1994

Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault

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TOWARD A UNIFIED THEORY OF PRODUCTS LIABILITY: REVIVING THE CAUSATIVE CONCEPT OF LEGAL FAULT

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I. INTRODUCTION

Accidents happen. This familiar maxim is the ineluctable starting point for any substantive disquisition concerning the law of products liability. The difficulty, of course, is in deciding what to *do* when accidents happen. If one accepts the proposition that the ultimate goal of tort law is to assign responsibility for harm, the decision as to who should bear responsibility when "accidents happen" is the ultimate question of products liability law.

Various legal theories have been devised over the centuries to answer this ultimate question. Modern products liability law provides essentially three paths to recovery: negligence, strict liability in tort, and warranty. These are very different paths, indeed; the path taken often means the difference between recovery and nonrecovery. And the paths themselves are not always clearly marked: along the way are perilous secondary paths with illogical pitfalls for the unwary. Why so many paths from which to choose? Is there a logical or at least historical justification for their differences? This article attempts to answer these questions. It concludes that neither logic nor history can support the current framework and advocates the construction of a single road, a unified theory of products liability, which the author calls causative liability.

The shibboleth one employs is not particularly important. The important point is that current products liability law is a patchwork of incoherent, inconsistent, and inefficient intellectual rags that can and should be discarded. As the American Law Institute (A.L.I.) ponders the future of products liability in an effort to devise a *Restatement (Third) of Torts*, courts must be given the flexibility to discard these moth-eaten, anachronistic, intellectual rags and replace them with a new, tightly-woven fabric in which to clothe products liability for the twenty-first century.

Before proceeding further, the reader may demand to know: What is causative liability? Causative liability is a theory which holds that if *X* causes harm to *Y* (in both a factual and proximate sense), *X* should be held legally responsible. *X* is legally at fault even though he may have exercised all due care. *X* therefore owes a duty to all individuals to refrain from acting in a manner that causes them harm. Thus, no elaborate inquiry into the questions of duty, the reasonableness of *X*'s conduct, or defectiveness is necessary.

Causative liability is *not* synonymous with absolute liability. *X* will be held legally responsible only insofar as his actions were both the cause-in-fact and proximate cause of *Y*'s harm. Thus, *Y*'s own actions, the actions

of third persons, and acts of nature can all serve to reduce or eliminate *X*'s liability. Likewise, the retention of proximate cause principles permits common sense and policy considerations to cut off *X*'s liability when his actions appear too attenuated to attribute legal responsibility to him.

To many readers, causative liability sounds a lot like strict liability. In its pure theoretical form, strict liability is the equivalent of causative liability. But the term "strict liability" has become so distorted as to be unrecognizable. Today's strict liability—as the term is used in the *Restatement (Second) of Torts*—is actually a hybrid of negligence and causative liability, an intellectual No Man's Land devoid of logic or consistency. Thus, the author has chosen to use the term "causative liability" to distinguish it from the modern concept of strict liability and prevent further intellectual distortion.

Perhaps an example can best illustrate the implications of causative liability. Imagine that your neighbor decides to cut down a tree on his property, and in the process, the tree lands on your house, causing great damage. Your neighbor, in cutting down the tree, exercised all reasonable care. Indeed, as he adamantly points out, he used the state-of-the-art technique for cutting down a tree, employing only the finest chain saw and cutting-edge cutting procedures. In so doing, no reasonable man could have foreseen the damage to your house. Current tort law would hold your neighbor to a standard of negligence, and you would not be able to recover. Do you care whether your neighbor acted negligently or not? Probably not. All you know is that your house is now a pile of rubble and that you are stuck with the cost of rebuilding.

What does this hypothetical have to do with products liability? Change the facts slightly, and the relevancy becomes clear. In the revised hypothetical, a *person* does not cause your injury, but a *product.* Imagine that you are cutting down a tree in your yard, using a state-of-the-art chain saw manufactured by XYZ Co. While you are exercising all reasonable care, the chain saw suddenly and inexplicably malfunctions, sending the blade through your left arm and severing it. Under current law, you have many legal theories under which to proceed. Assuming the chain saw conformed with the design specifications of XYZ Co., your likely theories will include negligent design,[1] res ipsa loquitur,[2] strict liability in tort for design defect,[3] and implied warranty of merchantability.[4]

Because XYZ Co.'s design is state-of-the-art, you likely will not be able to recover under either the negligent design or res ipsa loquitur theories. If

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1. *See* RESTATEMENT (SECOND) OF TORTS § 398 (1965); *see also* Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956).
2. *See* RESTATEMENT (SECOND) OF TORTS § 328D (1965).
3. *See id.* § 402A.
4. *See* U.C.C. § 2-314 (1990).

the XYZ Co. has not disclaimed implied warranties,[5] you may be able to recover under a warranty theory if you proffer evidence that the chain saw was unfit for its ordinary purpose of cutting trees.[6] Undoubtedly, XYZ Co. will rebut with substantial evidence that it exercised care in the manufacture and design of the chain saw.[7] What of strict liability in tort for design defect? Your ability to recover may hinge upon the test for defect employed in your jurisdiction. If a risk/utility test is employed, you will not recover unless you can establish that the malfunction was due to a characteristic of the chain saw design that renders the chain saw so risky that it outweighs the chain saw's overall utility.[8] In addition, in many jurisdictions, you will have to proffer a safer alternative design that is economically feasible and that does not diminish the chain saw's overall utility.[9] Clearly, numerous obstacles may prevent recovery under a risk/utility test of design defect.

Another possibility is that your jurisdiction employs a consumer expectations test[10] of design defect. Under this test, you would be required to prove that the chain saw failed to comport with the reasonable expectations of a chain saw consumer. Your chances of recovery under this theory are markedly improved, as the jury would likely agree that most chain saw purchasers do not expect their chain saws to malfunction without explanation and sever a limb. Indeed, the consumer expectations test is virtually synonymous with causative liability because reasonable consumers never expect a product to cause them harm.[11]

The point of the hypothetical is simple. Current products liability law, particularly in the design defect context, is irrational and inconsistent. Consumers injured by chain saws or any other product do not care whether the manufacturer exercised due care or whether the product's overall utility outweighs its risks. All they know is that the product hurt them. They did

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5. *See id.* § 2-316(2)-(3).

6. *See id.* § 2-314(2)(c).

7. *See id.* § 2-314 cmt. 13.

8. *See, e.g.*, Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979).

9. *See, e.g.*, Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978). *Contra* Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987).

10. *See, e.g.*, Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (defect is "a condition not contemplated by the ultimate consumer . . . ."); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794 (Wis. 1975).

11. *See* James A. Henderson Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1295 (1991) [hereinafter *Closing the Frontier*]. Indeed, perhaps the only time a consumer truly can be said to expect harm is when she assumes the risk of harm by a knowing and voluntary encounter. *See* Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Ct. App. 1976); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

not anticipate the harm, and they are innocent. They instinctively believe that product manufacturers, like neighbors who cut trees, should abide by the phrase, *sic utere tuo ut alienum non laedas.*[12]

Causally linked harm, however, is not sufficient for recovery under current products liability law. In addition to cause and harm, the modern products liability plaintiff must also prove the existence of a defect. The modern strict liability theories—both in tort and in warranty—require proof that the product is defective, either because it fails to comport with consumer expectations or because its risks outweigh its utility. Negligence also revolves around the notion of defect, but the focus is on defective human behavior—i.e., lack of prudence—rather than the product itself. The obsession with proof of defect as a prerequisite to recovery is unnecessary and distorts the central inquiry of responsibility for harm, which is the very heart of tort law.

Defectiveness has been the hallmark of products liability since its incipiency as a distinct branch of tort law. However, it must be remembered that products liability is the bastard offspring of negligence and warranty law. Is it any wonder that products liability law has been saddled with the legal baggage of its parents? In particular, design and informational defects have been shepherded into the risk-utility test, undoubtedly a variation of Learned Hand's $B < PL$ test for negligence.[13]

Why has a negligence analysis been adopted for design and failure to warn cases? The reasoning likely goes like this: While a reasonable consumer can look at a rat in a bottle and immediately discern negligence, such discernment is not so readily obtained when viewing a tractor that lacks a roll cage or a piece of metal that is excessively porous. When the rat is found in the bottle (a so-called manufacturing defect), the defect bespeaks, nay screams, "Negligence!" Thus, the argument goes, one should not have to prove that the manufacturer failed to exercise reasonable care because the defect, in essence, speaks for itself.[14] In the case of a tractor without a roll cage or a too-porous metal piece (so-called design defects), the defect is invisible to the average consumer, necessitating a closer, case-by-case negligence analysis. One is therefore required to prove that the lack of a roll cage or excessive porousness was unreasonable.

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12. "Use your own property so as not to injure that of another." *See* BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

13. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

14. It should be noted that the doctrine of res ipsa loquitur ("the thing speaks for itself") represented an early bridge between pure negligence and modern strict liability. Under this doctrine, plaintiffs enjoy an inference or presumption of negligence if they can prove that the product remained in control of the defendant until the time of purchase and that the accident which occurred does not normally happen in the absence of negligence. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944); Jakubowski v. Minnesota Mining & Mfg., 199 A.2d 826 (N.J. 1964).

In either the manufacturing defect or the design/informational defect scenario, the inescapable truth is that courts employ negligence, or more precisely, fault, principles. The difference between these two doctrinal categories, therefore, lies in the *application* of the fault principle, not in the underlying principle itself. In either case, the fault principle is the same: a products liability defendant is "at fault" if his actions fall below the level of ordinary prudence or reasonableness. Legal fault, in the modern sense, is therefore a moral judgment, not a causative judgment.

The difference, therefore, between manufacturing defects and design or informational defects is that courts conclusively presume fault in manufacturing defect cases while requiring outright proof of negligence in fault and informational defect cases. Why? The answer to this question is so simple that it proves perplexing. Under modern tort law, the test for legal fault is negligence. If negligence is the failure to exercise the care of a reasonable person in like circumstances,[15] then manufacturing defects are tantamount to negligence per se. No reasonable manufacturer would ever place a product on the market that failed to comport with its own manufacturing specifications. This is so because the reasonable person is precisely what that name implies—a *reasonable* person, not an overly cautious person or a careless person, but a person of ordinary prudence. A person of ordinary prudence, in turn, will adopt only those measures of quality control that are *reasonable* under the circumstances (degree of risk, severity of injury, etc.) and no more. Thus, the reasonable person is essentially free to establish his own standard of liability for manufacturing defects. If he fails to conform to his own specifications, he is, by definition, acting unreasonably; therefore, liability for manufacturing defects, while often termed strict liability, is in reality merely a form of negligence per se.

Design and informational defects warrant different treatment under traditional negligence principles because in such cases the reasonable person has acted in conformance with a self-imposed liability standard. Thus, the reasonable person (whose product design or warnings are a fortiori reasonable) does not (and indeed cannot) act negligently by placing a product on the market that conforms to her reasonable design or warnings. It necessarily follows that the reasonable person whose product conforms with her inherently reasonable design or warnings will be held liable under a design or informational defect theory only if the plaintiff can prove that the reasonable person was not reasonable after all but was, in fact, *unreasonable* because the product contained risks that outweighed its utility.

As just demonstrated, the underlying negligence principle of modern products liability law has created a difficult and often unjust dichotomy between manufacturing and design/informational defects. On the one hand, a manufacturing defect is per se unreasonable, and the injured consumer is entitled to compensation. On the other hand, a design or informational

15. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965).

defect is subject to specific proof of negligence before the injured consumer may recover. This dichotomy is a direct consequence of adopting the notion of "defect" as the sine qua non of recovery in products liability law.

The previous sentence will make many torts scholars nervous. Without the notion of "defect," many believe products liability law would be forced into an uncontrollable tailspin that would shatter the underlying basis of all tort law.[16] The result, many fear, of purging the word "defect" from the products liability vocabulary is either an unworkable, ad hoc liability standard or the Grim Reaper of torts law, no-fault compensation. As this Article will show, such fears are unfounded. The notion of "defect" can be discarded without simultaneously abandoning the historical foundation of tort law, the concept of "fault."

Perhaps the best way to demonstrate this theory is to reexamine fault as viewed in the classic case of *Palsgraf v. Long Island Railroad Co.*[17] As the reader will recall, the case involved a plaintiff who was hit on the head by a scale while standing on the defendant railroad's platform.[18] The scale was dislodged by a fireworks explosion that resulted when two railroad employees, attempting to assist a passenger board a train, knocked the passenger's covered package of fireworks loose in the process.[19] Writing for a slim four-three majority, Justice Cardozo determined that the defendant railroad was not negligent.[20] The reason that the railroad was not negligent, according to Justice Cardozo, was that the railroad's duty of due care did not extend to poor Mrs. Palsgraf.[21] The gravamen of negligence according to the majority was that

> bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been danger to his person. If the harm was not willful, he must show that the act as to him had possibilities of damage so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.[22]

The duty to exercise reasonable care, under Justice Cardozo's formulation, is triggered only when one can foresee harm to a particular plaintiff. Thus, no duty is owed to individuals for whom the defendant cannot specifically foresee harm. This formulation of negligence gives individuals

16. *See, e.g.*, Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1267-68.
17. 162 N.E. 99 (N.Y. 1928).
18. *Id.* at 99.
19. *Id.*
20. *Id.* at 100.
21. *Id.* at 100-01.
22. *Id.* at 101.

a great deal of freedom to act without legal liability for harms that they may cause.

The *Palsgraf* minority's formulation of negligence, expounded by Justice Andrews, is an entirely different view of fault. According to Justice Andrews, an individual is negligent when he acts in such a manner that causes harm. Under this view, "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[23]

The conceptual difference in negligence or fault between the majority and minority in *Palsgraf* was not, as Justice Andrews pointed out, "a mere dispute as to words."[24] These two views illustrate the fundamental difference of opinion as to the purpose of tort law: should tort law seek to provide compensation for all acts that cause harm, or should tort law seek to provide compensation only for acts that cause foreseeable harm to the specific plaintiff? Expressed another way, does one's duty of due care extend to all mankind or just to the plaintiff at hand?[25] How this question is answered has a tremendous impact on all branches of tort law, including products liability. If the purpose of tort law is to provide compensation for innocent victims of faulty acts, we must decide ab initio what we mean by the term "fault." In the products liability context, how one defines fault drives one's test for liability.

Modern products liability law clearly embraces Justice Cardozo's notion of "fault." A manufacturer's conduct is blameworthy only where harm to the user reasonably can be foreseen. The accepted proxy for fault is the product defect, which, as has been demonstrated, creates an absurd asymmetry between manufacturing, design, and informational defects. As pointed out earlier, manufacturing defects are per se unreasonable because harm to the user is almost always foreseeable. Design and informational defects, on the other hand, are not so obviously unreasonable, necessitating specific proof of unreasonable behavior. The self-defining circularity of this reasoning is obvious. It essentially presumes that some defects will carry foreseeable harm (manufacturing defects), while others will not (design and informational defects). A sliver of glass in a can of beans is presumed to pose foreseeable harm, while a prescription drug with teratogenic potential is not.

If one accepts the proposition that a defect is an appropriate surrogate to identify a faulty product (a proposition causative liability does not accept), then the focus naturally shifts to the question of how to define the term "defective." The quest to define the term "defective" has culminated

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23. *Id.* at 103 (Andrews, J., dissenting).

24. *Id.* at 102 (Andrews, J., dissenting).

25. *See id.* (Andrews, J., dissenting). It should be noted, however, that Justice Andrews agreed that the concept of proximate cause should be retained in order to cut off a defendant's liability. *See id.* at 103; *see also infra* note 489 and accompanying text.

in the conceptualization of two distinct categories: (1) products which do not conform to the reasonable manufacturer's own specifications (manufacturing defects), and (2) products which conform to specifications, but which no reasonable manufacturer would place on the market (design and informational defects).

Assuming, arguendo, that defect is an indispensable proxy for fault, one must nonetheless seriously question the validity of the presently accepted distinctions between manufacturing, design, and informational defects. These distinctions lose their meaning depending upon the level of abstraction with which they are viewed. For example, consider the following example borrowed from the proposed *Restatement (Third) of Torts*:

> XYZ Co. manufactures and sells automobiles. Sam purchased a new XYZ Model 300 and drove it around town for several days. Unknown to Sam, the lug nuts that hold the right front wheel to the axle were too large, allowing them to loosen and present a serious risk of eventual failure.[26]

Although the *Restatement* Reporters consider this an illustration of a manufacturing defect, it could just as reasonably be considered a design defect. If the lug nuts on the automobile do not conform to the manufacturer's specifications, current law labels it a manufacturing defect. By contrast, if the lug nuts are too large because the manufacturer's design team innocently but mistakenly believed they were an appropriate size, current law labels it a design defect. In the manufacturing defect situation, something goes wrong in the factory. The machines or employees malfunction. In the design defect situation, something goes wrong at the drawing board. The engineers, chemists, or designers malfunction. But at some level, every glitch on the factory floor is traceable to a decision made by those *not* on the factory floor—the designers, chemists, engineers, and managers. If a manufacturing defect occurs because quality control procedures permit an occasional nonconforming product to slip into the stream of commerce, is not the decision to employ such quality control procedures undeniably a component of the overall design of the product? A fortiori, every manufacturing defect is the result of a design defect. In essence, manufacturing defects are a mere subset of design defects.

Now reconsider the illustration in which Sam is injured when his automobile's lug nuts come loose. If the use of excessively large lug nuts is viewed as a mechanical error or a decisional error by a factory worker, it is a manufacturing defect under current law, and Sam can recover without specific proof of negligence. If, on the other hand, the use of excessively large lug nuts is viewed as a decisional error by an engineer or designer, it is a design defect, and Sam must prove that the overall risks of the

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26. RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5 cmt. b, illus. 1, at 106-07 (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft].

product's design outweighed its benefits before he can recover. At this point, the reader should ponder whether any of this legal line drawing should matter to Sam. Whether the use of excessively large lug nuts is viewed on a micro or a macro level, all Sam knows is that his automobile caused him harm.

Sam's view is essentially the view espoused by Justice Andrews in *Palsgraf*.[27] The manufacturer of Sam's automobile is at fault because his product caused harm. Whether harm to the particular plaintiff (Sam) was foreseeable should be irrelevant because the failure to use due care on the factory floor or in the development or implementation of quality control procedures created a foreseeable risk of harm to someone, somewhere. The act of placing the automobile in the stream of commerce in such a condition is an act of fault for which liability should attach.

Such a conception of fault conforms, moreover, to Sam's reasonable expectations. Sam has no way of knowing whether his automobile's lug nuts conform to XYZ Co.'s manufacturing specifications or whether XYZ Co.'s overall design procedures are adequate. To the extent Sam contemplates the notion of "defect" at all, he is likely to consider it synonymous with "injurious": the product injured him; therefore, it is defective.

It is the premise of this Article that if fault is viewed in the manner espoused by Justice Andrews's dissent in *Palsgraf*,[28] the need for the term "defect" and all its illogical subdivisions evaporates. Under this view, the basic foundation of tort law—the fault principle—is retained, but the focus is shifted to a more appropriate locale—causation. Thus, the key inquiry is not whether the product is defective, but whether the product actually and proximately caused harm. A product that causes harm is per se defective, and the entity that placed it in the stream of commerce is legally at fault. Because of the intensive focus on causation, perhaps the best description of this theory is "causative liability."

Part II of this Article will explore the roots of tort law in an attempt to discern whether Justice Andrews' conception of fault is historically supported. Part III will examine the rise of strict liability and its numerous, often inconsistent, applications. Part IV will provide an in-depth look at the products liability reforms contained in proposed *Restatement (Third) of Torts*. Part V will explore how other countries have approached products liability in an attempt to gauge how future products liability reform may affect the global competitiveness of American business. Finally, Part VI

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27. 162 N.E. at 101 (Andrews, J., dissenting). It should be noted that Justice Andrews advocated the use of proximate cause to cut off a defendant's liability when the potential for harm in the abstract (as opposed to the particular plaintiff) is too attenuated to fairly attribute legal responsibility to the defendant. *See id.* at 103 (Andrews, J., dissenting); *see also infra* note 489 and accompanying text.

28. *Id.* at 101-05 (Andrews, J., dissenting).

will discuss the general implications of a causative liability regime and identify its major strengths and weaknesses.

II. HISTORICAL CONCEPTS OF "FAULT"

A. Trespass

The precursor of modern negligence law is trespass, a legal theory that emerged in the King's Court in the middle of the thirteenth century.[29] In its initial form, called trespass *vi et armis* ("by force and arms"),[30] liability was imposed whenever the defendant's use of direct physical force caused personal or property damage to the plaintiff.[31] Intent to bring about harm was irrelevant—all the plaintiff needed to prove was that a direct physical act by the defendant resulted in harm.[32] General intent to do the act was "all the fault that was necessary for liability."[33] Bacon's 1630 treatise summarized trespass liability by stating that "if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished in the same as deeply as if he had done it of malice."[34] The defendant's only available defense was a lack of causation, usually demonstrated by proof that it was not her act that caused the harm, but rather the superseding act of a third person or an act of God.[35] For example, no causation existed if the defendant could prove that her act was not volitional because someone grabbed her arm and struck the plaintiff.[36]

Trespass *vi et armis* proved to be of limited use, however, to a plaintiff injured by an indirect act of the defendant. Thus, if *X* improperly attached a horseshoe that caused *Y*'s horse to stumble and throw *Y*, *Y* could not recover under a theory of trespass *vi et armis* because no direct physical contact occurred between *X* and *Y*.[37] In an effort to plug this compensation

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29. WEX S. MALONE, ESSAYS ON TORTS 9 (1986). *See also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 2 (1987); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 362 (1951).

30. *See* LANDES & POSNER, *supra* note 29, at 2; FREDERICK POLLOCK & FREDERIC W. MAITLAND, 1 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, lxii (2d ed. 1968).

31. MALONE, *supra* note 29, at 9; *see also* Gregory, *supra* note 29, at 362.

32. OLIVER W. HOLMES, THE COMMON LAW 65 (Mark DeWolf Howe ed., 1963); MALONE, *supra* note 29, at 9; WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 316 (2d ed. 1932); 1 POLLOCK & MAITLAND, *supra* note 30, at 54; 2 *id.*, at 471, 527-28.

33. Gregory, *supra* note 29, at 362.

34. WALSH, *supra* note 32, at 316 (citing BACON, MAXIMS, VII (1630)).

35. HOLMES, *supra* note 32, at 68.

36. *Id.*

37. Gregory, *supra* note 29, at 362; *see also* LANDES & POSNER, *supra* note 29, at 2.

gap, the early fourteenth century English courts developed another writ, trespass *sur le cas* ("on the case"),[38] that permitted plaintiffs to recover when injury was caused by an indirect act of the defendant.[39] As with its sibling trespass *vi et armis*, trespass on the case did not require proof of intent or knowledge of harm.[40] The defendant was legally at fault simply for causing the harm.[41]

It is tempting to believe, looking back with twentieth century eyes accustomed to viewing fault as a concept connoting a lack of reasonable prudence, that these early English judges viewed fault the same way, but such was not the case.[42] A brief look at a few early decisions concerning trespass on the case will help to demonstrate the common law concept of fault for indirect injury.

In the 1466 *Case of Thorns*, a plaintiff recovered for trespass when his neighbor, in the process of cutting thorns from a hedge dividing their property, unintentionally caused some branches to fall and harm the plaintiff's property.[43] Similarly, an English court, hearing a case in 1506 involving an accidental shooting, proclaimed, "[W]hen a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."[44]

The 1617 case of *Weaver v. Ward*[45] is often inaccurately cited as authority for the proposition that early courts employed a negligence standard for indirect injury. A closer look at the decision, however, indicates that the court did no such thing. In *Weaver*, the court held a soldier responsible for a shooting injury unintentionally inflicted upon a fellow soldier while participating in a military exercise.[46] The defendant in *Weaver* argued to the King's Bench that he should not be held liable unless the plaintiff could prove he was at fault.[47] The court rejected this argument, insofar as the term "fault" was meant to be synonymous with moral culpability.[48] The only fault or negligence needed to recover was

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38. *See generally* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 66-92 (1949).

39. LANDES & POSNER, *supra* note 29, at 2; MALONE, *supra* note 29, at 17; Gregory, *supra* note 29, at 363.

40. HOLMES, *supra* note 32, at 65, 68; MALONE, *supra* note 29, at 18-19.

41. MALONE, *supra* note 29, at 17.

42. *See id.* at 11.

43. Y.B. 6 Edw. 4, fol. 7, pl. 18 (1466), *reprinted in* CHARLES O. GREGORY ET AL., CASES AND MATERIALS ON TORTS 48 (3d ed. 1977); *see also* FIFOOT, *supra* note 38, at 195-97.

44. FIFOOT, *supra* note 38, at 70-71 (citing Y.B. 21 Hen. 7, fol. 27, pl. 5 (1506)).

45. 80 Eng. Rep. 284 (K.B. 1617).

46. *Id.*

47. *Id.*

48. *Id.*

acting in a manner that caused injury.[49] The court proclaimed that the defendant could be relieved of liability only upon proof that the act occurred "utterly *without his fault.* As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging . . . and that the defendant had committed *no negligence* to give occasion to the hurt."[50] It is apparent from this statement that while the King's Bench used the language "without his fault" and "no negligence," these terms were considered to be synonymous with "no causation." The two examples provided in the court's use of these terms—a third party grabbing the defendant's hand and the plaintiff deliberately running in front of the defendant's gun—are clearly situations illustrative of superseding cause. Thus, the early English courts, to the extent they employed the term "fault," clearly had something other than moral culpability or a lack of prudence in mind. Fault was a legal term, used to denote a party's causal responsibility for harm. A defendant was negligent or at fault in the eyes of the law if he committed an act that was the actual and proximate cause of harm.

B. Negligence

The concept of fault as synonymous with a lack of prudence first appeared in the mid-nineteenth century case of *Vaughn v. Menlove.*[51] The plaintiff was injured when a fire that started in the defendant neighbor's haystack spread, burning down the plaintiff's house.[52] The Court of Common Pleas affirmed the jury verdict for the plaintiff on grounds that the jury could determine whether the defendant failed to "proceed with such reasonable caution as a prudent man would have exercised under such circumstances."[53] Interestingly, the court noted that the gravamen of the plaintiff's case was negligence, an action "new in specie,"[54] grounded on the idea that "a man must so use his own property as not to injure that of others."[55]

Ironically, while *Vaughn v. Menlove* approved the use of a jury instruction that defined legal fault in terms of a lack of reasonable prudence, it also, in the same breath, proclaimed that this new cause of action was based upon the age-old maxim, *sic utere tuo ut alienum non laedas*—a concept of fault based upon simple legal causation.[56] In hindsight, this

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49. *Id.*
50. *Id.* (emphasis added).
51. 132 Eng. Rep. 490 (C.P. 1837).
52. *Id.*
53. *Id.* at 492.
54. *Id.* at 493.
55. *Id.*
56. "Use your own property so as not to injure that of another." *See supra* note 12

incongruity is not particularly shocking. The English courts had developed a new cause of action, termed "negligence," that was essentially a response to the Industrial Revolution with its concomitant increase in product-related workplace injuries.[57] As one commentator aptly noted: "There was wealth to be had and wages to be earned—but all at high risks in terms of safety. The new society in its dangerous world was viewed by the courts as one that was willing to compromise safety for economic advantage . . . ."[58]

The definition of fault under common law trespass—synonymous with causation of harm—was believed to be simply too much for burgeoning industries to bear. Infant industries stridently argued that a lesser standard of liability was needed lest courts should discourage investment, research and development, and full employment.[59] It just made economic sense, in a macro view, to limit industry liability to those situations where the plaintiff could prove some deviation from the behavior of the reasonable person. The quid pro quo was obvious: Some innocent victims would go uncompensated so that the money could be invested in expansion of industry. Thus, with a subtle stroke of the judicial pen, the concept of legal fault was converted from one of causation of harm to one of failure to exercise reasonable care.

The Industrial Revolution's revamped conceptualization of legal fault was quickly embraced by American courts. In *Brown v. Kendall*,[60] the plaintiff was injured when a stick-wielding defendant unintentionally struck the plaintiff while the defendant was trying to separate two fighting dogs.[61] The court denied recovery for plaintiff's trespass allegation, holding that liability could not be imposed without proof of a lack of reasonable care by the defendant.[62]

In the famous 1873 case of *Losee v. Buchanan*,[63] a steam boiler blew up and cast debris upon the plaintiff's land, causing property damage.[64] In a suit against the operator of the boiler, the court held that the plaintiff could not recover as he had offered no evidence that the defendant acted

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and accompanying text.

57. *See* Gregory, *supra* note 29, at 368; MALONE, *supra* note 29, at 14, 35. *But see* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 960-61 (1981) (arguing that negligence was a progressive, pro-plaintiff reaction to industrial revolution's antecedent no-liability barriers such as privity, immunity, and privileges).

58. MALONE, *supra* note 29, at 35.

59. *See* Gregory, *supra* note 29, at 368.

60. 60 Mass. 292 (1850).

61. *Id.* at 293.

62. *Id.* at 298.

63. 51 N.Y. 476 (1873); *see also* Losee v. Clute, 51 N.Y. 494 (1873) (suit against boiler manufacturer).

64. *Buchanan*, 51 N.Y. at 476.

unreasonably in operating the boiler.[65] Thus, *Buchanan* made it clear that this new legal beast known as negligence was very different indeed from common law trespass. If the *Buchanan* court had applied common law trespass on the case principles pronounced in the *Case of Thorns*[66] or *Weaver v. Ward*,[67] Losee clearly would have recovered: the steam boiler operator would be at fault because he operated a boiler that caused harm to the innocent plaintiff.

It is clear that by the time of *Brown* and *Buchanan*, American courts had begun the slow drift toward redefining the concept of legal fault through a new theory dubbed "negligence." Through an almost invisible evolution, the foundation of tort law—the fault principle—was semantically retained, but the definition of "legal fault" was fundamentally altered. By judicial sleight of hand, the meaning of legal fault was magically transformed to adapt to the changing needs of society.

III. "STRICT" LIABILITY

A. Animals

Perhaps the most ancient and universally accepted form of strict liability is that for damage caused by trespassing animals. The medieval law of deodands required the owner of a wandering beast that inflicted harm to surrender it to the victim's family (or later, the King) as compensation for breaching the peace and to appease God.[68] Thus, the owner of an animal that caused harm was required to pay compensation without regard to the exercise of due care.[69]

Generally speaking, this strict liability has survived to the present day. The *Restatement (Second) of Torts* imposes liability on the possessor of livestock,[70] wild animals,[71] and domestic animals with known or reasonably knowable abnormally dangerous propensities[72] even though the possessor has exercised reasonable care. The *Restatement (Second)* rules are not, however, the same as causative liability. Under the proposed causative liability theory, the owner or possessor of a wild animal, domestic animal,

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65. *Id.*

66. Y.B. 6 Edw. 4, fol. 7, pl. 18 (1466) *reprinted in* GREGORY, *supra* note 43, at 48; *see also* FIFOOT, *supra* note 38, at 195-97.

67. 80 Eng. Rep. 284 (K.B. 1617).

68. *See* 2 POLLOCK & MAITLAND, *supra* note 30, at 472-74; 1 *id.*, at 55.

69. *See* MALONE, *supra* note 29, at 13; FIFOOT, *supra* note 38, at 155.

70. RESTATEMENT (SECOND) OF TORTS § 504 (1977). *But see id.* § 505 (holding possessors of livestock that are driven on a public highway liable only for failure to exercise reasonable care).

71. *Id.* § 507.

72. *Id.* § 509.

or livestock would be required to compensate for any harm actually and proximately caused by the animal. Thus, the owner of a poodle that suddenly and inexplicably bites a neighbor's leg would be liable under causative liability without regard to whether the owner knew or should have known of the poodle's dangerous propensities.[73]

On the other hand, the *Restatement (Second)* rules regarding wild and abnormally dangerous domestic animals are stricter than causative liability because intervening unforeseeable acts of third persons or nature will not relieve the possessor of liability.[74] Interestingly, such intervening acts *will* relieve the possessor of livestock from liability under the *Restatement (Second)*.[75] Under a causative liability approach, acts of nature, other animals, or third persons would be relevant to determining the legal cause of harm. If the trier of fact determined that such intervening acts were causally responsible, the plaintiff's recovery could be reduced or barred altogether.

Another important difference between the *Restatement (Second)* strict liability and causative liability concerning wild animals should be noted. The *Restatement (Second)* rules limit the possessor's liability to harm that is caused by a dangerous characteristic of the wild animal.[76] Comment e of section 507 provides an illustration of a tame bear that escapes, falls asleep in the middle of the highway, and is subsequently run over by the plaintiff, who is driving with due care.[77] If the plaintiff brings suit alleging strict liability, she will not recover because falling asleep on a highway is not a dangerous characteristic of bears.[78] The causative liability theory, by contrast, would permit the injured plaintiff to recover in this situation, provided that the bear's escape was not so attenuated as to lead the trier of fact to conclude that the possessor should not be held causally responsible. Thus, the bear's possessor would have only two defenses under causative liability: (1) lack of cause-in-fact, and (2) lack of proximate cause. An intervening event that breaks the chain of causation—such as a third person who drugs the bear and dumps it in the road—would likely reduce or eliminate the possessor's liability. Likewise, evidence that the bear escaped two years before the incident would likely be sufficient to lead the trier of fact to conclude that harm was too remote to attribute liability to the possessor. This is so because the passage of time may well result in the bear's reverting to its wild state, thereby leading the trier of fact to

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73. *Contra id.* § 509 cmt. f ("[T]he possessor of a dog is not liable for its biting a person or worrying or killing livestock unless he has reason to know that it is likely to do so.").

74. *Id.* § 510.

75. *Id.* § 504(3)(c).

76. *Id.* § 507(2).

77. *Id.* § 507 cmt e.

78. *Id.*

reasonably conclude that attributing proximate causal responsibility to the owner would be inequitable.

B. Ultrahazardous/Abnormally Dangerous Activities

Liability without regard to reasonable care has long been imposed upon actors who engage in ultrahazardous[79] or abnormally dangerous[80] activities. The landmark case generally cited for this proposition is *Rylands v. Fletcher*,[81] in which the plaintiff's coal mine was flooded when the defendant's reservoir burst through an undiscovered subterranean shaft.[82] Although the defendant was found to have exercised all reasonable care, the House of Lords held that the defendant was liable for the harm resulting from the non-natural use of his land.[83]

The rule pronounced in *Rylands* amounts to causative liability for certain unusual uses of land, such as the storage of large quantities of water. The actor who engages in such use of his land does so at his peril and may escape liability for harm only upon a showing of intervening, or lack of, causation.[84] While the specific holding of *Rylands* was limited to unspecified non-natural uses of land, its underlying rationale potentially has much broader application.

One major theme in the *Rylands* decision is the notion of risk reciprocity. Judge Blackmun's opinion from the Exchequer Chamber noted,

> [T]here is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what they pleased . . . .[85]

If, as in *Rylands*, one party imposes upon another a risk against which the other cannot protect himself, he has invaded the other's protected interest in property or bodily integrity. If risks are not reciprocal, one party has the ability to limit another's freedom to use his body or property. As between the two parties, it seems reasonable to conclude that the party who acts in a manner that limits the other's freedom should bear the consequences of such action. Thus, because the defendant in *Rylands* imposed a risk upon the plaintiff that the plaintiff was ill-equipped to discover or guard against,

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79. *See* RESTATEMENT OF TORTS §§ 519-524 (1938).

80. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1977).

81. 3 L.R.-E. & I. App. 330 (H.L. 1868).

82. *Id.* at 332.

83. *Id.* at 342.

84. *Id.* at 339-40 (quoting the opinion of the lower court, the Exchequer Chamber, L.R. 1 Ex. 265 (1866)).

85. 1 Ex. 265, 287 (1866), *aff'd*, L.R.-E. & I. App. 330 (H.L. 1868).

no reciprocity of risk justified employing a less stringent liability standard.[86]

Another policy rationale implied in *Rylands* is the notion of negligence per se. In other words, there seems to be an implicit recognition that storing large quantities of water, no matter how carefully done, is inherently unreasonable because the risks and resulting injury are so great. Thus, although the plaintiff cannot prove negligence on the part of the defendant, the activity itself bespeaks negligence, much in the same way that a manufacturing defect, such as a rat in a bottle, bespeaks negligence.[87] There is "negligence in the air," and while the plaintiff would likely be unable to prove it, the activity undoubtedly caused harm; therefore, in retrospect engaging in an activity that hurts someone smacks of fault.

If this view is accepted, the notion of legal fault in the *Rylands* case begins to resemble Justice Andrews's notion of fault in *Palsgraf*.[88] In both the *Rylands* decision and the view of Justice Andrews, the defendant's act is legally faulty because the defendant imposed nonreciprocal risk upon the plaintiff. As between the Long Island Railroad Company and Mrs. Palsgraf, Justice Andrews believed that the railroad should bear legal responsibility because it created a risk Mrs. Palsgraf was powerless to guard against. As between the mine operator and the reservoir owner in *Rylands*, the reservoir owner was held legally responsible because it imposed upon the mine operator a risk that the mine operator was unable to prevent by reasonable precautions.

As between the innocent plaintiff and the defendant who voluntarily chooses to engage in such activity, fundamental notions of fairness support the *Rylands* outcome. Imposing the costs of harm upon the enterprise that engages in the activity forces the activity to internalize the costs of harm, enabling consumers to make more intelligent and socially efficient purchasing decisions and providing the enterprise with a strong incentive to avoid harm.[89] If reservoirs such as the one in *Rylands* are forced to absorb the costs of accidental spillage, presumably the cost of water stored in such a manner will more accurately reflect its true societal costs, providing incentives to consumers and water storage enterprises to substitute safer alternatives.[90] If safer alternatives are not available, internalization

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86. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972) (noting that strict liability is normally imposed when there is no reciprocity of risk between the plaintiff and defendant).

87. *See supra* note 14 and accompanying text.

88. *See supra* notes 23-25 and accompanying text.

89. *See* LANDES & POSNER, *supra* note 29, at 294; 1 REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 398 (A.L.I. 1991) [hereinafter 1 ENTERPRISE RESPONSIBILITY]; Jane Stapleton, *Products Liability Reform—Real or Illusory?*, 6 OXFORD J. LEGAL STUD. 392, 396 (1986).

90. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 181-82 (4th ed. 1992).

nonetheless achieves economic efficiency by encouraging greater investment in safety and providing less cumbersome means of adjudicating legal responsibility.[91]

Despite the many sound policies underlying the *Rylands* doctrine, it was met with a cold reception in the United States. It was viewed by American courts as a "weed in an unwelcoming garden"[92] that held the potential of smothering infant industries with liability.[93] The opinion of the New York Court of Appeals in *Losee v. Buchanan*[94] is indicative of this judicial paternalism: "We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization."[95]

In the face of such resistance, the first *Restatement of Torts* drafted a carefully circumscribed *Rylands*-esque rule for what it termed "ultrahazardous" activities.[96] An ultrahazardous activity was tightly defined as one that "necessarily involves a risk of serious harm . . . which cannot be eliminated by the exercise of utmost care, and . . . is not a matter of common usage."[97] Furthermore, unlike *Rylands*, the original *Restatement* imposed liability even though the harm was caused by an unforeseeable act of nature or a third person.[98]

What sort of activities were deemed ultrahazardous? It is apparent that the product manufacturer did not meet the definition of the original *Restatement* because the manufacture of products is a matter of common usage,[99] and the risk of serious harm is quite small.[100] Thus, as it was defined, the ultrahazardous activity doctrine held little promise for victims of product injuries. Arguably, however, some products would fail the risk/utility test used in the *Restatement of Torts*.[101] For example, certain prescription drugs may well present risks that outweigh benefits for some individuals. Even though a prescription drug may have great utility for most users such that it is not unreasonable or negligent for the manufacturer to

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91. HOLMES, *supra* note 32, at 93; LANDES & POSNER, *supra* note 29, at 294; Stapleton, *supra* note 89, at 395-96.

92. Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 258 (1987); *see also* Gregory, *supra* note 29, at 377.

93. Nolan & Ursin, *supra* note 92, at 260-65; *see also* Brown v. Collins, 53 N.H. 442, 448 (1873); Losee v. Buchanan, 51 N.Y. 476, 486-87 (1873).

94. 51 N.Y. 476 (1873).

95. *Id.* at 484.

96. RESTATEMENT OF TORTS §§ 519-524 (1938).

97. *Id.* § 520.

98. *Id.* § 522.

99. *See id.* § 520 cmt. e (defining common usage as that which "is customarily carried on by the great mass of mankind or by many people in the community").

100. *See id.* § 520 cmt. a (defining ultrahazardous activity in terms of a risk/utility balance).

101. *Id.*

market it,[102] the drug manufacturer has imposed a risk upon users that they are incapable of predicting or protecting themselves against.[103]

The resulting inconsistency should be apparent. If Smith is injured by falling debris as he passes by a blasting operation, he will be able to recover under the ultrahazardous activity doctrine.[104] If, however, Smith is injured by a prescription drug, the doctrine does not apply, and Smith will be forced to prove negligence on the part of the drug manufacturer.[105] In both instances Smith arguably was aware that he faced some degree of risk by walking alongside a blasting operation or by ingesting a prescription drug. However, in both instances Smith is unable to predict the likelihood of harm or protect himself against it. Thus, it can be said that the blaster and the prescription drug manufacturer have each imposed a nonmutual risk upon Smith for which they should be liable. If Smith exercises his freedom by walking past a blasting operation or swallowing a prescription drug and is harmed thereby, the blaster or the drug manufacturer should bear responsibility when harm results. As between Smith and the blaster or drug manufacturer, the blaster or drug manufacturer should be deemed legally at fault because his action caused harm.

Given that one of the underlying rationales of the ultrahazardous activities doctrine is this notion of risk reciprocity, why does the doctrine not extend to the hypothetical drug manufacturer? The answer appears to be the language of the original *Restatement* requiring that the activity not be a matter of "common usage."[106] Comment e to section 520 defines this term as an activity "customarily carried on by the great mass of mankind or by many people in the community."[107] Because prescription drugs are undoubtedly consumed by the great mass of mankind, Smith is out of luck.

Ironically, the ultrahazardous activity doctrine does not apply when it is needed the most—when an activity presents non-reciprocal risks to many people. The implicit message is that a socially useful activity that is widely engaged in will not be deemed ultrahazardous. The more successfully an enterprise lures individuals to engage in the activity, the more likely that it will be protected from the ultrahazardous doctrine, creating perverse incentives to garner market share rather than to develop safer alternatives.

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102. *Id.*

103. *See id.* § 520 cmt. d (Ultrahazardous activity "is of a sort which must be carried on under conditions which cannot be predicted at the time it is entered upon and which, if they arise, are incapable of being so provided against as to make the activity safe.").

104. *See id.* § 520 cmt. c (identifying blasting as an ultrahazardous activity).

105. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (declaring prescription drugs unavoidably unsafe, and therefore no strict liability can lie).

106. RESTATEMENT OF TORTS § 520(b) (1938).

107. *Id.* § 520 cmt. e. A question exists as to whether the language "carried on" refers to consumption or production. For an interesting case interpreting this language to refer to the number of producers, see Langan v. Valicopters, Inc., 567 P.2d 218, 223 (Wash. 1977) (crop dusting not a matter of common usage because only carried on by a few enterprises).

The *Restatement (Second)* reformulation of the doctrine—renamed the abnormally dangerous activity doctrine[108]—obscured matters even more. Section 520 of the *Restatement (Second)* adopted an explicit balancing approach to determine whether an activity was abnormally dangerous, listing six factors for consideration:

(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.[109]

Comment f to section 520 makes it clear that no one factor is decisive and that all factors do not have to be present, although "ordinarily several of them will be required . . . ."[110] As was the case with the ultrahazardous activity doctrine,[111] the determination of whether an activity is abnormally dangerous under these criteria is a matter of law for the court.[112]

The adoption of a balancing approach converted the liability standard for abnormally dangerous activities from causative liability to negligence.[113] It is merely an elaborate version of Learned Hand's negligence formula, $B < PL$.[114] The only difference is that under the abnormally dangerous activity doctrine, the determination of negligence is made by the judge rather than the jury, which according to Professors Henderson and Twerski has the desirable effect of reducing the "risk of succumbing to jury lawlessness."[115] Interestingly, the comments to section 519 vehemently deny this negligence characterization, proclaiming that

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108. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1977).

109. *Id.* § 520.

110. *Id.* § 520 cmt. f.

111. RESTATEMENT OF TORTS § 520 cmt. h (1938).

112. RESTATEMENT (SECOND) OF TORTS § 520 cmt. l (1977).

113. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 555 (5th ed. 1984); Nolan & Ursin, *supra* note 92, at 273; *accord* Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206, 1211 (Alaska 1978) (The "*Restatement (Second)* approach requires an analysis of degrees of risk and harm, difficulty of eliminating risk, and appropriateness of place, before absolute liability may be imposed. Such factors suggest a negligence standard.").

114. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (if burden of precautions is less than the probability times the magnitude of loss, then negligence exists).

115. Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1319-20.

> [t]he liability stated in this Section is not . . . based upon any negligence, either in attempting to carry on the activity itself in the first instance, or in the manner in which it is carried on. The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.[116]

While the comment spews forth a plethora of causative liability buzzwords, it is all smoke and mirrors. Causative liability based upon abnormal danger is an oxymoron. Use of the abnormal qualification inherently requires a balancing of the risks and benefits of the activity to determine whether a reasonable person would have engaged in the activity. The liability producing condition, abnormal danger, is negligence. Under causative liability, by contrast, the liability producing condition is causally-linked harm.

Again, the consequences of the semantical manipulation of the strict liability is misleading. Comment h to section 520 claims that the abnormally dangerous activity doctrine is aimed at forcing an enterprise to internalize the costs of harm associated with the "*unavoidable risk* remaining in the activity, even though the actor has taken all reasonable precautions . . . ."[117] Thus, because the activity cannot be made safe by the exercise of reasonable care, it is abnormally dangerous and strict liability, based on a balancing of factors, should be applied.[118]

If one takes the pronouncements of strict liability seriously, a glaring inconsistency develops. The reason articulated for imposing strict liability in the abnormally dangerous activities context is that the danger is unavoidable. Yet in the products liability context, unavoidable danger is cited as the reason for *not* imposing strict liability.[119] Thus, comment k of section 402A proclaims:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. . . . The seller of such

116. RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977).

117. *Id.* § 520 cmt. h (emphasis added).

118. *Id.* § 520 cmt. h.

119. *Id.* § 402A cmt. k (1965).

> products . . . is not to be 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 but apparently reasonable risk.[120]

The only plausible way to reconcile the inconsistency between the *Restatement (Second)* products liability rules and the abnormally dangerous activity doctrine is to point out that the latter is inapplicable if the activity is a matter of common usage. But as discussed earlier,[121] this distinction creates perverse incentives and appears to have no logical foundation. The fewer the people who engage in an activity, the more likely the activity will be deemed abnormally dangerous. One must question whether this is a sound proposition: Is the use or participation of a large number of people an equitable or logical basis upon which to declare that an activity is not abnormally dangerous? What if, as in the case of products such as prescription drugs, the common usage is arguably brought about by necessity?

These are important questions because the common usage factor so dominates the abnormally dangerous activity doctrine that it is the deciding factor in many cases. The dominance of the common usage factor becomes clear when one closely examines the list of six factors contained in section 520. Of the six factors, three incorporate the notion of common usage, including subsection (d), "extent to which the activity is not a matter of common usage,"[122] subsection (e), "inappropriateness of the activity to the place where it is carried on,"[123] and subsection (f), "extent to which its value to the community is outweighed by its dangerous attributes."[124] These three factors seem redundant because an activity of common usage generally will be considered appropriate to the place where it is carried on and likely will have great value to the community.

Thus, the balance of section 520 is from the outset skewed toward a finding of no abnormal danger if the matter is of common usage because "ordinarily several of [the factors] will be required for strict liability."[125] Thus, the presence or absence of this "Popularity Trilogy" can have a significant impact on outcome. A plaintiff injured by blasting conducted in a town where the largest employer manufacturers and stores explosives is not likely to recover under the *Restatement (Second)*. On the other hand, a plaintiff injured by blasting that occurs in an isolated area is likely to recover.

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120. *Id.*
121. *See supra* notes 106-07 and accompanying text.
122. RESTATEMENT (SECOND) OF TORTS § 520(d) (1977).
123. *Id.* § 520(e).
124. *Id.* § 520(f).
125. *Id.* § 520 cmt. f.

The skewed balance of the *Restatement (Second)* and its corresponding potential for unfairness has led several courts either explicitly to reject it or to pay perfunctory lip service to the doctrine while manipulating the factors to achieve justice. For example, the Washington Supreme Court, in *Siegler v. Kuhlman*,[126] held that judgment as a matter of law was appropriate for the family of a deceased seventeen-year-old girl who was killed when her car became engulfed in flames after driving over a gasoline spill emanating from defendant's tractor trailer.[127] The jury determined that neither the tractor trailer owner nor the driver had been negligent in the operation or maintenance of the tractor trailer;[128] therefore, the plaintiffs' only viable theories of recovery were res ipsa loquitur[129] and the abnormally dangerous activity doctrine. After extensively analogizing the case to *Rylands v. Fletcher*,[130] the court paid lip service to the six factors of section 520,[131] determining that three out of the six factors were present: high degree of risk; likelihood of great harm; and inability to eliminate danger through the exercise of reasonable care.[132] The remaining three factors of the *Restatement (Second)* were not mentioned. Not surprisingly, the three factors not mentioned are the Popularity Trilogy.[133] Two reasons were proffered for classifying the transportation of gasoline (clearly a matter of common usage) as abnormally dangerous: (1) lack of risk reciprocity, and (2) the difficulty of proving negligence in cases where the evidence is destroyed.[134] Both rationales are, of course, consistent with the *Rylands*[135] decision. Thus, the *Siegler* decision is arguably an adoption of *Rylands*[136] rather than an application of the abnormally dangerous activities doctrine of the *Restatement (Second)*.

Five years after *Siegler*, the Washington Supreme Court again appeared to perfunctorily apply the *Restatement (Second)* factors, in *Langan v. Valicopters, Inc.*[137] In *Langan*, an organic farmer suffered extensive crop damage when his neighbors crop-dusted for beetle infestation.[138] Analyzing the case under sections 519 and 520,[139] the court surprisingly found

126. 502 P.2d 1181 (Wash. 1972) (en banc), *cert. denied*, 411 U.S. 983 (1973).

127. *Id.* at 1183-84.

128. *Id.* at 1183.

129. The Washington Supreme Court also held that the trial court erred in refusing to instruct the jury as to res ipsa loquitur. *Id.* at 1184.

130. 3 L.R.-E. & I. App. 330 (H.L. 1868).

131. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

132. *Siegler*, 502 P.2d at 1186-87.

133. *See* RESTATEMENT (SECOND) OF TORTS §§ 520(d)-(f) (1977).

134. *Siegler*, 502 P.2d at 1185.

135. Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (H.L. 1868).

136. *Id.*

137. 567 P.2d 218 (Wash. 1977).

138. *Id.* at 219.

139. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977).

all six factors present.[140] Its analysis of the Popularity Trilogy is particularly adroit. The court confessed that crop dusting in the Yakima Valley was not uncommon, but concluded that it was not a matter of common usage because "it is carried on by only a comparatively small number of persons . . . ."[141] The court manipulated the *Restatement (Second)* statement that an activity is a matter of common usage if "carried on by the great mass of mankind or by many people in the community,"[142] by focusing on the small number of aircraft employed in the crop-dusting business, rather than the comparatively great number of farmers who employed the crop dusters.[143]

Regarding appropriateness of crop dusting to the Yakima Valley, the court simply stated: "Given the nature of organic farming, the use of pesticides adjacent to such an area must be considered an activity conducted in an inappropriate place."[144] In making this statement, the court simply erred. Given that most farmers in the Yakima Valley, as elsewhere, are nonorganic farmers who necessarily utilize pesticides, it is more logical to assume that the organic farm was inappropriately located, not the farm using pesticides. Indeed, the *Restatement (Second)* comment seems to make this point clear,

> There are some highly dangerous activities, that necessarily involve a risk of serious harm in spite of all possible care, that can be carried on only in a particular place. Coal mining must be done where there is coal; oil wells can be located only where there is oil; and a dam impounding water in a stream can be situated only in the bed of a stream. If these activities are of sufficient value to the community . . . they may not be regarded as abnormally dangerous when they are so located, since the only place where the activity can be carried on must necessarily be regarded as an appropriate one.[145]

Likewise, crop dusting must be done where there are nonorganic crops. Thus, engaging in crop dusting in an area essentially dedicated to nonorganic crops can hardly be said to be inappropriate to the place.

With regard to the final prong of the Popularity Trilogy, value to the community, the *Langan* court conceded that crop dusting was valuable to the community.[146] Nonetheless, the court felt that the dangerous attributes of crop dusting were sufficient to outweigh this value and concluded that

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140. *Langan*, 567 P.2d at 222-23.

141. *Id.* at 223.

142. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977).

143. The court stated that less than 300 aircraft were used for crop dusting during the year in which the injury occurred. *Langan*, 567 P.2d at 223.

144. *Id.*

145. RESTATEMENT (SECOND) OF TORTS § 520 cmt. j (1977).

146. *Langan*, 567 P.2d at 223.

crop dusters should pay their own way.[147] Whether the value of crop dusting to the Yakima Valley is outweighed by the danger is, of course, a question upon which reasonable minds can differ. But certainly the *Langan* court's cursory dismissal of the value to the community factor is suspect. It evidences a desire of the court to achieve what it perceived as a just result (compensation for the organic farmer) by manipulating the biased *Restatement (Second)* factors.

The Washington Supreme Court has not been alone in its apparent distaste for the *Restatement (Second)* factor approach. In *Yukon Equipment, Inc. v. Fireman's Fund Insurance Co.*,[148] the Alaska Supreme Court explicitly rejected the *Restatement (Second)* balancing test as applied to the storage of explosives on the grounds that the test "suggest[s] a negligence standard."[149] Noting that the imposition of strict liability for the storage and use of explosives had been "resolved by more than a century of judicial decisions,"[150] the *Yukon* court went on to condemn the Popularity Trilogy:

> We see no reason for making a distinction between the right of a homesteader to recover when his property has been damaged by a blast set off in a remote corner of the state, and the right to compensation of an urban resident whose home is destroyed by an explosion originating in a settled area. In each case, the loss is properly to be regarded as a cost of the business of storing or using explosives.[151]

The *Yukon* court's rebuff of the *Restatement (Second)* was imitated by the Oregon Supreme Court in *Koos v. Roth*.[152] In *Koos*, the court imposed strict liability on a farmer who engaged in the common practice of field burning to clear out old crops.[153] In so doing, the court explicitly rejected two prongs of the Popularity Trilogy, appropriateness to place and value to the community.[154] Thus, although field burning was concededly a matter of common usage in the community, the court refused to give weight to the value to the community or appropriateness to place in determining whether it was abnormally dangerous,[155] stating that

> the question is who shall pay for harm that has been done. . . . To say that when the activity has great economic value the cost should be borne by

147. *Id.*
148. 585 P.2d 1206 (Alaska 1978).
149. *Id.* at 1211.
150. *Id.*
151. *Id.*
152. 652 P.2d 1255 (Or. 1982).
153. *Id.* at 1267-68.
154. *Id.* at 1262-63.
155. *Id.*

> others is no more or less logical than to say that when the costs of an activity are borne by others it gains in value.[156]

The rationale for imposing strict liability exposed in *Siegler*,[157] *Langan*,[158] *Yukon*,[159] and *Koos*[160] has an eerie resemblance to the reasoning of *Rylands v. Fletcher*[161] and the early English cases involving common law trespass.[162] Enterprises that engage in crop dusting, the transportation of hazardous substances, explosives storage, or field burning are held legally responsible for harm caused by the enterprise.[163] Because the defendant has chosen to inject a nonreciprocal risk into the community and because the risk resulted in harm, the defendant should be held legally responsible. Thus, even though he can prove that he acted as a prudent gasoline transporter, blaster, crop duster, or field burner, he is nevertheless legally at fault because his actions caused harm. This proposition is the essence of causative liability.

The presence of the Popularity Trilogy in the *Restatement (Second)* effectively precludes the imposition of causative liability for many hazardous enterprises. Courts that choose to faithfully apply the *Restatement (Second)* factors seem to acknowledge this result. For example, in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*,[164] the Seventh Circuit reversed a summary judgment for the plaintiff switching line operator who was injured when the defendant's leased railroad car leaked the hazardous chemical acrylonitrile.[165] In holding that the action was not abnormally dangerous, Judge Posner, writing for the majority, invoked the Popularity Trilogy on behalf of the defendant, noting that transportation of hazardous substances via rail was a matter of common usage and that "there is no compelling reason to move to a regime of strict liability, especially one that

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156. *Id.* at 1262.

157. Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972) (en banc), *cert. denied*, 411 U.S. 983 (1973).

158. Langan v. Valicopters, Inc., 567 P.2d 218 (Wash. 1977).

159. Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206 (Alaska 1978).

160. *Koos*, 652 P.2d 1255.

161. 3 L.R.-E. & I. App. 330 (H.L. 1868).

162. *See supra* notes 43-50 and accompanying text.

163. The *Yukon* court seems to adopt an absolute liability standard, which is more stringent than causative liability. In *Yukon*, the explosion was caused by the deliberate ignition of thieves who had broken into the magazine. 585 P.2d at 1207. Under a causative liability standard the thieves' act could constitute a superseding cause to reduce or relieve the defendant of liability. *Contra* RESTATEMENT (SECOND) OF TORTS § 522 (1977) (acts of third persons, animals, or nature will not relieve the defendant of liability for carrying on an abnormally dangerous activity).

164. 916 F.2d 1174 (7th Cir. 1990).

165. *Id.* at 1175.

might embrace all other hazardous materials shipped by rail as well."[166] In addition, shipping hazardous substances via rail was not inappropriate to the place because railroad cars must inevitably traverse populated areas such as Chicago.[167] In Judge Posner's view, "Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island [rail] yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living."[168]

In a single sentence, Judge Posner turns the notion of risk reciprocity on its head. Although the hazardous substance shipper is undeniably the actor who injects the risk into the community, Judge Posner seems to conclude that it is the community residents who must bear responsibility when harm results. It is the residents who are at fault for living there. Brutal, indeed. But arguably a faithful application of the *Restatement (Second)* and the Popularity Trilogy.

Of the three prongs of the Popularity Trilogy, the value to the community factor[169] is perhaps the most disturbing. It essentially requires the court to conduct a balancing test within a balancing test. First, the court must balance value of the activity against its risks.[170] Next, the court must take the product of the first balance and pour it into the overarching balance with the other five factors. The danger in such a two-tiered balancing act is that a court which determines an activity's community value outweighs its risks will likely never conduct the second tier balance at all, rendering the other five factors listed in section 520 superfluous. This concern was expressed by several members of the A.L.I. during the debate on the adoption of section 520, including Professor Keeton, who believed that inclusion of the value to the community factor would "almost wipe out strict liability for a socially desirable enterprise."[171] One participant believed such value judgments should not be a factor because they were inappropriate subject matter for the courts, belonging more appropriately to the legislative branch.[172]

This last argument is particularly fascinating because it highlights yet another glaring inconsistency between the abnormally dangerous activities doctrine and products liability. The very value judgments explicitly required by section 520(f) for abnormally dangerous activities are condemned by some as beyond the purview of judges and juries in products liability design defect cases.[173] Such value judgments are termed "polycentric" in the

166. *Id.* at 1179.
167. *Id.* at 1180.
168. *Id.* at 1181.
169. RESTATEMENT (SECOND) OF TORTS § 520(f) (1977).
170. *Id.*
171. 41 A.L.I. PROC. 462 (1964); *accord* Nolan & Ursin, *supra* note 92, at 272-73.
172. 41 A.L.I. PROC. 460 (1964) (remarks of A.L.I. Vice President John Buchanan).
173. *See* REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 2

products liability design defect context, meaning they are simply too complex for appropriate resolution by judges and juries.[174] Why are such value judgments not also polycentric when used in the abnormally dangerous activities context?

There appears to be no logical reason for the distinction. Indeed, the only difference in the two situations is that in the abnormally dangerous activity context it is the judge who makes the value judgment whereas in design defect litigation these value judgments are often made by the jury. But surely this distinction cannot justify condemning value judgments in design defect cases. First, if one believes that value judgments are inappropriate in design cases because juries are normally the decisionmaker, then this belief reflects a fundamental distrust of juries, not a belief that value judgments regarding design defects are incapable of resolution. The solution, therefore, would lie in abolishing the jury system or restricting the jury's role in such judgments, *not* in denying altogether the validity of value judgments in design defect cases. Second, if one truly believes that juries are incapable of making value judgments, then one must also deny juries the responsibility for deciding negligence cases. After all, the classic formula for negligence, $B < PL$,[175] requires a careful balancing of benefits against probability of harm and risk of loss.

In the end, whether an act is negligent or not is undoubtedly a highly polycentric value judgment generally made by the jury. Holmes recognized the polycentricity of negligence long ago when he stated, "The trouble with many cases of negligence is . . . that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination."[176] If a judge is considered capable of determining whether value of blasting to a community is outweighed by the risks involved in blasting, why is a jury incapable of determining whether the value of a prescription drug to the community is outweighed by its inherent risks? And if a jury is capable of weighing the benefits, risks, and probabilities of harm regarding a physician's decisions (as in a malpractice suit), why is it incapable of weighing such factors for a prescription drug? The answer, of course, is that in all of these scenarios, the judge or jury is perfectly able to make such value judgments. The debate, therefore, is not *whether* such judgments should be made but rather *who* should make them.

The abnormally dangerous activity doctrine has had a checkered past, and many commentators have all but pronounced it dead, a victim of

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A.L.I. 55-57 (1991); Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1305. *But see* Stapleton, *supra* note 89, at 408.

174. *See* Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1305.

175. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

176. HOLMES, *supra* note 32, at 103; *accord* Stapleton, *supra* note 89, at 408.

judicial resistance and skepticism.[177] In most courts its application has been carefully circumscribed to activities such as blasting,[178] crop dusting,[179] explosives storage,[180] oil drilling,[181] and the handling of toxic substances.[182] Oddly, the safer an activity, the more likely negligence will be the standard of liability.[183] Is this a logical result? An activity or product that appears safe to the plaintiff arguably brings with it an implied warranty of safety which, if breached, should result in legal responsibility for the enterprise that placed it in the stream of commerce.[184] Indeed, it is precisely because the activity or product appears harmless that causative liability is a more appropriate legal standard. An innocuous-looking activity or product imposes risks which plaintiffs are particularly unable to anticipate or guard against. In such situations, there is clearly no reciprocity of risk between the parties; therefore, as between the defendant imposing the risk and the unassuming plaintiff, equity demands that liability be borne by the defendant.

If an activity is abnormally dangerous and causes harm, the injured plaintiff recovers. As Dean Prosser stated during debates on the adoption of the doctrine, nothing has to "go wrong" with the activity before liability is imposed.[185] Thus, once the activity has been pigeonholed as abnormally dangerous, no defect need be shown. The plaintiff does not have to prove that the blaster failed to conform to his own blasting procedures or that a reasonable blaster would not have blasted in such a manner. It is sufficient to show that the blaster hurt the plaintiff.

By contrast, in the products liability field, the plaintiff is saddled with the burden of proving that the product was in a "defective condition

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177. *See, e.g.*, Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 700 n.17 (1978) (characterizing the doctrine as "of almost no practical importance."); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 976 (1981) (commenting that the doctrine appears stagnated).

178. *See, e.g.*, Spano v. Perini Corp., 250 N.E.2d 31 (N.Y. 1969).

179. *See, e.g.*, Gotreaux v. Gary, 94 So. 2d 293 (La. 1957); Langan v. Valicopters, Inc., 567 P.2d 218 (Wash. 1977). *But see* Lawler v. Skelton, 130 So. 2d 565 (Miss. 1961).

180. *See, e.g.*, Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931).

181. *See, e.g.*, Green v. General Petroleum Corp., 270 P. 952 (Cal. 1928).

182. *See, e.g.*, State Dep't of Envtl. Protection v. Ventron, 468 A.2d 150 (N.J. 1983) (toxic waste). *See generally* Nolan & Ursin, *supra* note 92.

183. *See* RESTATEMENT (SECOND) OF TORTS § 520(a)-(b) (1977) (degree and likelihood of risk are two of six factors in determining whether activity is abnormally dangerous); *see also* LANDES & POSNER, *supra* note 29, at 114 (noting that as blasting becomes safer the reasons for imposing negligence liability standard increase).

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

185. 41 A.L.I. PROC. 451 (1964).

unreasonably dangerous . . . ."[186] Thus, beyond proving abnormal or unreasonable danger, the products plaintiff must also prove that the widget failed to conform to the manufacturer's own specifications or that no reasonable manufacturer would have placed the widget in the stream of commerce. Why must the products plaintiff bear this heavier burden? The distinction seems insupportable. A plaintiff injured by a widget has been harmed just as truly as a plaintiff injured by blasting. In either situation, the risk is nonreciprocal. In either situation, the defendant has caused the harm. In either situation, therefore, the defendant should be held legally responsible.

C. Warranty Law

One large area of strict liability law often overlooked is that of warranty. Warranties may be either express[187] or implied.[188]

1. Express Warranty

Since the landmark 1932 case of *Baxter v. Ford Motor Co.*,[189] plaintiffs injured as a result of reliance on an express warranty can recover without proof of privity or any failure of the manufacturer to exercise reasonable care.[190] Liability for breach of an express warranty is analogous to causative liability in that the only defense available is a lack of causation, which customarily manifests itself as a lack of reliance in the seller's expressions.[191] No proof of defect need be shown. If the product does not comply with the seller's express representations and if those representations were a factor in the purchasing or use decision, the seller is liable for any harm caused by a failure of the product to comport with the representation.

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186. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

187. *See* U.C.C. § 2-313 (1978); RESTATEMENT (SECOND) OF TORTS § 402B (1965).

188. *See* U.C.C. § 2-314-315; *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring).

189. 12 P.2d 409 (Wash. 1932).

190. *Id.* at 412; *see also* RESTATEMENT (SECOND) OF TORTS § 402B(b) (1965) (privity not required for express warranty in tort action).

191. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965) (Harm must be "caused by justifiable reliance upon the misrepresentation . . . ."); U.C.C. § 2-313 cmt. 3 ("In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement."). *But see* Stang v. Hertz Corp., 490 P.2d 475 (N.M. Ct. App. 1971) (holding that express warranty made after customer signs a car rental agreement cannot be "basis of the bargain" required for recovery under U.C.C. § 2-213(1)(a)), *rev'd on other grounds*, 497 P.2d 732 (N.M. 1972).

For example, in *Klages v. General Ordnance Equipment Corp.*[192] the plaintiff, a motel night clerk, was shot in the head by a robber after unsuccessfully attempting to incapacitate the robber by squirting mace into his eyes.[193] The advertisements for the mace boasted that it would provide "instantaneous incapacitation . . . an attacker is *subdued—instantly* . . . ."[194] Despite the fact that the plaintiff hit the robber with mace "'right beside the nose,'"[195] the mace failed to subdue the robber as promised.[196] The Pennsylvania Superior Court affirmed a judgment for the plaintiff on his express warranty in tort[197] claim on grounds that the plaintiff had justifiably relied on promotional representations to which the product failed to comply.[198] Thus, even in the face of possible superseding or intervening cause such as the criminal act in *Klages*, express warranty liability is broadly imposed if reasonable reliance and nonconformance to the seller's express advertisements can be proven. In this respect, express warranty may be more absolute than causative liability because liberal construction of the reliance element[199] implicitly relaxes proximate causation requirements.

2. Implied Warranty

From an academic standpoint, implied warranty strict liability is more intriguing than its express warranty sibling. The *Uniform Commercial Code (U.C.C.)* recognizes two implied warranties: the implied warranty of merchantability[200] and the implied warranty of fitness for a particular purpose.[201] The implied warranty of merchantability originated as a tort action for trespass on the case and is analogous to its sister tort of deceit.[202] The implied warranty of merchantability spans a wide conceptual range, with seven possible definitions provided in the U.C.C. for merchantable goods,[203] including such things as "fair average quality,"[204]

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192. 367 A.2d 304 (Pa. Super. Ct. 1976).

193. *Id.* at 307.

194. *Id.* at 306.

195. *Id.* at 307.

196. *Id.*

197. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965).

198. *Klages*, 367 A.2d at 312-13.

199. *See* U.C.C. § 1-102 (1990) (Act to be liberally construed to promote "underlying purposes and policies"). *See also* Lane v. C.A. Swanson & Sons, 278 P.2d 723, 726 (Cal. Ct. App. 1955) (noting that the current trend is to construe literally language regarding the quality of the goods in favor of the buyer).

200. U.C.C. § 2-314 (1990).

201. *Id.* § 2-315.

202. *See* William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

203. *See* U.C.C. § 2-314(2)(a)-(f) (1990).

"fit for the ordinary purposes for which such goods are used,"[205] and "adequately contained, packaged, and labeled."[206] The most commonly used definition in products liability cases is "fit for the ordinary purposes for which such goods are used."[207] If the plaintiff can establish (1) that the product is not merchantable, (2) that the plaintiff suffered harm, and (3) that the harm was caused by the product, she will recover.

A defendant's exercise of due care will be relevant to determining whether the warranty of merchantability was breached.[208] Therefore, the implied warranty of merchantability seems to be a hybrid of negligence and strict liability much like section 402A of the *Restatement (Second) of Torts*. Indeed, both section 402A and U.C.C's implied warranty of merchantability appear to require specific proof of deviation or malfunction, the former requiring the product be in a "defective condition"[209] and the latter requiring the product be of "unmerchantable" quality.[210] Perhaps the chief advantage to an injured plaintiff of the implied warranty of merchantability action over a section 402A action is simply that the term "merchantable" is broad enough to encompass a greater array of product malfunctions than section 402A. Of course, these advantages may be offset by the requirement of notice,[211] the possibility of disclaimer,[212] and other restrictions of warranty law.

While the fundamental roots of implied warranties lie in tort,[213] their modern development and significance decidedly lie in contract. The result is that the usefulness of implied warranties has been curtailed due to numerous procedural hurdles inherent in contract law. Relegating the notion of implied warranties to contract law has drained it of its force and heritage. Indeed, it is ironic that the only recognized tort action for warranty, section 402B of the *Restatement (Second) of Torts*, is limited to express warranties, a cause of action springing from contract law, not tort law. Why has tort law embraced the contract offspring of express warranty but shunned its own offspring of implied warranty? Arguably, tort law should recognize, as Justice Traynor astutely observed, that every product comes with an

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204. *Id.* § 2-314(2)(b) (fungible goods).

205. *Id.* § 2-314(2)(c).

206. *Id.* § 2-314(2)(e).

207. *Id.* § 2-314(2)(c); *see also* Hardman v. Helene Curtis Indus., 198 N.E.2d 681, 691 (Ill. App. Ct. 1964); Maybank v. S.S. Kresge Co., 266 S.E.2d 409, 412 (N.C. Ct. App. 1980), *modified on other grounds, and aff'd*, 273 S.E.2d 681 (N.C. 1981); Logan v. Montgomery Ward & Co., 219 S.E.2d 685, 687 (Va. 1975).

208. *See* U.C.C. § 2-314 cmt. 13 (1990).

209. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

210. U.C.C. § 2-314(1)-(2) (1990).

211. *See id.* § 2-607(3).

212. *See id.* § 2-316(2)-(3).

213. *See supra* note 202 and accompanying text.

"implied warranty of safety"[214] which, if breached, enables the consumer to recover without regard to what kind of defect caused the harm. The implied warranty of safety is particularly appropriate for a mature technological society in which the consumer has little or no opportunity to discern the product's safety. A product that causes harm is, by definition, not safe. Stated another way, a safe product would not harm its user. Under a causative liability regime, every product would carry an implied warranty of safety. A manufacturer who supplied a product that caused harm would therefore be legally at fault and held accountable.

D. Statutory Strict Liability

Modern strict liability is sometimes imposed by federal or state laws designed to provide compensation to plaintiffs for injuries where proof of negligence would be virtually impossible. For example, the Black Lung Benefits Act[215] established a trust fund to pay death and disability benefits to coal miners who contracted Black Lung Disease (pneumoconiosis).[216] Benefits are automatically payable upon proof of harm and causation.[217] Indeed, the Act goes even further and creates a rebuttable presumption of causation if the claimant worked in coal mines for ten years or more.[218] A death benefits claimant who proves that the deceased worked in mines for twenty-five years or more can recover without introducing any proof of causation unless the defendant proves by a preponderance of the evidence that the death was not mine-related.[219] The goal of the black lung statute is clearly compensation. Congress was concerned that the difficulty of proving causation impeded miners' ability to recover under normal workers' compensation rules.[220]

Another illustration of strict liability by statute is the National Vaccine Injury Compensation Program.[221] Under this statute, claims of over $1,000 for vaccine-related injury or death are under the jurisdiction of the United States Claims Court, which assigns such cases to a special master for vaccine injuries.[222] A claimant whose injury falls within a specified

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214. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring).

215. 30 U.S.C. §§ 901-960 (1988).

216. Pneumoconiosis is a debilitating, irreversible lung disease generally caused by long-term inhalation of coal dust. *See* H.R. REP. NO. 563, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2503, 2515.

217. *See* 30 U.S.C. § 921(a) (1988).

218. *See id.* § 921(c)(1).

219. *See id.* § 921(c)(5).

220. *See id.* § 901(a); *see also* H.R. CONF. REP. NO. 761, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2578, 2603.

221. 42 U.S.C. §§ 300aa-10 to aa-34.

222. *See id.* § 300aa-11(a).

Vaccine Injury Table[223] can recover upon proof that her injury is merely "in association with" a vaccine listed in the table.[224] Thus, claimants with specified conditions who obtained specified vaccines may recover without normal tort law proof of causation. In exchange for increased chances of recovery, plaintiffs harmed by vaccines are limited to recovery of compensatory damages, attorney's fees, and a maximum of $250,000 damages for pain and suffering.[225]

Federal environmental laws appear to be the newest wave of statutory strict liability. Strict liability has been imposed in recent years for nuclear radiation leakage,[226] water pollution,[227] oil spills,[228] and hazardous waste dumping[229] in the name of public policy.

At the state level, one of the more fascinating experiments with strict liability is the Virginia Birth-Related Neurological Injury Compensation Act.[230] Under this Act, physicians and hospitals may elect to participate in a fund[231] that provides compensation for birth-related neurological injuries.[232] Recoverable damages are limited to economic losses plus reasonable attorney's fees; claimants can neither recover for pain and suffering nor be awarded exemplary damages.[233] Compensation is automatic upon proof of a birth-related neurological injury and proof that the physician or hospital participated in the fund.[234] Thus, the claimant's prima facie case does not require proof of causation. The only way the fund will be relieved of its obligation to the claimant is if the physician or hospital can proffer evidence that the injury is not related to birth.[235] The Virginia statute essentially presumes causation for certain neurological injuries, subject to rebuttal evidence by the physician or hospital. In this manner, the Virginia statute is quite similar to the federal Black Lung and Vaccine Injury statutes.

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223. *See id.* § 300aa-14(a).

224. *Id.* § 300aa-11(c)(1)(C)(i). Plaintiffs whose injury does not appear in the table must prove causation by a preponderance of the evidence. *Id.* at § 300aa-11(c)(1)(C)(i)(I).

225. *Id.* § 300aa-15(a), (e).

226. *See* 42 U.S.C.A. § 2210(n)(1) (West 1973 & Supp. 1994).

227. *See* Federal Water Pollution Control Act, 33 U.S.C.A. § 1251(a) (West 1986).

228. *See* Oil Pollution Control Act of 1990, 33 U.S.C.A. §§ 2702, 2703 (West Supp. 1994); Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1653 (West 1986 & Supp. 1994).

229. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(1) & (2) (1988).

230. VA. CODE ANN. §§ 38.2-5000 to -5021 (Michie 1990).

231. *See id.* § 38.2-5020. The fund is funded by assessments on all physicians in the state and all participating hospitals. *Id.*

232. *See id.* § 38.2-5001 (defining "birth-related neurological injury").

233. *See id.* § 38.2-5009.

234. *See id.* § 38.2-5008.

235. *See id.*

All of these statutes are legislative responses to the harshness of negligence law and the difficulty of proving causation. It should be pointed out that, under a causative liability regime, plaintiffs injured by black lung disease, vaccines, or neurological disorders would still need these special statutory compensation schemes because causative liability would adhere to traditional tort law causation principles. Thus, those who claim that causative liability is akin to a no-fault compensation scheme are simply wrong. Statutory compensation schemes such as these go well beyond causative liability by loosening the claimant's burden of proof on causation. Even if causative liability were embraced by the courts, special no-fault compensation schemes would still be useful.

E. Strict Liability in Tort

The estrangement between tort law and pure strict (i.e., causative) liability was never complete. Even at the height of the industrial frenzy, courts uniformly imposed tort liability upon sellers of food and drink for any harms caused by their products.[236] Causative liability for products other than food, however, did not re-emerge until 1951, when an Ohio court imposed strict liability in tort on the manufacturer of a grinding wheel.[237] This revivified basis of liability quickly spread to products such as hair dye,[238] permanent wave solutions,[239] animal food,[240] cinder building blocks,[241] and automobile tires.[242] Dean William Prosser, the Reporter for the *Restatement (Second) of Torts*, proclaimed the growth of strict liability in tort "perhaps the most spectacular development that I have witnesses [sic] in my lifetime in the American law of torts."[243] Had Dean Prosser lived through the Middle Ages, however, the emergence of strict liability in the mid-twentieth century would not have appeared so spectacular, but more like a natural re-emergence, accompanying the maturity of the Industrial Revolution, of the causative notion of fault.

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236. *See, e.g.*, Klein v. Duchess Sandwich Co., 93 P.2d 799 (Cal. 1939); Donaldson v. Great Atl. & Pac. Tea Co., 199 S.E. 213 (Ga. 1938); Davis v. Van Camp Packing Co., 176 N.W. 382 (Iowa 1920); Parks v. G.C. Yost Pie Co., 144 P. 202 (Kan. 1914); Howson v. Foster Beef Co., 177 A. 656 (N.H. 1935); Minutilla v. Providence Ice Cream Co., 144 A. 884 (R.I. 1929).

237. Di Vello v. Gardner Mach. Co., 102 N.E.2d 289, 293 (Ohio 1951); *see also* 38 A.L.I. PROC. 71 (1962) (remarks of Dean Prosser).

238. *See, e.g.*, Graham v. Bottenfield's, Inc., 269 P.2d 413 (Kan. 1954).

239. *See, e.g.*, Rogers v. Toni Home Permanent Co., 147 N.E.2d 612 (Ohio 1958).

240. *See, e.g.*, Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959).

241. *See, e.g.*, Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873 (Mich. 1958).

242. *See, e.g.*, B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959).

243. 38 A.L.I. PROC. 52 (1962).

As originally drafted, the *Restatement (Second) of Torts* section 402A imposed strict liability only upon sellers of food.[244] At the 1961 annual meeting of the A.L.I., however, a motion to expand the scope of section 402A to include "products for intimate bodily use" passed by a vote of 70-34.[245] The debate on this motion to expand the scope of section 402A indicates that the A.L.I. members believed that products for intimate bodily use included such things as clothing[246] and detergents.[247]

Two years after the A.L.I. voted to expand the *Restatement (Second)* strict liability to products for intimate bodily use, the California Supreme Court upped the ante in its landmark decision, *Greenman v. Yuba Power Products, Inc.*[248] The *Greenman* court imposed strict tort liability on the manufacturer of a power lathe that inexplicably malfunctioned, causing a piece of wood to fly out and strike the plaintiff on the head.[249] Justice Traynor, speaking for the majority, laid down the new principle:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .
>
> . . . .
>
> . . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. . . . Implicit in the [product's] presence on the market . . . was a representation that it would safely do the jobs for which it was built.[250]

The A.L.I. membership responded to *Greenman* one year later by voting to expand the proposed *Restatement (Second) of Torts* section 402A to encompass all products.[251] At the time of the A.L.I.'s vote, the vast majority of courts had not ventured to apply strict tort liability beyond food and products for intimate bodily use.[252] Despite this fact, several A.L.I. members were clearly concerned that the *Restatement (Second) of Torts* would be an anachronism when published if such expansion were not

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244. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961); *see also* 38 A.L.I. PROC. 72-73 (1962).

245. 38 A.L.I. PROC. 72-75 (1962).

246. *Id.* at 73.

247. *Id.* at 74-75.

248. 377 P.2d 897 (Cal. 1963).

249. *Id.* at 898.

250. *Id.* at 900-01.

251. 41 A.L.I. PROC. 349 (1964).

252. *See* 41 A.L.I. PROC. 350 (1964) (remarks of Dean Prosser, who stated that only sixteen jurisdictions had extended strict liability in tort beyond food and products for intimate bodily use).

adopted,[253] and the greatly expanded section 402A was passed with surprisingly little debate.[254]

The post-*Greenman*[255] difficulty has been defining the prerequisites to recovery—the terms "defective"[256] and/or "unreasonably dangerous."[257] The final version of section 402A requires that the plaintiff prove the product was "in a defective condition unreasonably dangerous to the user or consumer."[258] Failure of the drafters to indicate whether these terms were intended to be alternative or cumulative prerequisites to recovery has spawned much debate and confusion. Indeed the terms "defective" and "unreasonably dangerous" seem tautological. But Dean Prosser justified the use of both terms to his colleagues by explaining that the term "'[d]efective' was put in to head off liability on the part of the seller of whiskey, on the part of the man who consumes it and gets delirium tremens, even though the jury might find that all whiskey is unreasonably dangerous to the consumer."[259] In so stating, Dean Prosser made it clear that mere unreasonable danger alone would not suffice for liability under section 402A. Not only must the product be unreasonably dangerous (a term which inherently "rings of negligence"[260]), but it must also inflict harm not normally associated with the product.[261] Thus, Dean Prosser stated that products such as alcohol, cigarettes, and certain prescription drugs would not be subject to liability because they would not be considered defective.[262] When Professor Dickerson observed that the addition of the term "defective" was "gilding the lily,"[263] Dean Prosser was sympathetic: "I was rather indifferent to [the addition of 'defective']. I thought 'unreasonably dangerous,' on the other hand, carried every meaning that was necessary, as Mr. Dickerson does; but I could see the point, so I accepted the change."[264]

Despite the A.L.I. membership's apparent belief that the dual terms were somehow distinct, the final version of section 402A defines them both in terms of a consumer expectations test.[265] Comment g defines defective condition as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[266] Comment i defines unreasonably dangerous as "dangerous to an extent beyond that which would be contemplated by the

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253. *See* 41 A.L.I. PROC. 350 (1964) (remarks of Dean William Prosser); *id.* at 353 (remarks of Mr. Bennett Boskey).

254. *See id.* at 349-75.

255. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962).

256. *See id.; see also* RESTATEMENT (SECOND) OF TORTS § 402A(7) (1965).

257. *See* RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

258. *Id.*

259. 38 A.L.I. PROC. 88 (1962).

260. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972).

261. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. h, i (1965).

262. 38 A.L.I. PROC. 87-88 (1962).

263. *Id.* at 87.

264. *Id.* at 88.

265. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i (1965).

266. *Id.* § 402A cmt. g.

ordinary consumer."[267] Thus, the comments to section 402A clearly expose the tautology because a product which is "dangerous to an extent beyond that which would be contemplated" which is also necessarily in "a condition not contemplated . . . which will be unreasonably dangerous."

Strangely, as alluded to earlier, courts have been hesitant to apply the consumer expectations test to design or informational defect cases,[268] although the explicit language of comments g and i seem to require it. Hesitancy in employing the consumer expectations test in non-manufacturing defect cases, according to Professors Henderson and Twerski, is due to the fact that it is too "open-ended and unstructured."[269] This argument cannot withstand scrutiny, however, when one considers that the substitute argued for, the risk-utility balance test, is equally open-ended and unstructured, necessitating the delicate balancing of an infinite number of unquantifiable factors. Indeed, it seems more reasonable to conclude that the trier of fact, particularly a jury, will be better equipped to determine whether a given product comports with the ordinary consumer's expectations than to conduct the nebulous balance of the risk-utility test.

The California Supreme Court, fifteen years after *Greenman*,[270] attempted to carve out an acceptable compromise between advocates of the risk-utility and consumer expectations tests for defect. In *Barker v. Lull Engineering Co.*, [271] the court explicitly acknowledged that either test was acceptable.[272] While this seemed to be a perfectly reasonable compromise, one must ponder why any compromise was required at all. After all, the *Restatement (Second)* language clearly adopted the consumer expectations test for both defective and unreasonably dangerous products.[273]

From whence did the risk-utility monster come? The risk-utility test appears to be a substitute for the consumer expectations test in cases where the defendant argued that the product was too complex for a reasonable consumer to form expectations.[274] This argument proves too much. True, ordinary consumers may not have precise expectations regarding the presence or absence of roll cages on construction equipment. Yet an ordinary consumer does expect construction equipment not to cause harm when used in a foreseeable manner. Thus, as alluded to earlier,[275] the consumer expectations test, when faithfully applied, amounts to the imposition of causative liability. If a product causes harm when

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267. *Id.* § 402A cmt. i.

268. *See* LANDES & POSNER, *supra* note 29, at 291-92 (noting that most courts employ a negligence test for design defects).

269. James A. Henderson Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the* Restatement (Second) of Torts, 77 CORNELL L. REV. 1512, 1534 (1992) [hereinafter Henderson & Twerski, *Proposed Revision*].

270. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962).

271. 573 P.2d 443 (Cal. 1978).

272. *Id.* at 457-58.

273. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i (1965).

274. *See generally* Reed Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 306-14 (1967).

275. *See supra* notes 9-11 and accompanying text.

used in a foreseeable manner, it fails to comport with an ordinary consumer's expectations, and the seller is held legally responsible. No doubt this is the true reason why defendants were eager to convince the courts that an alternative to the consumer expectations test was needed.

Another reason recently put forth to support adoption of the risk-utility test is that section 402A was never conceived by its authors as extending beyond manufacturing defects.[276] The only authority cited for this proposition appears to be comment g, which states that strict liability shall be imposed under section 402A "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[277] It is difficult to see how this language reveals that section 402A was perceived as a rule limited to manufacturing defects. Certainly comment g's language is equally applicable to design or informational defects, which are just as likely to be uncontemplated by the consumer, if not more so because they are so often latent.

This attempt at revisionist history must fail because the landmark *Greenman*[278] case—the impetus for the expansion of section 402A to products beyond food and products for intimate bodily use—apparently involved a design defect, as did numerous other pre-402A strict liability product cases. In addition, given that risk-utility is a negligence test, its use contravenes the explicit pronouncement of comment a that "[t]he rule is one of *strict liability* . . . . The Section is inserted in the Chapter dealing with the *negligence* liability of suppliers of chattels, for the convenience of reference and *comparison with other Sections dealing with negligence.*"[279] This comment makes it unmistakably clear that section 402A was intended to be something quite different from negligence. Thus, use of a risk-utility test as a substitute for the consumer expectations test cannot be historically justified.

IV. THE PROPOSED *RESTATEMENT (THIRD) OF TORTS*

A. Background

In 1991 the A.L.I. published a lengthy study on enterprise liability which recommended, inter alia, that the consumer expectations test be abolished and that an explicit negligence standard be adopted for design and informational defect product liability cases.[280] The A.L.I. study was not, however, representative of the full membership's views, but merely the views of fourteen individuals, and

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276. *See* James A. Henderson Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1260 (1993) [hereinafter Henderson & Twerski, *New Restatement*]; *see also* Henderson & Twerski, *Proposed Revision*, *supra* note 269, at 1526.

277. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

278. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963).

279. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965) (emphasis added).

280. 2 ENTERPRISE RESPONSIBILITY, *supra* note 89, at 81.

was sharply criticized by the A.L.I. membership, the study's Advisory Group members, and the study's Consultative Group members, as being drafted without adequate discussion or debate.[281]

Despite the intense criticism, the Reporters of the *Restatement (Third) of Torts* have embraced the recommendations of the A.L.I. study in their proposed revisions to section 402A.[282] The Reporters characterize the proposed revisions as a "pragmatic and functional approach . . . [that] will go a long way to settling troubled waters."[283] They are mistaken. The proposed *Restatement (Third)* will settle troubled waters only to the extent that it pacifies those on the bench or in academia who have been unwilling or unable to accept the notion of strict liability for products.

The Reporters have tried to downplay the fundamental sea-change reflected in their proposed revsions by characterizing the present section 402A as "anachronistic"[284] and proclaiming that the revised rules can be doctrinally characterized as negligence, warranty, or strict liability.[285] Technically, this proclamation is true; words are so malleable, especially in the hands of lawyers, that they can be employed in any manner desired. But encouraging scholars or courts to label the proposed revisions as strict liability is misleading at best and devious at worst. Certainly one is free to call a dog a cat, but in so doing, one would likely lose the meaning of "dog" altogether and create much unnecessary confusion along the way. Ironically, the Reporters previously advocated purging the "senseless rhetoric of strict liability . . . from [design] defect litigation."[286] They do not appear to have heeded their own call for clarity.

B. The Proposal

The proposed revisions to section 402A would legitimize the current tripartite conceptualization of defects by explicitly identifying manufacturing, design, and informational defects and establishing separate liability standards for each.[287] Manufacturing defects would be subject to strict liability.[288] If the plaintiff can prove that it is probable that the product failed to comport with a reasonable consumer's expectations because of a manufacturing defect, she can invoke strict

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281. *See* 68 A.L.I. PROC. 26-27 (1992) (remarks of Professor Shapo); *see also id.* at 29-30 (remarks of Mr. Bill Wagner); *see also* Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241 (1993).

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

283. Henderson & Twerski, *New Restatement*, *supra* note 276, at 1261.

284. Henderson & Twerski, *Proposed Revision*, *supra* note 269, at 1513.

285. *See* Tentative Draft, *supra* note 26, § 2 cmt. j, at 30.

286. James A. Henderson Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991) [hereinafter Henderson & Twerski, *Stargazing*].

287. *See* Tentative Draft, *supra* note 26, § 2(a)-(c), at 9-10.

288. *See id.* § 2(a), at 9.

liability and enjoy an inference of defect without proffering specific proof thereof.[289] Design defects, on the other hand, would be governed exclusively by a negligence liability standard.[290] Indeed, classifying the proposed design defect language as a mere negligence standard may be too generous. Perhaps "super" negligence would be a more appropriate label, as the standard requires the plaintiff to prove that the product's risks could have been reduced by a "reasonable alternative design."[291] Thus, mere proof that a product's risks outweighed its utility will not be sufficient to impose liability. The third type of defect, informational defect, is governed by a negligence standard.[292]

The initial question is this: Why impose strict liability on so-called manufacturing defects but not design or informational defects? The Reporters enumerate seven policy justifications for this dichotomy: (1) strict liability will encourage greater investment in safety; (2) internalization of manufacturing defect costs will provide consumers with the knowledge needed to make rational purchasing decisions; (3) lower litigation costs; (4) the difficulty of proving negligence; (5) the failure of a product with such a defect to comport with consumer expectations; (6) the superior knowledge of risks by the manufacturer imposes non-reciprocal risks on the consumer; and (7) risk spreading.[293]

These are sound reasons indeed for adopting a strict liability regime. What the Reporters fail to point out, however, is that these policy justifications are equally applicable to design and informational defect litigation. Further, when one considers that the distinction between manufacturing, design, and informational defects is tenuous at best, the desirability of extending strict liability to all products cases is compelling.

Consider the following hypothetical, provided by the Reporters as an illustration of a so-called manufacturing defect:

> Jack purchased a bottle of AAA Champagne from the BBB Liquor Mart. The champagne was bottled by AAA Inc. utilizing bottles manufactured by the CCC Glass Co. While Jack was opening the bottle it suddenly exploded, causing disfiguring cuts to his face. Expert testimony establishes that the bottle contained a manufacturing defect and could not withstand the pressure of the carbonization of the champagne. Both AAA and CCC utilize the best quality control techniques available in their manufacturing process. The defect in the bottle was latent and could not reasonably have been discovered by BBB. AAA, BBB, and CCC are subject to liability

289. *See id.* § 3, at 80.
290. *See id.* § 2(b), at 9; *see also id.* § 2 cmt. c, at 15.
291. *Id.* § 2(b), at 9.
292. *See id.* § 2(c), at 9-10; *see also id.* § 2 cmt. f, at 24.
293. *See id.* § 2 cmt. a, at 10-14.

> even though reasonable care was exercised in the preparation and marketing of the defective bottle of Champagne.[294]

If one steps back and views this hypothetical with a critical eye, it is easy to characterize it as an illustration of a so-called design defect. Rather than immediately pigeonholding the bottle's frailty as a failure to conform to the manufacturer's *ideal* design, it is just as reasonable to contend that the frail bottle nonetheless conformed to the manufacturer's *intended* design because the manufacturer's conscious quality control decisions invariably contemplated that one out of every *X* bottles would be frail. Thus, since the frail bottle arguably conformed to the manufacturer's intended design, it contained not a manufacturing defect, but a design defect,[295] albeit one that manifests itself only aberrationally.

But assuming arguendo that the distinction between manufacturing, design, and informational defects is valid, what justifications do the Reporters offer for testing them so differently? Comment b to proposed section 2 offers five justifications: (1) design defects cannot be defined in the same manner as manufacturing defects; (2) consumers are the "best risk minimizers" in the design defect situation, thereby necessitating a balancing of risks and utilities of the product before liability is imposed; (3) design safety decisions are not as consciously made as quality control (i.e., manufacturing) decisions; (4) inability to obtain insurance coverage if liability is imposed for unforeseeable risks associated with design defects; and (5) fairness to the manufacturer, who has a right "to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform."[296]

1. Criticisms of the Tripartite Defect Paradigm

These arguments deserve to be closely examined. First, the argument that design defects cannot be defined using a consumer expectations test is unsupportable when one considers that the alternative test proposed, the risk-utility test, is far more difficult for a jury to understand and effectively employ. A reasonable juror inherently understands a reasonable consumer's expectations concerning a product, but may well not be able to balance unquantifiable risks against unquantifiable benefits. The real beef with the consumer expectations test is not that it is unworkable but that it is tantamount to causative liability.[297]

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294. *Id.* § 2 cmt. b, illus. 1, at 14-15.

295. *See id.* § 2(a), at 9 (describing manufacturing defect as a "depart[ure] from [the product's] *intended* design . . . .") (emphasis added).

296. *See id.* § 2 cmt. a, at 11-13.

297. *See supra* notes 9-11 and accompanying text.

Indeed, the fact that the Reporters have included consumer expectations as one factor to be considered in a design's risk-utility balance[298] implicitly acknowledges that consumer expectations can be discerned. Why the Reporters do not confess their true reason for rejecting the consumer expectations test is unclear. Perhaps condemning the test as unworkable would simply raise fewer eyebrows than confessing a distaste for causative liability in design defect cases while simultaneously employing it in manufacturing defect cases. Ironically, the preferred substitute for consumer expectations— risk-utility—was considered by the Reporters in a 1991 law review article to be "unadjudicable" and "ask[ing] more of courts than they can deliver."[299] The proposed *Restatement (Third)* represents an abrupt about-face, wholeheartedly endorsing the risk-utility test as "necessary" in design defect cases.[300]

Why the intellectual flip-flop? Perhaps one motivation is the addition of a requirement that design defect plaintiffs prove a reasonable alternative design.[301] If no feasible alternative design exists, the argument goes, imposing liability is tantamount to a judicial ban of the entire product category.[302] The response to this argument is that imposition of liability is never analogous to banning a product design. The manufacturer is always free to continue marketing the design, although he will be forced to internalize the costs of those injuries for which the consumer successfully litigates or reaches settlement. Of course, most injured consumers will never initiate litigation or seek compensation, particularly if the injury is minor and the consumer has medical insurance.[303] For example, a 1991 report conducted by the RAND Institute for Civil Justice found that of those consumers claiming to have been injured by a product, only nine percent even considered filing suit, and only one percent actually hired an attorney for advice.[304] Similarly, a study by the Consumer Product Safety Commission found that fewer than three percent of consumers injured by products ever filed a claim to seek compensation.[305] Even assuming that consumers injured by design defects file lawsuits, their likelihood of winning is, on average, only thirty-five to forty percent.[306]

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298. *See* Tentative Draft, *supra* note 26, § 2 cmt. e, at 23-24.

299. Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1305.

300. *See* Tentative Draft, *supra* note 26, § 2 cmt. a, at 11.

301. *See id.* § 2(b), at 9; *see also* Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1299, 1308 n.164.

302. *See* Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1299-1300, 1308 n.164.

303. *See* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 109-20 (1991).

304. *See* 1 ENTERPRISE RESPONSIBILITY, *supra* note 89, at 269.

305. *See id.* at 399.

306. *See* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY FINAL REPORT, U.S.

Thus, imposing liability for a design defect by one court in one case is *not* tantamount to a ban on a product design. Rather, it is a determination that as between the plaintiff and the defendant at bar, the defendant should bear legal responsibility for the harm caused by the product, regardless of the existence of feasible design alternatives. Manufacturers who must bear legal responsibility for defective designs may well choose to continue marketing the product. They may be able to absorb the expected liability costs and continue to operate their businesses profitably.

The degree of harm that normally results from the defect likely will be a significant factor in determining whether a defectively designed product remains on the market. If the degree of harm normally resulting from the defect is high, injured consumers will bring suit more often, and any compensation they receive will be commensurately high. Thus, a manufacturer who markets a defectively designed product with the potential for inflicting grievous harm may find it more profitable to cease production. This is not an unreasonable decision for the courts to foist upon the manufacturer of such a product, and, in the end, it is the marketplace that ultimately drives the manufacturer's decision, not the courts.

The second reason given by the Reporters of the proposed *Restatement (Third) of Torts* for differentiating between manufacturing and design defects is that consumers are the "best risk minimizers" in the design defect situation.[307] The basic argument is that remedying many design defects is so costly, either in aesthetic, product usefulness, or pure monetary terms, that consumers can more cheaply prevent injuries than the manufacturer.[308] But how is this so? How can the average consumer prevent being harmed by a defectively designed product? Presumably, consumers could exercise greater care in the use and selection of products. If, however, a negligence regime is imposed on design defects, some harms caused by the product will not be internalized, the cost of the product will not accurately reflect the product's risks, and the consumer will not have the information necessary to select carefully. Thus, the argument must be based upon the theory that

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DEP'T OF COMMERCE II-54 (1977) (plaintiff success rate of 51% in federal and state trial and appellate courts in eight states surveyed from 1965 to 1976); LANDES & POSNER, *supra* note 29, at 303, 306 (plaintiff success rate of 38.95% in federal appellate courts and 34% in state trial courts from Jan. 1982 - Nov. 1984); Theodore Eisenberg & James A. Henderson Jr., *Inside the Quiet Revolution in Products Liability,* 39 UCLA L. REV. 731, 741 (1992) (39% plaintiff success rate in 1989); James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change,* 37 UCLA L. REV. 479, 545 (1990) (plaintiff success rate of 32.5% in 1987).

307. *See* Tentative Draft, *supra* note 26, § 2 cmt. a, at 12.

308. *Id.* "Many risks can be eliminated only by excessively sacrificing product features that make the products useful and desirable. For such risks, users and consumers are the best risk minimizers." *Id.* at 11-12.

risk can be more cheaply avoided if plaintiffs exercise greater care in *using* products.

This argument is valid only to the extent that a given jurisdiction does not take a plaintiff's misconduct into account in determining a product manufacturer's liability. In the vast majority of jurisdictions, foreseeable plaintiff misuse,[309] modification,[310] or contributory negligence[311] will reduce or bar recovery. Thus, to the extent that a plaintiff's own carelessness contributes to her harm, she generally will not be permitted to recover, providing a built-in incentive to use products with care. Beyond the economic incentives, however, lies the strongest incentive for a consumer to use a product with care: the prospect of personal injury. No doubt the overwhelming majority of consumers consider this possibility when contemplating the degree of care required in using a product.

If one agrees that the current legal regimes and the desire to avoid injury generally provide an appropriate incentive for the reasonable consumer to use products with care, how can it be that imposing liability on consumers will reduce risks more cheaply than imposing liability on manufacturers? After all, in the vast majority of design and informational defect situations, the design defect creates a latent danger, such as an excessively porous metal support, inadequate crash protection, inadequate flame retardant, or carcinogenic propensity. These are just a few examples of defects that consumers are unable to detect and unable to avoid, at *any* cost. Because these risks are so often nonreciprocal, strict liability makes more sense than a negligence regime. Indeed, the most spectacular products cases of recent years have involved latent defects: asbestos,[312] toxic shock syndrome,[313] the Dalkon Shield intrauterine device,[314] DES,[315] silicone gel breast implants,[316] and the Ford Pinto.[317] How does imposing liability on the

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309. *See, e.g.*, Dugan v. Sears, Roebuck & Co., 454 N.E.2d 64 (Ill. App. Ct. 1983).

310. *See, e.g.*, Anderson v. Dreis & Krump Mfg. Corp., 739 P.2d 1177 (Wash. Ct. App. 1987); Robinson v. Reed-Prentice Div., Package Mach. Co., 403 N.E.2d 440 (N.Y. 1980).

311. *See, e.g.*, Parris v. M.A. Bruder & Sons, Inc., 261 F. Supp. 406 (E.D. Pa. 1966); Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978).

312. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1335-40 (5th Cir. 1985) (discussing nature and scope of asbestos litigation), *cert. denied*, 478 U.S. 1022 (1986); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

313. *See, e.g.*, O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

314. *See, e.g.*, Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) (en banc); Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987).

315. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

316. *See, e.g.*, Toole v. McClintock, 778 F. Supp. 1543 (M.D. Ala. 1991).

317. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

users of these products more cheaply minimize risk? Indeed, how can risk be minimized at all by users of such products if they are not even aware of the risks? In such latent defect situations, the user can minimize risk only by avoiding the product altogether, a very costly way to avoid risk, both in terms of macroeconomics and individual freedom.

A third reason proferred by the *Restatement (Third)* Reporters for treating design and informational defects differently from manufacturing defects is that "[t]he element of deliberation in setting appropriate levels of design safety cannot be analogized to the settings of levels of quality control by the manufacturer."[318] To begin with, quality control is merely a subset of overall design safety. A manufacturer makes conscious decisions about product design—what materials to use, what the size and cost of the product should be, what machines will be needed to assemble it, how many operators will be employed and in what capacity, and how much deviation from ideal specifications will be tolerated. All of these considerations are part of a product's overall design, and all are deliberately determined.

To be sure, a design will possess risks that cannot be foreseen by a reasonable manufacturer. But neither can these risks be foreseen by the product user whose knowledge is undoubtedly inferior to that of the manufacturer. Thus, given that accidents happen and that accidents cannot be foreseen, who should bear legal responsibility for them? Short of socialization of product-related injuries via a no-fault nonjudicial compensation scheme, two parties may bear the ultimate responsibility: the manufacturer with superior knowledge who placed the product in the stream of commerce for profit, or the consumer with inferior knowledge who relied on the product's implied warranty of safety. Between the two, the manufacturer is the more culpable party to whom legal responsibility should attach.

The fourth argument put forth for judging manufacturing and design defects by a different legal standard is that imposing strict liability for design defects would render product liability insurance unobtainable. The insurability of a risk undoubtedly hinges upon the ability to accurately estimate the risk. The less accurately a risk can be estimated, the greater the risk assumed by the insurer and the higher the premium will be. Critics of strict liability for design defects argue that because such defects are often unforeseeable, the risks are unpredictable and incapable of accurate estimation. The concern is not really that liability insurance for design defects would be unobtainable in a strict liability regime but that it would be unaffordable.

First, it should be noted that, as a function of tort law, the products liability insurance crisis of the 1980s has passed, if it ever existed at all. Most observers seem to agree that it was precipitated not by changes in

318. *See* Tentative Draft, *supra* note 26, § 2 cmt. a, at 13.

legal doctrine, but by normal underwriting cycles.[319] Second, the foreseeability of risk is in the eyes of the beholder. The predictability of risk is dependent upon the amount of time and money a manufacturer is willing to invest in a given product. Insurers are aware of the level of investment manufacturers have made in the design of products. While insurers may not be able to predict with complete accuracy the risks inherent in a given product design, they can certainly provide a calculated and educated estimate in most instances, which is precisely what insurers are in the business of doing. At a minimum, the resulting degree of harm is generally predictable, whether design or manufacturing defects are involved.

If insurers determine that the risk is too unpredictable, they will either refuse to insure the product or will offer insurance at a correspondingly high price. The result will be that the manufacturer will either be forced to self-insure, pay the high premiums, or discontinue the product. From a societal point of view, this is a desirable consequence. Products that harbor unknown risks with high potential for harm should either not be placed in the stream of commerce or should at least be priced so as to inform consumers of their risks. Manufacturers who sell such risky products should do so at their peril.

The choices are simple: manufacturers can compensate injured victims, victims can go uncompensated, or injured victims can be compensated by social programs. The insurability argument is nothing more than a straw man designed to distract courts and academics from having to make this fundamental choice. Whether the victim's injury is due to a design or manufacturing defect and whether the compensation comes from an insurer or some other source is irrelevant.

The final reason offered by the Reporters of the proposed *Restatement (Third)* for differentiating between manufacturing and design defects is that it would be unfair to judge a manufacturer by a standard other than reasonableness.[320] This argument is rather easy to dismiss because it is hypocritical: under the proposal the reasonableness of a manufacturer's conduct is irrevelant in manufacturing defect litigation.[321] Although it is apparently quite fair to disregard reasonableness in manufacturing defect cases, are we to believe that it is somehow unfair to disregard reasonableness in the design defect cases?

The essence of causative liability, after all, is not reasonableness of the defendant's conduct but assignment of responsibility for harm. If *X* causes harm to *Y*, causative liability focuses not on the reasonableness of *X*'s

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319. *See* 1 ENTERPRISE RESPONSIBILITY, *supra* note 89, at 12, 271-72; 68 A.L.I. PROC. 21 (1991) (remarks of Professor Paul Weiler). *See generally* David J. Nye & Donald G. Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal,* 41 VAND. L. REV. 909 (1988) (examining trends in liability insurance payments from 1975-86).

320. *See* Tentative Draft, *supra* note 26, § 2 cmt. a, at 13.

321. *See id.* § 2(a).

behavior, but upon assigning responsibility for *Y*'s harm,[322] and *X* is therefore legally at fault. *Y* does not care whether *X* acted with or without prudence. All *Y* knows is that *X* caused him harm and should be held legally responsible. If one insists on clinging to reasonableness as a legal standard, causative liability can be said to embrace it because it proclaims that when *X* acts in a manner that causes harm, he has acted "unreasonably" in the eyes of the law.

2. Foreseeability, State of the Art, and the Scientifically Unknown

The proposed revisions would impose, as a prerequisite for legal liability, the foreseeability of the risk of harm posed by a design or informational defect.[323] No similar foreseeability standard is imposed for manufacturing defects.[324] Strangely, although the language clearly requires only foreseeability of *harm*, the comments cryptically state that liability will be imposed "only when the product is put to *uses* that it is reasonable to expect a seller to design or warn against foreseeable *use*."[325] The proposal seems to require the plaintiff to prove both foreseeability of harm and foreseeability of use, something the majority of courts today do not require.[326]

Interestingly, the comments to the proposal loosen this stringent foreseeability requirement for so-called mechanical products.[327] For these products, a plaintiff would be required only to prove foreseeable use, which would permit the trier of fact to infer foreseeable harm.[328] Nonmechanical products (presumably, inter alia, drugs and toxic chemicals) could be

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322. *Cf.* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 116 (La. 1986) ("The underlying reason for . . . strict liability is that the person to whom society allots the supervision, care or guardianship (custody) of the risk-creating person or thing should bear the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk."); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 549 (N.J. 1982) ("We impose strict liability because it is unfair for the distributors of a defective product not to compensate its victims. As between those innocent victims and the distributors, it is the distributors—and the public which consumes their products—which should bear the unforeseen costs of the product.").

323. *See* Tentative Draft, *supra* note 26, § 2(b)-(c), at 9-10.

324. *See id.* § 2(a), at 9.

325. *Id.* § 2 cmt. i, at 28 (emphasis added).

326. *See, e.g.*, Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 355 (Md. 1985) (Foreseeability of use carries with it automatic foreseeability of harm.); *see also* Richelman v. Kewanee Mach. & Conveyor Co., 375 N.E.2d 885, 888-89 (Ill. App. Ct. 1978) (Foreseeability of harm is all that is required.); Moran v. Faberge, Inc., 332 A.2d 11, 20 (Md. 1975) (same); *cf.* Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 87-88 (4th Cir. 1962) (Foreseeability of use carries with it automatic foreseeability of harm.).

327. *See* Tentative Draft, *supra* note 26, § 2 cmt. i, at 29.

328. *Id.*

deemed defectively designed only upon proof of both foreseeable use *and* foreseeable harm. Although the comments explicitly refer to this dual-foreseeability burden in the context of informational defects, a fair implication from the brief discussion of the issue is that it was intended to be extended to design cases as well.[329]

By requiring a plaintiff injured by a nonmechanical product to prove foreseeability of harm, the proposed *Restatement (Third)* distances itself from strict liability, the chief characteristic of which is imputed knowledge of harm.[330] Indeed, as the Supreme Court of California noted, "strict liability as to design defects is virtually a myth" unless knowledge of unforeseeable harm is imputed to the manufacturer.[331] The Reporters of the *Restatement (Third)* do not claim to be endorsing strict liability for design defects; quite the contrary: they openly acknowledge that they advocate a negligence regime.[332] But they also claim that their proposals *restate* current design defect law.[333] This is not true. Courts that have adopted section 402A of the *Restatement (Second) of Torts*[334] have created a hybrid between pure strict (i.e., causative) liability and pure negligence by imputing knowledge of harm to the manufacturer (a strict liability characteristic) and then asking whether the omniscient manufacturer acted reasonably in placing the product in the stream of commerce (a negligence test). Thus, the current majority view on design defects is a kind of strict negligence in which reasonableness of conduct is judged from the perspective of an omniscient manufacturer.

The proposed *Restatement (Third)*, by refusing to impute knowledge of harm, is a giant step backwards from current law. It is a descent from strict negligence to simple negligence and is therefore not a true "restatement" of current design defect law. This dramatic change was discovered by one alert A.L.I. member during the recent discussions on the 1991 A.L.I. enterprise liability study, which also advocated a return to a negligence regime:

> In calling the strict liability design defects test applied in America today a negligence standard, I think the Reporters have made a serious error,

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329. *See id.*

330. *See* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036 (Or. 1974); *see also* Dart v. Wiebe Mfg., 709 P.2d 876, 881 (Ariz. 1985) (en banc); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 117 (La. 1986); Feldman v. Lederle Lab., 479 A.2d 374, 385 (N.J. 1984), *cert. denied*, 112 S. Ct. 3027 (1992). *See generally* W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 835 (1973).

331. Keeton, *supra* note 330, at 39.

332. *See* Henderson & Twerski, *Stargazing*, *supra* note 286, at 1334.

333. *See* Henderson & Twerski, *Proposed Revision*, *supra* note 269, at 1546; Henderson & Twerski, *New Restatement*, *supra* note 276, at 1261.

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

> because in a number of reports, a majority have imputed knowledge of risk . . . . By suggesting that the [current] test for design defect is a negligence test, you are missing that very important point.[335]

The proposal appears to retreat from imputed knowledge only for nonmechanical products.[336] Although the term "nonmechanical" is not defined, the comments intimate that it would encompass such things as prescription drugs and toxic chemicals.[337] However, the term is sufficiently broad to also encompass over-the-counter drugs, cosmetics, soap, shoes, clothing, kitchen utensils, asbestos, furniture, hair dye, deodorant, toothpaste, contact lenses, furniture polish, coat hangers, tampons, IUDs, and household cleaning products, just to name a few. If one takes literally the term "nonmechanical product," the proposal's retreat from the use of imputed knowledge is much more significant than the comments reveal.

In their quest to provide what amounts to a development risks defense for prescription drugs and toxic chemicals, the Reporters have deprived plaintiffs injured by a wide array of products of the benefit of imputed knowledge that they now enjoy.[338] A liability regime which requires the plaintiff to prove foreseeability of harm at the time a product is marketed is a regime of pure negligence. Thus, the proposed revisions provide nonmechanical products with a development risks defense whereby no liability is imposed if the plaintiff cannot prove the supplier could foresee the harm. A supplier of furniture polish, for example, would not be liable for design or informational defects unless the plaintiff could prove that the supplier could foresee harm at the time the product was marketed.

The proffered justification for allowing a development risks defense for nonmechanical products is that "[t]he harms that result from unforeseeable risks—for example, in the human body's reaction to a new drug, medical device, or chemical—are not a basis of liability."[339] This justification is clearly circular: liability for unforeseeable harms cannot be imposed because unforeseeable harms are not a basis of liability. The other proffered justifications—the unavailability of insurance for unforeseeable risks and fairness—have already been addressed and found lacking.[340]

Curiously, the Reporters acknowledge that imposing strict liability on design defects "might foster increased manufacturer investment in safe-

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335. 68 A.L.I. PROC. 47 (1991) (remarks of Mr. Malcolm E. Wheeler).

336. *See* Tentative Draft, *supra* note 26, § 2 cmt. i, at 29.

337. *See id.*

338. Development risks are those risks which are scientifically undiscoverable by reasonable efforts at the time a product is placed on the market. *See* Stapleton, *supra* note 89, at 411; *see also* Dr. Hans C. Taschner, *European Initiatives: The European Communities, in* COMPARATIVE PRODUCT LIABILITY 10-12 (C.J. Miller ed., 1986).

339. *See* Tentative Draft, *supra* note 26, § 2 cmt. i, at 29.

340. *See supra* notes 319-21 and accompanying text.

ty."[341] Yet they then proclaim such investment to be merely "a matter of guesswork."[342] The incentive to design safe products provided by a strict liability regime is not speculative; it is a matter of common sense. Manufacturers who know they will have to compensate all users injured by their products will have a strong incentive to make their products as safe as possible. They will likely invest more, not less, in research and development to avoid causing harm. They will strive to foresee as much as possible to ward off future liability. In a negligence regime, by contrast, the product manufacturer will invest only that amount in safety which is necessary to bring him within the realm of reasonableness; he has no incentive to discover the currently unforeseen because he will not be liable for it.

The most common argument against imposing liability for unforeseeable harm is that it seems to impose no-fault liability upon product manufacturers. There are two counterarguments to this proposition. First, tort law is not uniformly based upon the reasonableness definition of "fault," as is evidenced, inter alia, by the doctrines of abnormally dangerous activities,[343] vicarious liability,[344] defamation,[345] and nuisance.[346] Indeed, because negligence measures fault from the perspective of the hypothetical reasonable person, it implicitly imposes absolute liability on the individual whose character or intelligence causes him to fall below this normative standard.

Second, as was discussed at the beginning of this Article, fault was historically viewed not as a declaration of moral culpability, but one of causal responsibility. We should hold a supplier of a defectively designed product liable for unforeseeable harm, not because he possesses culpable mens rea, but because society has determined that he is to be held legally at fault for marketing a product that resulted in harm to users. Between the

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341. *See* Tentative Draft, *supra* note 26, § 2 cmt. a, at 13.

342. *Id.*

343. *See* RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1977).

344. *See, e.g.*, Wood v. Central Ark. Milk Producers Ass'n, 349 S.W.2d 811 (Ark. 1961) (holding employer vicariously liable for employee's act in furtherance of business despite explicit prohibition by employer of such conduct); Jefferson v. Rose Oil Co., 232 So. 2d 895 (La. Ct. App. 1970) (employer held vicariously liable for intentional shooting by employee who was attempting to collect payment from customer).

345. While defamation is a strict liability offense at common law, the First Amendment has been interpreted as circumscribing the imposition of strict liability in certain contexts. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

346. *See, e.g.*, Valley Poultry Farms, Inc. v. Preece, 406 S.W.2d 413 (Ky. Ct. App. 1966) (affirming nuisance damage award against poultry raiser despite conformance to highest standards of care); Meat Producers, Inc. v. McFarland, 476 S.W.2d 406 (Tex. Ct. App. 1972) (holding that certain enterprises must internalize costs of harm inflicted on neighbors irrespective of the exercise of due care).

supplier and the consumer, the supplier is more blameworthy than the consumer and must shoulder legal responsibility for the harm. Thus, causative liability and fault are not mutually exclusive concepts. Indeed, this is precisely the rationale that has long been accepted for manufacturing defects in which foreseeability of harm is irrelevant. There is no compelling reason why foreseeability of harm should be considered dispensable for so-called manufacturing defects yet indispensable for so-called design and informational defects. Such blatant lack of uniformity is unsupportable.

3. The "Special" Case of Prescription Drugs and Medical Devices

(a) Background

Comment k of the current section 402A states:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. . . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be 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 but apparently reasonable risk.[347]

This language has been the subject of great disagreement. One view is that comment k was intended to preclude design defect strict liability for some[348] or all[349] prescription drugs. This intent is not apparent from either the language of comment k itself or from historical sources. During the A.L.I. floor discussion preceding the adoption of comment k, the drafter of the comment, Dean Prosser, clearly limited his references to "experimental" drugs only.[350] More striking, however, is the fact that a formal motion was put to the A.L.I. membership to exclude all prescription drugs from the black letter of section 402A, but it failed.[351] Furthermore, a

347. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

348. *See, e.g.*, Feldman v. Lederle Lab., 479 A.2d 374, 383 (N.J. 1984) (Comment k precludes design defect strict liability only for prescription drugs determined to be unavoidably unsafe on a case-by-case basis.), *cert. denied*, 112 S. Ct. 3027 (1992).

349. *See, e.g.*, Brown v. Superior Court, 751 P.2d 470 (Cal. 1988) (comment k precludes design defect strict liability for all prescription drugs).

350. *See* 41 A.L.I. PROC. 359-60 (1964).

351. 38 A.L.I. PROC. 97 (1961).

motion to declare, in the comments to section 402A, that all prescription drugs were intended to be excluded also failed.[352]

The reason for rejecting these attempts to provide a blanket exemption from strict liability for prescription drugs was expressed by one A.L.I. member this way:

> Now, I think the proposal being made here [to exempt all prescription drugs] would result in a situation in which a plaintiff, although he could show that there was a defect and that the condition was unreasonably dangerous, still could not recover *merely because he happened to be dealing with a drug,* and I think that would be outrageous. I respectfully submit that the fact that we are dealing with drugs, something that a layman doesn't know anything about, is all the more reason why the consumer who uses the drug needs protection of this kind. *The fact that it is a drug makes the need for this rule all the more imperative.*[353]

Thus, the courts that have interpreted comment k as being intended to prohibit the imposition of strict liability for prescription drug design defects are simply wrong. The A.L.I. membership considered such an exemption and unequivocally rejected it.

The Reporters of the *Restatement (Third)* clearly have a different view. Not only do they believe prescription drugs should enjoy immunity from strict liability design litigation, but they also believe immunity should extend to prohibit negligent design litigation as well.[354] Thus, the Reporters would prefer that plaintiffs injured by defectively designed prescription drugs be entirely precluded from recovery because they find the risk-utility test "unworkable."[355] Strangely, the risk-utility test is touted as more "certain" and "structured" than the consumer expectations test in non drug-related design cases.[356] Yet, as applied to drug-related cases—whether based on negligence or strict liability—the risk-utility test suddenly loses respectability. Considering that the risk-utility test is only a slight mutation of the negligence test, $B < PL$, the Reporters' condemnation of risk-utility condemns the entire law of negligence.

In various law review articles, the Reporters express their reasons for prohibiting prescription drug design litigation. In one article, they proclaim that drug design litigation constitutes "second-guessing the Food and Drug Administration."[357] Thus, the Reporters advocate complete immunity for prescription drugs and medical devices that comply with FDA regulations. If taken to its logical extreme, this argument would prohibit litigation for

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352. *Id.* at 97-98.

353. *Id.* at 97 (remarks by Mr. Farage) (emphasis added).

354. *See* Henderson & Twerski, *Proposed Revision*, *supra* note 269, at 1544.

355. *Id.* at 1544-45.

356. *Id.* at 1534.

357. Henderson & Twerski, *New Restatement*, *supra* note 276, at 1266.

any product regulated by the FDA, including food, cosmetics, animal drugs, medical devices, and over-the-counter drugs. And why stop with the FDA? Why not also preclude product design litigation for products regulated by other government agencies as well? And why stop with design defect litigation? Why not also preclude manufacturing defect litigation? Or informational defect litigation since advertisements are regulated by the Federal Trade Commission? The slope is slippery indeed. Are consumers willing to give up their right to litigate injuries simply because an underfunded and overworked federal agency has issued regulations? Clearly the answer is "no." Because of the significant implications for cutting off access to the courts, any government compliance defense, no matter how circumscribed, is more appropriately a decision to be made by the legislative, not the judicial, branch.

Another reason profferred by the Reporters for providing design defect immunity for prescription drug manufacturers is the so-called learned intermediary doctrine. They state that "the overwhelming majority of jurisdictions have taken the position that a court is not to substitute its judgment for that of the prescribing physician regarding the *design* of a prescription drug."[358] This is an inaccurate characterization of the learned intermediary doctrine. The learned intermediary doctrine simply holds that the responsibility for providing adequate warnings about a drug more appropriately rests with the prescribing physician rather than the drug manufacturer.[359] The manufacturer's duty to warn is limited to adequately advising the prescribing physician.[360] Thus, the learned intermediary doctrine has no relevance to design litigation at all. No one seriously doubts that it is the drug manufacturer, not the physician, who must bear responsibility for drug design.

(b) The "One Patient" Rule

Fortunately for consumers, the Reporters have not incorporated all of their wish list for prescription drugs into the proposed *Restatement (Third)*. Nonetheless, the proposal calls for a substantial change from current law. Essentially, the proposal would limit a prescription drug or a medical device manufacturer's liability to manufacturing defects, negligent failure to warn, and an extremely limited liability for negligent design.[361] The bottom line

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358. Henderson & Twerski, *Proposed Revision*, *supra* note 269, at 1522 (emphasis added).

359. *See, e.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); McEwen v. Ortho Pharmaceutical Corp., 528 P.2d 522, 529 (Or. 1974).

360. *Reyes*, 498 F.2d at 1276; *McEwen*, 528 P.2d at 529.

361. *See* Tentative Draft, *supra* note 26, § 4(b), at 88-89.

is that under the new proposal, "liability is likely to be imposed only under unusual circumstances."[362]

Extension of this broad immunity to medical devices is enigmatic. The Reporters' comments proclaim that both medical devices and prescription drugs are currently judged by negligence standards, yet they cite only eight decisions from six jurisdictions as authority—clearly not a majority position.[363] Given the ubiquity of medical devices in current products liability litigation, the proposed *Restatement (Third)* would effectively squelch the chances of recovery for those harmed by medical devices such as silicone breast implants, the Bjork-Shiley heart valve, and the Dalkon Shield. More careful consideration is required before medical devices are added to a list of immunized product manufacturers.

One justification recited for immunizing prescription drug manufacturers from design litigation is that they contain unforeseeable risks due to interaction with the mysterious human body. Even assuming, arguendo, that this is a legitimate concern, one must ponder whether this justification holds true for medical devices. The malfunction of the Bjork-Shiley heart valve, for example, has nothing to do with unforeseeable consequences of human implantation. Rather, it is simply a case of a design inadequacy that caused a life-threatening strut fracture in the valve.[364] Similarly, design defects in medical devices such as insulin infusion pumps, cardiac monitors and defibrillators, balloon catheters, and lithotripters have the potential for enormous harm and are as foreseeable as a defect in an automobile engine, punch press, or electric hair dryer. Medical devices are simply mechanical products which monitor or assist bodily functions. When they are defective, the resulting harm is generally no more due to an unforeseeable mysterious interaction with the human body than is the punch press which mutilates its user's hand. Hence, the liability standard for medical devices should be no different from any other product.

Along the same lines, one must wonder why the liability immunization line is drawn at prescription drugs. If the argument is based upon unforeseeable consequences of interaction with the human body, is it not true that over-the-counter (OTC) drugs may have equally unforeseeable hazards? Indeed, the line between many prescription and non-prescription drugs is arbitrary. Anyone who watches television can testify to the fact that many OTC drugs are former prescription drugs which are "now

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362. *Id.* § 4 cmt. f, at 95.

363. *See id.* § 4, Reporters' Notes to cmt. d.

364. *See FDA and the Medical Device Industry*, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy & Commerce, H. Rep. No. 101-27, 101st Cong., 2d Sess. 5 (1990), *microformed on* CIS No. 90-H361-51 (Congressional Info. Serv.); *see also Device Safety*, Hearings Before the Subcommittee on Health and the Environment of the Committee on Energy & Commerce, H. Rep. No. 101-157, 101st Cong., 1st Sess. 57-68 (1989), *microformed on* CIS No. 91-H361-7 (Congressional Info. Serv.).

available without a prescription." Why is it that the manufacturer of a drug must face dramatically expanded liability when he decides to obtain FDA approval to market it over-the-counter? Does not such a double standard provide a strong disincentive for manufacturers to attempt to seek OTC status for their drugs? If so, will this not hurt the economy and consumer freedom by producing fewer OTC drugs from which to choose? If such a liability standard does not provide a disincentive to seek OTC classification, does this not indicate that the difference between negligence and strict liability is not so severe that it would distort normal marketplace decision-making?

The potential for broadening the immunity from design defect liability beyond prescription drugs is enormous. Many modern products interact with the human body and pose hazards which are unforeseen, particularly if long-term exposure is anticipated. Pesticides, cosmetics, processed foods, and OTC drugs are all arguably plagued by unforeseen risks. Yet, surely no one would advocate that the manufacturers of these products be immunized from design defect liability. By proposing to immunize prescription drug and medical device manufacturers, the Reporters of the *Restatement (Third) of Torts* have opened a Pandora's box. Logic and fairness dictate an all-or-nothing choice: either all such products should be immunized from design defect liability, or none should be. Given that the consumers of such products face highly nonreciprocal risks and that providing stringent incentives to safety is particularly desirable in this context, a causative liability regime is preferable to a negligence regime.

It must also be noted, however, that the proposed *Restatement (Third)* is not so generous as to permit a negligence regime for prescription drug and medical device design defects. The liability standard for design defects is a very stingy mutation of negligence, creating essentially a "one patient rule." Under the one patient rule, a manufacturer of a prescription drug or medical device cannot be liable—even if the plaintiff proves the risks outweigh utility—so long as a reasonable medical provider would prescribe the drug or device for "any class of patients."[365] The implications of the rule are clarified in the comments:

> What may be harmful to one patient may be beneficial to another. . . . [A] drug is defectively designed only when it provides *no* net benefit to *any* class of patient. As long as a drug or medical device provides net benefits to *some* persons under *some* circumstances . . . the drug or device manufacturer should simply be required to instruct and warn health care providers of the risks and benefits.[366]

365. *See* Tentative Draft, *supra* note 26, § 4(b)(4), at 89.

366. *Id.* § 4 cmt. b, at 90 (emphasis added).

Thus, if there is *any* patient for whom a reasonable medical provider would deem the drug or device beneficial, all other user patients are precluded from litigating the issue of design defect under negligence or strict liability, "even if it is excessively harmful to [those] patients."[367] The one patient rule is a radical departure from current law. It not only precludes strict design defect liability, but also negligence liability so long as one patient could benefit from the drug or device.

The practical effect of the one patient rule cannot be overstated. Once a drug or medical device enters the market and becomes the drug or device of choice for a group of patients and their (presumably) reasonable physicians, the drug or device can never be declared defective in design, no matter how much harm it inflicts on other users. Some examples may help illuminate the enormity of the rule. If the one patient rule were in effect a few decades ago, Thalidomide users could never have recovered for negligent or strict liability design defect because Thalidomide was prescribed by reasonable medical providers for the treatment of inflammatory skin diseases and leprosy.[368] Likewise, today's victims of silicone gel breast implants would not be able to recover for design defect because reasonable medical providers still provide the implants for certain mastectomy patients.[369] DES victims could not recover because reasonable medical providers prescribed DES for non-pregnancy uses and as a morning-after contraceptive.[370] The list could go on and on. So long as a reasonable medical provider would prescribe the drug or device knowing of the risks at the time of sale,[371] the manufacturer is immune from design liability. Thus, discoveries about the hazards of a drug or device subsequent to time of sale are not relevant to the inquiry. The question is not whether a reasonable medical provider with 20/20 hindsight would prescribe the drug or device to a patient, but whether she would have prescribed it to a patient

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367. *Id.* at 91.

368. *See* Luc Thomas et al., *Successful Treatment of Adult's Langerhans Cell Histiocytosis with Thalidomide: Report of Two Cases and Literature Review*, 129 ARCH. OF DERMATOLOGY 1261 (1993); Andrew A. Skolnick, *Last USPHS Leprosy Hospital Phasing Out; Research Relocating to University*, 267 JAMA 2287 (1992).

369. *See* Marsha F. Goldsmith, *Image of Perfection Once the Goal—Now Some Women Just Seek Damages*, 267 JAMA 2439, 2442 (1992) (noting that the FDA moratorium on silicone gel breast implants still permits limited implantation for mastectomy and augmentation purposes); Donald A. Redelmeier et al., *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 JAMA 72, 74 (1993).

370. *See* Karen A. Bussel, Note, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 684 n.154 (1991) (citing GENA COREA, THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE TREATS WOMEN AS PATIENTS AND PROFESSIONALS 242-52 (1977)); Stephen A. Spitz, *From* Res Ipsa Loquitur *to Diethylstilbestrol: The Unidentified Torfeasor in California*, 65 IND. L.J. 591, 610 (1990).

371. *See* Tentative Draft, *supra* note 26, § 4 cmt. g, at 95 (foreseeability of harm refers to time of sale).

when the plaintiff received it. Notice that using a time of sale test requires implicit condemnation of the plaintiff's physician: the plaintiff can recover only if she can prove that no reasonable provider at that time would have so prescribed; thus, her own physician must be deemed to have acted unreasonably before she can recover. Needless to say, few instances will arise where the prescribing physician will be deemed to have acted unreasonably for prescribing a drug or device that was perfectly legal.

The proposal's failure to employ a time of trial standard for judging the reasonableness of a prescription drug design translates into complete immunity from design defect liability. If the drug or device has been legally placed on the market, undoubtedly a reasonable medical provider will be willing to prescribe it for one or more patients. Thus, under the one patient rule, users who are subsequently harmed—no matter how many or how seriously—will be unable to successfully challenge the design of the drug or device. This is no restatement of current law. It is comment k with a vengeance. It is a draconian departure more appropriately handled by the public legislative process than by a back room poker game played by legal academia.

What rationales are offered for this broad immunity? There appear to be two. First, it is agreed that "manufacturers must have ample discretion to develop useful drugs and devices without their design decisions being subjected to unwarranted judicial review."[372] The underlying current in this argument is that because drugs and devices save or improve our lives, tort law should give manufacturers of such products a little more legal wiggle room. Under this view, normal liability standards (i.e., those standards imposed on all other products) unduly discourage research and development when imposed on prescription drugs or medical devices.

This argument cannot withstand close scrutiny. Many products other than prescription drugs and medical devices save or improve our lives. Life preservers, heaters, processed food, ropes, nuts and bolts, and airbags can save our lives. Yet no one seriously advocates that these products should be immune from design defect liability. Indeed, in many ways modern existence is so dependent upon so many products that our lives literally hang by a thread, or screw, or nut, or wire—or drug or medical device. If design defect liability can be imposed without unduly hampering research and development for these other life-saving products, why not for prescription drugs and medical devices? No one doubts that the prescription drug and medical device industries operate quite profitably and that they are equally capable of shouldering responsibility for harm caused by defective design as are their counterparts who manufacture other essential products.

The second reason proffered for granting special immunity for prescription drugs and medical devices is that "governmental regulatory agencies adequately review new prescription drugs and devices, keeping unreasonably

372. *Id.* § 4 cmt. b, at 91.

dangerous designs off the market."[373] Yet the FDA, the primary agency charged with regulating prescription drugs and medical devices, approved such products as DES, Bendectin, the Dalkon Shield, silicone gel breast implants, the Copper-7 I.U.D., FD & C Red Nos. 2 and 32, the Bjork-Shiley heart valve,[374] and defectively designed cardiac defibrillators,[375] pacemakers,[376] balloon catheters,[377] kidney lithotripters,[378] insulin infusion pumps,[379] microprocessor ventilators,[380] and plasmapheresis equipment.[381] A 1991 report by the Advisory Committee on the FDA recognized that the common perception

> by former Department officials, business and consumer representatives, professional groups, as well as current and former FDA employees, depicted an Agency that is overextended, underfunded, and shackled by bureaucratic constraints. . . . [T]here is genuine concern that if these problems are not squarely addressed, the Agency will be unable to fulfill its vastly increased and critically important responsibilities in the future.[382]

Is this descriptive of an agency capable of keeping defectively designed drugs and devices off the market? Most Americans would not think so, and they certainly would not have sufficient confidence in the FDA to trade away their right to litigate design claims in the speculative hope of promoting greater research and development.

One final aspect of the proposed *Restatement (Third)* treatment of drugs and devices warrants discussion. The proposal rigidly adopts the learned intermediary doctrine and would permit litigation of a negligent failure to warn claim only in limited circumstance: when the manufacturer knew or should have known that no learned intermediary existed.[383] If this

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373. *Id.*

374. *See Compliance of Selected Acts Within the Jurisdiction of the Comm. on Energy & Commerce: Food, Drug, and Related Law*, 101st Cong., 1st Sess. 421-23 (1989), *microformed on* CIS No. 90-H361-51 (Congressional Info. Serv.).

375. *See Medical Device Safety, Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy & Commerce*, 101st Cong., 2d Sess. 92-93 (1990), *microformed on* CIS No. 91-H361-7 (Congressional Info. Serv.) (prepared statement of Richard Kusserow, Inspector General, Dep't of Health & Human Servs.).

376. *Id.* at 93-94.

377. *Id.* at 95.

378. *Id.* at 98-99.

379. *Id.* at 99-100.

380. *Id.* at 100-01.

381. *Id.* at 102-03.

382. FINAL REPORT OF THE ADVISORY COMMITTEE OF THE FOOD AND DRUG ADMINISTRATION, U.S. DEP'T OF HEALTH & HUMAN SERVS. 5-6 (May 1991).

383. *See* Tentative Draft, *supra* note 26, § 4(b)(3), at 88-89.

circumstance exists, the manufacturer could be held liable for negligent, but not strict liability, failure to warn.[384]

The difficulty with the proposal is that it legitimizes the learned intermediary doctrine in a way that denies courts the flexibility to develop a rule of nondelegability as to drug or device warnings. Recent cases have hinted that the learned intermediary doctrine may be anachronistic and that a preferable approach would be to consider the duty to warn nondelegable, incapable of being discharged merely by warning the prescribing physician.[385] While these cases can be characterized as hinging upon the absence of a meaningful learned intermediary because they involve mass immunization programs or oral contraceptives, such characterization is too simplistic. Underlying these cases is arguably a burgeoning policy of nondelegability, a policy that the proposed *Restatement (Third)* would cut off at the knees. The A.L.I. membership should, at a minimum, be cognizant of this possible unwanted side effect.

V. A GLOBAL PERSPECTIVE: CONTINENTAL DRIFT

Ironically, as the United States retreats to a negligence regime for products liability, the rest of the world is drifting toward causative liability. This slow but steady continental drift diffuses the argument that imposing causative liability at home will disadvantage American enterprise in the global marketplace. It should also cause causative liability critics to pause and consider whether a return to negligence will leave American consumers with fewer protections than their international counterparts. A closer examination of the products liability laws of other countries should help provide the global perspective necessary for American law reformers to craft a *Restatement (Third)* to carry the United States into the twenty-first century.

A. The European Community Directive

In 1985, after nine years of heated debate, the Council of European Communities (EC) adopted a formal directive for member states,[386] establishing strict liability for defective products.[387] The Directive bluntly

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384. *See id.* § 4 cmt. d, at 92.

385. *See, e.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65, 70 (Mass.), *cert. denied*, 474 U.S. 920 (1985).

386. There are twelve member states of the European Community: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

387. COUNCIL DIRECTIVE 85/374 OF 25 JULY 1985 ON THE APPROXIMATION OF THE LAWS, REGULATIONS, AND ADMINISTRATIVE PROVISIONS OF THE MEMBER STATES CONCERNING LIABILITY FOR DEFECTIVE PRODUCTS, 1985 O.J. (L210) 29, *reprinted in* JERRY

states, "The producer shall be liable for damage caused by a defect in his product."[388] The plaintiff's prima facie case thus consists of three elements: (1) defect, (2) causation, and (3) harm.[389] Once implemented by member states via authorizing legislation, the Directive would apply to personal or property damage of at least 500 E.C.U.[390] caused by any product placed on the market after adoption.[391]

In many respects, the EC Directive mirrors the current section 402A of the *Restatement (Second) of Torts*.[392] It adopts the concept of defect as a sine qua non to recovery and employs the consumer expectations test by proclaiming:

> 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.[393]

The EC Directive embraces the notion of an implied warranty of safety embodied in the consumer expectations test. However, to what extent European tribunals will faithfully adhere to the consumer expectations test remains unclear. At least one commentator has suggested that, much like their American counterparts, European courts will ignore the explicit language and substitute a negligence-based risk/utility test for design defects.[394] They may be heavily influenced by American decisions, present and future, in this respect.

The Directive differs from the proposed *Restatement (Third)* in a significant way: by explicitly acknowledging the relevance of foreseeable use, it implicitly acknowledges that foreseeability of harm is irrelevant. The proposed American reform, by contrast, explicitly requires proof of foreseeable risk of harm as part of a prima facie design or informational defect case.[395] By acknowledging the irrelevancy of foreseeability of harm, the EC Directive is faithful to the concept of strict liability, the hallmark of which is imputed knowledge of harm.

J. PHILLIPS ET AL., PRODUCTS LIABILITY: CASES, MATERIALS, PROBLEMS at 913-17 (1994) [hereinafter EC Directive].

388. EC Directive, *supra* note 387, at art. 1.
389. *Id.* at art. 4.
390. *Id.* at art. 9. E.C.U. refers to the European Currency Unit.
391. *Id.* at art. 17.
392. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
393. EC Directive, *supra* note 387, at art. 6(1).
394. *See* Stapleton, *supra* note 89, at 405.
395. Tentative Draft, *supra* note 26, § 2(b)-(c), at 9-10.

Acceptance and use of the imputed knowledge standard may, however, be significantly diluted if European courts determine that the language permitting consideration of "the time when the product was put into circulation"[396] precludes imputation of knowledge obtained after the time of marketing. If a time-of-sale imputation emerges as the preferred construction, the EC Directive may well amount to nothing more than a hybrid between negligence and causative liability, in much the same manner as the current section 402A. The time of marketing factor should more appropriately be treated as a permissible, but not a required, factor in determining defectiveness.

In addition to a three-year statute of limitations[397] and a ten-year statute of repose,[398] a producer subject to the EC Directive[399] has available six statutorily prescribed affirmative defenses:

(1) he is not the manufacturer, importer, or supplier;
(2) it is more probable than not that the defect did not exist when he placed the product in the stream of commerce;
(3) he did not manufacture, import, or supply the product for economic purposes;
(4) the defect is *caused by* mandatory compliance with a government regulation;[400]
(5) development risks; or
(6) he is a component manufacturer and the defect lies with the finished design.[401]

The first and third defenses address situations in which the plaintiff has identified the wrong party or a party who does not fall within the ambit of the Directive. The remaining defenses, except for the development risks

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396. *See* EC Directive, *supra* note 387, at art. 6(1)(c).

397. *Id.* at art. 10(1).

398. *Id.* at art. 11.

399. A "producer" is defined as "the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer." *Id.* at art. 3(1). A producer also includes importers, *id.* at art. 3(2), and, if the manufacturer cannot be identified, non-manufacutring suppliers. *Id.* at art. 3(3).

400. This defense does not provide immunity for products which comply with government regulations, but it is limited to those rare situations in which the cause of the harm is directly attributable to the government regulation. In other words, only if the defendant can prove that compliance with the government regulation *caused* the harm will he be immunized. Mere product conformance with government regulations, absent such causal link, is not a recognized defense. In this respect, the defense is analogous to the so-called "government contractor defense" which immunizes a government contractor from tort liability when harm is caused by a design requested and approved by the United States government. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

401. EC Directive, *supra* note 387, at art. 7.

defense, address superceding or intervening causes. Thus, the one defense available under the EC Directive that would not be permissible under a causative liability regime is the defense for development risks.

The Directive's development risks defense specifically states that a manufacturer will not be held liable if "the state of scientific and technical knowledge at the time [the manufacturer] put the product into circulation was not such as to enable the existence of the defect to be discovered."[402] At the outset, it seems plausible that inclusion of the defense indicates that compliance with state-of-the-art, while relevant,[403] is not intended to provide a complete defense. More importantly, the so-called development risks defense is merely an optional defense which member states are free to disallow.[404]

The fact that the development risks defense is only one of two provisions from which the member states are free to derogate[405] belies the intense controversy surrounding its adoption. As discussed above, a development risks defense holds a product manufacturer harmless for injuries which were unknown at the time the product was placed in the stream of commerce. A state-of-the-art defense, by contrast, may exculpate a manufacturer who merely complies with prevaling industry custom. Inclusion of the development risks defense is controversial because it ignores the strict liability concept of imputed knowledge and lessens the manufacturer's incentive to discover latent dangers. In this manner, some have argued that adoption of the development risks defense by member states will transform the EC Directive into "a mere exercise in 'window dressing,'"[406] hypocritical public homage to an impuissant strict liability god.

Despite the intense criticism, the United Kingdom,[407] Germany,[408] and Italy[409] have adopted the development risks defense. The French Consumer

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402. *Id.* at art. 7(e).

403. *See id.* at art. 6(1)(c) (stating that "the time when the product was put into circulation" should be taken into account).

404. *Id.* at art. 15(1)(b).

405. The other optional provision is a maximum damages ceiling for death or personal injury of 70 million E.C.U. *Id.* at art. 16(1).

406. Stapleton, *supra* note 89, at 422.

407. Consumer Protection Act, 1987, ch. 43, § 4(1)(e) Eng., *reprinted in* 39 HALISBURY'S STATUTES OF ENGLAND AND WALES (4th ed. 1988). The Consumer Protection Act became effective March 1988. THE LAW REFORM COMM'N OF AUSTRALIA, REP. NO. 51 AND THE LAW REFORM COMM'N OF VICTORIA, REP. NO. 27, PRODUCT LIABILITY 7 (1989) [hereinafter LAW REFORM COMM'N OF AUSTRALIA].

408. *See* Decree No. 224, art. 6(1)(e) (May 24, 1988) (Italy), *in* EEC STRICT LIABILITY IN 1992: THE NEW PRODUCT LIABILITY RULES 235, 238 (Gianni, Orgoni, Tonucci trans., PLI Litig. & Admin. Practice Course Handbook Series No. 371, 1989). The German implementing statute became effective January 1, 1990. WERNER PFENNIGSTORF, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES 55 (Donald G. Gifford & William M. Richman eds., 1991).

409. *See* Francesco Gianni, *Product Liability Law in Italy*, *in* EEC STRICT LIABILITY IN 1992: THE NEW PRODUCT LIABILITY RULES, at 117, 122 (PLI Litig. & Admin. Practice Course Handbook Series No. 371, 1989).

Law Revision Committee's draft to implement the EC Directive, however, did not include the defense.[410] It is not yet clear how widely the defense ultimately will be enacted. By mid-1995, however, the Council of European Communities must determine whether the defense should be completely eliminated.[411] American trends in this area may be very influential.

B. European Law Beyond the EC Directive

Article Thirteen of the EC Directive makes it clear that pre-existing causes of action are not preempted by the Directive.[412] Thus, the numerous strict liability statutes predating the passage of the Directive will likely remain in effect. A brief survey reveals the breadth of these laws.

Article 1384 of the French Civil Code has been interpreted by the courts to require strict liability for a wide array of products such as bicycles, steam boilers, automobiles, and explosives.[413] The Civil Code of the Netherlands, modeled after the French Civil Code, establishes strict liability for, inter alia, animals, environmental hazards, and contractors.[414] Sweden has enacted statutory strict liability for cattle, railroads, electricity, and aircraft.[415] In addition, it should be noted that a 1978 Swedish law encourages pharmaceutical manufacturers to voluntarily fund a no-fault compensation pool for those injured by drugs.[416] While participation by manufacturers and consumers is voluntary, the participation has been quite high, and consumers dissatisfied with an award can appeal or request arbitration.[417]

Germany, by contrast, enacted a no-fault compensation scheme, called the *Arzneimittelgesetz*, for prescription drugs, in response to the Thalidomide tragedy.[418] Germany also has statutory strict liability for aircraft, motor vehicles, and nuclear plants.[419] Switzerland, although not a member of the European Community, is expected to adopt the EC Directive for products in addition to retaining an extensive statutory strict liability regime for, inter alia,

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410. *See* Genevieve Viney, *The Civil Liability of Manufacturers in French Law*, *in* COMPARATIVE PRODUCT LIABILITY 73, 88 (C.J. Miller ed. & Philip Britton trans., 1986).

411. EC Directive, *supra* note 387, at art. 15(3).

412. *Id.* at art. 13.

413. PFENNIGSTORF, *supra* note 408, at 52.

414. *Id.* at 52, 167.

415. *Id.* at 52.

416. Jan Hellner, *Products Liability in Swedish Law*, *in* COMPARATIVE PRODUCT LIABILITY 127, 133-34 (C.J. Miller ed., 1986).

417. *Id.*

418. *See* PFENNIGSTORF, *supra* note 408, at 56; *see also* Spiros Simitis, *Products Liability: The West-German Approach*, *in* COMPARATIVE PRODUCT LIABILITY 99, 114 (C.J. Miller ed., 1986).

419. PFENNIGSTORF, *supra* note 408, at 51.

aircraft, motor vehicles, electrical installations, explosives storage, nuclear facilities, and water pollution.[420]

C. Beyond Europe

1. Japan

Non-European countries are also drifting toward strict liability for products. For example, while Japan currently follows a negligence regime, it has implemented strict liability for certain activities such as mines, nuclear facilities, and environmental pollution.[421]

Several influential private groups, including the Tokyo Federation of Bar Associations, the Komei-to Party, the Japanese Socialist Party, and an academic organization called the Group of 1990 Private Law Academy, have recently drafted reform proposals to adopt strict liability for products.[422] In addition, three quasi-official advisory groups put forth reform proposals in the waning months of 1993.[423] All of these proposals would adopt the concept of defect as the liability trigger,[424] and at least four would employ the consumer expectations test to define defectiveness.[425]

The Japanese reformers also seem to agree on several provisions which, if ultimately implemented, would place Japan among the strictest of product liability regimes. For example, all of the four major private organization reform proposals would shift the burden onto the product manufacturer to prove a lack of defect or causation.[426] Thus, an injured plaintiff would enjoy a presumption of both defectiveness and causation, resulting in a much lighter prima facie case than in the United States or under the EC Directive. The Group of 1990 proposal is illustrative: "It is presumed that there is a defect on a product when damage occurs by using the product in a reasonably expected manner and if such damage does not usually occur in such use."[427] If plaintiffs can prove that they used the products in a

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420. *Id.* at 51-52.

421. *Id.* at 53; *see also* Susumu Hirano, Comment, *Drafts of the Japanese Strict Product Liability Code: Shall Japanese Manufacturers Also Become the Insurers of Their Products?*, 25 CORNELL INT'L L.J. 643, 643 (1992).

422. Hirano, *supra* note 421, at 644-45.

423. *See* Eugene A. Danaher, *Products Liability Overhaul: Strict Liability Is Coming to Japan*, THE NAT'L L. J., Feb. 7, 1994, at 25 (the quasi-official groups are the Economic Welfare Council, the Hosei Shingkai of the Ministry of Justice, and the Industrial Structure Council).

424. *See* Danaher, *supra* note 423, at 25, 28 (noting that all three quasi-official groups employ the term "defect" but differ as to the definition thereof); Hirano, *supra* note 421, at 649.

425. Hirano, *supra* note 421, at 649.

426. *Id.* at 650-52.

427. *Id.*

reasonably foreseeable manner and that damage does not usually occur from such use,[428] they will enjoy a presumption of defectiveness and causation that the manufacturer must either rebut or be held liable. It should be noted, however, that the three quasi-official reform proposals disagree with this burden-shifting and recommend that the plaintiff's prima facie case continue to include proof of defectiveness.[429]

Another stringent provision shared by the major Japanese reform proposals is that plaintiff misconduct such as misuse, modification, or contributory negligence would reduce the plaintiff's recovery only if it is grossly negligent.[430] By contrast, both the EC Directive[431] and the proposed *Restatement (Third) of Torts*[432] would permit any negligent conduct of the plaintiff to reduce or bar recovery. Also in contrast to the EC Directive[433] and the proposed *Restatement (Third)*,[434] at least one major Japanese proposal, put forth by the Group of 1990, would not permit a development risks defense.[435]

The Japanese Cabinet is expected to reach a consensus on reform which will then be presented to the Japanese legislature, the Diet, sometime before the close of 1994.[436] Undoubtedly, the Japanese reformers will be closely following the *Restatement (Third)* reform developments with great interest.

2. Canada

Our neighbors to the north in Canada have also begun to expand the doctrine of strict products liability. Most Canadian provinces, as a general rule, employ a negligence standard for products liability.[437] While most

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428. Presumably this language is designed to prevent inherently harmful products such as tobacco and alcohol from being classified as defective. *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (stating that "good whiskey" and "good tobacco" are not unreasonably dangerous merely because they are harmful when used as intended).

429. Danaher, *supra* note 423, at 25.

430. Hirano, *supra* note 421, at 645.

431. *See* EC Directive, *supra* note 387, at art. 8(2) ("The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.").

432. *See* Tentative Draft, *supra* note 26, § 7, at 143-44 ("When the conduct of the plaintiff combines with a product defect to cause harm . . . and the plaintiff's conduct fails to conform to an applicable standard of care, responsibility for harm to the plaintiff is apportioned between the plaintiff and the product seller pursuant to the applicable rules governing apportionment of responsibility.").

433. *See* EC Directive, *supra* note 387, at art. 7(e).

434. *See* Tentative Draft, *supra* note 26, § 2(b)-(c), at 9-10.

435. Hirano, *supra* note 421, at 650.

436. Danaher, *supra* note 423, at 29.

437. *See generally* Negligence, 23 C.E.D. §§ 285-336 (Ont. 3d ed. 1994) (citing cases).

provinces have recognized the strict liability concept of implied warranties, the citadel of privity has not fallen in the same manner that it has in the United States.[438] Both Saskatchewan and New Brunswick, however, have enacted special products warranty acts for consumer goods which permit recovery, without regard to privity, against any supplier for personal or property damage resulting from a breach of the implied warranty of merchantability.[439]

Perhaps the most progressive Canadian reform effort occurred in Ontario in the late 1970s and early 1980s, when the provincial Law Reform Commission published a report recommending explicit adoption of a strict liability regime for products.[440] The apparent impetus for the recommendation was the questionable logic of continuing to segregate negligence from warranty law, both of which had been highly liberalized to the point of indistinguishability.[441] In the name of achieving uniformity, the Ontario Law Reform Commission recommended that a comprehensive regime of strict liability be adopted.[442] Although the recommendations were never adopted, they did not go unnoticed in other parts of Canada. In 1984, the Uniform Law Conference of Canada recommended that a uniform national products liability law be modeled on the Ontario report.[443] Much like efforts at nationwide products liability reform in the United States, the Canadian uniform model law was never enacted,[444] likely a victim of consumer group suspicion and provincial territoriality.

3. Australia

In Australia, a strong causative liability reform movement is presently gaining momentum. The Trade Practices Act of 1974 currently permits Australian consumers to bring suit for breach of implied product warranties, which, unlike the United States,[445] are not generally disclaimable.[446] However, much like the *Restatement (Second) of Torts* section 402A,[447] the Trade Practices Act requires proof of product defect before liability can be imposed.[448]

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438. *See* S.M. Waddams, *The Law of Products Liability in the Common Law Provinces of Canada*, *in* COMPARATIVE PRODUCT LIABILITY 161, 161 (C.J. Miller ed., 1986).

439. *See id.* at 163-66.

440. *Id.* at 167.

441. *Id.* at 168.

442. *Id.*

443. *Id.* at 169.

444. *Id.*

445. *See* U.C.C. § 2-316 (1990).

446. LAW REFORM COMM'N OF AUSTRALIA, *supra* note 407, at 6.

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

448. *See* LAW REFORM COMM'N OF AUSTRALIA, *supra* note 407, at 6.

In 1989, a joint report by the Law Reform Commission of Australia and the Law Reform Commission of Victoria recommended adoption of a causative liability regime for products in which the plaintiff's prima facie case would consist of only two elements: causation and harm.[449] The proposal would apply to all goods except human tissue, blood, and electricity,[450] and would impose liability on any entity in the marketing chain.[451]

Notably, the Law Reform Commission proposal intentionally rejected the notion of defect as a sine qua non of recovery.[452] The focus of the Australian reform proposal, as in a causative liability regime, is on causation. Plaintiff misconduct, acts of third parties, and force majeure would reduce the manufacturer's liability in a manner that accounts for their relative contribution to the harm.[453] Assumption of the risk would be a complete defense.[454]

One aspect of the Law Reform Commission proposal, however, is conspicuously out of place: the inclusion of a development risks defense for "truly undiscoverable" risks.[455] The publicly stated motivation for including the defense was a concern that without it, products liability insurance would be unavailable or unaffordable.[456] As pointed out earlier, however, this "insurance crisis" argument is highly speculative.[457]

The speculative insurance availability benefits of the development risks defense are more than outweighed by its costs. The defense creates severe market distortions which cripple the stated objectives of providing an incentive to safety, promoting informed consumer decision-making and proper pricing via internalization of risks.[458] A product whose manufacturer is immune from liability for undiscoverable risks will not accurately reflect the true costs of harm. Thus, the consumer purchasing such a product will not be given adequate information to exercise true freedom of choice in product selection. Without consumer knowledge of risk, the risk reciprocity gap widens into a canyon.

Why the Australian reform proposal included the development risks defense may never be known. Perhaps fears of an insurance crisis, though misplaced, were genuine. Perhaps inclusion of the defense was thought to be a necessary quid pro quo to passage, a concession made in order to begin the long journey toward meaningful reform. Whatever the case, the defense

449. *See id.* at 39-40; *see also* PFENNIGSTORF, *supra* note 408, at 55.
450. *See* LAW REFORM COMM'N OF AUSTRALIA, *supra* note 407, at 70-71.
451. *Id.* at 65.
452. *Id.* at 55.
453. *Id.* at 41-43.
454. *Id.* at 45.
455. *Id.* at 50.
456. *See id.* at 144.
457. *See supra* note 319 and accompanying text.
458. *See* LAW REFORM COMM'N OF AUSTRALIA, *supra* note 407, at 15-19.

certainly takes much out of the proposal's sting. Nonetheless, the core concept of the Australian Law Reform Commission proposal—causative liability without regard to defect—is a rational first step.

4. New Zealand

One final non-European country's approach to products liability should be mentioned because it represents the farthest end of the spectrum: no-fault compensation. Since 1972, New Zealand has had a general accident compensation scheme for personal injury which preempts private litigation.[459] The plan is funded by employers, the government, and motor vehicle owners.[460] No-fault liability such as that in New Zealand is not likely to be embraced by the United States. And despite the dire predictions of the anti-strict liability forces, a causative liability regime is not analogous to no-fault compensation. As dicussed earlier,[461] no-fault compensation schemes are normally extra-judicial mechanisms which employ a watered-down standard of causation. The resulting tradeoff is a higher likelihood of recovery in exchange for limited damages and restricted court access. By contrast, under a causative liability regime, by contrast, traditional tort causation principles remain intact, and plaintiffs continue to enjoy unfettered access to courts.

VI. CAUSATIVE LIABILITY

The use of a reasonable prudence (i.e., negligence) standard to define legal fault in products liability law is anachronistic and unjust. The industrial revolution is over; with its demise, the need for a definition of legal fault less rigorous than causative liability has evaporated. Products liability law should return to its historical roots, where the focus is not on *why* the accident happened, but who *caused* it. Under this causative liability approach, the judge and jury are freed from the need to assess moral blame and instead squarely face a more appropriate issue: deciding which party should bear the burden of legal responsibility. Causation, a concept long shrouded in secrecy and nonchalantly brushed aside as an unworkable nebula, should be brought into the light. It should be the primary focus of judges and juries in products liability actions. By facing and conquering the multiheaded hydra of causation, products liability law can achieve sorely needed uniformity and intellectual honesty.

Shifting the inquiry from reasonableness of conduct to causation of harm will not deprive products liability law of the tort law foundation of fault. Aristotle recognized long ago that causation can be considered coextensive

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459. PFENNIGSTORF, *supra* note 408, at 53.

460. *Id.* at 167-68.

461. *See supra* notes 215-35 and accompanying text.

with fault, stating that "it is often possible to ascertain one of two contrary moral states from the other, or to ascertain moral states from their phenomena, i.e. from their *causes and consequences*."[462] Similarly, under the theory of causative liability, fault is implicit because the act caused harm. One who acts in such a manner as to cause harm to another is at fault in a legal (rather than moral) sense, and no special inquiry into reasonableness is required. The uniform standard of causative liability fully captures the Aristotelean notion of corrective justice,[463] which holds:

> It makes no difference whether it be a virtuous man who defrauded a bad man, or a bad man who defrauded a virtuous man . . . [t]he law looks only to the degree of injury, it treats parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it.[464]

Focusing on causation also eliminates the need to pigeonhole a harmful product into illogical categories of manufacturing, design, or informational defect. A product that is the factual and proximate cause of harm is per se defective and there is no need to subdivide products into categories of defectiveness because the liability standard is uniform.

A. Cause-in-Fact (Factual Cause)

"Cause-in-fact," "factual cause," or "but for" causation, as every first-year law student knows, is generally an indispensable requisite to recovery in tort. It is the first head of the two-headed hydra of causation. The other head, as will be discussed in later paragraphs,[465] is "proximate" or "legal" cause, a policy tool designed to cut off liability for acts perceived as too remote, attenuated, or mere conditions.

Cause-in-fact, as the name suggests, is a complex factual inquiry whose goal is to decipher what events gave rise to the injury.[466] In the usual case there are numerous causes-in-fact of the harm.[467] For example, if

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462. ARISTOTLE, THE NICHOMACHEAN ETHICS 143 (J.E.C. Welldon trans., 1987).

463. Corrective justice is the justice sought in disputes between private parties. *Id.* at 154.

464. *Id.*

465. *See infra* notes 485-94 and accompanying text.

466. *See* Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 61 (1956).

467. *See* H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 69 (2d ed. 1985). This phenomenon also explains the famous "two fires" hypothetical, in which two fires combine to burn down the plaintiff's property. Although "but for" either fire, each fire alone would be sufficient to cause the harm, the plaintiff is permitted to recover against the defendant who set either fire because each fire is an independent factual cause of the harm.

Jones dies of a gunshot to the head, the bullet and the gun are undeniably factual, "but for" causes of Jones' unfortunate death. So, too, are the resulting loss of blood, the killer's act, the killer's parents, the killer's great-grandparents, all the way back to Adam and Eve—without them, Jones would never have died. They are all necessary antecedents in the factual chain of causation.

Causes-in-fact can be omissions rather than affirmative acts. For example, the failure to pay attention to the road can be a cause-in-fact of an accident. A lack of rain can be a factual cause of fire. Forgetting to water flowers can cause them to wilt. The difficulty, of course, with these omissions or negative causes is that they require that the trier of fact reconstruct a parallel series of facts in order to determine if, but for the omission, the harm would not have occurred.[468] Thus, the trier of fact must attempt to discern not just what actually happened but what would have happened if the driver had paid attention to the road, the rain had come, or the flowers had been watered.

Although pinpointing factual causes is more difficult when an omission brings about harm, it certainly can be done and, in fact, is done all the time. The entire tort of negligence revolves around a failure to exercise reasonable care. Most products liability actions involve a failure on the part of the manufacturer to take certain safety precautions. Thus, criticizing causative liability because of the difficulty of determining or limiting factual cause in an omission to act case throws the baby out with the bath water. Tort law often involves issues of negative causation, and juries and judges have proven quite capable of employing traditional cause-in-fact analysis in such cases. There simply is no reason to believe that the same inquiry cannot be capably resolved in the products liability context.

As the reader will recall, the initial introduction to the discussion of factual cause stated that it is generally a prerequisite to recovery. The word "generally" was chosen with care. There are instances in tort law—including products liability—in which proof of factual cause has been declared unnecessary. The famous case of *Summers v. Tice*[469] is a good illustration.

In *Summers*, two hunters simultaneously shot at some quail using the same kind of gun and the same kind of ammunition.[470] In the process of gunning for the quail, the plaintiff was struck in the eye and lip by two birdshot pellets.[471] The evidence presented at trial was inconclusive as to

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468. ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 21-25 (1961); HART & HONORE, *supra* note 467, at 60-61; Malone, *supra* note 466, at 67.

469. 199 P.2d 1 (Cal. 1948).

470. *Id.* at 2.

471. *Id.*

which hunter's birdshot lodged in the plaintiff's face.[472] The California Supreme Court affirmed the trial court's decision to hold both defendants jointly liable for the harm.[473] In so holding, the court essentially dispensed with the normal requirement that the plaintiff prove the defendant's act was a cause-in-fact of the injury. Normally, if evidence is in equipoise as to cause-in-fact, the plaintiff has not met his burden of proof, and summary judgment will be entered for the defendant. But in *Summers*, the evidence pointed equally to either hunter's birdshot being the factual cause of harm, yet plaintiff still recovered.

An approach analogous to that of *Summers* has crept into products liability law as well. For example, in the landmark case of *Sindell v. Abbott Laboratories*,[474] the California Supreme Court imposed "market share" or proportional liability on the manufacturers of DES, a prescription drug designed to help prevent miscarriage which was later determined to cause cancer in female offspring.[475] Because of the long latency period between exposure to DES and the appearance of cancer, the daughters who developed cancer often faced insurmountable evidentiary hurdles to identifying which of the 300 or so potential brands of DES their mothers had ingested.[476] In response, the *Sindell* court dispensed with proof of cause-in-fact as to any particular DES manufacturer and permitted recovery against each named defendant based upon its proportional share of the relevant DES market.[477]

Thus far, market share liability has been confined primarily to DES cases.[478] Judicial hesitancy is warranted. After all, dispensing with proof of factual cause is a slippery slope, descending straight into the abyss of absolute liability. It does not take much imagination to conjure up analogous products liability scenarios in which the plaintiff would have difficulty pinpointing the manufacturer of the product that caused harm.

For example, a lamp purchased several years ago short-circuits, burning beyond recognition. The injured plaintiff cannot remember where she bought the lamp and has no idea who manufactured it. A can of beans contains dangerous bacteria which results in illness several hours after

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472. *Id.* at 3.

473. *Id.* at 5.

474. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

475. *Id.* at 925; *see also* Tentative Draft, *supra* note 26, § 5 cmt. c, at 107-08.

476. *See* Tentative Draft, *supra* note 26, § 5 cmt. c, at 108.

477. *Sindell*, 607 P.2d at 936-38; *see also* Tentative Draft, *supra* note 26, § 5 cmt. c, at 108.

478. *See, e.g.*, Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich.), *cert. denied*, 469 U.S. 833 (1984); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); Martin v. Abbott Lab., 689 P.2d 368 (Wash. 1984); *see also* James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 492-93 (1990); *but see* Case v. Fibreboard Corp., 743 P.2d 1062, 1065-66 (Okla. 1987) (rejecting proportional liability for asbestos).

consumption. The plaintiff has discarded the can and the garbage collector has hauled it away. The plaintiff cannot recall what brand of beans she consumed and is unsure from which of the two grocery stores she regularly patronizes the beans were purchased. A pair of pajamas ignites upon contact with a gas stove, severely burning the plaintiff and rendering the pajamas unrecognizable. The plaintiff had received the pajamas as a holiday gift from a relative now deceased. He has no idea who manufactured the pajamas or where they were purchased.

Arguably, all of these hypotheticals would be ripe candidates for the invocation of market share liability. Yet somewhere along the spectrum of virtually innumerable defendants, most people viscerally cringe at the thought of dispensing with proof of cause-in-fact. Of the hundreds or thousands of possible lamp manufacturers, should each be required to compensate the plaintiff if she cannot prove her injury was more probably than not caused by a particular lamp manufacturer? The answer, for most people, is "no." The reason is that proportional liability is tantamount to absolute liability. The lamp manufacturer, bean manufacturer, and pajama manufacturer are transformed into insurers against all lamp, bean, or pajama injuries, whether caused by their product or not.

By being forced to assume responsibility for injuries not within their control, the manufacturers upon whom proportional liability is imposed become insurers rather than warrantors of the safety of their own products.[479] Market share liability forces the manufacturer to assume the risk of actions of other manufacturers of the same product, actions over which he has little knowledge and no control. It also distorts market pricing by forcing safer products to internalize the injury costs of more hazardous products. This distortion, in turn, leaves consumers unable to make informed purchasing decisions and exacerbates the nonmutuality of risk between manufacturer and consumer.

Under a causative liability regime, the imposition of proportional liability would not be permitted. Plaintiffs would be required to prove, by a preponderance of the evidence, that a named defendant's product was a cause-in-fact of the harm. While this may seem harsh for plaintiffs who cannot pinpoint the manufacturer whose product caused their harm, it is no more harsh than imposing liability on a manufacturer whose product has not been proven to cause harm.

In such difficult cases, perhaps the best and most honest solution is to create a statutory no-fault compensation scheme to assist plaintiffs who cannot meet traditional tort causation standards of proof. Indeed, as discussed earlier,[480] a number of federal and state no-fault compensation schemes have already been enacted to address precisely these kinds of proof problems. The *Sindell* court, while undoubtedly attempting to achieve equity in a case involving a sympathetic plaintiff, deviated from traditional tort principles and opened a Pandora's box of potential problems ill-suited for judicial resolution.

Interestingly, the proposed *Restatement (Third) of Torts* takes no position on market share liability for products but states that "[t]he Institute leaves to developing law the question of whether, given the appropriate factors, a rule of

479. *See* GAF Corp. v. County Sch. Bd., 629 F.2d 981 (4th Cir. 1980).

480. *See supra* notes 215-35 and accompanying text.

proportional liability should be adopted."[481] It would be wiser to nip proportional liability in the bud now; it is a deadly weed in the garden of tort law.

Another section of the proposed *Restatement (Third)* appears to adopt a relaxed causation standard, but in fact does not. The proposed section dealing with so-called crashworthiness litigation provides that a plaintiff who can prove that a product was a substantial factor that caused his injury to be more severe than it otherwise would have been can fully recover against the defendant unless the evidence supports apportionment of harm.[482] This rule is in keeping with the traditional tort principles regarding multiple individual causation; therefore, a tortfeasor who causes any portion of the plaintiff's harm is liable for *all* of the plaintiff's damages.[483] Only if the evidence supports apportionment between the defendant and other causes of injury will the defendant be relieved of liability for the entire harm.[484] A cause is a cause is a cause, so the argument goes; therefore, an action cannot be a partial cause unless the party with superior knowledge (the defendant) can prove it. This permits the injured plaintiff to obtain full recovery against any defendant who caused the harm unless the defendant can prove that, in fact, he did not cause the entire harm. Thus, the crashworthiness rule is not nearly so threatening to the notion of causation as market share liability, which dispenses with proof of *any* causation.

Under causative liability, the crashworthiness doctrine would be permissible. A plaintiff who could prove that the defendant's product was a cause-in-fact of all or a portion of his injury would reach the jury, provided the other head of the causation hydra, legal cause, did not prevent this result. A defendant who wished to attempt to apportion his own responsibility for the plaintiff's injury would be permitted to do so.

B. Proximate Cause (Legal Cause)

Dean Leon Green once keenly observed of proximate cause that "[n]o other formula . . . so nearly does the work of Aladdin's lamp."[485] While its sibling factual cause is a neutral, almost scientific inquiry, proximate or legal cause is undeniably a policy determination, anchored only by common sense and the quest for fairness.[486] Legal cause is really nothing more than a gatekeeping mechanism whereby the trier of fact sifts through all possible factual causes and rejects

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481. Tentative Draft, *supra* note 26, § 5 cmt. c, at 109.

482. *Id.* § 6, at 112.

483. *See id.* § 6 cmt. d, at 118-19; RESTATEMENT (SECOND) OF TORTS § 433A cmt. i, 433B(2) (1965).

484. *See* Tentative Draft, *supra* note 26, § 6 cmt. d, at 118-19; *see also* Summers v. Tice, 199 P.2d 1 (Cal. 1948).

485. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950) (citation omitted).

486. HART & HONORE, *supra* note 467, at 24; Kenneth Vinson, *Proximate Cause Should Be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215, 216 (1985).

those that are so microscopic, freakish, or otherwise attenuated that imposing liability on the defendant would work injustice.

For example, the presence of oxygen is undoubtedly a cause-in-fact of fire: but for oxygen, a fire could not exist.[487] However, because oxygen is always a necessary condition of fire, it is not appropriate to classify it as a cause to which legal responsibility should be ascribed.[488] While necessary conditions such as oxygen are undeniably causes-in-fact, such conditions should not be labelled "legal" causes simply because it would defy common sense to apportion legal responsibility to them.

The importance of legal cause in a causative liability regime was recognized many years ago by Justice Andrews in *Palsgraf v. Long Island Railroad Co.*:

> A murder at Serajevo [sic] may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. . . .
>
> What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.[489]

Foreseeability of harm or use is often used as a proxy for achieving the public policy and "rough sense of justice" referred to by Judge Andrews. Unfortunately, foreseeability tends to distract the factfinder's attention from the important policy decision of assigning legal responsibility for harm.

Some readers may consider the preceding sentence blasphemous. After all, by definition, the trier of fact is just that—a trier of fact, not of policy. But no one doubts that the current notion of proximate or legal cause is a policy question, that it is normally defined by foreseeability, and that the trier of fact normally makes the call. The problem with the current concept of legal cause—the use of foreseeability as the penultimate proxy—is that it clothes jury instructions in layer after layer of gobbledygook which sounds a lot like a *factual* inquiry. In reality, however, triers of fact who determine proximate cause are making complex policy decisions which define the boundaries of the law. Telling the jury that they are to make a factual determination as to whether the defendant's act created a foreseeable risk of harm is misleading. It is akin to telling them that they must find Paris and then giving them a map of Istanbul. It is no wonder they get lost.

In the products liability arena, the map given to the trier of fact is even more obscure. The proxy for legal cause—foreseeability of harm—is further limited by the notion of defect. Defectiveness is the tool designed to keep

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487. HART & HONORE, *supra* note 467, at 34-35.

488. *Id.*

489. 162 N.E. 99, 103 (N.Y 1928) (Andrews, J., dissenting).

products liability under control, to keep it within acceptable boundaries. But requiring proof of both defect and foreseeability of harm has obscured the core notion of legal cause almost beyond recognition. Causative liability would revive the original role of legal cause—placing commonsensical, policy-driven limits on liability—and would proudly bring it into the light for the trier of fact to see.

The commonly accepted policy filter for sifting out insignificant causes-in-fact is the substantial factor test. Under this test, "[t]he actor's negligent conduct is a legal harm to another if his conduct is a substantial factor in bringing [it] about."[490] As the *Restatement (Second) of Torts* comments confess, within the substantial factor test "there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred."[491] Thus, the substantial factor test is a policy evaluation which seeks to answer the question: Is the defendant's act *enough* to justify pinning legal responsibility on him? Clearly, legal cause, as defined by the substantial factor test, is a fluid concept incapable of rigid definition. Legal cause will vary with the particular circumstances of each case and, on a larger level, with the purpose for ascribing legal responsibility.[492]

Legal cause, as a policy tool, is malleable according to the perceived purposes of tort law, including products liability. If the goal of products liability is perceived as wealth maximization and optimum economic efficiency, legal causation will be limited to those situations in which the manufacturer could have avoided harm at lower cost than the injured plaintiff.[493] If, on the other hand, the goal of products liability law is perceived as assigning responsibility in order to achieve corrective justice, then legal cause is limited to those situations where the manufacturer imposed on the consumer nonreciprocal risks which resulted in harm.[494] Causative liability espouses the latter goal of products liability law.

VII. CONCLUSION

Causative liability has several benefits over both current law and the proposed *Restatement (Third) of Torts*. First, and perhaps most importantly, it is intellectually honest. It explicitly asks the triers of fact to make a policy determination as to the relative legal responsibility of the defendants,

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490. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

491. *Id.* § 431 cmt. a.

492. *See* HART & HONORE, *supra* note 467, at 62-63; John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 439-40 (1979).

493. *See* LANDES & POSNER, *supra* note 29, at 13, 229.

494. *See* ARISTOTLE, THE NICHOMACHEAN ETHICS 143-54 (J.E.C. Welldon trans., 1987).

rather than asking them to make such decisions using obscure surrogates such as defect, risk/utility, or reasonableness of conduct. It acknowledges the true nature of the jury's function and our faith in their ability to carry out that function with their eyes open.

Second, a causative liability regime provides consumers with knowledge of a product's risks by requiring internalization of costs for all harm caused by the product. Armed with this knowledge, consumers can make more intelligent and appropriate purchasing decisions. In essence, the marketplace is freed to function as it should: products reflect their true costs (but no more), and consumers have knowledge. Internalization will give consumers the opportunity to switch to safer substitutes if available. If safer substitutes are not available, consumers at least have knowledge of the product's risks and can intelligently determine for themselves whether to purchase the product. If a product's market share dwindles, it is because consumers have decided to avoid the risk. This is the free marketplace at its finest, not a judicial ban of the product.

A third benefit of causative liability, closely related to internalization, is restitution. While many have recognized that causative liability serves the goal of compensation, rarely is it recognized that the goal of restitution is just as significant in such a regime. A manufacturer under a negligence regime who has sold his product to consumers at a price that fails to reflect its hidden costs of harm is unjustly enriched when consumers purchase his product without knowledge of the harm they face.[495] The manufacturer in a negligence regime has, in essence, been permitted to charge a distorted price to induce greater sales. Thus, the manufacturer of a product which has been on the market for a significant period of time in a negligence regime may have been unjustly enriched to the tune of hundreds of millions of dollars. A causative liability regime, via proper internalization of costs of harm, would put an end to such unjust enrichment.

Finally, but not least significantly, a causative liability regime would encourage greater product research and development. A manufacturer who knows he will be held liable for harm proximately caused by his product will clearly have a greater incentive to produce safe products than a manufacturer who is held liable only for lack of due care. Under a causative liability regime, the product manufacturer has an incentive to discover latent dangers and to invest in research and development of safer designs at an optimum rather than a minimum level.[496] Judge Posner once expressed it this way:

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495. *See* Henderson & Twerski, *Closing the Frontier*, *supra* note 11, at 1274 (confessing that a negligence regime permits products to enter the market "without reflecting their true costs to society.").

496. *See id.* at 1274; *see also* LANDES & POSNER, *supra* note 29, at 293 ("Under a negligence standard the manufacturer will simply wait until the technology is developed; strict liability will give him an incentive to foster its development.").

> By making the actor strictly liable—by denying him in other words an excuse based on his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.[497]

Thus, by disregarding the manufacturer's knowledge of harm and focusing instead on whether the product caused harm, the judicial system can essentially force product manufacturers to invest in the technology to develop safer products when it is economically efficient for them to do so.[498]

This Article opened with the maxim, "accidents happen." Given that accidents happen even when reasonable care has been exercised, the focus of courts and legal scholars should be: What do we *do* about them? Which of two arguably innocent parties should bear responsibility for the harm? If both parties are morally innocent, can one party be considered legally at fault? The great push for a return to negligence embodied in the proposed *Restatement (Third) of Torts* would legitimize irrational and illogical distinctions that leave well-schooled legal brains spinning in confusion. It further distorts the inquiry, forcing future courts and academics into an intellectual straightjacket from whence they may never escape. The proposed *Restatement (Third)* is, in short, a giant step backwards, motivated perhaps more by political ideology than reasoned legal theory. By adhering to the elusive concept of defect and explicitly legitimizing the tripartite paradigm of manufacturing, design, and informational defects, it freezes into place distinctions without a difference. The time is ripe to rethink these distinctions, to rethink the practical and historical purpose of tort law, and to move forward, toward a unified theory of products liability, using logic, fairness, and common sense as our guides. Causative liability is one alternative that deserves careful consideration.

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497. Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990).

498. *See* MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE 100-02 (1993).