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Ohio's New Products Liability Law

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OHIO'S NEW PRODUCTS LIABILITY LAW

I. INTRODUCTION

> It is properly the responsibility of the judges . . . to promote the unfolding of the central idea underlying the concept of strict liability, and to see that the adjustment of the conflicting interests of the several types of persons affected is fair and responsible. . . . When tort law develops to a point that one group of persons conceives it to be too favorable to another group . . . the first group is likely to seek legislative "redress."[1]

All across the nation, these words are becoming a reality. Fueled by skyrocketing products liability insurance rates[2] and the growing perception that "strict" products liability is becoming "absolute" products liability,[3] insurance companies and manufacturing firms have joined together to lobby for legislative reform in the area of products liability. In Ohio, this movement resulted in the recent enactment of a comprehensive products liability statute.[4] The following note will consider a general history of the doctrine of strict products liability and some of the recent judicial developments that have led to the movement for legislative reform. Then, it will analyze Ohio's new products liability statute.[5] This analysis will focus on the three most controversial provisions of the Ohio act: (1) the legislature's decision to adopt a bifurcated approach for determining whether a product is defective by design;[6] (2) the statute's rejection of the hindsight standard for considering defectiveness;[7] and (3) the legislature's refusal to allow comparative responsibility to be asserted as a defense in a strict products liability action.[8]

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1. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 575 (1980).

2. *See* Brody, *When Products Turn into Liabilities*, FORTUNE, Mar. 3, 1986, at 20, 24 (observing that "[as] insurers have raised rates for liability coverage, or pulled out of the market altogether, unease among American manufacturers has given way to near-panic"); *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 18 (stating that "[t]he $9.1 billion Americans paid . . . [in 1985 for] liability insurance premiums was almost 60% higher than the figure . . . in 1983 and roughly equal to the combined 1985 budgets of the National Aeronautics and Space Administration and the Central Intelligence Agency"); N.Y. Times, Mar. 8, 1986, at 35, col. 3.

3. *See, e.g.*, U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-26 (1977) [hereinafter FINAL REPORT] (noting that a few courts have come "very close to holding the tort-litigation system should provide a recovery for persons who merely proved that they were injured by a product [and that] while these cases appear to be relatively few in number insurers have regarded them as quite important in their pricing practices").

4. OHIO REV. CODE ANN. §§ 2307.71–2307.80 (Anderson Supp. 1988).

5. *Id.*

6. *Id.* § 2307.75.

7. *Id.*

8. *Id.* § 2315.20(c)(1).

II. BACKGROUND

Over the last thirty years the development of strict products liability has progressed in three stages: adoption, clarification, and reformation. The following background section will discuss each of these stages separately, focusing initially on nationwide developments and then on the manifestation of such developments in Ohio's products liability law.

A. Adoption

From a national perspective the adoption stage began in the early 1960s with the celebrated case of *Greenman v. Yuba Power Products, Inc.*[9] In *Greenman,* Justice Traynor enunciated the following standard for products liability in tort:

> A manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being. . . . To establish the manufacturer's liability it is sufficient that plaintiff prove[] that he was injured while using the [product] in a way that it was intended to be used as a result of a defect in design and manufacture . . . .[10]

Two years after the *Greenman* decision, the American Law Institute adopted and published its own standard for products liability in Section 402A of the Restatement (Second) of Torts.[11] The combination of these two authorities laid the groundwork for what was to become one of the most revolutionary changes in American tort law. Henceforth, in products liability actions in tort, the focus of the inquiry would be placed on the condition of the product, rather than on the fault of the manufacturer.

Courts[12] and commentators[13] alike voiced their support for the

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9. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

10. *Id.* at 62–64, 377 P.2d at 900–01, 27 Cal. Rptr. at 700–01.

11. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965). This section states:

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

Id.

12. *See, e.g.,* Hill v. Harbor Steel & Supply Corp., 374 Mich. 194, 203, 132 N.W.2d 54, 57 (1965) ("We are holding that in a suit upon a warranty theory it is not necessary to show negligence, but rather breach of an implied warranty"); Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, ___, 127 N.W.2d 557, 560 (1964) (noting that in products liability cases "[t]he trend has been increasingly to apply a strict liability to the . . . [seller]"); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 596 (1963) (favorably citing the *Greenman* decision in

move away from negligence and towards strict products liability. Within a relatively short period of time, this doctrine was adopted in a vast majority of jurisdictions across the United States.[14] Basically, three major policy arguments were offered in support of the adoption of strict products liability. First, proponents of the products liability theory argued that, given the complexity of modern day manufacturing processes, it would be extremely difficult for a plaintiff to establish the manufacturer's liability under a negligence theory.[15] Second, advocates of strict products liability contended that the manufacturer is usually in a better position than the consumer to absorb or spread the costs of injuries caused by the manufacturer's products.[16] Third, supporters of strict liability maintained that it would deter manufacturers from producing unsafe products because it would make liability for defective products more certain.[17]

In Ohio, the adoption stage of strict products liability began with the case of *Rogers v. Toni Home Permanent Co.*[18] In *Rogers*, the Ohio Supreme Court held that a claimant injured by a defective product could maintain an action against a manufacturer based upon a tort theory of express warranty, despite the fact that there was no privity between the manufacturer and the claimant.[19]

Later, in 1966, the Ohio Supreme Court expanded upon the *Rog-*

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support of adoption of strict products liability).

13. *See, e.g.*, Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 856 (1963) (listing numerous factors which have contributed to the view that "when the benefits to the many come at a high cost to the few, the many should pay for these losses"); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30, 59 (1965) ("In enunciating the concept of strict liability, the courts have served at least two venerable . . . ends . . . stripp[ing] away the vestigial remnants which rendered the warranty action so cumbersome and restor[ing] simplicity and attention to substance . . . in the field of products liability"); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (providing the seminal discussion on the fall of the "citadel" of privity).

14. For a recent comprehensive survey of each state's position on strict products liability, see Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987).

15. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 693 (5th ed. 1984).

16. *Id.; see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 402(A) comment c.

17. W KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 15, at 693.

18. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

19. *Id.* at 249, 147 N.E.2d at 615–16. The court observed:

> Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to *strict* accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.

Id.

ers rationale in *Lonzrick v. Republic Steel Corp.*[20] The *Lonzrick* decision provided for recovery in a tort action based upon a theory of implied warranty.[21] The court reasoned that if one products liability claimant saw a manufacturer's advertisement and another claimant did not, but both were injured by the same product, it would be inherently unfair to allow recovery to the first claimant while denying recovery to the second.[22] Thus, under *Lonzrick,* a claimant who was injured by a manufacturer's defective product could maintain an action in tort despite the fact that he had not relied upon any express representations of the manufacturer.[23] This "implied warranty in tort" theory informally established a strict products liability standard in Ohio. Finally in 1977, the Ohio Supreme Court formally established a strict products liability standard by adopting Section 402A of the Restatement in *Temple v. Wean United, Inc.*[24] In *Temple* the court stated:

> Because there are virtually no distinctions between Ohio's implied warranty in tort theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d.[25]

B. Clarification

Along with the virtually nationwide adoption of strict products liability came the need for a clarification of what the elements of the doctrine were and how it would interact with other substantive areas of tort law. Nowhere was the need for clarification of elements more evident than in the area of design defects. Neither the *Greenman* decision nor Section 402A distinguished between the standard for a design defect and the standard for a manufacturing defect.[26] Yet, there is a significant difference between the two. In the case of a manufacturing defect, an objective standard for defectiveness is readily ascertainable. If a particular product is manufactured in such a way that it does not measure up to the manufacturer's own intended specifications, then that product contains a manufacturing defect.[27] There is no such objec-

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20. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
21. *Id.* at 237, 218 N.E.2d at 192.
22. *Id.*
23. *Id.*
24. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).
25. *Id.* at 322, 364 N.E.2d at 271.
26. *See* A. MURPHY, K. SATAGATA & F. GRAD, THE LAW OF PRODUCTS LIABILITY, PROBLEMS AND POLICIES 22–25 (1982).
27. M. MADDEN, PRODUCTS LIABILITY 322 (1988); P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 149 (1981); Wade, *supra* note 1, at 551 ("As a term of art, 'Defective' gives little trouble when something goes wrong in the manufacturing process and the product

tive standard for determining whether a product contains a design defect. Moreover, from the manufacturer's point of view, there is an even more significant difference between these two types of defects: While a manufacturing defect indicates that one unit of a product is defective, a design defect indicates that an entire product line is defective.[28] Thus, it was of the utmost importance that courts develop a clear and uniform standard for determining whether a product was defective in design.

Unfortunately, clarity and uniformity proved to be elusive goals in the area of design defects. Ultimately three different tests were developed to establish whether a product was defectively designed. As a result of its endorsement in Section 402A of the Restatement, the consumer expectation test was the first test to be applied in the area of design defects.[29] Reflecting the warranty heritage of strict products liability,[30] the consumer expectation test defines a product as defective when it is dangerous beyond the extent reasonably contemplated by the ordinary consumer.[31] A number of courts[32] and commentators[33] have maintained that this test is the most appropriate formulation for determining whether a product has a design defect. In the early 1970s, though, this assertion was challenged by Professors Wade[34] and Keeton.[35] Wade and Keeton argued that the test for design defects should

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is not in its intended condition").

28. *See* A. MURPHY, K. SATAGATA & F. GRAD, *supra* note 26, at 149.

29. RESTATEMENT (SECOND) OF TORTS, *supra* note 11, § 402(A) provides the following definition of an unreasonably dangerous product:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

30. *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 348 (1974).

31. *See, e.g.*, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 342–43, 247 N.E.2d 401, 403 (1969); Lester v. Magic Chef, Inc., 230 Kan. 643, ___, 641 P.2d 353, 359 (1982); Heaton v. Ford Motor Co., 248 Or. 467, ___, 435 P.2d 806, 808 (1967); Young v. Tide Craft, Inc., 270 S.C. 453, 471, 242 S.E.2d 671, 679–80 (1978); G.M. v. Simmons, 545 S.W.2d 855 (Tex. 1976), *rev'd*, 558 S.W.2d 855 (Tex. 1977); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 332, 230 N.W.2d 794, 798–99 (1975).

32. *E.g., Dunham*, 42 Ill. 2d at 342–43, 247 N.E.2d at 403; *Lester*, 230 Kan. at ___, 641 P.2d at 359; *Vincer*, 69 Wis. 2d at 332, 230 N.W.2d at 798–99.

33. *See, e.g.*, Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 331 (1967); Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 467–84 (1978); Rheingold, *What are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 591–600 (1967).

34. Wade, *On the Nature of Strict Tort Liability*, 44 MISS. L.J. 825 (1973).

35. Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

be drawn from the law of torts, rather than the law of contracts.[36] They suggested that some form of a risk/utility analysis should replace the consumer expectation test. Professor Wade set forth a multi-factor analysis for judges and juries to consider in determining whether a product was defective by design.[37] Professor Keeton, on the other hand, proposed that the analysis should turn on whether a reasonable manufacturer would place this product on the market, assuming that the manufacturer knew of the risks and utilities presently involved in the product's use.[38]

A number of courts have adopted a risk/utility standard for determining whether a product is defectively designed.[39] However, other courts have refused to adopt such a standard, maintaining that a risk/utility test constitutes a return to negligence.[40] Such criticisms may or may not be well founded, depending upon the form of risk/utility analysis employed. Although the Keeton formulation might superficially resemble a negligence standard, closer scrutiny reveals that there are distinct differences between the two. Foremost among these differences is the fact that Professor Keeton's risk/utility test focuses primarily upon the nature of the product: If the risks of the product outweigh its utilities *at the time of trial,* then the product is defective in design.[41] Unlike negligence—which focuses on the manufacturer's conduct at the

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36. Wade, *supra* note 1, at 556.

37. Wade, *supra* note 34, at 837–38. Wade lists the factors as follows:

(1) The usefulness and desirability of the product—its utility to the public as a whole;

(2) The safety aspect—the likelihood that the product will cause injury, and the probable seriousness of the injury;

(3) The availability of a substitute product which would meet the same need but less safely;

(4) The manufacturer's ability to make the product safer without impairing its usefulness or making it too expensive to maintain its utility;

(5) The user's ability to avoid danger by the exercise of care in the use of the product;

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of the obviousness of the danger, or the existence of suitable warnings or instructions;

(7) The manufacturer's ability to spread the loss by setting the price of the product or carrying liability insurance.

Id.

38. *See* Keeton, *Products Liability—Inadequacy of Information,* 48 TEX. L. REV. 398, 403–04 (1970).

39. *See, e.g.,* Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 175–76, 386 A.2d 816, 827–28 (1978); Voss v. Black & Decker Mfg., 59 N.Y.2d 102, 108–09, 450 N.E.2d 204, 208–09, 463 N.Y.S.2d 398, 402–03 (1983); Phillips v. Kimwood Mach. Co., 269 Or. 485, 498–99, 525 P.2d 1033, 1038–39 (1974).

40. *See* Suter v. San Angelo Foundry Co., 81 N.J. 150, 171, 406 A.2d 140, 150 (1979); Azzarello v. Black Bros. Co., 480 Pa. 547, 555–59, 391 A.2d 1020, 1024–26 (1978).

41. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing,* 58 N.Y.U. L. REV. 734, 761–63 (1983).

time the product was designed—Professor Keeton's test uses a hindsight approach that focuses on the nature of the product at the time of trial.[42] Hence, Keeton's theory is consistent with "strict" products liability.

However, the same cannot be said for Professor Wade's risk/utility standard. In a recent article,[43] Professor Wade acknowledges that his design defect formulation differs from Professor Keeton's in one vital respect: Professor Wade's test views the risks and utilities of the product at the time it was distributed, rather than at the time of trial.[44] In support of his position, Professor Wade points out that a risk/utility hindsight approach can place an unfair burden on the manufacturer because it holds the manufacturer responsible for risks which were scientifically unknowable, misuses which were absolutely unforeseeable, and designs which were technologically infeasible at the time of distribution.[45] Despite the inherent fairness of Professor Wade's approach, it may be viewed as inconsistent with the tenets of strict products liability. It can be argued that Professor Wade's standard shifts the focus of the strict products liability analysis towards what the manufacturer could have known or done at the time of distribution and away from the product's actual condition at the time of trial. Thus, Wade's approach may—as its critics claim—constitute a return to negligence in the realm of design defects.

A third standard for determining whether a design defect exists combines both the consumer expectation test and the risk/utility test. *Barker v. Lull Engineering Co.*[46] is the leading case which advocates this bifurcated approach. In *Barker* the California Supreme Court held that a design defect exists:

> (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[47]

The two-pronged standard set forth in *Barker* is an extremely pro-plaintiff approach for two reasons. First, it gives the plaintiff two alter-

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42. Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 305–08 (1979).

43. Wade, *supra* note 41, at 761–63.

44. *Id.*

45. *Id.* at 760.

46. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

47. *Id.* at 435, 573 P.2d at 457–58, 143 Cal. Rptr. at 239–40.

native routes through which to establish the manufacturer's liability in a design defect suit. Second, under the risk/utility prong of the test, the burden of proof is shifted onto the manufacturer to show that the utilities of the product outweigh its risks. A few courts have adopted the *Barker* approach,[48] but other courts[49] and commentators[50] have rejected it claiming that the two-pronged standard is confusing and one-sided.

During the second stage of the development of strict products liability there was also a need for some clarification on how this doctrine would interact with other substantive areas of tort law. Nationally, the most controversial issue in this respect was whether the affirmative defense of comparative negligence could be asserted in a strict products liability action. The theory of comparative negligence was developed in response to the harshness of its predecessor—contributory negligence.[51] Under traditional contributory negligence, a plaintiff who was even slightly at fault in causing his own injury was completely barred from recovery. Under the comparative negligence theory, however, the cost of an accident is to be apportioned between the plaintiff and the defendant in relation to their respective degrees of responsibility.[52]

There are essentially four different types of comparative negligence systems operating in the United States today: (1) the pure comparative negligence system;[53] (2) the less than system of comparative negligence;[54] (3) the greater than system of comparative negligence;[55] and (4) the slight versus gross system of comparative negligence.[56]

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48. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884–87 (Alaska 1979); Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 463, 432 N.E.2d 814, 818, *cert. denied*, 459 U.S. 857 (1982).

49. *See* Stenberg v. Beatrice Foods Co., 176 Mont. 123, 130–31, 576 P.2d 725, 729–30 (1978); Phillips v. Kimwood Mach. Co., 269 Or. 485, 498–99, 525 P.2d 1033, 1038–39 (1974).

50. *See* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 602–10 (1980); Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 782–97 (1979).

51. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 432 (1978).

52. V. SCHWARTZ, COMPARATIVE NEGLIGENCE 29 (2d ed. 1986).

53. *See* Fischer, *supra* note 51, at 436. In a pure comparative negligence system, liability is apportioned in direct proportion to fault in all cases. Therefore, even where a plaintiff is 90 percent responsible for his accident, he can still recover the 10 percent of his damages attributable to the defendant's own conduct. *Id.*

54. *Id.* at 437. Under the less than system of comparative negligence, a plaintiff can only recover where his fault is less than that of the defendant. Thus, if the plaintiff's fault exceeds 49 percent, he is completely barred from recovery. *Id.*

55. *Id.* In a greater than system of comparative negligence, a plaintiff can recover so long as his degree of fault is not greater than that of the defendant. Here, the plaintiff who is 50 percent responsible for his accident can still recover the other half of his damages from the defendant. *Id.*

56. *Id.* Under the slight versus gross system of comparative negligence, the plaintiff is only

Each of these systems demonstrates the significant role that a plaintiff's conduct can play in the reduction of an award for damages. Basically, there are two policy arguments underlying all of these systems. First, a plaintiff who bears partial responsibility for an accident should not be able to recover full damages from a defendant who is not entirely at fault in causing the accident.[57] Second, a plaintiff should be encouraged to maintain a reasonable standard of care for his own personal welfare and safety.[58] It is the first of these policy goals which raises the question of whether comparative negligence should be a defense in a strict products liability action. The first policy goal focuses on comparing the plaintiff's fault with that of the defendant. In a truly "strict" products liability action, though, it would seem that the defendant's fault is not an issue in the case. If the product is defective, the manufacturer is liable regardless of the degree of care exercised. Despite this semantic inconsistency, a majority of jurisdictions have chosen to adopt comparative negligence as a defense to strict products liability.[59] Courts and commentators have offered a number of rationales for reconciling the two doctrines. One of the first cases to apply comparative negligence as a defense in a strict products liability action was *Dippel v. Sciano.*[60] In *Dippel,* the Wisconsin Supreme Court skirted the semantic inconsistency between strict products liability and comparative negligence by characterizing strict products liability as negligence per se.[61] Although the "negligence" aspect of negligence per se allows for semantic continuity between the two doctrines, critics of the *Dippel* rationale claim that the negligence per se analogy is inappropriate in the area of strict products liability.[62]

Other authorities have attempted to resolve the conceptual differences between strict products liability and comparative negligence by maintaining that fault does exist in a strict products liability action.[63] According to these authorities, fault—in the strict liability sense—can be characterized as either "the 'social fault' involved in marketing de-

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allowed to recover damages when his fault is slight in comparison with that of the defendant. No apportionment of damages is made in this system of comparative negligence. *Id.*

57. *See Status and Trends in State Product Liability Law: Theories of Recovery,* 14 J. OF LEGIS. 216, 226 (1987).

58. *See* Fischer, *supra* note 51, at 432.

59. For a complete listing of the jurisdictions which have adopted comparative negligence as a defense to strict products liability, see Bieman, *supra* note 14, at 111.

60. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

61. *Id.* at ___, 155 N.W.2d at 64.

62. *See, e.g.,* Carestia, *The Interaction of Comparative Negligence and Strict Products Liability—Where are We?,* 30 INS. COUNS. J. 53, 61–63 (1980).

63. *See* Sun Valley Airlines, Inc. v. Avco Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Brewster, *Comparative Negligence in Strict Liability Cases,* 42 J. AIR L. & COM. 107 (1976).

fective products or the 'legal fault' arising from . . . [the breach of a] . . . duty to market defect free products."[64] It is this "social" or "legal" fault which can then be compared with the plaintiff's fault for purposes of apportioning damages. Another approach for bringing the two doctrines into accord is comparative causation.[65] Under this approach, the focus of the inquiry is not upon the fault of the parties involved in the accident; but rather, it is upon the causal contribution of each party to the accident. Here, in apportioning damages, the court considers the extent to which the defendant's product and the plaintiff's own conduct caused the injury. A final method for harmonizing strict products liability and comparative negligence is to compare the plaintiff's conduct with that of a reasonable person placed in the same or similar circumstances.[66] Under this approach, there is no need to look to the defendant's fault or the product's causal contribution to the accident. Instead, the plaintiff's recovery will simply be reduced by the extent to which his conduct during the accident deviated from that of a reasonable person.

But regardless of the theoretical approach that is taken, it is important to note that an unspoken policy rationale may lie behind this nationwide judicial movement in the area of comparative negligence. As the clarification stage began to draw to a close, some commentators maintained that the doctrine of strict products liability had become too "strict."[67] Injecting comparative negligence principles into strict products liability may be viewed as a way of returning balance to the system because it relieves the manufacturer from paying for that part of the accident which is attributable to the plaintiff's own conduct. Hence, the inherent fairness of the doctrine of comparative negligence in the strict products liability realm may have played a key role in its adoption by many states.

In Ohio, the various facets of the clarification stage were essentially manifested in two cases—*Knitz v. Minster Machine Co.*[68] and *Bowling v. Heil Co.*[69] The *Knitz* case answered the question of how

64. Fischer *supra* note 51, at 435.

65. *See* Brewster, *supra* note 63, at 118.

66. *See* Payne, *Reduction of Damages for Contributory Negligence*, 18 MOD. L. REV. 344, 344–47 (1955).

67. *See, e.g.*, Symposium, *Products Liability: Toward Balancing the Scales*, 11 AKRON L. REV. 593 (1978).

68. 69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied*, 459 U.S. 857 (1982).

69. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).

design defects would be evaluated under Ohio law.[70] First, in *Knitz* the Ohio Supreme Court held:

> [A] product design is in a defective condition to the user or consumer if (1) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design.[71]

Basically, this standard adopts the bifurcated approach advocated by the California Supreme Court in *Barker*. However, the Ohio Supreme Court was unwilling to go so far as to shift the burden of proof on the issue of defectiveness from the plaintiff to the defendant.[72] Second, the *Knitz* court also stated that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger . . . .' "[73] Thus, the Ohio Supreme Court adopted a hindsight approach for evaluating design defects, much like the one advocated by Professor Keeton.[74] Under such a hindsight standard, the risk/utility prong of the *Knitz* test focuses on the risks and utilities of the product in question at the time of trial, rather than at the time of manufacture.

The *Bowling* decision supplied an answer to the question of whether the doctrine of comparative responsibility would be applicable to strict products liability actions under Ohio law. In *Bowling*, the Ohio Supreme Court expressed concern over the theoretical inconsistencies between the doctrines of strict products liability and comparative responsibility.[75] In particular, the court focused on the incompatibility between enterprise liability and apportioning damage. Enterprise liability calls for spreading the loss caused by the defective product among all the users of the product whereas apportioning damages calls for dividing damage awards between the manufacturer and the plaintiff based upon the responsibility of each for the plaintiff's injury.[76] Based on these concerns, the Ohio Supreme Court ultimately concluded that the "principles of comparative negligence or comparative fault have no application to a products liability case based upon strict liability in tort."[77]

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70. *Knitz*, 69 Ohio St. 2d at 465, 432 N.E.2d at 817.
71. *Id.* at 466, 432 N.E.2d at 818.
72. *Id.* at 464–65, 432 N.E.2d at 817.
73. *Id.*
74. *See supra* notes 40–42 and accompanying text.
75. *Bowling*, 31 Ohio St. 3d at 285–86, 511 N.E.2d at 381.
76. *Id.*
77. *Id.* at 286, 511 N.E.2d at 380.

C. *Reformation*

During the late 1970s and early 1980s, there was a growing perception across the nation that the products liability revolution had turned into a products liability "crisis."[78] One of the major factors contributing to this concern was the dramatic increase in the cost of obtaining products liability insurance.[79] The insurance industry blamed the rate increases on the recent influx of strict products liability suits at both the state and federal level.[80] The American Trial Lawyers Association, however, argued that the rate increases were primarily a result of mismanagement and poor financial planning on the part of the insurance industry.[81] Regardless of who or what was to blame for the problem, the simple fact remained that a problem did exist. A number of manufacturing firms, especially smaller ones, were faced with three undesirable alternatives during the late 1970s and early 1980s: (1) they could try to absorb the substantial insurance premium increases into the costs of their products; (2) they could drop their insurance coverage and continue to operate without insurance; or (3) they could look for a new type of product to manufacture.[82] The first alternative was viewed as undesirable because it was economically infeasible for many industries.[83] The second alternative was also undesirable since it would often leave injured plaintiffs with no way to enforce their products liability judgments against manufacturers.[84] Finally, the third alternative was undesirable as well, because it might lead to a mass exodus of manufacturers away from the production of high-risk products which are extremely useful to our society.[85]

In response to this problem, a number of state legislatures enacted statutes designed to make products liability insurance more available and more affordable. Various statutory means were employed in the attempt to achieve this goal. Some of the most significant legislative developments were statutes of repose and limitation on products liability claims; statutes providing for the application of comparative negligence principles to strict products liability; and statutes shielding man-

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78. W. PROSSER, J. WADE, V. SCHWARTZ, TORTS CASES AND MATERIALS 737 (7th ed. 1982).

79. *See* Brody, *supra* note 2, at 20.

80. *Id.*

81. *See* Rutigliano, *Insurance Crises for Doctors? Fact, Fantasy, or Fiction?*, TRIAL, May 1986, at 28; Stewart, *The "Tort Reform" Hoax*, TRIAL, July 1986, at 89.

82. *Cf.* Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579, 579 (1980); Note, *The Proposed Product Liability Statute in Ohio—Its Purpose and Probable Results*, 29 CLEV. ST. L. REV. 141, 143 (1980).

83. *See* Note, *supra* note 82, at 143.

84. *See* Schwartz, *supra* note 82, at 579.

85. *Id.*

ufacturers from hindsight liability for risks which were scientifically unknowable or designs which were technologically infeasible at the time of the product's manufacture.[86]

Significant developments also occurred at the federal level during the latter part of the 1970s. In November of 1977, the Federal Interagency Task Force on Product Liability issued an extensive report on the causes of the products liability crisis.[87] The report was highly critical of the insurance industry's ratemaking procedures.[88] It also concluded that one of the primary problems underlying the crisis was the level of uncertainty and imbalance present in the tort litigation system.[89] Based upon the conclusions of this report, the Department of Commerce drafted the Uniform Products Liability Act (U.P.L.A.)[90] for voluntary use by the states in reforming their strict products liability standards. The U.P.L.A. suggests that a number of important changes need to be made in the area of products liability law. Initially, it is important to note that although the U.P.L.A. retains a strict liability standard for manufacturing defects, it adopts a fault based approach for determining whether a design defect exists.[91] The U.P.L.A. states:

> In order to determine that the product was unreasonably unsafe in design, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of these harms outweighed the burden on the manufacturer to design a product that would have prevented those harms, and the adverse affect that alternative design would have on the usefulness of the product.[92]

This standard—much like the Keeton and Wade standards discussed earlier[93]—employs a risk utility analysis to determine whether the product is defective by design. Moreover, like the Wade standard, the U.P.L.A. does not base the time for ascertaining the risks and the utilities of the product at the time of trial. Rather, the U.P.L.A. indicates that the risks of the product must outweigh its utilities at the time the product was manufactured.

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86. For a summary of recent products liability reform statutes, see L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16C(1)(i) (1987).

87. FINAL REPORT, *supra* note 3.

88. *Id.*

89. *Id.*

90. UNIFORM PRODUCTS LIABILITY ACT, *reprinted in* 44 Fed. Reg. 62, 714 (1979) [hereinafter U.P.L.A.].

91. *Id.* § 104(B), 44 Fed. Reg. at 62,721.

92. *Id.*

93. *See supra* notes 34–38 and accompanying text.

The U.P.L.A. also suggests a structured approach for considering the role that a plaintiff's misconduct should play in the reduction of damage awards.[94] The act discusses four different types of conduct which will trigger comparative responsibility.[95] First, although a plaintiff is not required to inspect a product, his damages may be reduced if he is injured while using a product whose defect is readily apparent even without inspection.[96] Second, where a plaintiff voluntarily and unreasonably uses a product which he knows to be defective, his damages will be subject to reduction.[97] Third, if a plaintiff misuses a product his "damages shall be subject to reduction or apportionment to the extent that the misuse was a cause of the harm."[98] Fourth, a plaintiff's alteration or modification of a product will result in a reduction of the damage award, except where such alteration or modification was reasonably foreseeable by the manufacturer.[99]

Commentators have expressed mixed opinions on the U.P.L.A.. Some praise it as a well-balanced approach, firmly rooted in the principles of tort law.[100] Others, however, see the U.P.L.A. as an unwelcome retreat to the days of negligence.[101] Although a number of states have incorporated various provisions of the U.P.L.A. in reforming their products liability laws, presently no state has adopted it in full.[102]

In Ohio, the reformation stage of strict products liability began to manifest itself in the late 1970s. During the 1979-1980 session of the Ohio General Assembly, the Ohio Senate passed a products liability bill which made certain defenses available in all products liability actions, rejected the hindsight approach for evaluating design defects, and proposed a statute of limitation that would be placed on many types of products liability claims.[103] This bill subsequently failed in the Ohio House of Representatives, but many of the ideas embodied in it resurfaced again in the mid 1980s.[104]

For more than eighteen months during 1986 and 1987, the Ohio General Assembly debated the merits of different proposals for resolv-

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94. *See* U.P.L.A., *supra* note 90, § 112(A)–(D), 44 Fed. Reg. at 62,737–38.

95. *Id.*

96. *Id.* § 112(A), 44 Fed. Reg. at 62,737.

97. *Id.* § 112(B), 44 Fed. Reg. at 62,737.

98. *Id.* § 112(C), 44 Fed. Reg. at 62,738.

99. *Id.* § 112(D), 44 Fed. Reg. at 62,738.

100. *See, e.g.*, Birnbaum, *supra* note 50, at 639–43.

101. *See, e.g.*, Twerski, *The Use and Abuse of Comparative Negligence in Strict Products Liability*, 10 IND. L. REV. 797, 825 (1980).

102. *See* SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSP., PRODUCT LIABILITY REFORM ACT, S. REP. NO. 422, 99th Cong., 2d Sess. 69, 72 (1986).

103. S.B. No. 67, 113th Gen. Assy., Reg. Sess. (1979-80). For a general discussion of the various provisions of this bill, see Note, *supra* note 82, at 145–66.

104. S.B No. 67, 113th Gen. Assy., Reg. Sess. (1979-80).

ing the insurance/tort crisis. Initially, eleven tort reform bills were introduced for consideration by the Ohio Senate in February of 1986.[105] Senate Bill 330 became the primary focus in this effort and the remaining tort reform bills were grafted onto it in varying degrees. Later, in April of 1986, a proposal calling for increased regulation of the insurance industry was introduced in the Ohio House of Representatives.[106] In September of 1986, the Senate tort reform bill and the House insurance reform bill were combined in Substitute Senate Bill 330. Some of the most controversial provisions of Substitute Senate Bill 330 were those which dealt with strict products liability. On November 21, 1986, Substitute Senate Bill 330 was passed by both houses of the Ohio General Assembly.[107]

Notwithstanding this vast legislative effort, Governor Richard F. Celeste vetoed the measure on December 19, 1986.[108] In his veto message the Governor severely criticized the products liability provisions of the bill. He stated that "[b]y severely undermining the strict liability doctrine and allowing the contributory negligence defense, these provisions would remove a vital health and safety protection offered for Ohioans, both consumer and employee, while failing to provide cost savings to Ohio businesses."[109] The Governor urged the General Assembly to reintroduce the measure without the products liability section and promised that if this were done he "would sign such a measure the day it reached . . . [his] desk."[110]

In accordance with the Governor's message, in the early months of 1987 Ohio legislators removed many of the objectionable products liability provisions from Substitute Senate Bill 330 and reintroduced the comprehensive tort reform package in the House of Representatives as House Bill 1 (H.B. 1).[111] The Ohio General Assembly passed H.B. 1 on September 30, 1987 and the Governor signed the bill into law on October 5, 1987.[112] The new law contained various compromises in its products liability provisions and the following analysis will evaluate the final product of those compromises.

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105. 1986 Ohio Legis. Serv. 3-26 (Baldwin).

106. *Id.* at 3-10.

107. *Id.* at 3-26.

108. *Id.*

109. *Celeste Vetoes Tort-Insurance Bill*, Gongwer News Serv., Inc., Ohio Report, Dec. 19, 1986, at 1.

110. *Id.*

111. 1987 Ohio Legis. Serv. 3-3 (Baldwin).

112. *Id.*

III. ANALYSIS

With the enactment of H.B.1, Ohio has recently joined the movement for reform in the area of strict products liability.[113] As was the case with the legislation of many other states and the U.P.L.A., the primary goal of Ohio's reform act is to return a measure of balance to the system of products liability.[114] The following analysis will consider the extent to which that goal has been achieved by focusing on three of the most controversial aspects of the Ohio act: (1) the adoption of the bifurcated approach for determining whether a product is defective by design; (2) the rejection of a hindsight standard for considering defectiveness; and (3) the disallowance of comparative negligence as a defense in a strict products liability action.

A. The Test for Design Defect

The new law provides that a product is defective by design if either of the following tests apply: "(1) When it left the control of its manufacturer, the foreseeable risks associated with the design . . . exceeded the benefits associated with that design . . . [or] . . . (2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[115] Essentially, this two prong test for design defects is a codification of the standard set forth by the Ohio Supreme Court in *Knitz v. Minster Machine Co.*[116] This is unfortunate, because the *Knitz* decision established a standard which is both confusing to jurors and unfair to defendants.[117] The major weakness of the *Knitz* approach—and hence the new law's provision on design defects—is the inclusion of the consumer expectation test as a method for determining whether a product is defective by design.

Several valid criticisms have been leveled against the consumer expectation test. A number of authorities have acknowledged that the consumer expectation test can be detrimental to a plaintiff's interests.[118] For example, where a defect in a product is obvious—and thus within the contemplation of the ordinary consumer—the plaintiff may be barred from recovery under the consumer expectation test, despite

113. OHIO REV. CODE ANN. § 2307.71–2307.80 (Anderson Supp. 1988).

114. S. DARLING, OHIO CIVIL JUSTICE REFORM ACT at v (1987).

115. OHIO REV. CODE ANN. § 2307.75.

116. 69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied*, 459 U.S. 857 (1982).

117. *Cf.* Stenberg v. Beatrice Foods Co., 176 Mont. 123, 576 P.2d 725 (1978); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Liability for Defective Products*, 27 S.C.L. REV. 803, 823 (1976).

118. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 421, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233 (1978); Keeton, *supra* note 42, at 302.

the fact that the risks of the product heavily outweigh its utilities.[119] Moreover, the consumer expectation test can be extremely detrimental to the interests of the defendant/manufacturer. First, the expectation standard may brand a product as "defective" where it clearly is not defective.[120] The most often cited example is that of a drug which would have tremendous utility for mankind but would also result in a small number of adverse side effects which were unknowable to the consumer or to the manufacturer.[121] Under these facts, the utilities of the product would certainly outweigh its risks. Under the consumer expectation test, though, the drug would be defective in design because it would be more dangerous than the ordinary consumer would expect.

Second, the subjective nature of the expectations test may prejudice the defendant's interests. Justice Praeger, of the Kansas Supreme Court, observed that "the ends of justice require an objective test, not a subjective test, in the area of products liability. A subjective test in this field of the law is not really a test at all. It is an unbridled license to the jury to 'do good' in the particular case."[122] Hence, when the jury is left with no factors to weigh and only the subjective consideration of what an "ordinary" consumer would expect from a product, the balance may be likely to fall in favor of the injured plaintiff, regardless of the utilities of the product in question.

Third, in many instances where technologically complex products are being scrutinized, the consumer may have no expectations whatsoever regarding how safely the product could or should have been manufactured.[123] Yet, if the ordinary consumer does not know what to expect from a product, then how can a jury consisting of "ordinary consumers" justly determine whether liability should be imposed upon a manufacturer under the consumer expectation test?[124] One commentator has suggested under these circumstances the jury will simply "guess."[125] If this assumption is true, then the manufacturer will at least have a fair chance with the jury. Unfortunately, a more likely result is that the jury will simply rely on the unconscious expectation or belief that if a consumer exercises reasonable care in using a non-defective product, he will not be harmed by it.[126] Under this assumption, when a technologically complex product causes the plaintiff's injury

119. *See* Keeton, *supra* note 42, at 302.
120. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 15, at 698.
121. *Id.*
122. Lester v. Magic Chef, Inc. 230 Kan 643, ___, 641 P.2d 353, 363 (1982).
123. *See* Birnbaum, *supra* note 50, at 614.
124. *Id.*
125. *Id.*
126. *See* Montgomery & Owen, *supra* note 117, at 828.

and the plaintiff has not misused the product, the jury will always conclude that the product is defective.

Still, courts adopting the bifurcated approach for determining design defects maintain that although the consumer expectation test cannot be used as an exclusive measure of defectiveness, it can serve as a useful floor below which no product design may fall.[127] This two prong approach resolves the plaintiff's problems regarding the consumer expectation test. In the situation discussed earlier involving a patent defect in the product, the injured plaintiff's claim will be saved by the fact that now he can simply assert defectiveness under the risk/utility prong of the test. However, the bifurcated approach does nothing to alleviate the defendant's concerns with the consumer expectation test. A plaintiff may still assert a claim under the expectations prong of the test and expose the defendant to all of the subjective, prejudicial, and unfair side effects which were discussed earlier.[128]

Ohio's new law could have returned a measure of balance to Ohio's products liability system by adopting a simple risk/utility approach for determining whether a design defect exists. Such a standard has been supported by a number courts,[129] commentators,[130] and legislatures.[131] The risk/utility test provides objective factors to be used as a guide by the jury in arriving at their decision and it sends the correct message to the manufacturing community:

> If designs are examined in light of scientific, engineering, and other applicable principles in a products liability case, manufacturers who do not adequately apply those principles will get the message and the deterrence goal in this field of law will be achieved. If, on the other hand, the scientific principles that necessarily must be used to design products are ignored, so that the outcomes of lawsuits depends on a merely subjective standard . . . [i.e. the consumer expectation test] . . . the only "message" that manufacturers will receive is that the legal system is irrational and capricious, a mere lottery.[132]

Unfortunately, the Ohio legislature has chosen a standard for determining defects which allows for such subjectivity and irrationality in its

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127. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 421, 573 P.2d 443, 451, 143 Cal. Rptr. 225, 233, (1978).

128. *See supra* notes 118–24 and accompanying text.

129. *See, e.g.*, Jeng v. Winters, 452 F. Supp. 1349 (M.D. Pa.), *aff'd*, 591 F.2d 1335 (3d Cir. 1978); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

130. *See, e.g.*, Keeton, *supra* note 35, at 38; Wade, *supra* note 34, at 837–38.

131. *See, e.g.*, ARK. STAT. ANN. § 34-2801-34-2807 (1979); KAN. STAT. ANN. § 60-3301 (1981).

132. Allen, *Product Liability Law and Motor Vehicle Design*, 14 U. TOL. L. REV. 301, 311 (1983).

products liability law. And, to that extent, the standard for design defects set forth by the Ohio legislature fails to achieve a proper balance between the interests of consumers and manufacturers in the area of products liability law.

B. *The Rejection of Hindsight*

In *Knitz*, the Ohio Supreme Court adopted a "hindsight" standard for ascertaining the time at which the defectiveness of a product will be examined.[133] Although the court's decision only expressly adopted this standard for the risk/utility prong of the *Knitz* test, it should also be noted that some aspects of hindsight are inherent in the consumer expectations prong of the test as well.[134] One of the greatest strengths of H.B.1 is the fact that it eradicates almost every aspect of hindsight liability from Ohio's products liability law.

There are basically three situations where hindsight liability presents a problem: (1) when dangers or risks relating to the normal use of the product are unknowable at the time of manufacture, but knowable at the time of trial;[135] (2) when scientific or technological breakthroughs since the time of the product's manufacture make it possible to design a safer product;[136] and (3) when a use or alteration of the product is unforeseeable at the time of manufacture, but foreseeable at the time of trial.[137]

In a recent publication, Professor Stanton Darling explains how the language of the statute deals with each of the aforementioned problems.[138] First, Professor Darling points out that under the risk/utility prong of the new law, all three types of hindsight liability are excluded.[139] The use of the language "foreseeable risks"[140] relieves the manufacturer of liability in instances where the danger in question in-

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133. *Knitz*, Ohio St. 2d at 462, N.E.2d at 814.
134. S. DARLING, *supra* note 114, at 63.
135. *See* Wade, *supra* note 41, at 754–56.
136. *Id.*
137. *Id.*
138. S. DARLING, *supra* note 114, at 70–72.
139. *Id.* at 71–72.
140. The statute defines "foreseeable risk" as follows:

(F) "Foreseeable risk" means a risk of harm that satisfies *both* of the following:

(1) It is associated with an intended or reasonably foreseeable use, modification, or alteration of a product in question;

(2) It is a risk that the manufacturer in question should recognize while exercising both of the following:

(a) The attention, perception, memory, knowledge, and intelligence that a reasonable manufacturer should possess;

(b) Any superior attention, perception, memory, knowledge, or intelligence that the manufacturer in question possesses.

OHIO REV. CODE ANN. § 2307.71(F) (emphasis added).

volved the normal use of the product and was unknowable at the time of manufacture. The "foreseeable risks" language also shields the manufacturer from liability where an alteration or misuse of the product was unforeseeable at the time of manufacture.[141] Moreover, the statute excludes hindsight liability where:

> [A]t the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product, unless the manufacturer acted unreasonably in introducing the product into trade or commerce.[142]

Second, Professor Darling indicates that all but one type of hindsight liability is removed from the consumer expectations prong of the statute's design defect standard.[143] The language of the test itself—"when used in an intended or reasonably foreseeable manner . . ."[144]—certainly excludes the manufacturer from liability for uses or alterations of the product which were unforeseeable at the time of manufacture. Likewise, the new law would protect the manufacturer from being held liable for scientific or technological breakthroughs arising subsequent to the products manufacture.[145] Nevertheless, one remnant of hindsight liability will still exist in Ohio's products liability law. Under the consumer expectations prong of the statute's design defect test, a manufacturer may still be subject to hindsight liability for dangers or risks relating to the normal use of the product which were unforeseeable at the time of manufacture, but foreseeable at the time of trial.[146]

Advocates of the hindsight approach may view Ohio's new products liability law as a return to a negligence standard in the area of design defects; but in reality, this provision is simply an attempt to justly balance the interests of both consumers and manufacturers in Ohio's product liability system. A number of rationales have been offered for imposing hindsight liability upon manufacturers. Some authorities have maintained that hindsight liability is advantageous because it makes it easier for the plaintiff to recover and simplifies evidentiary issues for the jury.[147] Although "making it easier for the plaintiff to recover" is an often expressed public policy behind strict

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141. S. DARLING, *supra* note 114, at 71–72.
142. OHIO REV. CODE ANN. § 2307.75(F).
143. S. DARLING, *supra* note 114, at 71–72.
144. OHIO REV. CODE ANN. § 2307.75(F).
145. S. DARLING, *supra* note 114, at 71–72.
146. *Id.*
147. *See* A. MURPHY, K. SANTAGATA & E. GRAD, *supra* note 26, at 27.

products liability, trends in recent years would seem to suggest that it has outlived its usefulness.[148] In fact, the recent movement for reform in the area of products liability has, in part, been premised on the belief that it has become too easy for plaintiffs to recover from manufacturers.[149]

A more persuasive argument, though, is the one pertaining to evidentiary problems. Trying to set the evidentiary stage for a jury with evidence of only what the defendant could have known at the time of the product's manufacturing may be a formidable task.[150] In *Beshada v. Johns-Manville Products Corp.*,[151] the New Jersey Supreme Court reasoned:

> The vast confusion that is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability constitutes a strong reason for avoiding the concept altogether by striking the state-of-the-art defense . . . Proof of what could have been known will inevitably be complicated, costly, confusing and time consuming . . . . We doubt juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue.[152]

However, it should be noted Professor Wade has persuasively countered this argument.[153] He maintains that this exact type of problem has been addressed and resolved by juries in another familiar context—the negligence case.[154] Under a negligence standard, the fault of an individual's actions is always judged at the time the action occurred, rather than at the time of trial. Professor Wade concludes that since "courts have not complained about experiencing undue difficulty in handling this task . . . [p]erhaps . . . [the knowability requirement] . . . is not as unwieldly as has sometimes been urged."[155]

Proponents of hindsight liability also argue that it is justifiable on the grounds that it promotes the manufacture of safer products.[156] Supposedly, the threat of hindsight liability will ensure that manufacturers employ more careful and thorough testing procedures before placing a product on the market.[157] This hypothesis is questionable in cases where the hindsight issue involves scientific or technological break-

148. *Id.*
149. *Id.*
150. *See* Wade, *supra* note 41, at 754.
151. 90 N.J. 191, 447 A.2d 539 (1982).
152. *Id.* at 202, 447 A.2d at 548.
153. *See* Wade, *supra* note 41, at 754–56.
154. *Id.*
155. *Id.*
156. *Beshada*, 90 N.J. at 202, 447 A.2d at 548.

throughs in design safety. Where the technological means of detecting a design defect are truly unknowable at the time of manufacture, no amount of testing and no degree of thoroughness would reveal the defect. Moreover, this deterrence element may, in fact, serve as a disincentive for improvements in product safety.[158] Once a product has been marketed, a manufacturer might consider it prudent to reject safer alternative designs developed at a later time: By introducing a newer, safer version of the product, the manufacturer may be branding his previous product as defective.[159] Furthermore, in some cases, the deterrent threat provided by hindsight liability may result in over-deterrence.[160] For example, the manufacturer of a new, extremely useful drug might be encouraged to delay the introduction of the drug onto the market despite the fact that its present utilities vastly outweigh its present risks.[161]

Another argument made in support of hindsight liability is that the manufacturer is in a better position than the plaintiff to spread the loss resulting from the injury.[162] Allegedly, manufacturing firms can spread the costs of injuries caused by their products among a vast pool of consumers vis-a-vis the price of their product.[163] However, there are two problems with this argument. First, accurately adjusting prices to reflect the costs of unknowable risks may be an impossible task.[164] Second, even if it was possible to spread such losses, it would be undesirable to do so. Although today's tort law does provide for strict products liability, it does not provide for absolute products liability.[165] Yet, imposing hindsight liability upon a manufacturer comes very close to achieving that very result.[166] If a manufacturer is to be held liable simply because it is more capable of spreading the loss, where will the manufacturer's liability end? In all probability, it will not end until the manufacturer has become an absolute insurer of its products. This result is clearly unacceptable under tort law principles.[167]

Ohio's new products liability statute abolishes most forms of hindsight liability and, in so doing, takes a significant step towards the goal of returning balance to its products liability law. The new law takes a

158. *See* Wade, *supra* note 41, at 755.
159. *Id.*
160. *See* Payton v. Abbot Labs., 386 Mass. 540, 437 N.E.2d 171 (1982).
161. *Id.* at 569–70, 437 N.E.2d at 188.
162. *Beshada,* 90 N.J. at 205, 447 A.2d at 547.
163. *Id.*
164. *See* Wade, *supra* note 41, at 755.
165. *See* Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding a Manufacturer Liable,* NAT'L L.J., Jan. 24, 1983, at 24, col. 1, 25–26.
166. *Id.*
167. *Id.*

reasonable approach to evaluating design defects by providing that the defectiveness of a product should be evaluated at the time of the product's manufacture and not at the time of trial. Such a rule is equitable to the interests of both plaintiffs and defendants.

C. *The Refusal to Adopt Comparative Negligence*

One of the most disappointing aspects of H.B.1 is its failure to allow comparative responsibility to be asserted as an affirmative defense in strict products liability actions. Ohio's new statute provides that "contributory negligence is not an affirmative defense to a products liability claim under sections 2307.71 to 2307.80 of the Revised Code."[168] This is basically a reaffirmation of the Ohio Supreme Court's position in *Bowling v. Heil Co.*[169] As discussed earlier,[170] the *Bowling* court reasoned that the public policy goals underlying strict products liability cannot be reconciled with those underlying comparative negligence.[171] Thus, the court held that there was no place for the application of comparative negligence principles in a strict products liability action.[172]

However, there are a number of rationales for bringing the principles of strict liability and comparative negligence into accord.[173] One persuasive method for reconciling these two theories is to recognize that the comparative responsibility of the plaintiff in comparative negligence actions can be viewed as the extent to which his conduct deviated from that of the reasonable person.[174]

Regardless of the approach chosen, though, comparative responsibility is consistent with the three major policy goals underlying strict products liability. First, this doctrine does not make it any more difficult for the plaintiff to establish the defendant's liability. In *Daly v. General Motors Corp.*,[175] the California Supreme Court maintained that "[p]laintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant's liability for injuries caused by a defective product remains strict."[176] Hence, under comparative responsibility, the defendant's *liability* will be determined in the

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168. OHIO REV. CODE ANN. § 2315.20(C)(1).
169. 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987).
170. *See supra* notes 76–79 and accompanying text.
171. *Bowling*, Ohio St. 3d at 280, 511 N.E.2d at 376.
172. *Id.*
173. *See supra* notes 60–66 and accompanying text.
174. *See* Note, *Coney v. J.L.G. Industries: Applying Comparative Negligence to Strict Products Liability: Should Ohio Follow?*, 13 CAP. U.L. REV. 457, 475 (1984).
175. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
176. *Id.* at 729, 575 P.2d at 1166, 144 Cal. Rptr. at 384.

same way it always has been determined; but, the plaintiff's *damages* will then be reduced by the extent to which his conduct deviated from that of a reasonable person, or to the extent that he was at fault in causing his own injury. Second, the doctrine of comparative negligence is not inconsistent with the policy of spreading the loss.[177] It is desirable to spread the cost of an injury caused by a manufacturer's defective product among all of the users of that product. However, it is not desirable that all product users should have to pay for that portion of an injury which was attributable to the plaintiff's own carelessness or stupidity.[178] Third, the principles of comparative negligence are not in conflict with the theory of deterrence which underlies strict products liability.[179] It has been argued that if comparative negligence is injected into strict products liability, manufacturers will become less concerned with improving product safety.[180] However, this argument overlooks the fact that manufacturers have no way of knowing whether any consumers will use the product negligently.[181] Thus, manufacturers will have to maintain the same standards regardless of whether the defense of comparative responsibility is available.[182]

Moreover, it can be argued that the adoption of a "pure" comparative negligence approach would be more equitable than Ohio's present assumption of the risk defense to strict products liability. A "pure" comparative approach would be more favorable to both consumers and manufacturers. Assumption of the risk is an all-or-nothing defense. Ohio's new statute provides that:

> [I]f it is determined that the claimant expressly or impliedly assumed a risk and that such express or implied assumption of the risk was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a *complete bar* to the recovery of those damages.[183]

So, the plaintiff who is responsible for his own injury up to a certain point will receive full compensation for the injury. But, the plaintiff who is responsible beyond that point is completely barred from receiving any recovery. With the "pure" comparative responsibility approach, there would be no such bar. Under a "pure" system, liability would be

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177. *See* Sanford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 593, 642 P.2d 624, 627 (1982).

178. *Daly*, 20 Cal. 3d at 728, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. OHIO REV. CODE ANN. § 2315.20(B)(2)(emphasis added).

apportioned in direct proportion to fault in all cases.[184] Thus, in Ohio, a comparison of comparative negligence with assumption of the risk reveals that comparative negligence constitutes a more just system of recovery for injured plaintiffs.

In addition, the adoption of comparative responsibility as a defense to strict products liability would be favorable for manufacturing interests. Under the present assumption of the risk defense in Ohio, the manufacturer has a heavy burden to carry.[185] In order to establish the assumption of risk defense, the defendant must show that: (1) the plaintiff discovered the defect and was aware of its dangers; (2) the plaintiff voluntarily used the product despite his knowledge of its defectiveness; and (3) the plaintiff's use of the product was unreasonable.[186] It is the first element of this defense which is most difficult for the defendant to prove. Because "awareness" deals with a subjective state of mind, the facts pertaining to this issue may be solely within the possession of the plaintiff.[187] Furthermore, the jury will usually consider evidence on the awareness issue in light of the "common-sense presumption that one generally does not do an act knowing that its direct consequences will be death . . . [or] serious injury."[188] But, under the comparative approach, the manufacturer would be relieved of this unfair burden. The comparative responsibility defense bases its apportionment on an objective standard: It simply considers the extent to which the plaintiff's conduct in using the product deviated from that of a reasonable person or the extent to which the plaintiff was at fault in causing his own injury. Hence, the comparative approach would constitute a more equitable system of apportioning damages for the defendant as well.

The failure of the Ohio General Assembly to adopt comparative responsibility as a defense to strict products liability is unfortunate. Not only is the doctrine of comparative responsibility consistent with the policies of strict products liability, but it is also a more just system of apportioning damages than the assumption of the risk defense now in place.

IV. CONCLUSION

In the final analysis, H.B.1's products liability provisions take a step in the right direction, but they do not go far enough towards achieving a balance between consumer interests and manufacturing in-

184. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351–52 (Tex. 1977).
185. Bowling v. Heil Co., 31 Ohio St. 3d 277, 289 511 N.E.2d 373, 382–83 (1987).
186. *Id.*
187. *Id.*
188. *Id.*

terests in Ohio's products liability system. The greatest strength of the bill is its elimination of hindsight liability because this ensures that "strict" products liability will not become "absolute" products liability in Ohio. But, the two major weaknesses of the act are its adoption of the consumer expectation test and its rejection of comparative responsibility as a defense to strict products liability. The consumer expectation test is extremely subjective at best and prejudicial at worst. The legislature should have excluded the expectations test and simply adopted a risk/utility standard for considering design defects. Finally, the legislature should have allowed comparative responsibility to be asserted as a defense in strict products liability actions. Comparative responsibility can be harmonized with strict products liability and it provides a more equitable system of apportionment of damages than the present system of assumption of risk.

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