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Products Liability—Strict Liability in Tort: Defect Need Not Render Product "Unreasonably Dangerous"—Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972)

Charles L. Coleman

PRODUCTS LIABILITY—STRICT LIABILITY IN TORT: DEFECT NEED NOT RENDER PRODUCT "UNREASONABLY DANGEROUS"—Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

Plaintiff Cronin was injured when the bread delivery truck he was driving for his employer collided with another vehicle. An aluminum safety hasp designed to hold the truck's bread racks in place failed during the collision; as a result, plaintiff was pushed forward through the windshield of the truck and injured seriously. Plaintiff's expert witness testified that the hasp was unusually weak because of bubbles and organic matter in the metal, that the hasp would have withstood the forces exerted by the racks during the collision had it not been flawed, and that the flaws and weakness of the metal were present at the time of manufacture, not caused by fatigue during use. Cronin obtained judgment against defendant Olson Corporation, original seller of the assembled bread truck, on the basis of strict liability in tort. Olson sought reversal on the ground that the trial court had refused to require Cronin to prove that the truck's defective condition (due to the faulty safety hasp) made it "unreasonably dangerous to the user or consumer."[1] The California Supreme Court unanimously affirmed, holding in *Cronin v. J. B. E. Olson Corp.*[2] that the manufacturer is strictly liable in tort for all injuries proximately caused by its defective products; the defect need not make the product unreasonably dangerous to the user or consumer.

The California courts have pioneered the development of strict liability in tort; California's experiences with the evolving rules surrounding the doctrine may be expected to have great impact on the law in her sister states. This note will examine the popular rationales and other factors which may account for, but do not justify, the use of an "unreasonably dangerous" requirement in strict liability cases. It will be shown that this requirement added nothing of substance to the

1. Olson also argued that proximate causation between the defect and plaintiff's injuries was not established, since the hasp did not cause the collision. This argument was rejected summarily by the court, 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437. California essentially has adopted the reasoning in Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See* Thomas v. General Motors Corp., 13 Cal. App. 3d 81, 91 Cal. Rptr. 301 (1970), where it was held that a manufacturer may be held liable for failing to make a product safer for foreseeable misuse by a consumer.

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

elements of strict liability in tort but was simply a stumbling block for plaintiffs. It was repetitive of other elements of the tort and imported vague overtones of negligence confusing to a jury hearing a strict liability case. Stripping away the "unreasonably dangerous" requirement reveals the two core elements of strict liability in tort in California: a "defective" product and its proximate causation of an injury. This note will describe the contours of both elements.

I. THE *GREENMAN* RULE AND THE *RESTATEMENT (SECOND) OF TORTS* § 402A

In the premier California products liability case, *Greenman v. Yuba Power Products, Inc.*,[3] the California Supreme Court held that strict liability in tort is not governed by contract warranty principles, but by separate principles of risk distribution. "A manufacturer is strictly liable in tort," Justice Traynor wrote for the court, "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."[4] This language has come to be known as the "*Greenman* rule" and has been cited repeatedly by courts in California as definitive of the California products liability rule.[5] *Greenman* made no mention of a requirement that the defect make the product "unreasonably dangerous."

Two years after *Greenman* was decided, the *Restatement (Second) of Torts* § 402A was published in its final form.[6] The *Restatement* expounded a rule of strict liability similar to that in *Greenman* but added the requirement that the product in question be in a defective condition "unreasonably dangerous to the user or consumer."

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3. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
4. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
5. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970). *See also* R. CARTWRIGHT & J. COTCHETT, CALIFORNIA PRODUCTS LIABILITY ACTIONS 422-27 (1970). The *Cronin* court reaffirmed the *Greenman* test as being definitive, 8 Cal. 3d at 129-30, 501 P.2d at 1158-59, 104 Cal. Rptr. at 438-39.
6. RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads in full as follows:
(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

The California court in *Cronin* did not attempt to explain the occasional use of the phrase "unreasonably dangerous" in past California cases or to examine the *Restatement's* reasons for the dual requirements of defect and unreasonable danger. Rather than discuss cases which had mentioned the § 402A requirements,[7] the court brushed them aside with the observation that very little could be gleaned from the mention of the *Restatement* rule in California cases because, until *Cronin,* no conflict between it and *Greenman* on the question of "unreasonable danger" had arisen.[8] Similarly, the Court did not question the validity of the *Restatement's* rationale for the additional requirement of unreasonable danger; it simply indicated that in the past it had exercised its prerogative to ignore the *Restatement* § 402A restrictions on strict liability,[9] and that the mere mention of § 402A in strict liability cases did not signify California's assent to each of that section's provisions. The court found the "unreasonably dangerous" element objectionable because it tended to make plaintiffs establish the manufacturer's negligence,[10] and it accordingly had no qualms

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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.

7. The following California Supreme Court cases mentioned the "unreasonably dangerous" requirement: Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Jimenez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

The following California Court of Appeals cases mentioned the requirement: Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968); Read v. Safeway Stores, Inc., 264 Cal. App. 2d 404, 70 Cal. Rptr. 454 (1968); Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); Johnson v. Standard Brands Paint Co., 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969); Oakes v. Geigy Agricultural Chemicals, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969); Grinnell v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 79 Cal. Rptr. 369 (1969); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970); Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1970); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); Lewis v. American Hoist and Derrick Co., 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (1971); Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971); Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972) (conflict of laws); Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972).

8. 8 Cal. 3d 121 at 131, 501 P.2d 1153 at 1161, 104 Cal. Rptr. 433 at 441.

9. 8 Cal. 3d at 131, 501 P.2d at 1160, 104 Cal. Rptr. at 440. The court cited Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970), where the apparently restricted applicability of RESTATEMENT (SECOND) OF TORTS §402A to sellers was put aside and a strict liability recovery allowed against a lessor of gasoline trucks.

10. 8 Cal. 3d at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

about eliminating the requirement. Although the California court found it unnecessary to undertake a critical examination of the *Restatement's* rationale or a careful analysis of past case law, such investigation would have vindicated the position taken in *Cronin*.

The *Restatement's* rationale for the "unreasonably dangerous" requirement, found in Comments *i, j* and *k* to § 402A, is that although many desirable products can be dangerous under some circumstances, liability should not follow if the dangers are of the type to be expected from the products. Comment *i* states that an expected danger is not "unreasonable."[11] This "unreasonably dangerous" requirement was supposedly included to shield from liability manufacturers of products that are ordinarily safe to use but which necessarily contain some possibility of harm.[12] Comment *k* deals with "unavoidably unsafe" products, such as the Pasteur rabies vaccine, whose dangers, though substantial, are not so serious as the dangers they eliminate. "Such a product," says the Comment, "properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous."[13]

Certainly all products which are unreasonably dangerous to the user or consumer would be adjudged "defective" as that term is commonly understood by the *Restatement* and the courts of California.[14] It follows that a product which is not defective can not be unreasonably dangerous. The "unavoidably unsafe" products described in

11. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i* at 352-53 (1965) reads in pertinent part:

> [M]any products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

See note 21 *infra* regarding the use of the consumer's expectations as a test of defectiveness.

12. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23-26 (1966).

13. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *k* at 353-54 (1965). Comment *k* reads in pertinent part as follows:

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

14. *See* note 56 *infra* regarding the definition of "defect" in the RESTATEMENT and note 22 *infra* regarding the definition of "defect" in California. *See also* Jiminez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

Comment *k*, when properly prepared and accompanied by adequate warning, are not defective according to the Comment, and therefore injuries arising out of the use of these unavoidably dangerous products will not give rise to strict tort liability. The "unreasonably dangerous" test serves no purpose in such cases, for the result is completely determined by a finding of no defect.

The requirement is similarly unnecessary when the product is defective. However, while all unreasonably dangerous products are defective, a product can be defective, under some definitions of "defect," without being unreasonably dangerous.[15] For these products, it might be suggested, the "unreasonably dangerous" test is necessary to prevent trivial defects from giving rise to liability. But while it is easy to conceive of a defective but not unreasonably dangerous product,[16] it is difficult to imagine that a *defect* whose risk of harm was so foreseeable that it would be held the *proximate cause* of the injury would not also be found "unreasonably dangerous."[17] Thus the additional "unreasonably dangerous" requirement is superfluous both when the product in question is defective and when it is not. Consequently, the requirement does not materially further the purpose of protecting the legitimate concerns of manufacturers of unavoidably dangerous products or of the society which demands, but may be injured by, those products.

A similar conclusion can be drawn regarding those products discussed in Comment *i*. While Comment *k* refers to "unavoidably unsafe" products which are "quite incapable of being made safe for their intended or ordinary use," Comment *i* refers to products with lesser unavoidable dangers which "cannot possibly be made entirely safe for all consumption."[18] The dangers mentioned in Comment *i* appear to be quite as unavoidable as those in Comment *k*, the only difference between them being the degree of danger involved. Comment *k* "unavoidably unsafe" products are apparently never safe for ordinary use, while Comment *i* products appear to be safe for most consumption, though not totally harm-free. If the more dangerous Comment *k* prod-

15. *See* note 22 *infra*.
16. An example of a defective but not unreasonably dangerous product might be an automobile with exterior paint that blisters and peels off easily when exposed to the sun.
17. *See* note 14 *supra*.
18. *See* note 11 *supra*.

ucts, properly prepared and accompanied by adequate warning, are not defective solely by reason of their large but unavoidable hazards, neither should the safer Comment *i* products, if similarly free from defects in other respects, be rendered defective by their smaller unavoidable hazards. The manufacturers of Comment *i* products therefore are protected, as are the manufacturers of Comment *k* "unavoidably unsafe" products, because their products, if properly prepared and accompanied by adequate warning, are *not defective* even though they may cause injury; furthermore, even if their products are defective for some reason, they must *proximately cause* injury before liability can arise. The "unreasonably dangerous" requirement is an added element of plaintiff's burden of proof which can find no policy justification in either Comment *i* or Comment *k*.

It has been suggested here as axiomatic that an unreasonably dangerous product is *ipso facto* defective. According to Comment *j* to § 402A, a product which is safe for use when accompanying warnings are followed is neither unreasonably dangerous nor defective.[19] When a warning could render use of a product safe, and if adequate warning is given, the product is not defective (according to Comment *j*); if the warning is inadequate, the product is automatically unreasonably dangerous and ipso facto defective. The danger is automatically "unreasonable" because any increased danger due to nondisclosure would almost certainly outweigh the slight utility of not making the effort to disclose. Under any definition of "defect," moreover, such an unnecessary and easily avoided danger to the unwary consumer surely would be held to constitute a defect as well; the danger is unavoidable,[20] not contemplated by the consumer,[21] and

19. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *j* at 353 (1965). Comment *j* reads in pertinent part as follows:

Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . . . 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 a defective condition,* nor is it unreasonably dangerous (emphasis added).

20. Dean Prosser has suggested avoidability of danger as a key factor in determining defectiveness and the applicability of strict liability in tort. *See* 18 HASTINGS L.J. 9, 23-26 (1966). Comments *i* and *k* to § 402A tell us that unavoidable hazards do not render a product defective. The inference that products with avoidable dangers are defective is not unfair, if the term "avoidable" is properly defined. "Avoidable" is used here, in keeping with common understanding, to refer to those dangers whose costs of elimination do not exceed the costs of the injuries they cause. Hazards which cannot

"unreasonably dangerous"[22] to him. Where failure to provide a needed warning is shown, the statement that the product is also "unreasonably dangerous" adds nothing to the inevitable finding of defectiveness, nor, where the product is rendered safe by adequate warning, does the statement that the product is "not unreasonably dangerous" add anything to the inevitable finding of no defectiveness. Although the findings may be triggered for distinguishable reasons, the point remains that in warning cases defective products are coextensive with dangerous products, and the requirement of a dual showing of defect

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be avoided economically are "unavoidable." "Avoidability," thus understood, is a viable determinant of defectiveness which embodies the same principles as the "unreasonably dangerous" test.

21. If the consumer were aware of the hazard, the warning would be unnecessary. The question of what the consumer contemplates or is led to expect is another possible determinant of defectiveness. *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363 (1965) [hereinafter cited as Traynor]. The popularity of the consumer's expectation as a determinant of defectiveness stems from the warranty background of strict liability and the influence of the UCC. Dean Prosser states that "[t]he prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety." PROSSER, TORTS § 99 at 659 (4th ed. 1971). The difficulty with using the expectations of the consumer as a gauge of defectiveness is that the consumer arguably *expects* those features of products of which he is *aware;* if the consumer is *aware* of a patently dangerous design feature of a product when he buys it, then the danger conforms to his expectation and the product could not be "defective" under this definition. Neither the *Greenman* rule nor § 402A requires that the injured plaintiff be *unaware* of the dangerous design feature. Such a requirement was expressly rejected by the California Supreme Court in Luque v. McLean, 8 Cal. 3d 136, 144-45, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1973), decided the same day as *Cronin.*

22. This definition of defect seems to be the one envisioned by the RESTATEMENT. *See* Wade, *Strict Liability for Manufacturers,* 19 SW. L.J. 5, 14-17 (1965), where it is also pointed out that the dual requirement of defect and unreasonable danger is redundant, though it is suggested there that the notion of defect be dropped and unreasonable danger retained. Professor Wade recognizes the alternative of eliminating "unreasonable danger" and retaining the "defect" requirement and mentions some advantages of each alternative.

A product unreasonably dangerous because of a failure to warn or because of a design feature is "defective" under two of the three possible California definitions of that term delineated in *Jiminez* (*see* text accompanying notes 67-69 *infra*): (1) A defect is obviously synonymous with an "unreasonably dangerous feature" when a defect is defined as an unreasonably dangerous feature; (2) a product which is "unreasonably dangerous" will only rarely be "*reasonably fit* for its intended purpose," and it is therefore "defective" if "defect" is so defined; but (3) a whole product line could be designed or marketed in such a way that the use of any individual sample would be unreasonably dangerous, yet that sample would not be "defective," if "defect" is defined as a "deviation from the norm."

The definition of a defect as a "deviation from the norm" would not contain unreasonably dangerous warning or design features within its scope. This definition, to the extent that it operates to exclude such unreasonably dangerous design features, is not accepted by the California courts or by the RESTATEMENT. For the California Supreme Court's inclusion of design defects in strict liability cases, see note 42 *infra.*

and unreasonable danger is as redundant and cumbersome in Comment *j* as it is in Comments *i* and *k*.

Nevertheless, while the *Restatement* requirement (explained in Comments *i, j* and *k*) that the defect cause the product to be "unreasonably dangerous" was not in the older California jury instructions,[23] it was later incorporated in a newer version of those instructions.[24] The instruction actually given by the trial judge in *Cronin*, however,

23. The manufacturer [retailer] of an article who places it on the market for use under circumstances where he knows that such article will be used without inspection for defects, is liable for injuries proximately caused by defects in the manufacture or design of the article of which the user was not aware provided the article was being used for the purpose for which it was designed and intended to be used.
COMMITTEE OF STANDARD JURY INSTRUCTIONS, SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS, CIVIL (BOOK OF APPROVED JURY INSTRUCTIONS) No. 218-A (5th ed. 1969) [hereinafter cited as BAJI]. BAJI is generally regarded as the accepted text on instructions throughout California. R. CARTWRIGHT & J. COTCHETT, CALIFORNIA PRODUCTS LIABILITY ACTIONS 420 (1970). Note the close similarity between the above instruction and the *Greenman* test.

24. The defendant . . . is not required under the law so to create and deliver its product as to make it accident proof; however, he is liable to the plaintiff for any injury suffered by him if the plaintiff establishes by a preponderance of the evidence all of the facts necessary to prove each of the following conditions:
First: The defendant placed the . . . . . in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the particular . . . . . would be used without inspection for defects in the particular part, mechanism or design which is claimed to have been defective;
Second: The . . . . . was defective in design or manufacture at the time it was placed on the market and delivered;
Third: The plaintiff was unaware of the claimed defect;
Fourth: The claimed defect was a [proximate] [legal] cause of any such injury to the plaintiff occurring while the . . . . . was being used in the way and for the general purpose for which it was designed and intended, and
Fifth: The defect, if it existed, made the . . . . . unreasonably dangerous and unsafe for its intended use.
[An article is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics.]
BAJI No. 9.00 (This instruction was revised after *Cronin*. *See* note 26 *infra*).
The [manufacturer] [retailer] of an article who places it on the market for use under circumstances where he knows that such article will be used without inspection for defects in the particular part, mechanism, or design which is claimed to have been defective, is liable for injuries proximately caused by defects in the manufacture or design of the article which caused it to be unreasonably dangerous and unsafe for its intended use and of which the user was not aware, provided the article was being used for the purpose for which it was designed and intended to be used.
[An article is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.]
The plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove each of the foregoing conditions.
Id., No. 9.01 (This instruction was deleted after *Cronin*. *See* note 26 *infra*).

was based on the older, then-current instruction.[25] Defendant-appellant Olson argued that the *Restatement* § 402A rule, as recognized in the new instructions and as applied by the courts, represented the current law of California; plaintiff argued that the *Greenman* rule was definitive. After the latter view prevailed in *Cronin,* the California jury instructions were again revised, and the "unreasonably dangerous" requirement was excised.[26]

Cronin was unique in presenting the conflict between the two tests on the question of "unreasonable danger." The *Greenman* rule and the § 402A rule often had been cited together in California Supreme Court and lower court opinions, the conflict between them not then being perceived.[27] Although several opinions had mentioned or even

25. The trial court instruction read in pertinent part as follow:

In this action, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to prove the following issues as to each defendant seller:

1. That the seller placed the equipment on the market for use under circumstances where he knew that such equipment would be used without inspection for defects;

2. That there was a defect in the manufacture or design of the equipment involved;

3. That the user was not aware of the said defect;

4. That the equipment was being used for the purpose for which it was designed and intended to be used;

5. That the injuries and damages complained of were proximately caused by the said defect;

6. The nature and extent of the injuries and damages sustained by the plaintiff.

8 Cal. 3d at 128, 501 P.2d at 1158, 104 Cal. Rptr. at 438.

26. The 1972 revision of BAJI (Supp. 1973), *supra* note 23, 9.00 reads as follows:

The _____ of an article is [liable] [subject to liability] for injuries proximately caused by a defect in the article which existed when the article left possession of the defendant[s], provided that the injury resulted from a use of the article that was reasonably foreseeable by the defendant[s].

BAJI 9.01 was deleted in the 1972 revision. *Id.*, 9.01.

27. The low degree of conflict between *Greenman* and the RESTATEMENT occasioned by the "unreasonably dangerous" requirement can, perhaps, be accounted for by the following observation:

In the vast majority of products liability suits resulting in plaintiff's verdicts, it has been relatively easy to determine that a product was unreasonably dangerous. Difficulties in applying the 'unreasonably dangerous' standard arise most frequently when the product in question is unavoidably unsafe . . . .

Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability,* 64 MICH. L. REV. 1350, 1374 (1966). The "difficulty" with unavoidably unsafe products, of course, gave rise to the requirement that the products be *unreasonably* dangerous.

The conflict between *Greenman* and the RESTATEMENT is recognized in R. CARTWRIGHT & J. COTCHETT, CALIFORNIA PRODUCTS LIABILITY ACTIONS 420 (1970) [hereinafter cited as R. CARTRIGHT & J. COTCHETT]. The "unreasonably dangerous" requirement is roundly criticized, and the *Greenman* rule suggested as the true test of liability in California. The requirement (eliminated by Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163,

explicitly stated the requirement,[28] the great majority had not. Moreover, as the *Cronin* court observed,[29] in none of the cases stating the "unreasonably dangerous" requirement did the decision turn on whether the jury must decide the injuries were caused by a "defective" product or by a "defective condition unreasonably dangerous."

While there is no reported California case in which the results turn on the unreasonably dangerous requirement, *Pike v. Frank G. Hough Co.*[30] has been cited to support the proposition that California has adopted the *Restatement* requirement of an "unreasonably dangerous" product.[31] *Pike* involved a paydozer alleged to be defective in design solely because it lacked adequate safety devices (rear view mirrors and back-up warnings). The *Pike* court recited the *Greenman* rule, referring to *Greenman* as a "landmark opinion,"[32] but the court added that "[t]he Restatement Second of Torts, section 402A *succinctly recites* the standard for strict liability applicable to manufacturers." (emphasis added).[33] The opinion was riddled with references to "unreasonable risks" and "defective and dangerous" products, and it placed heavy reliance on the reasoning of *Greenman's* Illinois counterpart, *Suvada v. White Motor Co.*,[34] which had adhered closely to the *Restatement* rule and included the requirement that the defective condition be "unreasonably dangerous." After discussing *Suvada*, the California Supreme Court said in *Pike:* "We adopt a similar rule . . . . Whether the paydozer was unreasonably dangerous . . . is clearly a question of fact to be determined by the jury."[35] This comment indicates that the *Pike* court believed that the *Greenman* test embodies the "unreasonably dangerous" requirement. *Jiminez v. Sears, Roebuck & Co.*,[36] the only other California Supreme Court case interpreting *Greenman* to permit an "unreasonably dangerous" requirement, relied on *Pike* to

104 Cal. Rptr. 443 (1972)) of plaintiff's unawareness of the defect is also criticized. *Id.* at 426-28.

28. *See* note 7 *supra.*
29. 8 Cal. 3d at 131, 501 P.2d at 1161, 104 Cal. Rptr. at 441.
30. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).
31. *See, e.g.,* Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 919, 90 Cal. Rptr. 305, 315 (1970); Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1073, 91 Cal. Rptr. 319, 325 (1970); Silverhart v. Mount Zion Hospital, 20 Cal. App. 3d 1022, 1027, 98 Cal. Rptr. 187, 189 (1971).
32. 2 Cal. 3d at 475, 467 P.2d at 235, 85 Cal. Rptr. at 635.
33. 2 Cal. 3d at 475, 467 P.2d at 236, 85 Cal. Rptr. at 636.
34. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
35. 2 Cal. 3d at 476, 467 P.2d at 237, 85 Cal. Rptr. at 637.
36. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

establish as one permissible definition of a defective condition "one which was 'unreasonably dangerous' to the user, consumer, or bystander. (See Rest. 2d Torts § 402A)." As well as prompting this statement in *Jiminez,* the *Pike* opinion has induced lower courts to hold that California has adopted the *Restatement* rule,[37] but none of these cases actually negated the *Greenman* rule. The *Pike* opinion was a major cause of the introduction of the "unreasonably dangerous" requirement into California case law, but it was not the only one.

II. FAILURE TO WARN, DESIGN DEFECTS AND THE "UNREASONABLY DANGEROUS" REQUIREMENT

In California, nearly all the cases not relying on *Pike* as controlling which mentioned unreasonable danger involved failure to warn.[38] This frequent connection of the "unreasonably dangerous" requirement with the failure to warn indicates that factors other than solely the prestige of the *Restatement* may have operated to introduce that phrase into the products liability law of California. The mention of the "unreasonably dangerous" requirement in California cases also may be attributable to the desire to extend strict liability to manufacturers of dangerously designed products; this can be achieved either by defining "defect" broadly enough to include dangerous design features and making the manufacturer liable for injury caused by any "defect" in his product, or by allowing liability for any injury caused by an "unreasonably dangerous" design feature and not bothering to label that feature a "design defect."

37. *See* note 31 *supra.*

Pike v. Frank G. Hough Co., where the RESTATEMENT view appears to prevail, can be partly accounted for under the "warning-connectedness" explanation of the term "unreasonably dangerous" discussed below. *Pike* was a "warning" case; the principal question at issue in the case was whether a failure to provide safety devices (a design defect) could, of itself, constitute a defect for strict liability purposes. In answering in the affirmative, the court *analogized* the failure to provide safety devices to the unreasonably dangerous failure to warn. Hence, perhaps, the reference in *Pike* to "unreasonably dangerous" products:

> No rationale has been suggested to justify imposing strict liability with respect to a faultlessly made product which is unreasonably dangerous because it is produced without safety warnings, while refusing to impose strict liability with respect to a product which is unreasonably dangerous because it is produced without safety devices . . . .

2 Cal. 3d at 477, 467 P.2d at 237, 85 Cal. Rptr. at 637.

38. For cases using "unreasonably dangerous" in connection with failure to warn, see Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965)

"Defect" sometimes has been defined narrowly as a "deviation from the norm." This definition, it will be shown below, does not comprehend those features in products which otherwise would be labelled "design defects." The relationship of defectiveness and unreasonable danger in § 402A is, as has been shown, one in which the separate element of unreasonable danger is superfluous because the test of defectiveness is sufficient to produce the desired result in every case. But under the narrower "deviation from the norm" definition of defectiveness, this would not necessarily be the case; courts might adopt an alternative phrase such as "unreasonably dangerous" to find liability for injuries caused by dangerous design features which otherwise would be left uncovered by the shrunken notion of defectiveness.

One proponent of this "deviation from the norm" definition is Dean Keeton, who wrote in 1969:[39]

> I, unlike the authors of the *Restatement,* would limit the use of the word "defective" to the case of an *unintended* condition, a miscarriage in the manufacturing process. Most of the decisions applying strict liability notions have involved "defective" products in this limited sense . . . .

Under this definition, *design* features which cause economically avoid-

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(failure to give adequate notice of the burning time of a dynamite fuse could render the dynamite "unreasonably dangerous" and serve as a foundation for strict liability); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966) (flammability of auto engine); Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968) (warning adequate to protect normal user is sufficient, hypersensitive user must protect self); Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (failure to disclose air pressure and load limitations constituted unreasonably dangerous defect); Johnson v. Standard Brands Paint Co., 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969) (inadequate warnings accompanying ladder); Oakes v. Geigy Agricultural Chemicals, 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969) (polio vaccine causes polio); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971) (drug harms sensitive patient); Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (1971) (question of fitness for intended purpose to be determined by referring to load capacity warnings in instruction manual); Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972) (plaintiff's hand crushed in press).

In the exhaustive list of California products liability cases mentioning the "unreasonably dangerous" requirement in note 7 *supra,* only two, Read v. Safeway Stores, Inc. and Kasel v. Remington Arms Co., do not either mention failure to warn or rely on *Pike* as controlling authority. *Kasel* dealt primarily with conflicts of law and merely accepted BAJI, *supra* notes 23-24, No. 9.00, the then current jury instruction (containing the unreasonably dangerous phrase), as representative of California law on the subject.

39. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products,* 20 SYRACUSE L. REV. 559, 562 (1969) (emphasis added) [hereinafter cited as Keeton].

able injuries are not "defects" because they are *intended* conditions of the product, but they are "unreasonably dangerous" because the costs of eliminating them are less than those of the injuries they cause. To yield results which do not fly in the face of the established rule of strict liability for injuries caused by products marketed with unreasonably dangerous design,[40] the Keeton approach apparently contemplates that a showing of "defectiveness" is unnecessary in dangerous design cases, and that a showing of "unreasonable danger" alone will suffice in such cases. Thus, products that might otherwise be called "defective in design" are termed instead "unreasonably dangerous" under the Keeton view, but liability still follows.[41] The same criterion of avoidability of injury can be applied regardless of which requirement is used, and in this sense it hardly matters which is chosen. But if *both* a design defect and an unreasonably dangerous condition were to be required, as the *Restatement* seems to suggest by treating them as conjunctive requirements, the cumulative effect would be to increase plaintiff's burden of proof to the point of requiring a showing of negligence.

To the extent that the Keeton "deviation from the norm" definition of "defect" holds sway, design defect cases will contain a required showing of "unreasonable danger." *Warning* cases are likely to be design defect cases because only dangers due to the known and intended features of a product can be warned against, while the dangers caused by sporadic errors in the manufacturing process are too varied and unpredictable in nature to be the subject of a general warning to consumers. A popular but narrow definition of "defect" can thus lead to the felt need for the term "unreasonably dangerous" in cases involving design features which cause injury, and these design cases are often connected with failure to warn. Hence, perhaps, the fact that a disproportionately large number of cases mentioning "unreasonable danger" involved failure to warn.

40. *See* W. PROSSER, TORTS § 99 at 659 nn.75 & 77 (4th ed. 1971):

> [I]t is clear that the 'defect' need not be a matter of errors in manufacture, and that a product is 'defective' when it is properly made according to an unreasonably dangerous design, or when it is not accompanied by adequate instruction and warning of the dangers attending its use.

See also note 35 *supra*.

41. *See* Keeton, *supra* note 39, at 563.

It is desirable to settle upon a definition of "defective" or some other term to describe the type of product whose ill effects are fairly chargeable to the defendant manufacturer or seller. Either the Keeton approach should be adopted, and the requirement of unreasonable danger treated as sufficient without a further "defect" requirement, or the broader definition of defect should be maintained, as it was in *Cronin*, with the recognition that an added requirement of "unreasonable danger" is redundant because it duplicates the results of a test for defectiveness. Dean Keeton's definition of "defect" may have the virtue of conforming to commercial usage and to the layman's understanding of a defect as something accidental and unintended which occurs in the manufacturing process, but his approach is not accepted by the California Supreme Court.[42] Nevertheless, use of the term "unreasonably dangerous" probably is attributable, at least in part, to the widespread view which restricts the use of the term "defective" to products manufactured in an accidentally improper fashion and does not include those designed in an improper fashion.

III. THE MANUFACTURER AS "INSURER"

The *Restatement* attempts to justify the "unreasonably dangerous" requirement as necessary to encourage the manufacture of beneficial but "unavoidably unsafe" products. This note has proffered a "warning-connectedness" explanation for the appearance of the requirement in design defect cases. In addition, it is often suggested that the requirement is necessary to prevent the manufacturer from becoming an "insurer" or, rather, to avoid making the manufacturer

42. The California court has admitted that it has done little to explain what it means by "defective." *See, e.g., Cronin*, 8 Cal. 3d at 130, 501 P.2d at 1160, 104 Cal. Rptr. 440. But in *Greenman*, 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701, the court referred to defects in "design and manufacture," and in *Cronin*, 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442, the court stated:

> We can see no difficulty in applying the *Greenman* formulation to the full range of products liability situations, including those involving "design defects". A defect may emerge from the mind of the designer as well as from the hand of the workman.

Both the *Greenman* and *Cronin* statements are dicta, since neither case involved a design defect, but the understanding of the California court of the possible scope of the term "defect" is clear in Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 476-77, 467 P.2d 229, 237, 85 Cal. Rptr. 629, 637 (1970).

bear costs not properly allocable to him.[43] This argument was rejected by the *Cronin* court:[44]

> [W]e think that such protective end [protecting manufacturers from excessive liability] is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was a proximate cause of the injuries. Although the seller should not be responsible for all injuries involving the use of its products, it should be liable for all injuries proximately caused by any of its products which are adjudged "defective."

Labelling an injury-causing product "defective" is often in fact a policy decision that the manufacturer should bear the risks arising from products in that condition. Similarly, a finding of proximate cause amounts to a policy decision that a particular injury should be held to *arise from* the defectiveness of that product for purposes of liability.[45] The policy decision of whether a risk is properly allocable

43. *See* Cowan, *Some Policy Bases of Products Liability,* 17 STAN. L. REV. 1077, 1090 (1965), where the distinction is emphasized between "the voluntary undertaking to insure an individual against a specified class of losses . . . and the imposition by law of the duty to compensate for losses *caused* by *defective* products . . . . An 'insurer' does not cause injury which he then compensates." An automobile insurance company will compensate *all* injuries arising out of the operation of an automobile, while the automobile manufacturer compensates only those injuries which are proximately caused by a defect in the automobile. The manufacturer provides "insurance" only against those injuries which he has *caused* by marketing a defective product.

It may be argued that the phrase "unreasonably dangerous" is needed to reflect the limited extension of strict liability beyond unwholesome food cases to "products that create as great or greater hazards if defective." *See Greenman,* 59 Cal. 2d at 62, 377 P.2d at 900, 22 Cal. Rptr. at 700. This phrase may be understood to mean that manufacturers of products whose defects would not likely lead to serious injury are exempt from strict tort liability. The argument rests upon the notion that some products are more "inherently" or "imminently" dangerous than others. However, the attempted limitation to "inherently" or "imminently" dangerous products was abandoned long ago in negligence cases and is equally untenable for strict liability cases. *See* Prosser, *Strict Liability to the Consumer in California,* 18 HASTINGS L.J. 9, 21 (1966).

The "unreasonably dangerous" product is also reminiscent of the "ultrahazardous" activity, though the analogy between the two is not apt. Dynamite, properly manufactured and marketed, is not defective or "unreasonably dangerous," and the seller is not liable for injury it causes; the *user* of the dynamite is engaged in an "ultrahazardous" activity and is liable for injuries caused by his use regardless of how careful he is. Indeed, it was because some products were unavoidably unsafe to use, and therefore not *unreasonably* dangerous to use, that the notion of "ultrahazardous" use was invented as a means of placing the risk of harm on the user, who benefits most from the dangerous activity.

44. 8 Cal. 3d at 133-34, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

45. *See* W. PROSSER, TORTS § 42 (4th ed. 1971) and the Song-Beverly Consumer Warranty Act, CAL. CIVIL CODE § 1794.3 (West 1973) which states:

The provisions of this Chapter shall not apply to any defect or nonconformity in

to a manufacturer can be made at either point, although the notion of defectiveness, thanks to its commercial background, is not as purely subjective as proximate cause.

With these opportunities available at trial to decide whether the manufacturer ought to bear the risk of injury (the decision being based more or less upon risk distribution reasoning, depending on which definition of defect is adopted),[46] nothing is gained by adding "unreasonable danger" as another element of proof; certainly the test for strict liability is not rendered more objective by the "unreasonably dangerous" test, for it is at least as subjective in nature as the first two elements mentioned. Much is lost, however, since the plaintiff is burdened with convincing a jury of an element of proof with negligence connotations.[47]

Notwithstanding the several explanations discussed above for the use of the "unreasonably dangerous" requirement, the requirement has no real underlying justification in the doctrine of strict liability in tort. Accordingly, the *Cronin* court properly eliminated it and reestablished the two basic elements of liability required by the *Greenman* rule—causation and defectiveness. With the "unreasonably dangerous" requirement eliminated in California, attention should focus upon the proof required to satisfy these two elements of liability.

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consumer goods caused by the unauthorized or unreasonable use of the goods following sale.

See also Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966), upholding a trial court ruling that plaintiff had to show, as an element of recovery in a strict liability case, that he was using the product in a reasonable way when injured. While the court recognized that contributory negligence is not a defense in a strict liability case, it held that plaintiff must disprove any *abuse* of the product as part of his burden of proving that a "defect" "caused" the accident.

46. *See* note 20 *supra*. *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23-27 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 16-20 (1965); Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398 (1970).

47. This is observed by the *Cronin* court, 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal Rptr. at 442. *But see* Noel, *Manufacturer's Negligence of Designer Directions for Use of a Product*, 71 YALE L. J. 816, 838 (1962). *See also* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960), where the similarity in burden of proof between negligence and strict liability cases is noted, the author estimating that in less than one case in one hundred would recovery be denied if the establishment of negligence were required in addition to the showing of a defect.

IV. PROXIMATE CAUSE AND LEGAL CAUSE

Both *Greenman* and the *Restatement* stated only that the defect has to "cause" the injury. Neither specified whether *proximate* cause[48] or the more relaxed standard of *legal* cause[49] was contemplated. The opinions between *Greenman* and *Cronin* lay no apparent stress on establishing proximate causation, and several authorities have suggested that the proximate cause standard, geared as it is to culpability, should be relaxed or changed for products liability cases.[50] Although the *Cronin* court cited the *Greenman* test as controlling, it mentioned the requirement of proving proximate causation as one of the seller's remaining protections after elimination of the "unreasonably dangerous" requirement.[51] The court stated that "strict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable."[52] This requirement of reasonable foreseeability was incorporated in the revised jury instructions adopted after *Cronin*;[53] the addition of this element to the existing requirement of proximate cause in the jury instructions makes the new causation requirements in California products liability cases a strong one. In practice, however, few products liability cases turn on whether proximate or legal cause is required. Rather, controversy in products liability cases centers more often around the other element of strict liability in tort, a "defect."

V. WHAT CONSTITUTES A DEFECT?

"A defect may be variously defined, and as yet no definition has

48. BAJI, *supra* note 23, No. 3.75, defines *proximate cause* as "a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred."

49. *Id.*, No. 3.76, defines *legal cause* as "a cause which is a substantial factor in bringing about the injury."

50. *See* W. PROSSER, TORTS § 79 (4th ed. 1971). It is suggested there that proximate cause standards should be more restrictive in strict liability cases than in negligence cases, since the strict liability defendant may be less culpable. *See also* R. CARTRIGHT & J. COTCHETT, *supra* note 27, at 436:

> The term "proximate cause" has led to confusion and the recommended term in a products liability case is "legal cause." This follows the decisions that talk in terms of "substantial factor" as a test for causation. This [test] is stated in RESTATEMENT (SECOND) OF TORTS § 431 (1965).

51. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

52. 8 Cal. 3d at 127, 501 P.2d at 1157, 104 Cal. Rptr. at 437.

53. *See* note 26 *supra*.

been formulated that would resolve all cases or that is universally agreed upon."[54] This frank admission by the California Supreme Court accurately summarizes the problem of defining a "defect." Courts and commentators have generally recognized three major ways to define "defect" involving concepts of "unreasonably dangerous," "deviation form the norm" and "reasonable fitness for intended purpose."[55]

A. "Unreasonably Dangerous"

Under this approach, the social utility of a dangerous product, or of a dangerous aspect of a product, is weighed against the total social cost of eliminating the danger.[56] If the utility outweighs the cost, then the useful activity is protected by the "unreasonably dangerous" requirement. The danger in question need not result from use of the product for its normal purpose; foreseeable danger arising from common but abnormal uses of a product must be weighed also. Thus, a product can be reasonably fit for its normal purpose yet unreasonably dangerous (defective) when used for other purposes.[57] It is not clear whether *Cronin* precludes reliance on the "unreasonably dangerous" definition of "defect." The court warned that its abolition of the "unreasonably dangerous" requirement as an element of strict liability in tort is not to be sidestepped easily: "[M]erely proclaiming that the phrase 'defective condition unreasonably dangerous' requires only a single finding would not purge that phrase of its negligence complexion."[58] On the other hand, the court probably did not intend to go

54. *Jiminez*, 4 Cal. 3d at 384, 482 P.2d at 684, 93 Cal. Rptr. at 772-73.

55. *See, e.g.*, Traynor, *supra* note 21; *Jiminez*, 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769.

56. This is the approach taken by the RESTATEMENT. Although § 402A does not define "defect" for strict liability purposes, it is fair to attribute the "unreasonably dangerous" definition to it because no other policy than that served by the "unreasonably dangerous" definition is furthered by the RESTATEMENT's additional requirement of a defect. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965).

Suggested factors to weigh in determining whether or not to hold the seller liable include: (1) Need for product; (2) availability of safer substitutes; (3) probability and seriousness of injury; (4) obviousness of danger; (5) knowledge and expectations of the public regarding the danger; (6) avoidability of injury through careful handling of product and (7) cost of effectively eliminating or reducing danger. *Id.* at 17.

57. *See* P. Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398, 399 (1970).

58. 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

so far as to eliminate completely the policy of weighing of dangers against costs which is often sought to be furthered by the "unreasonably dangerous" requirement. The *Cronin* court recognized that the definition of defectiveness in California inheres in the "cluster of useful precedents" provided by past products liability cases[59] and did not suggest that it rejected those cases which used the weighing approach under an "unreasonably dangerous" definition of "defect." *Cronin* thus aimed more at keeping the term "unreasonably dangerous" out of jury instructions as an element of plaintiff's case to be proved than at eliminating the policy considerations which inspired it.

B. "Deviation from the Norm"

"Deviation from the norm" as a definition of defectiveness has well-known shortcomings. Products with patently dangerous design defects may be the norm in a particular industry; it would follow, under the "deviation from the norm" definition, that such a product is not defective. Yet it is clear from *Luque v. McLean,*[60] decided the same day as *Cronin,* that the manufacturer will be held accountable for injuries proximately caused by poorly designed products, and that such products are "defective." The definition also poses the problem of deciding which control group should be deemed to be the "norm" against which the product in question is to be compared. An additional problem is posed by the plaintiff whose personal deviation from the norm causes him to be injured by a product. Courts generally will hold the manufacturer liable for failure to warn if the injurious interaction of its product with plaintiff's "defect" (*e.g.*, an allergy) is sufficiently foreseeable.[61] The "deviation from the norm" definition, by failing to include within its scope these injury-producing aspects of a product, does not consistently predict the result at which courts arrive. However, while a product's conformity to the norm does not mean that it will not be found defective, its flawed condition or other negative deviation from the norm is a relatively dependable indicium

59. *Id.*, n.16.
60. 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443.
61. *See* W. PROSSER, TORTS § 102 at 670 (4th ed. 1971). *But see* Harris v. Belton, 258 Cal. App. 2d at 611, 65 Cal. Rptr. at 816.

of defectiveness. The layman's understanding of "defect" probably conforms closely to this "deviation from the norm" definition; the product is one of inferior quality due to some miscarriage in the manufacturing process.

Also, if that product, as a proximate result of its inferior quality, causes injury, it would be defective under the "unreasonably dangerous" definition previously discussed. In a defect defined as a deviation from the norm, the danger resulting from the deviation is not an unavoidable feature of the product itself, although it may in fact be unavoidable given the limitations of the manufacturing process. The costs of errors in the manufacturing process, however unavoidable, are allocated to the manufacturer under the strict liability doctrine. As observed in the *Restatement* § 402A, Comment *i,* the manufacturer will not be held responsible for the unavoidable dangers of good whiskey, but it will be responsible for the dangers of whiskey adulterated, no matter how unavoidably, during the manufacturing process. Thus, in the case of manufacturing defects the "unreasonably dangerous" test and the "deviation from the norm" test should yield the same results. The latter test, however, does not adequately cover design defects, which are present in a whole product line and hence are "normal." Although the "deviation from the norm" definition does not cover design defects and is thus narrower in scope than the other two definitions, it frequently is used because it is more amenable to conclusive proof, where evidence is available, than are the more vague and subjective definitions, "unreasonably dangerous" and "unfit for intended purpose."

C. Reasonable Fitness for Intended Purpose

Reasonable fitness for intended purpose and merchantability are, of course, concepts rooted in the law of contract and warranty, and their use in defining defectiveness for the purposes of tort liability is the result of the evolution of strict liability in tort from principles of implied warranty.[62] While many contract limitations on plaintiff's recovery (privity, notice etc.) have been discarded from the law of strict

62. *See* Prosser, *Strict Liability to the Consumer in California,* 18 HASTINGS L.J. 9 (1966); Titus, *Restatement (Second) of Torts Section 402 and the Uniform Commerical Code,* 20 STAN. L. REV. 713 (1970); *see generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960).

liability in tort, warranty concepts of defectiveness often have been borrowed intact. Dean Keeton argues that commercial standards of defectiveness should not be applied in cases involving strict liability in tort because in ascertaining the manufacturer's liability for personal injuries, the dangerous nature of the product, not the disappointment of commercial expectations, is at issue.[63] Of course, a large area of overlap between those products found unreasonably dangerous and those found unmerchantable and unfit for intended purposes undoubtedly exists.[64] Although some authorities contend that any product not reasonably fit for its intended purpose is defective in both the warranty and strict liability senses,[65] even those arguing for the broadest definition of "defect" for the purposes of strict liability in tort would agree with Traynor's statement: "*Defect* becomes a fiction, however, if it means nothing more than a condition causing physical injury."[66]

In *Jiminez v. Sears, Roebuck & Co.*,[67] the California Supreme Court recognized the impossibility of settling upon one definition of "defect" for all purposes. The court cited examples of its prior application of all three of the above mentioned definitions and implied that the definition chosen for submission to a jury will depend upon the facts of each case.[68] The *Cronin* court retained this open approach to the elements of "defectiveness"[69] and gave no sign that it considered a tightening of the definition of "defect" necessary to compensate for the elimination of the requirement that the product be "unreasonably dangerous."

63. *See* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1336 (1966).

64. *See* note 27 *supra*.

65. R. CARTRIGHT & J. COTCHETT, *supra* note 27.

66. Traynor, *supra* note 21, at 372.

67. 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971). *Jiminez* dealt primarily with the important question whether or not the *res ipsa loquitur* doctrine can be applied to infer the existence of a defect from an injury. The court in *Jiminez* did not disturb the rule that circumstantial evidence, but not *res ipsa loquitur*, can be used, to establish a defect. (McCarter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 493 (1968)). But the court did allow *res ipsa loquitur* to be used in the related proof of manufacturer's *negligence* in causing the defect. It held that the joining of a strict liability theory with a negligence theory concerning the same defect did not preclude plaintiff from seeking a *res ipsa* instruction in the latter count.

68. 4 Cal. 3d at 384, 482 P.2d at 684, 93 Cal. Rptr. at 772.

69. 8 Cal. 3d at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442, n.16:

> We recognize, of course, the difficulty inherent in giving content to the defectiveness standard. However, as Justice Traynor notes, there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty law. (Traynor, *supra*, 32 TENN. L. REV. 363, 373).

VI. CONCLUSION

The California Supreme Court's abolition in *Cronin* of the "unreasonably dangerous" requirement significantly lightens plaintiff's burden of proof in products liability cases by eliminating an element suggestive of negligence. Since elimination of the plaintiff's need to prove negligence elements was a major reason for the introduction of strict liability in tort,[70] the purpose of that doctrine is furthered by this opinion. The legitimate interests of defendant manufacturers and sellers have not been compromised by the *Cronin* decision, for plaintiff must still prove the existence of a defect and its proximate causation of his injury.

The "unreasonably dangerous" requirement has three possible explanations, none of which justifies its retention by the courts: (1) Manufacturers of desirable but unavoidably unsafe products are adequately protected because their products are not necessarily defective; (2) "unreasonably dangerous" is descriptive only and has no separate legal content when used in failure to warn cases; and (3) the manufacturer is protected from becoming an "insurer" of his product by the requirement that plaintiff show existence of a defect and proximate causation.

Some commentators predict that the proof requirements of defectiveness and causation will be steadily eroded until a system similar to workmen's compensation is established in the field of products liability.[71] *Cronin v. J. B. E. Olson Corp.* can be viewed as a step down the road to manufacturers' "absolute" liability for injuries connected with their products, for it does lighten plaintiff's burden in proving defectiveness by eliminating the additional "unreasonably dangerous" requirement. But *Cronin* does not represent a turning point; it merely effects the policy of eliminating required showings of negligence in products liability cases which the California court announced in 1963

70. 8 Cal. 3d at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d at 461-62, 150 P.2d at 440-41 (Traynor, J. concurring) and Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

71. *See* Cowan, *Some Policy Bases of Strict Liability,* 17 STAN. L. REV. 1077, 1094 (1965). For a discussion of the interaction between workmen's compensation and strict tort liability see Comment, *Workmen's Compensation: Toward a Stricter Liability for Enterprise,* 6 U. MICH. J.L. REF. 190 (1972).

in *Greenman* and which the *Restatement* attempted to embody in § 402A. Accordingly, other jurisdictions which have embraced the doctrine of strict liability in tort, such as Washington, may also wish to reconsider the "unreasonably dangerous" requirement in the *Restatement* § 402A.[72]

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72. A New Jersey court recently adopted the reasoning of *Cronin* and held that:

> [T]he additional element of "unreasonable danger" is not a valid part of the concept of strict liability in tort in the State of New Jersey. . . . [The court] therefore adopts as law § 402A, minus the phrase, "unreasonably dangerous" and minus any necessity for the jury to find that the product was in a "defective condition *unreasonably dangerous*."

Glass v. Ford Motor Co., 123 N.J. Super. 599, 601, 304 A.2d 562, 564 (1973).

The Washington equivalent of *Greenman* is Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969), *noted* in 45 WASH. L. REV. 441 (1970). In *Ulmer,* which states the current products liability law of Washington, the Washington Supreme Court adopted the RESTATEMENT (SECOND) OF TORTS § 402A as the products liability rule for the state, seemingly including the "unreasonably dangerous" requirement:

> On a new trial, however, an instruction stating the rule according to RESTATEMENT SECOND) OF TORTS § 402A (1965) should be given, rather than instruction No. 6, which does not make it clear that the manufacturer is liable only for defects which create an unreasonable risk of harm.

75 Wn. 2d at 532, 452 P.2d at 735.

The rule embodied in the rejected Instruction No. 6 seems identical to that announced in *Cronin;* the instruction reads, in pertinent part, as follows:

> If you find that there was a defect . . . which existed at the time of the sale . . . and the plaintiff was injured as a proximate result of such defect, then I instruct you to find for the plaintiff and against the defendant.

Id. at 524, 452, P.2d at 730.