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The Proposed Products Liability Restatement: A Misguided Revision

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THE PROPOSED PRODUCTS LIABILITY RESTATEMENT: A MISGUIDED REVISION

Hon. George C. Pratt:

We are going to continue ahead with Professor Phillips.

*Professor Jerry Phillips**:

Thank you, Judge Pratt, members of the panel, ladies and gentlemen. If I can begin by addressing the initial question that was talked about this morning of dividing products liability into three categories of defect:[1] manufacturing flaw,[2] the design flaw[3] and the absence or inadequacy of warning.[4]

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1. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984). Section 99 states in relevant part that "in strict liability . . . the product must be defective in the kind of way that subjects persons or tangible property to an unreasonable risk of harm." *Id.* Furthermore, § 99 states that:

> a product is defective as marketed . . . for any of the following reasons: (1) a flaw in the product that was present in the product at the time the defendant sold it; (2) a failure by the producer or assembler of a product adequately to warn of a risk or hazard related to the way the product was designed; or (3) a defective design.

Id.

2. *See* KEETON ET AL., *supra* note 1, at 695. Section 99 defines the term "manufacturing defect" as a "flaw that is created in the construction or marketing processes [which] makes the product unreasonably dangerous as a matter of law since it causes the product to be more dangerous than it was designed to be." *Id. See also* Delzotti v. LaFrance, 179 A.D.2d 497, 579 N.Y.S.2d 33 (1st Dep't 1992). In *Delzotti*, plaintiff Firefighter, who was injured "when a folding step on a fire truck gave way, causing him to fall," sued manufacturer of fire truck, claiming that his injuries were caused by manufacturing defect which occurred due to 'metallurgical deficiencies.' *Id.* at 497, 579 N.Y.S.2d at 33-34.

3. *See* KEETON ET AL., *supra* note 1, at 698. According to § 99, the courts use two different approaches when deciding whether a particular design is hazardous to the point of making the product "unreasonably dangerous."

The approaches are: (1) the "consumer-contemplation test," where a product is found to be "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" and, (2) the risk-utility test, under which approach, "a product is defective as designed if . . . the magnitude of the danger outweighs the utility of the product." *Id.*; *see also* Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir. 1976) (determining whether a gas control valve had a design defect depended upon a balancing test weighing "seriousness of harm against the costs of taking precautions"); Haran v. Union Carbide Corp., 68 N.Y.2d 710, 711, 497 N.E.2d 678, 679, 506 N.Y.S.2d 311, 312 (1986) (stating that a "product's risks must be balanced against its utility and affordability, and against the risks, utility and costs of alternatively designed products . . . ."); Cover v. Cohen, 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984); Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983). In *Voss*, the New York Court of Appeals held that several factors must be examined in balancing the risks inherent in a product's design:

> 1) the utility of the product to the public as a whole and to the individual user; 2) the nature of the product . . . ; 3) the availability of a safer design; 4) the potential for designing . . . the product so that it is safer but . . . functional and reasonably priced; 5) the ability of the plaintiff to have avoided injury . . . ; 6) the degree of awareness of the potential danger of the product reasonably attributed to the plaintiff; and 7) the manufacturer's ability to spread . . . cost[s] related to improving the safety of the design.

Id. at 109, 450 N.E.2d at 208-09, 463 N.Y.S.2d at 402.; *see also* Fallon v. Clifford B. Hannay & Son, Inc., 153 A.D.2d 95, 99, 550 N.Y.S.2d 135, 137 (3d Dep't 1989) (applying several factors adopted in *Voss* to determine whether risks outweigh utility of a manufacturer's hose reel).

4. *See* KEETON ET AL., *supra* note 1, at 697. According to § 99, a product may be found to be defective if there is a failure to warn or a failure to adequately warn "about a risk or hazard related to the way a product is designed." *Id.* A manufacturer will not be held liable unless it is shown that the manufacturer "knew or should have known of the risk or hazard about which he failed to warn." *Id.*; *see also* Jackson v. Coast Paint and Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974). According to the *Jackson* court:

> On the issue of the duty to warn . . . the question . . . is "whether the danger or potentiality of danger, is generally known and recognized" [and] whether the product as sold was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community. . . ."

Id.; Freund v. Cellofilm Properties, Inc., 432 A.2d 925, 932 (N.J. 1981) (stating that "a products liability charge in an inadequate warning case must

Victor Schwartz,[5] I believe, advocated that kind of division with the proposed uniform law that he drafted fifteen years ago.[6]

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focus on safety and emphasize that a manufacturer . . . has not satisfied its duty to warn, even if the product is perfectly inspected, designed, and manufactured . . . ."); Cover v. Cohen, 61 N.Y.2d 261, 276, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 386 (1984). The New York Court of Appeals, in *Cover*, held that the nature of a warning depends upon a number of factors:

> [1] the harm that may result from use of the product without notice, [2] the reliability and any possible adverse interest of the person . . . to whom notice is given, [3] the burden to the manufacturer or vendor involved in locating [necessary] persons . . . , [4] the attention which it can be expected a notice in the form given will receive from the recipient, [5] the kind of product involved and the number manufactured . . . and [6] steps taken . . . to correct the problem.

Id.; Power v. Crown Equip. Corp., 189 A.D.2d 310, 313, 596 N.Y.S.2d 38, 39 (1st Dep't 1993) (holding that manufacturer will be held liable for failing to act reasonably in providing an appropriate warning); Young v. Robershaw Controls Co., 104 A.D.2d 84, 87, 481 N.Y.S.2d 891, 894 (3d Dep't 1984) (holding that there is a continuing duty to warn of defects); *cf.* Goldberg v. Union Hardware Co., 162 A.D.2d 658, 658-59, 557 N.Y.S.2d 104, 105 (2d Dep't 1990) (holding that absence of consumer complaints as to adequacy of product supports a jury's verdict that a manufacturer did not breach a duty to warn consumers); Belling v. Haugh's Pools, Ltd., 126 A.D.2d 958, 959, 511 N.Y.S.2d 732, 733 (4th Dep't 1987) (stating that "there is no liability for failure to warn of obvious danger . . . .").

5. Victor E. Schwartz obtained a B.A. *summa cum laude* from Boston University in 1962, and his J.D. *magna cum laude* from Columbia University in 1965. He is author of V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986); co-author of W. PROSSER ET AL., CASES AND MATERIALS ON TORTS (8th ed. 1988), V. SCHWARTZ ET AL., GUIDE TO MULTISTATE LITIGATION (1985), and V. SCHWARTZ ET AL., PRODUCT LIABILITY: CASES AND TRENDS (Prentice Hall 1987). Mr. Schwartz is also a drafter of the Uniform Product Liability Act. *See also infra* note 6 for information on the Act.

6. UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714, 62,721 (1979) [hereinafter UPLA]. Section 104 states that a product can be found defective if: "(1) It was unreasonably unsafe in construction [Subsection A]; (2) It was unreasonably unsafe in design [Subsection B]; (3) It was unreasonably unsafe because adequate warnings or instructions were not provided [Subsection C] . . . ." *Id.* Before the enactment of the UPLA, the issue of identifying basic standards of responsibility to which product manufacturers are to be held, generated much controversy. *See, e.g.*, Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 648 (1978) (stating that two sources of change in modern products liability are "expansion of the concept of defect in products liability actions"

I have never been able to make that distinction in my mind or see the value in that categorization,[7] and I am not sure whether Professors Henderson and Twerski still adhere to that view,[8] but there is an excellent case on this point demonstrating the futility of making that kind of distinction,[9] not from the frequency point

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and "restriction of defenses based upon plaintiff's conduct . . . ."); *see also* Victor E. Schwartz, *The Death of "Super Strict Liability": Common Sense Returns to Tort Law*, 27 GONZ. L. REV. 179 (1991-92). Mr. Schwartz defines "super strict liability" as "liability . . . even though the manufacturer neither knew nor could have known about the risk imposed by the design," where "there was no safer way to make the product given the existing technology." *Id.* at 179. Mr. Schwartz, as well as does the UPLA, agree that applying "super strict liability" is "inappropriate for defective-design and failure-to-warn cases" since it is unsound public policy to put a burden on the manufacturers to make their products safer than is possible under existing technology. *Id.* at 180.

7. UPLA, 44 Fed. Reg. 62,724. Section 104 specifically categorizes the types of product defects under which the manufacturer can be held liable.

8. *See* Aaron D. Twerski, *From A Reporter: A Prospective Agenda*, 10 TOURO L. REV. 5 (1993). *See also* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1516 (1992) (recognizing need for distinct categories of defects since "the rule developed for manufacturing defects is inappropriate for the resolution of design and warning defect cases . . . ."); *cf.* Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law -- A Rush to Judgment*, 28 DRAKE L. REV. 221, 223 (1978-79). According to Twerski and Weinstein,

> Many of the ideas presented by the U[niform] P[roducts] L[iability] L[aw] have enormous potential for inclusion into the common law development of products liability over the next decade, but they will require the careful hand of the courts to assure that such doctrines are developed through careful attention to the varying fact patterns which create the rich tapestry of products liability law. It is much too early for legislation to pre-empt the creativity of the common law in the continuing development of products liability law.

Id.

9. John F. Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) For Products Laibility?*, 10 TOURO L. REV. 21 (1993). *See also* Brady v. Melody Homes Mfr., 589 P.2d 896 (Ariz. Ct. App. 1978). In *Brady*, the court recognized that the distinctions among manufacturer defect, design defect, and failure to warn defect become "blurred or meaningless in particular cases." *Id.* at 898; Dion v. Graduate Hosp., 520 A.2d 876, 880 (Pa. 1987) (holding that "[t]here are difficulties in thinking of

of view which Mr. Vargo mentioned,[10] but in another vein entirely.

That case is *Bryan v. John Bean Division of FMC Corp.*[11] There, the court found that the plaintiff stated a cause of action for both manufacturing defect and design defect.[12] The manufacturing defect resulted from the method of control, supervision and testing, which as the court said, was a design decision.[13]

It seems to me that manufacturing defects are typically a result of design decisions of how to control, how to monitor and how to produce your product.[14] These are inextricably interrelated.[15]

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an inadequate warnings case as a products liability case . . . " since nothing is alleged to be wrong with product's design in a warnings case).

10. Vargo, *supra* note 9. The frequency point of view, according to Mr. Vargo, is a theory that helps distinguish between a manufacturing defect and a design defect. As the frequency of the occurrence of product defect increases, there is a greater likelihood that it is a design defect..

11. 566 F.2d 541 (5th Cir. 1978).

12. *Id.* at 549 (holding that designer who distributed cast-iron tool could be liable for design and manufacturing defects when both defects caused the product to be unreasonably dangerous).

13. *Id.* at 547-48. In *Bryan*, in a special finding, the jury, found that the design specifications provided by defendant John Bean Corporation to third party defendant Midland-Ross, the Foundry that cast the product, were inadequate. Due to this inadequacy, the product, as cast by Midland-Ross, was too hard and brittle to perform as intended. *Id.* at 547. The implication was that had the design blueprint sufficiently established hardness specifications for the product, there would not have been a manufacturing defect.

14. But see Lesnefsky v. Fischer & Porter Co., 527 F. Supp. 951, 955 (E.D. Pa. 1981) which discusses that "a manufacturer . . . under § 402A[,] who produces a component part in accordance with the specifications of a buyer[,] is not liable for the part's defective design unless manufacturer has or should have knowledge that product is unsafe for the use intended . . ."; RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 69 (Quorum Books 1980). According to Epstein's treatise,

> [Manufacturing] defect cases presuppose that the design is safe but insist that the product is dangerous because it does not conform to the design. Design defect cases presuppose that the product conforms to design but insist that the design itself is unsafe. Construction defects arise because of occasional miscarriages in the manufacturing process; design defects necessarily pervade an entire line of products whose production was exactly as intended.

And if the Restaters try to make a distinction between the two, it will cause the courts, the plaintiffs, the defense attorneys, and others to fight battles that should not be fought.[16]

Moreover, there is never mentioned in this categorization a fourth type of defect, which I have always contended is clearly a type of defect. This type of defect is misrepresentation,[17] either

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Id.

15. But see UPLA, 44 Fed. Reg. 62,714 § 104 (1979) for a discussion of the distinction between manufacturing defects and design defects. *Id.* at 62,721. A manufacturer will be strictly liable for a manufacturing defect if, "when the product left the 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.* However, whether a manufacturer will be found liable under a design defect theory is determined by weighing "the likelihood that the product would cause the claimant's harm or similar harms . . . [against] the burden on the manufacturer to design a product that would have prevented those harms. . . ." *Id*; Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 248 (5th Cir. 1990) (following reasoning of the Supreme Court in Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the court determined that it would be unfair to find a manufacturer liable for a design defect where product was constructed according to government specifications); Leeds v. Cincinnati, Inc., 732 F.2d 1194, 1197 (3d Cir. 1984) (holding that a manufacturer would be strictly liable for manufacturing defects but would not be strictly liable for design defects unless design is "unreasonable").

16. *See, e.g.*, Hutto v. BIC Corp., 800 F. Supp. 1367, 1371 (E.D. Va. 1992) (stating that "whether this defect [in defendant's lighter] is the result of a 'design' defect or a 'manufacturing' defect may not be material; what is material is that there is evidence that the cause of this defect is either BIC's design of the lighter or its manufacture of the lighter . . . ."); Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1163 (Cal. 1972) (suggesting that distinction between manufacturing defects and design defects is not justified, considering the additional burden placed upon plaintiffs trying to prove design defects). According to the *Cronin* court, "[i]t is difficult to prove that a product ultimately caused injury because a widget was poorly welded--a defect in manufacture--rather than because it was made of inexpensive metal difficult to weld, chosen by a designer concerned with economy--a defect in design." *Id.* at 1163. Therefore, this court was unwilling to "provid[e] such a battleground for clever counsel." *Id.*

17. *See* Hutchinson Utils. Comm'n v. Curtiss-Wright Corp., 775 F.2d 231, 238 (8th Cir. 1985). In order to establish an intentional misrepresentation claim, a defendant must:

culpable[18] or innocent.[19] If you read the seminal case of *Greenman v. Yuba Power Products., Inc.*,[20] Justice Traynor

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[make] a false representation of a past or existing material fact, susceptible of knowledge, knowing it to be false or without knowing whether it was true or false, with the intention of inducing the person to whom it was made to act in reliance upon it or under such circumstances that such person was justified in so acting and was thereby deceived or induced to so act to his damage.

Id.; KEETON ET AL., *supra* note 1, § 106, at 736-37. Misrepresentation may be through oral or written words, by "[m]erely . . . entering into some transactions," by making statements which "create a false impression in the mind of the hearer," or by "active concealment of the truth." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 402B (1965) (stating that "[o]ne engaged in the business of selling . . . is subject to liability [for misrepresentation] . . . even though [the misrepresentation] is not made fraudulently or negligently . . . .").

18. *See* KEETON ET AL., *supra* note 1, at 741. Culpable, or intentional, misrepresentation "involves the intent that a representation shall be made, that it shall be directed to a particular person or class of persons, that it shall convey a certain meaning, that it shall be believed, and that it shall be acted upon in a certain way." *Id.* at 745.

19. *See* Banco Totta E Acores v. Fleet Nat. Bank, 768 F. Supp. 943 (D.R.I. 1991). The *Banco* court held that a claim for recission failed under the theory of innocent misrepresentation, since the remedy of recission was inappropriate where a plaintiff could not be restored to his or her original status. *Id.* Furthermore, according to this court, an additional element was necessary to establish a claim for innocent misrepresentation. *Id.* "[T]he plaintiff must have justifiably relied on the representation, mistaken or deceitful, [which was] made by the defendant." *Id.* at 948; *see also* Dixie-Portland Flour Mills v. Nation Enters., Inc., 613 F. Supp. 985, 989 (N.D. Ill. 1985) (stating that "[t]o be liable for negligent misrepresentation, a defendant must be in the business of supplying information for the guidance of others in their business transactions . . . ."); Halpert v. Rosenthal, 267 A.2d 730, 735 (R.I. 1970) (recognizing that a false, though innocent, misrepresentation of fact can be a basis for recission of a contract since "the misrepresenter's good faith is immaterial.") *Id.* at 735; KEETON ET AL., *supra* note 1, at 741. Innocent, or negligent misrepresentation involves a statement "made with an honest belief in its truth" which nevertheless, "because of lack of reasonable care in ascertaining the facts, or in the manner of expression, or absence of the skill and competence required by a particular business or profession" is negligent. *Id.* Alfred Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679, 690 (1973) (stating that innocent misrepresentation occurs where defendant "makes an unqualified assertion of a fact that is susceptible of knowledge, and the assertion turns out to be untrue . . . .").

made the point, amongst other things, as a basic reason for adopting strict liability, that "[i]mplicit in [a product's] presence on the market" is a "representation that it [will] safely do the jobs for which it was built."[21] This, combined with all the marketing, advertising and other methods that manufacturers and product suppliers use to sell their products, creates a consumer expectation of safety and usability.[22]

Twenty years ago, Professor Shapo of Northwestern University wrote a major article in the *Virginia Law Review*[23] in which he contended, I think quite correctly, that products liability is shot through with aspects of both express and implicit representation.[24] All courts, with the exception perhaps of

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20. 377 P.2d 897 (Cal. 1963).

21. *Id.* at 901. *See also* Dean v. General Motors Corp., 301 F. Supp. 187, 190-91 (E.D. La. 1969) (stating that "[t]he design must measure up to what the community is entitled to expect of those who persuade the public to buy their products . . . .").

22. *See, e.g.*, Adkins v. GAF Corp., 923 F.2d 1225, 1228 (6th Cir. 1991) (requiring that "[t]he packaging of a product is . . . an element to consider when determining whether the consumer would reasonably expect the content of the package to pose the danger it did."); Hauter v. Zogarts, 534 P.2d 377, 382-83 (Cal. 1975) (stating that where label on shipping carton and instruction book of golf training device urged players to drive ball with full power and further stated "COMPLETELY SAFE BALL WILL NOT HIT PLAYER," it was reasonable to infer that consumer would believe the device safe for all levels of ability); Tirino v. Kenner Prods. Co., 72 Misc. 2d 1094, 1095, 341 N.Y.S.2d 61, 64 (Civ. Ct. 1973) (explaining that liability would be imposed where plaintiff used a product that was labeled "Non-Toxic" in exact way as depicted on the product's packaging).

23. Marshall Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

24. *Id.* at 1158. While express representations are statements specifically made about a product's quality, usefulness, etc., implicit representations are beliefs reasonably illicited about a product indirectly. According to Shapo:

> A cause of action exists, at a minimum, for untrue product representations made in a context which includes the defendant's knowledge or quasi-knowledge of their falsity. This context typically also includes the plaintiff's ignorance of the true facts, a deficiency which quite infrequently is known to the defendant and which usually is justified by customary practice concerning that kind of purchase.

Id. In cases of implicit representations, Shapo declares that:

California in *Brown v. Superior Court*,[25] in dictum, say where you have a misrepresentation case, you have true strict liability.[26]

I do not think that we can ignore the representational aspects of products liability in determining whether a product is defective, nor should it be pulled out as a separate basis under section 402B of the Restatement (Second) of Torts.[27] It is an integral part of 402A liability.[28]

> The question should be whether the product image that falls on the consciousness of the purchaser as revealed by the seller varies significantly from the objective facts about the aspect of the product at issue, surely those known to the seller. [Therefore,] [t]he notion of the representation becomes redefined to include a *larger field of communication*, and the representation, however communicated, receives more realistic examination with respect both to the production and reception of the image.

Id. at 1163-64 (emphasis added); *see* Marshall Shapo, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE (forthcoming 1993).

25. 751 P.2d 470 (Cal. 1988) (stating that strict liability does not apply to drug manufacturer who makes misrepresentation with regard to purpose for which drug is prescribed).

26. *See* Badger Pharmacal Inc. v. Wisconsin Pharmacal Co., 1 F.3d 621, 622 n.1 (7th Cir. 1993). Wisconsin courts do not draw a distinction between "strict responsibility misrepresentation" and strict liability misrepresentation; Heiser Lincoln-Mercury, Inc., v. Hagemeier, No. 91-1783, 1992 Wisc. App. LEXIS 1293, at *4 (1st Dist. July 14, 1992). Persichini v. Brad Ragan, Inc., 735 P.2d 168, 172 (Colo. 1987); Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042, 1045 (Colo. 1983) (stating that § 402B of Restatement (Second) of Torts "imposes strict liability upon sellers of products . . . which are misrepresented to the consuming public . . . ."); American Safety Equip. Corp. v. Winkler, 640 P.2d 216, 220-22 (Colo. 1982); Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982); Nugent v. Utica Cutlery Co., 636 S.W.2d 805, 808-09 (Tex. 1982); Baugh v. Honda Motor Co., Ltd., 727 P.2d 655, 667 (Wash. 1986).

27. RESTATEMENT (SECOND) OF TORTS § 402B (1965). Section 402B states:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
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> (a) it is not made fraudulently or negligently, and
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> (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

There has been talk, among Professor Madden, Professor Henderson, and others, about whether or not you should use the date of trial[29] or the date of manufacture[30] in determining what the objective manufacturer could have done or could have known.[31]

Id.

28. *See* Leichtamer v. American Motors Corp., 424 N.E.2d 568, 577 (Ohio 1981) (citing Greenman v. Yuba Power Prods., Inc., 377 P.2d 892 (Cal. 1962)) (stating that when manufacturer places a product on market, there is an implied representation that it will "safely do the jobs for which it was built . . . ."); Burrows v. Follett & Leach, Inc., 340 N.W.2d 485, 491 (Wis. 1983) (explaining that on the facts of that case, absence of any express representations "as to the safety" of product, a finding of strict liability under § 402A was inappropriate).

29. *See* Gomulka v. Yarapi Mach. & Auto Parts, Inc., 745 P.2d 986, 989 (Ariz. 1987) (stating that in strict liability cases manufacturer's conduct at time of manufacture is not material because knowledge of a product's risks is imputed to manufacturer at time of trial); Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 881 (Ariz. 1985) (stating that test is whether manufacturer would continue to market his product with knowledge of risks at time of trial).

30. *See* Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 556 (Cal. 1991) (stating that manufacturer is liable for "risks . . . known or knowable at time of manufacture . . . ."). According to the *Anderson* court, to hold otherwise, would discourage the manufacturer from developing new products because of the danger that advances in technology would result in possible liability. *Id.* at 556.; Fireboard Corp. v. Fenton, 845 P.2d 1168, 1175 (Colo. 1993) (arguing that manufacturer's liability is based on knowledge of product's risks at time of manufacture and distribution).

31. *See* Woodill v. Parke Davis & Co., 402 N.E.2d 194, 199 (Ill. 1980) (stating that "[t]o hold a manufacturer liable for failure to warn of danger of which it would be impossible to know . . . would make manufacturer virtual insurer of the product."); Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 569-71 (1969). The Keeton approach imputes knowledge to the manufacturer at the time of trial, even if the risk was not known to the manufacturer at the time of manufacture or distribution. *Id.*; John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 834-35 (1973). While Keeton would find the manufacturer liable based on information available at the time of trial, the approach taken by Wade would find the manufacturer liable "if it had known of the product's dangerous condition at the time it was marketed."; *see also* Habecker v. Clark Equip. Co., 942 F.2d 210 (3d Cir. 1991). The manufacturer is liable for known and unknown product risks. *Id.* at 216. "This rule can be justified because it provides

Professor Twerski stated that only a small minority of jurisdictions use the date of trial time.[32] Washington was mentioned.[33] I believe Pennsylvania is such a jurisdiction.[34] Arizona is such a jurisdiction in *Dart v. Wiebe Manufacturing, Inc.*[35] I believe Hawaii is also such a jurisdiction in asbestos

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manufacturers with an incentive to invest, not only in proven safety features, but also in the testing and development of any new feature that may prove superior." *Id.*

32. *See* Habecker v. Clark Equip. Co., 942 F.2d 210 (3d Cir. 1991); *see also In re* Hawaii Fed. Asbestos Cases, 665 F. Supp. 1454 (D. Haw. 1986), *aff'd* 960 F.2d 806 (9th Cir. 1986); Dart v. Wiebe Mfg., Inc., 709 P.2d 876 (Ariz. 1985); Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978); Wood v. Ford Motor Co., 691 P.2d 495, 498 (Or. 1984), *rev. denied*, 697 P.2d 556 (Or. 1985) (stating that the "test is whether a reasonably prudent manufacturer would have so designed and sold the product in question had it known of the risk which injured plaintiff . . . .").

33. *See* Lenhardt v. Ford Motor Co., 683 P.2d 1097, 1100 (Wash. 1984) (stating that liability of manufacturer is based on characteristic of product and not on conduct of manufacturer). *But see* Ayers v. Johnson & Johnson Baby Prods. Co., 818 P.2d 1337, 1344 (Wash. 1991) (stating that time of manufacture is appropriate standard in determining whether product is "reasonably safe as designed"); Falk v. Keene Corp., 782 P.2d 974, 980 (Wash. 1989) (declaring that to find the manufacturer liable, plaintiff must prove that "at the time of manufacture, [the risk of harm to the plaintiff] . . . outweighs the manufacturer's burden to design a product that would have prevented those harms . . . .").

34. *See Habecker*, 942 F.2d at 215-16. Under Pennsylvania law, evidence of what was known about a product's safety feature is not relevant to whether the product was defective. *Id.* The product itself is relevant, and not the conduct of the manufacturer. *Id.* Therefore, the determination of whether the product was defective is based on the knowledge available at the time of trial. *Id.*; Lewis v. Coffing Hoist Div., 528 A.2d 590, 594 (Pa. 1987) (stating that manufacturer's liability in design defect case is based on knowledge of product defect at time of trial and not on manufacturer's conduct in making design choice).

35. 709 P.2d 876, 881 (Ariz. 1985). The *Dart* court found that, in a strict liability risk/benefit analysis, unlike in a negligence setting, the focus should be on the "quality of the end result," rather than on the conduct of the manufacturer. *Id.* According to the court's "hindsight test," also known as the "prudent manufacturer test[,] . . . the quality of the product may be measured not only by the information available to the manufacturer at the time of design, but also by the *information available to the trier of fact at the time of trial.*" *Id.* (emphasis added); *see also* Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D.

litigation.[36] I believe Federal Rule of Evidence 407[37] also supports such proposition when it states that you can use evidence

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Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). The *Dorsey* court declared that "the proper test of 'unreasonable danger' was whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the potential dangerous consequences the trial just revealed." *Id.* at 759-60; Byrns v. Riddell, Inc., 550 P.2d 1065, 1068 (Ariz. 1976); Barker, 573 P.2d at 457. According to the *Barker* court,

> the fact that the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders.

Id.; Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978); Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Or. 1974). According to the *Phillips* court,

> the question of whether the design is unreasonably dangerous can be determined only by taking into consideration the surrounding circumstances and knowledge at the time the article was sold, and determining therefrom whether *a reasonably prudent manufacturer would have so designed and sold the article in question had he known of the risk involved which injured plaintiff.*

Id. at 1037 (emphasis in original).

36. *In re* Hawaii Fed. Asbestos Cases, 665 F. Supp. 1454 (D. Haw. 1986), *aff'd*, 960 F.2d 806 (9th Cir. 1992). Due to its policy of providing "consumers with the maximum possible protection that the law can muster against dangerous defects in products," the Hawaii Supreme Court decided that this policy would be furthered by allowing the consumer to show the existence of a design defect "under either or both" the consumer expectation test and the risk-benefit/hindsight approach. *Id.* In other words, where the ordinary consumer expectation test would be inadequate in the strict liability setting, the Hawaii court was willing to protect the plaintiff by evaluating the product "in the light of hindsight." *Id.* at 1456; *see also* Kisor v. Johns-Manville Corp., 783 F.2d 1337 (9th Cir. 1986). According to the *Kisor* court, "ignorance of the product's danger is [no] defense to strict products liability." *Id.* at 1341.

37. FED. R. EVID. § 407. This rule provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another

of remedial measures of anyone other than the defendant to show the product was defective when made at a prior time.[38] You can even use the defendant's improvements on the product where it is introduced to show feasibility at the time the product was made.[39] If you adopt the date of manufacture time to determine defectiveness in strict liability, you must, it seems to me, implicitly or explicitly overrule Rule 407, which the federal courts[40] and almost all state courts[41] apply.

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purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

38. *In re* Aircrash in Bali, India, 871 F.2d 812, 816 (9th Cir.) (stating that a Federal Aviation Administration report on airline's safety procedures is not excludable under Rule 407 where it is prepared by FAA and not by defendant), *cert. denied*, 493 U.S. 917 (1989); Koonce v. Quaker Safety Prod. & Mfg. Co., 798 F.2d 700, 720 (5th Cir. 1986) (holding that exclusion of a memo is not required under Rule 407 for subsequent remedial measures where memo was written by employer who was not a party in action); Middleton v. Harris Press & Shear, Inc., 796 F.2d 747, 751 (5th Cir. 1986) (holding that modifications made subsequent to plaintiff's injury were admissible under Rule 407 when modifications were made by non-defendant); *accord* Dixon v. International Harvester Co., 754 F.2d 573, 583 (5th Cir. 1985) (stating that Rule 407 does not bar evidence of repairs made by non-defendant); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 889 (5th Cir. 1983) (stating that "neither the text of rule 407 nor the policy underlying it excludes evidence of subsequent repairs made by someone other than the defendant.").

39. Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (stating that Rule 407 does not exclude feasibility of precautionary measures); Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989) (holding that where feasibility is not in controversy, Rule 407 exception does not apply); Dixon v. International Harvester Co., 754 F.2d 573, 584 (5th Cir. 1985) (holding that although repairs are made years after product was manufactured, evidence of repairs is admissible under feasibility exception of Rule 407); Estate of Spinosa v. International Harvester Co., 621 F.2d 1154, 1160 (1st Cir. 1980) (stating that post-manufacture evidence cannot be used to prove product was defective when manufactured, but only when feasibility exception is controverted). *See, e.g.*, Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

40. The majority of circuits exclude subsequent measures as evidence, and apply Rule 407. *See* Raymond, 938 F.2d at 1522 (holding explicitly that Rule 407 applies to strict liability cases); Chase v. General Motors Corp., 856 F.2d 17, 22 (4th Cir. 1988) (applying Rule 407 to negligence, as well as products

Moreover, the majority of courts recognize a post-sale duty in negligence, at least to warn, when you discover you have

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liability cases); Ault v. International Harvester Co., 528 P.2d 1148, 1152 (Cal. 1974).

> In the products liability area, the exclusionary rule of § 1151 [equivalent to Fed. R. Evid. 407] does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of § 1151 is not applicable to a strict liability case . . . .

Id.; Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986); Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 470 (7th Cir. 1984) (holding that failure to apply Rule 407 would deter subsequent measures by manufacturer); Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 888 (holding that Rule 407 applies in strict liability cases); Josephs v. Harris Corp., 677 F.2d 985, 991 (3d Cir. 1982) (holding that "Fed. R. Evid. 407 is applicable to products liability actions based on §402A of the Restatement."); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981) (stating that "[t]he application of those principles convinces us that although negligence and strict products liability causes of action are distinguishable, no distinction between the two justifies the admission of evidence of subsequent remedial measures in strict products liability actions."), *cert. denied*, 456 U.S. 960 (1982). Only two circuits do not apply Rule 407 to strict products liability cases. Burke v. Deere & Co., No. 92-1990, 1993 U.S. App. LEXIS 21878, at *19 (8th Cir. Aug. 27, 1993) (holding that existence of modification programs is admissible as evidence of subsequent remedial measures necessary to prove strict liability cases); Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 (8th Cir. 1989) (arguing that Rule 407 only applies to negligence cases); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983) (stating that "where there is any reason for use of the evidence other than to establish the defendant's negligence, Rule 407 should not apply."), *cert. denied sub nom.* Piper Aircraft Corp. v. Seven Bar Flying Serv., Inc., 466 U.S. 958 (1984).

41. *See, e.g.*, *Ault*, 528 P.2d 1148, 1152 (Cal. 1974):

> In the products liability area, the exclusionary rule of § 1151 [equivalent to Fed. R. Evid. 407] does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of § 1151 is not applicable to a strict liability case . . . .

Id.; Chart v. General Motors Corp., 258 N.W.2d 680, 683 (Wis. 1977) (holding that evidence of subsequent remedial change is admissible in products liability case under Wisconsin law); Fields v. Volkswagen of America, Inc., 555 P.2d 48, 58 (Okla. 1976) (allowing recall letters as evidence to prove post-accident improvements).

marketed a defective product.[42] In some cases, there is a duty to recall, as required by the National Traffic and Motor Vehicle Safety Act,[43] or by common law.[44] In some of these instances,

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42. *See* Andrulonis v. United States, 924 F.2d 1210, 1221 (2d Cir. 1991) (stating that "a manufacturer . . . may incur liability for failing to warn of newly discovered dangers in the use of a product that came to his attention after manufacture or sale.") (quoting Cover v. Cohen, 61 N.Y.2d 261, 274-75, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984); Ierardi v. Lorillard, Inc., 777 F. Supp. 420, 423 (E.D. Pa. 1991) (stating that "[t]o impose a post-sale duty to warn . . . where defect is not remedial, where product is no longer being manufactured, and is no longer in use, [and] where it would be impracticable to personally notify every consumer . . . would be a perversion of [the duty to warn] doctrine."); Pfeiffer v. Eagle Mfg. Co., 771 F. Supp. 1133, 1139 (D. Kan. 1991) (holding that duty to warn is continuous, and therefore, requires manufacturers to keep abreast of new developments as overall policy to protect consumers); Walton v. Avco Corp., 610 A.2d 454, 459 (Pa. 1992) (holding that manufacturer has duty to warn after manufacturing date in order to preserve and promote social policies behind Restatement (Second) of Torts § 402A); Walton v. Avco Corp., 557 A.2d 372, 378-80 (Pa. 1989) (leaving question open as to how broad post-sale duty to warn should be interpreted).

43. 15 U.S.C. §§ 1411-20 (1988). Section 1411 of the Act provides:

> If a manufacturer-
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> (1) obtains knowledge that any motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety; or
>
> (2) determines in good faith that such vehicle or item of replacement equipment does not comply with an applicable Federal motor vehicle safety standard prescribed pursuant to section 1392 of this title; he shall furnish notification to the Secretary and to owners, purchasers, and dealers, in accordance with section 1413 of this title, and he shall remedy the defect or failure to comply in accordance with section 1414 of this title.

Id.

44. *See* Santiago v. Group Basil, Inc., 830 F.2d 413, 416 (1st Cir. 1987) (per curiam) (holding that retailer or manufacturer will be liable for failing to meet his or her duty to recall); Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 398 (Iowa 1985) (holding that retailer is liable for failure to recall defective product). *But see, e.g.*, Smith v. Firestone Tire & Rubber Co., 755 F.2d 129, 135 (8th Cir. 1985) (stating that since appellants could not support legal duty to recall tire rims, negligence had not been established); Strunk v. Lear Siegler, Inc., No. 91-2331L, 1992 U.S. Dist. LEXIS 15684, at 12 (D. Kan. 1992) (holding that there is no duty to recall under Kansas law).

the duty is to recall, or repair, free of charge, where there are post-sale duties that arise in negligence.[45]

Some mention has been made here today about providing clarity and precision to the law of tort liability. As a teacher of tort law, one of the greatest bogeymen I have been subjected to over time has been the concept of clarity and precision in the law of torts, where it does not exist.[46] As we all know, the law of torts reflects the thinking of the common person in this country, and it involves large social and policy judgments that are not reducible to a formula.[47]

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45. Cover v. Cohen, 61 N.Y.2d 263, 276, 461 N.E.2d 864, 872, 473 N.Y.S.2d 378, 386 (1984). Post-sale duty to warn and/or duty to take other steps, depends upon several factors:

> the harm that may result from use of the product without notice, the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given, the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given, the attention which it can be expected a notice in the form given will receive from the recipient, the kind of product involved and the number manufactured or sold, and the steps taken, other than the giving of notice, to correct the problem . . . [and] any governmental regulation dealing with notice.

Id.

46. *See* Jerry J. Phillips, *Truth and Fiction in the Judicial Handling of Statutes*, 44 LA. L. REV. 1309, 1322 (1984) (stating that regulation of tort law's "relatively imprecise standards" would inhibit its ability to "respond to changing social needs"); *see also* Jerry J. Phillips, *To Be or Not to Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55, 60 (1986) (explaining that fixed damages, for recovery in tort, will hinder law's ability to adopt to changing circumstances).

47. *See* Eric T. Freyfogle, *Water Justice*, 1986 U. ILL. L. REV. 481, 503 (1986). According to Freyfogle, "[t]ort law has long had close ties to community values and standards, and to shifting concepts of public morality. Tort law, that is, is based on imprecision and judgments by local community members . . . ." *Id.*; *see also* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986) (justifying development of products liability since policy of law of warranty did not give public sufficient protection from dangerous products); Bellevue South Assocs. v. HRH Constr. Corp., 78 N.Y.2d 282, 304, 579 N.E.2d 195, 206, 574 N.Y.S.2d 165, 176 (1991) (stating that policy behind tort law is to benefit society).

However, if we try to obtain precision, and if we think risk utility[48] is precise, then you have not read the cases in this area with any care.[49] Certainly, an economist would be appalled at the way attorneys present the issue of risk utility in the typical products case. I think what they are appealing to, more often than not, is the concept of the ordinary person's reaction, known as the consumer expectations test,[50] or in the Uniform Commercial

48. KEETON ET. AL., *supra* note 1, at 699. According to § 99, a product, under the risk utility approach, is defective when the danger (risk) of the product outweighs its utility. Under this approach, a product is defective "if a reasonable person would conclude that the danger-in-fact . . . outweighs the utility of the product." *Id.*

49. *See* Griggs v. BIC Corp., 981 F.2d 1429 (3d Cir. 1992). Various jurisdictions utilize different tests in determining a manufacturer's liability in a design defect case. *Id.* at 1433. Some courts use "consumer expectations test," and other courts use the "risk-utility test." *Id.*; Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240, 1246 (Colo. 1987) (stating that consumer contemplation test is not satisfactory standard for determination of manufacturer's liability for product defects), *cert. dismissed*, 485 U.S. 901 (1988); Ziegler v. Kawasaki Heavy Indus., Ltd., 539 A.2d 701 (Md. Ct. Spec. App.), *cert. denied*, 542 A.2d 858 (1988). In some cases, the risk is not reasonable. *Id.* at 705. The consumer contemplation has been held inapplicable where "the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Id.* at 706; Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986). Determining when a manufacturer is liable for a product defect has been one of the most controversial issues in products liability. *Id.* at 376. Courts have applied the consumer contemplation test, as well as the risk utility test. *Id.* "[T]he precise contours" of the risk utility test varies from "court to court." *Id.* at 376, n.7. Rainbow v. Albert Elia Bldg. Co., 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982). A design defect case using risk utility analysis, involves a subjective judgment "on matters that are frequently scientific . . . . [T]he process is imprecise and in all fairness the inquiry should be limited to technology which exists at the time of manufacture." *Id.* at 294, 436 N.Y.S.2d at 485; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 486 (1989) (declaring that "need for theoretical clarity" is most urgent in tort law).

50. *See, e.g.*, Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993) (following trend of risk-utility analysis); *see* Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 880 (Ariz. 1985) (holding that consumer expectation test should only be used "when the consumer may form an expectation . . . ."); Ewen v. McLean Trucking Co., 706 P.2d 929, 934 (Or. 1985) (explaining that jury instructions should focus on amount of risk perceived by ordinary consumer);

Code,[51] as reasonably fit for the purposes for which the product was made.[52]

I have always felt the consumer expectations test -- defined in terms of seller presumed knowledge[53] and in terms of subsequent developments in the industry,[54] and in terms of the representational factors -- more nearly strikes at what the average person on the jury does when she or he makes a judgment in this type of case.[55] It is the test that is reflected in the Uniform

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see also Barnes v. Vega Indus., 676 P.2d 761, 763 (Kan. 1984) (stating that "[t]he definition of 'unreasonably dangerous' set forth in Comment *i* of § 402A has been designated the 'consumer expectation' test . . . ."); Phillips v. Kimwood Mach. Co., 525 P.2d 1034, 1036 (Or. 1974) (holding that a "dangerously defective article" is defined as one that "a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character* . . . .") (emphasis in original).

51. U.C.C. § 2-314 (1993).

52. U.C.C. § 2-314(2) (1993). This provision states, in relevant part: "Goods to be merchantable must be at least such as . . . c) are fit for the ordinary purposes for which such goods are used." *Id.*

53. *Phillips*, 525 P.2d at 1036 (holding that test for strict liability is "whether the seller would be negligent if he sold the article *knowing of the risk involved*"). According to the *Phillips* court, "the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing." *Id.* In other words, "a manufacturer who would be negligent in marketing a given product . . . would necessarily be marketing a given product which fell below the reasonable expectations of consumers who purchase it." *Id.* at 1037.

54. *See, e.g.*, George v. Celotex Corp., 914 F.2d 26, 28 (2d Cir. 1990) (stating that manufacturer has a duty to keep up with discoveries in his field); Linday v. Ortho Pharmaceutical Corp., 637 F.2d 87, 91 (2d Cir. 1980) (stating that a manufacturer must "keep abreast of the current state of knowledge of its products . . . ."); Cover v. Cohen, 61 N.Y.2d 261, 274, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984) (stating that a manufacturer is expected to warn of dangers which come to light); Young v. Robertshaw Controls Co., 104 A.D.2d 84, 87-88, 481 N.Y.S.2d 891, 894 (3d Dep't 1984) (stating that a manufacturer must respond to evidence that product is dangerous).

55. *See* Sperry-New Holland v. Prestage, 617 So. 2d 248, 254 (Miss. 1993); Leichtamer v. American Motors Corp., 424 N.E.2d 568, 577 (Ohio 1981) (stating that "[a] product will be found unreasonably dangerous if it is dangerous . . . beyond the expectations of an ordinary consumer when used in an intended or reasonably foreseeable manner.").

Commercial Code, which is enacted in all states of this country, with the exception of Louisiana.[56] It is the test reflected in the standard of the European Economic Community,[57] which by the

56. *See* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 113 (La. 1986). Louisiana requires plaintiff to demonstrate:

> that the harm resulted from the condition of the product, that the condition made the product unreasonably dangerous to normal use, and that the condition existed at the time the product left the manufacturer's control. Under a pure strict liability theory, the product is on trial, not the knowledge or conduct of the manufacturer.

Id. The knowledge, possessed by the manufacturer, is implicated in strict products liability only when plaintiff alleges either that the manufacturer failed to issue an adequate warning, or that the manufacturer should have adopted a safer product design. *Id.* Essential to plaintiff's case, under each of the three theories, is that "defendant's product was unreasonably dangerous to normal use." *Id.* A product is considered "unreasonably dangerous" when the product that produced plaintiff's injury "was dangerous to an extent beyond that which would be contemplated by [an] ordinary consumer." DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26, 30 (La. 1981), *cert. denied*, 459 U.S. 836 (1982). Additionally, certain products are classified "unreasonably dangerous per se." *Halphen*, 484 So. 2d at 113. Within this class, liability is "imposed solely on the basis of the intrinsic characteristics of the product irrespective of the manufacturer's intent, knowledge or conduct." *Id.* A product is categorized as "'unreasonably dangerous per se' if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product." *Id.* at 114. Regarding the application of products liability in Louisiana, see Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980); Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978); Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971); Addison v. Williams, 546 So. 2d 220 (La. Ct. App. 1989); LeBleu v. Homelite Div. of Textron, 509 So. 2d 563 (La. Ct. App. 1987); *But see* La. Prod. Liab. Act § 2800.56 (1988), *infra* note 84.

57. 28 O.J. EUR. COMM. (L 210) 29, art. 1 (1985). On July 25, 1985, the European Economic Community (EEC) adopted a uniform products liability directive which holds "[t]he producer [strictly] liable for damage caused by a defect in his product." *Id.* The directive defines "defect" as follows:

> 1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation. 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

way, folds into its test a product "get-up" standard, which is representational in nature.[58] The European community, with whom we are becoming ever more closely tied economically, uses what I believe to be the consumer expectations test. I think it would be unfortunate for the American Law Institute at this time to steer away from the standard used both by the Code and by the European community.[59]

The consumer expectations test has been criticized on two grounds: (1) the consumer can have no expectation of safety when the danger is obvious,[60] and (2) the consumer has no ordinary expectations in the case of a complicated design question, requiring expert testimony.[61] I think both criticisms are misplaced.

A consumer can certainly expect greater safety even though she is exposed to an obvious danger.[62] To say that she cannot, is

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Id. at art. 6. *See generally* Gregory G. Scott, *Product Liability Laws in the European Community in 1992*, 18 WM. MITCHELL L. REV. 357 (1992).

58. *See* Peter DeVal & R.J. Dormer, *Developments in English Products Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 364 (1988).

59. *See generally* ROBERT E. CARTWRIGHT & JERRY J. PHILLIPS, PRODUCTS LIABILITY § 1.08 (1986 & Supp. 1992).

60. *See, e.g.*, Mavilia v. Stoeger Indus., 574 F. Supp. 107, 111 (D. Mass. 1983) (stating that in wrongful death action brought by decedent's wife against manufacturer and designer of gun which had been fired at decedent by an unnamed assailant, court dismissed claim, asserting that "death may result from careless handling of firearms [which] is known by all Americans from an early age."); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 799 (Wis. 1975) (concluding that "the average consumer would be completely aware of the risk of harm to small children . . . when the [pool's] retractable ladder is left in a down position and the children are left unsupervised.").

61. Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1034 (Or. 1974). At least one court has suggested that a "knowledgeable seller test" be substituted for the consumer expectations test under such circumstances. *Id.* The court in *Phillips* defined a dangerously defective product as "one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.*" *Id.* at 1036 (emphasis in original).

62. *But see* Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 441 (Ind. 1990) (stating that a "plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted the risk . . ." should be denied

about as antiquated as saying that an employee assumes the risks of a dangerous workplace,[63] and therefore has no expectations of safety. Both doctrines have been rejected in modern jurisprudence.[64]

Where the question of causation or defectiveness presents a complicated issue about which the average consumer - as embodied in the deliberations of the lay jury - has no immediate expectations, then, those expectations have to be informed by expert testimony. That is exactly what we do in negligence cases, and we can do the same in strict products liability as well.[65]

Professor Henderson talked earlier about the undesirability of using the tort system primarily as a method of social insurance,[66] and with that I fully agree. I think it is a mistake to say that

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recovery where product is defective); Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976) (explaining that failure of consumer to keep dangerous machinery in optimum working order may preclude recovery if product is found unreasonably dangerous).

63. *See* CARTWRIGHT & PHILLIPS, *supra* note 59, § 8.41 (1986) (stating that "[m]any courts have sustained verdicts for plaintiff, especially where product is used by plaintiff in a daily job, and manufacturer has failed to equip it with an entirely possible, often inexpensive, safety device.").

64. *See* Perkins v. Spivey, 911 F.2d 22, 29 (8th Cir. 1990) (abandoning defense of assumption of risk by employer since "employer's common law duty to provide a safe workplace was intended to protect employees from unsafe workplaces where they could suffer physical injury."), *cert. denied*, 111 S. Ct. 1309 (1991); Ford v. El Dorado & Wesson R.R., 848 F.2d 911, 913 (8th Cir. 1988) (holding that "assumption of risk is not a defense under FELA [Federal Employment Liability Act]" where employee was injured at workplace); *see also* Wren v. Sullivan Elec., Inc., 797 F.2d 323, 326 (6th Cir. 1986) (stating that "Tennessee law imposes on [employer] . . . obligation to protect its own employees authorized to be on the site by providing a safe workplace, and . . . thus provide[s] to all workers on the site a workplace free from the specific hazards envisioned in the regulations."); Micallef v. Miehle, 384 N.Y.S.2d 115, 348 N.E.2d 571 (N.Y. 1976) (leading case reflecting obviousness of danger as a bar to recovery); Rhodes v. Service Mach. Co., 329 F. Supp. 367 (D.C. Ark. 1971) (obviousness of danger is no bar in workplace product injury).

65. *See* Karns v. Emerson Elec. Co., 817 F.2d 1452, 1459 (10th Cir. 1987) (permitting expert to testify that product was "unreasonably dangerous beyond the expectation of the average user.").

66. *See* James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107, 118 (1993).

social insurance is the primary goal of tort law.[67] Tort law is indeed designed to compensate,[68] but nothing can do that like a well administered and cost effective social insurance system. I do not think there is any doubt about that. But to me, it has always been the *primary* thrust of tort law to do justice and to effect fairness, to provide the consumer with a feeling that she has had

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67. *But see* Mauro v. McCrindle, 70 A.D.2d 77, 82, 419 N.Y.S.2d 710, 714 (2d Dep't 1979). The court stated that

> as a means of social insurance, in certain situations liability has been imposed irrespective of fault . . . thereby removing the potential burden of loss from the innocent victim and placing it upon another, largely innocent, party who is in a better position to spread the risk upon society as a whole.

Id., *aff'd*, 52 N.Y.2d 719, 417 N.E.2d 567, 436 N.Y.S.2d 273 (1980); James Fleming, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 540 (1952) (discussing social insurance philosophy as mixed in with tort liability).

68. *See* Carey v. Piphus, 435 U.S. 247, 253-55 (1978) (holding that major principle of damages is that of compensation where defendant has breached his duty toward plaintiff); Ball v. Chicago, No. 92-3358, 1993 U.S. App. LEXIS 20620, at *17 (7th Cir. Aug. 12, 1993) (applying monetary sanction); Richmond v. Madison Management Group, Inc., 918 F.2d 438, 446 (4th Cir. 1990) (stating that "[r]ecovery in tort is available only when there is a breach of a duty to take care for the safety of the person or property of another."); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 453 (9th Cir. 1983) (explaining that "[i]f the product proves to be defective, consumers should receive compensation for disappointment of their reasonable expectations of safety."), *cert. denied*, 464 U.S. 1043 (1984); Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 374 S.E.2d 55, 58 (Va. 1988) (holding that tort redresses those victims who have suffered from defendant's breach of his duty imposed by law).

her day in court,[69] and to provide a safety incentive to create safer products.[70]

There is empirical and other literature written as to whether tort law provides any effective means of deterrence, particularly regarding strict liability.[71] There is, interestingly, the same type of argument that has continued over the years in the area of criminal law. For example, does punishment provide any sort of effective deterrent on the criminal? I have heard no one in this country calling for the abolition of the criminal law simply because it cannot be proven whether it is an effective deterrent. It also provides many other valuable social goals in society, as does tort law in its presumed deterrent effect.[72]

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69. *See* United States Fidelity & Guaranty Co. v. Federal Reserve Bank, 620 F. Supp. 361, 370 (S.D.N.Y. 1985) (holding that true goal of torts is to promote fairness and to apportion loss), *aff'd*, 786 F.2d 77 (2d Cir. 1986); Patterson v. Gesellschaft, 608 F. Supp. 1206, 1213 (N.D. Tex. 1985) (explaining that "[o]ur tort law is premised upon fairness, making individuals responsible for their own acts."); *see also* Michael E. Solimine, *Activism and Politics on State Supreme Courts: State Supreme Courts in State and Nation*, 57 U. CIN. L. REV. 987, 997 (1989) (book review) (stating that tort law serves various purposes, one being fairness to the litigants).

70. *McKay*, 704 F.2d at 452 (9th Cir. 1983) The *McKay* court stated that a "reason for imposing strict liability is to deter manufacturers from marketing unsafe products by encouraging the use of cost-justified safety features. The safer the product . . . the lower the costs of accidents[,]" which will, in turn, reduce the purchase price and increase the sales of the product. *Id.*; Disaster At Detroit Metro Airport, 750 F. Supp. 793, 801 (E.D.Mich. 1989) (stating that "[tort law] encourage[s] the design of safe products, thereby reducing the incidence of injuries by making the producer incur the monetary consequences that are associated with defective goods.").

71. *See* William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1778 (1992) (stating that strict liability serves deterrence purposes and provides a measure of additional insurance for accident victims); David G. Owen, *Alternative Compensation Schemes and Tort Theory: Deterrence and Desert in Tort*, 73 CAL. L. REV. 665, 667 (1985) (stating that "[p]rior to the strict liability revolution in product warning litigation, the tort law system did not deter significantly the distribution of hazardous products by chemical manufacturers.").

72. *See* Jones v. Reagan, 696 F.2d 551, 554 (7th Cir. 1983) (holding that tort law has a deterrent function, "accomplished through the setting of standards of conduct . . . ."); Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1141 (S.D.N.Y. 1992) (stating that tort law acts as a

Finally, Professor Henderson, if I understood him correctly, said at lunch today that the Reporters of the American Law Institute, are currently thinking of a presumed seller's knowledge or a true strict liability standard[73] for all products with the exception of pharmaceutical and toxic products,[74] which, by the way, is a very large exception. One must wonder why these exceptions are contemplated.[75] Professor Madden pointed out that the enterprise responsibility study, prepared under the

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deterrent by providing a disincentive for wrongful behavior). Several courts do recognize that one purpose of tort law is deterrence. *See* Campbell v. United States, 962 F.2d 1579 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993); Phillips v. Western Co. of N. Am., 953 F.2d 923 (5th Cir. 1992); Bell v. Milwaukee, 746 F.2d 1205 (7th Cir. 1984); *see also* Jerry J. Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 612 (1985) ("In all events, society demands or expects retribution. Assumed deterrence and expected retribution are also important in the jusitfication for tort law.").

73. *See* Friedman v. National Presto Indus., Inc., 566 F. Supp. 762, 765 (E.D.N.Y. 1983) (holding that true strict liability cases only ask whether "the utility of the design choice outweighs its danger."); Larson v. Thomashaw, 307 N.E.2d 707, 717 (Ill. App. Ct. 1974) (applying a true strict liability standard by relaxing burden of proof for plaintiff and only requiring that plaintiff prove that product malfunctioned); Jarrell v. Monsanto Co., 528 N.E.2d 1158, 1169 (Ind. Ct. App. 1988) (Shields, P.J., concurring) (stating that "the Indiana statute is a true strict liability statute in that the focus is upon the condition of the product and not upon the seller's conduct.").

74. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1964). Pharmaceutical products, "which are incapable of being made safe for intended and ordinary use . . . properly prepared, and accompanied by proper directions and warnings, [are] not defective, nor [are they] *unreasonably* dangerous." *Id.* Since the disease may lead to death, "both the marketing and the use of the [drugs] are fully justified, notwithstanding the unavoidably high degree of risk which they involve." *Id.* "Because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety," and this, not holding the seller of the products strictly liable, is justified. *Id.* Furthermore, such products are required to have directions or warnings on the product, as to its use, so as "to prevent the product from being unreasonably dangerous." *Id.* at cmt. j.

75. *See* 2 A.L.I. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, ch. 12 (1991) (prepared for but not adopted by the American Law Institute) (stating that strict liability is not always standard used since applying this standard depends upon danger posed by product and value of product to community).

auspices of the American Law Institute, concluded that in the case of toxic torts, strict liability should be retained. Why? Because toxic substances are so dangerous.[76] In this area, strict products liability begins to meld with the liability for ultrahazardous conduct[77] or abnormally dangerous activities, as

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76. *See In re* DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992). According to the *DES* court,

> Toxic torts possess some of the following features: (1) geographically widespread exposure to potentially harmful agents that (2) affects a large or indeterminate number of plaintiffs, (3) possibly over long time periods, even generations, (4) in different ways such that (5) there is difficulty in establishing a general theory of causation and (6) an inablility to link a particular defendant's actions to a particular plaintiff's injuries, as well as (7) difficulty in determining the number of potentially responsible defendants and (8) in determining their relative culpability, if any, which often results in (9) multiple litigations that burden the courts and cause huge transaction costs, including heavy legal fees, and (10) which threatens the financial ability of many companies or of whole industries to respond to traditional damage awards.

Id. at 562; *see also* T & E Indus. v. Safety Light Corp., 587 A.2d 1249, 1255 (N.J. 1991) (stating that toxins are dangerous because they pose an unusual threat to community); State Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 159 (N.J. 1983) (stating that "[p]ollution from toxic wastes that seep onto the land of others and into streams necessarily harms the environment."). The court in *Ventron*, also held that "disposal of toxic wastes may cause a variety of harms, including ground water contamination via leachate, surface water contamination via runoff or overflow, and poison via the food chain." *Id.* at 159-60.

77. *See* Daigle v. Shell Oil Co., 972 F.2d 1527, 1544-45 (10th Cir. 1992) (stating that term ultrahazardous activity is synonymous with term "abnormally dangerous activity" used by Restatement (Second) of Torts); T & E Indus., 587 A.2d at 1259 (stating that under Restatement (Second) of Torts § 519, "one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."); State Dep't of Envtl. Protect., 468 A.2d at 159 (N.J. 1983) (stating that Restatement (Second) of Torts substituted standard of "abnormally dangerous" for "ultrahazardous" under §§ 519 and 520); Russell-Stanley Corp. v. Plant Indus., 595 A.2d 534, 539 (N.J. Super. Ct. Ch. Div. 1991) (explaining that ultrahazardous standard has been replaced by abnormally dangerous activities standard of Restatement (Second) of Torts, §§ 519 and 520); *see also* RESTATEMENT (SECOND) OF TORTS § 520 cmt. c (1977). According to

defined by of the Restatement (Second) of Torts section 520.[78] I think the Reporters would do well to consider the interrelationship between strict products liability and abnormally dangerous activities, particularly in the area of toxic torts.[79]

With regard to pharmaceuticals, I understand they are health-giving,[80] and therefore, you can only test such products up to a

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comment c, "[a] combination of factors stated in Clauses (a), (b) and (c), or sometimes any one of them alone, is commonly expressed by saying that the activity is "ultrahazardous." Furthermore, "[l]iability for abnormally dangerous activities is not . . . a matter of these three factors alone." *Id.*

78. RESTATEMENT (SECOND) OF TORTS § 520 (1977). Section 520 provides:

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

Id.

79. *See Daigle*, 972 F.2d at 1544 (stating that Restatement (Second) of Torts § 519 applies strict liability to "abnormally dangerous" activities and § 520 contains factors "to weigh in determining whether an activity should give rise to strict liability"); Russell-Stanley, 595 A.2d at 539, n.6 (stating that "it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes . . . .") (quoting State Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 159 (N.J. 1983)).

80. *See* Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528, 540 (6th Cir. 1993). The defendant, in *Tobin*, argued, correctly, that a drug manufacturer should be shielded from liability under comment k of the Restatement (Second) of Torts § 402A, because comment k shields manufacturers from liability for "highly useful and desirable product[s] attended with a known but reasonable risk." *Id.*; Mazur v. Merck & Co., 964 F.2d 1348, 1353 n.5 (3d Cir. 1992). The court stated in *Mazur*, that some products, under the Restatement (Second) of Torts § 402A comment k, are considered to be unavoidably unsafe products. *Id.* These products usually are in the field of drugs, and are incapable of being made safe. *Id.* A seller of such

certain point. Then, you have to stop and put the product on the market, sometimes before knowing what the risks of the drug may be.[81] But the uncertainty that exists with regard to pharmaceuticals, and the utility of pharmaceuticals, is not significantly different from that which exists with regard to other

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products is usually "not held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known and apparently reasonable risk." *Id.*; Brown v. Superior Ct., 751 P.2d 470, 479 (Cal. 1988) (stating that "[p]ublic policy favors the development and marketing of beneficial new drugs, even though some risks, serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering."); Hahn v. Richter, 628 A.2d 860, 871 (Pa. Super. Ct. 1993) (Cavanaugh, J., concurring). A manufacturer of prescription drugs is not subject to strict liability, under § 402A of the Restatement (Second) of Torts because such products are useful and desirable. *Id.* Pharmaceuticals are products "whose costs are considered by society to be more beneficial than their potential harm." *Id.* at 870. Additionally, the Food and Drug Administration "has the institutional capacity and legislative mandate for weighing the costs and benefits for particular pharmaceuticals." *Id.* Therefore, pharmaceuticals are held to a negligence standard rather than a strict liability standard. *Id.* "Unlike other manufactured products, prescription drugs play a significant role in dissipating suffering and in prolonging human life." *Id.*

81. *See* Brown, 751 P.2d at 479 (stating that delaying new drugs from entering market would not be beneficial to public, and that public policy encourages marketing new drugs because drugs save lives and therefore outweigh any risks that may arise); Hahn, 628 A.2d 860, 865 (stating that some products, such as pharmaceuticals, are "incapable of being made safe for [their] intended use . . . because of lack of time and opportunity for sufficient medical experience there can be no assurance of safety, but such experience . . . justifies the marketing and use of the drug notwithstanding a medically recognizable risk . . . .") (citing Incollingo v. Ewing, 282 A.2d 206, 219-20 (Pa. Super. Ct. 1971)); Collins v. Eli Lilly Co., 342 N.W.2d 37, 52 (Wis. 1984) (explaining that policy justification, under comment k of the Restatement (Second) of Torts § 402A, for eliminating strict liability for pharmaceuticals, is the necessity to market new drugs "without adequate testing because of the urgent need for treatment of a serious health hazard . . . ."); Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J. 705, 731 (1989-90) (explaining that some product risks are not discoverable until product "has been on the market for some time," and that such risks cannot be discovered prior to marketing "by using existing scientific knowledge and technology . . . .").

socially useful products. To retain a pocket of negligence liability for pharmaceuticals may be like the loss of the nail that caused the loss of the shoe, and of the horse, and finally of the battle.

At least in their *Cornell Law Review* article,[82] Professors Henderson and Twerski abjure the idea of having a generic design defect concept,[83] which Louisiana, before its law was revised by statute,[84] said was an appropriate way to look at a product design. If the product could feasibly be made safe, but on balance, is socially undesirable, the product should not be on the market.[85]

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82. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402 of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

83. *Id.* at 1517. In design defect cases, a risk-utility test is necessary, since "[p]roducts are not defective merely because their designs are dangerous." *Id.* To allow a generic design defect concept "would cause more careful product users to subsidize less careful users, a result that would be both inefficient and unfair." *Id.* "Risk-utility balancing is required to determine which risks are more fairly and efficiently borne by product sellers . . . and which should be borne by individual product users who suffer injury." *Id.* Under risk-utility balancing, "knowledge of risks and risk-avoidance techniques reasonably available at the time of distribution" is taken into account. *Id.* "To impose liability for unforeseeable and hence incalculable risks would violate a manufacturer's right to be held to a liability standard that it is capable of meeting." *Id.*

84. Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 465-66 (5th Cir. 1984) (stating that under Louisiana law, "manufacturer is presumed to know the defects in its product," and that foreseeability is not an issue). *Halphen* has been revised by LA. REV. STAT. ANN. § 2800.56 (West 1991), which states in pertinent part:

> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control: (1) [t]here existed an alternative design for the product that was capable of preventing the claimant's damage; and (2) [t]he likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product.

Id.

85. *Cf.* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1088-89 (5th Cir. 1973) (explaining that decision to market a "commercial product possessing both unparalleled utility and unquestioned danger" requires a

Why should a jury not be able to determine, in a strict liability context using the date of trial, with regard to, for example, such products as DES, thalidomide, the Dalkon Shield and other such products, that these products should never have been on the market?[86] This, it seems to me, is the type of decision that the jury is most competent at making. Using risk-utility, the jury makes that determination in a very rough sort of fashion.[87] But determining issues such as the social utility of products and whether they should even be on the market,[88] and whether or not a substitute product, rather than a redesigned one, is the way to

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balancing, and a warning of the risks); Davis v. Wyeth Lab., Inc., 399 F.2d 121, 129 (9th Cir. 1968) (stating that polio vaccine requires warning of risks before it can be properly marketed).

86. Gifaldi v. Jefferson Chem. Co., No. 91-CV-677E, 1992 WL 76980, at *2 (W.D.N.Y. Mar. 30, 1992) (stating that it is for jury to decide whether a product is safe enough to be put on market); O'Bara v. Piekos, 161 A.D.2d 1118, 1119, 555 N.Y.S.2d 939, 941 (4th Dep't 1990) (declaring that "it is for . . . jury to determine . . . scope of . . . product's intended purposes and whether . . . product was reasonably safe when placed in . . . stream of commerce.").

87. *Borel*, 493 F.2d at 1087. The jury, as fulcrum in the risk-utility balancing process, must realize that "product[s] have both utility and danger." *Id.*

88. *See, e.g.*, Duford v. Sears, Roebuck & Co., 833 F.2d 407, 411 (1st Cir. 1987) (stating that a product's "social utility" is one factor in determining if its design is "unreasonably unsafe," and that courts must look at "whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing cost . . . .") (quoting Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 847 (N.H. 1978)); 1 M. STUART MADDEN, PRODUCTS LIABILITY § 6.9, at 218 (2d ed. 1988) (stating that "only safe products should be marketed, and . . . safe products [are] those whose utility outweighs the inherent risk."); *see* Kathryn Dix Sowle, *Towards Synthesis of Product Liability Principles: Schwartz's Model and the Cost-Minimization Alternative*, 46 U. MIAMI L. REV. 1, 8 (1991). In her article, Sowle states that:

> A sharp kitchen knife, for instance, would create an unreasonable risk if the cost of blunting the knife were less than the expected accident costs of sharp kitchen knives . . . . Thus, sharp kitchen knives would create a reasonable risk because the social utility of sharp knives exceeds their expected risks.

Id.

go,[89] is the type of decision which the jury is unusually well-suited to make.[90]

There are a number of ways to define true strict liability, if the Reporters are of a mind to do so. Some of the ways are set forth in an Appendix to my remarks, containing a suggested redraft of section 402A.[91] I think the Reporters will make a grave mistake

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89. *See* Friedman v. National Presto Indus., 566 F. Supp. 762, 764 (E.D.N.Y. 1983) (discussing whether substituted products would add to the expense).

90. *See* Coursen v. A.H. Robins Co., 764 F.2d 1329, 1337 (9th Cir. 1985) (stating that jury is capable of evaluating social utility of Dalkon Shield). *But see* Motter v. Everest & Jennings Inc., 883 F.2d 1223, 1227 (3d Cir. 1989) (stating that design defect issue is given to jury after trial judge conducts risk-balancing test); Hon v. Stroh Brewery Co., 835 F.2d 510, 512 (3d Cir. 1987) (explaining that jury gets case once trial court determines that strict liability applies).

91. 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.

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.

if they try to define product defectiveness too narrowly, and if they try to pigeonhole types of defects into manufacturing, warning and design.[92] I think they will make an even greater mistake if they try to return to negligence principles in defining design, warning or any other defect. They will become bogged down in the quagmire of foreseeability.[93]

The noble experiment of section 402A should not be abandoned so quickly, before it has hardly even taken root.[94] Courts and lawyers raised in a tradition of negligence law have had trouble

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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.

92. *See, e.g.*, UPLA, *supra* note 7, at 62,721; EPSTEIN, *supra* note 14, at 69; KEETON ET AL., *supra* note 1, at 695.

93. CARTWRIGHT & PHILLIPS, *supra* note 59, § 8.17 (1986). Foreseeability is a concept rooted in negligence law and "has no place in strict liability law." *Id.* at 967. As such, it retains all of the problems involved with the "reasonable person" standard. *Id.* What is a foreseeable use for a product, or what is a foreseeable injury must be determined on a fact-specific basis by what a reasonable plaintiff or a reasonable manufacturer would have done under the same or similar circumstances. *Id.* BLACK'S LAW DICTIONARY 619 (6th ed. 1990) (defining foreseeability as "ability to see or know in advance").

94. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992). The revision of § 402A involves "changing the relevant language to conform to current understandings" in the products liability area and not to make any radical alterations in areas where there has been no confusion. *Id.* at 1513.

in conceptualizing strict products liability.[95] But it can be done, and it should be done. The high role of the American Law Institute should be to do just that, and not to follow in the muddy tracks of "tort reformers" who have already wreaked such havoc on American tort and products liability law.

Strict liability can make a beneficial difference, and a very big one, in products liability law. I am afraid we have become indifferent to that fact. Our task, as judges, as litigators, and as academicians, should be to make this important difference clear to the public. Otherwise, we may find ourselves returning to the antediluvian rules of 19th century tort law.[96] Thank you.

Hon. George C. Pratt:

Thank you, Professor Phillips.

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95. Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205 (1989-90). Under strict liability (§ 402A), the privity requirement has been eliminated. *Id.* at 231. Prior to the adoption of § 402A, an injured plaintiff could recover, under strict liability, only in cases involving wild animals and unreasonably dangerous activities. *Id.* at 205-06 Traditionally, under negligence law, the manufacturer who placed a defective product on the market was able to avoid liability by claiming lack of privity. *Id.*

96. *See, e.g.*, Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 650 (1990) (reviewing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988)). "Responding to pressure, [from those demanding tort reform,] states enacted pro-defendant legislative adjustments to . . . products liability and general tort law." *Id.* at 659. According to Professor Page, Peter Huber tries "to convince the general reader that tort law has become mired in a 'poisonous swamp.'" *Id.*