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INTRODUCTION

"The complications surrounding the definition of a defect suggest inquiry as to whether defectiveness is the appropriate touchstone of liability."[1] This statement by former Chief Justice Roger Traynor, one of the leading architects of strict liability for defective products, is curious in that it was made two years after the California Supreme Court established defectiveness as the measure of liability in *Greenman v. Yuba Power Products, Inc.*,[2] which opinion he wrote. Although the California Supreme Court has decided several products liability cases since *Greenman,* and a great number of cases of strict liability for defective products have reached the appellate courts in California, the definition of a defect has been a continuing source of difficulty for the judiciary.[3] In *Barker v. Lull Engineering Co.*,[4] the California Supreme

1. Traynor, *The Ways and Means of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 372 (1965). Apology is made for quoting this statement in this manner for effect. It unduly highlights one aspect of an historic article.

2. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697. Perhaps the quotation from Traynor's article and his discussion of the problems with the definition of defect in the article effectively demonstrate how the desire to promote a social policy outdistanced a solid analytical foundation. *See* Traynor, *supra* note 1, at 376-78. For a critique of the *Greenman* opinion as judicial legislating see Dickerson, *Was Prosser's Folly Also Traynor's?,* 2 HOFSTRA L. REV. 469 (1974). If policy concerns did not override the need for logical foundation in *Greenman,* it is difficult to understand how Chief Justice Traynor could write the *Greenman* opinion, which is credited with establishing defectiveness as the key to the manufacturer's liability, and then question defectiveness as the standard two years later in an article. *See* notes 12-19 *infra* and accompanying text for a discussion of *Greenman.*

3. The California Supreme Court cases that discuss the definition are analyzed in notes 28-44, 60-76, and 91-158 *infra* and accompanying text. See notes 54-59 and 77-90 *infra* and accompanying text for a discussion of the more significant appellate cases in California.

Many commentators have criticized the California Supreme Court's approach. *See generally* Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication,* 73 COLUM. L. REV. 1531 (1973). Henderson believes that courts must adopt some form of a reasonableness standard for judging a manufacturer's responsibility, *id.* at 1547, and that the California Supreme Court's approach is confused, *id.* at 1542. *See also* Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?,* 8 SW. U.L. REV. 109 (1976), who contends that design cases should be tried

Court articulated a new test for defectiveness.[5] After tracing the development of the definition of defect in the California courts, this Comment will evaluate the *Barker* test and its implications.

A General Perspective

Commentators have traditionally divided defects in products liability cases into three categories: (1) miscarriage in manufacture; (2) design error; and (3) failure to warn.[6] Miscarriage in manufacture encompasses those situations in which a mistake was made in assembly, such as the omission of an essential part, so that a product reaches a consumer in a condition different from that which was intended. Miscarriage-in-manufacture cases have given the courts the least trouble since they manifest a clear error by the manufacturer. A product is defective due to design error when the manufacturer fails to foresee hazards associated with the normal use of a product which is created according to design. An example of such defect is a power lawn mower which the designer did not anticipate as being capable of ejecting small pebbles at high velocities.[7] An example of the third category, failure to warn, is the lack of any warning on a tire that it could explode during mounting unless it is lubricated.[8]

Although liability does not depend on the categorization of the defect, and while California courts do not always denominate the particular type of defect in dispute,[9] the conceptual scheme is useful for two reasons. First, the distinction between manufacturing defects and design defects separates a line of cases that

under negligence theory. *Id.* at 123. The similarity between strict liability and negligence is also noted and discussed in Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825, 835 (1973). Wade suggests that the California Supreme Court provide greater explanation of the meaning of defect. *Id.* at 833. *See also* Keeton, *Product Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30, 32 (1973).

4. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

5. *See* text accompanying notes 104-13 *infra*.

6. *See* Keeton, *supra* note 3 at 33-34.

7. *See* Foglio v. Western Auto Supply, 56 Cal. App. 3d 470, 128 Cal. Rptr. 545 (1976).

8. *See* Casetta v. U.S. Rubber Co., 260 Cal. App. 2d 792, 67 Cal. Rptr. 645 (1968).

9. In fact, at times the distinction is disavowed. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1971). The distinction between a manufacturing defect and a design defect may break down in a case such as *Cronin* where an aluminum hasp failed, causing injuries to the plaintiff, because it was flawed with pits, voids, and holes. *Id.* at 125-27, 501 P.2d at 1156-57, 104 Cal. Rptr. at 436-37. Did a miscarriage in manufacture occur because the hasp was incorrectly cast, or was there design error because an inferior metal was used? *See* notes 155-57 *infra* and accompanying text. In addition, a difficult evidentiary problem may be present if the product is substantially demolished by the accident.

have been difficult to reconcile.[10] Second, a recent case decided by the California Supreme Court indicated that different defects may give rise to different jury instructions.[11]

I. THE DEVELOPMENT OF THE DEFINITION

A. EARLY FORMULATIONS—*Greeman v. Yuba Power Products, Inc.*

Greenman marked a significant departure from the previous law of products liability.[12] Chief Justice Traynor first dismissed the manufacturer's contention that notice of breach of warranty must be given by citing precedent which disregarded the notice requirement[13] and by reasoning that the notice requirement was a "booby-trap for the unwary."[14] He then proceeded to state the basis for strict liability as follows: "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."[15] Elaborating on the elements necessary to maintain a cause of action in strict liability, Chief Justice Traynor continued:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured

10. *See, e.g.,* Korli v. Ford Motor Co., 69 Cal. App. 3d 115, 137 Cal. Rptr. 828 (1978). *See* notes 83-89 *infra* and accompanying text. Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974), *see* note 81 *infra*. Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (1973), *see* note 80 *infra*.

11. *See* Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). *See* notes 150-54 *infra* and accompanying text.

12. Although a comprehensive explanation of the state of product liability law prior to *Greenman* is beyond the scope of this article, it can be said in very general terms that liability was premised on the notion of express or implied warranties of fitness for purpose and merchantability running from the product to the purchaser and sometimes to the user. For the classic discussion of the state of the law prior to *Greenman*, *see* Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1103-14 (1960). *See id.* at 1124-27 for a critique of warranty. For other analyses of the law prior to *Greenman*, *see generally* Keeton, *Product Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 855-57 (1963); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L. J. 5, 5-9 (1965). A survey of warranty cases in California as well as other jurisdictions is contained in Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960).

13. The court relied on La Hue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957) and Chapman v. Brown, 198 F. Supp. 78 (D. Hw. 1961), *aff'd* Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962) (notice issue is jury question).

14. 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700. The notice requirement proved a trap because the uninformed consumer did not understand the necessity of giving notice. *Id. See* James, *Products Liability*, 34 TEX. L. REV. 192, 197 (1955), which was cited in *Greenman*. *See* 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

15. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 701.

> while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.[16]

Most of the *Greenman* opinion was devoted to justifying the imposition of strict liability for the manufacture of defective products, the summary of which is that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market . . . ."[17] Because the court did not focus on it, the definition of defect that emerged from *Greenman* was vague. It was linked to a few key phases—"defect causing injury" and "unsafe for intended use"—and, since the court's discussion of the facts of the case was brief,[18] the meaning of defect could not be inferred from an analysis of the facts. The court may have reasoned that the precise definition of defect would evolve gradually in later cases and that the rationale for the imposition of strict liability was more important at the time.[19] It may also have wished to avoid limiting the development of the new tort with a precise definition. Of course, the court may simply have failed to contemplate any problems with the definition.

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16. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

17. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. The rationale for strict liability is more fully articulated by Traynor in his article. *See* Traynor, *supra* note 1, at 366. Strict liability will encourage manufacturers to produce safe products and will ensure that liability will rest with the "one best able to anticipate and bear the risks of injury." *Id.* The risk of injury can be distributed by the manufacturer to the public as a cost of doing business. *Id. See also* Prosser, *supra* note 12, at 1120-24, for rationales stated by other commentators for strict liability.

18. The recitation of the facts consisted of the following two sentences:

> His [the plaintiff's] expert witness testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine . . . .

Id. at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

19. In a later case, Luque v. McClean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), the court stressed the importance of the rationale in *Greenman,* rather than the two *Greenman* formulations of the definition of defect. *Id.* at 141-45, 501 P.2d at 1166-69, 104 Cal. Rptr. at 446-49. The trial court in *Luque* had construed the language of the second *Greenman* formulation—"defect . . . of which plaintiff was not aware"—to mean that a defect must be hidden or patent for a plaintiff to recover. In *Luque,* the California Supreme Court's discussion of the two *Greenman* formulations and their reliance on the *Greenman* rationale demonstrates that the rationale, rather than a precise formulation, was foremost in significance. *Id.*

Restatement Section 402A

The first comprehensive statement of the special liability of a seller of a defective product was expressed in section 402A of the Restatement (Second) of Torts.[20] This section would affix liability to a seller for harm caused by "any product in a defective condition unreasonably dangerous to the user."[21] Section 402A was designed to create a new tort that was not burdened with the "luggage"[22] of warranty theory, such as the consumer's reliance on the skill of the seller, the Uniform Commercial Code's limitations on the scope and content of warranties, notice requirements, or warranty disclaimers.[23]

The Restatement's repeated use of the term "unreasonably dangerous"[24] suggests the concept of reasonable conduct in the context of negligence. This approach is equivalent to asking whether the seller was negligent because he or she created an unreasonable risk of harm to the consumer.[25] Not only is the Restatement definition akin to the usual standard for determining liability under a negligence theory, but in practice, it also operates to produce the same result that would obtain if the same facts were subjected to a negligence analysis.[26] Perhaps it is not surprising that the Restatement definition of strict liability for products is firmly rooted in the negligence notion of reasonableness, since it is difficult to impose liability without consideration

20. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter referred to as RESTATEMENT § 402A]. The Restatement encompassed several changes that occurred after *Greenman*, such as the extension of liability to "sellers" which included retailers. *See id.* § (1)(a) and Comment f. The discussion here focuses on the definition of defect in the Restatement.

21. *Id.* § (1).

22. *See* Prosser, *supra* note 12, at 1133.

23. RESTATEMENT § 402A, *supra* note 20, Comment m. *See* Prosser, *supra* note 12, at 1128 (reliance), 1128-30 (UNIFORM COMMERCIAL CODE), 1131-33 (disclaimer), 1130 (notice), for further elaboration of the concerns expressed in Comment m.

24. *See, e.g.*, RESTATEMENT § 402A, *supra* note 20, Comments g, i, j, k. For example, Comment g reads in pertinent part: "[A] condition contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Comment i states: "The rule . . . applies only where the defective condition of the product makes it unreasonably dangerous . . . ."

25. *See* Wade, *supra* note 12. As Professor Wade phrased the test: "[A]ssuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market?" *Id.* at 15.

26. *See* Keeton, *Products Liability—Some Observations About Allocations of Risks*, 64 MICH. L. REV. 1329, 1340-41 (1966); Prosser, *supra* note 12, at 1119; Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 n. 5 (1971); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 323 (1966).

of reasonableness. Legal fault, or the absence of reasonable conduct, is a central theme of tort law.[27]

B. The Restatement and *Greenman* Formulations in Tandem

While *Greenman* enunciated the rationale supporting the California Supreme Court's new approach to products liability, the next several opinions of the court set the limits of the scope of strict liability. Although these early cases were more concerned with either expanding or contracting the grounds for strict liability recovery than actually defining defect, an examination of the opinions nevertheless reveals how the Restatement and *Greenman* formulations were assimilated in theory and identically applied in practice.[28]

The first case to reach the California Supreme Court after *Greenman* was *Vandermark v. Ford Motor Co.*[29] Although the *Vandermark* facts were not related at length, it seems that a miscarriage in manufacturing caused the plaintiff's automobile to swerve off the road when the brakes partially applied themselves.[30] The *Vandermark* court found the retailer of the defective automobile, along with the manufacturer, liable for the resultant injuries. Since it is not difficult to adjudge a product defective when it is not sold in the condition intended by the manufacturer, *Vandermark* added little to the developing concept of defect other than another fact situation in which the court found a product to be defective.

Seely v. White Motor Co.,[31] despite its preoccupation with determining when strict liability rather than warranty applies, is noteworthy because of the disparate views expressed in the majority opinion and in Justice Peter's separate opinion. In *Seely*, the plaintiff's truck did not perform properly and eventually went

27. *See* W. Prosser, Law of Torts § 1 (1971).

28. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 2d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). "In numerous cases this court and the Courts of Appeal have referred to the Restatement and the *Greenman* standards in tandem, as if they were for all practical purposes identical." *Id.* at 132, 501 P.2d at 1160, 104 Cal. Rptr. at 440.

29. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

30. *Id.* at 259-60, 391 P.2d at 169-70, 37 Cal. Rptr. at 897-98. Something went wrong in the assembly so that the car contained "dirt in the master cylinder, a defective or wrong-sized part, distortion of the firewall, or improper assembly or adjustment." *Id.* at 260, 391 P.2d at 170, 37 Cal. Rptr. at 898. Evidentiary problems prevented a clearer determination of what was actually wrong.

31. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1969).

off the road when its brakes failed. The Supreme Court ruled that the plaintiff was entitled to recover the purchase price and damages for his economic loss (lost profits from loss of the use of the truck) on an express warranty theory.[32] The court, drawing a distinction between warranty theory and strict liability, seemed to adopt the Restatement concept of defect when it defined the scope of a manufacturer's duty: "He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create *unreasonable* risks of *harm.*"[33] Determining that a product creates "unreasonable risks of harm" is no different than finding a product is "unreasonably dangerous" under the Restatement test. Moreover, matching a "standard of safety" sounds very much like meeting the standard of reasonable care or, in other words, not acting negligently. Thus, the majority's analysis in *Seely* is in some respects a negligence analysis.

Justice Peters' opinion, which dissented in part and concurred in part, is the only post-*Greenman* opinion to liken defectiveness to warranty notions until very recently.[34] Justice Peters reasoned that strict liability, like warranty, should cover "economic loss" since defectiveness under strict liability theory means the same as unmerchantable in the warranty context.[35] "[A]ll the strict liability rule does to implied warranty law is abolish the notice requirement, restrict the effectiveness of disclaimers . . . and abolish the privity requirement . . . . It does not introduce a notion of 'defective' which is different from that of 'unmerchantable' in implied warranty law."[36] Thus, while Justice Peters' opinion conceived of a defect as analogous to the warranty standard of unmerchantibility, the *Seely* majority's brief analysis corresponded to the Restatement's approach.

32. *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.

33. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23 (emphasis added).

34. *See* Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975), which is discussed in note 115 *infra. See also* Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 275 (1978), and text accompanying notes 113-21 *infra.*

35. 63 Cal. 2d at 25, 403 P.2d at 156, 45 Cal. Rptr. at 28. It should be noted that the issue addressed by both the majority and Justice Peters was not whether defective meant unmerchantable or unreasonably dangerous. Rather, the issue was whether strict liability doctrine or warranty theory covered the situation before the court. The contrast in definition is merely pointed out to demonstrate how the majority seemed to favor the Restatement view and Justice Peters seemed to see defective in the context of warranty law.

36. *Id.* at 29, 403 P.2d at 158, 45 Cal. Rptr. at 30.

Pike v. Frank G. Hough Co.[37] marked a significant stage in the development of the definition of defect, not only for its outright adoption of the Restatement position,[38] but also because it addressed the distinction between defective design and miscarriage in manufacture.[39] In *Pike,* the decedent was killed by a backing paydozer because the vehicle's design obstructed the driver's rear vision.[40] After discussing the plaintiff's claim under negligence theory,[41] the court considered the applicability of strict liability and observed: "Most reported cases in California . . . have applied strict liability to products containing defects in their manufacture; few have involved defects in design."[42] The court stated that there was no significant difference as far as liability "since a product may be equally defective and dangerous if its design subjects . . . persons to *unreasonable risk* or if its manufacture does so."[43] Moreover, the Restatement language was employed in several other portions of the opinion.[44]

Thus, after declining to adopt the Restatement's language and approach on several earlier occasions, the Supreme Court chose to do so in the first case presenting the narrow issue of defective design. While the court did not indicate why it decided

37. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

38. *See id.* at 477, 467 P.2d at 237, 85 Cal. Rptr. 637. For the substance of the Restatement test, *see* notes 20-26 supra, and accompanying test.

39. *Id.* at 476-77, 467 P.2d at 236-37, 85 Cal. Rptr. at 636-37. *See* text accompanying notes 6-9 *supra.*

40. The survivors sued in negligence and strict liability and were non-suited, but the Supreme Court found sufficient facts to present a triable issue on both theories. *Id.* at 470-72, 467 P.2d at 232-33, Cal. Rptr. at 632-33 (negligence); *id.* at 476-77, 467 P.2d at 236-37, 85 Cal. Rptr. at 636-37 (strict liability). *Pike* said that according to the precedent of Menchaca v. Helms Bakeries, 68 Cal. 2d 535, 439 P.2d 903, 67 Cal. Rptr. 775 (1968), a product is negligently designed if it is not equipped with reasonable safety devices. 2 Cal. 3d at 171-72, 467 P.2d at 233, 85 Cal. Rptr. 633. The *Pike* court reasoned that since a product could be defective if it was produced without safety warnings, no distinction prevents a product from being defective because it was produced without safety devices. *Id.* at 477, 467 P.2d at 237, 85 Cal. Rptr. at 637.

41. *Id.* at 472-74, 467 P.2d at 233-35, 85 Cal. Rptr. at 633-35.

42. *Id.* at 475, 467 P.2d at 236, 85 Cal. Rptr. at 636.

43. *Id.* (emphasis added).

44. "THE RESTATEMENT SECOND OF TORTS, section 402A succinctly recites the standard for strict liability applicable to manufacturers: 'One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . .'" *Id.* The court later stated: "[A] product may be defective if it lacks safety devices necessary to its reasonable safety." *Id.* Further: "Whether the paydozer was unreasonably dangerous due to faulty design . . . is clearly a question of fact . . . ." *Id.* at 476, 467 P.2d at 239, 85 Cal. Rptr. at 639. The opinion also cites Comment i to RESTATEMENT § 402A. *Id.* at 477, 467 P.2d at 237, 85 Cal. Rptr. at 637. For an appellate opinion interpreting *Pike* as an acceptance of the Restatement language, see Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970).

to use the Restatement formulation,[45] it may have been used due to its similarity to a negligence analysis.[46] As demonstrated by the court's discussion of the negligence cause of action,[47] a negligence approach to design error seemed appropriate because products are designed by specialists, such as engineers, whose conduct has generally been judged according to the standard of care in their fields of expertise.

In *Jiminez v. Sears, Roebuck & Co.*,[48] the California Supreme Court, while referring directly to the elusive concept of defect, did not elaborate further since that was not necessary to decide the issues presented.[49] The court recognized that no definition of defect capable of resolving all cases had been developed but stated that two possible approaches were the "deviation-from-the-norm test"[50] and the "unreasonably dangerous" or Restatement test.[51] The similarity between the latter analysis and that of negligence was acknowledged: "By focusing on unreasonably dangerous, this test of defect becomes similar to but not necessarily the same as the test for negligent design."[52] The court did not dwell on the distinction since it was "unnecessary to labor the difficulties of the defect concept . . . because . . . instructions on negligence would serve the plaintiff better . . . ."[53] The *Jiminez* opinion

45. It is suggested that in the absence of a clearly articulated standard for defectiveness at the time, the court may have fallen back on the familiar notions of negligence expressed in the Restatement language. *See* text accompanying notes 25-26 *supra*. Note that use of the Restatement may have been merely a fortuity on the court's part—use of the words without consideration of the ramifications that would occur in the years ahead.

46. *See* text accompanying notes 25-26 *supra*.

47. *See* 2 Cal. 3d at 470-74, 467 P.2d at 232-35, 85 Cal. Rptr. at 632-35.

48. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971). *Jiminez* came to the California Supreme Court on appeal by the defendant from the trial court's order for a new trial to permit a jury to receive instructions on negligence; strict liability instructions had been given. The court affirmed, ruling that the plaintiff, who was injured when the ladder he was using collapsed, was entitled to have instructions on negligence submitted to the jury. *Id.* at 387, 482 P.2d at 686, 93 Cal. Rptr. at 774.

49. *Id.* at 384-85, 482 P.2d at 684-85, 93 Cal. Rptr. at 772-73.

50. *Id.* at 383, 482 P.2d at 684, 93 Cal. Rptr. at 772. This test was not applied by the court in any prior cases, but it is discussed in Traynor's article. See Traynor, *supra* note 1, at 368-70.

51. 4 Cal. 3d at 384, 482 P.2d at 684, 93 Cal. Rptr. at 772.

52. *Id.* The crux of the problem was succinctly identified as follows:

> Part of the problem, of course, is that over the years a considerable body of law has been developed as to negligence permitting definitive instructions based upon tested and settled principles; whereas the same development has not yet occurred with respect to the more recent doctrine of strict liability in tort.

Id.

53. *Id.*

demonstrated the Supreme Court's reluctance to embrace a particular definition of defect at the time, or at least its unwillingness to consider the issue until a case required such an explication.

The Courts of Appeals

Although the California Supreme Court did not unequivocally accept any one definition of defect between *Greenman* and *Jiminez,* the trend developing in the lower appellate courts was clear. The courts of appeal, which confronted the issue more frequently, tended to adopt the Restatement view of defect. For example, when dealing with so-called "drug cases" wherein plaintiffs suffered allergic reactions, the courts used a theory of negligence[54] or the quasi-negligence analysis of the Restatement.[55] Negligence elements—the reasonable use of the product[56] and the reasonableness of the manufacturer's conduct[57]—entered into strict liability discussions. The Restatement and *Greenman* formulations of defect were used interchangeably, either without distinguishing them or by mixing the language of each.[58] Despite

54. *See* Love v. Wolf, 226 Cal. App. 2d 378, 402-03, 38 Cal. Rptr. 183, 197-98 (1964) (no need for strict liability since negligence analysis adequate).

55. *See* Oakes v. E.I. Du Pont de Nemours & Co., 272 Cal. App. 2d 645, 648-51, 77 Cal. Rptr. 709, 711-13 (1969) (extensive discussion of RESTATEMENT). *But see* Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 432-38, 79 Cal. Rptr. 369, 373-76 (1969).

56. *See* Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 639-41, 52 Cal. Rptr. 679, 684-86 (1966). The jury instructions given by the trial court read, in pertinent part, as follows: "The manufacturer . . . is liable for injuries proximately caused by defects . . . provided the article was being used reasonably for the purpose for which it was designed . . ." *Id.* at 639, 52 Cal. Rptr. at 682. The court found that the instructions could have been "more artfully drafted," but the use of the word "reasonably" correctly stated that the product must not have been subjected to abnormal use. *Id.* at 640, 52 Cal. Rptr. at 683. For another case on conflicting negligence and strict liability instructions, see Cracknell v. Fisher Governor Co., 247 Cal. App. 2d 857, 56 Cal. Rptr. 64 (1967). Strict liability instructions are also discussed in Preissman v. Ford Motor Co., 1 Cal. App. 3d 841, 82 Cal. Rptr. 108 (1969).

Although it reached the appellate court on a non-suit issue rather than jury instruction error, Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966), was an early case that demonstrated the absence of any definition of defect at the time. The court referred to the design as possibly defective without explanation of the test used. *Id.* at 650, 55 Cal. Rptr. at 101.

57. *See* Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970). In *Garcia,* an eleven-year-old was injured when a stopped washing machine started spinning while he was removing clothes. It appears the court felt the defendant had been unreasonable in failing to install an inexpensive safety switch and in failing to meet the necessary standard of care since other similar machines had safety switches. *Id.* at 323, 82 Cal. Rptr. at 422.

58. *See* Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (1970). In *Thomas,* the court reasoned in terms of reasonable care in discussing strict liability as follows:

the fact that *Greenman,* perhaps the most widely known strict liability case, was decided by the state Supreme Court, California's intermediate appellate courts consistently applied the Restatement approach to defective design in the period preceding *Cronin v. J.B.E. Olson Corp.*[59]

C. DIVERGENCE OF THE RESTATEMENT AND *Greenman* FORMULATIONS: *Cronin*

In *Cronin v. J.B.E. Olson Corp.,*[60] the California Supreme

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> [T]he manufacturer must use reasonable care to design his product so as to make it safe for the use for which it was intended. "Reasonable care" varies with the facts of each case; it involves a balancing of the likelihood of harm to be expected from a machine with a given design and the gravity of the harm if it happens against the burden of the precaution which would be effective to avoid the harm.

Id. at 88-89, 91 Cal. Rptr. at 305 (citations omitted). *See also* Thompson v. Package Machinery Co., 22 Cal. App. 3d 188, 99 Cal. Rptr. 281 (1971). Under the heading "Doctrine of Strict Liability," the *Thompson* court quoted RESTATEMENT (SECOND) OF TORTS § 398 (1965) on negligence in manufacture, *id.* at 191-92, 99 Cal. Rptr. at 283-84, but later used the section 402A terminology of unreasonably dangerous, *id.* at 192, 99 Cal. Rptr. at 284, and spoke in terms of "reasonably required" safety devices. *Id.* at 193, 99 Cal. Rptr. at 284.

In Badorek v. General Motors Corp., 90 Cal. Rptr. 304 (1970) (hearing granted, cause transferred to Supreme Court and retransferred to Court of Appeal; appeal subsequently dismissed), the court did not distinguish between the Restatement and *Greenman* rules in analyzing the defectiveness of the design of a Corvette automobile. *See id.* at 919, 90 Cal. Rptr. at 315. According to the court, one reason stated in *Greenman* for strict liability was that "the losses due to defective products unreasonably dangerous should be placed upon the manufacturer . . . ." *Id.* Since nowhere did *Greenman* use the term "unreasonably dangerous," it would appear the *Badorek* court read the words into *Greenman* because it did not distinguish *Greenman* from the Restatement. After quoting the Restatement at length, *id.* at 916-17, 90 Cal. Rptr. at 314, the court discussed *Greenman* and coined a new statement of defectiveness in a sort of meld of the *Greenman* language with that of the Restatement. *See id.* at 918-19, 924-25, 90 Cal. Rptr. at 314-15, 319. The new catch phrase was "unreasonably defective" design, *id.* at 924-25, 90 Cal. Rptr. at 320, but the approach was the same as the Restatement test of unreasonably dangerous. It is submitted that the combination of words was ill chosen. "Unreasonably defective" could give the impression that a reasonable defect may exist, which would be contrary to the *Greenman* rule. Similarly, according to the Restatement, if the fault in the product is not unreasonable, then it is not a defect by definition.

59. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). It is suggested the appellate courts accepted the Restatement view for the following reasons: (1) the California Supreme Court opinions, starting with *Greenman,* were vague in discussing defect (*see* text accompanying notes 17 & 18 *supra*), so the courts turned to the Restatement for guidance. *See* 8 Cal. 3d at 132-33, 501 P.2d at 1161-62, 104 Cal. Rptr. at 441-42; (2) until *Cronin,* the Restatement was not viewed as inconsistent with *Greenman, id.* at 131-32, 501 P.2d at 1160-61, 104 Cal. Rptr. at 440-41, especially since *Greenman* was so vague. Therefore, the more concrete analysis of the Restatement could be adopted. The Restatement test was so similar to the traditional negligence approach (*see* text accompanying notes 24-26 *supra*) that the appellate courts were comfortable with the reasoning and language.

60. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 453 (1972).

Court expressly rejected the Restatement's "unreasonably dangerous" test for defective products.[61] In *Cronin,* an aluminum hasp holding bread trays in the back of a truck failed when the plaintiff was involved in an accident; the trays slid forward and pushed the plaintiff through the windshield. The hasp failed because it "contained holes, pits and voids."[62] The trial court refused the defendant's instruction to the jury which embodied the Restatement's language of unreasonably dangerous.[63] The Supreme Court affirmed the trial court's rejection of the instruction because the language of the Restatement "burdened the injured plaintiff with proof of an element which rings of negligence."[64] After the Restatement view was disavowed, the broad formulation of *Greenman* was reinstated.[65]

In dismissing the manufacturer's claim of insufficient evidence of defectiveness, the court rejected a "state-of-the-art" type defense similar to an assertion of due care. The appellant argued that defectiveness cannot properly be determined without proof of some standard set by knowledgeable individuals for the manufacture and use of the particular part.[66] The court did not explain why the argument "lacked merit"[67] other than to note that no standard bread racks were available, that the defendant intended that the hasp would restrain the bread racks, and that the plaintiff's expert testified that the hasp was composed of defective metal.[68]

Addressing the question of whether the unreasonably dangerous language should have been included in the jury instructions, the court reviewed the effect of the Restatement language on the development of the law in California and admitted the courts of appeal resorted to it for guidance due to the "simplicity" of *Greenman.*[69] The court wanted to relieve the plaintiff of the task of proving negligence because "the very purpose of our pioneering

61. *Id.* at 132-33, 501 P.2d at 1160-61, 104 Cal. Rptr. at 440-41.

62. *Id.* at 127-28 and n. 5, 501 P.2d at 1158 and n. 5, 104 Cal. Rptr. at 438 and n. 5.

63. *Id.* at 124, 501 P.2d at 1155-56, 104 Cal. Rptr. at 435-36.

64. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

65. *Id.* at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

66. *Id.* at 125, 501 P.2d at 1156, 104 Cal. Rptr. at 436. However, *compare* the reading of *Cronin* by the majority in Horn v. General Motors Corp., 17 Cal. 3d 359, 367, 551 P.2d 398, 402, 131 Cal. Rptr. 78, 82 (1976), *with* the dissent in *Horn* by Justice Clark. *Id.* at 374, 551 P.2d at 406, 131 Cal. Rptr. at 86.

67. 8 Cal. 3d at 126, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

68. *Id.* at 127, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

69. *Id.* at 133, 501 P.2d at 1161, 104 Cal. Rptr. at 441.

efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence . . . ."[70] The court feared the Restatement language was susceptible of a reading that would "require the finder of fact to conclude that the product is, first, defective and, second, unreasonably dangerous."[71]

To free the test of its "negligence complexion,"[72] the court reiterated the language of *Greenman* and linked liability to the single word "defective."[73] In a footnote, the court stated: "We recognize, of course, the difficulties inherent in giving content to the defectiveness standard."[74] However, the court quoted an article by Chief Justice Traynor to support the view that a "cluster of useful precedents" would supply content to the defectiveness standard.[75] Despite the inclination of the courts of appeal to use the Restatement approach as an alternative or as a supplement to the "simplicity" of *Greenman,* and despite the absence of any other explanation of defect,[76] the court offered nothing to assist the lower courts save the initial *Greenman* formulation.

The Continuing Uncertainty

As might have been expected, the *Cronin* decision prompted confusion in the lower appellate courts: "Since the decision of our Supreme Court in *Cronin v. J.B.E. Olson* . . . there has been considerable uncertainty as to the definition of a defective product."[77] After *Cronin,* the courts of appeal occasionally followed *Cronin*[78] but at other times returned to the Restatement.[79] Manu-

70. *Id.* at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

71. *Id.*

72. *Id.*

73. *Id.* at 134-35, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

74. *Id.* at 135 n. 16, 501 P.2d at 1162 n. 16, 104 Cal. Rptr. 442 n. 16.

75. *Id., quoting* Traynor, *supra* note 1, at 373. The article in question was written in 1965. It would seem that if a cluster of precedents sufficient to guide the appellate courts had existed, the appellate courts would not have followed the Restatement. *See* notes 54-59 *supra* and accompanying text.

76. The court acknowledged this in *Cronin* as follows: "But throughout the development of the *Greenman* rule we have said very little to explain what we meant in that case by a 'defect' which would give rise to liability if injury were proximately caused thereby." 8 Cal. 3d 131, 501 P.2d at 1160, 104 Cal. Rptr. at 440.

77. Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 543-44, 132 Cal. Rptr. 605, 611 (1976). *See* note 81 *infra. Contra* Foglio v. Western Auto Supply, 56 Cal. App. 3d 470, 128 Cal. Rptr. 545 (1976). "In *Cronin* . . . the court laid to rest the confusion which had theretofore existed in California concerning the proper formulation of the principle of strict liability . . . ." *Id.* at 473, 128 Cal. Rptr. at 547.

78. *See, e.g.,* Foglio v. Western Auto Supply, 56 Cal. App. 3d 470, 128 Cal. Rptr. 545 (1976). The court of appeal found reversible error in the trial court's instruction to the

facturers were held liable for reasonably foreseeable consequences involving their products[80] and were required to act reasonably in preventing dangerous designs in their products.[81] Strict liability was again merged with negligence.[82] This was probably due to the

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jury that a "defective design is such that the design itself subjects a user or bystander to an unreasonable risk of harm . . . ." *Id.* at 473, 128 Cal. Rptr. at 546. The instructions were quite similar to those rejected in *Cronin. Id.* at 474, 128 Cal. Rptr. at 547.

79. *See, e.g.,* Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972). The court adopted the Restatement language as follows:

> Strict liability for deficient design of a product (as differentiated from defective manufacture or defective composition) is premised on a finding that the product was unreasonably dangerous . . . , and in turn, the unreasonableness of the danger must necessarily be derived from the state of the art at the time of design.

Id. at 641, 105 Cal. Rptr. at 895.

80. *See* Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (1973). In *Culpepper,* the court found that manufacturers should be liable for "reasonably foreseeable occurrences involving their products," *id.* at 519, 109 Cal. Rptr. at 115, a test for negligence, even though the case was submitted on a strict liability theory only. The court looked at the standard of care, reviewing the plaintiff's evidence of an "implied standard that a car should not roll over . . . at any speed regardless of how much the driver turns the front wheels." *Id.*

81. *See* Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974). In *Self,* the plaintiff claimed that the designed placement of an automobile's gas tank made the auto defective. In a frank discussion of the difficulties of designing a vehicle that would be "uniformly strong under all points and conditions," *id.* at 9, 116 Cal. Rptr. at 579, the court admitted that a "lawsuit is a poor way to design a motor vehicle, for the suit will almost invariably emphasize a single aspect of design to the total exclusion of all others." *Id.* at 8, 116 Cal. Rptr. at 579. Instead of using the unreasonably dangerous test, the court reasoned a product was defective if it presented an "excessive preventable danger." *Id.* at 7, 116 Cal. Rptr. at 578. The manufacturer was required to take "reasonable precautions." *Id.* at 8, 116 Cal. Rptr. at 579. In discussing "excessive preventable danger" and "reasonable precautions," the determinant was the reasonableness of the defendant's conduct. *Id.*

See also Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976). In *Buccery,* the plaintiff sustained a head injury in a low speed rear end collision because his vehicle lacked a head restraint. *Id.* at 537-38, 132 Cal. Rptr. at 607. After a discussion of *Pike, Cronin,* and *Thomas,* the test for defectiveness was set out:

> The foregoing authorities give us no comprehensive definition of a defective product or defective design. What they do teach, however, is that any product so designed that it causes injury when used or misused in a foreseeable fashion is defective if the design feature which caused the injury created a danger which was readily preventable through the employment of existing technology at a cost consonant with the economical use of the product.

Id. at 548, 132 Cal. Rptr. at 614.

82. *See* Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972). In discussing the relationship between the plaintiff's various causes of action, the court reasoned:

> Since the issue is whether [the defendant] designed and put into circulation a product unreasonably dangerous for use and

fact that the cluster of precedents mentioned in *Cronin*[83] did not provide an adequate definition of defect.

The court of appeal's opinion in *Korli v. Ford Motor Co.*,[84] soon to be reviewed by the California Supreme Court, demonstrates an unsuccessful attempt to apply this cluster of precedents. Three tests for defectiveness were set forth by the court of appeal: (1) a "degree of safety which is reasonable and practical within the state of the art" is required; (2) a product must match the quality of most like products and not deviate from the norm; and (3) a product cannot be unfit for its ordinary purpose.[85] The court also stated that the balancing of the likelihood of harm against the burden of precaution was another test,[86] but this seems a mere linguistic variant of the first test. In support of the first test, the court cited *Self v. General Motors Corp.*, *Thomas v. General Motors*, *Pike*, and *Buccery v. General Motors Corp.*[87] However, the reasoning of these cases is indistinguishable from a negligence analysis of reasonableness. The deviation-from-the-norm test is essentially another negligence inquiry. Phrased in other words, this test inquires whether the manufacturer's conduct conformed to the accepted standard of care (the norm) when the product was produced.[88] The final test proposed, that of fit-

> since the unreasonableness of the danger must be determined by the potential available to the designer at the time of design, it is apparent that the strict liability and negligence claims merge.

Id. at 641, 105 Cal. Rptr. at 895.

83. *See* note 75 *supra* and accompanying text.

84. 137 Cal. Rptr. 828 (1977), *hearing granted* (July 21, 1977). The plaintiff in *Korli* sued for the wrongful death of her husband and daughter and for the emotional injury she suffered in seeing their deaths. The plaintiff's two-year-old child fell out of the back seat of the family's 1965 Lincoln automobile as the car was traveling on the freeway, and her husband was killed trying to rescue the child. Plaintiff alleged the door of the automobile was defectively designed because it was hinged at the rear and its unlatching lever was too accessible. *Id.* at 829-30.

85. *Id.* at 831.

86. *Id.*

87. *Id.* Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1971); *see* note 37 *supra*, Buccery v. General Motors Corp., 60 Cal. App. 3d 553, 132 Cal. Rptr. 605 (1976); *see* note 81 *supra*, Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); *see* note 83 *supra*, Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (1970). In *Thomas*, the court said a "manufacturer must use reasonable care to design his product so as to make it safe for the use for which it was intended. 'Reasonable care' . . . involves a balancing of the likelihood of harm . . . and the gravity of harm . . . against the burden of the precaution . . . ." 13 Cal. App. 3d at 88, 91 Cal. Rptr. at 305 (citations omitted).

88. To support the use of this approach, the court cited *Jiminez*, 137 Cal. Rptr. at 831. In *Cronin*, the California Supreme Court impliedly repudiated the *Jiminez* analysis in so far as it forced the plaintiff to prove negligence. 8 Cal. 3d at 121, 132, 501 P.2d 1153, 1160-61, 104 Cal. Rptr. 433, 440-41.

ness for the ordinary purpose, was the pre-*Greenman* warranty approach.[89] Thus, the cases relied on by the court of appeal in *Korli* failed to deter the court from applying negligence and warranty notions which *Cronin* and *Greenman* sought to abolish in strict liability cases.

II. THE DECISION IN *BARKER V. LULL ENGINEERING CO.*

In *Barker,* the California Supreme Court attempted to clarify some of the confusion that *Cronin* had engendered in the lower courts.[90] The plaintiff in *Barker* was injured while operating construction equipment.[91] He claimed the trial court had erred in instructing the jury that "strict liability for the defect in design of a product is based on a finding that the product was unreasonably dangerous for its intended use."[92] The defendants, on the other hand, attempted to escape *Cronin's* disapproval of the "unreasonably dangerous" language in jury instructions by limiting the holding of that case to manufacturing defects.[93]

In discussing the interpretive problems that had plagued the lower courts following *Cronin,* the Supreme Court recognized the inherent difference between design defect and manufacturing or production defect cases.[94] Defining the term defect in a jury instruction where manufacturing defects are in issue requires little elaboration since such defects are readily identifiable—they dif-

89. *See* note 12 *supra* in reference to the pre-*Greenman* approach.

90. *See* note 132 *infra* regarding this confusion.

91. 20 Cal. 3d at 422, 573 P.2d at 449, 143 Cal. Rptr. at 231. While the plaintiff was operating a loader, the load began to shift and tip. The plaintiff leaped from the cab of the machine, but was injured by the falling load of lumber. For further facts, see *id.* at 419-22, 573 P.2d at 447-49, 143 Cal. Rptr. at 229-32.

The plaintiff contended the loader was defective for the following reasons: (1) the narrow base of the loader made it unstable, with a tendency to roll over; (2) the cab was not equipped with a roll bar or seat belts; (3) the load leveling control lever did not have a locking device and was vulnerable to inadvertent bumping by the operator; and (4) the loader's transmission did not have a park position. *Id.* at 420-21, 573 P.2d at 447-48, 143 Cal. Rptr. at 229-30.

The defendant contended that the plaintiff had misused the loader, that the safety devices proposed by plaintiff were not used on competitive loaders, that such safety devices would make the loader the functional equivalent of a crane, that a roll bar was unnecessary since it would not roll over completely, and that no transmissions which were marketed for this vehicle were manufactured with a park position. *Id.* at 421-22, 573 P.2d at 448-49, 143 Cal. Rptr. at 230-31.

92. *Id.* at 422 n. 4, 573 P.2d at 449 n. 4, 143 Cal. Rptr. at 231 n. 4.

93. *Id.* at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

94. *Id.* at 417-18, 573 P.2d at 446, 143 Cal. Rptr. at 228.

fer either from the manufacturer's intended result or from other units of the same product line. However, "when a product is claimed to be defective because of an unsafe design . . ., the contours of the defect concept may not be self-evident."[95] The court found the jury instruction erroneous because the unreasonably dangerous standard applied to neither manufacturing nor design defect cases.[96] Thus the court reaffirmed the *Cronin* holding that the Restatement's "unreasonably dangerous" formulation was an "undue restriction"[97] on the application of strict liability, a restriction which might prevent recovery for injuries caused by patent defects or defects within the reasonable contemplation of the consumer.[98] In the court's view, the Restatement standard permits "the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by that product."[99] The court held that recovery should not be limited to cases where a product is more dangerous than contemplated by the average consumer.[100] The flaw in the Restatement test, according to the *Barker* court, was that consumer expectations were the "ceiling", or upper limit, of a manufacturer's liability.[101] On the contrary, consumer expectations should be the "floor", or the lower limit, of liability.[102]

A. THE *Barker* TEST

After acknowledging that "the term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts,"[103] the *Barker* court

95. *Id.* The court also noted that cases alleging an inadequate warning present much the same difficulties as the design defect cases. *Id.* However, since inadequate warnings are seldom alleged, these cases will not be discussed here.

96. *Id.* at 426, 573 P.2d at 451-52, 143 Cal. Rptr. at 233-34.

97. *Id.* at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233. *See* notes 60-76 *supra* and accompanying text for a discussion of *Cronin*.

98. The court cited Luque v. McClean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), where the unguarded hole of a rotary lawnmower was obvious, but recovery was still permitted.

99. 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.

100. *Id.*

101. *Id.* at 425-26 n. 7, 573 P.2d at 451 n. 7, 143 Cal. Rptr. at 233 n. 7. In a footnote, the court noted that an additional reason for discarding the "unreasonably dangerous" language was the possibility the language could be misinterpreted to mean the product must be abnormally dangerous. *Id.* at 426 n. 8, 573 P.2d at 452 n. 8, 143 Cal. Rptr. 234 n. 8, *quoting* Wade, *supra* note 3. In another footnote, the court stated the particular instruction at issue in *Barker* was erroneous because it indicated only that "intended use," rather than "reasonably foreseeable use," of the product was relevant. *Id.* at n. 9, 573 P.2d at 452 n. 9, 143 Cal. Rptr. at 234 n. 9.

102. *Id.* at 426 n. 7, 573 P.2d at 451 n. 7, 143 Cal. Rptr. at 233 n. 7.

103. *Id.* at 427, 573 P.2d at 453, 143 Cal. Rptr. at 235. The court also noted the

articulated the following two-fold test for defectiveness: A product is defective in design if the plaintiff proves that: (1) the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or (2) the product's design proximately caused injury and the defendant fails to prove that the benefits of the design outweigh the dangers inherent in such design.[104] In support of the consumer expectation test, the court cited several earlier decisions,[105] but did not discuss how those cases established that consumer expectations govern defectiveness. The court stated that under this standard, a plaintiff would be able to prove defectiveness by resorting to circumstantial evidence even if the accident precludes identification of the specific causal defect.[106]

Since in many situations, the consumer will not know what to expect, the court stated that the consumer's expectations cannot serve as the sole measure of liability.[107] To supplement the consumer expectations test, the court set forth the alternative balancing test—the weighing of the benefits of the design against its hazards. The court concluded that past cases[108] indicated the following factors were to be considered in evaluating a design: the gravity of the danger posed by the design, the expense of an

particular difficulty of defining "defect" in design cases, *id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236, and rejected the contention of amicus that the intent of the *Cronin* decision was to leave "defect" undefined. *Id.* at 427, 573 P.2d at 452, 143 Cal. Rptr. at 234. The struggles of the lower courts are alluded to. *Id.* at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235.

104. The test is stated several places in the opinion. *See id.* at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228; *id.* at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234; *id.* at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.

105. The court cited Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1971); Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); Self v. General Motors, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); Culpepper v. Volkswagen of America, Inc., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (1973); Van Zee v. Bayview Hardware Store, 268 Cal. App. 2d 351, 74 Cal. Rptr. 21 (1968). The court's use of these cases is discussed in notes 114-22 *infra* and accompanying text.

106. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

107. *Id.*

108. The court cited the following cases: Horn v. General Motors, 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Henderson v. Harnischfeger Corp., 12 Cal. 3d 663, 527 P.2d 353, 117 Cal. Rptr. 1 (1974); Luque v. McClean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Heap v. General Motors, 66 Cal. App. 3d 824, 136 Cal. Rptr. 304 (1977); Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); Self v. General Motors, 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

improved design, and the adverse consequences to the product and consumer that would result from an alternative design.[109]

According to the *Barker* court, California decisions had repeatedly emphasized that one of the principal purposes underlying the strict products liability doctrine is to relieve an injured plaintiff of the "onerous evidentiary burdens inherent in a negligence cause of action."[110] Therefore, to comport with this objective, the burdens of persuasion and of producing evidence to show that a product is not defective must rest on the defendant if the plaintiff succeeds in making a prima facie showing that the injury was proximately caused by the product's design.[111] The court reasoned that since the factors relevant to the risk-benefit test often involved technical matters within the defendant's knowledge, it is appropriate that the defendant bear the evidentiary burden.[112]

III. END OF THE UNCERTAINTY

A. Ordinary Consumer Expectations

The first part of the new dual standard for defectiveness articulated in *Barker,* the ordinary consumer expectations test, seems a striking departure from the court's previous holding. The court noted the standard's similarity to warranty notions: "This initial standard, somewhat analogous to the Uniform Commercial Code's warranty of fitness and merchantability (Cal. U. Com. Code § 2314) reflects the warranty heritage upon which California product liability doctrine in part rests."[113] Although the court cited several decisions as precedent for the use of the consumer expectations standard,[114] all but one of the cited cases demonstrate that the approach is a return to warranty notions.

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109. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

110. *Id.* Prior to *Barker,* the plaintiff was faced with the burden of proving by a preponderance of the evidence that the product was defective. Now, if the plaintiff can prove that the product's design caused the injury, the burden is on the defendant to show that on balance the product was safe and not defective.

111. *Id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

112. *Id.* The argument is similar to the reasoning behind res ipsa loquitor in negligence. *See* W. Prosser, *supra* note 27, § 39.

113. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236.

114. *See* Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975) (*see also* note 115 *infra*); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (*see also* notes 37-44 *supra* and accompanying text); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (*see also* notes 12-20 *supra* and accompanying text); Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974) (*see also* note 81 *supra*); Van Zee v. Bayview Hardware Store, 268 Cal. App. 2d 351, 74 Cal. Rptr. 71 (1968).

The most recent of the cited cases, *Hauter v. Zogarts,*[115] did perhaps give a hint that the court was resuming a warranty approach since the defendant's liability in *Hauter* was based on a breach of express and implied warranties, as well as strict liability. *Greenman* was also cited, but it is notable for the view that warranty law is inapplicable in the consumer context.[116] *Pike* referred to consumer expectations, but in the context of the Restatement's unreasonably dangerous language,[117] and *Pike's* use of this language was later disavowed in *Cronin.*[118] *Self* equated defectiveness with excessive preventable danger.[119] In *Culpepper,*

115. 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975). In *Hauter,* the thirteen-year-old plaintiff was injured by a practice device designed to aid unskilled golfers in improving their skills, and he relied on strict liability as well as express and implied warranty theories. The express warranty claim was based on the carton's language that the device was "completely safe ball will not hit player." *Id.* at 119, 534 P.2d at 379, 120 Cal. Rptr. at 689. Although the court could have based its affirmance of the trial court's judgment not withstanding the verdict simply on its conclusion that the device was defectively designed, *id.* at 122, 534 P.2d at 388, 120 Cal. Rptr. at 692, it chose instead to analyze the product's failure at length in terms of breach of express and implied warranties. *Id.* at 114-21, 534 P.2d at 383-87, 120 Cal. Rptr. at 687-91.

116. The court in *Greenman* was more likely concerned with the notice requirement of warranty than with warranty theory itself, but the following language appears in the opinion:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

117. The court in *Pike* reasoned:

> A jury could decide that an earth-moving machine with a 48-foot by 20-foot rectangular blind spot was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it (or by a bystander), with the ordinary knowledge common to the community as to its characteristics.

RESTATEMENT (SECOND) OF TORTS, § 402A, Comment i at 352.

118. In referring to *Pike* the *Cronin* court stated: "It is notable that in the *Pike* case, in which we supposedly 'adopted' 'the standard of strict liability as stated in the Restatement,' we nowhere disavowed *Greenman* nor considered ourselves in conflict with that 'landmark opinion' . . . ." 8 Cal. 3d at 131 n. 14, 501 P.2d at 1161 n. 14, 104 Cal. Rptr. at 441 n. 14 (citation omitted).

119. *See* 42 Cal. App. 3d at 6, 116 Cal. Rptr. at 578.

it is unclear what test was applied, although the deviation from the norm test was discussed.[120] The final case cited in *Barker* as precedent for the consumer expectations standard, *Van Zee v. Bayview Hardware Store,*[121] did not attempt to define defective design other than to mention, in passing, *Greenman.*[122] An analysis of the cases cited by *Barker* in support of the ordinary consumer expectations test shows that contrary to the *Barker* court's assertion, the test was rarely used by California courts, at least after *Greenman.*

The pronouncement of this standard is surprising both in its return to notions of warranty law and in its adoption of the Restatement approach. In *Cronin,* the court had unequivocably rejected the approach and terminology of the Restatement for its "ring of negligence,"[123] and the *Barker* court reiterated the court's objections to the Restatement language.[124] The court stated the drafters of the Restatement employed the unreasonably dangerous language in order to limit strict liability to a product which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[125] The court then criticized the Restatement test because it permitted any lowered expectations of the consumer to serve as a shield for the manufacturer.[126] But despite its criticism of the Restatement language, the court accepted its purpose—the protection of the consumer's expectations—incorporating the consumer expectations language into the two-part test of defectiveness.[127]

The ordinary consumer expectations test for strict liability in *Barker* leaves defect undefined, as did *Cronin.* The notion of the ordinary consumer in strict liability is as vague and amorphous as the analogous reasonable person in negligence. Presumably, when defective condition was undefined, the jury imposed liabil-

120. *See* 33 Cal. App. 3d at 517-18, 109 Cal. Rptr. at 114-15. *See* note 81 *supra.*

121. 268 Cal. App. 2d 351, 74 Cal. Rptr. 21 (1968).

122. *Id.* at 361, 74 Cal. Rptr. at 27.

123. 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

124. *Id.* 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.

125. *Id.* quoting RESTATEMENT § 402A, *supra* note 20, comment i.

126. 20 Cal. 3d at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.

127. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38. It is highly likely that the formulation of both the Restatement and the California Supreme Court have had the same ultimate purpose throughout the development of the doctrine of strict liability, but after *Cronin* this was unclear. *See* notes 60-76 *supra* and accompanying text. *See generally* the discussion of the Restatement in *Cronin.* 8 Cal. 3d at 130-33, 501 P.2d at 1159-62, 104 Cal. Rptr. at 439-42.

ity when, in their judgment, the product was in such a condition that the manufacturer should be responsible for the harm caused by the product. Now, in determining what the ordinary consumer's expectations of the product would have been, the jury will no doubt consider what their own expectations of the product would have been after discounting any special expertise or knowledge they may have. In essence, the jury will continue to decide whether the product was as safe as it should have been. The only difference is that the *Barker* consumer expectations standard avoids the defective condition language which the court felt could mislead the jury in design defect cases.[128]

B. *Barker's* BALANCING TEST

Although the first part of the new standard is surprising for its acceptance of the Restatement's purpose, if not its language, and the new shift towards warranty, the second part of the *Barker* test is an unremarkable ratification of appellate court opinions delivered since *Cronin.* As discussed earlier,[129] many recent cases had employed a balancing test in evaluating the possible defectiveness of a given design, and the *Barker* court adverted to them.[130] When the court articulated the factors to be considered by the jury in weighing the benefits and burdens of a particular design, it simply repeated those factors which had previously been considered in lower court opinions.[131] Thus, the new test would not appear to alleviate the appellate court's confusion following *Cronin.*[132] However, if the trial court is able to instruct the jury to weigh the specified factor enunciated in *Barker,* it will not be left to draw its own conclusion as to the meaning of defective design. When the term was left largely undefined, the jury may

128. *See* 20 Cal. 3d at 428, 573 P.2d at 453, 143 Cal. Rptr. at 235. The court accepted the reasoning of Professor Wade that the normal use of the word "defective" connotes a manufacturing defect so the jury might be misled when faced with a design mistake. *See* Wade, *supra* note 3, at 831-32. *See also* Hoenig, *supra* note 3, at 118.

129. *See* note 81 *supra.*

130. 20 Cal. 3d at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235. The court cited in this regard: Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (1976); Self v. General Motors Corp., 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (1974); Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973).

131. 20 Cal. 3d at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235. *See* note 81 *supra.*

132. Referring to the lower courts, the *Barker* court stated: "Our decision in *Cronin* did not mandate such confusion." 20 Cal. 3d at 429, 573 P.2d at 453, 143 Cal. Rptr. at 235. At the outset of the opinion, the court stated that they were taking "this opportunity to attempt to alleviate some confusion that our *Cronin* decision has apparently engendered in the lower courts." *Id.* at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

have balanced the benefits and hazards of the design anyway,[133] but the potential for confusion was present nevertheless. With the new balancing test, no longer will the jury be left to speculate on what makes a product defective, but it can focus directly on features of the design.

As previously demonstrated,[134] the cases on which *Barker* relied as precedent for the risk-benefit standard analyzed the manufacturer's strict liability in a manner similar to negligence analysis. *Barker* acknowledged that the factors it discussed raised issues "similar to issues typically presented in a negligent design case . . . ."[135] Responding to this, the court attempted to differentiate between the concepts of negligence and strict liability.

First, the court distinguished between the two concepts by noting that the burden of proof shifted to defendants in strict liability. The purpose of *Cronin* was to relieve plaintiffs of the "onerous evidentiary burdens inherent in a negligence cause of action."[136] Placing the burden on defendants to prove the safety of their products relieves plaintiffs of the task of proving the manufacturer acted unreasonably. In effect, this forces manufacturers to prove that they acted reasonably in choosing the particular design of the product. Contrary to *Barker,* this is still a negligence approach; the elements in issue have the "ring of negligence." The only difference is that defendants in strict liability, rather than plaintiffs in negligence, have the evidentiary burden respecting those elements.

Second, the court recognized it was impossible to eliminate the inevitable balancing of alternative designs.[137] *Barker* tacitly admitted that the "ring of negligence" cannot be eliminated. Strict liability does not differ from negligence in its approach to weighing competing considerations in a product's design except for the shifting of the burden of proof.

Third, the court pointed out that the viewpoint and focus of the jury in a strict liability action differs from their perspective

133. As the court stated, "weighing the extent of the risks and the advantages posed by alternative designs is inevitable in many design defect cases." *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. 239.

134. *See* note 81 *supra* and accompanying text.

135. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

136. *Id.*

137. *Id.* at 433, 573 P.2d at 456, 143 Cal. Rptr. at 238.

in a negligence action.[138] In strict liability actions, the jury is instructed to focus on the product instead of the manufacturer's conduct. While the distinction may exist in theory, practically there would seem to be little difference in design cases.[139] If the benefits of a product's design outweigh the dangers of the design, the manufacturer's conduct in choosing the design was obviously reasonble, and consequently not negligent. It is suggested that, with one exception, negligence is coextensive with strict liability under *Barker's* balancing test in all design cases except those in which an unsafe product was produced by a manufacturer who exercised due care. It is submitted that this situation arises only when the product performs in an unexpectedly harmful way or when the injury was not reasonably foreseeable. Since the product is in the condition intended by the manufacturer, scrutiny of the product necessitates scrutiny of the manufacturer's intentions and conduct in formulating that intention. As one commentator has said: "In design cases much more than the product is impugned."[140]

C. Precedent for the Dual Approach

Since previous California decisions had not used the "two-pronged"[141] definition of design defect set out in *Barker,* the court

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

139. As the court said: "It is true, of course, that in many cases proof that a product is defective in design may also demonstrate that the manufacturer was negligent in choosing such a design." *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. An article by Professor Wade, *supra* note 3, is cited several places in *Barker. See* 20 Cal. 3d at 426 n. 8, 573 P.2d at 452 n. 8, 143 Cal. Rptr. at 234 n. 8; *id.* at 428, 573 P.2d at 453, 143 Cal. Rptr. at 235; *id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236; *id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. Professor Wade reasoned as follows:

> To return to the relationships between negligence and strict liability for products, so far as the manufacturer is concerned, it is only when something has gone wrong with the manufacturing process and the product is not in the condition in which it was intended to be that there is any significant difference. In the case of the improper design which makes the product dangerous, whatever is enough to show that strict liability should apply (that it has a "defective design", to use the *Cronin* approach), will also be enough to show negligence on the part of the manufacturer . . . . The proof necessary to establish strict liability will certainly be sufficient to establish negligence liability as well . . . . *There are thus innate similarities between the actions in negligence and in strict liability, and changing the terminology does not alter this.*

Wade, *supra* note 3, at 836 (emphasis added). *See also* Hoenig, *supra* note 3, at 118-19.

140. Hoenig, *supra* note 3, at 121.

141. 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

referred to two cases from other jurisdictions that adopted a "somewhat similar, though not identical, dual approach . . . ."[142] An analysis of the two cases reveals that, although they may have utilized a dual approach, the standard applied was actually the Restatement test. In *Henderson v. Ford Motor Co.*,[143] a Texas case involving the defective design of an air filter housing in an automobile, the court applied the Restatement language as follows: "The question is whether this filter housing, and *all housings of the same design,* were unreasonably dangerous . . . ."[144] The jury had been instructed according to the Restatement.[145] The other case cited, *Welch v. Outboard Marine Corp.*,[146] made similar use of section 402A. The plaintiff claimed the jury had been incorrectly charged,[147] but the court of appeals found that the charge was not confusing since its last sentence "exactly tracks the language of Comment i of Section 402A."[148] While it is unlikely that the *Barker* court felt compelled to cite precedent for the mere duality of the *Barker* test, it is difficult to understand how the two cases support the substance of the *Barker* standard since they applied the Restatement analysis.

D. Application of the Two-fold *Barker* Test

The *Barker* balancing approach will be easily applied by trial courts. Apart from the evidentiary advantage favoring plaintiffs,[149] the approach is substantially similar to negligence analysis.[150] However, because the consumer expectation test has been

142. *Id.*

143. 519 S.W. 2d 87 (Tex. 1975).

144. *Id.* at 92 (emphasis in original).

145. The actual instruction was as follows:

> A product may be considered defective or defectively designed if, at the time it leaves the seller's hands, it is in a condition not expected by the buyer and which would be unreasonably dangerous to the ordinary buyer. To be "unreasonably dangerous" the product must be dangerous to an extent beyond that which would be expected by the ordinary buyer with the ordinary knowledge common to the community as to the characteristics of such product.

Id. at 94 n. 1. *See* Restatement § 402A, *supra* note 20, and comment i, which are discussed in notes 20-25 *supra* and the accompanying text.

146. 481 F.2d 252 (5th Cir. 1973).

147. *Id.* at 253.

148. *Id.* at 254. In fact, the actual language of part of the instruction was nearly identical to Comment i. *See id.* at 253-54.

149. *See* notes 138-39 *supra* and accompanying text.

150. *See* Hoenig, *supra* note 3, at 123-25; Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products,* 20 Syracuse L. Rev., 559, 562 (1969). Keeton felt that strict liability and the Restatement approach should be

applied infrequently since *Greenman,* the manner in which it will operate remains a matter of speculation. Any time an injury results from the use of a product, a jury could, and probably would, conclude that the ordinary consumer's expectations had not been satisfied. Consumers usually do not expect to be injured by products so that if an injury has occurred, the product will most likely fail this part of the test. The only time consumer expectations will be satisfied after injury has resulted from use of a product will be when the ordinary consumer would have expected injury and consequently, the plaintiff should have expected injury. If the plaintiff did not actually expect to be injured, he or she did not assume the risk in the classic sense of voluntarily encountering a known danger. Nevertheless, the manufacturer must prove something very similar to assumption of risk before a risk-benefit balancing will be undertaken.

E. Categorization of Product Liability Cases

In *Barker,* the court was able to distinguish between design cases and manufacturing cases since the facts of *Barker* clearly put only the design of the machine in issue, and it appeared to limit application of the two-fold test to design defect cases.[151] This categorization of products liability cases differs from the view expressed in *Cronin* and may prove unworkable. In *Cronin,* the court referred to the "difficulty inherent in distinguishing between types of defects"[152] and concluded that "a distinction between manufacture and design defects is not tenable."[153] The *Cronin* court stated the reason for its conclusion thusly:

> The most obvious problem we perceive in creating any such distinction is that thereafter it would be advantageous to characterize a defect in one rather than the other category. It is difficult to prove that a product ultimately caused injury be-

used only in manufacturing defect cases. Keeton, *supra* at 562. Hoenig stated that the 402A or defective criterion "provide little assistance in design cases where evaluative inquiries and policy balancing are essential." Hoenig, *supra* note 3, at 120. Negligence theory, Hoenig reasoned, would permit a jury "to consider *all* relevant factors in ascertaining whether a particular design is one for which liability should be imposed." *Id.* at 122. Using negligence concepts in products liability has the advantage that judges, jurors, and lawyers are familiar with them. *Id.* at 124.

151. The court introduced the twofold test by stating "a trial judge may properly instruct the jury that a product is defective in design . . . ." 20 Cal. 3d at 435, 573 P.2d at 457, 143 Cal. Rptr. at 239. *See also id.* at 417, 573 P.2d 446, 143 Cal. Rptr. at 228.

152. 8 Cal. 3d at 134, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

153. *Id.*

> cause a widget was poorly welded—a defect in manufacture—rather than because it was made of inexpensive metal difficult to weld, chosen by a designer concerned with economy—a defect in design . . . . We wish to avoid providing such a battleground for clever counsel.[154]

The *Barker* decision may create such a battleground if in a particular case it is more advantageous for the plaintiff or defendant to have the *Barker* standard applied than the test for manufacturing defects, which seems to still be governed by the *Cronin* rule.[155] For example, a plaintiff may allege defective design as an attempt to shift the burden of proof to the defendant to prove that the product was safe.[156]

If dividing products liability cases into design or manufacturing defect cases is necessary to apply the *Barker* rule, trial courts will encounter cases which are difficult to categorize, especially if the product is greatly damaged or destroyed. For example, it was never made clear whether *Cronin* was a design case. The concluding discussion in *Cronin*[157] apparently characterized the case as one involving design error because the court discussed why *Greenman* applied to design situations. Such discussion would have been pointless unless the *Cronin* facts suggested the need to address the design issue. In *Barker,* however, the court recited the defendant's argument that *Cronin* should be limited to the manufacturing defect context without comment regarding the characterization.[158]

Of course, it may be that the two-part *Barker* rule will be applied to manufacturing defect cases as well. In a few instances, the *Barker* court referred to products in general, rather than product design, in discussing the applicability of the *Barker* rule.[159]

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154. *Id.*

155. *See* 20 Cal. 3d at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.

156. The court's language mandating the shifting of the burden was also phrased so as to apparently limit its application to design cases: "[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift . . . ." *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

157. 8 Cal. 3d at 134-35, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

158. *See* 20 Cal. 3d at 424-25, 573 P.2d at 450-51, 143 Cal. Rptr. at 232.

159. *See e.g., id.* at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228, where the court stated that in cases of "inadequate warning" the term "defective" must be defined further for the benefit of the jury. *See, e.g., id.* at 425-26 n. 7, 573 P.2d at 451 n. 7, 143 Cal. Rptr. at 233 n. 7, where the court stated: "a product must meet ordinary consumer expectations as to safety to avoid being found defective." The court also said: "When a *product* fails

This implies that the holding may apply to production defect and failure-to-warn cases. The application of the *Barker* rule to other types of product liability cases would significantly alter the prosecution of such cases in light of the defendant's evidentiary burden imposed by the *Barker* holding.

IV. CONCLUSION

In California, development of a definition of defect began with the broad formulation of the new tort in *Greenman.* However, the lower appellate courts, and the Supreme Court to a limited extent, revived the familiar sounding language of the Restatement's "reasonableness" approach as *Greenman* proved too imprecise to apply in the more difficult cases. In *Cronin,* the Supreme Court recognized that the intermediate appellate courts were tending toward a negligence test, and it reiterated the rationale and language of *Greenman,* vague as it was, in an effort to arrest development of the doctrine along negligence lines. The result was that the lower courts again returned, for the most part, to a negligence analysis.

In *Barker,* the Supreme Court sought to establish a broad definition of defective design without the notion of defectiveness set out in *Cronin.* To accomplish this, the court returned to a warranty concept borrowed from the Restatement—"the ordinary consumer's expectations as to safety." This novel return to warranty notions gives little content to the definition of defect. It appears that application of this standard will result in liability in all cases where the plaintiff's conduct does not resemble assumption of risk. In addition to the consumer expectation standard, the court recognized and accepted the appellate court trend by propounding a second standard that permits a jury to balance competing considerations, but the court placed on the defendant the burden of proving that the design was not defective. This second standard of the *Barker* test is an unremarkable ratification of the opinions of the lower courts. The shifting burden of proof, however, is a significant addition to strict liability doctrine. The *Barker* opinion seems to require that a distinction be made between design and manufacturing defects, but this may

to satisfy such ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation, a manufacturer is strictly liable for resulting injuries." *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (emphasis added).

be difficult at times. The problem could be avoided if, as seems probable, the *Barker* rule is applied in all types of product liability cases.

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