate in a strict liability case and (6) because it suggests there is no liability for "patent" as opposed to "latent" dangers, a doctrine which increasingly is being rejected by the courts. Factor (7) will determine whether strict liability should be imposed on a particular manufacturer, but it should not be part of the balancing to decide whether a given product is unreasonably dangerous. *See* Vetri, *Products Liability: The Developing Framework for Analysis, supra* note 218, at 303-04 and cases cited therein.

Professor Vetri recently proposed another balancing framework which complements many of the principles set forth herein and which may be quite useful in evaluating the dangers of a product:

Risk versus Feasibility of Risk Elimination Analysis (utility v. risk): Balancing of Factors

a. *Risk*
   (1) What risks of harm were created by the alleged unreasonably dangerous condition of the product?
   (2) What is the probability of such risks causing harm?
      (a) Analyze all of the circumstances concerning the likelihood of occurrence of the harm including human nature and the tendency of people to be careless on occasion.
      (b) Consider the user's ability to avoid danger by the exercise of care in the use of the product.
      (c) Consider the user's anticipated awareness of the dangers in the product and their avoidability, because of general public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions.
   (3) What is the gravity of the harm such risks could cause?

b. *Feasibility of Risk Elimination*
   (1) Consider the availability of alternative products which would meet the same need and not be as unsafe.
   (2) Consider the manufacturer's ability to eliminate the unsafe character of the product without substantially impairing the product's usefulness or making it too expensive.
   (3) Consider the social utility of the product if the alleged unreasonably dangerous condition cannot be reasonably eliminated.

Vetri, *Products Liability: The Prima Facie Case, supra*, note 218, at 1132.

Employing those factors, courts, without exceeding their intrinsic capabilities, can measure whether a product presents unreasonable danger and impose strict liability in tort on a manufacturer for conscious design choices.[297]

D. Theories - Recommendations

Plaintiffs injured by unsafe products typically plead in the alternative three theories of recovery - warranty, negligence and strict liability in tort. Because product-related injury litigation continues to be relatively new and many issues remain unresolved, attorneys are justifiably chary of relying on a single theory which they may fail to prove at trial and with which a trial court judge might not be familiar. Although justifiable, that reluctance should not inhibit the bar from moving gradually to plead and prove a single cause of action based on strict liability in tort for all physical injuries caused by unsafe products.[298]

1. Warranty

Warranty liability is rooted in contract law. Thus, privity, disclaimers and required notice of breach under pre- and post-UCC commercial law are often substantial obstacles to recovery.[299] Warranties, whether express or implied, depend upon some form of representation by the seller and expectation of reliance thereon by the buyer.[300] As such, warranties work best when used to impose liability, in a commercial context, for inadequacies in bargained-for products; they function least effectively to provide injury reparation for

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297. Courts have balanced risk against utility to determine the unreasonableness of the dangerous condition of a given product in numerous cases. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974); Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974); Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972); Metal Window Prods. Co. v. Magnusen, 485 S.W.2d 355 (Tex. Civ. App. 1972); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d. 641, 274 N.E.2d 828 (1971); Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

298. *See* Green, *supra* note 53, at 1192. Dean Keeton says:

> My principal thesis is and has been that theories of negligence should be avoided altogether in the products liability area in order to simplify the law, and that if the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow.

Keeton, *supra* note 216, at 409. In Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717 (1975), the appellate court upheld the trial court's refusal to submit a products case on both negligence and strict liability theories. The trial court had determined that the negligence issue was superfluous and allowed only the strict liability issue to go to the jury. *Id.* at 412, 533 P.2d at 719-20.

299. *See* discussion pp. 225, 240-41, 243-45 *supra*.

300. *See* discussion pp. 238-43, 245 *supra*.

the remote user.[301]

While language in part of the commentary of section 402A blurs the distinctions between products liability in warranty and in tort,[302] Dean Prosser, Reporter for the Second Restatement, made it quite clear that strict liability in tort under section 402A "is not subject to the various contract rules which have grown up to surround [the sale of goods]."[303] This blurring of liability in tort with language of warranty and buyer expectations may be understandable in light of the paucity of judicial decisions available to the drafters when they wrote the section, but this warranty language in the commentary should not be used to drag the baggage of warranty into a tort action.[304] Unless the plaintiff is seeking recovery for economic loss alone resulting from bargained-for, but inadequate, products, running the gauntlet of proving warranty will not avail plaintiff of anything not already enjoyed under strict liability in tort.[305]

2. *Negligence*

There is considerable need to clarify the differences between negligence and strict liability theories of recovery in product injury litigation. Commentators and courts have described the similarities between the elements of proof in, and the results of, products litigation under negligence and strict liability.[306] These similarities, how-

301. This is particularly critical in a state such as Montana in which the economy is primarily oriented to agricultural and mineral resource development for external consumption and which, in turn, depends upon external manufacture of industrial products for internal use.

302. RESTATEMENT (SECOND) OF TORTS 402A, Comments *c* and *g* (1965) (Comment *c* speaks of consumer expectations, reliance and sellers standing behind their goods; Comment *g* speaks of conditions "contemplated" by the consumer).

303. *Id.* Comment *m*.

304. *See* W. PROSSER, *supra* note 3, § 98, at 656-58. *See also* Greenman v. Yuba Power Prods. Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

305. The issue of recovery for purely economic loss under a theory of strict liability in tort is beyond the scope of this article. Courts have disagreed over this issue. *Compare* Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) *with* Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The issue should depend upon the relationship of the parties. If the parties have entered into a contractual relationship, then it seems clear that warranty liability under the UCC should control. However, if the parties are only remotely related and the consumer has suffered a loss for which he cannot recover under a warranty theory, then on some facts, it may be appropriate to allow recovery under strict liability. *See* Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 152-58, 45 Cal. Rptr. 17, 24-30 (1965) (Peters, J., concurring and dissenting). *See also* Brown v. Western Farmers Assoc., 268 Ore. 470, 521 P.2d 537 (1974). When purely economic loss, such as lost profits, is directly associated with injury to property or person, it seems fairly clear that courts will have little difficulty in finding liability for the economic loss as well as the personal or property damage. *See* Hales v. Green Colonial, Inc., 490 F.2d 1015, 1021-22 (8th Cir. 1974). It is only when the purely economic loss is not tied to personal and property damage that courts have struggled to resolve that issue.

306. *See* discussion and authorities cited pp. 230-32 *supra*.

ever, engender confusion rather than confidence on the part of the bench and bar when handling product cases.[307] Some courts simply treat the concepts as indistinguishable,[308] while others treat each distinctly and find error in jury instructions which tend to confuse those issues.[309]

Furthermore, the presence of a balancing process which inheres in both the evaluation under a negligence theory of a manufacturer's conduct pursuant to a reasonable person standard and evaluation under a strict liability theory of a product pursuant to the unreasonable danger standard tends to encourage commingling of the concepts.[310] Balancing, however, is not a process which is exclusive to negligence. For instance, under common law theories of tort liability for abnormally dangerous activities, the courts use a balancing process to determine whether to impose liability for resultant injury.[311] It is the focus of the balancing process in a strict liability case which distinguishes it from the balancing in a negligence case. *In a strict liability case the balance focuses on the dangerousness of the product, not the reasonableness of the manufacturer's conduct.*[312] If the product is unreasonably dangerous because of flaws in manufacture or design, or because of inadequate warnings, the manufacturer is strictly liable for his conduct in placing the product on the market; the manufacturer's exercise of due care—a negligence concept—is irrelevant.[313] As the Oregon Supreme Court noted in *Roach v. Kononen*:

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307. *See* discussion of Professor Kiely's thesis regarding the "crisis of confidence" in products liability litigation, p. 223 *supra*.

308. *See, e.g.*, Balido v. Improved Mach., Inc., 29 Cal. App.3d 633, 640, 105 Cal. Rptr. 890, 895 (1973).

309. *See, e.g.*, Eshbach v. W. T. Grant's and Co., 481 F.2d 940, 944 (3d Cir. 1973); Lunt v. Brady Mfg. Corp., 13 Ariz. App. 305, 307, 475 P.2d 964, 966 (1970). *Cf.* Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (negligence and strict liability treated distinctly).

310. *See* discussion p. 257 *supra*.

311. *See generally* W. PROSSER, *supra* note 3, § 75, at 494-96; RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964). Dean Wade also notes this analogy. Wade, *supra* note 181, at 835-36.

312. Roach v. Kononen, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974). *See also* Green, *supra* note 53, at 1186, 1202-03.

313. The distinctions between recovery under negligence and under strict liability become clearer if one adopts the rule proposed by Dean Wade, *supra* note 181, at 834-35, and Dean Keeton, *supra* note 216, at 404, 408. This rule imputes to the manufacturer in a strict liability case knowledge of the dangerous condition of the product it is placing on the market. Thus, "a greater burden is placed on the manufacturer . . . because the law assumes he has knowledge of the article's dangerous propensity which he may not reasonably be expected to have, had he been charged with negligence." Roach v. Kononen, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974). That rule has been utilized by courts in many jurisdictions. *E.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974); Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971). Full discussion of this rule may be found in Vetri, *Products Liability: The Developing Framework for Analysis*, *supra* note 218, at 296-302.

> The article can have a degree of dangerousness which the law of strict liability will not tolerate *even though the actions of the designer were entirely reasonable* in view of what he knew at the time he planned and sold the manufactured article.[314]

3. *Strict Liability*

Plaintiffs should endeavor to plead and prove their cases in strict liability alone. Pleading both theories may have practical consequences which make recovery under strict liability less likely. Pleading negligence in addition to strict liability permits the defendant to introduce a barrage of evidence showing its exercise of due care and its careful and prudent manufacture and allows it to prove any of the traditional negligence defenses. Under the onslaught of due care evidence, juries may not be able to separate plaintiff's theories and may not understand fully that due care and negligence defenses are relevant to one claim and not to the other. Therefore, juries may base a verdict for the defendant manufacturer on its showing of due care or contributory negligence even though the plaintiff had proved a strict liability case. The effective result may be that a strict liability action is subjected to the rules and limitations of a negligence action.[315]

Admittedly, if there is substantial evidence of fault on the part of the manufacturer, plaintiffs' attorneys may justifiably believe that they will be able to obtain larger jury awards if they plead and prove negligence as well as strict liability. Moreover, pleading strict liability alone exposes the plaintiff to the risk that trial judges inexperienced in products litigation may improperly permit introduction of irrelevant evidence of due care. That error may result in verdicts for defendant manufacturers despite clear liability under a strict liability theory. Furthermore, judges who have had little exposure to strict liability may improperly dismiss on technical grounds cases brought solely on that new theory.

Given these very real risks today, plaintiffs' attorneys may conclude that alternative pleading is still the best practice. In the future, however, they should attempt to educate themselves and the rest of the bar in the policies and elements of strict liability in tort. Plaintiffs' attorneys should consider pleading a single claim under strict liability and then submit to the court a motion in limine[316] to

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314. 269 Ore. 457, 465, 525 P.2d 125, 129 (1974) (emphasis added).

315. Green, *supra* note 53, at 1212, (citing Hauter v. Zogarts, 14 Cal.3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (appellate court upheld judgment for plaintiff notwithstanding jury verdict for defendant)).

316. A motion in limine is a threshold or preliminary motion to exclude evidentiary

preclude submission of evidence of due care or contributory negligence at trial. If that motion is denied by the trial judge, counsel must petition the supreme court for a writ of supervisory control to clarify the issue.[317] If that fails, the trial court should permit the plaintiff to amend his pleadings to add a claim in negligence.[318] Hopefully, clear and concise direction from the supreme court will make use of these procedures unnecessary.

III. Other Important Strict Liability Issues

Apart from this general conceptual framework for analyzing strict liability cases, there are other, less crucial, but still important, issues which arise in strict liability litigation. The following group of issues selected for discussion is not meant to be all-inclusive but rather is intended to highlight problems which counsel frequently encounter. The goal is to alert the bench and bar to these issues as areas of potential controversy and to suggest ways to resolve them, not to analyze them in depth.

A. Comparative Negligence and Strict Liability

Two years after judicial adoption of strict liability under section 402A,[319] the legislature further altered the course of tort litigation in Montana by adopting a modified form of comparative negligence.[320] The statute changed the harsh common law doctrine of contributory negligence, providing that negligence of the person seeking relief will not bar recovery if such negligence is not greater than the negligence of the person against whom recovery is sought.[321] Under the statute, the plaintiff's damages are simply diminished in proportion to the amount of negligence attributable to him.[322] One unresolved question, however, is whether the legislative policy of comparative negligence should apply to the judicial doctrine of strict liability in tort.

Section 402A commentary eliminates some forms of contributory negligence as defenses to a strict liability claim for relief because

material "which might, by its mere mention, result in prejudice on the part of the jury." Note, *The Motion in Limine - A Useful Procedural Device*, 35 Mont. L. Rev. 362 (1974).

317. Rule 17, Mont. R. App. Civ. P.

318. Rule 15, Mont. R. Civ. P. (providing for amendment by leave of court to be "[f]reely given when justice so requires.")

319. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973).

320. 175 Mont. Laws, ch. 60, § 1 (codified at R.C.M. 1947, § 58-607.1 (Supp. 1975)).

321. R.C.M. 1947, § 58-607.1 (Supp. 1975).

322. *Id.*

"the liability with which this Section deals is not based upon negligence of the seller. . . ."[323] Thus it would seem to follow logically that a defense grounded in negligence - whether contributory negligence or comparative negligence - should have no application in a section 402A action. The few courts which have dealt with the issue, however, have not agreed on the effect that a comparative negligence statute will have on strict liability claims.[324]

Courts which have applied comparative negligence to strict liability actions have advanced different theories to support that application. A federal court in New Hampshire reasoned that because the state supreme court previously had allowed contributory negligence as a complete defense in strict liability actions, it also would apply the State's new comparative negligence statute to such actions.[325]

The Wisconsin Supreme Court decided that a strict liability action was, in effect, a negligence action.[326] The court could ascertain no meaningful distinction between liability imposed for violation of a legislative safety standard and liability imposed for violation of a court-adopted rule of strict liability; both violations constituted negligence per se.[327] Thus, the court held that a negligence defense based on the State's comparative negligence statute was still available to the defendant.[328] The court explained that it had adopted strict liability to relieve plaintiffs of the difficult burden of proving specific acts of negligence and to preclude defenses related to war-

323. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n* (1965).

324. Four States have applied, or have indicated in dicta that they will apply, comparative negligence in strict liability cases: Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55, 64-65 (1967); Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972); West v. Caterpillar Tractor Co., 336 So.2d 80, 90 (Fla. 1976); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 43 (Alas. 1976).

Federal courts, interpreting state law, have decided that the supreme courts of four additional States will apply comparative negligence in strict products liability cases: Chapman v. Brown, 198 F. Supp. 78, 85 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676-83 (D. N.H. 1972); Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975) (interpreting Mississippi law).

Courts in two States have stated that comparative negligence does not apply in strict liability cases: Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974); Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976). The Supreme Court of California, without directly addressing the issue of the comparative negligence defense, has indicated that comparative negligence will not be applied under California's judicially created strict liability doctrine. Horn v. General Motors Corp., 131 Cal. Rptr. 78, 551 P.2d 398, 403 (1976). Yet another comparative negligence jurisdiction stated flatly that negligence defenses have no application to strict liability, but, like the California court, spoke in terms of contributory rather than comparative negligence. Parzini v. Center Chemical Co., 134 Ga. App. 414, 214 S.E.2d 700, 702 *rev'd on other grounds*, 234 Ga. 868, 218 S.E.2d 580 (1975).

325. Hagenbuch v. Snap-On Tools, 339 F. Supp. 676, 683 (D. N.H. 1972).

326. Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

327. *Id.* at 64-65.

328. *Id.*

ranty theories of liability; it had not intended to impose absolute liability or to make the seller an insurer.[329]

The Alaska Supreme Court applied comparative negligence to a strict liability case to distribute the losses between the parties, making the seller strictly liable, but not for the damage which the plaintiff caused through his own negligence.[330] The court decided that applying comparative negligence in a strict liability action would be logical and consistent with the law of products liability. The plaintiff should not be allowed to recover full damages in a strict liability action when he would recover less in a negligence action based on the same injuries from the same product.[331]

The courts which have refused to apply comparative negligence in strict liability cases have based refusal on interpretation of the language of the particular State's comparative negligence legislation, in light of the language and policies of section 402A. The Oklahoma Supreme Court rejected the manufacturer's contention that comparative negligence should apply, saying that the state statute "has no application to manufacturers' products liability, for its application is specifically limited to *negligence actions* . . . manufacturers' products liability is not negligence. . . ."[332] The Colorado Court of Appeals similarly reasoned that: "Products liability under section 402A does not rest upon negligence principles . . . the focus is upon the nature of the product . . . rather than on the conduct either of the manufacturer or of the person injured because of the product."[333]

This latter approach to comparative negligence is more persuasive; statutory comparative negligence has no place in a strict liability action for product injuries. In Montana, this view is supported by the core philosophy underlying judicial adoption of strict liability, the practical consequences of allowing negligence-based defenses, and the legislative history of the State's comparative negligence statute.

In *Brandenburger*, the Montana Supreme Court made it clear that the policies of diverting the risk of loss from the individual consumer to the manufacturer and deterring the introduction of dangerous products in the market underlay adoption of section 402A

329. *Id.* at 63. The rationale for adoption of strict liability in Montana is clearly distinguishable. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 514-15, 513 P.2d 268, 273 (1973). *See* discussion p. 277 & note 334 *infra.*

330. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alas. 1976).

331. *Id.* This holding also ignores the policy reasons such as risk spreading and deterrence which make a strict liability case distinct from a negligence case.

332. Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974).

333. Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976).

as the rule of law in this State.[334] Using comparative negligence to limit damages recoverable by the plaintiff would burden the individual with the loss even though the manufacturer initially created the risk of injury to the plaintiff by marketing the dangerous product and also would reduce the deterrence value of section 402A. The Restatement imposes strict liability for the *sale* of the product which injuries the plaintiff. It is the manufacturer's risk-creating conduct which exposed the plaintiff to danger; if the product had never been placed on the market the plaintiff never would have encountered the risk. The manufacturer should pay the cost of plaintiff's injuries because its activity exposed him to the risks and it received the economic benefits of the activity.

Moreover, application of comparative negligence principles to reduce plaintiff's recovery in a strict liability action will have serious practical consequences in the trial of a strict liability action. Introduction of evidence of negligence and due care in a strict liability case will tend to confuse the issue of the manufacturer's liability.[335] Under section 402A, the manufacturer is liable for the sale of a defective, dangerous product; presence or absence of due care is not a factor in the imposition of liability. The manufacturer may be entirely free from negligence, yet still be liable. But, if comparative negligence principles were to apply, the jury in some instances would be asked to balance the negligent conduct of the plaintiff against conduct of the defendant which is not characterized as negligent. If the plaintiff has been even slightly careless in using the product, he will be forced to show negligence on the part of the manufacturer to counterbalance his own negligence. The likely result will be jury denial of full recovery, even though the manufacturer's due care should not otherwise insulate it from liability under section 402A. Comparison of the negligence of the manufacturer to the negligence of the plaintiff would reduce strict liability to a mere form of words and would result in improper denial of numerous claims.

Finally, the Montana comparative negligence statute speaks only to negligence claims; applying it to a strict liability action would require exceedingly strained judicial construction and would contravene the intent of the legislature. A bill making the comparative negligence statute applicable to torts of strict liability and clarifying other areas of tort law was introduced in the 1977 legislature.[336]

334. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 514, 513 P.2d 268, 273 (1973).

335. *See* discussion pp. 271-74 *supra*.

336. H.R. 320, 45th Legis. (1977). [After this article was written, H.R. 320 was passed and signed by the Governor.—Ed.]

Although the bill in modified form has passed the House and is presently in the Senate where it appears likely to pass and become law, the crucial section making comparative negligence applicable to strict liability was deleted from the bill before it passed the House.[337] This confirms that the legislature in adopting comparative negligence did not intend it to apply to non-negligence torts such as strict liability under section 402A. If the legislature had intended it to so apply, it would have retained that language in the present bill to clarify its intent in passing the original legislation.[338]

B. Strict Liability Defenses

Although judges and attorneys should not be allowed to use comparative negligence to reduce the plaintiff's recovery in strict liability, the defendant manufacturer is not without defenses to the

337. Before it was deleted the section read: "For the purposes of this act, 'negligence' includes torts of strict liability and breach of warranty to the extent that they would, apart from 58-607.1, give rise to the defense of contributory negligence." H.R. 320, 45th Legis. § 5 (1977).

338. One commentator has argued that comparative negligence is consistent with the risk spreading rationale of strict liability because it "allows a just and simple way of placing a part of the cost where it belongs - on the individual plaintiff." Schwartz, *Strict Liability And Comparative Negligence*, 42 TENN. L. REV. 171, 179 (1974). Professor Schwartz would have courts in States with comparative negligence statutes adopt a pure form of comparative negligence as part of the State's common law. *Id.* at 180. That approach still downgrades the practical consequences of requiring the jury to consider the plaintiff's conduct in awarding damages. It is like comparing apples and oranges to compare plaintiff's fault to the conduct of the defendant in which fault is irrelevant. Dean Green, however, takes the position that even though liability is strict and not subject to comparison of fault, there still may be reason to reduce damage awards on the grounds of the common law rule of avoidable consequences. That rule does not create a defense; instead, it is a rule of damages whereby plaintiff's recovery is precluded for those items of damages which could reasonably have been averted by him. Green, *supra* note 53, at 1216-17 (citing C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 33, at 129 (1935)). The authors, nonetheless, believe that requiring juries to consider plaintiff's conduct may result in improper denial of recovery because it will require introduction of otherwise irrelevant and extraneous evidence which will confuse the central issue of liability.

Under the Restatement framework for strict liability, contributory negligence is no defense, whereas assumption of risk is. *See* discussion pp. 279-82 *infra*. One strong argument for using a comparative negligence rule is that it will allow plaintiffs to recover even when they have assumed the risk of using the dangerous product. Proponents argue that it would be anomalous to allow some recovery in negligence (reduced by risk assumed) and yet deny all recovery under strict liability. *See* Vetri, *Products Liability: The Prima Facie Case*, *supra* note 218, at 1127, *accord*, Vetri, *Products Liability: The Developing Framework for Analysis*, *supra*, note 218, at 314 n. 99. This argument is consistent with the notion that the defendant should be held liable for having placed the risk-creating production on the market. *See* discussion pp. 247, 253-55 *supra*. However, it does not match the position taken regarding the practical consequences of trying a products case under a comparative negligence rule. For that reason, the authors advocate continued reliance on the Restatement framework of defenses to a strict liability claim, while carefully limiting the applicability of the assumption of risk defense. *See* discussion pp. 280-82 *infra*.

plaintiff's claim. Certain conduct of the plaintiff may defeat recovery. The section 402A commentary provides a starting point for discussion of these defenses.

1. *Contributory Negligence*

Comment *n* of section 402A states flatly: "[C]ontributory negligence . . . is *not* a defense when such negligence consists merely in a failure to discover the defect . . . or to guard against the possibility of its existence."[339] Under that view, plaintiff's failure to exercise the due care required by the objective standard of the reasonably prudent person does not bar recovery and plaintiff is not required to affirmatively plead exercise of due care.[340] The overwhelming majority of jurisdictions that have adopted strict liability for defective products has followed that rule; only two jurisdictions have not.[341]

Contributory negligence was not considered in either *Brandenburger* or *Barich*, and thus, it is unclear whether the Restatement view will be followed.[342] However, two federal cases aris-

339. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n* (1965) (emphasis added).

340. *See* Williams v. Brown Mfg. Co., 45 Ill.2d 418, 261 N.E.2d 305, 309-10 (1970) (in a strict liability case a greater degree of culpability, amounting to assumption of risk, is necessary to preclude recovery).

341. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 107-08 (1972) (citing Stephan v. Sears, Roebuck & Co., 110 N.H. 248, 266 A.2d 855 (1970), and Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967), as the two exceptions).

342. It should be noted that in Oltz v. Toyota Motor Sales, U.S.A., Inc., 166 Mont. 217, 531 P.2d 1341 (1975), the court did deal with the issue of contributory negligence in a strict liability case. The court decided that the driver of the Toyota which crashed and killed the plaintiff's decedent in *Brandenburger* was barred from recovery by the prior jury finding that he had been *grossly negligent* in operating the vehicle.

Thus, contributory negligence may be available as a defense in those limited situations where the person seeking recovery operated the vehicle in a grossly negligent manner and the defective condition of the vehicle played no part in the original collision, but merely enhanced the subsequent injuries. *Id.* at 220, 531 P.2d at 1343.

Beyond the limited applicability of this holding, there is considerable ground for questioning the reasoning and authority the court used in reaching its decision. Justice Castles said that the court had examined the authorities cited by both parties before deciding; however, neither of the cases cited in the opinion in any way supports the decision reached. The first, Adams v. Ford Motor Co., 103 Ill. App.2d 356, 243 N.E.2d 843 (1968), was a lower appellate court opinion which had been effectively overruled by the Illinois Supreme Court nearly five years before the *Oltz* decision. In *Adams*, the court relied on an earlier opinion which was specifically reversed by the supreme court in Williams v. Brown Mfg. Co., 45 Ill.2d 418, 261 N.E.2d 305 (1970).

The second case relied on, General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969), did not even involve second collision liability or the defense of contributory negligence. At trial the plaintiff had recovered a substantial judgment against the manufacturer and on appeal the judgment was affirmed. The trial court had given certain instructions regarding the negligence of the plaintiff as a defense, but the appellate court made it clear that the instructions dealt with *misuse* of the product, *not contributory negligence*. *Id.* at 680. *But cf.*

ing in Montana will provide guidance for the supreme court when it first confronts the issue.[343] In each case, the Restatement view was not questioned; plaintiff's carelessness would preclude recovery only if it consisted of voluntarily embracing known dangers, not mere failure to exercise the objective standard of due care.[344]

2. *Assumption of Risk*

Some forms of conduct on the part of the plaintiff may defeat his strict liability claim. Comment *n* of section 402A points to the kind of conduct which will prevent recovery: "[C]ontributory negligence which consists in *voluntarily and unreasonably* proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability."[345] Whereas the standard for the contributory negligence which is no defense is objective, the standard for assumption of risk, which is a defense, is subjective and requires that plaintiff use the product after acquiring actual knowledge of its dangers.[346]

Whether the plaintiff's conduct demonstrates that he did assume the risk will depend on a variety of factors. The plaintiff must know the facts that create the danger and must comprehend the danger;[347] his age, experience, and intelligence must be considered.[348] Most courts require the defendant to prove that the plaintiff actually

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Jacobson v. Colorado Fuel & Iron Corp., 409 F.2d 1263 (9th Cir. 1969) (holding that where the product will be used under the supervision of the employer, the manufacturer will not be liable to the employer for failure to warn).

343. Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974); Tomicich v. Western-Knapp Eng'r, Co., 423 F.2d 410 (9th Cir. 1970). Federal cases treating fact situations arising in Montana are often looked to for guidance by the Montana Supreme Court if the court has not previously decided a particular issue. For example, in Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 512-13, 513 P.2d 268, 272 (1973), the court noted that in Hornung v. Richardson-Merrill [sic], Inc., 317 F. Supp. 183 (D. Mont. 1970), and Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968), federal courts had anticipated eventual adoption of strict liability as the law of the state.

344. Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 814-15 (9th Cir. 1974) (specifically citing with approval Comment *n* and holding that contributory negligence would bar recovery only if plaintiff was aware of and unreasonably embraced the danger); Tomicich v. Western-Knapp Eng'r Co., 423 F.2d 410, 413 (9th Cir. 1970) (denying recovery because of voluntary exposure to known danger).

345. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *n* (1965) (emphasis added).

346. Noel, *supra* note 341, at 121-22; RESTATEMENT (SECOND) OF TORTS § 496D, Comment *c* (1965). *See also* Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 815 (9th Cir. 1974); D'Hooge v. McCann, 151 Mont. 353, 443 P.2d 747 (1968).

347. *Id. See generally* W. PROSSER, *supra* note 3, § 68, at 447; *cf.* Hanson v. Colgrove, 152 Mont. 161, 447 P.2d 486 (1968).

348. *See, e.g.*, Saeter v. Harley-Davidson Motor Co., 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (1960) (twenty-eight year old plaintiff with six years of experience riding motorcycles brought an action for injury from defective motorcycle).

realized the danger; but, because it sometimes may be impossible to prove actual knowledge, some courts will permit proof by circumstantial evidence that the plaintiff "should have been aware" of the risk in view of all the circumstances.[349] However, a recent Ninth Circuit case arising on appeal from a Montana district court, *Jackson v. Coast Paint & Lacquer Co.*,[350] held that the knowledge of the plaintiff's employer will not be imputed to the plaintiff and required that the defendant show that the actual user of the product understood the product's hazards and voluntarily assumed the risk.[351]

Even if the risk is known, plaintiff does not assume it unless his decision is entirely free and voluntary. Thus, although an employee who fully appreciates the danger of a defective machine may be compelled to encounter that risk if he desires to keep his job, the manufacturer should not be relieved of liability if the employee later is inadvertently injured by the product.[352] Similarly, because of time constraints or other pressures such as the unavailability of alternative products, the plaintiff's decision to use a product he knows is dangerous may not be wholly voluntary.[353]

Moreover, insulation of the manufacturer from liability seems questionable when the manufacturer markets a product having open and obvious dangers which may be eliminated economically and to which the user cannot always be attentive.[354] Obvious dan-

349. Downey v. Moore's Time-Saving Equip., Inc., 432 F.2d 1088, 1093 (7th Cir. 1970); Bereman v. Burdolski, 204 Kan. 162, 164, 460 P.2d 567, 569 (1969).

350. 499 F.2d 809 (9th Cir. 1974).

351. *Id.* at 815.

352. Thus, in Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971), the court properly rejected the defendant's contention that the plaintiff had "voluntarily" placed her fingers in such a position that they were severed by the machine. The court concluded that "if the plaintiff's fingers became placed in a dangerous position in the machine by reason of inadvertence, momentary inattention or diversion of attention, that this would not amount to assumption of the risk." *Id.* at 774.

353. Professor Vetri emphasizes the additional requirement that the plaintiff's conduct in assuming the risk be "unreasonable" as well as knowing and voluntary. Vetri, *Products Liability: The Prima Facie Case, supra* note 218, at 1125. This requirement accords with the proposition that assumption of the risk should be available only in those limited circumstances when it is clear the plaintiff knowingly decided to encounter a risk with little or no necessity or compulsion to do so. It also comports with the literal language of Comment *n*.

354. A traditional limitation on a manufacturer's liability has been that he is not liable for open and obvious dangers when it can reasonably be presumed that the user was familiar with the risks of the using the product. W. PROSSER, *supra* note 3, § 96, at 649. *See, e.g.*, Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). But, that rule frequently has been criticized and, in the context of a strict liability cause of action, may have limited applicability. *See* Keeton, *supra* note 216, at 399-405; Wade, *supra* note 181, at 842-43. Dean Wade notes that the rule may be viable for products such as cigarettes and alcohol where the consumer freely accepts *unavoidable* dangers to his own person and for products such as hoes or axes where the dangers in use inhere in the utility of the product, but he is critical of the rule where the obvious dangers of

gers are analogous to warnings. Warnings are not always an effective means of reducing product risk, consequently manufacturers may be forced to make design alterations as well as to give warnings in order to reduce the unreasonable dangerousness of their products.[355] Just as warnings alone do not preclude liability for defective designs, marketing products with patent hazards should not relieve the manufacturer from liability if inexpensive safety features could be provided to reduce those hazards.[356] In a design defect case the defense of assumption of risk arguably should be severely restricted; allowing that defense in such cases contravenes the policy of encouraging manufacturers to change hazardous designs.

C. *Foreseeability, Intended Use, and Abnormal Use*

The use to which the plaintiff put the product must have been reasonably foreseeable by the manufacturer. Unforeseeable use which results in injury to the plaintiff may preclude plaintiff's recovery because the product was not in an unreasonably dangerous defective condition, or under some circumstances, it may mean that plaintiff assumed the risk of such use.

Early in the development of strict liability under section 402A, courts relied on the doctrine of intended use to limit the range of risks for which a manufacturer might be held responsible.[357]

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the product could have been eliminated. The first question in those latter cases should be whether the product was unreasonably dangerous as sold—whether the utility of the product as designed outweighed the risks created by the design. *See, e.g.*, Luque v. McLean, 8 Cal.3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972) (rejecting instruction which required plaintiff to carry burden of showing that defect was *not* obvious); Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (rejecting defendant's contention that obviousness of peril precludes liability). *See also* Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973).

355. *See* discussion of warnings pp. 262-67 *supra*.

356. Thus, in Luque v. McLean, 8 Cal.3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), the court reversed a judgment for defendant manufacturer of a lawn mower which had mangled the plaintiff's hand when he slipped and accidently put his hand into the unguarded blade. The trial court erroneously had required the plaintiff to show that he was unaware of the dangerous condition. Testimony had indicated that the unguarded mower was very hazardous, that the risk of injury was foreseeable, and that the injury could have been prevented by a simple and inexpensive safety device. And, in Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972), the court refused to relieve the manufacturer of liability for injury to the plaintiff from a punch press which lacked a simple safety switch. As Professor Vetri has noted, if the product is unreasonably dangerous as designed and marketed, then evidence of the plaintiff's conduct in encountering those dangers should not be allowed as a defense "because to do so, in effect, repudiates the very duty established for the manufacturer: . . . [H]e should not be relieved of liability . . . when the lack of the safety device results in an injury that a fulfillment of the duty would have prevented." Vetri, *Products Liability: The Prima Facie Case*, *supra* note 218, at 1127.

357. *See* Kiely, *supra* note 9, at 932. Another area where courts have used concepts of foreseeability to limit recovery is in those cases where the product caused injury to a by-

Whereas only those risks which are remotely foreseeable or not foreseeable at all are excluded from liability under the negligence doctrine of foreseeability, the intended use doctrine limits liability to those risks which are *reasonably* foreseeable under *normal* use of the product.[358] The Illinois Supreme Court stated this view in *Winnett v. Winnett*:[359]

> In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for *the purpose for which it was intended* or for which it is *reasonably foreseeable* that it may be used.[360]

Since publication of section 402A in 1965, courts have employed the doctrine of intended use in this way to limit manufacturer liability.[361] Some courts, however, in an attempt to broaden the scope of liability without doing violence to the intended use doctrine, have expanded it to include the notion of a foreseeable "use environment" for each product. They emphasize that *where* a product is used is as important as *how* it is used in determining the spectrum of risks that must be foreseen by the manufacturer.[362] *Turcotte v. Ford Motor Co.*[363] exemplifies this effort:

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stander. *E.g.*, Winnett v. Winnett, 57 Ill.2d 7, 310 N.E.2d 1 (1974). The trend, however, seems to be either to reject foreseeability as a limit to bystander recovery or at least to give it a broader interpretation to permit bystander recovery. *See* Howes v. Hanson, 56 Wis.2d 247, 201 N.W.2d 825 (1972); Elmore v. American Motors Corp., 70 Cal.2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). *See also* Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970); Note, *Strict Products Liability to the Bystanders: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971).

358. Kiely, *supra* note 9, at 932. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

359. 57 Ill.2d 7, 310 N.E.2d 1 (1974).

360. *Id.* at 11, 310 N.E.2d at 4 (emphasis added).

361. *See* Kiely, *supra* note 9, at 933. Professor Kiely says the question has been debated most rigorously in the "second collision" cases where plaintiffs have sought to hold automobile manufacturers liable for *enhancement* of injuries in collisions, even though the initial collision was not caused by any defect in the product. The two conflicting lines of authority emanate from Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966) (denying recovery), and Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (allowing recovery). The *Evans* line of authority - limiting liability by relying on the concept of intended use - may still constitute a bare majority; however, the definite trend since 1970 has been toward the *Larsen* position. Judge Tamm of the District of Columbia Court of Appeals recently noted that: "The modern trend of the case law and increasingly the weight of authority favors *Larsen's* extended scope of liability." Knippen v. Ford Motor Co., 546 F.2d 993, 998 (D.C.Cir. 1976).

362. *See, e.g.*, Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973); Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D. D.C. 1972); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

363. 494 F.2d 173 (1st Cir. 1974).

> A literal . . . interpretation of "intended use" fails to recognize that the phrase was first employed in early products-liability cases such as Greenman . . . merely to illustrate the broader central doctrine of foreseeability. The phrase was not meant to preclude manufacturer responsibility for the probable ancillary consequences of normal use. . . . Instead, a manufacturer "must also be expected to anticipate the environment which is normal for the use of his product and . . . he must anticipate the reasonably foreseeable risks of the use of his product in such an environment."[364]

The Montana Supreme Court in *Brandenburger* appears to have adopted this more liberal view of foreseeability and intended use, choosing to follow the growing majority position that an automobile manufacturer is liable for conditions which enhance injuries on collision, even though the condition did not itself cause the collision, because collisions are predictable in the environment of intended use of the product: "[I]njuries are readily foreseeable as an incident to the normal and expected use of the car. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts."[365] Because this view better implements the policy bases underlying strict liability, the Montana bench and bar should retain this position and also apply the broader concepts of foreseeability and environment of use to products other than automobiles.[366]

If injury results from use which was unforeseeable within the use environment of the product, the product may be deemed not unreasonably dangerous.[366.1] As Comment *h* of section 402A states: "A product is not in a defective condition when it is safe for normal handling and consumption." The foreseeability of the particular use should be measured by an objective standard, not by the manufac-

364. *Id.* at 181.

365. Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 516, 513 P.2d 268, 274 (1973). The court also cited with approval the following language from Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968): "No rational basis exists for limiting recovery to situations where the defect in design or manufacture was a [*sic*] causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called 'second collision' of the passenger with the interior part of the automobile, all are foreseeable." Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 516, 513 P.2d 268, 274 (1973).

366. *See, e.g.*, Raymond v. Riegel Textile Corp., 484 F.2d 1025 (1st Cir. 1973) (flammable children's wear); Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962) (excellent refutation of intended use defense in a negligence case by manufacturer of poisonous furniture polish ingested by infant); Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962) (hula skirt ignited while wearer danced near open fire).

366.1. Ford Motor Co. v. Matthews, 291 So.2d 169 (Miss. 1974). The court noted that the foreseeability of misuse was a question for the jury. *Accord*, Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975).

turer's actual expectations.[367] Abnormal use which was not objectively foreseeable will not be an affirmative defense; instead, the plaintiff simply will be unable to show the existence of an unreasonably dangerous defective condition in the product when marketed.

If the plaintiff does not follow warnings regarding hazards associated with the foreseeable uses of the product, the first questions a court must answer are whether the warnings were adequate under the circumstances and whether they would have reduced the risks if they had been heeded. If not, then the manufacturer may be responsible for injuries despite the warnings and despite the plaintiff's failure to follow them because the product was marketed in an unreasonably dangerous condition.[368]

If the warnings were clear, conspicious and objectively effective in reducing the risks of use, then the manufacturer may attempt to show that the plaintiff consciously disregarded the warnings and therefore assumed the risk.[369] However, in such cases, it will be easier for the manufacturer to simply prove the adequacy of the warning, thereby making the plaintiff's conduct irrelevant. Whether the plaintiff knowingly encountered the risk or carelessly failed to follow the warnings, the result is the same; there was no "defect" in the product.[370]

D. Tracing the Defect

Although part of the rationale for adoption of strict liability for defective products was to enable injured plaintiffs to overcome the difficulties of proving negligence, section 402A only imposes manufacturer liability if the product reached the consumer "without substantial change in the condition in which it is sold."[371] The require-

367. *See* Simpson Timber Co. v. Parks, 369 F.2d 324 (9th Cir. 1966), *vacated and remanded*, 388 U.S. 459 (1967), *aff'g district court and remanding* 390 F.2d 353, *cert. denied*, 393 U.S. 858 (1968).

368. *See* discussion of warnings pp. 262-67 *supra*.

369. *But see* discussion pp. 281-82 *supra*.

370. *See generally* Vetri, *Products Liability: The Prima Facie Case*, *supra* note 218, at 1126-27.

371. RESTATEMENT (SECOND) OF TORTS § 402A, (1)(b) (1965). Comment *g* says: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." There are several other pertinent comments which expand on this core idea. Comment *d* provides that the rule of section 402A "extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer." Comment *g* also provides that "the seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed" and that "safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner."

ment that plaintiff trace the defect back into the hands of the defendant manufacturer is a substantial obstacle to recovery. Lapse of time and long continued use will not prevent recovery where satisfactory proof of an original defect is made;[372] however, where no direct evidence exists and proof must be by inference, the plaintiff's continued use may preclude a finding that the product was defective when it was sold.[373] Once the plaintiff has used the product for any extended period of time it will be difficult for him to counteract the argument that the seller does not undertake to provide a product that will not wear out.[374]

Even if the plaintiff can overcome the obstacle presented by lapse of time and continued use, he still must eliminate the possibility that other causes, including his own improper conduct, were responsible for the injury. Once plaintiff has accounted for his own conduct and has eliminated all other reasonably probable causes, he has established a strict liability claim against the dealer who sold the product. To reach beyond the dealer to the manufacturer,[375] the plaintiff then must show that the defect existed when it reached the dealer.[376] In certain situations, courts in some jurisdictions have

372. *Cf.* Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969) (case brought on a negligence cause of action but illustrative of the type of fact situation where long use did not preclude recovery).

373. *See* Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969).

374. *See, e.g.*, Barich v. Ottenstror, ___ Mont. ___, 550 P.2d 395, 398 (1976). *But cf.* Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969). In Tucker v. Unit Crane & Shovel Corp., 256 Ore. 318, 320, 473 P.2d 862 (1970), in which plaintiff's intestate was killed in 1965 by a crane manufactured in 1956, the court noted that "prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe . . . ." Some of the nice questions that can arise here are reviewed in Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401, 403 (1969):

> [The evidence in this case], including both the General Services Administration specifications and tests and the testimony of the experts as to "work hardening" or "metal failure," shows that hammers have a propensity to chip which increases with continued use. From that evidence it would appear that a new hammer would not be expected to chip, while at some point in its life the possibility of chipping might become a reasonable expectation, and a part of the hammer's likely performance. The problems arise in the middle range, as Chief Justice Traynor has illustrated: "If an automobile part normally lasts five years, but the one in question proves defective after six months of normal use, there would be enough deviation to serve as a basis for holding the manufacturer liable for any resulting harm. What if the part lasts four of the normal five years, however, and then proves defective? For how long should a manufacturer be responsible for his product?"

375. Simply as a practical matter it is usually the initial manufacturer of the defective product which will have the greatest financial capacity to provide reparation for plaintiff's injuries.

376. Dean Prosser notes that: "When on the evidence it appears equally probable that the defect has developed in the hands of the dealer, the plaintiff has not made out a case of strict liability, or even negligence, against any prior party." He goes on to say, however, that: "There need not be conclusive proof, and only enough is required to permit a finding of the greater probability." W. PROSSER, *supra* note 3, § 103, at 674-75.

attempted to ease plaintiff's burden by shifting responsibility for tracing the defect to the manufacturer which seeks thereby to avoid liability.[377]

In *Knudson v. Edgewater Automotive Division*,[378] a case brought in negligence, the Montana Supreme Court made some telling comments about its perception of these questions. Although saying that a manufacturer does not have a duty to furnish a product that will not wear out,[379] the court qualified that statement by taking a rather expansive view of the length of time after sale a manufacturer should be responsible for his product. The court found the manufacturer liable even though four years had passed between the date of manufacture and the injury and even though the product had a life expectancy of only fifteen years: "The only testimony concerning the condition at the time of the accident was by foreman Morris, and he was definite in his opinion that the jack had not been altered and the pin was broken and was the pin that was in the jack when purchased."[380] The court's acceptance of this testimony, despite some conflicting testimony by the plaintiff, and its rejection of defendant's presentation of evidence of alteration of the jack, illustrates the court's rather liberal view of the plaintiff's satisfaction of its burden in this situation.

The court also takes a rather liberal view of what the plaintiff must show to eliminate the possibility of other causes of the injury. First, the court effectively shifted to the defendant the burden of showing that the plaintiff's conduct was an equally probable cause of the injury. The court declared that because there was no evidence in the record to show any improper conduct by the plaintiff the trial court was not in error when it rejected defendant's contentions regarding contributory negligence and assumption of risk.[381] Second, the court allowed the plaintiff to reach beyond the dealer to recover from the manufacturer simply on the basis of testimony by the dealer that he sold the product in 1959 as new and that he had tested the product then and found that the critical, defectively designed component was in place.[382]

In *Barich v. Ottenstror*,[383] the plaintiff did not recover because she did not show that the defect existed in the hands of the defen-

377. *Id.* at 675-76 (citing, *inter alia*, Pulley v. Pacific Coca-Cola Bottling Co., 68 Wash.2d 778, 415 P.2d 636 (1966)).

378. 157 Mont. 400, 486 P.2d 596 (1971).

379. *Id.* at 414-15, 486 P.2d at 604. The court cited with apparent approval an instruction given by the trial court to that effect.

380. *Id.* at 411, 486 P.2d at 602.

381. *Id.* at 412-13, 486 P.2d at 603.

382. *Id.* at 411, 486 P.2d at 602.

383. ___ Mont. ___, 550 P.2d 395 (1976).

dant. The plaintiff sought to recover for injuries suffered when she fell and broke her wrist while attempting to lift a cardboard wardrobe which ripped. The wardrobe had carried clothing from Anaconda, Montana, to Pennsylvania, had remained in an unheated "garage for the next two years subjected to the vicissitude of temperature and humidity typical to Pennsylvania," and then had returned in a rented truck to Anaconda.[384] Addressing section 402A's requirement of tracing the defect in the context of a Rule 56 motion for summary judgment, the court decided that the defendant had met its burden under Rule 56 by submitting evidence of the plaintiff's use of the product for a considerable length of time after sale. The court followed decisions in other jurisdictions in holding that long use creates an inference that "the defective condition could not have existed at the time the product was sold." To resist the Rule 56 motion, it was incumbent upon the plaintiff to overcome those inferences in order to show that genuine issues of material fact existed for trial.[385]

Courts should not allow defense counsel to use the tracing requirement to erect unreasonable barriers to plaintiffs' recovery. To do so would undercut the clear policy foundations underlying strict liability. The philosophies implicitly expressed in *Knudson*, where the court did not require the plaintiff to present direct and persuasive proof tracing the defect to the manufacturer and did allow a reasonable passage of time without creating an inference favorable to the manufacturer, should be reinforced and continued.

E. Causation

Section 402A provides that "one who sells any product in a defective condition unreasonably dangerous . . . is subject to liabil-

384. *Id.* at 397. The court considered photographs and testimony regarding the condition of the wardrobe:

> After over two years of continued use for both storage and moving, the carton, although clearly still usable, showed the obvious signs of normal wear and tear. A puncture hole exists on the same side used by appellant when the accident occurred, and a huge tear in the cardboard appears near the base of the carton. The box is necessarily reinforced by masking tape in several critical areas. Appellant was unable to recount any specific facts which might tend to explain the deterioration of the carton's condition. *Id.*

385. *Id.* at 398. Because the case came before the court on appeal of a motion for summary judgment, the opinion has limited application to the overall question of the respective burdens of plaintiffs and defendants in tracing the defect. Nonetheless, the holding that evidence of long use creates an inference that the defect did not exist in the hands of the manufacturer seems to be a retreat from the holding in *Knudson*. However, the difference may lie in the nature of the products at issue. The jack in *Knudson* was expected to be used heavily for fifteen years, whereas the cardboard product in *Barich* probably was approaching the end of its expectable useful life at the time the accident occurred.

ity for physical harm thereby *caused* to the ultimate user or consumer. . . ." Thus, section 402A clearly requires that the *sale* of the product substantially contribute to the consumer's injury; the more difficult problem is to define the precise nature of that requirement. Courts traditionally use proximate cause—"producing cause, legal cause, *causa causans*"[386]—in negligence cases when limiting liability as a matter of social policy, and some courts apply legal cause to strict liability cases.[387] However, *"[T]hese purely legal concepts present a false causation issue,"* "whether . . . the seller's placing the product in the stream of trade did contribute substantially to the consumer's injury in making use of the product is . . . the only legitimate cause issue."[388]

F. Defendants Other Than Principal Manufacturers

Section 402A provides:

> (1) "One who *sells* any product in a defective condition unreasonably dangerous . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . if
>
> (a) the *seller* is engaged in the business of selling such a product . . . (emphasis added).

Comment *a* states that "this Section states a special rule applicable to sellers of products," and Comment *c* provides the justification for imposing strict liability on the seller.[389] Comment *f* further defines

386. Green, *supra* note 53, at 1198.

387. The concept of foreseeability has been incorporated into proximate cause as a limitation on liability in a negligence case. If the injury was an unforeseeable result of defendant's activity, then there is no negligence. *E.g.*, Stephens v. Mutual Lumber Co., 103 Wash. 1, 173 P. 1031 (1918). In a strict liability case the foreseeability concepts incorporated in legal or proximate cause which are used to limit liability are unnecessary because analogous limits are already present in the doctrines of abnormal use. *See* discussion pp. 282-85 *supra*.

388. Green, *supra* note 53, at 1198-99. *See also* Vetri, *Products Liability: The Prima Facie Case*, *supra* note 218, at 1125. Professor Vetri says that: "Plaintiff carries the burden of proof to show that the harm is *factually related* to the defective condition of the product. . . ." (emphasis added). But he also says: "If it can be shown that the product likely failed because of a defective condition and contributed to plaintiff's harm, the jury will be allowed to infer the causal connection." *Id.*

Dean Green also noted that "it is remarkable how many false issues of causal connection are raised and sometimes employed to defeat a plaintiff's case when the seller has violated its duty to give an adequate warning of the dangerousness of its product or adequate directions for its use." Examples given are a seller's contentions that the "consumer would not have heeded a warning or read the directions" or "would have disregarded the danger." Dean Green repudiates such false issues in the following terms: "If the consumer has in fact made use of the product for the purpose intended, what might have happened had the seller performed his duty to warn or direct is only a red herring designed to divert the Court from the basic issue." Green, *supra* note 53, at 1199-1200. *See* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972).

389. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965). The Comment says:

> On whatever theory, the justification for the strict liability has been said to be that

what is meant by the phrase "business of selling":

> The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. . . .
>
> The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. . . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.[390]

Since adoption of section 402A in 1965, courts have focused on which defendants are and should be included in the definition of being "in the business of selling a product." Courts in most jurisdictions initially limited strict liability in tort to those specifically enumerated in Comment *f* of section 402A - manufacturers, retailers, wholesalers and distributors.[391] One commentator has suggested that courts are now evincing "increased willingness . . . to expand the application of the concept of 'seller' to additional parties in the

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the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

390. A good discussion of occasional sellers is found in Samson v. Riesing, 62 Wis.2d 698, 215 N.W.2d 662 (1974), but the cause of action there was for breach of warranty and negligence.

391. *See, e.g.*, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969); Housman v. C. A. Dawson & Co., 106 Ill. App.2d 225, 245 N.E.2d 886 (1969); Barth v. B. F. Goodrich Tire Co., 265 Cal. App.2d 228, 71 Cal. Rptr. 306 (1968); Read v. Safeway Stores, Inc., 264 Cal. App.2d 404, 70 Cal. Rptr. 454 (1968).

The drafters of the Restatement expressed no opinion on imposing liability on sellers of component parts, but, instead included a caveat that says that strict liability may not apply "to the seller of a component part of a product to be assembled." In Comment *q* the drafters explained that there had not been enough cases by then to justify adopting a rule on the issue. The Comment does say, however, that "where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer." A number of courts have followed this approach to impose liability. *See, e.g.*, City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis.2d 641, 207 N.W.2d 866 (1973) (expressly relying on language of Comment *q*).

American business scene,"[392] but this effort to expand imposition of strict liability has proceeded slowly and in most instances has been grounded primarily on warranty theories.

1. *Other Suppliers*

As to lessors and bailors of products, strict liability first invaded the field of bailments for hire when courts found a warranty of fitness and safety to the immediate bailee;[393] the right to recover was extended to third parties not in privity in *Cintrone v. Hertz Truck Leasing & Rental Service.*[394] Today, commercial lessors are subject to strict liability in many states.[395]

Sellers of used products have been held liable under both negligence and strict liability theories for selling unsafe products,[396] but strict liability probably will continue to have more limited applicability.[397]

2. *Real Property*

The imposition of liability in negligence upon builders and contractors has tended generally to follow that for manufacturers and

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392. Kiely, *supra* note 9, at 927-28. *See, e.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (beauty shop for hair care products); Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965) (lessors); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (mass producer of homes).

393. *See, e.g.*, Electrical Advertising Inc. v. Sakato, 94 Ariz. 68, 381 P.2d 755 (1963).

394. 45 N.J. 434, 212 A.2d 769 (1965). *See also* Fulbright v. Klamath Gas Co., 271 Ore. 449, 533 P.2d 316 (1975).

395. Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Bachner v. Pearson, 479 P.2d 319 (Alas. 1970). Although courts emphasize that defendant must be in the business of leasing, it need not be its primary business. Price v. Shell Oil Co., 2 Cal.3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). In *Cintrone*, the New Jersey Supreme Court found that many of the same policy reasons underlying strict liability for manufacturers and sellers applied equally well to commercial lessors. The products leased are often equally hazardous, the lessee similarly often has less bargaining power than the lessor and must rely on the lessor, and the lessor usually is in a better position to prevent the risks and to spread the risk of loss. Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769, 776-81 (1965). *See also* Lovely v. Burroughs Corp., 165 Mont. 209, 527 P.2d 557 (1974) (liability imposed on lessor for economic loss, based upon R.C.M. 1947, § 42-211).

396. *See, e.g.*, Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1953) (negligence); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 322 A.2d 440 (1974) (strict liability); Turner v. International Harvester Co., 133 N.J. Super. 277, 336 A.2d 62 (1975). *See generally* Note, *Turner v. International Harvester Company: Strictly Speaking, Can Section 402A Be Extended To Hold Used Car Dealers Liable In Tort?* 21 S. D. L. REV. 468 (1976).

397. *See* Peterson v. Lou Bachrodt Chevrolet, Co., 61 Ill.2d 17, 329 N.E.2d 785 (1975); Rix v. Reeves, 23 Ariz. App. 243, 532 P.2d 185 (1975). A number of courts have, however, extended the scope of section 402A to permit recovery for unsafe products sold by many persons who might not otherwise be considered "suppliers." *See* Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974) (manufacturer of grenades on a government contract); Link v. Sun Oil Co., ___ Ind. App. ___, 312 N.E.2d 126 (1974) (service station owner for installing new tube in tire which exploded); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971).

suppliers of products.[398] Today, the rule of liability in negligence without privity is almost universally accepted and applied to the contractor so that he is "liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done."[399]

Since the early 1960's, courts have imposed strict liability under a theory of implied warranty of habitability which runs from the builder or seller of a newly built structure to the immediate buyer.[400] In 1965 this warranty was extended to a third-party occupant in a New Jersey case.[401] This case has since been followed by a small number of other jurisdictions,[402] and it should become the prevailing rule.[403] While most courts which have found contractors strictly liable have relied on warranty theories, a rather recent Nevada case[404] imposed strict liability in tort on a home repair contractor for installation of a residential gas system which leaked and resulted in fire damage.[405]

3. *Endorsers*

In negligence cases, a person who sells as his own a product which was manufactured by another, assumes the responsibility of the manufacturer.[406] Recently, courts also have imposed strict liability in this situation.[407] When an endorser, such as a testing laboratory, specifically certifies that a product is safe, negligence liability also may be imposed.[408]

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398. W. PROSSER, *supra* note 3, § 104, at 680.

399. *Id.* at 681. The rule applies to those who do the original work, supervising architects and engineers, and those who make repairs in, or install parts of, the structure.

400. *See, e.g.*, Cochran v. Keeton, 287 Ala. 439, 252 So.2d 313 (1971); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). In these cases, the resultant injury was to the property of the plaintiff, not to his person.

401. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

402. *See, e.g.*, Hyman v. Gordon, 35 Cal. App.3d 769, 111 Cal. Rptr. 262 (1973); Kriegler v. Eichler Homes, Inc., 269 Cal. App.2d 224, 74 Cal. Rptr. 749 (1969); State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966). *See generally* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (dicta).

403. *See* W. PROSSER, *supra* note 3, § 104, at 682. *But see* Barnes v. MacBrown & Co., ___ Ind. App. ___, 323 N.E.2d 671 (1975); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972).

404. Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971).

405. *Id.* at 208-09, 484 P.2d at 576.

406. Initially courts imposed liability on the theory that defendant was estopped from denying that it had manufactured the product, but today courts reason that the defendant has vouched for the product. *See* RESTATEMENT (SECOND) OF TORTS § 400, *e.g.*, Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962); Penn v. Inferno Mfg. Co., 199 So. 2d 210 (La. App. 1967); Sears, Roebuck & Co. v. Morris, 273 Ala. 218, 136 So. 2d 883 (1961).

407. *See* Schwartz v. Macrose Lumber & Trim Co., 50 Misc.2d 547, 270 N.Y.S.2d 875 (Sup. Ct. 1966).

408. Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967).

4. Services

While it is clear that "one who renders services to another is under a duty to exercise reasonable care in doing so, and that he is liable for any negligence to anyone who may foreseeably be expected to be injured as a result,"[409] efforts to extend strict liability to services have been relatively unsuccessful.[410] There are, however, courts which have found strict liability on either a warranty or tort basis. In *Worrell v. Barnes*,[411] a home repair contractor was held strictly liable in tort for "supplying" defective gas pipe fittings; in *Newmark v. Gimbel's Inc.*,[412] a beauty parlor was held strictly liable on a warranty theory for applying the offending product to plaintiff's hair;[413] and in *Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*,[414] a seller of electricity was held liable on an implied warranty theory for a fire that burned plaintiff's home.[415] While it is difficult to predict the extent to which strict liability in either tort or warranty will be applied to service transactions, it may play a more significant role in the future.[416]

CONCLUSION: JUDGE AND JURY

In concluding, the respective roles of judge and jury in a strict liability case require comment. In a traditional negligence case, the jury plays the critical role in deciding whether the defendant negli-

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Sometimes, the court will find liability based on negligent misrepresentation. *See* Hanberry v. Hearst Corp., 276 Cal. App.2d 680, 81 Cal. Rptr. 519 (1969). One California court has even stated that recent commentary might warrant reevaluation of the rationale of *Hanberry* with the implication that strict liability might be imposed. Kasel v. Remington Arms Co., 24 Cal. App.3d 711, 726-27, 101 Cal. Rptr. 314, 324 (1972). But more courts deny liability. Yuhas v. Mudge, 129 N.J. Super. 207, 322 A.2d 824 (1974); MacKown v. Illinois Publishing & Printing Co., 289 Ill. App. 59, 6 N.E.2d 526 (1937).

409. W. PROSSER, *supra* note 3, § 104, at 679.

410. Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975); LaRossa v. Scientific Design Co., 402 F.2d 937 (3rd Cir. 1968). Courts often have declined to apply strict liability even when a product has been supplied in the course of the service. Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969). This seems to be especially true where defendant is a "professional." Magrine v. Spector, 100 N. J. Super. 223, 241 A.2d 637 (1968); Silverhart v. Mount Zion Hosp., 20 Cal. App.3d 1022, 98 Cal. Rptr. 187 (1971).

411. 87 Nev. 204, 484 P.2d 573 (1971).

412. 54 N.J. 585, 258 A.2d 697 (1969).

413. The court said the transaction was a "hybrid partaking of incidents of a sale and a service." *Id.* at 701.

414. 38 Mich. App. 325, 196 N.W.2d 316 (1972).

415. The court said that it saw "no reason why the concepts of implied warranty should depend upon a distinction between the sale of a good and the sale of a service." 196 N.W.2d at 318.

416. *But cf.* Hoover v. Montogomery Ward & Co., 270 Ore. 498, 528 P.2d 76 (1974) (court rejected strict liability for defective installation of non-defective component part and expressly distinguished *Newmark* and *Worrell*, saying that those cases dealt with services in which a defective product was used).

gently caused damage to the plaintiff. The decisional role of the judge is limited unless he determines that the jury could not reasonably find for the plaintiff, in which case he will direct a verdict for the defendant.[417]

In contrast, in a strict liability case, judges play a larger role in deciding the threshold question of whether strict liability should even apply to the type of product or type of seller at issue. Section 402A imposes upon manufacturers a strict liability legal obligation to refrain from placing a product in the stream of trade in an unreasonably dangerous defective condition.[418] The trial judge must determine whether the particular defendant is subject to that strict liability legal obligation to protect the plaintiff against harm before he allows the case to go to the jury.[419] To make that determination, the trial judge first must consider whether the various policy factors,[420] such as spreading the risk of loss and deterrence, which support the imposition of that legal obligation apply,[421] and then he must consider whether the risk of injury for which the plaintiff claims the right to recover falls within the scope of that obligation.[422] If the judge decides that it would not be unreasonable for the jury to find for the plaintiff, he then may properly submit the issues to them.[423] Dean Green notes that in practice when the trial judge has any doubts about these issues he frequently will resolve them in favor of submitting the issues to the jury.[424]

The jury then must decide whether the manufacturer or seller

417. *See* Wade, *supra* note 181, at 838.

418. RESTATEMENT (SECOND) OF TORTS § 402A (1965); Green, *supra* note 53, at 1200.

419. *See* Wade, *supra* note 181, at 838; Vetri, *Product Liability: The Developing Framework for Analysis, supra* note 218, at 303-04.

420. *See, e.g.*, Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 514-15, 513 P.2d 268, 273 (1973); Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). *See generally* discussion pp. 247-48 *supra*.

421. *See* Vetri, *Products Liability: The Prima Facie Case, supra* note 218, at 1119. *Cf.* Wade, *supra* note 181, at 838.

422. Green, *supra* note 53, at 1200-01. Professor Vetri enumerates some of these scope of duty issues as follows:

> Other issues, such as whether retailers should be held strictly liable, whether strict liability protection extends to bystanders, the type of damages to be compensated, the inclusion or exclusion of developmental risks within the scope of protection and the extension of strict liability to other types of transactions are all resolved under the duty element.

Vetri, *Products Liability: The Prima Facie Case, supra* note 218, at 1119.

423. Wade, *supra* note 181, at 839 (citing, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969)). In *Dunham*, the plaintiff lost his sight in one eye when a metal chip from a top grade quality hammer broke off and went into his eye. Experts testified that they could not find any flaws in the forging of the hammer. Nonetheless, the Illinois Supreme Court upheld the trial court's submission of the case to the jury. The court said that products were defective if they endangered users and that evaluation of that dangerousness was properly a factual determination for the jury to make. 247 N.E.2d at 403.

424. Green, *supra* note 53, at 1202.

has violated his legal obligation, or duty, by considering the evidence presented by both parties to determine whether the condition of the product unreasonably endangered the plaintiff. This evaluation necessarily entails a risk-utility balancing analysis.[425] Dean Wade argues that the factors he has proposed for making this risk-utility analysis[426] should not be submitted to the jury; he implies that those factors are only helpful to judges, students and commentators.[427] He would prefer, instead, to instruct the jury to consider whether "a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character," would have placed the product on the market.[428]

This approach seems to return to negligence notions of reasonable prudence and an objective standard of conduct and fails to fully and properly inform the jury of the nature of its decisionmaking process. As Dean Green notes, both the "reasonable seller with actual knowledge" standard of Dean Wade[429] and the reasonable expectations of the ordinary consumer standard of the Restatement[430] ring of negligence and are unnecessary attempts to impose an external objective standard for juries to use in evaluating the conduct of the manufacturer.[431] Juries should be trusted to make their own determination whether the manufacturer violated his duty to refrain from placing a hazardous product on the market. To make this determination, they should know what factors bear upon their evaluation of the product which the manufacturer placed on the market. Professor Vetri correctly advocates informing the jury of the nature of its decision by instructing them to "balance the probability and gravity of harm against the utility of the alleged defective condition by considering the manufacturer's ability to eliminate such condition at a reasonable cost without impairing the utility of the product."[432]

With the respective roles of judge and jury in mind, the bench and bar in Montana can seize the opportunity to build a products

425. *See generally* discussion pp. 257, 259-61, 263-65, 67-70 *supra*.

426. *See* text and accompanying footnotes pp. 268-69 *supra*.

427. Wade, *supra* note 181, at 840.

428. *Id.* at 840.

429. *Id.* at 834-35, 839-40. *See generally* Phillips v. Kimwood Mach. Co., 269 Ore. 485, 491-94, 525 P.2d 1033, 1036-37 (1974). *Cf.* Keeton, *supra* note 216, at 404, 408 (proposing a similar imputation to the seller of knowledge of the dangerous condition).

430. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *g* at 352 (1965). *See, e.g.*, Kirkland v. General Motors Corp., 521 P.2d 1353, 1362-63 (Okla. 1974).

431. Green, *supra* note 53, at 1204-06.

432. Vetri, *Products Liability: The Developing Framework for Analysis, supra* note 218, at 304. He would thus describe to the jury the factors which would go into this balancing, including presumably either the factors he or Wade has enumerated. *See* pp. 268-69 & note 296 *supra*.

liability jurisprudence which is clear and fair. Being ever alert to the pitfalls encountered in other jurisdictions with this new field of strict liability, courts and counsel should seek to implement the policies underlying adoption of section 402A of the Restatement without being hindered by the technical language of that section.