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AN OBVIOUS WRONG DOES NOT MAKE A RIGHT: MANUFACTURERS' LIABILITY FOR PATENTLY DANGEROUS PRODUCTS

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A noticeable exception to the recent expansion in manufacturers' tort liability has been in the area of obviously dangerous products. Many courts, seemingly blinded by the fact that an obvious danger should be apparent to all, have denied consumers recoveries. Some simply have found that a manufacturer has no duty to safeguard against patent perils, others have found obviousness instrumental in limiting the extent of that duty and still others have found obviousness helpful in sustaining a successful affirmative defense. Professor Marschall contends that these courts have neglected a fundamental objective of tort law—fairness between the parties. In this article, she examines the various theories which might support a consumer's recovery and the manner in which these principles have been applied in the obvious-danger context. She points out ways in which greater protection for consumers can be achieved within the framework of existing tort theory. Her basic argument, however, is for a form of absolute liability for manufacturers of patently dangerous products as the proper standard to ensure fairness.

I

INTRODUCTION

GREAT progress has been made toward expanding the consumer's right to recover for personal injuries caused by defectively designed products. However, since this trend has required the revamping of several traditional legal doctrines, the movement toward reform has been somewhat diffused. Predictably, but unfortunately, attempted innovations have not produced coordination among theories. As a consequence, gaps have appeared, leaving significant areas where buyers remain unprotected. One area in need of attention involves products whose dangerous design is obvious. Through an analysis of the doctrines

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affecting recovery for injuries caused by such products, this article will indicate not only the inadequacies and confusion in current negligence and warranty law, but also the extent to which outmoded negligence concepts muddy the waters of strict liability in tort. It will explore the probable reasons for these gaps in consumer protection and suggest possible methods for closing them.

Under present law, a person injured by using a dangerous product may sue the manufacturer for damages on one or more of the following four theories: (1) he may allege that the manufacturer was negligent in failing to warn of the danger involved in using the product; (2) he may claim that the manufacturer was negligent in the design or construction of a product which exposed the plaintiff to an unreasonable risk of injury; (3) he may argue that the manufacturer should be held strictly liable in tort for injuries resulting from the use of his product; or (4) he may assert that the manufacturer has breached an implied warranty of merchantability because the danger rendered the product unfit for the ordinary purposes for which it was intended.

The manufacturer has been left with ample opportunity to avoid liability. If the danger of injury arises from a defect in design, rather than in construction, and the danger inherent in the design is apparent, the plaintiff's chances of recovery under any of these theories may be severely restricted or wholly eliminated. On the one hand, the manufacturer may be absolved from a duty to warn or to make the product less dangerous, precisely because the risk of injury is obvious. On the other hand, because of his use of a patently dangerous product, the plaintiff may be held to have assumed the risk of injury, to have negligently contributed to his own injury or to have inserted an intervening cause which makes his own action, rather than that of the manufacturer, the proximate cause of the injury. As will be seen, the role and the weight assigned to the factor of "obviousness" in these dangerous-design cases have varied according to the plaintiff's underlying theory of recovery. As a result, the protection available to a consumer in any given case remains uncertain.

In examining the legal problems caused by multiple theories of liability and multiple defenses in dangerous-design cases, this article will use an analysis derived from an article by Professor George P. Fletcher.[1] Fletcher rejects the commonly held view that the history of tort law reflects a "struggle between negligence and fault on the one hand, and strict liability on the other."[2] Instead,

[1] Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).
[2] Id. at 539.

he perceives a conflict between "two radically different paradigms for analyzing tort liability"[3]—the paradigm of reasonableness[4] and the paradigm of reciprocity.[5] Roughly speaking, under the paradigm of reasonableness, tort rules are evaluated in terms of their instrumental utility in promoting the welfare of society as a whole.[6] Under the paradigm of reciprocity, tort rules are designed to promote fairness between the parties to an incident causing injury to one or more of them.[7]

I agree with Fletcher that the purpose of a tort system should be to foster fairness[8] and that, for this reason, the paradigm of reciprocity represents a preferable mode of analysis. However, Fletcher's approach is not free from difficulty. After discussing the paradigm of reasonableness, the next section outlines Fletcher's theory, applies it in brief to dangerous-products cases and points out some of the problems that Fletcher's approach engenders. The remainder of the article reveals in detail the pitfalls of the paradigm of reasonableness in the context of litigation involving dangerous products. Finally, the article will note how the paradigm of reciprocity can be used to promote fairness and will show that, in this context, fairness requires that the party injured by an obviously dangerous product recover in the vast majority of cases.

II

THE ANALYTICAL FRAMEWORK

A. The Paradigm of Reasonableness

1. Definition

A familiar conceptual framework for tort liability is the paradigm of reasonableness. This paradigm centers around the economic "reasonable man" and holds that a person who acted reasonably will not be held liable to another he has injured.

> Reasonableness is determined by a straight-forward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover.[9]

The paradigm is utilitarian both in formulation and in intended effect. For it purports not only to determine which activities are

[3] Id. at 540.
[4] Id. at 542.
[5] Id. at 540.
[6] Id. at 542-43.
[7] Id. at 540-41.
[8] Id. at 538-39.
[9] Id. at 542.

socially desirable but also to discourage those that are not, through the imposition of penalties.[10]

2. A Critique

In theory, the paradigm of reasonableness is a useful tool since a cost-benefit analysis is readily adaptable to a society's changing concepts of properly allocated tort responsibility. As applied to products-liability cases, however, the paradigm has yielded unsatisfactory results. First, it has not been utilized to take account of all the costs to society of an injury caused by an obvious defect. More importantly, in its application, proper emphasis has not been placed upon what I feel to be the overriding purpose of tort law—fairness to the injured party.

a. The Failure to Account for Societal Costs——Few would dispute that the paradigm, as applied, has degenerated into a very narrow cost-benefit analysis. Reasonable manufacturers are in business to make money. Thus, when deciding whether or not a manufacturer acted reasonably in making and marketing an obviously dangerous product without a safeguard, a court weighs only the costs of adding the safeguard against any potential diminution in profits that will result from not adding it. Little if any attention is paid to the social costs of an injury caused by an obviously dangerous product. For example, if a highly skilled workman is totally and permanently disabled by an inadequately designed machine, society is forever deprived of his individual skills. Even if someone can be trained to replace him, there frequently will be uncompensated costs to the employer.[11] Yet, as the paradigm's utilitarian calculus has been applied in the past, these costs are left out of the ultimate liability decision.

b. Unfairness to the Injured Party——A more important shortcoming of this cost-benefit analysis is its failure, in far too many cases, to compensate the injured victim. Professors Blum and Kalven apparently consider this fact irrelevant in the case of an obvious or well-known danger, basing their conclusion on two assumptions.[12] First, they feel that the individual consumer can protect himself by exercising a thoughtful and free market "vote" for either a safer and more expensive product or for a

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[10] See id. at 542-43.

[11] Cf. W. Prosser, Torts 938 (4th ed. 1971) [hereinafter Prosser, Torts].

[12] See W. Blum & H. Kalven, Public Law Perspectives on a Private Law Problem 58-59 (1965). In fairness, I should note that in the cited pages Blum and Kalven are evaluating the choice of a system of tort liability from an economist's perspective. They conclude that in some cases the system chosen would have no effect upon the society's allocation of resources. See id.

cheaper but more dangerous product. Second, if the consumer buys a dangerous product they assume he has the information necessary to make a reasonable choice for or against accident insurance.[13] The Maryland Court of Appeals adopted this rationale in an inadequately-safeguarded-lawnmower case, *Myers v. Montgomery Ward & Co.*,[14] stating:

> [T]he absence of these safety devices was apparent at the time of purchase, and, in a free market, Myers had the choice of buying a mower equipped with them, of buying the mower which he did, or of buying no mower at all.[15]

There are several problems with this reasoning. First, there is no assurance that a consumer shopping for a product will always have a choice between a safe one and a dangerous one. While well-designed lawnmowers may always be available, markets for other, less common products may not offer safe designs. Or the product may be unavoidably dangerous—such as a knife, or a drug that cannot be made safe for all persons. Second, although the absence of a safety device may be obvious, the extent of the danger may not be appreciated by some purchasers. And obtaining risk information may be either impossible or expensive for the individual consumer since he has no easy access to accident statistics for a particular product. Third, even if he correctly perceives the abstract danger, for psychological reasons an individual is likely to underestimate the risk of serious harm to himself.[16] Fourth, even if there are both safe and unsafe designs, it is most frequently the poor who from economic necessity will be forced to buy the less safe product. Finally, the dangerous product may injure bystanders who had no say in the initial decision to purchase. In short, market choice is not always available and market information is less than perfect. In the end, justifications for a cost-benefit analysis which often leaves an injured consumer uncompensated are unsatisfactory.

The unfairness that can result to an individual from the reasonableness approach is illustrated by the following hypothetical. Suppose that a defendant manufactures a drug which produces the most effective pain relief for 3,000,000 persons suffering from severe pain. However, it is known that approximately two persons among 1,000,000 users of the drug will suffer serious eye damage irreversible by the time it is detected. Let us further

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[13] Id.

[14] 253 Md. 282, 252 A.2d 855 (1969).

[15] Id. at 297, 252 A.2d at 864.

[16] G. Calabresi, The Cost of Accidents: A Legal and Economic Analysis 205 (1970).

assume that the defect in the product could be remedied by an expenditure that would make manufacture unprofitable. Assume further that society, through the Food and Drug Administration, has decided that it will not intervene directly to prevent manufacture and sale of the drug. So long as the drug is marketed with a strong warning and with instructions for use only in cases of severely incapacitating pain where no other drug offers significant relief, the benefits to society are felt to outweigh the drug's dangers.

Assume further that the risk of loss in the hypothetical is placed on the consumer. Knowledge of the risk involved will probably deter some consumers from buying the drug (usually because their doctors decide not to prescribe it), resulting in a slightly higher price for the drug. Assume, however, that enough persons buy at the higher price to make it profitable for the company to continue manufacturing and selling the drug. For those who do buy and are injured, it is a bad ballgame indeed. Their blurred vision, or even blindness, goes uncompensated, and they are, in effect, told by the utilitarians that this is all right. The utilitarians reason that a different allocation of loss merely would substitute certain interrelated costs for the uncompensated harm of injured users. Some users who want the drug would not be able to afford it. This would result in an even higher priced drug which in turn places more dollar costs on those who continue to buy. To the utilitarian mind this substitution of costs is unjustified because the risk of harm to the total consuming community is small.

The drug hypothetical underscores Fletcher's contention that a cost-benefit analysis results in inequities to the individual who "cannot fairly be expected to suffer . . . deprivations in the name of a utilitarian calculus. His life, bodily integrity, reputation, privacy, liberty and property—all are interests that might claim insulation from deprivations designed to further other interests."[17]

c. The Deterrence Arguments——The central thesis of the reasonableness paradigm is that the threat of judgment liability will deter socially undesirable activities and encourage desirable ones. Thus, it may be argued that a manufacturer will refrain from marketing products deemed "unreasonably" dangerous rather than face the possibility of judgment costs. As a corollary to this argument, a manufacturer could be expected to produce safer products. If this theoretical hypothesis were a practical reality, then the paradigm of reasonableness might be an acceptable framework

[17] Fletcher, supra note 1, at 568.

for deciding obvious-danger cases. Unfortunately, the imposition of liability may be neither a deterrent nor an incentive—the threat of increased liability-insurance premiums may not affect a manufacturer's conduct.[18]

Of course, it might also be argued that the utilitarian decision *not* to impose liability for the manufacture of an obviously dangerous product will have an important deterrent effect on consumers. It is conceivable that the absence of a consumer's remedy for injuries from obviously dangerous products might deter careless use. Calabresi points out, however, that a consumer would be as much deterred by the possibility of physical suffering as he would be by the prospect of uncompensated suffering.[19] He also notes that careless conduct due to absentmindedness is not deterrable by any means since it is a fact of life that individuals cannot control all their acts.[20] In short, it seems unlikely that the decision to shift losses caused by obviously dangerous products, or to leave such losses where they originally fell, will have any meaningful effect on patterns of conduct.[21]

Most cases involving dangerous products have been resolved within the framework of the paradigm of reasonableness. Yet, as has been demonstrated, this paradigm appears to be unsatisfactory. First, I feel that it has been applied too narrowly. Many of the societal costs of injuries caused by obviously dangerous products have been left out of the liability decision. Second, I feel that the paradigm fails to properly achieve the central goal of a tort system—fairness among individual litigants. Finally, the paradigm of reasonableness may fail to satisfy its own utilitarian reason for being. The purpose of imposing liability in a utilitarian system is to encourage or discourage conduct. Yet, as we have seen, in many situations it is highly questionable whether these utilitarian liability decisions have significant impact upon society's conduct in the obvious-danger area.

B. The Paradigm of Reciprocity

In order to advance general social welfare the paradigm of reasonableness often sacrifices fairness to individual plaintiffs.

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[18] A. Ehrenzweig, Psychoanalytic Jurisprudence 247 (1971). However, what a given manufacturer would do is obviously an empirical question. It would seem that many self-insured manufacturers might well choose to make a safer product in order to minimize their costs.

[19] Calabresi, supra note 16, at 218.

[20] Id. at 109-10.

[21] In fact, deterrence probably could be implemented better by direct administrative and criminal sanctions. Passage of the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. II, 1972), is the latest step in this direction.

The paradigm of reciprocity, by contrast, seeks to vindicate "the community's sense of fairness" to individual litigants.[22] Fairness is achieved only if "all individuals in a society have the *right* to roughly the same degree of security from risk."[23] If an individual is forced to relinquish his security and suffers injury, he may be entitled to compensation, which serves as "a surrogate for the individual's right to the same security as enjoyed by others."[24] Thus, the first inquiry under the paradigm of reciprocity is whether the individual deserves compensation. The second inquiry is whether the defendant should compensate.[25]

1. Should the Plaintiff Be Compensated?

To determine the injury victim's right to recover, one examines the nature of the risk to which he was exposed. All members of society are constantly exposed to risks of injury resulting from forms of behavior that are typical in their community and their conduct in turn exposes others to danger. Fletcher terms these risks "background risks."[26] Other forms of behavior are less typical and more hazardous. Fletcher postulates that "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant."[27] By contrast, if two individuals expose each other to risks of similar order and magnitude, there is no right to recovery.[28] In the first situation, the risks are nonreciprocal; in the second, they are reciprocal.[29]

To illustrate this distinction, Fletcher uses several hypotheticals. When a pilot flies an airplane, he exposes those on the ground to a nonreciprocal risk of injury. At the same time, he exposes other pilots in the air to a reciprocal risk of injury. If the pilot crashes, victims on the ground may be entitled to compensation. If there is a collision with another plane, neither pilot will normally recover.[30] In the first case, the risk is nonreciprocal not only because the activities engaged in by victim and pilot are dissimilar, but also because the victim exposes the pilot to no risk and, indeed, *cannot* expose the pilot to the same type of risk. The pilot's activity is not typical in the victim's locality, the ground:

22 See Fletcher, supra note 1, at 538.
23 Id. at 550 (emphasis added).
24 Id.
25 Id. at 540-41.
26 Id. at 543.
27 Id. at 542.
28 Id.
29 Id. at 542, 549.
30 Id. at 542.

it does not create a "background risk." In such situations, tort law has traditionally imposed strict liability on the pilot.[31]

Fletcher's theory becomes more complicated when he develops his analysis to show how negligence fits into the paradigm of reciprocity. He suggests that in some instances, the pilot of a plane that collides with another plane (or, as is more likely, his survivors) may have a right to compensation. If one pilot engages in extreme behavior—for example, by doing loops in the air—the risk to which he exposes the other pilot may *become* nonreciprocal, even though in the world of these pilots the risk of collision is a background risk and even though they engage in activity of the same general order.[32] Fletcher seems to be saying that a significant difference in the degree of risk may become a difference in the order of risk as well;[33] but he does not say so explicitly. In this manner, Fletcher seems unconsciously to introduce notions of reasonableness into his paradigm of reciprocity. How does one determine when a difference in degree becomes a difference in order? One decides whether the defendant acted negligently, that is, beyond "the bounds of reciprocity."[34] But Fletcher does not say how "negligence" under a reciprocity standard would differ from "negligence" under a reasonableness standard.

Fletcher's theory creates other related problems, which he recognizes. First, how does one decide when a risk is of the same order as another risk?[35] To compare a series of what he would call background risks, how does the risk to others created by owning a vicious dog compare to the risk of owning a docile dog? Of owning a cat? Of owning an attractive nuisance? Of owning a motorcycle? And so forth. One might easily construct a series of hypotheticals in which neighbors expose each other to risks of various sorts. Are all of these truly background risks? How many people must engage in an activity in a given locality before it becomes a background risk?[36] Do two background risks always cancel each other out? If not, how do we determine when they do and when they don't? Is it possible to have risks of different orders but similar in degree?

A second problem acknowledged by Fletcher involves the timing of the creation of risk. He describes as "at the fringes of the paradigm of reciprocity" the conceptual difficulty posed by

31 See id. at 547-48.
32 See id. at 548.
33 See id. at 548-49.
34 Id. at 548.
35 See id. at 542, 571-72.
36 See id. at 572.

considering a motorist who hits a pedestrian about to climb into his car.[37] In another moment, the risks would have been reciprocal. Are they considered nonreciprocal simply because of those few steps? Fletcher does not distinguish among the potential for creating a risk, the actual creation of a risk and the culmination of a risk in injury. All of us have the potential to create risks to others, but not all of our activity fulfills that potential. Some of our behavior is harmless. Furthermore, when we do engage in activity that could harm others, injury does not always result. We must consider questions of liability only when harm has actually resulted to at least one party. The only risks relevant to such questions are the risks mutually created by the parties at the time of the accident that caused the injury or injuries. Thus, in the above hypothetical, the fact that a pedestrian momentarily would have become a motorist is irrelevant.

In spite of such difficulties, Fletcher's theory is basically sound and the issue of who should bear the loss of injuries caused by dangerous products fits neatly into his analysis. Under a paradigm of reciprocity, it would seem that all injuries proximately caused by dangerous products are the result of nonreciprocal risks and are therefore recoverable. Such risks are nonreciprocal because plaintiff and defendant are not engaged in the same category of activity: the defendant is manufacturing and marketing a dangerous product; the plaintiff is using, or is a bystander to one using, such a product.[38] The latency of a danger more easily discoverable by the manufacturer than by the consumer increases the degree of the nonreciprocal risk. If the danger is obvious, however, it does not make the risk reciprocal. Therefore, the obviousness of the danger is irrelevant to the initial determination that the victim has been exposed to a nonreciprocal risk and deserves compensation.

Application of the paradigm of reciprocity is complicated in

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[37] Id. at 549 n.46.

[38] A more intricate analysis might apply in cases of pure economic harm rather than personal injury. Where the manufacturer subjects the consumer only to the risk of economic harm, such as loss of income when the product fails, the consumer's failure to prevent or mitigate damages creates a risk of manufacturer liability which could be considered the creation of a reciprocal risk. Both parties are engaged in the general market of selling and buying goods for mutual economic benefit. However, if the categories are defined more narrowly, one could say that the manufacturer-selling market is a category distinct from the buyer-using market. As in the antitrust area, the crucial question becomes one of market, or category, definition. Rather than attempting to balance economic losses through torts theory, cases involving only economic harm are probably best left to principles of the Uniform Commercial Code which speaks directly to such concepts as consequential damages and the duties to prevent and to mitigate economic harms.

dangerous-products cases by the fact that there may be several classes of parties to a case. Indeed, this factor seems to confuse Fletcher in his brief treatment of products-liability issues. He considers the case of a pedestrian suing an automobile manufacturer for injuries caused by design defects,[39] stating:

> In these cases, the ultimate issue is whether the motoring public as a whole should pay a higher price for automobiles in order to compensate manufacturers for their liability costs to pedestrians. The rationale for putting the costs on the motoring public is that motoring, as a whole, imposes a nonreciprocal risk on pedestrians and other bystanders. . . .[40]

In this passage, Fletcher seems to fall back into the reasonableness paradigm without noticing what he has done. The language conflicts with his earlier argument that tort law should be concerned with justice between individuals.[41] Logically, Fletcher should state the ultimate issue as whether the activity of manufacturing and marketing a dangerous, but socially useful, article puts a nonreciprocal risk of physical harm on the *individual* plaintiff consumer, whether user or bystander. For Fletcher to assume cost spreading by the manufacturer as inevitable, and to shift his focus to reciprocity between *all* consumers of a certain dangerous product (via the manufacturer) and bystanders injured by that product is to succumb to the multistep cost-benefit analysis he deplores.[42]

Fletcher correctly is skeptical about the merits of cost-benefit analysis in tort law. In products-liability cases, cost-benefit analysis requires balancing personal injury oranges against economic apples, while simultaneously focusing on the individual consumer harmed by product X and on all consumers of that product—a difficult feat indeed. For torts analysis purposes, whether costs will be passed on to the consumers of product X should be deemed irrelevant in adjusting rights as between the manufacturer of product X and the individual injured by that product. It is the manufacturer who creates the initial risk, not all the consumers of the product.

2. Should the Manufacturer Compensate?

Under the paradigm of reciprocity, injuries sustained as a result of reciprocal risks go uncompensated. Injuries resulting from the imposition of a nonreciprocal risk are compensated, un-

[39] Fletcher, supra note 1, at 570.
[40] Id.
[41] See id. at 538, 542.
[42] See id. at 573.

less the defendant has an "excuse" for his behavior. The availability of an excuse does not signify social approval of the actor's conduct in general. Rather it indicates that, in a particular instance, the actor's conduct was understandable, although perhaps not reasonable, and he should not have to pay damages for the injury it caused.[43] "Excuse" must be distinguished from its analogue in the paradigm of reasonableness, "justification." Justification involves changing a norm by stating that conduct will now and in the future be regarded as reasonable and therefore nonactionable.[44] Thus, the paradigm of reasonableness merges the two inquiries of reciprocity—the victim's right to compensation and the defendant's responsibility for payment—into one inquiry.[45]

Fletcher discusses the two types of excuses that are relevant to the paradigm of reciprocity, the excuse of compulsion and that of unavoidable ignorance.[46] Only the latter is available to a manufacturer who markets a dangerous product,[47] and it should be available only in a limited class of cases. If a risk is latent in a product, a manufacturer cannot be expected to know that it is dangerous until it has harmed someone. Thus, he should be excused from liability for at least the first injury. However, if a danger is obvious, the manufacturer cannot argue that he did not know that his product might injure someone. He has no excuse.

Without a way to legitimate his actions, the manufacturer might want to assert defenses based on the plaintiff's conduct or the conduct of others, such as assumption of risk or contributory negligence. Under the reciprocity theory, neither of these arguments is doctrinally logical. Fletcher acknowledges this fact, but glosses over it by stating that the rationale for limiting liability by means of proving a "self-regarding risk" created by plaintiff "is unrelated to the paradigm of reciprocity."[48] Although it is possible to engraft carefully limited and defined defenses onto the paradigm of reciprocity by using the cost-benefit balancing approach of the reasonableness theory, I suggest that such exceptions to absolute manufacturer liability should not be introduced.

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[43] See id. at 551-52, 559. Note that the question of excuse remains separate from the question of plaintiff's entitlement to recovery. Id. at 553-54.

[44] Id. at 558-59.

[45] Id. at 542.

[46] Id. at 551-53.

[47] The risk presented by dangerous products closely resembles the risk in ultrahazardous-activity cases analyzed by Fletcher. In such cases, only the excuse of unavoidable ignorance is commonly available. Id. at 554-55.

[48] Id. at 549 n.44.

III

THEORIES OF LIABILITY

A. Caveat Concerning Obviousness and Unavoidability

As will be seen, the role and weight assigned to the factor of obviousness in products-liability cases have varied depending on the plaintiff's underlying theory of recovery, a result which leaves uncertain the protection available to consumers. Before proceeding to an examination of the case law concerning dangerous products, attention should be drawn to a distinction that will reappear from time to time throughout this discussion: the difference between the *obviousness* of a danger and its *unavoidability*. A given product may have dangerous features that are apparent to the user, *i.e.*, that are obvious. Alternatively, the dangers may be latent in a product. Either obvious or latent dangers may also be unavoidable, *i.e.*, it may be technologically impossible for the manufacturer to design a product that fulfills the identical function but is not dangerous.

Traditionally, manufacturers have not been held liable for an injury sustained in the use of any unavoidably dangerous product. If the danger is latent, a manufacturer may have a duty to warn the user, but the warning may not be necessary if the defect is obvious. In *Albert v. J. & L. Engineering Co.*,[49] the plaintiff's hand was injured while he was cleaning a sugar-cane-harvesting machine. Expert testimony established that the installation of protective guards would have rendered the machine inoperable. Since the defect's obviousness negated the need for a warning, the manufacturer was absolved of liability for negligent design. The principle illustrated by *Albert* is recognized in comment k to Section 402A of the Restatement (Second) of Torts which provides that unavoidably unsafe products will not be deemed unreasonably dangerous so long as they are properly prepared and marketed and accompanied by proper warnings.

Under the paradigm of reasonableness, the manufacturer's conduct is termed justifiable, because the benefits produced by it outweigh the costs it entails. Refusal to justify such conduct, however, would neither offend logic nor impede economic progress; unavoidability need not always exempt the manufacturer from liability. Under the paradigm of reciprocity, one who manufactures and sells an unavoidably dangerous product, such as a knife, creates a nonreciprocal risk to the consumer. If injury results from use of the knife, the consumer should be compensated. This allocation of cost would not halt the manufacture of knives.

[49] 214 So. 2d 212 (La. App. 1968).

> Protecting the autonomy of the individual does not require that the community forego activities that serve its interests. In the case of socially useful activities, then, insulation can take the form of damage awards shifting the cost of the deprivation from the individual to the agency inexcusably causing it. The burden should fall on the wealth-shifting mechanism of the tort system to insulate individual interests against community demands. By providing compensation for injuries exacted in the public interest, the tort system can protect individual autonomy by taxing, but not prohibiting, socially useful activities.[50]

Despite the clear distinction between unavoidably dangerous products and obviously dangerous products, many courts either fail to recognize it or refuse to find it legally significant. As a result, manufacturers have been absolved from liability for marketing obviously dangerous products when the danger might have been corrected. In the leading case of *Campo v. Scofield*,[51] the manufacturer was held free from liability for alleged negligence in the design of an onion-topping machine with exposed blades. The court failed to accord legal significance to the distinction between obviousness and unavoidability, dismissing the complaint in spite of the plaintiff's assertion that he was prepared to show the availability and feasibility of safeguards.[52]

B. Liability for Harm Resulting from Negligent Failure to Warn

1. The Duty

Even where the danger is unavoidable, the manufacturer still has a duty to warn. However, where the danger is obvious, a suit or count based on negligent failure to warn will usually fail. If the manufacturer can reasonably expect the user to see and appreciate the danger, it is assumed that the danger carries its own warning and the manufacturer has no independent duty to advise caution.[53] When a high school gymnast sought recovery for injuries received on a trampoline, the New Mexico Supreme Court held that the manufacturer had no duty to warn.[54]

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[50] Fletcher, supra note 1, at 568-69.

[51] 301 N.Y. 468, 95 N.E.2d 802 (1950).

[52] See id. at 471-72, 95 N.E.2d at 803-04.

[53] Note, The Manufacturer's Duty to Warn of Dangers Involved in the Use of a Product, 1967 Wash. L.Q. 206, 213.

[54] Garrett v. Nissen Corp., 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972). The court stated that the manufacturer had no duty to warn because the plaintiff had actual knowledge of the danger. However, the manufacturer's standard of care should be determined by what is reasonably foreseeable at the time he manufactures and markets the product. If he had a duty to warn and did not do so, he breached his duty. If the plaintiff nonetheless had actual knowledge of the dangers involved, this knowledge could be viewed as evidence that the plaintiff assumed the risk.

2. A Warning Should Always Be Required

The danger inherent in a particular product design may be easily discernible and yet not fully appreciated by the user. The plaintiff in *Jamieson v. Woodward & Lothrop*,[55] who suffered a detached retina when the rubber exerciser she was using slipped and snapped back into her face, alleged that the manufacturer was liable for negligent failure to warn.[56] The majority concluded that the danger was so obvious that the manufacturer had no duty to warn.[57] The dissenters argued that although the elasticity of the rope might be obvious, the dangers involved in doing the recommended exercise might not be so readily apparent.[58]

The approach the majority in *Jamieson* took toward the duty to warn is not an unusual one. For the case presented a typical situation where the dangers involved would be obvious to most users. Professor Noel notes that where the shortcomings of the design and its attendant dangers will be fully appreciated by most users courts generally have found no duty to warn the occasional inexperienced or naive user.[59] He correctly questions the wisdom of this approach.[60] It is a simple matter to give adequate warning, and this should be done even if only a few users need the education.

C. Liability for Harm Resulting from a Negligent Design

All jurisdictions recognize a cause of action for negligent design. However, the claim that an obviously dangerous product has been negligently designed is not always treated sympathetically. Some courts have allowed the obviousness of a defect to preclude liability as a matter of law. Others have placed obviousness in the "unreasonable risk" calculus as a factor tending to exculpate the manufacturer because it decreases the likelihood of harm. And a third group has concluded that obviousness is irrelevant to the manufacturer's duty.

1. The Campo *Doctrine—Obviousness Precludes Liability as a Matter of Law*

In many jurisdictions obviousness is likely to present an obstacle to establishing an initial breach of duty by the manufac-

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55 247 F.2d 23 (D.C. Cir.) (en banc), cert. denied, 355 U.S. 855 (1957).
56 Id. at 24.
57 See id. at 29-30, 33.
58 Id. at 34-35.
59 Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 272-73 (1969).
60 Id. at 273.

turer. The view most unfavorable to plaintiffs is the one advanced by the New York Court of Appeals in *Campo v. Scofield.*[61] That case treats the allegation and proof of the *latency* of the peril as necessary to the establishment of a cause of action for negligent design.

> The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to the plaintiff or other users. . . .[62]

The *Campo* approach has been reconfirmed by the New York high court in two subsequent decisions. In the first, the court affirmed the dismissal of a suit by a child who had been injured in a fall from a dangerously designed doorstoop. The court found the failure to allege latency fatal to the plaintiff's cause of action.[63] In the second, the court of appeals held that the supplier of a scaffold was under no duty of reasonable care to furnish safe chattels where the defect was patent.[64]

The *Campo* doctrine has not been confined to New York. In other jurisdictions plaintiffs have been denied recovery, as a matter of law, where the danger was obvious and where the manufacturer allegedly could have eliminated the defect.[65] Particularly frequent are cases involving insufficiently safeguarded lawnmowers, with a substantial number of courts declaring that the *Campo* doctrine precludes recovery in the absence of allegations and proof that the defect was latent.[66]

Although some have questioned "whether the *Campo* case stands for the proposition that an obvious danger can never be an unreasonably dangerous one,"[67] the language in *Campo* and the cases just cited indicate that it does. In New York, patency of the defect requires a finding of no breach of duty as a matter

[61] 301 N.Y. 468, 95 N.E.2d 802 (1950).

[62] Id. at 471, 95 N.E.2d at 803.

[63] See Inman v. Binghamton Housing Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

[64] See Sarnoff v. Charles Schad, Inc., 22 N.Y.2d 180, 239 N.E.2d 194, 292 N.Y.S.2d 93 (1968).

[65] See, e.g., Poppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815 (1972) (bicycle without headlight or reflector); Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964) (load-binder without a safety ratchet); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959) (insufficiently guarded tobacco harvester).

[66] See, e.g., Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969); Kientz v. Carlton, 245 N.C. 236, 96 S.E.2d 14 (1957).

[67] 2 F. Harper & F. James, The Law of Torts 215 (Supp. 1968).

of law. Justification for this approach is not apparent. Most courts deem it sufficient to rely on the bald statement from *Campo* that "the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all."[68] The *Campo* court's position was apparently grounded on the notion that if manufacturers are to be required to install all possible safety devices, this fiat should be legislative, not judicial.[69]

Despite the criticism by Harper and James that the *Campo* doctrine is "a vestigial carryover from pre-*MacPherson* days when deceit was needed for recovery,"[70] there was minimal judicial reaction against it for 15 years. During the late 1960's, however, a progressive trend emerged. Increasingly, negligent design came to be viewed as a jury question even where the danger was obvious.[71]

2. *Obviousness as One Factor Bearing on the Manufacturer's Duty*

The liberalizing trend just noted is evident in two recent negligent-design cases. In *Palmer v. Massey-Ferguson, Inc.*,[72] the plaintiff had recovered from the manufacturer of a hay-baler which lacked certain safety features. The defendant appealed, claiming, among other things, error in the trial court's refusal to instruct the jury that a manufacturer had no duty to provide a guard or other protective device against a patent peril.

The court of appeals affirmed the trial court's decision stating:

> It seems to us that a rule which excludes the manufacturer from liability if the defect in the design of his product is patent but applies the duty if such a defect is latent is somewhat anomalous. The manufacturer of the obviously defective product ought not to

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[68] 301 N.Y. at 472, 95 N.E.2d at 804.

[69] See id. at 475, 95 N.E.2d at 805.

[70] 2 F. Harper & F. James, The Law of Torts 1544 (1956).

[71] Thus, in Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967), the court upheld the jury's right to determine whether or not a lawnmower was negligently designed. And, in Brandon v. Yale & Towne Mfg. Co., 342 F.2d 519 (3d Cir. 1965) (per curiam), the court affirmed a jury verdict for a plaintiff who claimed that a fork lift was negligently designed because it lacked safety equipment, despite the fact that the design defect was obvious. Finally, in Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), a builder-vendor failed to install an inexpensive valve. This omission resulted in serious burns to a 16-month-old child by 190- to 210-degree water. The court found the defect was not patent, but, in dictum, questioned the requirement of latency and concluded that "obviousness of a danger does not necessarily preclude a jury finding of unreasonable risk and negligence." Id. at 87, 207 A.2d at 323.

[72] 3 Wash. App. 508, 476 P.2d 713 (1970).

> escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form.[73]

The trend away from *Campo* is also evident in *Byrnes v. Economic Machinery Co.*[74] The plaintiff had been injured when a fellow employee activated a machine while the plaintiff was adjusting it. Although the machine was obviously dangerous, since its moving parts were exposed during adjustment, a Michigan appellate court reversed the summary judgment that the defendant had been granted.

The *Byrnes* court was confronted with *Fisher v. Johnson Milk Co.*,[75] a case that recently had been decided by the Michigan Supreme Court. *Fisher* held, as a matter of law, that a wire milk-bottle carrier was not negligently designed, even though it was without a false bottom to prevent breakage. The holding was premised on the fact that the danger in the carrier was obvious.[76] *Fisher* seemed to adopt *Campo* without qualification,[77] and also relied heavily on another case we have already discussed, *Jamieson v. Woodward & Lothrop*.[78] Nevertheless, the *Byrnes* court succeeded in distinguishing the facts before it from the other three cases. It did so by cutting through the rhetoric of the "latent-defect" rule:

> In reaching their decisions, the courts made much of the need for a latent defect or danger to be present before a duty can be imposed on a manufacturer. In reality, these requirements bear on the unreasonableness of the risk to which one is exposed. . . . If a risk is unreasonable and foreseeable, a duty on the manufacturer's part may arise. In . . . [*Fisher*] the plaintiff was not exposed to a foreseeable unreasonable risk. Therefore, the manufacturer was not subject to liability. . . .[79]

The court noted the "modern tort concept" that awareness of the defect does not itself preclude recovery. Since the manufacturer knew that the machine would have to be continually serviced and adjusted, and since it was arguable that the risk created was un-

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[73] Id. at 517, 476 P.2d at 718-19.

[74] 41 Mich. App. 192, 200 N.W.2d 104 (1972).

[75] 383 Mich. 158, 174 N.W.2d 752 (1970).

[76] See id. at 160-62, 174 N.W.2d at 753-54.

[77] See id. at 162-63, 174 N.W.2d at 754.

[78] 247 F.2d 23 (D.C. Cir.) (en banc), cert. denied, 355 U.S. 855 (1957), cited in 383 Mich. at 160-61, 174 N.W.2d at 753-54.

[79] 41 Mich. App. at 201, 200 N.W.2d at 108. There is an alternative rationale that the *Byrnes* court did not mention. *Fisher* may represent a situation where the danger was unavoidable since a false bottom would not necessarily have prevented the bottles from breaking if dropped. Unavoidability of the danger can logically be deemed to exempt the manufacturer from liability under the paradigm of reasonableness.

reasonable, the court ordered the case to be submitted to the jury.[80]

In view of the fact that the court was operating within the paradigm of reasonableness, this disposition was clearly preferable to adoption of the approach taken by the *Campo* court. One way to determine what is an "unreasonable risk" is to balance the likelihood and gravity of the foreseeable harm against the cost of eliminating the risk.[81] Since obviousness of a danger should create caution on the part of users, thus reducing the likelihood of harm, under this equation it seems appropriate to regard obviousness as *one* factor in assessing the manufacturer's duty.[82] As previously stated, however, under no circumstances should obviousness be held to preclude manufacturer liability as a matter of law.

3. *The Effect of Obviousness on Affirmative Defenses*

Despite the substantial number of negligent-design cases holding that obviousness of a design defect is relevant in assessing the manufacturer's duty, there has been a recent move toward the position that obviousness is to be considered only in the area of affirmative defenses. For example, in *Jamieson v. Woodward & Lothrop*,[83] the dissenting judge suggested that obviousness "would seem to be pertinent . . . on the question of whether the plaintiff assumed the risk . . . rather than on the question of the manufacturer's negligence."[84] Similar sentiments were expressed by the California Supreme Court in *Pike v. Frank G. Hough Co.*[85] There, the court stated unequivocally that in regard to the negligent-design count, "the obviousness of peril is relevant to the manufacturer's defenses, not to the issue of duty."[86] The practical im-

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[80] See id. at 201-03, 200 N.W.2d at 108-09.

[81] Cf. 2 F. Harper & F. James, The Law of Torts 1542 (1956).

[82] The Restatement (Second) of Torts also seems to be in harmony with the view that obviousness of a danger does not necessarily preclude a finding of negligent design. Section 398 states:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Restatement (Second) of Torts § 398 (1965). Comment a to this section notes that the section is a special application of the rule governing negligent manufacture stated in section 395. This latter section invokes as its standard of liability "an unreasonable risk of causing physical harm" to those using the product for a foreseeable purpose.

[83] 247 F.2d 23 (D.C. Cir.) (en banc), cert. denied, 355 U.S. 855 (1957).

[84] Id. at 38.

[85] 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (noted in 49 Tex. L. Rev. 591 (1971)).

[86] 2 Cal. 3d at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634. This view was

pact of this distinction is found in the burden of proof: plaintiff must prove breach of the manufacturer's duty; defendant must establish any affirmative defense.

Traditionally, all types of plaintiffs' conduct classifiable as assumption of risk, ordinary contributory negligence or misuse have operated as a bar to recovery on a negligent-design count.[87] To consider the appropriateness of this result in cases involving obvious danger, it is necessary to review the ways in which the rules have been applied.

a. Assumption of the Risk——A person is said to assume the risk of an activity when he knowingly encounters a danger and fully appreciates the risks involved. However, the fact that a person assumed the risk of an activity does not necessarily preclude a recovery for injuries suffered. For assumption of the risk only constitutes a defense to an action if the plaintiff can be said to have unreasonably assumed the risk. In this situation, the danger accepted is disproportionate to the advantage sought. On the other hand, if the plaintiff had knowledge of the risk and voluntarily, but reasonably, proceeded to encounter it, he may still recover.[88] While obviousness may play a role in the determination, the ordinary balancing theory used does not take into account the fact that the manufacturer of an obviously dangerous product creates a risk to others while those who purchase the product jeopardize only their own safety.

What kind of fact situation would support a finding that plaintiff reasonably encountered a known danger? Suppose he is an employee assigned to use a meat grinder having no guard to protect his fingers. If he agrees to use the machine, and due to momentary inadvertence allows his fingers to get caught, what would be the probable result? A jury could well find that his

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reaffirmed in the strict-liability case of Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972). See text accompanying notes 137-39 infra. *Pike*'s limitation on obviousness, as being relevant only to defenses, also was approved, in dictum, in Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 518, 476 P.2d 713, 719 (1970).

87 See Prosser, Torts, supra note 11, at 416.

88 See id. at 440-41, 670-71. As Prosser points out, unreasonable assumption of the risk is more properly labeled contributory negligence. Professor Robert Keeton suggests why reasonable assumption of the risk should not bar recovery in a negligence situation:

> Why should a negligent defendant be allowed to escape liability because the plaintiff chose to expose himself to the risk negligently created by the defendant, if the plaintiff's choice was reasonable? Should we not instead say that the defendant's negligence unfairly confronted plaintiff with a hard choice in which exposure to defendant's negligently created risk seemed the lesser evil and that, therefore, the defendant should be liable?

Keeton, Assumption of Product Risks, 19 Sw. L.J. 61, 71 (1965) (citation omitted).

voluntary decision to work with a dangerous machine was reasonable, *i.e.*, that he had not unreasonably assumed the risk. His inadvertence, if relevant at all, would not constitute assumption of risk, but at the most contributory negligence.

Suppose, however, that an experienced mechanic operates a trencher, the drive belt of which has been set in a tight position by the manufacturer.[89] The operator has read instructions from the manufacturer stating that the drive belt should be adjusted so that it is loose enough to slip if an object gets caught in the digging chain. The digging teeth catch on an underground pipe, causing the machine to lurch forward, and as a result, the plaintiff is injured. In this situation, the initial decision to work with a dangerous machine appears reasonable. However, a jury would probably conclude that the operator, by failing to comply with the simple instructions, had unreasonably assumed the risk of that decision. Alternatively, the jury might conclude that the operator's failure to adjust the machine constituted contributory negligence.

The crucial difference between the two hypotheticals is that in the second, the plaintiff had a reasonable alternative, that of remedying the defect himself. Since he failed to do so, the manufacturer should be relieved from liability. Momentary inadvertence, an unavoidable human failing, is not to be equated with a conscious decision to encounter a danger which could be eliminated before using the product. If manufacturers are deemed justified in creating and marketing unavoidably dangerous products, justice demands users should be excused for unavoidable moments of inadvertence as well as for reasonably encountering a known danger.

The fact that the danger is obvious is frequently urged as grounds for a finding that plaintiff had unreasonably assumed the risk as a matter of law. There are at least two reasons why reasonable assumption of risk usually should remain a jury question despite the obviousness of the danger. In the first place, it should be noted that although the design that creates the danger may be plainly visible, the danger itself may either be unknown or insufficiently appreciated.[90] The necessity for appreciation of the risk is set forth in the Restatement: "Except where he ex-

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[89] These facts are taken from Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

[90] See Messina v. Clark Equip. Co., 263 F.2d 291, 294 (2d Cir.) (Clark, C.J., dissenting), cert. denied, 359 U.S. 1013 (1959); cf. Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand. L. Rev. 93, 121-22 (1972) [hereinafter Noel, Defective Products].

pressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character."[91]

The requirement that the plaintiff know of and understand the risk is usually considered to be a subjective standard; relevant evidence is the plaintiff's testimony and such factors as age and experience.[92] For example, in *Greco v. Bucciconi Engineering Co.*,[93] the plaintiff was injured when metal sheets fell on his hand because of a defect in the machine's fingers. The fingers were supposed to catch and hold the sheets. Although the plaintiff knew that the machine sometimes malfunctioned, he had allegedly never seen the sheets fall while a pin, which had been inserted to remedy the defect, was present. The court held that it was impossible to say, as a matter of law, that the plaintiff had assumed the risk. It was for the jury to decide whether or not it was reasonable for him to assume the sheets would not fall while the pin was inserted.[94]

Although the standard for assumption of the risk is basically subjective, the courts have introduced an objective element into the determination by allowing the trier of fact to consider obviousness of the design defect as evidence that plaintiff must have known of the hazard. In *Williams v. Brown Manufacturing Co.*,[95] the court stated:

> No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard . . . ; and the factors of the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses, . . . will all be relevant to the jury's determination of the issue, if raised. . . .[96]

It is submitted that assumption of the risk should remain a subjective factor. Although 99% of the population might perceive the risk, the remaining one percent should not be precluded from a chance to convince the jury that they, in fact, did not.

The conclusion that assumption of risk usually should remain a jury question is buttressed by the observation that those who use obviously defective products often do so because they lack viable alternatives. Many products-liability cases involve employees injured by machinery with obvious defects. Since the em-

[91] Restatement (Second) of Torts § 496D (1965).
[92] Noel, Defective Products, supra note 90, at 121-28.
[93] 407 F.2d 87 (3d Cir. 1969).
[94] Id. at 92-93.
[95] 45 Ill. 2d 418, 261 N.E.2d 305 (1970).
[96] Id. at 430-31, 261 N.E.2d at 312 (citations omitted).

ployee's only alternative to using the defective machine is to lose his job, it is doubtful whether it can be said that he has voluntarily assumed even a very obvious risk.[97] It is also true that the low-income consumer often lacks alternatives because he simply cannot afford the safer but more expensive product. Likewise the consumer who relies for information on advertising may lack an educated alternative.

Picture the consumer who buys a belt reducer on the strength of an advertisement extolling the desirability of being slim and the durability of the machine. However, the advertisement omits the mention of any dangers. Later he reads a newspaper article discussing the dangers inherent in using any belt reducer. If the buyer tries to return the machine, the seller is likely to refuse, arguing that it is not dangerous or that, if it is, this fact should have been apparent from the outset.

It is bad enough that the consumer is frequently without any real alternative to using an obviously dangerous machine. But matters are made worse if the nature of the danger requires constant vigilance on the part of the consumer, as, for example, in the case of heavy machinery with unguarded moving parts. Since inadvertence is never really totally avoidable, the consumer runs the risk of an accident. However, as has been argued earlier, the possibility that inadvertence may result in injury should not make the consumer's choice to use the machine unreasonable. The issue of the reasonableness of the assumption of risk should be referred to the jury.

b. Contributory Negligence——In contrast to contributory negligence amounting to assumption of the risk, ordinary contributory negligence consists of either unreasonable failure to appreciate a risk or an inadvertent mistake in dealing with a risk.[98] The first category, unreasonable failure to discover a risk, is clearly not applicable to obvious dangers. Plaintiff's inadvertence, however, is frequently a source of claimed contributory negligence.

A significant recent circumvention of the contributory negligence doctrine was made in *Bexiga v. Havir Manufacturing Corp.*,[99] decided by the New Jersey Supreme Court. There an employee injured his hand on a punch press that allegedly had been negligently designed. The machine could have been equipped with a device allowing activation only when both the operator's hands were pressing buttons, thus preventing the injury. The court,

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97 See text accompanying notes 194-99 infra.

98 See Prosser, Torts, supra note 11, at 424.

99 60 N.J. 402, 290 A.2d 281 (1972).

after holding that the trial court had erroneously dismissed the plaintiff's claim, went on to consider the defendant's contention that the plaintiff had been contributorily negligent. Noting that the defense had been held unavailable in negligence cases "where considerations of policy and justice dictate," the court concluded that on the facts before it contributory negligence was unavailable.[100]

> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against. . . .[101]

Simply stated, *Bexiga* held that a plaintiff will not be deemed contributorily negligent for using a machine in a fully foreseeable, if inadvertent, way, if the danger could have been safeguarded against by the manufacturer.

As precedent for its holding, the *Bexiga* court cited two cases. The first, *Soronen v. Olde Milford Inn, Inc.*,[102] dealt with the sale of liquor to a visibly intoxicated customer. The court refused to recognize the claim that the plaintiff's drunkenness amounted to contributory negligence. The second, *Bahlman v. Hudson Motor Car Co.*,[103] involved an automaker's express warranty that its car had a safe top constructed from one piece of steel. The plaintiff had been injured when he overturned the car and suffered a gash on his head from a seam in the roof. The Michigan Supreme Court declared contributory negligence unavailable as a defense against a warranty-of-safety claim.

The logic of these cases is compelling. Once it is established that the defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct. It has been suggested that this reasoning could eliminate the defense of contributory negligence from most negligence and strict-liability cases, allowing it to be used only in cases in which the plaintiff is the party most capable of cost spreading and accident-level optimization.[104]

The fact that contributory negligence is not completely tossed out the window by *Bexiga* does not mean, however, that

[100] Id. at 412, 290 A.2d at 286. New Jersey is a jurisdiction which classifies unreasonable assumption of the risk as contributory negligence. See Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 472-73, 251 A.2d 278, 282-83 (1969).

[101] 60 N.J. at 412, 290 A.2d at 286.

[102] 46 N.J. 582, 218 A.2d 630 (1966).

[103] 290 Mich. 683, 288 N.W. 309 (1939).

[104] See Comment, 86 Harv. L. Rev. 923, 929-31 (1973).

it is a good doctrine. In fact, the New York legislature has frequently considered abolishing it.[105] And the New York Court of Appeals has likewise indicated an openness toward substituting comparative negligence for contributory negligence. In *Dole v. Dow Chemical Co.*,[106] the court allowed defendant joint tortfeasors to seek either partial or total indemnification by impleader, with the amount of indemnification based on a comparison of the negligence of the tortfeasors. A logical extension of this doctrine would have allowed a defendant to counterclaim or claim a set-off for plaintiff's negligence, thus introducing a system of comparative negligence between plaintiffs and defendants as well as between defendant joint tortfeasors.[107]

In *Codling v. Paglia*,[108] the court of appeals had a chance to extend *Dole* to a situation involving contributory negligence. However, because the driver of the defective vehicle had already voluntarily settled with the bystander-plaintiffs, and because the court felt that substituting comparative negligence for contributory negligence is "more appropriate for legislative address," the court refused to extend *Dole* into the contributory negligence area.[109] The court did leave open the possibility of judicial reform in the event of legislative inaction, stating: "We do not, however, *now* apply these [*Dole* apportionment] principles to the Paglia settlement."[110] The court acknowledged that it had been critical of the doctrine of contributory negligence,[111] and two judges filed a concurring opinion arguing that the time had come to substitute comparative negligence for contributory negligence.[112] Therefore, it seems possible that the court could extend *Dole* when confronted with a contributory negligence situation where there has been no pretrial settlement by any of the parties.

Although seemingly appropriate, a different kind of limitation on the defense of contributory negligence apparently has not been urged in negligent-design cases. It is common doctrine that when the defendant creates a risk in reckless disregard of the safety of others, the plaintiff can recover despite his own negligence.[113] Admittedly, characterizing the manufacturer's conduct as reck-

[105] For a discussion of one of the proposed statutes that did not pass, see Note, Proposed Adoption of Comparative Negligence in the State of New York, 25 Fordham L. Rev. 184 (1956).

[106] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[107] Comment, 47 N.Y.U.L. Rev. 815, 833 (1972).

[108] 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

[109] Id. at 344-45, 298 N.E.2d at 630, 345 N.Y.S.2d at 471-72.

[110] Id. at 344, 298 N.E.2d at 630, 345 N.Y.S.2d at 471 (emphasis added).

[111] Id., 298 N.E.2d at 630, 345 N.Y.S.2d at 471.

[112] See id. at 345-48, 298 N.E.2d at 630-32, 345 N.Y.S.2d at 472-74.

[113] See Leflar, The Declining Defense of Contributory Negligence, 1 Ark. L. Rev. 1, 5-6 (1946).

less would be possible only where the product has caused previous injuries or where other factors indicate a high probability of harm. However, since the rule of contributory negligence persists despite heavy criticism[114]—a "chronic invalid who will not die"[115]—all possible avenues for avoiding it should be utilized and the possibilities inherent in the reckless-disregard theory should not be ignored.

4. Conclusions Regarding the Effect of Obviousness in Negligent-Design Actions

The effect that an obvious danger will have on what is now termed a negligent-design case will vary depending upon the paradigm of responsibility that the courts choose to apply. For those which insist on using the paradigm of reasonableness, obviousness of a danger will remain relevant. Since that standard revolves around a utilitarian balancing of the risks created by the defendant against the benefits of his conduct, obviousness of the danger should be considered as a factor minimizing the likelihood of harm. If the danger is unlikely to cause frequent injury, if the foreseeable injuries will usually be slight, and if the cost of preventing the injuries will be high, it can be said that defendant's failure to adopt a safer design is reasonable.

Once a breach of a defendant's duty is established under this paradigm, however, only intentional and unreasonable conduct, never mere inadvertence, should defeat the plaintiff's right to recover. For the most part, traditional notions of contributory negligence[116] and assumption of risk should disappear. In particular, when the probability of the plaintiff's inadvertence is foreseeable and the manufacturer has the capacity to guard against that contingency, he should not be released from his duty toward plaintiff simply because the danger is obvious. As the *Bexiga* court so correctly perceived, the defendant's duty to provide safeguards against obvious dangers is imposed precisely to prevent harm to inadvertent users.[117] Therefore, the user's foreseeable conduct should not negate the duty.

The conclusions reached with respect to the paradigm of reasonableness would be significantly different were a reciprocity analysis applied. Under this theory, the consumer-plaintiff always

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114 See, e.g., James, Contributory Negligence, 62 Yale L.J. 691, 704-05 (1953).

115 Prosser, Torts, supra note 11, at 418.

116 As Prosser points out, "contributory negligence" is an inaccurate term since negligence traditionally has meant conduct which creates an undue risk of harm to others. See id.

117 See text accompanying notes 99-101 supra.

would be entitled to compensation because of the nonreciprocal risk of harm imposed on him by the manufacturer. Nor could the manufacturer successfully claim either of the two excuses recognized under the reciprocity theory.[118] The excuse of compulsion would not be available in any products-liability action. And in obvious-danger cases the excuse of unavoidable ignorance would never be available.[119]

Affirmative defenses based on reasonableness justifications are doctrinally inconsistent with the reciprocity theory and would not be allowed. However, if the evidence proved that the injured plaintiff specifically rejected an available and proffered safeguard at the time of purchase, and did so with full knowledge of the nature and extent of the potential danger, recovery should be denied. Rather than labeling this situation assumption of the risk, the manufacturer's conduct could be deemed not a proximate cause of the injury. An alternative solution would be to find that the plaintiff had failed to prove a manufacturer-created risk, but rather that the risks had been jointly created.

D. Strict Liability in Tort

1. The Manufacturer's Breach of Duty

A substantial number of states now hold manufacturers strictly liable in tort for injuries caused by the marketing of dangerous and defective products. This approach eases the plaintiff's task considerably by requiring less extensive proof than is demanded in a negligent-design case. But does the obviousness of a danger affect recovery under a strict-liability theory? The answer depends upon whether the court adopts the formulation set out in the Restatement (Second) of Torts or adopts the one developed by the California Supreme Court—the *Greenman-Cronin* theory. We will begin by considering the Restatement's approach.

a. The Restatement Approach——Section 402A of the Restatement (Second) of Torts imposes liability, regardless of negligence, on one "who sells any product in a defective condition unreasonably dangerous to the user." A defect in design, as well as a defect in the material used or in construction, may render a product unreasonably dangerous.

Comment i to section 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be con-

[118] See text accompanying notes 43-47 supra.

[119] However, in the case of a latent danger, if the manufacturer were unavoidably ignorant of its existence, he could be excused from liability for the first injury.

templated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This language suggests that the drafters of the Restatement felt unreasonableness should be determined by reference to an objective standard, rather than by reference to the imprecise subjective expectations of the injured party. This conclusion seems clear since comment i speaks of dangers beyond those "which would be contemplated by the ordinary consumer," not dangers beyond those actually contemplated by the injured plaintiff.

A subjective standard clearly would have been unwise since it would encourage an enticingly specious argument in opposition to the claim of any plaintiff injured by an obviously dangerous product. It could be contended that a patent danger is never subjectively unreasonable—the mere fact of purchase being used to establish that the product's dangers did not exceed the consumer's reasonable expectations. However, this reasoning ignores the fact that a consumer who genuinely wants to purchase a safe product may be forced to buy a dangerous one. In short, if accepted, the argument would foster a result contrary to the spirit of the Restatement. An injured party would be penalized simply because he made a Hobson's choice.

The objective standard of comment i suggests the following question for jury determination: did the dangers presented by the product exceed those that would have been expected by the average consumer, *once he had been apprised of all information commonly known about its qualities*? In answering this question the jury would be making a comparison. It would set the risks perceived by the hypothetical consumer against those actually presented. If the real danger exceeded the imagined danger then the manufacturer would be held liable. Expert testimony would play a vital role in the determination since it would not be possible to evaluate a product's real dangers without making reference to industry standards, dangers in design, the existence of alternative materials, methods of production or safeguards, and other similar technical factors.

In practice, the courts have not made the inquiry just suggested. Despite the fact that section 402A, read along with comment i, purports to focus on the reasonableness of the danger involved, the courts have focused on the reasonableness of the manufacturer's risk-creating conduct. The assumption is made throughout that he knew of all the dangers involved.[120]

[120] See Keeton, Manufacturer's Liability: The Meaning of Defect in the

The reasonableness question has been decided by reverting to the negligence test of balancing the seriousness of the harm against the costs of avoiding it.[121] This approach differs from the old negligence test in only one substantial way—the dangers considered are not the dangers about which a reasonable manufacturer should have known, but rather the dangers which are proved to be involved in the particular case.[122] The obviousness of the defect then assumes the same relevance in a strict-liability case that it does in negligent-design actions—the more obvious the defect, the more likely it is that users will avoid the harm.

If obviousness were considered to be but one factor in the cost-benefit calculus used in evaluating the reasonableness of dangers, no great harm would be done. Unfortunately, however, the *Campo* doctrine[123] has crept into strict liability in some jurisdictions. This disturbing trend toward denying recovery as a matter of law to a plaintiff injured by an obviously dangerous product is well illustrated by three cases.

In the first, *Maas v. Dreher*,[124] an Arizona appellate court adopted Judge Traynor's conclusion that under the Restatement "strict liability is primarily concerned with the surprise element of danger."[125] Therefore, the court held that a manufacturer could not be strictly liable in tort for an open and obvious danger known to the plaintiff.[126] The court did make it clear, however, that it had applied an objective standard based on perceptions of the ordinary consumer, not on the actual subjective knowledge and appreciation of the particular plaintiff.[127] Similarly, in *Downey v. Moore's Time-Saving Equipment, Inc.*,[128] the court stated that Indiana law requires the plaintiff to prove the existence of a latent defect in a strict-liability case.[129]

Finally, the Seventh Circuit Court of Appeals approved the following jury instruction in *Ilnicki v. Montgomery Ward Co.*,[130] a strict-liability case involving lawnmower injuries:

Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 568 (1969) [hereinafter Keeton, Defect]; Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 15 (1965).

121 See, e.g., Dorsey v. Yoder Co., 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), aff'd, 474 F.2d 1339 (3d Cir. 1973).

122 Keeton, Defect, supra note 120, at 568.

123 See text accompanying notes 61-62 supra.

124 10 Ariz. App. 520, 460 P.2d 191 (1969).

125 Id. at 522, 460 P.2d at 193, citing Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 370 (1965).

126 10 Ariz. App. at 523, 460 P.2d at 194.

127 Id., 460 P.2d at 194.

128 432 F.2d 1088 (7th Cir. 1970).

129 Id. at 1093.

130 371 F.2d 195 (7th Cir. 1966).

> The manufacturer of a machine is under no duty to design or produce a machine that is accident proof or fool proof, nor is he under any duty to guard against an injury from an obvious peril, or from a source manifestly dangerous.[131]

b. The California Approach—An Anti-402A Theory—— Without articulating the label, the California Supreme Court recently moved toward the reciprocity approach in evolving an "anti-402A" theory of strict products liability. The development took place in two companion cases interpreting the following standard that had been formulated in *Greenman v. Yuba Power Products, Inc.*:[132] "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."[133]

In the first case, *Cronin v. J.B.E. Olson Corp.*,[134] the court required proof of defectiveness but rejected an interpretation of *Greenman* which would have necessitated a showing that a product was "unreasonably dangerous." To do so, the court reasoned, would be to burden "the injured plaintiff with proof of an element which rings of negligence."[135] But, since the purposes of strict liability in tort are to relieve the plaintiff from the problems inherent in proving negligence and to make the manufacturer liable for injuries caused by defective products, an "unreasonably dangerous" requirement would be a backward step.[136]

In the second case, *Luque v. McLean*,[137] the court had to decide whether or not obviousness retained any possible relevance to a determination of the manufacturer's duty. Certainly, *Cronin* implied that it did not. However, before the *Luque* court could reach this conclusion, it had to overcome some troublesome and ambiguous language in *Greenman*:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture *of which plaintiff was not aware* that made the Shopsmith unsafe for its intended use.[138]

The court concluded that the language did not make latency a necessary element in plaintiff's cause of action for strict liability

131 Id. at 199.
132 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
133 Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
134 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
135 Id. at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
136 Id. at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
137 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).
138 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701 (emphasis added).

in tort. Rather, it meant that the defect must have been one as to which the plaintiff had not voluntarily and unreasonably assumed the risk, with the burden of proving assumption on the defendant.[139] *Luque* thus seems to foreclose any possibility that obviousness of a danger could be deemed relevant to the assessment of the manufacturer's duty. However, this conclusion may well be tempered by the definition of "defective" that a court chooses to apply.

Neither *Cronin* nor *Luque* really meet the question of what a defect is, although in *Cronin* the court did note the difficulty of demarcating the term.[140] Two possible definitions can be posited. First, a defective product might be defined as one which should not have been marketed when judged in the light of trial-established facts regarding such things as plaintiff's injury, statistics on other persons injured by that model and the manufacturer's choice of material and design. This definition, however, gets back to a hindsight reasonable-manufacturer standard, one which the California court apparently hoped to avoid. The court implicitly rejected a definition of "defective" based on the "surprised ordinary consumer test" which makes a product unreasonably dangerous under comment i to Section 402A of the Restatement (Second) of Torts.

Second, a product might be deemed defective if its dangerous characteristics could have been avoided or mitigated through a better manufacturing process, a safer design or more adequate warnings. This amounts to saying two things: if a product can be made safer, it should be, regardless of economic cost; and, furthermore, failure to make these improvements will result in manufacturer liability. Although obviousness of a danger would be irrelevant to the question of initial manufacturer liability, the test is unsatisfactory. This is because it places the burden of proving the technological feasibility of safeguarding the product on the plaintiff although the defendant has easier access to the data relevant to this inquiry.

Thus, by resorting to the requirement that a product be "defective," the California court has left open the possibility of semantic debate over the term's meaning. Rather than clinging to this requirement, the court should have taken *Greenman* to its logical extreme. It should have required only proof that a product was dangerous—that in the state it was sold by the manufacturer, it was a proximate cause of the injuries suffered. Requiring only

139 8 Cal. 3d at 141-45, 501 P.2d at 1166-69, 104 Cal. Rptr. at 446-49.
140 8 Cal. 3d at 134 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16.

proof of dangerousness forces the same result as would be obtained by application of the paradigm of reciprocity except in the area of affirmative defenses. Short of an explicit acceptance of the reciprocity analysis, this would provide the most satisfactory structure for a strict-liability recovery.

2. Affirmative Defenses to Strict-Liability Actions

a. Under the Reasonableness Theory——If strict liability in tort is viewed as a means to effective risk spreading when no comprehensive insurance plan exists, affirmative defenses should become less important if not extinct. Professor Page Keeton concludes that once plaintiff has shown his injury to have resulted proximately from defects in an improperly designed product, "conceivably few, if any, defenses would have to be recognized as further limitations on the makers' responsibility."[141] Even misuse of a bad product might not prevent plaintiff's recovery since the defect and plaintiff's conduct each could be considered a "but for" cause of the injuries.[142]

In contrast to Keeton's restrictive approach, the Restatement seems to take a more liberal view toward affirmative defenses. Comment n to section 402A states that while mere failure to discover a defect or to guard against its possibility will not defeat a plaintiff's action, voluntary and unreasonable exposure to a known danger will. The formulation, although widely accepted,[143] leaves two central problems unresolved. The first is found in its resort to the ubiquitous unreasonable-conduct standard, one that is again left insufficiently articulated. The courts have yet to fill the void successfully; thus, the standard's precise boundaries remain undefined.

In *Messick v. General Motors Corp.*,[144] one of the few cases interpreting comment n, the Fifth Circuit Court of Appeals applied Texas law to a section 402A case. It concluded that the Texas Supreme Court would follow the comment and would require an unreasonable assumption of the risk to defeat recovery. The court then affirmed a judgment for a plaintiff who continued to drive his car despite the knowledge that its steering mechanism was defective. The facts that the plaintiff needed his car to earn a living and had invested one-sixth of his income in car pay-

141 Keeton, Defect, supra note 120, at 567.

142 Id.

143 Prosser, Torts, supra note 11, at 670-71; see Buttrick v. Lessard & Sons, 110 N.H. 36, 260 A.2d 111 (1969).

144 460 F.2d 485 (5th Cir. 1972).

ments were vital to the finding that his continued use of the car was reasonable.[145]

A second significant shortcoming of section 402A's treatment of plaintiff's conduct is its failure to clarify the relationship of comment n to comment h. Comment h states that a product is not defective when it is safe for normal handling and consumption. This indicates that misuse is to be considered separately from voluntary and unreasonable assumption of a known risk rather than being subsumed thereunder. Predictably, many jurisdictions have placed the burden of proving normal product use on the plaintiff, while all courts view assumption of risk as an affirmative defense.[146] This difference in treatment creates a problem because any possible distinction between unreasonable assumption of the risk and misuse is a subtle one, and the categories frequently overlap. For example, if the plaintiff attempts to clean a meat grinder while the machine is running, it could be contended that he unreasonably assumed the risk of the activity because he had the alternative of turning off the machine and cleaning it. It could also be argued that the plaintiff's action was a use of the product in a manner that could not have been reasonably foreseen by the manufacturer and thus constituted misuse. Either label seems logical.

Consider the facts of *Bartkewich v. Billinger*,[147] a troublesome case which applied section 402A. The plaintiff, an experienced glass-factory worker, was injured when he stuck his hand into a glass-breaking machine to unclog a jam. The machine was poorly designed and had no safeguards to prevent the occurrence. The jury returned a verdict for the plaintiff which was reversed by the Pennsylvania Supreme Court with directions to enter judgment for the defendant *n.o.v.*[148] While it is clear that the court thought the plaintiff's conduct unreasonable,[149] the contrary position is arguable on the facts. As an employee, the plaintiff's initial decision to use the dangerous machine seems reasonable, and the act of sticking his hand into the machine may not have been the sort of deliberate act that should amount to an unreasonable assumption of the risk. Unfortunately, the court did not explicitly state the ground for its decision. There is language, however, to

145 Id. at 494.

146 See Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267, 272-73.

147 432 Pa. 351, 247 A.2d 603 (1968).

148 Id. at 356-57, 247 A.2d at 606.

149 See id. at 355, 247 A.2d at 605-06.

indicate that it thought the plaintiff's conduct amounted to misuse and not merely an unreasonable assumption of the risk: "We believe . . . that . . . [section 402A] should only apply to allow recovery where the absence of the safety device caused an accidental injury which was of the type that could be expected from the *normal* use of the product."[150]

The implications of this proposed reading of *Bartkewich* are disturbing. Since the court ordered entry of a judgment for defendant *n.o.v.*, the case could be read as holding that plaintiff's failure to prove normal use always defeats a section 402A claim as a matter of law. An inadvertent mishandling of a product apparently would be as fatal as deliberate misuse. While it can hardly be certain that *Bartkewich* was intended to be read so broadly, it is clear that this reading would do violence to the intent of comment n to section 402A. For it simply cannot be said that every misuse of a product is unreasonable. Even deliberate and unreasonable misuse is sometimes foreseeable. Under the reasonableness paradigm, arguably the manufacturer should guard against such conduct.[151]

Although his conduct always will be relevant to the proximate-cause issue in a 402A case, plaintiff should not have to show normal use of the product. Once he clears the proximate-cause hurdle, misuse, like other categories of plaintiff's conduct, should be considered only as an affirmative defense. Otherwise, consumer-oriented courts can be expected to view borderline problems as questions of assumption of the risk, while manufacturer-oriented courts will look to the doctrine of misuse. Courts should be reluctant to remove from jury consideration questions concerning the effect of plaintiff's conduct on his right to recover, regardless of the label applied to the conduct. According to Professor Noel, the current trend in products-liability cases is away from finding assumption of risk as a matter of law,[152] although he indicates that courts which are not wholeheartedly committed to the notion of strict liability may be more easily persuaded to direct a verdict against the plaintiff.[153]

In sum, the defenses available to a section 402A action should be severely limited. In a case like *Bartkewich*, for example, the manufacturer had ample time to evaluate the necessity and feasibility of safeguards. If the unguarded machine posed unreasonable danger to users, the manufacturer's liability should not be

150 Id. at 354, 247 A.2d at 605 (emphasis added).
151 See Prosser, Torts, supra note 11, at 669.
152 Noel, Defective Products, supra note 90, at 127.
153 Id. at 128.

defeated absent an equally deliberate decision by the plaintiff to encounter the danger unreasonably or to misuse the product.

A significant limitation on defenses to strict-liability actions was achieved by the New Jersey Supreme Court in *Bexiga v. Havir Manufacturing Corp.*[154] As will be recalled, the court held that the defendant had a duty to install safeguards on a punch press in order to protect users from their own foreseeable inadvertence.[155] To let this anticipated conduct preclude liability would be, the court said, "anomalous"; therefore, consideration of contributory negligence was precluded.[156]

Bexiga must not be read too broadly, for the court based its decision on a limited dictum in *Ettin v. Ava Truck Leasing, Inc.*[157] *Ettin* had said that contributory negligence would be unavailable in special situations in the strict-liability area.[158] The *Bexiga* court clearly felt that it was faced with such a special situation.[159] But in no way did *Bexiga* imply that it was overruling *Ettin*'s clear indication that contributory negligence would be an available defense to most strict-liability claims.

The *Ettin* court had discussed favorably two earlier cases.[160] In the first,[161] the plaintiff was found contributorily negligent for continuing to drive a truck after becoming aware that the brakes were defective. In the second,[162] recovery was precluded by the unusual and careless manner in which the plaintiff had tried to open a glass toothbrush container. The *Ettin* court refused to differentiate among misuse, ordinary contributory negligence and assumption of the risk, citing with approval the following statement from the second case:

> "Simply stated, we are of the view that where a plaintiff acts or fails to act as a reasonably prudent man in connection with use of a warranted product or one which comes into his hands under circumstances imposing strict liability . . . , and such conduct proximately contributes to his injury, he cannot recover. . . . A manufacturer or seller is entitled to expect a normal use of his product. The reach of the doctrine of strict liability in tort . . . should not be extended so as to negate that expectation."[163]

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154 60 N.J. 402, 290 A.2d 281 (1972).
155 See text accompanying notes 99-101 supra.
156 60 N.J. at 412, 290 A.2d at 286.
157 53 N.J. 463, 251 A.2d 278 (1969), cited in 60 N.J. at 412, 290 A.2d at 286.
158 See 53 N.J. at 473, 251 A.2d at 283.
159 60 N.J. at 412, 290 A.2d at 286.
160 See 53 N.J. at 470-72, 251 A.2d at 281-82.
161 Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).
162 Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965).
163 53 N.J. at 472, 251 A.2d at 282, quoting 45 N.J. at 574, 214 A.2d at 20.

Thus, under *Ettin* and *Bexiga* it seems likely that plaintiff's failure to exercise reasonable care, regardless of the label, will bar his recovery unless that conduct was foreseeable and preventable by the manufacturer.

b. Under the Paradigm of Reciprocity——Are there any doctrinally logical defenses under the reciprocity theory? As we have already discussed, the answer is no, because neither the excuse of compulsion nor that of unavoidable ignorance will be available to a manufacturer in an obviously-dangerous-product case.[164] We might review, however, the "reasonableness" exceptions that courts might be expected to make to the reciprocity theory. It bears repeating that these utilitarian exceptions, if applied, should be carefully limited and defined, and should be considered solely as matters of affirmative defenses. Defenses might be available in cases of: (1) conscious and intentional misuse of the product by plaintiff, on the ground that his misconduct is "weightier" than defendant's; (2) plaintiff's refusal of a manufacturer's safeguard proffered at no additional cost (perhaps a category of misuse); and (3) unavoidably dangerous products such as knives and moving machinery where no safeguards are available under existing technology. The recognition of defenses, of course, depends upon a court's view of where the loss reasonably should fall.

3. The Calabresi and Hirschoff Test for Strict Liability

Rejecting both the current reasonableness test, in which the court or jury balances the cost of the accident against the manufacturer's cost of avoiding it, and the reciprocity theory, Calabresi and Hirschoff propose a new test for strict products liability.[165] Accepting a central aim of minimizing the sum of accident costs and accident-avoidance costs, they suggest that risk should be borne by the cheapest cost avoider, defined as the party who "is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."[166] They reject a test which would place the costs of all accidents deemed not worth having on the injured party unless the injurer was negligent, or one which places such costs on the injurer unless the injured was negligent.[167] By avoid-

164 See text accompanying notes 43-48 supra.

165 Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055 (1972).

166 Id. at 1060 (emphasis omitted).

167 Accidents deemed not worth having are determined through a cost-benefit analysis.

ing any inflexible rule of thumb which always places liability on the same category of persons, and searching for the best cost avoider in each particular case, Calabresi and Hirschoff hope to both maximize primary-cost avoidance[168] and to minimize the sum total of both accident costs and primary-accident-avoidance costs.[169]

Whether or not this hope is justified is open to a debate which will not be pursued here because, in any event, the test does not provide a satisfactory framework for the resolution of strict-liability cases. Although theoretically appealing, the test is impractical and inefficient because of the difficulties involved in locating the best decisionmaker. Judges and juries are not trained to draw multibranched decision trees. To compare the decision-making abilities of a manufacturer at one point in time with those of a consumer at another raises questions too complex and uncertain of outcome for the real world of negotiation and trial practice. The Calabresi and Hirschoff system would necessitate more lawyer, judge and jury hours to settle or try each case. Its extreme flexibility would make predictions of trial outcomes more speculative than under existing tests of strict liability. Its adoption therefore would result in more trials and fewer settlements.

4. *Conclusions Regarding the Obviousness of a Danger in a Strict-Liability-in-Tort Action*

The *Campo* latent-defect doctrine has no place under any theory of strict liability in tort. Under section 402A, obviousness of the defect should be one factor in determining whether or not the product is unreasonably dangerous. Obviousness minimizes likelihood of harm. Thus, if foreseeable injuries probably will be slight, and if the cost of avoiding the danger is high, it can be concluded that a product is not unreasonably dangerous. Under the new *Greenman-Cronin* test, by contrast, obviousness of the danger has been held to be important only to affirmative defenses.

Regardless of the theory of strict liability applied, plaintiff's mere inadvertence should never defeat recovery. Nor should his misuse of the product where both the defect and plaintiff's misconduct are found to be concurrent proximate causes of the injury. Unreasonable assumption of the risk should be available as a defense only if the plaintiff rejected an available and proffered

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168 Primary-accident-cost avoidance refers to the "reduction of the number and severity of accidents." See Calabresi, supra note 16, at 26. For a detailed discussion of primary-accident-cost avoidance, see id. at 68-129.

169 See Calabresi & Hirschoff, supra note 165, at 1084-85.

safeguard with full knowledge of the nature and extent of the danger to which he was exposing himself.

If the reciprocity theory is adopted, manufacturers automatically become liable to consumers. Obviousness should have no effect on this liability, and no doctrinally logically defenses are possible.

E. Strict Liability in Warranty

1. Establishing the Plaintiff's Cause of Action

In cases involving consumers injured by dangerous products, the clear trend is toward the adoption of strict liability in tort as the proper framework for analysis,[170] leaving the Uniform Commercial Code to govern cases involving commercial users[171] and cases of economic loss to consumers.[172] Some commentators, however, have questioned the advisability of bypassing the provisions of the Code regarding privity, notice and disclaimers.[173] More importantly, some courts continue to apply the Code even in consumer actions involving personal injury or property damage.[174] Thus, considerations of the Code provisions still retain relevance to these categories of cases.

The patency of the dangerous design has a significant effect on the plaintiff's cause of action for breach of an implied warranty under the Code. Obviousness of the defect may defeat recovery altogether by making the defect a nonproximate cause of the injury. Section 2-314 sets forth the standard of merchantability, stating in subsection (2)(c) that goods must be fit for the ordinary purposes for which they are used. Comment 13 to this section stresses that breach of warranty must be shown to be the proximate cause of the loss sustained and concludes: "Action by the buyer following an examination of the goods which ought to

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170 See, e.g., Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970). See also Note, Strict Products Liability and the Bystander, 64 Colum. L. Rev. 916, 936 (1964).

171 See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Once it is agreed that a distinction between consumers and commercial users is appropriate, it may be difficult to determine into which category a particular plaintiff fits.

172 See Note, Economic Loss in Products Liability Jurisprudence, 66 Colum. L. Rev. 917, 928-42 (1966).

173 See Dickerson, The ABC's of Products Liability—With a Close Look at Section 402A and the Code, 36 Tenn. L. Rev. 439, 450-51 (1969); Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692, 712-13 (1965).

174 See, e.g., Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

have indicated the defect complained of can be shown as matter bearing on whether the breach itself was a cause of the injury." Comment 8 to section 2-316(3)(b) states further that if the buyer uses the goods after discovering the "defect," the resulting injuries "may be found to result from his own action rather than proximately from a breach of warranty."[175] This language indicates that the use of an obviously dangerous product is only *one* factor bearing on proximate cause.

However, later sections of article 2 take a less sympathetic approach to obvious defects. Section 2-715(2)(b) allows consequential damages for personal injuries proximately resulting from any breach of warranty. But comment 5 to that section uncompromisingly declares that if the buyer did discover the defect prior to his use of the product "the injury would not proximately result from the breach of warranty." Since an obvious defect is, almost by definition, one that will have been discovered, the harshness of this comment should be apparent.

The significance of obvious defects in a Code action has not been ignored by the judiciary. For example, *Erdman v. Johnson Brothers Radio & Television Co.*[176] involved a situation where a latent defect became obvious due to malfunctioning. The Maryland Court of Appeals relied, in large part, upon the language in comment 13 to section 2-314 and comment 5 to section 2-715 (2)(b) to defeat recovery in a warranty action.[177] The plaintiffs had continued to use their color television set despite the fact that they had noticed its intermittent emission of smoke and sparks. The court stated:

> It would appear that an individual using a product when he had actual knowledge of a defect or knowledge of facts which were so obvious that he must have known of a defect, is either no longer relying on the seller's express or implied warranty or has interjected an intervening cause of his own, and therefore a breach of

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[175] Section 2-316(3)(b) refers to special situations in which the circumstances of a transaction are deemed to impose a duty on the buyer to discover defects.

> [W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances have revealed to him . . . .

Comment 8 to section 2-316(3)(b) implies that any buyer who continues to use a product after discovering a defect may be barred from a recovery, even though the circumstances did not impose a general duty to examine. Thus, obvious defects may defeat the implication of a warranty before one reaches the issue of proximate cause.

[176] 260 Md. 190, 271 A.2d 744 (1970).

[177] See id. at 197-203, 271 A.2d at 748-51.

> such warranty cannot be regarded as the proximate cause of the ensuing injury. . . .[178]

The main thrust of *Erdman* is that even if an implied warranty has been breached, the breach cannot be the proximate cause of the injuries where the defect is obvious.

The notion that plaintiff's use of an obviously dangerous product precludes the breach of warranty from being the proximate cause of injuries is an example of the frequent confusion of proximate cause and contributory negligence.[179] If the breach of warranty is a significant factor in causing plaintiff's injury, there is proximate cause. If the plaintiff's conduct is also a significant cause of his injuries, he may be denied recovery on the ground of contributory negligence. Rather than confusing its legal theories, the Code should have provided directly for a contributory negligence defense. Moreover, since the burden of proving causation is on the plaintiff and the burden of proving contributory negligence is usually on the defendant, the Code approach is unfairly weighted against the plaintiff.

2. *Affirmative Defenses to Strict Liability in Warranty*

Even if the plaintiff injured by an obviously defective product can establish a breach of warranty and clear the proximate-cause hurdle, it still remains uncertain whether or not he will recover. For it is unclear to what extent contributory negligence and assumption of the risk are available to defeat his recovery.[180] The Code does not define either defense nor does it state whether either may be used.[181] In light of these omissions it is not surprising that the cases differ as to whether or not contributory negligence and assumption of the risk are available as defenses to warranty actions.[182]

The New York Court of Appeals seems clearly committed to contributory negligence as a defense to strict liability through warranty. In the recent case of *Codling v. Paglia*,[183] the court held, without discussing the language of the Code, that under strict liability in warranty a defect's being discoverable by reasonable exercise of due care precludes plaintiff's recovery.[184] The court did not clearly state whether latency must be alleged and

178 Id. at 196-97, 271 A.2d at 747.

179 See Prosser, Torts, supra note 11, at 417; Green, Contributory Negligence and Proximate Cause, 6 N.C.L. Rev. 3, 11 (1927).

180 1 R. Anderson, Uniform Commercial Code 542 (2d ed. 1970).

181 Id. at 544, 546.

182 Annot., 4 A.L.R.3d 501, 503 (1965).

183 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

184 Id. at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70.

proved by plaintiff or whether it is a defensive matter. However, the choice of language indicates that the court considered latency as bearing on the defense of contributory negligence. Since the only strict-liability recovery in New York is grounded in warranty,[185] *Codling* means that no New York plaintiff can recover if injured by an obviously dangerous product.

Because the rubric of strict liability in tort seems destined to replace strict liability in warranty, a detailed analysis of warranty cases is outside the scope of this article. A few general observations, however, should be made. Many of the courts which avoid adopting negligence terminology because of its dissimilarity to warranty law achieve the same result through the proximate-cause notions previously discussed, or by declaring that a buyer who uses an article he knows to be defective is no longer relying on the warranty.[186]

As in strict liability in tort, a category of conduct which frequently bars plaintiff's recovery is unreasonable exposure to a known and appreciated risk.[187] In warranty cases, rather than labeling this assumption of risk, courts frequently talk in terms of the plaintiff's duty to mitigate or avoid damages.[188] Professor Levine suggests that the buyer's contributory fault can be utilized in determining the measure of damages, rather than allowing it to affect the manufacturer's liability.[189] This approach was taken, in fact, in one case, *Chapman v. Brown*.[190] Although more cumbersome procedurally than allocating the entire loss to one party, such a comparative distribution of damages seems fairer.

3. *Conclusions Regarding Strict Liability in Warranty*

Since the Uniform Commercial Code is primarily designed to deal with transactions between equally knowledgeable businessmen, it is an awkward vehicle to resolve products-liability questions involving personal injuries or property damage to noncommercial consumers. The Code's cost-avoidance analysis is really better suited to achieve justice between commercial parties, especially where only economic loss is involved.[191] Tort principles which seek to compensate the injured by placing liability on the

185 See, e.g., Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

186 Annot., 4 A.L.R.3d 501, 505 (1965).

187 See Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty, 52 Minn. L. Rev. 627, 638-39 (1968).

188 Id. at 640.

189 Id. at 643-44.

190 198 F. Supp. 78 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962).

191 See note 38 supra.

risk creator will result in a fairer and more certain distribution of consumer losses.

The creator of a nonreciprocal risk can fairly be held accountable to the injured consumer regardless of whether the latter could have avoided the harm. This principle is valid even in the unusual case where the manufacturer sells directly to the consumer. The fact that the context is one of a so-called "bargaining relationship" does not preclude the application of the theory of reciprocity. The citadel of privity as a prerequisite for recovery against the manufacturer has indeed fallen,[192] but the absence of privity should not be deemed necessary to justify the use of tort principles. In fact, in negligence law, the closer the relationship between the parties, the easier it is to find duty to the plaintiff.

The tort theory of reciprocity fits like a glove any situation where one party wields a unique power to impose risks of physical harm on the other. The consumer who orders directly from the manufacturer seldom has much, if any, power to bargain for a safer product. Even if he did, he usually would have insufficient knowledge of the product's dangers to alert him to the necessity for such bargaining. Therefore, the consumer who buys directly from the manufacturer, and who suffers personal injury or property damage, should be treated under tort principles in the same manner as any other customer.[193]

Strict products liability is a relatively new thing under the sun, thus far not fitting with complete comfort into any preexisting contract or tort setting. But it seems at least less uncomfort-

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192 Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966) [hereinafter Prosser, Citadel].

193 Where only economic losses are incurred by the consumer, whether he is the direct purchaser from the manufacturer or a subpurchaser, only rights and remedies contained in the Uniform Commercial Code should apply. See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). See also Restatement (Second) of Torts § 402A, which limits strict liability in tort to situations involving physical harm. But see Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

As Prosser states, "[l]oss on the bargain must depend on what the bargain is." Prosser, Citadel, supra note 192, at 823. The Code is specifically designed to aid in ascertaining the parameters of a contract. It should be noted that limiting a consumer who suffers only economic harm to Code remedies can be considered compatible with reciprocity theory. The buying and selling of goods for economic benefit can be deemed one category of conduct in which each party suffers only the reciprocal risk that the deal will not meet his economic expectations. A nonreciprocal risk perhaps still could be found if the dealing was so unfair that an inordinate degree of risk was imposed on one party. However, this interpretation should be rejected because it taints reciprocity analysis with the paradigm of reasonableness. To avoid this taint and to take advantage of a statute tailored to the evaluation of such claims, actions seeking recovery for economic loss should be under the sole jurisdiction of the Code.

able as a tort theory. Therefore, it is hoped that states such as New York will abandon warranty principles and give serious consideration to the tort theory of reciprocity as the most appropriate theoretical framework for the doctrine.

IV

Categories of Injured Parties

Little mention has been made so far of the different categories of persons who may be harmed by an obviously dangerous product. Is there any reason to differentiate among and between: (1) purchaser-users and mere users, (2) employees and other users, (3) children and adults or (4) bystanders and users?

If the paradigm of reciprocity is used to make the initial liability decision, the plaintiff's category normally would make no difference. For in almost every case, the manufacturer of an obviously dangerous product would have created a nonreciprocal risk of harm to the injured party. Therefore, in the discussion that follows, the focus will be on the use of the reasonableness paradigm in establishing negligent design, or in proving that a product is unreasonably dangerous under Section 402A of the Restatement. We will also consider strict liability in warranty. In addition, some attention will be given to affirmative defenses, which generally are utilitarian justifications for shifting the risk of loss from the manufacturer back to the plaintiff.

A. When the Injuries Are Suffered by the Product's User

1. Purchaser-Users Versus Mere Users

Under the reasonableness rubric, purchasers and users should be treated identically despite the fact that mere users do not have an initial choice in the selection of the product. If the obvious danger was avoidable by using safeguards or better material, the question becomes one of balancing the likelihood and seriousness of the harm against the cost of avoiding it. The fact that an obvious danger is as likely to be avoided by a mere user as by a purchaser-user indicates that these two classes should be treated alike. Conceivably, the difference between purchaser-users and mere users might be relevant to the defenses asserted by the manufacturer.

2. Employee-Users

The nonvoluntary character of an employee's "choice" to encounter a dangerous situation raises serious questions as to

whether or not he can really be said to have assumed the risk of his injury or to have been contributorily negligent. Noel notes that an employee's consent to work under dangerous conditions, when given because of economic pressure, does not preclude a suit against the employer. Analogizing from this, Noel suggests that "the workman injured because of . . . [an] unsafe design is subject to comparable economic pressure and . . . his consent to use the dangerous machine, perhaps in order to retain his job, is likewise not free and voluntary."[194]

This latter principle has been recognized in a case where an employee was injured when her hand and arm slipped into an unguarded machine.[195] It has also been recognized in a Washington Supreme Court case where a workman lost three fingers when his hand slipped on a centralizer which had no protective features.[196] The court held that the patency of the danger, rather than automatically relieving the manufacturer from liability, would do so only in the event that the plaintiff voluntarily and unreasonably encountered it. The court concluded that "[i]t could never be said as a matter of law that a workman whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same."[197]

It should be pointed out that not all courts take this liberal view. In *Fore v. Vermeer Manufacturing Co.*,[198] an employee had actual knowledge that a trencher's brakes were defective, but continued to operate it anyway. The court, in holding that the employee had assumed the risk as a matter of law, concluded that fear of losing one's job was not evidence of legal constraint which rendered the employee's conduct involuntary.[199]

In cases involving ordinary contributory negligence it has been observed that an employee working under dangerous conditions may, because of the demanding nature of the particular job, be unable to exercise adequate care for his own safety.[200] The same principle was recognized in *Pike v. Frank G. Hough Co.*,[201] where the court quoted the following language with approval:

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194 Noel, Defective Products, supra note 90, at 127 (footnote omitted).

195 Rhoads v. Service Mach. Co., 329 F. Supp. 367, 381 (E.D. Ark. 1971).

196 Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969).

197 Id. at 836, 454 P.2d at 208.

198 7 Ill. App. 3d 346, 287 N.E.2d 526 (1972).

199 Id. at 349, 287 N.E.2d at 528. This case probably should be classified as one of misuse because the plaintiff did have an opportunity to render the machine safe before using it and consciously chose not to do so.

200 See Gyerman v. United States Lines Co., 7 Cal. 3d 488, 501, 498 P.2d 1043, 1051, 102 Cal. Rptr. 795, 803 (1972).

201 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

"[w]here a person must work in a place of possible danger the amount of care he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case."[202]

3. *Children-Users*

Children as a class of plaintiffs require special consideration. Recognizing this fact in *Hood v. Formatron Corp.*,[203] the Oklahoma Supreme Court held as error an instruction on the issue of negligent design which indicated the necessity of proving a latent defect where the plaintiff was a two-year-old child.[204] Most cases, however, deny recovery to the injured child either on the ground of the patency of the defect to the parent[205] or because the parent's failure to protect his child from the obvious danger is found to be an unforeseeable intervening cause.[206]

Consideration of the actual circumstances of these cases suggests that children form a class of plaintiffs to whom the obviousness of the danger is irrelevant. Since it is quite foreseeable that a parent may fail to protect a child from an obviously dangerous product, the parent's conduct should not be considered a superseding cause barring recovery.

B. The Injured Bystander

Injured bystanders were once unprotected by the law, but all jurisdictions now recognize a cause of action in their favor for injuries caused by negligent conduct.[207] Thus, once negligent design is established, recovery is usually allowed. In jurisdictions adopting strict liability in tort, the clear trend is in a similar direction and bystanders are usually protected.[208] In fact, it was reported in 1971 that only one jurisdiction which had adopted the doctrine of strict liability in tort had rejected the general principle of by-

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202 Id. at 473, 467 P.2d at 234-35, 85 Cal. Rptr. at 634-35, quoting Varas v. Barco Mfg. Co., 205 Cal. App. 2d 246, 263, 22 Cal. Rptr. 737, 747 (1962), quoting Johnson v. Nicholson, 159 Cal. App. 2d 395, 410, 324 P.2d 307, 316 (1958).

203 488 P.2d 1281 (Okla. 1971).

204 Id. at 1283. See also Phillips, Products Liability for Personal Injury to Minors, 56 Va. L. Rev. 1223, 1225 (1970).

205 See, e.g., Poppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815 (1972), where the court applied the latent-defect requirement to defeat recovery by a 12-year-old child injured while riding at dusk on a bicycle which had no light or reflectors. The court emphasized that the absence of safety devices "was obvious and in fact actually observed by the parents-purchasers." Id. at 388, 190 S.E.2d at 817.

206 See Phillips, supra note 204, at 1226-35.

207 Prosser, Torts, supra note 11, at 622.

208 See, e.g., Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

stander recovery.[209] The Uniform Commercial Code, by contrast, is generally more restrictive. Liability of sellers under express or implied warranties is limited in most jurisdictions to the buyer and his family, household and guests.[210] But the Code does contain more liberal alternatives which allow bystander recovery,[211] and many courts have judicially expanded the classes of protected persons.[212]

One would think that the latent-defect rule would have no effect on bystander recovery. Its rationale would seem to be incompatible with most bystander cases, because the innocent third party rarely has a chance to see the danger and avoid it. Nevertheless, jurisdictions which hold that obviousness precludes manufacturer liability have extended the rule to defeat recovery by bystanders.

In *Stovall & Co. v. Tate*,[213] a student sitting in her classroom lost most of the vision in one eye when struck by a rock thrown from a lawnmower being operated in the school yard. In her suit against the manufacturer, the plaintiff alleged negligent design, breach of implied warranty and strict liability in arguing that the lawnmower should have been equipped with a deflecting device. The court held that strict liability should be adopted only through legislative action, and that because the danger was obvious, the defendant manufacturer was entitled to summary judgment on the negligence count; the warranty counts were dismissed for lack of privity.[214] The court stressed that the user knew of the danger.[215] This indicates an unarticulated rationale: that as between a user aware of an obvious danger and the manufacturer, the user is the best cost avoider. This reasoning defeats an important economic consideration, cost spreading; and in the event the user is judgment proof, it denies justice to a totally innocent plaintiff.

In jurisdictions which do not follow the latent-defect rule,

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209 Note, Strict Products Liability to the Bystander: A Study in Common Law Determinism, 38 U. Chi. L. Rev. 625, 635 (1971) [hereinafter Note, The Bystander].

210 Uniform Commercial Code § 2-318, alt. A; see Note, The Bystander, supra note 209, at 628.

211 Uniform Commercial Code § 2-318, alts. B, C; see Note, The Bystander, supra note 209, at 631 n.34.

212 See, e.g., Toombs v. Fort Pierce Gas Co., 208 So. 2d 615 (Fla. 1968). In Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), the New York Court of Appeals applied the doctrine of strict liability in warranty to a bystander. Id. at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

213 124 Ga. App. 605, 184 S.E.2d 834 (1971).

214 See id. at 614-15, 184 S.E.2d at 840.

215 See id. at 614, 184 S.E.2d at 840.

the courts have shown more interest in the plight of the bystander. The clear trend is to say that as to bystanders there is always initial manufacturer liability for manufacturing and selling a defective product, although assumption of the risk by the bystander has not yet been ruled out as a defense. For example, in *Pike v. Frank G. Hough Co.*,[216] the plaintiff bystander had been injured when hit by a bulldozer. The court noted that "it is not necessarily apparent to *bystanders* that the machine operator is incapable of observing them though they are 30 to 40 feet behind the vehicle and in its direct path."[217] The court also quoted with approval language from Harper and James indicating that even if courts are unwilling to protect those who buy obviously dangerous products, negligence law requires that others be protected.[218]

The *Pike* court did say, however, that obviousness is relevant to affirmative defenses.[219] With respect to unreasonable assumption of the risk, this makes sense. There is no reason to treat bystanders differently from users, provided that the manufacturer proves that the injured bystander did, in fact, know of, appreciate and unreasonably assume the risk.

The Ninth Circuit has adopted the *Pike* approach toward bystanders. In *Wirth v. Clark Equipment Co.*,[220] a bystander was run over by the wheel of a carrier which had been custom-built to the purchaser's specifications. The defect alleged was a design which prevented the operator from seeing the ground in front of the right wheel for a distance of 51 feet, nine inches. In addition, the carrier had no wheel guards, mirrors or other such safeguards. The trial court refused to submit the issue of strict liability to the jury, finding that the machine was custom-built and could not contain any concealed defects. The Ninth Circuit reversed, citing *Pike* and holding that even if the machine were considered custom-built, there was no evidence that the defect was obvious to the plaintiff bystander.[221]

The Eighth Circuit has also followed the *Pike* approach. In *Passwaters v. General Motors Corp.*,[222] a motorcycle passenger was injured when her leg came into contact with the metal flanges protruding from the wheel cover of a passing automobile designed by the defendant. In the trial court, the plaintiff lost by directed

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216 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).
217 Id. at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634 (emphasis in original).
218 Id. at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635.
219 Id. at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634.
220 457 F.2d 1262 (9th Cir.), cert. denied, 409 U.S. 876 (1972).
221 Id. at 1267.
222 454 F.2d 1270 (8th Cir. 1972).

verdict on both negligent-design and strict-liability theories.[223] The Eighth Circuit reversed, holding that protection is extended to bystanders under both doctrines.[224] It also quoted with approval language from *Elmore v. American Motors Corp.*[225] indicating that bystanders are entitled to even more protection than consumers and users.[226]

It is hard to understand why some courts have been reluctant to allow bystander recovery from the manufacturer where the defect is obvious. In theory, recovery is consistent with a number of traditional tort policies. For one, bystander recovery facilitates loss spreading, a reason that has been offered to justify the ease with which such recovery has been allowed in strict-liability cases. Clearly, the bystander is no better able to distribute the loss of his injuries than is the injured user.[227] Moreover, it is obvious that the manufacturer is clearly better suited to compare costs of avoidance with costs of compensation and act on that decision.[228] Even those who believe that fault is necessary before purchasers and users can recover agree that bystanders should be protected by strict liability because it is impossible for them to bargain collectively for safer products.[229] And finally, to achieve a fair distribution of loss under the reciprocity theory, bystander recovery from the manufacturer who created the obvious, nonreciprocal risk is essential.

V

Conclusion

Our examination of the cases dealing with obviously dangerous products has revealed what I consider to be an unfortunate tendency. Overly protective of manufacturers, many courts have allowed obviousness of a defect to bar a plaintiff's recovery in a variety of ways.

The most unacceptable of these is the *Campo* doctrine which makes the allegation and proof of latency a material element of the plaintiff's cause of action. Although the doctrine arose in a negligent-design action, in some jurisdictions it has spread into strict liability in tort. Also, in those jurisdictions which continue

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223 Id. at 1272.

224 Id. at 1274-78.

225 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

226 454 F.2d at 1278-79, quoting 70 Cal. 2d at 586, 451 P.2d at 88-89, 75 Cal. Rptr. at 656-57.

227 See Note, The Bystander, supra note 209, at 637-38.

228 See Calabresi & Hirschoff, supra note 165, at 1262-63.

229 See Note, The Bystander, supra note 209, at 642.

to couch strict liability in a warranty framework, the obviousness of a danger generally precludes recovery as a matter of law. Courts reach this result by holding either that obviousness prevents the implication of a warranty, or that it compels a finding that the defect was not a proximate cause of the plaintiff's injury. The rationale for denial of recovery in this group of cases is unclear because *Campo* and most of its progeny merely pronounce in conclusory fashion the principle that a manufacturer never should be liable for harm resulting from an obviously dangerous product.

A second approach courts have taken is to consider obviousness as one factor in assessing the reasonableness of the manufacturer's conduct, whether in a negligent-design action or a strict-liability count under Section 402A of the Restatement. A third and distinctly minority view is that obviousness is relevant only to affirmative defenses. In these courts, obviousness often leads to a finding of unreasonable assumption of the risk and infrequently to a finding of ordinary contributory negligence. In New Jersey, however, the *Bexiga* doctrine can be invoked to bar consideration of these affirmative defenses where justice requires, and its spread to other jurisdictions seems likely.

I think compensation for harm should be considered the basic purpose of strict liability in tort and perhaps of all tort law. To rid strict liability of all remnants of negligence will require the adoption of a radically different doctrinal framework. A satisfactory one is found in the paradigm of reciprocity which focuses primarily on fairness to individuals rather than on social considerations such as loss spreading and cost avoidance.[230] This paradigm imposes liability on the creator of a nonreciprocal risk. Since a consumer is never engaged in the activity of manufacturing and marketing dangerous, although perhaps socially useful, items, he can never be a reciprocal-risk creator with the manufacturer. Thus, if the reciprocity theory is kept in its pure form the consumer of an obviously dangerous product always will be entitled to recover. The manufacturer will have no excuse since the traditional reciprocity excuses of compulsion and of unavoidable ignorance will never be applicable in this type of case.

Any temptation to engraft reasonableness exceptions onto

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230 Of course, the paradigm of reciprocity, by sharply increasing the number of manufacturers held liable for products injuries, also will maximize loss spreading as well as achieving the goal of fairness. Although cost avoidance theoretically could be maximized by the use of Calabresi and Hirschoff's "cheapest-cost-avoider" test, that test is impractical; and I would argue that fairness is a more important goal. See text accompanying notes 165-69 supra.

the paradigm of reciprocity should be resisted. Such exceptions would be doctrinally inconsistent with the basic theory and would reintroduce the old negligence calculus. Fears should not be raised by the fact that the pure reciprocity theory amounts almost to absolute liability for products manufacturers. Through the proximate-cause rubric they will receive adequate protection from unfair liability.

In conclusion, the limited scope of this article should be emphasized. It has dealt entirely with a discussion of the consumer-manufacturer relationship. The hard question of whether the theory of reciprocity requires liability of the "innocent" retailer to the consumer injured by a product is left for future consideration. The question of whether absolute manufacturer liability and voluntary liability insurance will create a completely satisfactory compensation scheme for those injured by products has not been discussed in detail; nor have alternative compensation schemes such as compulsory no-fault insurance. Some commentators have argued that complete social insurance offers the only adequate solution for compensating the large number of persons injured in our highly industrialized society.[231] This probably is true, but it seems unlikely that we will be ready to accept such a comprehensive scheme in the near future. Meanwhile, if tort liability finds its base in the pure reciprocity theory outlined here, a relatively effective compensation scheme will have been achieved for those injured by products regardless of whether the danger is latent or patent.

231 See Ehrenzweig, supra note 18, at 247; Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774, 812 (1967).

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