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CAVEAT EMPTOR: WILL THE A.L.I. ERODE STRICT LIABILITY IN THE RESTATEMENT (THIRD) FOR PRODUCTS LIABILITY?

Hon. George C. Pratt:

Thank you very much Professor Twerski. I have a question for you which I will save until the question period. The next speaker will be John Vargo, a practicing attorney.

Mr. John Vargo:*

Professor Twerski, I hope I do not add to your pain but there is going to be considerable disagreement with your position on section 402A.¹ I hope there is no offense to Judge Pratt in his re-

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1. See James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1514 (1993). The authors suggest the following revisions to § 402A:

Special Liability of One Who Sells a Defective Product

- (1) One who sells any product in a defective condition is subject to liability for harm to persons or property proximately caused by the product defect if the seller is engaged in the business of selling such a product.
- (2) The rule stated in Subsection (1) applies in the case of a claim based on a
 - (a) manufacturing defect even though the seller exercised all possible care in the preparation and marketing of the product;
or
 - (b) design defect only if the foreseeable risks of harm presented by the product, when and as marketed, could have been reduced at reasonable cost by the seller's adoption of a safer design;
or
 - (c) warning defect only if the seller failed to provide reasonable instructions or warnings about nonobvious product-related dangers that were known, or should have been known, to the seller.

marks which indicated a concern with economics and its effect on the manufacturer. What we have lost sight of in the last fifteen years is another huge group, the consumers, and the economic effect on this group.² I have read with great interest the *Cornell*

Id. Professors Henderson and Twerski, as co-reporters for the Restatement (Third) of Torts, take the position that they are attempting to change the standard from strict liability to negligence for design defect and failure to warn cases. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A (1965). This provision provides in relevant part:

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

Id.

2. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c. Section 402A of the Restatement (Second) of Torts was originally drafted as a method of protection for the consumer against defective products. Comment c provides in relevant part:

[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id.; see also David A. Fischer, *Products Liability - The Meaning of Defect*, 39 MO. L. REV. 339, 359 (1974) (stating that when the risk of danger is high, “most private consumers will not be able to bear the cost . . .”); Frank J. Vandall, “Design Defect” in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 77 (1982) (stating that the test set forth by Judge Learned Hand, “tends to make injurers richer at the expense of victims . . .”).

article by Professors Twerski and Henderson³ and their other law review articles over the last ten years.⁴ As reporters for the Restatement Third on Products Liability, Professors Henderson and Twerski have stated that they are attempting to write a draft that reflects what they believe is a consensus or the majority position of the courts.⁵ However, Professors Henderson and Twerski's position is, in my view, simply a return to negligence. I would take the same position as a famous judge who said "I dissent for reasons stated by the majority."⁶ I believe the Restatement under section 402A should remain one of strict liability in all its forms, including those for warnings.

Professor Jerry Phillips has submitted to the reporters what I consider is a true restatement which sets forth strict liability.⁷

3. See Henderson & Twerski, *supra* note 1.

4. Since 1983, Professor Twerski's articles have indicated a shift towards the concerns of the manufacturer and away from the concerns of the consumer.

5. Henderson & Twerski, *supra* note 1, at 1513.

6. The author is not referring to a specific case, but rather to a phrase used by many attorneys and judges to express the view that the majority has not grasped the point.

7. RESTATEMENT (SECOND) OF TORTS § 402A (Proposed Redraft 1993)
The draft states:

- (1) One who supplies a defective product is subject to liability for harm to persons or property caused by the product defect if the supplier is engaged in the business of supplying products of the kind having the product defect.
- (2) The rule stated in Subsection (1) applies in the case of a claim based on a defective product even though the supplier exercised all possible care in the manufacture or marketing of the product.
- (3) For purposes of Subsection (1) a defective product means a product that
 - (a) is not fit for the ordinary purposes for which the product was made,
 - (b) does not meet the expectations of the ordinary person,
 - (c) because of its dangerous condition would not be put on the market by a reasonably prudent supplier assuming he knew of its dangerous condition,
 - (d) is unduly dangerous,
 - (e) can practicably be made safer,
 - (f) has a practical substitute, or
 - (g) has been explicitly or implicitly misrepresented by the supplier.

There are good reasons why strict liability should be the rule, and there are many inappropriate reasons why strict liability has been rejected by some scholars and courts.⁸ I would like to point out a few since I may not get to all of them in the short time allowed.

What distinguishes strict liability from negligence?⁹ It is very simple. One must impute the knowledge of the relevant danger or

The above list of factors is not intended to be exclusive. A product may be defective if one or more of the above or other relevant factors applies.

(4) A determination of product defect shall be based on all relevant evidence as of the date of trial.

Id. Other examples of product-related terms that are multi-definitional include “merchantability” and “abnormally dangerous activities.” *See also* UCC § 2-314(2) (1993). Section 2-314(2) describes merchantable goods as those which at least:

(a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promise or affirmations of fact made on the container or label if any.

Id.

8. *See generally* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1206-13 (1992).

9. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965). Comment a provides in pertinent part: “The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in preparation and sale of the product.” *Id.*; RESTATEMENT (SECOND) OF TORTS § 282 (1965) provides in pertinent part: “[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” *Id.* Negligence as defined above

[D]oes not include acts which, although done with every precaution which it is practicable to demand, involve an irreducible minimum of danger to others, but which are so far justified by their utility or by traditional usage that even the most perfect system of preventative law would not forbid them. These may for convenience be termed “acts which create a strict liability.”

Id.

defect at the time of trial to the manufacturer.¹⁰ That is it. How have some courts accomplished the imposition of strict liability? This has been done by several means. First is *Phillips v. Kimwood Machine Co.*,¹¹ where the court imputed knowledge of the product's danger to the manufacturer, then asked whether the manufacturer was negligent for marketing the product in its original form.¹² After you impute knowledge, all you have left is traditional negligence principles.¹³ The other method of achieving strict liability is by employing the consumer expectation test.¹⁴ This is a simple test. If the product does not conform to what a reasonable consumer expects, then the product is defective.¹⁵ If it does conform to such expectations, the

10. *Petty v. United States*, 740 F.2d 1428, 1440 (8th Cir. 1984). The *Petty* court stated that an action based on strict liability focuses on the product, not on the manufacturer's conduct or knowledge. *Id.* To focus on whether the product is defective or not the courts have imputed the knowledge of the risk of danger to the manufacturer. *Id.*; *Halphen v. Johns-Manville Sales Corp.*, 737 F.2d 462, 465 (5th Cir. 1984) (holding that in Louisiana the manufacturer is presumed to know the defects of its products); *Seefeld v. Crown, Cork & Seal Co. Inc.*, 779 F. Supp. 461, 464 (D. Minn. 1991) ("the distinction between strict liability and negligence in . . . failure to warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.").

11. 525 P.2d 1033 (Or. 1974).

12. *Id.* at 1036. Strict products liability involves imposing constructive knowledge of a product's defective condition and then evaluating the reasonableness of placing such product into the stream of commerce. *Id.* See also *Wertheimer*, *supra* note 8, at 1196. "[T]he *Phillips* doctrine, which is essentially a risk/utility balancing test, directs the court or jury to decide whether assuming knowledge, the manufacturer should have been selling the product, in the form in which it was being marketed." *Id.*

13. See *Wertheimer*, *supra* note 8 at 1036. "The test . . . is whether the seller would be negligent if he sold the article knowing of the risk involved." *Id.*

14. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 698 (5th ed. 1984). "[A] product is defectively dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics." *Id.*

15. *Id.*

product is not defective.¹⁶ There are, however, several other tests for strict liability. For example, California uses a two step approach in *Barker v. Lull Engineering Co. Inc.*,¹⁷ which applied the consumer expectation test and, in the alternative, applied a risk-utility balancing test.¹⁸

The consumer expectation test seems to be the most popular method for achieving strict liability.¹⁹ However, scholars recog-

16. See *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1392 (5th Cir. 1992) (holding that there is no strict liability in tort for an open and obvious danger because the product is not more dangerous than contemplated by the consumer and “hence cannot under the consumer expectation test, applied in Mississippi, be unreasonably dangerous”); *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991) (holding a “product can only be defective when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale.”).

17. 573 P.2d 443 (Cal. 1978).

18. *Id.* at 455. “A product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” *Id.* Alternatively, a product may be found defective by use of the risk-utility balancing test. In this test

the jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design and the adverse consequences to the product and to the consumer that would result from an alternative design.

Id. at 454-55.

19. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977). Comment i provides in relevant part: “[t]he 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 characteristic.” *Id.*; Fischer, *supra* note 2, at 348 (stating that many courts have used the consumer expectation test as a “criteria for defining defect.” If a consumer reasonably expects a product to be safe, it is considered defective if it does not meet those reasonable expectations.); see also Christina M. Moylan, *In Pursuit of the Appropriate Standard of Liability for Defective Product Designs*, 42 ME. L. REV. 453, 458-60 (1990) (deriving the consumer expectation test from § 402A); Wertheimer, *supra* note 9, at 1197-99 (“The consumer expectation test ties the concept of defect to the reasonable consumer’s expectation of the product’s safety.”).

nize several problems with this test.²⁰ What are the problems? Under the consumer expectation test, the consumer's knowledge is all important, whereas the manufacturer's knowledge is not relevant.²¹ But, the knowledge that a normal consumer has concerning the qualities of a particular product creates problems in some instances.²² For example, the consumers' expectations may be too low.²³ When a consumer knows of the particular danger in the product, the product may not be considered defective.²⁴ A

20. See Fischer, *supra* note 2, at 349-52. "[T]he consumer expectations may be too high or too low. In addition, once expectations become settled in a manner consistent with present practice, manufacturers will have no incentive to improve the safety of products even when feasible. This frustrates a major policy underlying strict liability." *Id.*; Moylan, *supra* note 19, at 459. The article stated, among other things, that the consumer expectation test has been criticized for its lack of distinction between both negligence and warranty theories. This test may be no different from a negligence test because an ordinary consumer is not likely to expect more than the exercise of reasonable care by the manufacturer. *Id.*

21. See Wertheimer, *supra* note 8, at 1197-99 (stating that knowledge of danger is irrelevant under consumer expectation test except as recognized by the consumer); see also Gary D. Hermann, *The Consumer Expectation Test, Application of a Difficult Standard for Determining Product Defects*, 41 FED. INS. & CORP. COUNS. Q. 251, 264 (1991) (stating "the fact that the danger is unknown to the manufacturer does not change the fact that it makes the product more dangerous than the consumer would expect.").

22. See *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194-95 (Alaska 1992) (describing problems consumers have in forming reasonable expectations due to lack of knowledge about prescription drugs).

23. See Fischer *supra* note 2, at 349-50 (discussing problems that could arise if the consumer expectation test is used as the exclusive test in defining defectiveness); see also David G. Owen, *Products Liability: Principles of Justice for the Twentieth Century*, 11 PACE L. REV. 63, 80-81 (1990) ("occasionally a manufacturer is forced to disappoint a minority of consumers who possess peculiarly high expectations of product safety or who are particularly risk-averse, clumsy, careless or dull-witted."); John Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829 ("In many situations, . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.").

24. See *England v. Gulf & W. Mfg. Co.*, 728 F.2d 1026 (8th Cir. 1984); see also Wertheimer, *supra* note 8, at 1198 (explaining that punch press without guard would not be defective because consumer would expect injury to result under such circumstances).

typical example is a punch press without a guard.²⁵ In this situation, what fool would stick his hand into the operating area of the press when he knows that a hand could be severed? However, as is well known, many products can easily be guarded, and such products would be considered defective under a risk-utility test.²⁶ The consumer's knowledge of a product's danger has resulted in what some courts call the open and obvious danger rule.²⁷ This rule eliminates liability no matter what theory (strict liability or negligence) is used.²⁸ Another problem with the consumer expectation test is when the consumer expectations are too high.²⁹ In this instance, the consumer expects safety when the product cannot possibly be made safe.³⁰ Finally, the consumer will fail to establish liability under the consumer expectation test when it

25. See *England*, 728 F.2d at 1028; see also *Hartman v. Miller Hydro Co.*, 499 F.2d 191, 192 (10th Cir. 1974) (plaintiff injured by unguarded shaft of bottle washing machine).

26. See *Campo v. Scofield*, 95 N.E.2d 802, 803 (1950) (plaintiff injured hand by coming in contact with unguarded revolving rollers); but see *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759 (1971) (holding that danger of unguarded rotary blade obvious to plaintiff will not automatically preclude recovery).

27. See *Weatherby v. Honda Motor Co.*, 393 S.E.2d 64, 65 (Ga. Ct. App. 1990) (under the open and obvious rule, "a product is not defective if the absence of a safety device is open and obvious, and there is no duty to warn of an obvious danger . . ."); see also Jodie L. Miner, *An Analysis of Koske v. Townsend Engineering: The Relationship Between The Open and Obvious Danger Rule and the Consumer Expectation Test*, 25 IND. L. REV. 235, 239 (1991); see generally Jerry J. Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

28. See, e.g., *Volkswagen of America, Inc., v. Young*, 321 A.2d 737, 744-45 (Md. 1974) (denying strict liability where defect in design was "patent or obvious" to the user); *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 347 (Mo. 1964) (imposing liability in negligence where the construction defect was not obvious to the user).

29. See Wertheimer, *supra* note 8, at 1199 (noting that consumer expectations may be too high "as in the case of a product which the consumer might assume to be safe, but which cannot be made safe . . ."); see also Fischer *supra* note 2, at 349-50. "Expectations as to safety will not always be in line with what the reasonable manufacturer can achieve because the average consumer will not have the same information as experts in the field. Consumer expectations may be too high or too low." *Id.*

30. See Fischer, *supra* note 2, at 349-50.

cannot be shown what an ordinary consumer's expectations are concerning the product's danger.³¹

A review of the imputed knowledge rule can highlight the competing policy issues between negligence and strict liability.³² When a manufacturer actually knows of the danger in the product and the plaintiff can prove such knowledge, then negligence and strict liability are essentially equivalent.³³ However, applying strict liability in situations where the product manufacturer has knowledge of the defect or danger, has the beneficial effect of relieving the plaintiff of such proof.³⁴

Strict liability has its major benefit when the plaintiff is unable to prove negligence (knowledge of the danger).³⁵ For example, strict liability allows the finding of liability when the plaintiff cannot prove the manufacturer was negligent in discovering the defect in the product.³⁶

31. See *Brown v. Superior Court*, 751 P.2d 470, 477 (Cal. 1988) (recognizing that consumers of prescription drugs lack expectations about the safety of such drugs unless doctor so informs individual, therefore, the consumer expectation test is inapplicable to prescription drugs).

32. See *Kisor v. Johns-Manville Prods. Corp.*, 783 F.2d 1337, 1342 (9th Cir. 1986) (holding it was error for the court to refuse plaintiff's requested instruction that the manufacturer still had a duty to warn even if it showed that it was unaware its product was dangerous); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 548 (N.J. 1982) (holding question of whether knowledge of dangers of product was scientifically available at time of manufacture or question of whether medical community was unaware of danger of asbestos at that time, cannot be raised as a defense in a strict liability for failure to warn case).

33. See James C. Shubert, Jr., *Uncertainty in the Courts - Should Manufacturers be Held Liable for Failing to Warn of Scientifically Undiscoverable Hazards?*, 7 J. PROD. LIAB. 107, 110 (1984); see Wertheimer, *supra* note 8, at 1192. "[M]any courts, when applying strict product liability, have imputed the knowledge of the product's danger available at the time of trial to the manufacturer as of the time of the product's manufacture. Once this knowledge has been imputed, the standard is the same as a negligence standard." *Id.*

34. See Wertheimer, *supra* note 8, at 1193.

35. See Wertheimer, *supra* note 8, at 1195.

36. See Wertheimer, *supra* note 8, at 1195 ("imputation of knowledge serves solely to relieve the plaintiff of proving an element that the plaintiff would otherwise have had to demonstrate.").

The essential difference between negligence and strict liability is demonstrated by the case *Beshada v. Johns-Manville Products Corp.*³⁷ When a defect or danger is unknowable or not discoverable, the imputed knowledge rule of strict liability has its greatest effect.³⁸ The *Beshada* case applied strict liability by imputing knowledge of the danger to the manufacturer when such knowledge was either unknowable or undiscoverable, including those situations where the alleged defect was a failure to warn.³⁹ The almost universal rejection of the imputed knowledge rule in warning cases,⁴⁰ and the heavy criticism of *Beshada*,⁴¹ was due

37. 447 A.2d 539 (N.J. 1982).

38. See Wertheimer, *supra* note 8, at 1193.

The imputation of knowledge has two results. First, the plaintiff does not have to prove that the manufacturer was negligent in failing to discover the danger. Second, the plaintiff does not have to prove that the danger was, in fact, knowable or discoverable. The plaintiff simply has to prove that the product contained the danger; the manufacturer's knowledge of its presence is then irrebutably presumed.

Id.

39. *Beshada*, 447 A.2d at 546-49. The *Beshada* court held that manufacturers of products are liable where they fail to warn consumers of dangers associated with the use of the manufactured product notwithstanding whether the specific danger was knowable or discoverable given the state of art of technology at the time of the failure to warn. *Id.* This decision was reasoned by the *Beshada* court to best encourage the overall policies that the court was concerned with - namely, not making innocent and injured consumers the sole bearers of risk of injury from defective products and the sharing of this burden by the manufacturer and their consumers through their product prices. *Id.* at 549.

40. See *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 344 (5th Cir. 1982) (recognizing that the "determination that a particular product is so unreasonably hazardous as to require a warning of its dangers is not an absolute. Such a determination is necessarily relative to the scientific knowledge generally known or available to the manufacturer at the time the product in question was sold."); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 548 (Ind. 1979) (concluding that the duty to warn does not arise until the manufacturer of the drug knows or should have known of the danger involved); see also Charles C. Marvel, Annotation, *Strict Products Liability - Failure to Warn*, 33 A.L.R. 368, 370 (1984) (stating that some courts hold that "liability based upon a failure to warn users of a product's inherently dangerous quality or characteristic may be imposed only where the

in large part by some scholars who gave arguments which revealed only half the story about strict liability.⁴² It is now time to reveal the other half of the arguments in favor of strict liability.

Assume the danger in a product is unknowable or undiscoverable in a warning case.⁴³ When strict liability is applied, you impute knowledge of the danger.⁴⁴ Thus, in a warning case, where the danger is unknowable, strict liability requires the manufacturer to do the impossible.⁴⁵ The manufacturer cannot warn about

manufacturer, distributor, or seller, as the case may be, had actual or constructive knowledge of the dangerous quality or characteristic.”).

41. See *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 539 (Me. 1986) (rejecting *Beshada* and adopting the foreseeability test in § 402A “that in a warning context, actual or constructive knowledge on the part of the manufacturer at the time of distribution is relevant in determining the applicability of strict liability”); see also Andrew T. Berry, *Beshada v. Johns-Manville Corp.: Revolution - or Aberration - in Products Liability Law*, 52 *FORDHAM L. REV.* 786, 791-98 (1984); William R. Murray, Jr., Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, *Beshada v. Johns-Manville Products Corp.*, 71 *GEO. L.J.* 1635, 1646-53 (1983).

42. See generally Sheila Birnbaum, *Unmasking The Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 *VAND. L. REV.* 593, 643 (questioning whether some courts have abandoned the consideration of the manufacturer’s conduct, for their eagerness to provide recovery for injured plaintiffs and thereby overemphasized the risk-spreading rationale); KEETON ET AL., *supra* note 14, at 698 (“It would seem to be extending strict liability too far to require a manufacturer to bear the costs of accidents to a few who were victimized by an unknowable risk of a good product.”).

43. See, e.g., *Pollard v. Ashby*, 793 S.W.2d 394, 396 (Mo. 1990) (where plaintiff suffered serious injuries during chemonucleolysis treatments to repair a lumbar disc rupture).

44. See *Menna v. Johns-Manville Corp.*, 585 F. Supp. 1178, 1184 (D. N.J. 1984) (where the court rejected the sophisticated user defense and imputed knowledge of the danger to the suppliers who sold asbestos to the Owens-Corning Company); see also Wertheimer, *supra* note 8, at 1216. “[F]ailure to warn is a strict products liability cause of action, and in strict products liability knowledge of the danger is imputed to the manufacturer.” *Id.*

45. See Wertheimer, *supra* note 8, at 1239-40. The article points to the differing treatment failure to warn cases receive in different jurisdictions. Some courts reason that to impute knowledge to a manufacturer in a failure to

dangers that are unknown and unknowable.⁴⁶ The problem with some courts, including *Beshada*, is the failure to admit they are asking the impossible. Admit it! Strict liability in the warning case of unknowable dangers asks the manufacturer to do what it cannot do, period.⁴⁷ The failure of *Beshada* is the court's attempt to avoid the obviousness of requesting the manufacturer to do what it could not do.⁴⁸

However, the critics of *Beshada* looked at only one half of the arguments concerning the imputed knowledge rule. I believe it was such half arguments that convinced Dean John Wade to reject the rule of strict liability.⁴⁹ Also many courts rejected strict liability in warning cases because they were convinced by arguments which revealed only one half of the total picture and have not heard the other half.⁵⁰

It is true, from the manufacturer's view, that something is wrong with strict liability since it asks the impossible.⁵¹ It is not fair. It is illogical. But, the argument about fairness and logic is just as valid when liability in the warning cases is observed from the consumer's viewpoint. When a consumer is confronted with

warn case is unfair because it necessitates a manufacturer's warning of danger of which it had no knowledge, while other courts view failure to warn cases as a sub-species of design defect cases - the defect in question being the lack of warning which would make the product safer for use by consumers. *Id.*

46. *See* *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 550 (Cal. 1991) (noting that if every product without a warning were judged *per se* defective a plaintiff would need only to prove an injury to recover, which would defeat the goal of the failure to warn theory of strict liability).

47. *See, e.g., id.* at 550 (unfair to hold that manufacturer must warn of something that is unknowable).

48. *See* *Wertheimer, supra* note 8, at 1215; *see also Beshada*, 447 A.2d at 545-46. The *Beshada* court said unequivocally, "by imposing strict liability, we are not requiring defendants to have done something that is impossible." *Id.* The court continued to justify its holding that the manufacturer should be liable for dangers that were unknowable based on policy grounds which favor manufacturer liability, in other words, the general goals of strict liability in products liability cases. *Id.*

49. John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983).

50. *See supra* note 42 and accompanying text.

51. *See supra* note 48 and accompanying text.

the danger in a product which cannot be discovered, then you are asking the consumer to do the impossible. The danger in the product is unknowable and undiscoverable by the consumer. It is illogical to hold the consumers responsible in such situations. It is not fair to the consumer. Thus, many courts, convinced by the manufacturer's arguments, or by scholars and legal writers who support the manufacturer's view, have only examined warning cases from the manufacturer's viewpoint.⁵² Why not look at such cases from the consumer's viewpoint? The true issue in the warning case where the danger is unknowable or undiscoverable is that it is impossible for both the manufacturer and the consumer to discover the danger or defect.⁵³ When the issue is so framed the only question remaining is one of policy; who between these two innocent parties should bear the loss?⁵⁴ If strict liability is applied, the manufacturer will be liable.⁵⁵ If negligence is applied, the consumer will bear the loss.⁵⁶ Under the

52. See Wertheimer, *supra* note 8, at 1216 n.108. *Beshada* gave rise to numerous scholarly works which discussed the unfairness to manufacturers when they are subjected to strict liability for dangers in their products that they could not have known about. *Id.* See generally Richard C. Henke & Hon. John E. Keefe, *Presumed Knowledge of Danger*, 19 SETON HALL L. REV. 174, 184 (1989) (stating that after *Beshada* the imputation of knowledge of danger in failure to warn cases implies a presumption of knowledge that the product was defective, not of the reasonable foreseeability of harm).

53. See Wertheimer, *supra* note 8, at 1186-87. The author states, "because it is oriented toward compensation and not towards fault, strict products liability is not about blame; it is about responsibility." *Id.*

54. See Wertheimer, *supra* note 8, at 1186-87. "As between the innocent plaintiff and the innocent manufacturer, the choice to place the liability on the manufacturer is not dictated by economic theory alone . . . it has also been motivated by fairness." *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

55. See Wertheimer, *supra* note 8, at 1185 ("If the manufacturer made the product and the product caused injury while used in a foreseeable manner, then the manufacturer should be liable. That is the theory behind strict liability."); Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366.(1965) "The reasons justifying strict liability emphasize that there is something wrong, if not in the manufacturer's manner of production, at least in his product." *Id.*

rules proposed by Professors Henderson and Twerski, negligence is applied in situations where the danger or defect is unknowable or undiscoverable.⁵⁷ Under their rule, the manufacturer is never liable since the consumer always bears the loss in the unknowable danger situation.⁵⁸

When this proposed rule is expanded to include design cases as well as those of warnings, the bias against the consumer becomes more evident. It is quite clear that application of negligence in a design case will always find liability in favor of the manufacturer and against the consumer when the danger is unknowable.⁵⁹ This means that the costs of very certain injuries from dangerous products are borne by the consumer.⁶⁰ Thus, whenever you hear an argument, whether it be in your law school classroom or in court which gives only one half of the argument about the unfairness or illogic concerning the application of the imputed knowledge rule from the viewpoint of the manufacturer, I am asking all of you to please provide the other half of the argument. The arguments made by the manufacturer are in fact valid; you are asking the impossible. But, these same arguments are identical to those that can be made by the consumer. If you add the other half of the issue, then it is clear that you are asking the impossible of the consumer. When viewing the imputed knowledge rule, it is clear that you have a choice between two parties that are completely innocent.⁶¹

56. See Wertheimer, *supra* note 8, at 1270-71. "Strict liability is based on the premise that the cost should fall on the manufacturer. Its abolition means that the cost will fall on the consumer." *Id.*

57. See Wertheimer, *supra* note 8; see also *supra* note 1 and accompanying text.

58. See Henderson & Twerski, *supra* note 1, at 1516. "[I]t seems only just that consumers who benefit from products should share, through increases in the prices charged for those products the burden of unavoidable injury costs that result from undetectable manufacturing defects." *Id.*

59. See Wertheimer, *supra* note 8 and accompanying text.

60. See *Cochran v. Brooke*, 409 P.2d 904, 907 (Or. 1966). The court refused to apply strict liability to manufacturers of the drug chloroquine because of the possibility of the far-reaching consequences that might ensue from such a decision. *Id.*

61. See Wertheimer, *supra* note 8, at 1186-87.

May I read a quote from Professor Wertheimer's recent article concerning the failing of the *Beshada* case in recognizing this issue:

In its ruling, the *Beshada* court used an unfortunate phrase when it stated "[b]y imposing strict liability, we are not requiring defendants to have done something that is impossible." The court was indeed allowing defendants to be liable for not doing something that the defendants could not have done. One cannot warn of a danger that is undiscoverable. The answer is, however, that other goals supersede the apparent unfairness of holding a party liable for failing to do something which that party could not have done. The unfairness is illusory because the manufacturer, by creating and selling the product, has in fact caused the injuries at issue and should pay for them. If the manufacturer is not liable, the cost will fall on the injured customer. Surely this is more inequitable than placing that cost on the party responsible for putting the product on the market. Indeed, requiring the consumer to absorb the cost is tantamount to requiring the consumer to subsidize the manufacturer's costs. One can imagine a situation in which a manufacturer produces and sells a new product that causes unforeseen injuries. Unless knowledge of the danger is imputed to the manufacturer, the manufacturer may make a profit from that product in part because the manufacturer will not have to pay the cost of the injuries.⁶²

There are other methods that have been employed to change the strict liability rule into one of negligence which Professors Henderson and Twerski allege is the majority or consensus view of the courts.⁶³ If what they say is true, why has this occurred?

Maybe it is the lack of education by scholars and professors concerning the true nature of strict liability.⁶⁴ Another possible reason for the so-called return to negligence is the application of

62. See Wertheimer, *supra* note 8 (citing *Beshada*, 447 A.2d at 546).

63. See Henderson & Twerski, *supra* note 1, at 1513, "[L]anguage that has been interpreted by so many courts over such a substantial period of time cannot be cavalierly discarded." *Id.*

64. See generally John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991).

“state-of-the-art”.⁶⁵ State-of-the-art is based upon a simple concept. The manufacturer is not liable when the product is made as safe as technology can make it.⁶⁶ But, strict liability can coexist with state-of-the-art.⁶⁷ This occurs when you impute knowledge of the danger but you do not impute knowledge of the cure.⁶⁸ Thus, even when knowledge of the danger is imputed, the manufacturer may still be relieved of liability if there is no cure for the danger.⁶⁹ But, the courts have gone further and have expanded state-of-the-art to include the manufacturer’s absence of knowledge of the danger.⁷⁰ In such a form, state-of-the-art

65. See *Anderson v. Owens-Illinois, Inc.*, 799 F.2d 1, 2 (1st Cir. 1986) (“the state-of-the-art defense require[s] that even scientific experts be unaware of the danger, and thus the injury which plaintiff ultimately suffer[s].”); see generally Gary B. Spradley, *Defensive Use of State of the Art Evidence in Strict Liability*, 67 MINN. L. REV. 343 (1982); Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Product Liability Cases*, 77 NW. U. L. REV. 1 (1982); Alan Calnan, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 SYRACUSE L. REV. 797 (1985).

66. See, e.g., *Tioga Public School Dist. v. United States Gypsum*, 984 F.2d 915, 923 (8th Cir. 1993) (“Government standards” allowing state-of-the-art defense does not include compliance with General Services Administration specifications); *Norton v. Snapper Equip. Div. of Fuqua*, 806 F.2d 1545, 1549 (11th Cir. 1987) (plaintiff failed to show that new “dead man” devices were available or feasible for installation on 1981 lawn mowers); *In re Asbestos Litigation*, 984 F.2d 915, 923 (8th Cir. 1987) (state-of-the-art defense available to drug manufacturers, but not to asbestos manufacturers); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1472 (10th Cir. 1988) (discussing Nebraska’s statutory provision allowing a state-of-the-art defense).

67. See *Norton*, 806 F.2d at 1549; *Borel v. Fibreboard Paper Prod.*, 493 F.2d 1076, 1088 (5th Cir. 1973).

68. See Wertheimer, *supra* note 8, at 1207 (“[State-of-the-art] defense is consistent with imputing knowledge of the product’s danger because under strict products liability, while knowledge of the product’s danger is imputed, knowledge of the cure is not.”).

69. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); *Pegg v. General Motors Corp.*, 391 A.2d 1074, 1082 (Pa. Super. Ct. 1978) (stating that a manufacturer will not be held strictly liable simply because a product is inherently dangerous).

70. See *Basko v. Sterling Drug*, 416 F.2d 417, 426 (2d Cir. 1969); *Woodhill v. Parke Davis*, 402 N.E.2d 194, 199 (Ill. 1980); Richard E. Byrne,

transforms strict liability into negligence.⁷¹ If a court interprets state-of-the-art to mean that the manufacturer is only held to what it knew at the time of manufacture, then you are applying negligence, not strict liability⁷². Thus, state-of-the-art swallows the rule of strict liability and you are back to negligence.⁷³

Another method where negligence has supplanted strict liability is through the application of “alternative feasible designs.”⁷⁴ In a

Strict Liability and the Scientifically Unknowable Risk, 57 MARQ. L. REV. 660, 668 (1974).

71. See *Beshada*, 447 A.2d at 546-49 (reasoning that state-of-the-art defense is grounded in negligence theory and denying it as a defense in asbestos cases based on strict liability); see also Ellen Wertheimer, *Azzarello Agonistes: Bucking the Strict Products Liability Tide*, 66 TEMP. L. Q. 419, 430 (1993) (“Strict products liability has been transformed into a negligence-based doctrine by those courts that have done so in order to protect manufacturers in cases where strict liability would be inappropriate.”); Anita Bernstein, *A Model of Product Liability Reform*, 27 VAL. U. L. REV. 637, 659 (1993) (discussing the dilution of strict products liability doctrine by the use of the state-of-the-art defense); David P. Griffith, Note, *Product’s Liability - Negligence Presumed: An Evolution* 67 TEX. L. REV. 851, 864-65 (1989) (“Courts also impose a negligence standard whenever they require plaintiffs to prove that defendants products failed to perform in accordance with the “state-of-the-art.”).

72. See Dana K. Astrachan, *Anderson v. Owens-Corning Fiberglass Corp. Asbestos Manufacturers and Strict Liability: Just How Strict Is It?*, 23 PAC. L.J. 1807, 1856 (1992) (stating that if the defendant is able to show that the hazards of the product were unknowable at the time of manufacture, failure to warn actions returns to the realm of negligence); Wertheimer, *supra* note 71, at 441 (finding that introducing state of the art evidence transforms strict liability into pure negligence by displacing the focus from the product to the manufacturer’s conduct).

73. Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence In Strict Product Liability Cases*, 77 NW. U. L. REV. 1, 7 (1982) (discussing state-of-the-art evidence under a negligence theory); Griffith *supra* note 71, at 865:

Negligence doctrine requires a manufacturer to act as a reasonable person in conducting business activities, and this includes keeping informed of and adhering to state of the art. Thus, requiring the plaintiff to prove that the manufacturer’s product did not conform with the state-of-the-art amounts to a negligence standard.

Id.

74. See Wertheimer, *supra* note 8, at 1242-44; James A. Henderson, Jr., *The Role of the Judge in Tort Law: Why Creative Judging Won’t Save the*

design case, some courts require the plaintiff to prove an alternative feasible design.⁷⁵ This requires the plaintiff to prove that a feasible alternative design existed at the time the allegedly defective product was manufactured.⁷⁶ This, in reality, is requiring the plaintiff to redesign the product with the knowledge of the industry that existed at the time of manufacture.⁷⁷ This knowledge includes the knowledge of the danger at the time of manufacture; thus, liability is based upon negligence, not strict liability.⁷⁸

There are other methods that have been used over the last fifteen years to change the rule of strict liability to that of negligence, however, time prevents full and complete explanations of such methods in this short presentation. However, I will touch upon a few of these methods.

One common method is to separate defects into convenient, legal cubbyholes and, after such separation, to apply different stan-

Products Liability System, 11 HOFSTRA L. REV. 845, 850 (1983) (“In substance, if not in form, I am proposing a negligence test for design defect cases The plaintiff should be required to show that his loss was avoidable . . . by an alternative design”).

75. See *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978); but see *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97 (Minn. 1987) (where the court decided that the plaintiff was not required to show proof that an alternative feasible design existed).

76. See, e.g., *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 215 (3d Cir. 1991) (stating that in order to impose liability on a manufacturer for design defect an “alternative, feasible, safer design” must have existed at the time of manufacture. “If no such alternative feasible design existed when the product was manufactured, then the design cannot be said to be ‘defective’”); *Huddell*, 537 F.2d at 737 (requiring that plaintiff “offer proof of an alternative, safer design, practicable under the circumstances” when showing defective design).

77. See, e.g., *Wilson*, 577 P.2d at 1327 (plaintiff had expert witnesses testify as to alternative airplane engines available at time of manufacture to help “redesign” the airplane that had crashed).

78. See *Wertheimer supra* note 8, at 1243,

[T]he alternative feasible design doctrine transforms products liability into a negligence-based doctrine by focusing on the time of manufacture as the relevant period for availability of the alternative. The doctrine asks whether it was feasible to redesign the product, in light of the state of industry knowledge at the time of manufacture.

Id.

dards of liability to each category.⁷⁹ For example, warning defects have been artificially separated from design defects.⁸⁰ Once separated, some jurisdictions apply negligence in the warning case because they have been convinced by the one half argument or half of the story concerning knowledge of the danger.⁸¹ At the same time, these courts will apply strict liability in the design case.⁸² Thus, the court applies a “stricter” standard in the design case which may appear illogical. When confronted with the illogic of applying different standards in warning and design cases, the court may adopt a uniform standard of negligence in all

79. See William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 782-83 (1983) (testing for defectiveness by separating defects into three categories then applying different theories for recovery to each category).

80. See *Williamson v. Piper Aircraft Corp.*, 968 F.2d 380, 384 (3d Cir. 1992) (stating that a product can be defective under strict liability either because of the way it was designed or because of the failure to provide instructions); *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1152 (8th Cir. 1990) (stating “[t]he strict liability theory is further divided into liability for defective design of a product and liability for failure to warn of an inherent danger in the product”); *Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1173 (Colo. 1993) (to establish liability under § 402A plaintiff must show the product was defective and unreasonably dangerous but to prove a failure to warn case plaintiff must show a particular risk was known or knowable in light of recognized knowledge available at time of manufacture).

81. See *Grasmick v. Otis Elevator Co.*, 817 F.2d 88, 90 (10th Cir. 1987) (holding negligent failure to warn is one part of negligence but where a manufacturer knows or should know of unreasonable dangers associated with the use of its product it has a duty to warn of these dangers); *Johnson v. American Cyanamid Co.*, 718 P.2d 1318, 1324 (Kan. 1986) *aff’d*, 758 P.2d 206 (Kan. 1988) (holding that in a negligence action we focus on defendant’s conduct and the plaintiff must prove the defendant acted unreasonably “in light of known or constructively known risks”); *Feldman v. Lederle Lab.*, 479 A.2d 374, 452 (N.J. 1984) (stating that warnings, generally should be measured by knowledge at the time the manufacturer distributed the product).

82. See *Sperry v. Bauermeister, Inc.*, No. 92-3626, 1993 WL 328402 (8th Cir. Sept. 1, 1993) (Missouri law recognizes both recovery under strict liability for defective design and a cause of action for negligent failure to warn); *Grasmick*, 817 F.2d at 90 (holding strict liability and negligence theories are distinct theories and may be alleged in that same action); *Feldman*, 479 A.2d at 386 (stating negligence and strict liability may be deemed to be “functional equivalents”).

cases.⁸³ Thus, in my opinion, by artificially dividing defects into the traditional categories--manufacturing, design and warnings and applying different standards to each category, some courts may allow the negligence exception to swallow up the strict liability rule.

The same method used in allowing the application of negligence in warning cases to subsume application of strict liability in design cases may allow the elimination of strict liability in manufacturing defect cases.⁸⁴ Professors Henderson and Twerski basically propose that strict liability be applied in manufacturing defect cases but negligence be applied in design and warning cases.⁸⁵ Thus, I predict that the same fate could follow, even in

83. See *Parker v. Olfa Corp.*, 709 F. Supp 794, 796 (E.D. Mich. 1989) The *Parker* court found that

[i]mposing a negligence standard for design defect litigation is only to define in a coherent fashion what our litigants in this case are in fact arguing and what our jurors are in essence analyzing. Thus, we adopt, forthrightly, a pure negligence risk utility test in products liability actions against manufacturers of products where liability is predicated upon defective design.

Id.; see also *Miller v. Todd*, 518 N.E.2d 1124, 1139 (Ind. 1990) (holding that “general negligence principles apply to impose liability when unreasonable risk of injury is created by the manufacturer’s design . . .”); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 560 (Ind. App. 1979) (holding that “where the duty to warn is under consideration, the standard of strict liability is essentially similar to the standard for establishing negligence . . .”); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185 (Mich. 1984). The *Prentis* court found that in cases against a manufacturer for defective design, the process used in the past may have served to confuse rather than enlighten the jurors. *Id.* Imposing a negligent standard for design defect litigation is only to define in a coherent fashion what our litigants in this case are in fact arguing. *Id.*

84. See *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984) (holding that the standard of strict liability or negligence is similar such that “failure to give an explicit strict liability instruction [where negligence instruction was given] is unlikely to be reversible error . . .”).

85. See Henderson & Twerski, *supra* note 1, at 1515. Professors Henderson and Twerski stated that “manufacturing defects are dangerous departures from a product’s intended design, and . . . occur in a small percentage of units in a product line.” *Id.* Moreover, “a seller of any product containing a manufacturing defect should be liable in tort . . . regardless of the plaintiff’s ability to maintain a traditional negligence or warranty action.” *Id.*

the manufacturing defect case; negligence would become the rule.⁸⁶ Another problem with the application of differing standards applied to defect categories is that the categories are artificial concepts that, on many occasions, have little to do with reality. Almost all of us have accepted the traditional three categories of defect.⁸⁷ But, as originally conceived, warnings were considered part of the design process.⁸⁸ I believe Professor Twerski, in some of his original writings at Cornell, has stated that warnings are part of the design process,⁸⁹ as has Dean John Wade⁹⁰ and Professor Wertheimer.⁹¹ In addition, as a result of my personal experience in teaching products liability at the Society of Automotive Engineers (SAE), for the past eleven years in this country and overseas, it is clear that the engineers who design products

Since the theory of strict products liability for manufacturing defects is difficult to apply to design or warning defects, most courts use a different standard when dealing with design and warning cases. *Id.* at 1515-16. However, Professors Henderson and Twerski have taken “no explicit position” as to “whether design and warning defects are governed by strict liability,” but do argue that by imposing strict liability on manufacturing defects “achieve all the policy benefits . . . [while presenting] no downside costs.” *Id.* at 1530-31.

86. *Author’s Comment: If the courts apply a different standard in warning and design cases and accept the “unfairness argument” as outlined in the text accompanying notes (79-83) *supra*, then it is a very simple step to accept the argument that strict liability should be eliminated in manufacturing defect cases. The argument could proceed very logically because a court could ask, since a manufacturing defect only involves a very small number of cases, why should we go to the effort of applying strict liability in the few, rare instances of a manufacturing defect? It would be much simpler for the courts to accept negligence in all cases once strict liability is eliminated for design defects. Thus, like dominoes, strict liability would fall as a result of the first push—artificial division of product defects into categories, leading to application of negligence in warning cases then to design cases and, finally, to manufacturing defect cases.

87. See KEETON ET AL., *supra* note 14, at 695-98.

88. See Wertheimer, *supra* note 8, at 1202 n.65; see also Wade *supra* note 49, at 740-41; Dix W. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256 (1969).

89. See Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability - Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

90. See Wade, *supra* note 49, at 740.

91. See Wertheimer, *supra* note 8, at 1202.

treat warnings as part of the design process. Whenever an engineer applies Failure Modes and Effects Analysis (FMEA) or Fault Tree Analysis in the design process, they do not make distinctions between the different types of defects and uniformly treat warnings as part of the design.⁹²

In fact all three artificially created defect categories are extremely difficult to distinguish. For example, in Professor Oscar Gray's home state of Maryland there is a case we have used for almost eleven years as an example at SAE--*Harley-Davidson Motor Co., Inc. v Wisniewski*.⁹³ In *Wisniewski*, the plaintiff proceeded through an "S" turn at twenty-five mph on a Harley-Davidson Motorcycle.⁹⁴ As he went around the turn, his throttle control handle slipped off the bar; the plaintiff lost control and crossed the center line, crashing into an oncoming car.⁹⁵ The plaintiff sued Harley-Davidson, and the evidence at trial showed that a "C" clamp holding the throttle control to the handle bars of the motorcycle came loose.⁹⁶ The "C" clamp had two screws which held it together. One of these screws was overtorqued or overtightened during the manufacturing process and developed a small crack. Later, the motorcycle's vibrations propagated the crack until the "C" clamp separated.⁹⁷ At this separation, the throttle control came off the handle bars, resulting in the accident.⁹⁸ Is this a manufacturing, design or warning defect?

Professor James Henderson:

It does not matter.

92. See John F. Vargo, *Product Liability Law and Product Design: The Relationship*, 237, 242-62 (1989) (A. T. L. A. Annual Convention, Boston).

93. 437 A.2d 700 (1981).

94. *Id.* at 702.

95. *Id.*

96. *Id.* at 703.

97. *Id.*

98. *Id.*

Mr. John Vargo, Esq.:

Whether it matters or not, we are obligated to categorize it to clarify what rule (negligence or strict liability) applies. It does not matter from the plaintiff's viewpoint as long as he can prove a defect. But, it may matter a great deal to the manufacturer concerning his response to the problem. What type of defect is it?

Audience Member:

Manufacturing defect.

Mr. John Vargo, Esq.:

Almost all engineers, when asked this question, respond in the same manner. They initially state that it is a manufacturing defect. But, how do you know? What distinguishes the defect categories? Those of you who have taken torts or products liability are taught how to distinguish them. What is the difference between a manufacturing defect and a design defect?⁹⁹ It is in Professor Twerski's book, and he knows what I am talking about.¹⁰⁰ What is the difference between these two defects? Let us start with a manufacturing defect.¹⁰¹ How often does it occur according to the law?

99. See 44 Fed. Reg. 62, 714 (1979). "To find a manufacturing defect the trier of fact must find that when the product left control of the manufacturer, the product deviated in some material way from the manufacturer's design specifications, or performance standards, or from otherwise identical units of the same product line." *Id.* To prove a design defect "the trier of fact must find that at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms outweighed the burden on the manufacturer to design a product that would have prevented those harms" *Id.*

100. See ALVIN S. WEINSTEIN, ET AL., PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT, DESIGN, AND MARKETING, at 34 (John Wiley & Sons eds., 1978) (discussing distinction between production errors and design flaws).

101. See *supra* note 99 and accompanying text.

Audience Member:

Once in a great while.

Mr. John Vargo, Esq.:

Once in a great while. Maybe one, maybe two, who knows.¹⁰² But, you automatically said this motorcycle example was a manufacturing defect. How do you know this? You have a screw coming apart, right?

Audience Member:

The product failed to live up to its own standard.

Mr. John Vargo, Esq.:

No! You are merely repeating how the law defines the defect. How do you know it is a manufacturing defect?

Audience Member:

You really do not.

Mr. John Vargo, Esq.:

Why not?

Audience Member:

102. See generally Garey B. Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 355 (1982) (discussing that in the arguments in favor of admitting evidence of prevailing industry practice on the issue of defectiveness, such evidence can never be conclusive); Robert A. Bernstein, *Evidence of Producer's Due Care in a Products Liability Action*, 25 VAND. L. REV. 513, 519 (1972) (stating that defendant can avoid liability when plaintiff purchases from defendant but defect was created after the sale).

It could be design defect.¹⁰³

Mr. John Vargo, Esq.:

How do you tell the difference between the two? How do you know? Assume you are an engineer for Harley-Davidson. How would you discover which type of defect existed in the motorcycle?

Audience Member:

Test or check the screws in other motorcycles.

Mr. John Vargo, Esq.:

Now you are doing something? The defect category is determined by the frequency of occurrence; quoting Professor Twerski—"It's the frequency of occurrence."¹⁰⁴ However, is there truly a bright line between a manufacturing defect, a design defect and a failure to warn? In the motorcycle example, it could be a manufacturing defect as a result of a disgruntled employee who purposely overtightened a screw during the manufacturing process. It could be a design defect as a result of the process chosen to assemble the product.¹⁰⁵ For example, all or most of the "C" clamp screws could have been overtorqued with an air pressured hand tool. But, is this a design defect because of the frequency (not all but many of the screws could be overtorqued) or a manufacturing defect? Even assuming only a few of the screws are overtorqued, some courts may consider it a design because it was a conscious choice of the type of equipment used on the as-

103. See *supra* note 99 and accompanying text.

104. James A. Henderson, Jr. & Aaron D. Twerski, *The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld*, 67 N.Y.U. L. REV. 1174, 1178-79 n.22 (1992).

105. See *Acosta v. Honda Motor Co.*, 717 F.2d 828, 840 (3d. Cir. 1983) (where plaintiff submitted evidence that "defendants merely spot-checked rear wheels during the assembly process and did not crush test or weigh each wheel.").

sembly line.¹⁰⁶ In addition, the frequency concerning the number of cracked screws can range from just a few to all of the screws. At what point does the defect magically change from one of manufacturing to one of design? There is a huge gray area which may make a great difference, especially if you use strict liability for manufacturing defects and negligence for design defects as Professors Henderson and Twerski recommend.¹⁰⁷

In addition, the response of the manufacturer can differ according to the frequency and artificial categorization of defect. If you categorize the defect as one of design because of the method chosen in assembly, do you spend millions of dollars for a recall based upon that artificial categorization? What if the frequency is small or there was just this one defective screw in spite of the chosen process or assembly?

The whole artificial categorization of defects creates proof problems and issues that must be litigated when you apply different standards (strict liability or negligence) to each separate type of defect.¹⁰⁸ In reality, such categories of defects are taken from

106. *See, e.g.*, *Forest v. E.I. DuPont de Nemours, & Co.*, 791 F. Supp. 1460, 1468 (D. Nev. 1992) (noting that the test for design defect includes review of designer's "conscious design choices."); *Derosa v. Remington Arms Co.*, 509 F. Supp. 762, 766 (E.D.N.Y. 1981) (stating that manufacturer is responsible for "purposeful design choice" that causes injury to user); *Prentis*, 365 N.W.2d at 183-84 (focusing on quality of manufacturer's "decision" in design defect cases); *but see* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1563 n.143 (1973). According to Professor Henderson, only a handful of oddly reported cases have exercised judicial review of manufacturer conscious design choices. *Id.* These decisions, he concludes, "do not reflect a general shift in judicial attitudes towards reviewing conscious design choices so much as they reflect unusual pressures generated by the peculiar facts of these cases." *Id.*

107. *See, e.g.*, Henderson & Twerski, *supra* note 1 at 1530-32; James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 271-73 (1990); James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1333-34 (1991).

108. *See* Birnbaum, *supra* note 42, at 646-48 (discussing plaintiff's problems and benefits of making a prima facie case under either strict liability standards or negligence); Wertheimer, *supra* note 8, at 1251. The Supreme Court of California explained the difference between negligence and strict

the manufacturer's view, not that of the consumer. The consumer could care less about such categories since he was injured by a defective product.

Some scholars take the view that strict liability is appropriate exclusively for manufacturing defects since you will only impose liability in a small number of cases (low frequency as a definition of manufacturing defect).¹⁰⁹ However, these scholars state that strict liability should not be used in design cases since this would be such a crushing blow on the manufacturer.¹¹⁰ In the design case, all the products may be considered defective (frequency definition of defect). Thus, some scholars state that negligence should be applied or, as some suggest, no liability should be imposed on the manufacturer.¹¹¹ A few authors state that a jury should not second guess what the manufacturer is doing.¹¹²

But, recall what I requested at the beginning of my talk. How about the other half of the argument and the other half of the story? It seems to me an amazing argument that it is only appropriate to impose liability in situations where there is a little bit of danger. In other words, apply strict liability only for manufacturing defects where the numbers are small, but reject strict liability where there is more and more danger to the consumer from design defects. In other words, the more danger presented to the consumer, the less the liability! I have always had a problem with this concept.

liability. In negligence the jury looks to the reasonableness of the manufacturer's conduct, whereas, in strict liability, the jury looks at whether the product is defective by weighing the costs and benefits (citing *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1150-51 (Cal. 1984)).

109. See Henderson & Twerski, *supra* note 1, at 1515 (noting that manufacturing defects "typically occur in only a small percentage of units in a product line").

110. See Birnbaum, *supra* note 42, at 643-49.

111. See Birnbaum, *supra* note 42, at 643-49.

112. See James A. Henderson Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1577-78 (1973).

Another retrenchment on strict liability is the development of law and economics and the use of risk-utility¹¹³ as a sole standard for liability. Such a standard is nothing but negligence.¹¹⁴ The origin of such economic analysis is based upon a few older negligence cases of Judge Learned Hand.¹¹⁵ Judge Hand stated that the degree of care demanded of a person is a product of three factors.¹¹⁶ All law students here should know this since you either have been or will be tested on it:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens,

113. See generally *Lake v. Firestone Tire & Rubber Co.*, No. 90-1787, 1991 U.S. App. LEXIS 14238, at *5 (6th Cir. June 27, 1991) (stating that under the risk-utility test a defectively designed product is a product whose utility is outweighed by the danger inherent in its introduction into the stream of commerce. This test involves a balancing test between the chance of harm and the burden of taking precautions against any harm); *Prentis*, 365 N.W.2d at 183 (stating the risk-utility analysis involves an assessment of the decisions made by manufacturers with respect to the design of their products); *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 379 (1982) (denying liability based on the risk-utility analysis where plaintiff failed to produce factual evidence concerning the extent of the risk involved or the proposed alternatives).

114. See *Zettle v. Handy Mfg. Co.*, 998 F.2d 358, 360 (6th Cir. 1993) (holding that the court has adopted a “pure negligence,” risk-utility test in products liability actions when liability is based on defective design); *Prentis*, 365 N.W.2d at 184. The court noted:

when a jury decides that the risk of harm outweighs the utility of a particular design . . . it is saying that in choosing the particular design and cost tradeoffs, the manufacturer exposed the consumer to a greater risk of danger than he should have. Conceptually, and analytically this approach bespeaks negligence.

Id.

115. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Judge Learned Hand explained that it “[p]ossibly serves to bring this notion [of risk utility] into relief to state it in algebraic terms: if the probability be called P; the injury L and the burden B; liability depends upon whether B is less than L multiplied by P: *i.e.*, whether B [is] less than PL.” *Id.*; see also *Prentis* 365 N.W.2d at 184 (explaining “[t]he risk utility balancing test is merely a detailed version of Judge Learned Hand’s negligence calculus” in *Carroll Towing Co.*).

116. See *Carroll Towing Co.*, 159 F.2d at 173; *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev’d*, 312 U.S. 492 (1941).

and balanced against the interest which he must sacrifice to avoid the risk.¹¹⁷

This quote is usually all you hear from your professors, especially those who follow law and economics. But, may I continue the above quote from Judge Hand with the words that are seldom repeated, but which are, in my opinion, the most important:

All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.¹¹⁸

I would like to continue my criticism of law and economics. In an upcoming article of mine, there is a statement which includes an observation by Professor Teuber:

The ability of economists to place an economic value on anything is doubtful. It seems appropriate for a tangible item, such as property, to be the subject of economic evaluation, such as the cost-benefit analysis or tort law. Economists experience a great deal of consternation, however, in trying to place economic or monetary values on intangible items, such as human life and well being. Economists' valuation of a human life may range from \$175,000 to \$3,200,000. It is not the inability to arrive at a single figure that is most disturbing; rather, it is "a coarseness and grossness of moral feeling, a blunting of sensibility, and a suppression of individual discrimination and gentleness Society seems willing to accept a considerable amount of cost-ineffectiveness when it comes to human values."¹¹⁹

Professor Teuber's analysis of peoples' attitudes towards risks describes the inadequacies of the cost-benefit analysis:

117. *Conway*, 111 F.2d at 612. The court held that since the custom in the area was to take the curve on the wrong side of the road, defendant's "routine dereliction" did not constitute gross recklessness and in the "hierarchy of guilt such carelessness did not stand high" enough to allow plaintiff to sue under Vermont's guest statute. *Id.* at 613.

118. *Id.* at 612.

119. John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1627-28 (1993).

Because it fails to respect the distinctiveness of people's responses to risks, or to do justice to the morally significant ways in which risks can be distributed, or to give proper weight to the importance we attach to human life in situations of felt urgency, or to capture the special significance of our concern for autonomy and rights, cost-benefit analysis cannot yield the same result as individual consent. For these reasons, we should not be persuaded to allow cost-benefit analysis to determine public policy--to do, as it were, our talking for us.¹²⁰

Thank you for your time.

Hon. George C. Pratt:

Thank you Mr. Vargo. Professor Twerski spoke about the introduction of strict products liability as being a liberating anthem.¹²¹ I wonder if the plaintiffs' attorneys have not ground out the anthem in some respects. In listening to the very persuasive presentation of Mr. Vargo, I was thinking back to some of the cases that I presided over more than eleven years ago.

It seemed to me that every products liability case which came before me had a products liability claim, whether based on a defective design or failure-to-warn, and a negligence claim. In pretrial conferences, I urged the plaintiffs' attorneys to simplify their cases -- make them sparkle a little. They replied, "No Judge, we can't give up any of the theories." They refuse to give up the negligence theory because they want the jury to think that the defendant is an evil person. They want to present that evidence even if it is not convincing to win on negligence grounds. It may win hearts, even if it does not win minds. So what happens? The cases end up a muddle of confused facts and confused issues. There is more emphasis on negligence and less emphasis on strict liability. You know the old saying, "If you don't use it, you lose it." I think that is almost what has happened in many

120. *Id.* at 1628-29 (citing Andreas Teuber, *Justifying Risk*, DAEDALUS, at 247 (Fall 1990)).

121. See Aaron D. Twerski, *From A Reporter: A Prospective Agenda*, 10 TOURO L. REV. 4, 9 (1993).

aspects in the products liability area. Whether it should be that way is another question.

As I told Professor Twerski, I have a question for him. He raised the question of whether or not we should have such a thing as a drug design claim.¹²² I draw on my own experience of a case that I tried involving Quadrigen, a vaccination for children. The case was settled just before it went to the jury.

Because children do not like to get needles stuck in them, the drug manufacturers came up with the idea of combining the four main vaccines -- mumps, chicken pox, measles, and polio -- and putting them into a single vaccine. Apparently what happened, by combining the four, was that one of the vaccines destroyed the polio vaccine. As a result, the child got polio and became paralyzed. I was told at the trial that the "four-in-one" vaccine has since been abandoned. Now they have a "three-in-one," plus a separate polio vaccine. This was a case where the design was to put all four together. The manufacturers could have been done separately, but they created the "four in one" vaccine, apparently for the economic value of it. It seemed to me that that was clearly a design defect. Obviously, they would not have manufactured the drug in this way had they known what the consequences were. So my question is, "Isn't this a good example of a design defect case?"

Professor Aaron Twerski:

My answer to that would be that we are thinking very heavily about the logistics and how to frame the drug design case. So, I think this very well may be a design defect case. If I were to take the opposing side on that issue, and I am not inclined to do it as a matter of principle, but if I were to do it, I think the contention could very well be on warning grounds as well.

122. *Id.* at 15-16.

Hon. George C. Pratt:

How could they warn if they did not know it was going to happen?

Professor Aaron Twerski:

The question with regard to design will have the same issue as warning; whether or not in the whole drug field we will have liability for unforeseeable risks. In the design field, it may be that the benefit of the “four-in-one” is something that ought not to have been done until the testing was letter perfect. So I think this may very well have been a better design case than a warning case.

Quadrigen was the first case in American legal history of design litigation for drugs. Thereafter, there has been remarkably little design litigation. That does not mean they are not legitimate cases and that they should not be accounted for by appropriate rules. In short, I tend to agree with you that there should be a well-fashioned rule dealing with drug design litigation.

Hon. George C. Pratt:

John Vargo used much of your materials against you. Would you care to respond to Mr. Vargo?

Professor Aaron Twerski:

Interestingly John, much of what you said I agree with. I hope that much of what you pointed out will find its way into the Restatement comments. Let me tell you what I disagree with. Number one, your example out here.¹²³ As I mentioned before, there are a broad range of cases that have a *res ipsa* like quality.¹²⁴ It

123. Mr. Vargo displayed a hand drawn diagram depicting a Harley Davidson handlebar in order to illustrate a defective throttle clamp. *See supra* notes 93-98 and accompanying text.

124. *See supra* note 121, at 13-14.

does not make a difference whether you call it design defect, manufacturing defect, or failure to warn. This is one of them. This is a *Henningsen*¹²⁵ type case, and we ought to be able to articulate it, and I think we have.

Secondly, the distinction between failure to warn, design and manufacturing defect is so deeply entrenched that it works in 99.9% of the cases. You pointed to something I wrote,¹²⁶ and I stand behind it. I wrote that at the extreme, any distinction that you make in the entirety of the law breaks down.¹²⁷ There are no such things as perfect categories. The question is: are they good and are they sound. This one is both good and sound. It has worked in literally thousands of cases. I think you are right, the other situation ought to be accounted for, and I think we can account for it.

With regard to *Beshada*,¹²⁸ we have done our homework. I know of only five jurisdictions, that I can think of right now, that follow *Beshada*. New Jersey is not one of them because it backed down off of *Beshada*.¹²⁹ *Beshada* suggested that in a failure to warn setting, the court should apply the test, if you knew then what you know now, would you market the product the same way.¹³⁰ I think Hawaii, Massachusetts, Missouri, Pennsylvania and Washington do the same.¹³¹ On any theory of a restatement

125. See *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69 (N.J. 1960).

126. See *supra* text accompanying note 100.

127. See ALVIN S. WEINSTEIN, ET AL., PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT, DESIGN, AND MARKETING, at 34 (John Wiley & Sons eds. 1978) (discussing the distinction between production errors and design flaws).

128. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982) (consolidated actions brought against manufacturers and distributors of asbestos products). In *Beshada*, the New Jersey Supreme Court held that a manufacturer who could not have known of a danger at the time of marketing can nevertheless be liable for failure to warn. *Id.* at 549.

129. See *Feldman v. Lederle Lab.*, 479 A.2d 374, 388 (N.J. 1984) (limiting the rule in *Beshada* to asbestos cases); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 301 (N.J. 1983) (holding that state of the art evidence is admissible in defective design cases).

130. See *Beshada*, 447 A.2d at 544-49.

131. See *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987) (holding that sellers knowledge has no bearing on the elements of a

of law, if you are working forty-five to five, that is irresponsible. I do not think you can do it, and I do not think we ought to do it. I think there is a reason why forty-seven courts have refused to apply this standard. It is unfair. Not only is it unfair to the manufacturer, it is unfair to consumers as well because it has devastating effects. It drives older and more experienced companies out of the market and favors new entrants into the market in an unconscionable way. It is neither a fair test, nor a sensible test.¹³² The fact of the matter is that these are technological harms in which no one can do anything about. We are dealing with a framework in the law of torts which says that unless you have a good reason for transferring costs, you let the losses fall where they may. We have never had a tort system in this country which pays no attention to the terms in force, and I do not think we are about to start one right now.

On the other hand, it seems to me that the assumed knowledge concept is a good one in many cases like *Phillips v. Kimwood Machine Co.*¹³³ That is the kind of case where I think I agree with you that we ought to assume knowledge. Why the devil doesn't he know? The principles of physics have been around since Newton. Why should we not charge him with that knowledge? Why should we make plaintiffs jump through hoops? I do not think we ought to. I think there is a way of saying that. On the other hand, to jump from that premise to the liability in the context of *Beshada*, that there is liability for scientifically un-

strict products liability claim); *Hayes v. Ariens Co.*, 462 N.E.2d 273 (Mass. 1984); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984) (en banc) (stating that the "law in Missouri holds that state of the art evidence has no bearing on the outcome of a strict liability claim; the sole subject of inquiry is the defective condition of the product and not the manufacturer's knowledge, negligence or fault."); *Carreter v. Colson Equip. Co.*, 499 A.2d 326 (Pa. Super. Ct. 1985); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1340 (Wash. 1992) (en banc) (holding that the test for inadequate warnings requires no showing of foreseeability).

132. For criticism of the *Beshada* reasoning see Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892 (1983).

133. 525 P.2d 1033 (Ore. 1974); see *supra* notes 12-13 and accompanying text.

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CAVEAT EMPTOR

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knowable risks, is about as big a jump as me jumping from here to Red China.

