University of Dayton Law Review

Volume 43 | Number 2 Article 5

3-1-2018

Sailing under False Colors: The Continuing Presence of Negligence Principles in "Strict" Products Liability Law

Richard C. Ausness
University of Kentucky

Sailing under False Colors: The Continuing Presence of Negligence Principles in "Strict" Products Liability Law

Cover Page Footnote

I would like to thank the University of Kentucky College of Law for supporting this research with a summer research grant.

SAILING UNDER FALSE COLORS: THE CONTINUING PRESENCE OF NEGLIGENCE PRINCIPLES IN "STRICT" PRODUCTS LIABILITY LAW

Richard C. Ausness[*]

I. INTRODUCTION

Dean Prosser, in his celebrated article, *The Assault Upon the Citadel*, compared the assault on warranty law's privity requirement to an attack on a stoutly defended fortress during the Middle Ages.[1] Since that time, another conflict has arisen among students of products liability, namely whether product sellers should be subject to strict liability or whether certain aspects of this field should instead be controlled by negligence principles. However, unlike the assault some sixty years ago on the privity requirement, this present conflict bears a greater resemblance to the protracted trench warfare of World War I than it does to the siege of a medieval citadel.

In a nutshell, here is the problem: For reasons that will be described in greater detail below, the law of products liability was cast solely in terms

* Associate Dean for Faculty Research and Stites & Harbison Professor of Law, University of Kentucky. B.A. 1966, J.D. 1968, University of Florida; LL.M. 1973, Yale Law School. I would like to thank the University of Kentucky College of Law for supporting this research with a Summer research grant.

[1] *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103 (1960).

of strict liability in tort when the courts abandoned warranty law in the 1960s. The early pioneers, such as Prosser and Traynor, believed that defectiveness was the touchstone of liability under their proposed strict liability regime. Only later, did it become apparent that the existing defectiveness paradigm, which worked well with manufacturing defects, was not suitable in cases where a product's design or warnings were at issue.[2] Instead, courts and commentators developed various tests of defectiveness for product designs and warnings purportedly based on strict liability. In fact, these tests, which typically involved some form of risk-utility balancing, were based more on negligence than strict liability.

I conclude that the time has come to repudiate concepts of defectiveness and strict liability in design and failure to warn cases, which constitute the bulk of products liability litigation,[3] and instead adopt an approach that focuses more on manufacturer conduct. In other words, strict liability and the concept of defectiveness should be confined to manufacturing defects. Furthermore, negligence principles should be applied when design and failure to warn cases are involved and the concept of defectiveness can be dispensed with as unnecessary since the risk-utility balancing analysis of negligence can focus on the manufacturer's conduct instead.

Part II recounts the familiar story of how strict products liability triumphed over negligence and warranty law in the early 1960s. It also explores the role that policy rationales, such as risk distribution and accident cost avoidance, played in the development of products liability law during this period. Part III examines the use of defectiveness as a liability standard and also documents the lingering role of negligence in § 402A and its comments. It also describes the various tests for defectiveness that evolved in the 1970s and 1980s in response to the increasing recognition that design and warning cases needed to be evaluated differently than manufacturing flaws. Part IV analyzes the new Products Liability Restatement and points out its heavy reliance on negligence principles, particularly in § 2(b) and § 2(c). Finally, Part V proposes liability rules for design and warning cases that eliminate defectiveness as a basis for liability and, instead, focus on the conduct of the product manufacturer.

II. THE APPARENT TRIUMPH OF STRICT LIABILITY.

By the mid-1960s, a consensus had emerged among judges, lawyers, and academics that strict liability in tort was the preferred basis for products liability in the United States.[4] But, how did this consensus come about? This

[2] The term "warning" will be used to include instructions as well.

[3] *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 748 (1996).

[4] *But see* Marcus L. Plant, *Strict Liability for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 940 (1957).

part of the article will examine the history of products liability from the *MacPherson* case in 1916 to the promulgation of § 402A in 1965 to determine why negligence and warranty law were eventually rejected in favor of strict liability in tort. Later, we shall examine why courts continued to adhere, at least in theory, to strict liability in design and failure to warn cases even after it became apparent that it made more sense to rely expressly on negligence principles to resolve these cases.

A. *The Journey from Negligence to Warranty to Strict Liability.*

According to the popular narrative, the period from 1940 to 1965 was marked by the gradual acceptance of strict liability as the basis for the modern law of products liability. To be sure, strict liability had an ancient and honorable pedigree, with deep roots in both criminal law and tort law. For example, some of the laws of the Babylonian King, Hammurabi, imposed strict liability on the owners of animals who injured others.[5] Likewise, the custom of "noxal surrender" practiced by Romans and other pre-Christian Europeans allowed the owner of an object that accidentally caused harm to another to avoid reprisals by turning over the object to the victim or his family.[6] The concept of *deodand* provides another example of the imposition of liability without regard to the guilt or innocence of the defendant's conduct.[7] According to this principle, the owner of an object which caused injury could avoid liability by surrendering it to the King who was supposed to devote it to a charitable use.[8] Finally, during the Middle Ages the writ of trespass provided a remedy against personal injuries and invasions of property injuries that resulted from direct contact, even when the contact was unintentional.[9] In effect, liability in such cases was strict.[10]

However, the first products liability cases were based on negligence rather than strict liability.[11] Chief among them was *Winterbottom v. Wright*,[12] decided by an English court in 1842. The plaintiff in *Winterbottom* was the

---

[5] *See* M. Stuart Madden, *The Cultural Evolution of Tort Law*, 37 ARIZ. ST. L.J. 831, 849-50 (2005). However, Hammurabi's laws also contain examples of liability for negligent conduct. *Id.* at 850.

[6] *See* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181–82 (1973).

[7] *See* Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, (1970) (internal citations omitted).

[8] Finkelstein, *supra* note 6, at 182. Deodand was not abolished in England until 1846. *Id.* at 170 (internal citations omitted).

[9] *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361–62 (1951). Strictly speaking, the type of contact necessary to impose liability was considered to be a wrong in itself. *Id.* at 363.

[10] *See* Peter Handford, *Intentional Negligence: A Contradiction in Terms?*, 32 SYDNEY L. REV. 29, 39 (2010).

[11] Prior to the Industrial Revolution, most commercially produced products were produced by individual craftsmen. The guilds to which these craftsmen belonged imposed liability on their members if their products failed to meet the guild's quality standards. *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 957 (2007).

[12] *See Generally* Winterbottom v. Wright, 152 Eng. Rep. 402 (Exch. 1842).

driver of a Royal Mail stagecoach who was injured when the coach broke down and caused him to be thrown from his seat.[13] The plaintiff sued the contractor who had supplied the coach, alleging that that he had failed to properly maintain it.[14] However, the court dismissed the claim because there was no privity of contract between the parties.[15] For more than seventy years thereafter, *Winterbottom* was cited for the proposition that lack of privity would bar negligence and breach of contract claims against remote product manufacturers.[16]

Then, in 1916, Justice Cardozo in *MacPherson v. Buick Motor Company*[17] expressly rejected *Winterbottom*'s privity requirement, at least where a consumer was harmed by a product that was "imminently dangerous" when defective.[18] In *MacPherson*, the plaintiff was injured when one of wheels of his Buick Runabout collapsed, causing the car to swerve into a ditch.[19] Eventually, almost all American courts came to agree with Justice Cardozo that privity of contract was an inappropriate requirement in an era where product manufacturers rarely entered into contracts with their retail customers.[20] Thus, *MacPherson* opened the way to a products liability regime based on negligence principles.

However, once the privity barrier was overcome, it quickly became apparent that negligence, at least in its traditional form, was inadequate from the perspective of injured consumers. One obvious difficulty was proving that the manufacturer failed to exercise reasonable care in designing or fabricating the product in question.[21] Expert testimony was often required to prove lack of due care, although some courts mitigated the plaintiff's burden of proof on this issue by expanding the scope of *res ipsa loquitur*.[22] In addition, in order to prevail, the injured consumer would have to prove that

---

[13] *Id.*

[14] *Id.* at 403. Strictly speaking, the lawsuit was an action on the case, but the underlying claim was based on negligence. *See* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 562 (2014).

[15] The privity doctrine provided that a manufacturer's duty only extended to its immediate purchaser. *See* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 593 (1980).

[16] *See* Cornelius W. Gillam, Products Liability in a Nutshell, 37 OR. L. REV. 119, 133 (1958). During this period, American courts employed a number of questionable devices to circumvent the privity defense. *Id.* at 152–55.

[17] MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

[18] *Id.* at 397–98. Cardozo relied for this proposition on *Thomas v. Winchester*, 217 N.Y. 382 (1852), in which a druggist was held liable for selling a drug labeled as extract of dandelion when in fact it contained extract of belladonna, a deadly poison. The court in *Thomas* declared that, since the poison was imminently dangerous, the druggist owed a duty to the public in general and not just to one with whom he was in privity. *Id.*

[19] *Id.* at 384.

[20] *See* Dix W. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 965 (1957). The rule in *MacPherson* was also adopted by the Restatement of Torts. *See* Restatement (First) of Torts § 395 (1934).

[21] Birnbaum, *supra* note 15, at 595; Gillam, *supra* note 16, at 144–45.

[22] Noel, *supra* note 20, at 978–79; George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2307 (1989).

the defendant's negligence caused his or her injuries. Finally, there were a variety of affirmative defenses, such as contributory negligence and assumption of risk, which a manufacturer could invoke to defeat a consumer's damage claim.

These concerns led legal scholars to search for a liability theory for products liability that did not require a finding of fault. Strict liability was an obvious possibility. At that time, a number of strict liability rules were recognized in the United States. One form of strict liability was the rule that imposed strict liability for injuries caused by trespassing livestock or wild animals that escaped from captivity.[23] In addition, in a number of states, persons who engaged in "ultrahazardous" activities on their land were subject to strict liability.[24] However, it was clear that neither of these liability rules could be directly applied to defective products.

Another form of liability, warranty law, seemed to offer a more promising alternative to negligence. An express warranty could arise when the seller made an express promise or statement of fact to the buyer about the quality or safety of the product being sold.[25] In addition, implied warranties could arise by operation of law, regardless of the intent of the parties.[26] The most important implied warranty was that of merchantability or quality which required that goods be reasonably fit (and safe) for their ordinary purposes.[27] The seller could be held liable if the goods sold were not merchantable regardless of whether or not the seller exercised reasonable care.

However, there were two aspects of warranty law that greatly reduced its value as a strict liability to consumers. First, warranties were generally limited to parties who were in privity with each other. Second, warranties could be disclaimed and remedies could be limited by the seller. During the period between 1940 and 1965, both commentators and courts attacked these features in the hopes of transforming warranty law into a more pro-consumer liability regime.[28] As in the case of negligence, the critics initially concentrated their fire on the privity requirement. Beginning with *Mazetti v. Armour & Co.*, a number of courts also did away with the privity requirement in implied warranty cases involving food and drink, citing, *inter alia*, the

---

[23] *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 MEM. L. REV. 823, 829–37 (2003).

[24] Marcus L. Plant, *Strict Liability for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 940 (1957).

[25] *See* James A. Spruill, Jr., *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551, 559 (1941).

[26] *See* Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 126 (1948).

[27] *See* William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 121 (1943).

[28] *See, e.g.*, Greenman v. Yuba Power Prod. Inc,, 377 P.2d 897 (Cal. 1963); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Prosser, *supra* note 1, at 1099.

public's interest in safe products for human consumption.[29] In addition, in the 1930s, a few courts began to hold that privity of contract would not be required to recover for breach of an express warranty for the sensible reason that such warranties were really directed at the ultimate purchaser, not the person with whom the manufacturer was in privity.[30] However, as Dean Prosser points out, it was not until the 1950s that the tide began to turn more generally against the privity of contract requirement in implied warranty cases.[31] At first, the courts proceeded cautiously, doing away with the privity requirement for products intended for intimate bodily use such as hair dye,[32] soap,[33] and permanent wave solution.[34] Later, the privity requirement was rejected in cases involving ordinary products such as cinder blocks[35] and electric cable.[36]

Eventually, the privity requirement suffered a fatal blow in 1960 when the New Jersey Supreme Court did away with it in a case where a retail consumer was injured when her newly purchased automobile veered off the road and crashed into a brick wall.[37] The court in *Henningsen v. Bloomfield Motors* declared that consumers should be able to hold manufacturers responsible when their products caused harm, regardless of the absence of privity.[38] Furthermore, the *Henningsen* court also ruled that manufacturers could not avoid liability for product-related injuries by the use of disclaimers or by otherwise attempting to limit a consumer's remedies.[39] According to Professor Priest, "*Henningsen* marked the effective end of the relevance of contract law in defective product actions involving personal injury. Its holding allows recovery based on an implied warranty of merchantability, but it repudiates every other principle of contract law potentially applicable to product defect actions."[40]

While purporting to liberate warranty law from the twin restrictions of privity and disclaimers, the *Henningsen* decision exposed the inadequacies

---

[29] 75 Wash. 622, 135 P. 633, 636 (1913). *See, e.g.,* Klein v. Duchess Sandwich Co., 93 P.2d 799, 804 (Cal. 1939); Coca-Cola Bottling Works v. Lyons, 111 So. 305, 307 (Miss. 1927); Jacob E. Decker & Sons v. Capps, 144 S.W.2d 404 (Tex. Civ. App. 1940).

[30] *See* Baxter v. Ford Motor Co., 12 P,2d 409 (Wash. 1932); Larson v. Fid. Sav. & Loan Ass'n, 35 P.2d 108 (Wash. 1934).

[31] Prosser, *supra* note 1, at 1111–14.

[32] *See* Graham v. Bottenfield's, Inc., 269 P.2d 413 (Kan. 1954).

[33] *See* Kruper v. Proctor & Gamble Co., 113 N.E.2d 605 (Ohio Ct. App. 1953), rev'd on other grounds, 117 N.E.2d 7 (Ohio 1954).

[34] *See* Markovich v. McKesson & Robbins, 149 N.E.2d 181 (Ohio Ct. App. 1958).

[35] *See* Spence v. Three Rivers Builders & Masonry Supply, Inc., Inc., 90 N.W.2d 873 (Mich. 1958).

[36] *See* Continental Copper & Steel Indus. V. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. D.C.A. 1958).

[37] *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960).

[38] *Id.* at 99–100.

[39] *Id.* at 95, 97; *see also* David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 971 (2007).

[40] *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 507 (1985); *see also* David G. Owen, *The Fault Pit*, 26 Ga. L. Rev. 703, 713 (1992).

of warranty law as a source of consumer protection and opened the door for a tort-based system of strict liability instead.[41] Almost twenty years earlier, in *Escola v. Coca Cola Bottling Co. of Fresno*,[42] Justice Roger Traynor had urged the California court to adopt strict liability in tort as a basis for imposing liability on the sellers of defective products. The *Escola* case involved a waitress who was injured when a soft drink bottled broke in her hand.[43] Although the court upheld a lower court judgment for the plaintiff on the basis of *res ipsa loquitur*, Traynor argued that warranty law did not offer sufficient protection to ordinary consumers who were injured by defective products.[44] Instead, Traynor declared, "it should now be recognized that a manufacturer incurs absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[45] Despite Traynor's forceful advocacy of strict liability in tort, his concurring opinion in *Escola* went largely unnoticed at the time. [46]

However, three years after the *Henningsen* decision, the California Supreme Court in *Greenman v. Yuba Power Products*, Inc.,[47] expressly rejected implied warranty as a basis for products liability in favor of Traynor's theory of strict liability in tort. The plaintiff in *Greenman* was struck in the head by a block of wood when the Shopsmith workbench he was using malfunctioned.[48] The plaintiff alleged negligence and breach of warranty against the manufacturer. The manufacturer defended against the warranty claim by contending that the plaintiff failed to provide it with reasonable notice of his claim, as required by a provision of the Uniform Sales Act.[49]

However, Chief Justice Traynor, speaking for a unanimous court, not only rejected this argument, but went on to declare that "[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."[50] The *Greenman* decision "swept the country in a firestorm fashion" and most legal commentators applauded what they thought was a victory for strict liability.[51]

At the same time that the *Greenman* case was working its way

---

[41] *See* Priest at 507–08.

[42] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 440.

[46] *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 498–99 (1985).

[47] 377 P.2d 897, 901 (Cal. 1963).

[48] *Id.* at 898.

[49] *Id.* at 899.

[50] *Id.* at 900.

[51] *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 U. MEM. L. REV. 823, 867 (2003).

through the California courts, a committee of American Law Institute chaired by Dean Prosser was drafting a provision to the Restatement of Torts for the purpose of addressing the products liability issue.[52] The result was § 402A, which embraced *Greenman*'s adoption of strict liability in tort.[53] According to this provision, one who sold a product "in a defective condition unreasonably dangerous to the user or consumer" was liable for any resulting physical harm even though the seller "exercised all possible care in the preparation and sale of his product."[54] Like the *Greenman* decision, § 402A achieved widespread acceptance throughout the country.

In the years before § 402A made it official, most legal scholars endorsed strict liability on both practical and theoretical grounds. William Prosser and Roger Traynor were among those who set the stage for strict liability by focusing on the practical limitations of warranty law,[55] while Fleming James developed a theoretical argument in support of strict liability based on the concept of risk distribution.[56]

In the 1940s and 1950s, Prosser and Traynor focused their attention on those aspects of warranty law that they felt disqualified it as a means of dealing with the problem of defective products. Although warranty law was nominally a no-fault liability regime, in fact, it presented many barriers to recovery by injured consumers.[57] In particular, to succeed under implied warranty, the plaintiff had to show that there was privity of contract between him and the manufacturer of the defective product. In addition, the consumer had to give the manufacturer timely notice that a breach of warranty hadoccurred.[58] Finally, manufacturers and other sellers could limit their liability contractually by means of disclaimers and limitation of remedies. Both Prosser and Traynor contended that these doctrines foreclosed the use of warranty law as a basis for products liability.[59]

The primary focus of their criticism was the privity requirement. According to this concept, those who entered into a contract with one another were in privity, while those who had not contracted directly with one another

---

[52] *See* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 577–78 (2014).

[53] *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 974–75 (2007).

[54] *See* RESTATEMENT (SECOND) OF TORTS § 402A (Am. Law Inst. 1965).

[55] As early as 1941, Prosser in the first edition of his treatise on the law of torts, set forth the arguments for strict liability. *See* William L. Prosser, HANDBOOK OF THE LAW OF TORTS, 688-93 (1941). Traynor did the same a few years later in his concurring opinion in Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440–44 (Cal. 1944). Other proponents of strict liability included Page Keeton, Wex Malone and Dix Noel. *See* George L. Priest, Comment, *Strict Product Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2307 (1989).

[56] *See* James R. Hackney, Jr., *The Intellectual Origins of American Strict Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 490–95 (1995)

[57] *See* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980).

[58] *See* Prosser, *supra* note 1, at 1130.

[59] *See* Prosser, *supra* note 1, at 1133–34; *Greenman*, 377 P.2d at 900.

were not.[60] As one commentator pointed out, the privity requirement developed when products buyers and sellers dealt with each other face-to-face and where most buyers were capable of inspecting these products to determine their quality.[61] However, as the nature of marketing and production changed, the privity requirement ceased to serve any purpose other than to insulate product sellers from liability. This led Prosser and others to argue that the privity requirement should be abandoned and that manufacturers' warranties, express and implied, should run to the ultimate purchasers of their products.[62]

The notice requirement was another aspect of warranty law that came under attack during this period. This provision of the Uniform Sales Act required a buyer who accepted delivery of goods to notify the seller within a reasonable time that the goods were defective.[63] Prosser acknowledged that the notice requirement served a useful purpose where disputes arose between the immediate parties to a contract for the sale of goods.[64] However, quoting from an article by Fleming James,[65] he warned that when this requirement was applied to remote parties in personal injury cases, it became "a booby-trap for the unwary."[66] In addition, Prosser cautioned that "[t]he injured consumer is seldom 'steeped in the business practice which justifies the rule' and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings."[67] Chief Justice Traynor made a similar observation in *Greenman*, also describing the notice requirement as a "booby-trap for the unwary."[68]

In addition, critics of warranty law also criticized the use of disclaimers and limitations of remedies in sales contracts. Disclaimers prevented an implied warranty from arising in the first place,[69] while limitations restricted the remedies available to the injured party if a breach of warranty occurred.[70] Advocates of strict liability argued that disclaimers and limitations of remedies stripped consumers of warranty protection, leaving

---

[60] *See* Debra L Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1310 (1987).

[61] See *See* Lester W. Freezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1, 1 (1938).

[62] Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 80 (N.J. 1960); *see also* 2 Harper & James, Law of Torts 1571–72 (1956); *see also* Prosser, Law of Torts 506–11 (2d ed. 1955).

[63] *See* Uniform Sales Act § 49 (1906). A similar provision can be found in the Uniform Commercial Code. *See also* Uniform Commercial Code § 2-607(3)(a).

[64] Prosser, *supra* note 1, at 1130.

[65] Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44 (1955).

[66] Prosser, *supra* note 1, at 1130.

[67] *Id.*

[68] Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (1963).

[69] William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117, 157 (1943).

[70] Debra L Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1289 (1987).

them without legal recourse if they were injured.[71] Again, Prosser conceded that disclaimers and limitations on remedies were appropriate in contracts between commercial buyers and sellers.[72] However, he declared, "[i]t is another thing entirely to say that the consumer who buys at retail is bound by a disclaimer which he has never seen, and to which he would certainly not have agreed if he had known of it, but which defeats a duty imposed by the policy of law for his protection."[73] The *Henningsen* court echoed this sentiment, declaring that inequality of bargaining power forced buyers to accept oppressive conditions:

> They must often accept what they can get though accompanied by broad disclaimers. The terms of these disclaimers deprive them of all substantial protection with regard to the quality of the goods. In effect, this is by force of contract between very unequal parties. It throws the risk of defective articles on the most dependent party. He has the least individual power to avoid the presence of defects. He also has the least individual ability to bear their disastrous consequences.[74]

Another argument against warranty was the problem of "circularity." Under warranty law, the injured consumer would sue the retailer, who would then sue the supplier for indemnity who would sue the next person up the supply chain until it reached the manufacturer. As Prosser pointed out, "[t]his is an expensive, time-consuming, and wasteful process and it may be interrupted by insolvency, lack of jurisdiction, disclaimers, or the statute of limitations anywhere along the line."[75] In his view, it would be more efficient to allow an injured consumer to sue the manufacturer of a defective product directly.[76]

Finally, the proponents of strict liability constructed a narrative about the relationship between manufacturers and consumers that reinforced their contention that warranty law was inadequate to protect consumers against defective products. Their first claim was that true "freedom of contract" was lacking in most cases because the prevalence of adhesion contracts made it impossible for consumers to bargain for greater protection from manufacturers. This argument was influenced by the work of Friedrich Kessler.[77] Kessler argued that in the modern age of mass production, freedom

---

[71] *Prosser, supra* note 1, at 1133.
[72] *Id.*
[73] *Id.*
[74] Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1960) (quoting Lawrence Vold, Law of Sales 447 (2d ed. 1959)).
[75] *Prosser, supra* note 1, at 1124.
[76] *Id.*
[77] Priest, *supra* note 40, at 484.

of contract was an illusion.[78] Instead, standardized contracts enabled parties with greater bargaining power to impose their will on weaker parties.[79] Prosser, Traynor, and others embraced Kessler's theory of unequal bargaining power. For example, in *Henningsen v. Bloomfield Motors, Inc*,[80] Justice Francis described the adhesion contract in the case as "a sad commentary upon the automobile manufacturers' marketing practices,"[81] the court declared that:

> [I]n present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses."[82]

Another concern was information asymmetry between manufacturers and retail consumers.[83] According to this narrative, in the good old days, products were simple and buyers were familiar enough with them to accurately evaluate their safety and quality.[84] However, as products became more complex, the average consumer had little ability to inspect for defects or to otherwise protect himself against injury.[85] According to Traynor, "[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package."[86]

A final component of the manufacturer-consumer relationship centered on the production and marketing practices of large manufacturers. By the dawn of the twentieth century, it became apparent that the marketing structure of modern business enterprises largely excluded any direct contact between producers of products and retail consumers.[87] Traynor alluded to this development in *Escola*, declaring that, "[a]s handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been

---

[78] *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

[79] *Id.*

[80] 161 A.2d 69, 86 (1960).

[81] *Id.* at 78.

[82] *Id.* at 86.

[83] *See* Mary J. Davis, *Individual and Institutional Responsibility: A Vision Comparative Fault in Products Liability*, 39 Vill. L. Rev. 281, 347 (1994).

[84] *See* Lester W. Freezer, *Manufacturers' Liability for Injuries Caused by his Products*, 37 Mich. L. Rev. 1, 1 (1938).

[85] *See* K. N. Llewellyn, *On Warranty of Quality and Society: II*, 37 Colum. L. Rev. 341, 404 (1937).

[86] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944).

[87] *See* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 Marq. L. Rev. 555, 565 (2014).

altered."[88]

At the same time, manufacturers often engaged in marketing and promotional activities that were designed to provide consumers with a false sense of security about the safety and quality of their wares. In the words of the *Henningsen* court,

> [U]nder modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend "upon the intricacies of the law of sales."[89]

All of this supported the proposition that modern consumers needed greater legal protection against the harm caused by defective products. This left strict liability in tort as the sole remaining option.

While Prosser, Traynor, and their supporters were attacking warranty law on practical and doctrinal grounds, Fleming James was providing theoretical support for strict liability in tort. James justified a shift to strict liability primarily in terms of risk distribution goals.[90] The theoretical foundation of James's approach to risk distribution seems to have been based on enterprise liability. Simply stated, enterprise liability posits that losses created or caused by an enterprise or activity should be borne by those that benefit from that enterprise or activity.[91] This was because commercial enterprises were better able to spread these costs than individual victims and because these enterprises were more likely to respond to the safety incentives created by the imposition of liability upon them.[92] Workers compensation statutes represent an early application of this principle.[93] Under these laws, injured workers received compensation on a no-fault basis because these losses constituted a cost of doing business because employers could pass them along to the consumers who ultimately benefitted from the enterprise in

---

[88] *Escola*, 150 P.2d at 443.

[89] *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 83 (1960).

[90] *See* Gary T. Schwartz, Article, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601, 635 (1992).

[91] *See* Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153, 158 (1976).

[92] *See* Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 Cal. L. Rev. 2403, 2406 (2000).

[93] *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 U. MEM. L. REV. 823, 862–63 (2003).

question.[94]

Fleming James was more concerned with applying his risk distribution theories to tort law more generally, but in the 1950s, he began to turn his attention to products liability.[95] In his treatise on the law of torts, James also applied his theory of risk distribution to the problem of defective products.[96]

According to the theory of enterprise liability, the production and sale of consumer products exposes purchasers and others to the risk of injury from dangerous and defective products. Because manufacturers and others in the distributive chain profit from the distribution of these products, it is appropriate to require them to compensate those consumers who are injured as a result of their exposure to harmful products. Not only do these commercial enterprises have the resources to provide compensation, but the imposition of strict liability will provide an incentive for them to improve the safety of their products. Finally, liability could also be imposed on non-manufacturers, such as distributors and retailers, because they facilitated the distribution of defective products into the stream of commerce and profited from such activities.[97]

Although Prosser was skeptical of the "deterrence" rationale,[98] he was somewhat more receptive to the risk distribution argument.[99] Traynor, on the other hand, relied heavily on both of these concepts in his *Escola* opinion, declaring that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[100] Addressing the risk distribution issue, Traynor pointed out that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[101]

The efforts of Prosser, Traynor, James, and others to promote strict liability in tort eventually bore fruit in the early 1960s when negligence and warranty law seemed to be completely banished from the products liability scene. Instead, the new Restatement of Torts endorsed strict liability as the

---

[94] *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 466 (1985).

[95] *See* Fleming James, Jr., *Products Liability Pt. 2*, 34 TEX. L. REV. 192, 227–28 (1955).

[96] *See* Fowler Harper & Fleming James, Jr., *The Law of Torts* (1956).

[97] *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 171-72 (Cal. 1964).

[98] *See Prosser, supra* note 1, at 1133–34.

[99] *Id.* at 1120.

[100] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 440 (1944) (Traynor, J., concurring).

[101] *Id.* at 441.

most appropriate basis for products liability law.[102]

III. NEGLIGENCE AND PRODUCTS LIABILITY.

While it was not apparent at the time, elements of negligence still lurked in the shadows of 402A and continues to do so under the new Products Liability Restatement regime.

A. *The Restatement of Torts Section 402A.*

Although comment *m* to § 402A expressly stated that "[t]he basis of liability is purely one of tort,"[103] the drafters of § 402A did not create a wholly strict liability system, but instead they put together a combination of warranty, negligence, and strict liability. Even though § 402A expressly rejected the privity requirement of warranty law[104] and declared that it was not governed by the provisions of the Uniform Sales Act or the Uniform Commercial Code,[105] aspects of warranty law played a prominent role in the black letter text of § 402A and in the comments to it. First, strict liability was restricted to the sale of a product[106] by sellers who were "engaged in the business of selling such a product."[107] This was similar to the sort of liability imposed on commercial sellers under the implied warranty of merchantability. Second, the Restatement limited liability to products that were sold "in a defective condition unreasonably dangerous to the consumer or to his property."[108] This defect requirement was remarkably similar to the warranty law requirement that a product be "merchantable." Furthermore, the use of the consumer expectation test in comments *g* and *i* to define "defective condition" and "unreasonably dangerous" reflected the warranty law principle that consumers should get the goods that they bargained for.[109]

Section 402A also required that a product be "unreasonably dangerous" to the user or his property.[110] This concept was addressed in comment i. Although the phrase "unreasonably dangerous" sounds like negligence, the drafters of § 402A inserted this language to confirm that a product was not defective simply because it was inherently dangerous.[111] Thus, sellers of such products as butter, drugs, whiskey or cigarettes were

---

[102] § 402A(2)(a) expressly declared that a seller would be liable to an injured consumer even though he "exercised all possible care in the preparation and sale of his product...."; *See also* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 975 n. 100 (2007).

[103] *See* Restatement (Second) of Torts § 402A, cmt. m (1979).

[104] *Id.*, § 402A(2)(b).

[105] *Id.*, § 402A, cmt. m.

[106] *Id.*, § 402A(1).

[107] *Id.*, § 402A(1)(a).

[108] *Id.*, § 402A(1).

[109] *See* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 614 (1980).

[110] § 402A(1).

[111] Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1234 (1993).

subject to liability only if they were more dangerous than a consumer would expect them to be.[112] Thus, "good whiskey" would not be considered unreasonably dangerous because it might cause drunkenness or alcoholism, but "bad whiskey" that contained excessive levels of fusel oil would be.[113] Likewise, "good butter" would not be unreasonably dangerous because it might cause heart attacks, but "bad butter," contaminated with poisonous fish oil, would be.[114] This limitation on liability is not unlike the warranty concept of merchantability that requires that products "pass without objection in the trade."[115]

In addition to aspects of warranty, negligence principles were also amply represented in § 402A. For example, the drafters of § 402A excluded certain products from the scope of strict liability, thereby leaving them to be dealt with under negligence law.[116] Thus, comment *k* provided that "unavoidably unsafe" products would not be considered to be either defective or unreasonably dangerous even though they caused injury to consumers.[117] Comment *k* did not define what it meant by "unavoidably unsafe;" rather, it gave a number of examples. The first group included products like the rabies vaccine that had high social utility but might cause harmful side effects.[118] The second group of products included "drugs, vaccines, and the like" that were sufficiently dangerous to require a prescription.[119] The final category consisted of "new or experimental drugs" that were potentially dangerous because "lack of time and opportunity for sufficient medical experience" made it impossible for the seller to guarantee the drug's safety.[120] In addition, to be considered unavoidably unsafe, the product's apparent utility had to outweigh its apparent risks and the seller was required to warn about known risks.[121]

Furthermore, a number of comments indicated that, in some cases, the plaintiff's conduct relieves a defendant of liability. For example, comment *n* stated that contributory negligence was not a defense when it

---

[112] Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 229 (1989).

[113] *See* § 402A, cmt. i.

[114] *Id.*

[115] U.C.C. § 2-314(2)(a) (2002).

[116] *See* David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 345–46 (1974); Marcia A. Mobilia, *Allergic Reactions to Prescription Drugs: A Proposal for Compensation*, 48 ALB. L. REV. 343, 345 (1984).

[117] *See* Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J.705, 713 (1989-90). It is interesting to note that the California Supreme Court concluded that "comment k, by focusing on the blameworthiness of the manufacturer, sets forth a test which sounds in negligence." *See* Brown v. Superior Court, 751 P.2d 470, 476 n. 4 (Cal. 1988).

[118] *See* § 402A, cmt. k.

[119] *Id.*

[120] *Id.*

[121] *Id.* Since all of the examples provided in comment k involved prescription drugs and vaccines, most courts limited its scope to pharmaceutical products; *See* DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PROD. LIAB. § 19:5 at 868 (4th ed. 2014).

merely consisted of failure to discover a defect in the product or to guard against the possibility of a defect.[122] However, comment *n* also declared that a plaintiff would be barred from recovery if he became aware of the danger and voluntarily and unreasonably made use of the product anyway.[123]

Other comments provided that product sellers would not be liable for injuries that resulted from misuse such as "abnormal handling" or "abnormal consumption."[124] In addition, comment j stated that sellers could assume that consumers would follow instructions and warnings, presumably leaving them without protection if they failed to do so.[125] Although it is possible to maintain, it is possible to have a doctrine that imposes strict liability on a defendant, while barring recovery for plaintiffs based on their negligent behavior,[126] it is difficult to characterize such an arrangement as one of pure strict liability. Rather, it is, at best, a mixture of strict liability and negligence.

B. Design Defects

The potential tension between negligence and strict liability in products liability law soon came out into the open.[127] The controversy settled around the test for defectiveness in design and failure to warn cases. § 402A did not distinguish among the various types of defects. Instead, it simply stated that in order for there to be liability, the product in question be in a "defective condition." This term was examined in comments *g* and *h*.[128] Comment g defined defective condition as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[129] Comment *h* declared that a product is not in defective condition "when it is safe for normal handling and consumption."[130]

This comment went on to provide that a defective condition "may arise not only from harmful ingredients, not characteristic of the product itself . . . but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed."[131] This latter provision seemed to be primarily directed at contaminated food or drink.

However, courts soon began to realize that there was a significant

---

[122] *See* § 402A, cmt. n (1965). This was consistent with the rule that ordinary contributory negligence will not bar suits based on other forms of strict liability. *See* Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 293 (1994).

[123] RESTATEMENT (SECOND) OF THE LAW TORTS § 402A, cmt. n.

[124] *Id.*, cmt. H.

[125] *Id.*, cmt. j.

[126] *See* William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777, 798 (1983).

[127] *See* Owen at 745.

[128] *See* Priest at 2318.

[129] *See* Restatement § 402A, cmt. g.

[130] *Id.*, cmt. h.

[131] *Id.*

difference between manufacturing defects and other defects, such as design defects and inadequate warnings. In the case of manufacturing defects, the Restatement's consumer expectation test was largely displaced (except in the case of contaminated food and drink) by a strict liability (deviation from the norm) approach. But if manufacturing defects are different from other defects and if manufacturing defects are subject to strict liability, then one may argue that design defects and inadequate warnings should not be subject to the same liability rule as manufacturing defects. This, indeed, is a position that a number of commentators have taken over the years.[132] The obvious choice of an alternative liability rule is, of course, negligence.

At the time of § 402A's adoption, most product liability litigation involved either contaminated food or manufacturing defects. These were one-of-a-kind cases. In contrast, design defects cases involved an entire product line and so the potential liability was much greater.[133] However, as design defect cases became more common in the late 1960s and early 1970s, it became obvious that the Restatement's consumer expectation test was not suited for this more complex type of litigation.[134]

There were a number of problems with the consumer expectation test as applied to product design.[135] First, it was difficult to determine what an individual consumer's expectations about a product's design actually were or should be. Most courts agreed that the consumer expectation test should be an objective one. If the test were held to be subjective in nature, the absurd result would be that a particular product design could be defective for some consumers, but not for others, depending on what their individual expectations were. Consequently, courts quickly added qualifying language, such as "reasonable" or "ordinary" to make it clear that the expectations in question were those of the community in general and not those of any particular consumer.

The consumer expectation test was especially problematic when used to evaluate a complex product's design because a consumer could not realistically have an expectation about the design of products such as airplanes, automobiles, or industrial machinery.[136] Finally, because the consumer expectation test was concerned with protecting consumers against risks that could not be discovered by casual inspection, applying it to products

---

[132] *See* Henderson at 403–04; *See also* Priest at 2303.

[133] *See* Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205, 218–20 (1989).

[134] *See* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: an Empirical Analysis*, 77 N.Y.U. L. REV. 874, 891 (2002).

[135] *See* Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1236 (1993).

[136] *See* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 614 (1980); Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 891 (2002).

with obvious risks meant that a manufacturer might escape liability even though these risks could be eliminated by a safer design.[137]

In response to these concerns, a new approach, known as the risk-utility test, began to emerge in the 1970s as a test for defective design. An early version of this test, first proposed by John Wade,[138] consisted of a grab bag of miscellaneous factors that judges and juries could pick and choose from when deciding whether a product's design was defective or not.[139] Among the factors for consideration were: the overall utility of the product; the likelihood that the product will cause harm and the seriousness of that harm; the availability of a substitute product; the manufacturer's ability to eliminate the risk; the user's ability to avoid the danger by exercising due care; the obviousness of the danger and the existence of suitable warnings and instructions; and the manufacturer's ability to spread the loss by means of higher prices or liability insurance.[140]

Later, Page Keeton refined the Wade formula by imputing knowledge of the design risk to the manufacturer.[141] As such, it became known as the Wade-Keeton test and was adopted by a number of courts in the 1970s. The principal characteristic of these early versions of the risk-utility formulation was that it asked the judge or jury to determine whether the benefits of the product as a whole outweighed its risks and did not expressly consider the possibility of a safer alternative design.[142]

Another version of this approach was known as the prudent manufacturer test, under which the judge or jury would consider whether a prudent manufacturer, knowing of the design's risks, would place the product in the market.[143]

Eventually, legal scholars developed a more sophisticated version of the risk-utility test, which was primarily concerned with achieving an optimal (or economically efficient) allocation of resources for product safety.[144]

---

[137] *See* David A. Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 348–52 (1974); Jerry J. Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797, 803–04 (1982).

[138] *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837–38 (1973).

[139] *See* W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573, 580–81 (1990).

[140] *Id.*

[141] *See* W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 404 (1970); Page Keeton, *Manufacturers' Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

[142] *See* Michael D. Green, *Symposium, The Products Liability Restatement: Was It a Success?: The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 822 (2009).

[143] *See* James A. Henderson, Jr., Symposium, *The Passage of Time: The Implications for Product Liability: Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 NYU L. REV. 765, 767–68 (1983).

[144] *See* W. Kip Viscusi et al., *Determining Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 Seton Hall L. Rev. 1437, 1448–49 (1994).

According to this theory, producers should be encouraged to spend money on product safety as long as these marginal safety costs are less than the marginal costs of injuries from defective products (as measured by tort liability).[145] Conversely, a producer will choose to pay damage claims when the marginal cost of further safety measures exceeds the marginal benefits of additional accident cost reduction.[146]

The goal of optimizing resources led courts to focus on the particular aspect of the design, usually a safety feature (or lack thereof) that caused the harm.[147] This version of the risk-utility test bore a strong resemblance to the Learned Hand's formula in *United States v. Carroll Towing Co.*,[148] where Judge Hand recast negligence law's familiar reasonable prudent person standard into a mathematical formula. According to this formula, the burden of taking precautions to avoid a risk of harm should be balanced against the likelihood that the harm will occur multiplied by the seriousness of the harm.[149] A finding of negligence would be justified if the burden of taking precautions is less than the likelihood of harm multiplied by the gravity of the harm.[150] When applied to products liability, failure to adopt a more cost-efficient design could lead a jury to conclude that the product was defective.

Some commentators objected to this version of the risk-utility approach because they felt that it effectively resolved design defect cases using a negligence standard. Realizing this, advocates of strict liability offered two reasons why the risk-utility test still embodied strict liability principles. First, they claimed that risk-utility test is not a form of negligence because the focus is on the condition of the product rather than the conduct of the seller.[151] Second, they rejected the state of the art concept and argued that a product's design should be judged by the technology that was available at the time of the injury, or even at the time of trial, rather than at the time it was designed and manufactured.

---

[145] *See* James A. Henderson, Jr., Symposium, *The Passage of Time: The Implications for Product Liability: Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 NYU L. REV. 765, 767–68 (1983).

[146] *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 864–65 (1984).

[147] *See* David G. Owen, W. Page Keeton, Symposium on Tort Law, *Toward a Proper Test for Design Defectiveness: "Micro-Balacing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1690 (1997).

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

[149] *Id.*

[150] *Id.*

[151] *See, e.g.*, Caterpillar Tratcor Co. v. Beck 593 P.2d 871, 889 (Alaska 1979); Barker v. Lull. Eng'g Co., 573 P.2d 443, 457 (Cal. 1978); Blue v. Envtl. Eng'g, Inc., 828 N.E.2d 1128, 1142 (Ill. 2005); Gregory v. Cincinnati Inc., 538 N.W.2d 325, 329 n. 8 (Mich. 1995); Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 186 (Mich. 1984); Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1036 (Or. 1974). *See also* Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1221 (1993) (criticizing this practice).

C. Inadequate Warnings.

A similar disagreement arose in connection with product warnings and instructions. Unlike the adequacy of a product's design, courts typically held that warnings were adequate if they satisfied certain specific requirements.[152] First, the warning had to provide information about all significant risks and also had to disclose the likelihood and seriousness of these risks.[153] The warning was also required to be prominent and be phrased with a degree of intensity that was commensurate with the danger.[154] Furthermore, the warning had to be easily understood by its intended audience.[155] Finally, it must be communicated in an effective manner.[156]

All of these requirements could be taken into account as factors in a risk-utility analysis.[157] The dispute about whether strict liability or negligence should be applied in failure to warn cases eventually devolved into a debate over imputed knowledge. In other words, should the duty to warn be based on hindsight or foresight? Advocates of a hindsight test contended that to avoid liability, at the time of sale, a seller must disclose all risks, regardless of whether they were scientifically knowable at that time. In the celebrated case of *Beshada v. Johns-Manville Products Corp.*,[158] the New Jersey court adopted a hindsight test.[159] Other courts followed the New Jersey court's lead.[160]

However, the Beshada opinion was criticized by many commentators,[161] and the New Jersey court eventually repudiated the hindsight test in *Feldman v. Lederde Laboratories*[162] and instead adopted a foresight test.[163] Under this approach, a seller is only required to warn of risks that were known, or scientifically knowable, at the time of sale. A number of other states quickly adopted the hindsight approach, and it is almost certainly

---

[152] *See* Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330, 338 (5th Cir. 1984).

[153] Deines v. Vermeer Mfg. Co., 755 F. Supp. 350, 353 (D. Kan. 1990).

[154] Salmon v. Parke Davis & Co., 520 F.2d 1359, 1363 (4th Cir. 1975).

[155] Bryant v. Technical Research Co., 654 F.2d 1337, 1345–46 (9th Cir. 1981); MacDonald v. Ortho Pharm. Corp., 475 N.E.2d 65, 71 (Mass. 1985).

[156] Sterling Drug, Inc. v. Yarrow, 408 F.2d 978, 991–92 (8th Cir. 1969).

[157] Charles E. Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZAGA L. REV. 205, 224 (1989-90).

[158] *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982).

[159] *Id.* at 545.

[160] *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1341–42 (9th Cir. 1986); *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 550 (Haw. 1987) (certifying questions sub nom); *In re Asbestos Cases*, 829 F.2d 907 (9th Cir. 1987).

[161] *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 NYU L. Rev. 265, (1990); Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the road to a Reasonable Doctrine*, 58 NYU L. Rev. 892, 901–05 (1983); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 NYU L. Rev. 734, 754–56 (1983).

[162] Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984).

[163] *Id.* at 386-89.

the majority rule today.[164] Once the foresight approach became generally accepted, it became apparent that the duty to warn, even more so than the law of defective design, reflected a liability regime that was functionally equivalent to negligence.[165]

IV. THE ALI PRODUCTS LIABILITY RESTATEMENT.

In 1998, the American Law Institute replaced § 402A with a more comprehensive document: the Products Liability Restatement.[166] Like its predecessor, defectiveness is a fundamental aspect of the Products Liability Restatement's liability scheme, and it holds manufacturers and sellers strictly liable to consumers if their products are defective.[167] However, unlike § 402A, the new Restatement recognizes three distinct ways that a product may be defective: defective manufacture, defective design, and inadequate warnings or instructions.[168] Furthermore, each type of defect is defined differently.

Section 2(a) provides that that a product that contains a manufacturing defect is subject to liability "even though all possible care was exercised in the preparation and marketing of the product."[169] This is a true strict liability rule.[170] However, § 2(b), which deals with product design, and § 2(c), which is concerned with warnings, reflect negligence rather than strict liability principles. For example, § 2(b) declares that a product is defective in design "when the *foreseeable* risks of harm posed by the product could have been reduced or avoided by the adoption of a *reasonable* alternative design by the seller or other distributor, a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product *not reasonably* safe" (emphasis added).[171] Arguably, use of terms like "foreseeable," "reasonable," and "not reasonably safe" indicate that the liability involved in design defect cases is somewhat less than strict. This conclusion is strengthened by the requirement that the plaintiff prove the existence of a reasonable alternative design (RAD) in order to recover under a defective design theory. Realizing this, some proponents of traditional strict liability strongly objected to the inclusion of the RAD requirement, equating

---

[164] *See, e.g.*, Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1164–65 (4th Cir. 1986); Powers v. Taser Int'l, Inc., 174 P.3d 777, 783–84 (Ariz. Ct. App. 2008); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 641 (Md. 1992); Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922–24 (Mass. 1998); Young v. Key Pham., Inc., 922 P.2d 59, 63–65 (Wash. 1996).

[165] Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 626 (1992).

[166] *See* Products Liability Restatement § 1 (1998).

[167] *Id.*, § 1.

[168] *Id.*, § 2.

[169] *Id.*, 2(a).

[170] *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 751.

[171] *See* Products Liability Restatement § 2 (1998) (emphasis added).

it with negligence law's state-of-the-art concept.[172]

Section 2(c) parallels the Restatement's formula for design defects and provides that a product may be defective because of inadequate instructions or warning when: the *foreseeable* risks of harm posed by the product could have been reduced or avoided by the provision of *reasonable* instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product *not reasonably safe*.[173] As in the case of § 2(b), the inclusion of such terms as "reasonable" and "foreseeable" suggests that § 2(c) also reflects a negligence law influence.[174]

The comments and reporters' notes flesh out much of the black letter text of § 2. For example, comment *a* acknowledges that the liability rule that governs manufacturing defects is different than the rules that are applicable to other types of defects.[175] Comments *d*, *e*, and *f* are concerned with design defects. Comment *d*, which is entitled "general considerations," confirms that § 2(b) has adopted reasonableness or risk-utility balancing test as the standard for evaluating a product's design.[176] The comment also states that an assessment of product design under § 2(b) usually involves a comparison between an alternative design and the design that caused the plaintiff's injury.[177] Comment *d* then acknowledges that a similar approach "is also used in administering the traditional standard in negligence" and then goes on to declare that "[t]he policy reasons that support use of a reasonable- person perspective in connection with the general negligence standard also support its use in the products liability context."[178] This comes very close to concluding that design defect claims should be subject to a negligence standard.

However, comment *f*, which is entitled "factors relevant in determining whether the omission of a [RAD] renders a product not reasonably safe," introduces some additional considerations into design defect litigation.[179] Having established the existence of an alternative design, comment *f* seemingly requires a plaintiff to provide evidence that the alternative design is "reasonable" and that the omission of this alternative

---

[172] *See*, e.g., Marshall Shapo, *In search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); Frank Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994).

[173] David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 780.

[174] *Id.* at 763–64.

[175] Restatement (Second) of Products Liability § 2, cmt. a (2017).

[176] *Id.*, cmt. d.

[177] *Id.* Comment e suggests that a showing of an alternative design may not be necessary in those rare cases where a product's design is "manifestly unreasonable."

[178] *Id.*

[179] *Id.*, cmt. f.

design rendered the product "not reasonably safe."[180] This involves a consideration of various "factors," including: (1) the magnitude and probability of the foreseeable risks of harm; (2) the instructions and warnings accompanying the product; (3) the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; (4) the likely effects of the alternative design on production costs; (5) the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and (6) the range of consumer choice among products.[181] While many of these factors are consistent with a risk-utility analysis, some of them, such as "esthetics," consumer expectations,[182] and consumer choice seem to incorporate non-economic considerations into the analysis. Nevertheless, comment *f*'s overall approach is more consistent with negligence than it is with strict liability.

Comments *i*, *j*, *k*, *l*, and m are concerned with warnings. Comment i points out that § 2(c) adopts a reasonableness test for evaluating warnings and that this approach parallels the standard applicable to design defects in § 2(b).[183] At the same time, while the liability standards adopted in § 2(b) and § 2(c) are virtually identical, the defectiveness concept is more difficult to apply in warning cases because so many factors may be taken into account.[184] Nevertheless, it is clear that § 2(c), with its emphasis on foreseeable risks, rejects a hindsight approach and adopts a foreseeability test.[185] In other words, the liability standard is one of negligence.[186]

Some of the other comments either restrict the scope of strict liability or eliminate it altogether for certain types of products or product sellers. For example, comment *j* indicates that manufacturers and other sellers are generally not required to warn or instruct about known or obvious risks.[187] Also, comment *k* provides that manufacturers are not required to warn about the risk of an allergic reaction unless the harm-causing ingredient "is one to which a substantial number of persons are allergic."[188]

Finally, comment *m* states § 2(c) imposes liability "only when the product is put to uses that it is reasonable to expect a seller or distributor to

---

[180] *Id.*

[181] *Id.*

[182] The role of the consumer expectation test the Product Liability Restatement is also discussed further in comments g and h.

[183] *Id.*, cmt. i.

[184] *Id.*

[185] *See* Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 905 (2001) (pointing out that the Restatement draft treats foresight as an aspect of the negligence analysis).

[186] *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. OF LITIG. 955, 981 (2007).

[187] Restatement (Second) of Products Liability § 2, cmt. j (2017). However, as comment l points out, a manufacturer may be required to design its product in such a way as to eliminate an obvious risk. *Id.* at cmt. l.

[188] *Id.*, cmt. k.

foresee."[189] Thus, the Product Liability Restatement expressly adopts a negligence-oriented foresight test and rejects the hindsight approach that would be associated with strict liability.

Other provisions of the Products Liability Restatement also incorporate elements of negligence. For example, § 6 avoids imposing strict liability in most cases on the makers of prescription drugs and medical devices.[190] After providing for liability for prescription drugs and medical devices that are defective in some way,[191] §6(c) declares that a drug or medical device will not be deemed not reasonably safe due to defective design "if the *foreseeable* risks of harm . . . are sufficiently great in relationship to its *foreseeable* therapeutic benefits that *reasonable* health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for *any class of patients*." (emphasis added).[192]

Negligence concepts are also present in the provisions of § 6 that address the duty to warn. For example, § 6(d) states that a prescription drug or medical device will not be treated as not reasonably safe unless *reasonable* instructions or warnings regarding *foreseeable* risks of harm are not provided to prescribing health care providers.[193] Furthermore, § 6(d)(1) retains the learned intermediary rule, which relieves drug manufacturers of their duty to communicate warnings to the ultimate users or consumers of their products.[194] Finally, § 6(e) states that retail sellers and distributors will not be held liable unless the product contains a manufacturing defect or if they fail "to exercise *reasonable care*." (emphasis added)[195]

This is clearly a negligence standard. I believe that negligence concepts also pervade § 8, which is concerned with used products.[196] First of all, a seller of used products is generally liable for harm caused by a defective product if the defect "arises from the seller's failure to exercise reasonable care."[197] Strict liability is imposed only if a manufacturing defect is involved, if the product is remanufactured, or if the seller has failed to comply with an applicable product safety statute.[198] Certain provisions of the Products Liability Restatement exclude other products from the scope of strict liability and presumably leave negligence (or possibly warranty law) by default as the applicable liability rule. For example, § 19(c) states that "[h]uman blood and

---

[189] *Id.*, cmt. m. This foreseeability limitation also applies to product design. *Id.*
[190] *Id.* § 6.
[191] *Id.* § 6(a)-(b).
[192] *Id.* § 6(c) (emphasis added).
[193] *Id.* § 6(d).
[194] *See* Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 WAKE FOREST L. REV. 97, 106–110 (2002).
[195] *See* PRODUCTS LIABILITY RESTATEMENT § 6(e) (1998).
[196] *Id.* § 8.
[197] *Id.* § 8(a).
[198] *Id.* § 8(b)–(d).

human tissue, even when provided commercially," shall not be subject to strict liability.[199] Furthermore, comment *b* to § 19 observes, and presumably endorses, the rule that strict liability will not be imposed on the sale of living animals unless they are diseased.[200]

Negligence principles also displace strict liability with regard to certain post-sale duties. For example, § 10 subjects sellers to liability for failure to provide a post-sale warning "if a reasonable person in the seller's position would provide such a warning."[201] Likewise, § 11(b) imposes liability on a seller who is required to, by the government, recall a product, or who voluntarily undertakes to recall a product, but only if it "fails to act as a reasonable person in recalling the product."[202] Finally, § 13 states that a successor corporation may be held liable for failure to warn of a risk created by a predecessor if "a reasonable person . . . would provide a warning."[203]

Finally, § 17 declares that a damage award may be reduced when "the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."[204] This ambiguous statement is clarified in comments *a* and *b*, which acknowledge that most states have adopted some form of comparative fault and applied it to products liability cases.[205] Thus, the Products Liability Restatement incorporates negligence principles into products liability law, at least where plaintiffs' conduct is concerned.

V. DISAGGREGATING PRODUCTS LIABILITY LAW.

Although it is nominally based on strict liability, modern products liability law actually contains large pockets of negligence. To be sure, manufacturing defects are entirely subject to a strict liability standard. If someone is injured as the result of a manufacturing defect, he or she will almost certainly be fully compensated. However, design defects and inadequate warnings and instructions are different.

They are subject to a cost-benefit balancing test which insulates the manufacturer from liability when the marginal cost of taking additional precautions exceeds the marginal benefits of additional accident reduction. This, of course, is essentially a negligence analysis. The negligence-based aspects of the treatment of design and inadequate warnings are further exemplified by the use of the state-of-the-art principle and the RAD requirement in design defect cases as well as the use of the foresight test in

---

[199] *Id.* § 19(c).
[200] *Id.* § 19 cmt. b.
[201] *Id.* § 10(a).
[202] *Id.* § 11(b).
[203] *Id.* § 13(a)(2).
[204] *Id.* § 17(a).
[205] *Id.* § 17, comments a & b. This trend began in 1978 with the California Supreme Court's decision in *Daly v. General Motors Corp.*, 575 P.2d 1162, 1169 (Cal. 1978).

warning cases. Liability is further limited under the present approach by such defenses as comparative fault, misuse, and alteration.

I will now consider how key products liability doctrines should be changed to reflect this reality. There are essentially three options: (1) adopt an approach that applies strict liability to all types of defective products; (2) adopt an approach that applies negligence principles to all types of defective products; or (3) retain strict liability for manufacturing defects and apply a more explicit negligence-based approach to product design and warnings. However, before moving on to this task, I would like to briefly discuss the status of defectiveness in products liability.

A. The Defect Requirement.

In a no-fault liability regime, some sort of limiting principle is needed to prevent strict liability from becoming absolute liability. Under an absolute liability regime, a manufacturer would be liable to someone who is injured by its product even though the manufacturer has exercised reasonable care and the product is not defective.[206] To avoid this result, the drafters of § 402A imposed liability upon product sellers whose products were in a defective condition which made them unreasonably dangerous to users or consumers.[207] This concept works well where manufacturing flaws are concerned. Thus, to recover for a product-related injury, the victim must show that the product in question not only caused the injury, but that it was defective in some way. This requirement would exclude non-defective but inherently dangerous products from liability. Furthermore, for manufactured products, the test was simple: Did the product that caused the injury deviate in some way from its intended design?[208]

However, the defect requirement becomes redundant when liability is based on negligence principles rather than strict liability, as is arguably the case with product design and warnings. If liability in those cases is based on a negligence-oriented risk-utility analysis, there is no need to consider defectiveness. For example, if a risk-utility analysis reveals that a manufacturer could have used an alternative, safer, cost-effective design, then we would conclude that the manufacturer has acted unreasonably and should be held liable. In other words, if the product's design is the result of unreasonable decisions by the manufacturer, any consideration of whether the product's design is defective is confusing and superfluous.

---

[206] *See* John C.P.Goldberg, Article, *Inexcusable Wrongs*, 103 CAL. L. REV. 467, 506 (2015); Steven A. Schwartz, Note, *A Distinction Without a Difference?: Bartlett Going Forward*, 84 FORDHAM L. REV. 325, 342 (2015).

[207] *See* RESTATEMENT (SECOND) OF TORTS § 402A(1).

[208] The deviation from the norm test did not work very well with food and drink. Consequently, most courts utilized the consumer expectation test instead. DAVID G. OWEN, PRODUCTS LIABILITY LAW, 487–90 (2d ed. 2008).

B. Adopting a "Pure" Strict Liability or a "Pure" Negligence Approach.

1. Strict Liability.

At the present time, products liability law purports to be based on strict liability, but it is only so in the case of manufacturing defects.[209] Could strict liability realistically be extended to include design defects or inadequate warnings and, if so, what would it look like? First of all, almost no one wants to impose absolute liability on product sellers. Not only would such a liability regime impose staggering costs on product sellers (who would pass them on to consumers), but it would be very difficult to administer in cases where multiple causes were involved. Therefore, liability would have to be subject to some sort of limitation. Since the current risk-utility balancing approach is substantially similar to negligence, how would a design or warning be defective under a true risk-utility rule?

Presumably, the defect requirement would have to be retained. However, defectiveness is an empty concept where product design and warnings are concerned. Something more is needed to formulate a workable definition for defectiveness that is not merely negligence posing as strict liability. One possibility is to retain the risk-utility balancing process in product design and warning cases but eliminate the foreseeability rule that is currently embodied in sections 2(b) and 2(c). In other words, to adopt a pure strict liability approach, the state-of-the-art doctrine would have to be removed from § 2(b) and a hindsight test would have to be imposed in § 2(c).

2. Negligence.

Another approach would be to abandon strict liability altogether and apply negligence principles across-the-board. As mentioned earlier, such a move would primarily affect manufacturing defects since design defects and inadequate warning and instruction cases are already largely subject to negligence principles. As will be discussed later, the negligence principles applicable to design defects and inadequate warning and instructions would incorporate a risk-utility balancing approach. As for manufacturing defects, it might be possible to transform the existing deviation-from-the-norm formula from a test for defectiveness into a rebutable presumption of negligence. Another possibility would be to liberalize the "malfunction" provision of § 3. This would bring all forms of product defect into line by switching the focus from the defectiveness of the product to more of a focus on the decisions that resulted in the production of a product that was not reasonably safe.

But is the game worth the candle? There is general agreement that

[209] David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 744.

the deviation from the norm approach works quite well in manufacturing defect cases. Therefore, it may be better to acknowledge that a strict liability approach is best for manufacturing defects and retain the deviation-from-the-norm test in such cases. In other words, perhaps we should formally divide products liability into a hybrid system in which manufacturing defects are subject to a strict liability rule and other types of product defects are subject to a form of negligence.

C. A Proposed Approach.

I propose that manufacturing defect cases would continue to be governed by a strict liability (deviation-from-the-norm) rule, while design and warnings cases would be covered by a negligence or risk-utility balancing formula. No longer would courts and commentators persist in calling a pig (negligence) a mule (strict liability), but instead they would honestly recognize a pig for what it really is.[210] But what form should this take? Various approaches are possible. The simplest option would be to return to the familiar "reasonable prudent person" standard. However, this formula may not be appropriate for a process that typically involves collaborative decisions by a multitude of people. A better approach might be to compare the defendant's design or warning with that of a "reasonably prudent manufacturer." This formula is somewhat similar to the "prudent manufacturer" rule that some states adopted as an alternative to the consumer expectation test.[211] However, unlike this earlier version, knowledge of the risk would not be imputed to the defendant.

According to another approach, proposed by my colleague, Mary Davis, liability for product sellers in design cases "should be made in a negligence-based action and should focus on the manufacturer's conduct by raising the standard of care to the highest level possible."[212] This standard of care would be similar to that traditionally imposed on common carriers and public utilities.[213] According to Professor Davis, imposing a heightened standard of care would provide greater protection to consumers and would also "comport with the public's demand for manufacturer responsibility."[214] By imposing a higher standard of care upon manufacturers, while still remaining within the framework of negligence, this approach bridges the gap between negligence and strict liability, while avoiding the conceptual

---

[210] *Id.* at 749.

[211] *See* Nichols v. Union Underwear Inc., Co., 602 S.W.2d 429, 433 (Ky. 1980); Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 821 (N.J. 1978); Phillips v. Kimwood MacHine Co., 525 P.2d 1033, 1036 (Or. 1974); *see also* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 618–19 (1980).

[212] Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1220 (1993).

[213] *Id.* at 1248–81.

[214] *Id.* at 1222.

problems associated with defectiveness.

A final alternative would expressly retain the existing risk-utility balancing approach but reformulate it in a way that would make it more transparent and less confusing. More than two decades ago, David Owen proposed a number of alternatives to the draft Products Liability Restatement's language in § 2(b) and § 2(c).[215] Retaining the Restatement's concept of defectiveness and the alternative design requirement, Professor Owen suggested the following definition be adopted for design defects: "A product is defective in design if a feasible alternative design was foreseeably safer and better overall in terms of its balance of safety, utility and cost."[216] Presumably, a similar approach could be applied to warning and instruction evaluations. Such a test might declare that: "A product is defective with respect to a warning or instruction if an alternative warning or instruction was foreseeably safer and better overall in terms of its balance of safety, utility and cost."[217]

However, I would take this a step further and eliminate the concept of defect altogether from the liability tests for design and warnings. Instead, as Mary Davis would suggest, the focus would shift from characterizing a product as defective to evaluating the conduct of the manufacturer in designing the product or formulating warnings or instructions.[218] In design cases, the applicable liability rule would be phrased as follows: "A seller shall be liable to a user or consumer for failure to exercise reasonable care in the design of its product if the design failed to incorporate a feasible design feature that was foreseeably better in terms of its balance of safety, utility and cost and that this failure was a proximate cause of the user or consumer's injury." A similar formulation might be applied in warning cases as well: "A seller shall be liable to a user or consumer for failure to exercise reasonable care in the formulation or communication of its warnings or instructions if it failed to incorporate language in its warnings or instructions that was foreseeably better in terms of its balance of safety, utility and cost or if it failed to exercise reasonable care in the communication of these warnings and instructions to foreseeable users or consumers and that this failure to formulate or communicate these warnings or instructions was a proximate cause of the user or consumer's injury." These formulations would eliminate the last vestige of strict liability in design and warning cases and would predicate liability, at least for manufacturers, squarely on the basis of negligence.

---

[215] *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 767–77.

[216] *Id.* at 775.

[217] *Id.*

[218] Citing: Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1221 (1993).

A negligence approach might also be used to address the issue of inherently dangerous products. As long as a seller warns about foreseeable non-obvious risks, it should be able to sell such products as long as the risk was not wholly unreasonable. Also, the adoption of an express negligence standard should eliminate the need for a special provision for prescription drugs and medical devices. Finally, it would eliminate most, though not all, of the inconsistent and confusing doctrines associated with services and hybrid transactions. Finally, the adoption of a negligence standard with respect to product design and warnings would greatly reduce the "apples and oranges" problem that is currently associated with mixing strict liability and comparative fault.

However, introducing negligence principles expressly into products liability law does raise one problem, namely whether distributors and retail sellers should be held liable to injured consumers, and if so, on what basis. As early as 1964, the California Supreme Court held that distributors and retail sellers could be held strictly liable to consumers for injuries suffered from defective products even though they did not design or manufacture the products in question.[219] Other courts soon followed suit[220] and the rule of distributor and retailer liability has now been endorsed by the Products Liability Restatement.[221] The imposition of liability on distributors and retailers is not out of place in a strict liability regime where engaging in a commercial marketing transaction, rather than failing to exercise reasonable care, is the source of liability. However, if a negligence rule is applied to downstream sellers, they will often escape liability unless they have failed to discover an obvious flaw or otherwise failed to exercise due care. Another problem is whether distributors and retailers should be held strictly liable for manufacturing flaws, as are product manufacturers, but should only be held to a negligence standard, like manufacturers, in product design and warning cases.

A possible solution to this problem is to hold distributors and retail sellers vicariously liable for the acts of manufacturers in some circumstances. This approach can be found in the Model Uniform Products Liability Act[222] and in a number of state statutes which relieve non-manufacturing sellers of liability unless the manufacturer is either not subject to the jurisdiction of the court or is, or likely to become, insolvent.[223] Restricting the liability of distributors and retail sellers in this fashion protect consumers when necessary but would also avoid the circularity problem that Prosser warned about in the

---

[219] *See* Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964).

[220] *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW 1009 (2d ed. 2008).

[221] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20(a) (Am. Law. Inst. 1998).

[222] Modern Uniform Products Liability Act, 44 Fed. Reg. 62725 (Oct. 13, 1979).

[223] *See* John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287, 295 (1991).

1960s.[224]

VI. CONCLUSION.

For more than half a century, many courts and commentators have insisted that the law of products liability is based on strict liability in tort. This principle was also embodied in the two Restatements. In fact, it is an "open secret" that negligence principles, not strict liability, largely govern in design and warning cases.[225] This practice of "calling a pig a mule"[226] continues to confuse judges, law teachers, and law students alike. The time has come to clear this matter up once and for all. I have proposed that strict liability, in the form of the "deviation-from-the-norm" test, be retained in manufacturing defect cases, while cases involving product design and warnings should be governed by negligence principles that reflect some form of risk-utility balancing. Furthermore, if this approach is adopted, the concept of defectiveness, and the definitional problems that are associated with it, can be dispensed with. If this proposal is adopted, I believe that products liability litigation will become clearer, more fair and more transparent.

[224] *See Prosser, supra* note 1, at 1133–34.

[225] *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 749.

[226] *Id.*