# **ARTICLE: The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects--A Survey of the States Reveals a Different Weave** [[1]](#footnote-2)\*

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**Reporter**

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**Text**

**[\*500]**

I. Introduction

The structure of this Article is somewhat unusual and is a direct result of recent projects undertaken by the American Law Institute (ALI or Institute). In 1992, the Institute began a project to rewrite section 402A of the Restatement (Second) of Torts: Products Liability. [[2]](#footnote-3)1 To date, this project has produced **[\*501]** two Preliminary Drafts, [[3]](#footnote-4)2 four Council Drafts, [[4]](#footnote-5)3 and two Tentative Drafts. [[5]](#footnote-6)4 The cornerstone of the ALI's proposal for products liability design defects requires the consumer to prove a reasonable alternative design in all design defect cases before the product's manufacturer can be held liable. This requirement is found at section 2(b) of Tentative Draft No. 2. [[6]](#footnote-7)5

The Institute's co-reporters, Professors James A. Henderson, Jr. and Aaron Twerski, authored the drafts and claim they are attempting to restate as closely as possible the existing law of products liability rather than attempting to effect a rule based upon their own policy views. [[7]](#footnote-8)6 The purpose of this Article is to examine whether or not there is, in fact, a "consensus" of existing law requiring proof of an alternative design before liability can attach.

Part II of this Article provides an analysis of the ALI's proposal to require consumers to prove a reasonable alternative design based upon the analysis of existing common law on design defects. Part III of this Article provides a state-by-state **[\*502]** analysis of the existing common law rules for strict liability in design defects. The structure of Part III is designed to provide the reader with immediate reference to the exact language that the courts have used when dealing with the question of design defects.

The somewhat unusual structure of Part III was chosen because of the great amount of controversy surrounding the coreporters' conclusions as to the "consensus" of the common law. The controversy over what constitutes a "consensus" of products liability law dealing with design defects is based upon several factors. First, the co-reporters' research has been severely criticized for failure to accurately reflect a consensus. [[8]](#footnote-9)7 The co-reporters list cases that they interpret as reflecting a more or less majority rule. However, these citations have been attacked as not standing for the proposition stated. [[9]](#footnote-10)8 Second, the research has also been criticized for failing to provide an in depth analysis of the position taken in jurisdictions which were excluded from the co-reporters' majority. [[10]](#footnote-11)9

It seems clear that the Institute members rely, to a great extent, upon the co-reporters' research and conclusions to identify a "consensus" or the majority rule. During the 1994 Annual Meeting debate over the pros and cons of section 2(b), Professor Jerry Phillips commented that the tenor of the discussions made it clear most Institute members had not read the cases being debated. [[11]](#footnote-12)10 The members' reliance upon the co- **[\*503]** reporters' analysis is certainly understandable since reading and analyzing the cases cited by the co-reporters is a tremendous task. In fact, it is almost inconceivable that every Institute member would read and analyze all key cases on design defects from every jurisdiction.

Finally, there is one major flaw in the co-reporters' analysis of existing law. The co-reporters rely, to some extent, on three types of authority which may or may not reflect the common law of a particular jurisdiction: the co-reporters cite to legislation (discussed separately below) and to federal and intermediate state appellate court decisions. There is absolutely nothing wrong with citing to federal and intermediate state appellate court decisions as long as they accurately reflect either the express or inferred intent of the state's highest court. Skeptics may conclude that selection of this type of authority is based upon a "pick and choose" search for authority to support a preconceived conclusion. This may or may not be true. Nevertheless, there is, at least, an appearance of impropriety in citing this type of authority without an in depth analysis of whether the authority accurately reflects the highest court's position. [[12]](#footnote-13)11

It is because of this controversy that Part III of this Article is structured, as far as possible, to set forth cases from each state's highest court. Although other authority is also cited, the **[\*504]** decisions of each state's highest court are stressed. Part III does not take on the near impossible task of analyzing every design case but attempts to analyze each jurisdiction's "key" cases that represent the flow and history of the law on design defects. Apologies to anyone who may find a favorite case missing from Part III; however, the cases selected for analysis should contain the reasoning of, if not actual citations to, the missing cases.

Although the selection of cases for discussion in Part III is important for determining each state's law on design defect, probably the most important task is the interpretation of the selected cases. Every author brings his or her own bias to this task which invokes a problem that cannot be entirely eliminated. This problem is the basis for Part III's unusual structure. Numerous and extensive quotations from each case are set forth either in the body or the footnotes of Part III in an attempt to minimize the effect of the author's interpretive bias. These quotations are intended to allow the reader to interpret the meaning of the court's decisions without reference to the author's commentary. When extensive quotations are not used, the commentary provides extensive footnoting to the courts' holdings and findings. Although case analysis by the Author is undertaken in Part III, the reader may ignore it or compare it with what the reader interprets the law to be based upon the extensive quotations and footnoting.

Part III sets forth three major sources of law for each jurisdiction: common law, statutes, and pattern jury instructions. Emphasis is placed on the common law for a specific reason. The founders of the ALI had an aversion to legislation. The professed goal of the ALI in regard to the Restatement was to develop an authority that accords with decisions from the courts. [[13]](#footnote-14)12 In addition, almost all recent product liability legislation has been a result of what is commonly called "tort reform." "Tort reform" legislation which limits consumer rights is the by-product of highly organized groups' weighty influence **[\*505]** on state legislatures. [[14]](#footnote-15)13 These groups represent the viewpoints of manufacturers, corporations, and insurance companies. [[15]](#footnote-16)14 Tort reform has been highly criticized as being based upon questionable allegations and reasoning. [[16]](#footnote-17)15 This Article uses the term "tort reform" sparingly because it promotes the almost benign suggestion that the changes are somehow beneficial to both the consumer and existing law. Instead, the term "anticonsumer" or "pro-manufacturer" is used to characterize the particular issue as either helping or harming a consumer or manufacturer.

Finally, the Appendix to this Article contains indices based upon state-by-state summaries of the established common law. The indices divide the states into groups which are defined by the tests used by the courts to determine products liability in design defects. This Appendix provides a quick reference for analyzing the true "consensus" of common law, if any, among the states for products liability in design defects. **[\*506]**

II. An Analysis of the ALI's Proposal for Products Liability Design Defects

This Part examines the ALI's proposal to make it an absolute requirement that the plaintiff present evidence of a reasonable alternative design. Part II's analysis, which exclusively focuses on design defects, begins with a brief background of the Institute's development of strict liability--from section 402A's adoption to projects undertaken in the mid-1980s to the present proposals.

This Part then examines the results of Part III to determine whether or not the common law as applied to design defects is in accord with the ALI's proposal. Although the primary purpose of Part III is to determine this issue, examination of the cases reveals much more. It appears that most jurisdictions which apply strict liability to design defects adhere, in one way or another, to one major policy--relieve the consumer from proving the manufacturers' fault or negligence. [[17]](#footnote-18)16 Although this policy basis for strict liability is obvious since it applies liability despite all possible care, the burden of proof issue appears to be the heart of the problem with the ALI's present proposal. The burden of proof is probably the most important policy issue underlying strict liability. This Article is not designed to fully explore the burden of proof issue, but it cannot be ignored. It will, hopefully, illuminate this point and encourage others to delve more deeply into the burden of proof issue and give it the attention it properly deserves. **[\*507]**

A. The ALI and Strict Liability--A Movement from ProConsumer to Pro-Manufacturer

1. The Restatement (Second) Section 402A--A Pro-Consumer Movement

During the early 1960s, the ALI, under the leadership of its reporter, William Prosser, developed several drafts of strict liability for products. [[18]](#footnote-19)17 Beginning at the 1961 Annual Meeting, the membership was presented with a draft applying strict liability only to food products. [[19]](#footnote-20)18 Subsequent drafts extended strict liability to several other types of products. [[20]](#footnote-21)19 By 1964, this process culminated in the final form of the present rule for strict liability, section 402A, which applies to all products. [[21]](#footnote-22)20 The newly adopted section 402A was pro-consumer in that it was designed to afford maximum protection from defective products. [[22]](#footnote-23)21 The black-letter rules of law and the comments made it clear that no proof of negligence was required. [[23]](#footnote-24)22 Section 402A, or its equivalent, was almost immediately adopted by practically every jurisdiction in the country. [[24]](#footnote-25)23 **[\*508]**

2. The Basic Policy Foundation for Strict Liability--To Relieve the Consumer from the Burden of Proving Negligence

The legendary and primary reason for adopting strict liability was to relieve the consumer from the burden of proving negligence. This rationale has been well expressed in numerous decisions and commentaries. [[25]](#footnote-26)24 For example, in the American Casebook series on Products Liability, Professors David Fischer and William Powers, Jr. list six policy justifications for strict liability. In discussing the burden of proof issue, the authors state:

4. Proof Problems. Quite often the manufacturer of a defective product is negligent. Modern complexities, however, frequently make it very difficult for plaintiff to establish this. This is particularly so because he is usually at a relative disadvantage because the manufacturer has greater access to expertise, information, and resources. Imposing strict liability relieves plaintiff of the burden of proving fault. See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 34-35 (1973); Schwartz, Foreword: Understanding Products Liability, 67 Calif.L.Rev. 435, 459-61 (1979).

The policy of helping plaintiffs avoid proof problems has been quite influential. Throughout these materials you will see instances where courts either eliminate the need to prove a particular element of plaintiff's case, or they shift the burden of proof on the issue to defendant. Examples include proof of causation in warning cases, proof of identity of defendant as the person who manufactured the product, proof that a risk inherent in the product was scientifically unknowable, and proof that the utility of a product's design outweighs its benefits. Indeed, the most significant difference between negligence and strict liability may turn out to be where the burden of proof lies with respect to such issues. [[26]](#footnote-27)25 **[\*509]**

3. The ALI's Pro-Manufacturer Movement

In the mid-1980s, the "heyday" of tort reform's anti-consumer movement, the ALI undertook a new project under the leadership of its newly elected director, Professor Geoffrey Hazard. [[27]](#footnote-28)26 The project was entitled "Compensation and Liability for Product and Process Injuries" and primarily involved products liability. [[28]](#footnote-29)27 The final result was a basic attack on consumer protection. [[29]](#footnote-30)28 The project proposals were based upon economic and insurance perspectives, [[30]](#footnote-31)29 and the recommenda- **[\*510]** tions proposed dramatic changes which include the following:

1. Regulatory compliance as a complete or partial defense to a products action.

2. Adoption of negligence rather than strict liability as the standard for products liability.

3. Elimination of the collateral source rule.

4. Partial elimination of damages for pain and suffering for an injured victim.

5. Restriction of punitive damages.

6. Control of plaintiff's attorney fees.

7. Blue Ribbon science panels that override the jury process. [[31]](#footnote-32)30

Pertaining to design defects, the project proposal recommended eliminating the consumer expectation test and adopting a risk-utility (cost-benefit) test requiring proof of a feasible alternative design. [[32]](#footnote-33)31 During the early draft stages of this project, several Institute members voiced objections to the reports' obvious bias. At the 1987 Annual Meeting, Professor Walter Hull Beckham, Jr., then a member of the ABA Committee on tort reform, expressed the sentiments of several Institute members:

I have great difficulty with this Institute, in which I have great confidence and pride as to my membership, becoming involved in a matter of this kind without those who are going to be making the report completely starting from scratch in an impartial investigation with a group who represents adequately all points of view that are going to have to be considered if it's going to be done fairly before a final report is made.

I notice that in the makeup of this committee there **[\*511]** are two representatives from corporations, one of which is, as I understand it, the general counsel for Johnson & Johnson; another is the Vice President of Johnson and Higgins in New York. I notice that we have an economist in the group; I notice that we have a doctor in the group.

. . . .

I find that, although from the members of this committee and the Advisers and Reporters, eleven out of the nineteen are not members of the American Law Institute, and, therefore, there has been no reluctance to go outside, as there should not be, in matters of this kind, yet, I find no one that I recognize here who represents consumer people, who represents poor people, who represents people who are going to be the plaintiffs in these cases and who are going to be injured.

I find this report to be slanted, if you want to put it that way, or, perhaps that's not a good word. I find it to be heavy on the side of the protection of corporate interest. I find it to be very light on the side of what I consider to be substantive justice for people who are injured and who come into the court system under the tort system.

The blueprint to me, Mr. President, is pretty clear. It kind of reminds me of Minnie Pearl's brother who went into the blacksmith's shop and was watching him make horseshoes. The blacksmith says, "Don't touch those, they're hot." In a little while the fellow picked up one and dropped it real quick. The blacksmith said, "Aha, it burned you, didn't it?" He said, "No, it just don't take me long to look at a horseshoe." (Laughter)

With the blueprint that you have furnished us on pages 26 and 27, it doesn't take me long to look at this horseshoe to see where this group is headed and what they are going to come out with. It's going to be a workmen's compensation type of system; it's going to be back into contracts between consumers and producers which the implied warranties made a great effort to get away from; it's going to be a workmen's comp system as to the medical profession; it's going to be a contractual system between unequals in the marketplace and we're going to go through all of the fights that we've had before. So be it. I hope I'm here to fight the whole five years. **[\*512]**

Whether I am or not, I think we ought to start off at scratch with a group that is broadly representative of all of the people whose rights are going to be affected by this Institute.

In all fairness and in all candor, I do not believe that this Institute has a reputation among our profession or among the public for being attorneys for the consumer and the poor. I believe that we have a reputation rather of having practices and of having spent our professional lives to a large extent with those, which appear to me to be getting the heavier consideration.

I notice that you have indicated in one sentence in here that you intend to greatly enlarge the Advisers. I believe, having been an academic myself for fifteen years on the faculty of the University of Miami teaching Torts, I believe there's nothing wrong with having some lawyers who are practicing in the courtrooms to come in and to temper academia in these matters. I hope we get some trial lawyers who know something about the tort system; I hope we get some consumer advocates as Advisers. Thank you, Mr. President. (Applause) [[33]](#footnote-34)32

Mr. Gerald T. Wetherington issued similar warnings about the need for an unbiased report at the 1987 Annual Meeting:

Mr. President, the great acceptance that the work of The American Law Institute for over forty or fifty years has received has been because there's been confidence that the work that has been produced by the Institute has been balanced and objective.

If we look at the report in the Introduction, in the second paragraph it says, "There is considerable consensus that the existing tort liability and litigation system for dealing with such injuries is unduly costly and contentious; distributes compensation in an erratic and inconsistent fashion; and has contributed to the unavailability of affordable liability insurance and to the withdrawal of socially valuable products and services from the market."

Now, about that statement there is violent disagree- **[\*513]** ment in this country. The ABA report that was produced--and the Reporter was Mr. Shapo--was squarely opposite to that conclusion.

. . . .

What troubles me about this is that this begins with the appearance of a study that from its inception is not open-minded. The idea that the Institute should study something as important as the tort system is very good. The idea that we start from this point of view is going to immediately cast question insofar as the objectivity of the study in the minds of people. [[34]](#footnote-35)33

The project continued until the final draft was submitted at the 1991 Annual Meeting where there was substantial opposition. [[35]](#footnote-36)34 Because of the opposition, the ALI did not adopt or take further action on the project. [[36]](#footnote-37)35 Nevertheless, the Compen- **[\*514]** sation Project was not dead.

In March of 1992, the ALI announced plans to revise section 402A. [[37]](#footnote-38)36 In June of 1992, the ALI appointed Professors James A. Henderson, Jr. and Aaron D. Twerski as co-reporters for the new project. [[38]](#footnote-39)37 The co-reporters had just authored an article in the Cornell Law Review entitled "A Proposed Revision of Section 402A of the Restatement (Second) of Torts," [[39]](#footnote-40)38 **[\*515]** which recommended that design defect liability be based upon proof of a safer, more cost-effective alternative design. [[40]](#footnote-41)39 The co-reporters' views, over the years, reflect a return to the negligence theme for design defects. [[41]](#footnote-42)40

4. The New Restatement and the Reasonable Alternative Design Requirement for Design Defects in Tentative Draft No. 1

The new project to revise section 402A went through several drafts prior to Tentative Draft No. 1. [[42]](#footnote-43)41 Nevertheless, very few changes were made. [[43]](#footnote-44)42 Each revised draft placed the burden on the plaintiff to prove a reasonable and feasible alternative design. [[44]](#footnote-45)43 In effect, Tentative Draft No. 1 revived the highly criticized Compensation Project's proposal which began in the mid-1980s and was discontinued in 1991. In May 1994, the ALI members discussed and debated Tentative Draft No. 1 section 2(b), which mandates the establishment of this proof by the plaintiff. [[45]](#footnote-46)44 The type of evidence that is deemed relevant **[\*516]** for the determination of whether the plaintiff has met his or her burden of proof is found in comment d of Tentative Draft No. 1 section 2(b).

Although comment d does not require detailed proof of costs and benefits, the rule still places an extremely heavy burden of proof on the plaintiff. The primary problem with the rule is in its absolute application. Without proof of an alterna- **[\*517]** tive design, there can be no liability. Applied as an absolute, the rule is too harsh. Even assuming the rule should apply in some design cases, it still requires proof of too much detailed evidence, evidence which is more readily accessible to the defendant than the plaintiff. [[46]](#footnote-47)45

During the 1994 Annual Meeting, the alternative design proposal in Tentative Draft No. 1 [[47]](#footnote-48)46 was the subject of heated debate between a few members who represent consumers and those who represent manufacturers and corporations. [[48]](#footnote-49)47 This meeting revealed that the ALI's policy that "each member must leave his client at the door" [[49]](#footnote-50)48 may, in reality, be difficult, if not impossible, to meet. The meeting also revealed that not all voting members were cognizant of the massive amount of case law which had developed on design defects; [[50]](#footnote-51)49 many members were, in effect, totally reliant upon the reporters' research. Thus, two potential problems became apparent. First, if the membership fails to leave the client at the door, most, if not all, of the Restatement's consumer protection could be eliminated because the membership is largely comprised of those who **[\*518]** represent corporate interests. [[51]](#footnote-52)50 Second, even if the membership does diligently leave the corporate client at the door, the voting may be based upon blind reliance rather than independent decision.

5. The ALI's Elimination of the Consumer Expectation Test as an Independent Test of Liability in Tentative Draft No. 1

The co-reporters eliminated the consumer expectation test in the original drafts. [[52]](#footnote-53)51 Elimination of this test met with great opposition. [[53]](#footnote-54)52 Proponents of the consumer expectation test pointed out that the courts were applying consumer expectation tests in many cases. [[54]](#footnote-55)53 In response to this opposition, the coreporters reintroduced the test in the ALI rule for design defects. [[55]](#footnote-56)54 Nevertheless, the consumer expectation test was not reincorporated as an independent test of liability which would reflect how the courts continue to use it. Instead, the consumer expectation test was reincorporated in comment e as one factor that may be considered in determining "the necessity for, or the adequacy of, a proposed alternative design." [[56]](#footnote-57)55

At first glance, this may appear to be a reasonable rule which could be interpreted as applying the consumer expectation test to determine whether or not reasonable alternative design evidence would be required and then, if so, whether or not the evidence was adequate. A closer inspection reveals that this "so-called" consumer expectation factor is so overshadowed by the section 2(b) black-letter rule for design defects, which **[\*519]** clearly makes proof of alternative design an absolute requirement, that the consumer expectation factor exists in name only. If courts follow the section 2(b) black-letter rule, the clear language of the accompanying comments pushes the consumer expectation factor so far in the shadowy background that it is, for all intents and purposes, lost. [[57]](#footnote-58)56 Since section 2(b) makes alternative design evidence an absolute requirement, the consumer expectation factor has no real bearing on "the necessity for . . . a proposed alternative design." [[58]](#footnote-59)57 Since section 2(b) also requires detailed proof of the alternative design, the consumer expectation factor for the "adequacy of . . . a proposed alternative design" exists in name only. [[59]](#footnote-60)58

B. The 1995 Annual Meeting and the Adoption of Section 2(b) as Expressed in Tentative Draft No. 2

Just prior to the 1995 Annual Meeting, the ALI published its second Tentative Draft to be debated by the members. [[60]](#footnote-61)59 The black-letter rule of section 2(b) remained essentially unchanged and, with a minutia of modification to a few comments, the standard for design defects still imposed an absolute requirement that the plaintiff prove a reasonable alternative design. [[61]](#footnote-62)60

At the outset of the meeting, Professors Henderson and Twerski asserted that their research confirmed their view that section 2(b)'s requirement of a reasonable alternative design "reflects a clear majority of the case law and it's also reasonable." [[62]](#footnote-63)61 Both Henderson and Twerski refused to recognize any **[\*520]** other test, including consumer expectations, as an independent means of determining liability for design defects. Both of the co-reporters based their rationale of rejecting the consumer expectation test on the basis that it "has a mean-spirited quality to it" by denying liability when the dangers of a product are open and obvious. [[63]](#footnote-64)62

The first day the debate focused on proposals made by Professor Marshall Shapo to replace section 2(b) with a separate test for liability. [[64]](#footnote-65)63 Professor Shapo stated his objection to section 2(b) as follows:

These proposals are not right as a matter of history; they are not right as a matter of policy; most importantly, from the standpoint of this Institute, which stakes its reputation on the persuasive force of its Restatements, they are not right as a matter of law. I will state my objections first, and then I will outline the ways in which I believe my amendment is superior.

Preliminarily, I would like to say that I think you cannot separate this discussion from two aspects of its historical background: first, the overwhelming judicial acceptance of section 402A, and second, the extraordinary politicizing of this debate to the point where it has become more a forum for legislative lobbying than an inquiry into what is the best legal rule.

My most general objection is that the Reporters have severed the black letter of products liability from its moorings, most centrally 30 years of judicial development under section 402A, and that perhaps they have even unmoored it from the general body of tort law and even from relevant contract law.

My specific objections arise from my study and writing on the subject for a generation. Perhaps it is something that I should only tell my therapist, but I have read 9,000 or more cases on this subject in that time, and certain features of this proposal are, to me, not recognizable as the **[\*521]** main current of American judicial thinking.

Where the Reporters are modest and self-contained in other parts of the draft, they present us in these crucial sections with the most rigid requirements, two in particular, as Jim has indicated. Specifically, they have imposed an unyielding requirement that plaintiffs prove a reasonable alternative design in practically all design defect cases, without showing a clear trend in current case law and, indeed, with strong scholarly case law analysis to the contrary. I believe that, if passed, this proposal would be a truly self-inflicted wound for the Institute, because it seems clear that it would change not only the law but the way the law is practiced in many jurisdictions. [[65]](#footnote-66)64

During the debate of Professor Shapo's proposed amendment, several prominent ALI members expressed their belief that section 2(b) did not represent the current common law and that, as Professor Shapo had succinctly stated, the section reflected a political debate similar to legislative lobbying. Professor Howard Latin expressed his view that proposed section 2(b) is not just a return to negligence but a return to a standard less than that required under negligence law:

I hope that most of you remember the old Orson Welles advertisement for Paul Masson, that "we will sell no wine before its time." Well, I would like to argue that what we are doing now is rushing the process to get through, and in the process of doing that we have completely lost sight of the forest while arguing about particular trees.

I would like to try to go back to broad principles and identify what the forest is, or at least one way of describing the forest. In the last 30 years, in the evolution of products liability--I'm talking now just about design defect, although I think it applies more broadly--in the last 30 years, the vast majority of jurisdictions have felt the need to go beyond basic negligence law to expand consumer protections or to expand manufacturer responsibilities in some way. I am emphasizing "in some way," be- **[\*522]** cause there has not been a consensus or agreement. So some jurisdictions have used failure to meet consumer expectations as an independent ground for liability. Almost all jurisdictions have used imputation of knowledge, which means look at what we now know about the consequences of a product use rather than what could have been foreseen. Some jurisdictions have used burden-shifting devices, some jurisdictions have cut back on comparative or contributory negligence, but I believe the vast majority of jurisdictions have gone beyond the basic negligence test, and that's the overwhelming trend of the last 30 years.

Now what's happened here is, by looking just at each doctrinal rule and shooting many of them down because they don't independently command a majority, we now have a document that doesn't go beyond negligence rules and, in numerous instances, falls back to a lesser boundary of liability than even traditional negligence did. So what we have are the Reporters knocking down consumer expectations because it doesn't meet the majority test, which is certainly true; knocking down category liability because it doesn't meet the majority test, which is certainly true; looking at each step or each different treatment and losing sight of the fact that the process we have been seeing is a general process of expanding liability doctrines beyond the boundaries of negligence, but there hasn't been any consensus on particularly how the law should go about doing that.

Now the result of that is, if we started with what I believe a real Restatement would start with, which is the law, the courts--the majority of states--do not believe that the traditional negligence standard alone is enough to impose the proper balance between manufacturers and consumers. That to me is an unarguable statement of the majority sentiments of the courts. If you accept that as the majority position of the states now, then we can focus on which are better doctrines and which are worse doctrines to try to accomplish that. But instead, by looking at each doctrine separately as if they didn't interrelate, as if there were no larger picture, what we are getting is that all of the deviations the different states have tried are being shot down as being not majority treatments, except for imputa- **[\*523]** tion, which is definitely majority treatment but is being shot down anyway because the Reporters think it hasn't withstood the test of time.

So I would like to encourage you to really say in a Restatement are we moving forward to general policies underlying products liability law or are we being buried in the specific doctrines and losing sight of the fact that, if you manipulate or address each doctrine separately, you can lose sight of the overall direction of products liability law?

Now I don't agree with everything in Marshall's proposed amendment by a long shot--it hasn't had three years of work in developing it--but it does represent going back to what I believe is the central principle, which is that we need a balance between consumer interests and manufacturer interests that goes beyond the traditional negligence approach. And if the Shapo amendment is approved, that's not the end of the ball game, that's the start of a new ball game, looking at alternative ways of achieving that, I believe, majority state view in more constructive, more sensible ways than many of the courts or many of the experiments have identified individually. [[66]](#footnote-67)65

Professor Richard W. Wright stated in part:

I actually want to support practically all that Howard Latin said. I have again read over a lot of the cases, and I don't think that the risk-utility test proposed by the Reporters really is an accurate reflection of the case law in all the different jurisdictions, for the reasons that Howard Latin says. I also think that it really is one step forward, two steps back.

. . . .

This test [section 2(b)] is one that really imposes a much stricter test than the ordinary negligence test. I think it's wrong to say it's the same test. It is a much stricter test, and it's one that really goes against--and I think this is what I'd like to finish up on, if I have the time--it's one that really goes against the core premises of modern product liability, and I think those are really the burden of **[\*524]** proof problems plaintiff faced and the implied warranty aspects of the consumer expectations doctrine. Both of those are ditched; those two fundamental aspects of the rationale for product liability are ditched in this Restatement. [[67]](#footnote-68)66

Professor Virginia E. Nolan expressed a great deal of concern about the inability of the ALI members to disassociate their views from those of their clients. She explained that for this reason, the debate failed to reflect what the current law reflects. Professor Nolan stated, in part:

I am a professor at the University of San Diego Law School, and I also have no clients, and I would like to let you know that this is actually my second year here. Last year, I was here and said nothing, but I'd like to give you a sense, from a person who is new to this, how I felt last year, what I've thought about this year, and my feeling that I must speak today.

Last year, when I attended the proceedings, what I heard was that each speaker who stepped to the microphone identified his or her client and then spoke about the ability of the member to be able to distance himself or herself from the point of view of the client. And then what I heard was a series of points of view reflecting the defense bar's point of view, with the very well-rehearsed statements that were made representing the client's point of view. I did not see the separation between the two.

I went away from this body perplexed, because I have taught tort law for 20 years, I have written numerous articles, coauthored articles in the area, and have recently coauthored a book in the area that's entitled Understanding Enterprise Liability, so I do feel I have some knowledge as to tort law, both in California and across the United States, and I also had some sense of what this body was responsible for doing.

What I do not believe our responsibility is, is to vote the view of our clients. I think we have a higher moral obligation, and that is to vote in the best interests of the **[\*525]** development of the law and how best to guide the judiciary as to what the law is currently.

My colleague, Professor Ursin, who was also my coauthor, and I, have called this version, "The Third Retrenchment of Torts." I think a more honest version would be to say that, in fact, with respect to design and warning defect, there is no longer strict liability if this is what we are passing. I think it is a major step backwards, not only for the development of the law, but also for consumer protection and consumer rights.

I am not here speaking for the ATLA, the CTLA, or anything of that nature, but just as a law professor who has taught in the area for many, many years. It seems the best we could do at this juncture, and what I think Marshall is crying out for us to do, is to take time to think more, to not rush, to not feel we are stuck with some timetable that has been superimposed upon us, but rather to do our jobs, be a deliberative body, be a judicious body, but not a body that is legislating. I would just say let's please take time out, not rush, not say that we must do this, that we must somehow step back from what the courts have been doing for the past 30 years and basically have one piece of legislation which represents our point of view, because it does not represent our point of view. Look around at the numbers of speakers who are here to speak who, it's already been stated, will not have the time to do so.

So I ask, please, let's not rush this to an end. I think we need more time to think, more time to deliberate, and more time to vote in the best interest of this body, but it might not be the best interests of any particular client. Thank you. [[68]](#footnote-69)67

During the debate, President Wright placed severe time restraints upon the members' discussion of issues, sometimes limiting the speakers to five minutes or less. [[69]](#footnote-70)68 Several other members gave their views on Professor Shapo's proposed amendment; however, the views expressed made it clear that, **[\*526]** on the whole, the members were proffering the views of their clients without any empirical data or in depth research of the common law. [[70]](#footnote-71)69 In addition, several members, including the coreporters, appeared to focus on whether the consumer expectation test or the proposed section 2(b) standard was preferred despite multiple warnings that more important issues existed, such as the fact that section 2(b) did not reflect the common law, that ALI members were not "leaving their clients at the door," and that section 2(b) was a standard worse than negligence law. [[71]](#footnote-72)70

The introduction, debate, and voting on Professor Shapo's amendments to section 2(b) took slightly over an hour. [[72]](#footnote-73)71 The ALI rejected his amendment. [[73]](#footnote-74)72 The following day, President Wright gave the membership one hour and forty five minutes to debate section 1 and section 2 of Tentative Draft No. 2, giving the speakers three minutes each for comments. [[74]](#footnote-75)73 Robert Habash moved to amend section 2(b) to soften the harshness of the reasonable alternative design requirement. Mr. Habush stated, in part:

I rise to propose an amendment to section 2(b), which is set forth on page 20 of the handout. I hope if you haven't read it, you should. Let us be honest with each other by elevating the reasonable alternative design from a factor in a risk-utility test to a precondition to a successful product liability design case. The draft has tilted the playing field **[\*527]** against many legitimate claims over product defect. Lacking trial experience, I am sure the Reporters did not realize how heavy a burden they have created even for the most skilled plaintiffs' litigator, maybe not in some of the runof-the-mill cases but certainly in some cases.

We must be concerned that there have been products in the past and there will be products in the future of such high risk and such low social utility that they will flunk a risk-utility test, but because the plaintiff cannot get through the gatekeeper of reasonable alternative design, that claim will either not be brought or will fail. I worry that what if there had been only one IUD, one Dalkon Shield, only one type of asbestos. I worry that there may be complex products that will be too difficult for a plaintiffs' attorney to be able to propose an alternate design. I worry about judges who will use this as black-letter law to require prototypes, testing on tracks, who will require market surveys and economic analysis that plaintiffs will not be able to comply with. And I worry about the cost to the average litigant and the average lawyer to try to comply with this barrier.

My proposal simply allows a court to avoid unjust results. It cuts some slack and waives the requirement in some cases. It will be a very small escape hatch, but it does restore some balance in the draft's most erosive provision and that is the reasonable alternate design.

There are many in this room who applaud the negative effects that the RAD has on consumers. There are some who would even wish to make it more harsh. But I urge those of you who have loved this Institute and what it stands for in the past to restore a little bit of balance back into the provision, and if a product is of such high risk and so little social utility that it flunks the risk-utility test, then a judge should be able to, in his or her discretion, grant an exception to this rule. That is exactly what my amendment proposes, and I ask you to adopt it. Thank you. [[75]](#footnote-76)74

The Habush amendment proposed an exception to the rea- **[\*528]** sonable alternative design requirement when the risks of a product obviously outweighed its benefits. The co-reporters took the position that such an amendment was already addressed in comment d to section 2(b) or could be addressed in section 3 which allowed a type of res ipsa action. [[76]](#footnote-77)75 Professor Oscar Gray pointed out, however, that comment d was not in any way supported by the black-letter rule of section 2(b) and that section 3, according to the procedural rules of the ALI, was not open for debate until later. [[77]](#footnote-78)76 Professor Richard Wright correctly pointed out that section 3, as presently written, does not adequately cover the issues raised by the Habush amendment. [[78]](#footnote-79)77

During the debate on the Habush amendment, Professor M. Stuart Madden made the following statement:

The decided cases proclaim an overwhelming adoption of a requirement of a reasonable alternative design, and reference to a random products liability treatise reveals these states adopting such a rule: Oregon, Minnesota, Pennsylvania, Kansas, Ohio, West Virginia, Louisiana, Massachusetts, and Illinois. The Reporters' prodigious research adds 13 additional states to those requiring a showing of a reasonable alternative design, and decisions in six other jurisdictions suggest that, without evidence of a safer alternative design, a plaintiff's case may not get to the jury.

Now the bean counter in me impelled me to add these figures up, and they come to 28 states, a supermajority of jurisdictions. The Reporters' research demonstrates that requiring the design defect plaintiff to prove an alternative feasible design is the majority rule; it's the ascendant standard, and it's the better rule of law. For this reason, I oppose the Habush amendment's broad exception to that requirement. [[79]](#footnote-80)78

It appears, however, that of the nine states mentioned by Pro- **[\*529]** fessor Madden not a single one has clearly adopted a reasonable alternative design pursuant to "common law." [[80]](#footnote-81)79 Furthermore, Professor Madden's statement that twenty-eight states follow such a rule appears to be a gross exaggeration of what the common law reflects in this country [[81]](#footnote-82)80 since it appears that only three states have clearly adopted this rule under common law. [[82]](#footnote-83)81

Professor Richard Wright attempted to correct the exaggeration but was cut off by President Wright because of the arbitrary time limitations placed upon the speakers. [[83]](#footnote-84)82 Professor Wright commented on these time limitations:

I really get the feeling that with this limitation, unless it is changed, that this is not going to be a deliberative body; it's more like a sausage factory. I can't believe that this incredibly important set of provisions--and focusing not just on the core issue of design defect and specific sort of possible limitations of that as opposed to open-ended ones, but there are a number of other issues to be addressed, maybe less critical, in terms of drafting, that can't possibly be reached in the time that we have been limited to. I just don't really understand how this body, on this important issue, can limit debate to the extent that has been done. It hasn't been done in the past. I don't understand why it's being rushed on this particular project. [[84]](#footnote-85)83

Professor Wright's frustration on the time limit was echoed by Roxanne Conlin: **[\*530]**

I want to join with Professor Wright in his concern about the speed with which we are trying to move through these important topics. I realize that the President once argued the case of Hughes Tool Co. v. TWA in the U.S. Supreme Court in a half an hour with $ 183 million at stake, but I suggest that what is at stake in these proceedings is a good deal more important than even $ 183 million. What is at stake are the rights not only of the potential litigants, both plaintiff and defendant, that we can imagine now, but also of those we can't imagine because the products that will injure them have not yet been invented. So I respectfully suggest, with the insight that newcomers sometimes feel, that we are spending much too little time on the proposed Restatement of Products Liability. I believe this subject is worth at least two full days, and I hope the Institute will allot at least that much time to the debate next year. [[85]](#footnote-86)84

The Habush amendment was rejected by the ALI. [[86]](#footnote-87)85 Professor Shapo again attempted to modify section 2(b)'s absolute requirements with another amendment which was also voted down by the Institute. [[87]](#footnote-88)86 Section 2(b) in Tentative Draft No. 2, as adopted by the ALI, reads as follows:

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, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe. [[88]](#footnote-89)87

The factors that are relevant for determining a reasonable **[\*531]** alternative design are found in comment e which reads as follows:

e. Design defects: factors relevant in determining whether the omission of a reasonable alternative renders a product not reasonably safe. Subsection 2(b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude of the foreseeable risks of harm, the instructions and warnings that accompanied the product, the nature and strength of consumer expectations regarding the product, the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed, and the effects of the alternative design on production costs, product longevity, maintenance and repair, esthetics, and marketability. Plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case. Depending on the mix of these factors, a number of variations in the design of a given product may meet the test in section 2(b). On the other hand, it is not a factor under section 2(b) that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry. These considerations do not speak to whether a product is reasonably designed.

When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.

While plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risks of harm, section 2(b) does not require the plaintiff actually to produce a prototype in order to make out a prima facie case. For example, qualified expert testimony on the issue suffices if it reasonably supports the conclusion that a reasonable alternative design could have been adopted at the time **[\*532]** of sale. Moreover, the requirements in section 2(b) relate to what the plaintiff must prove in order to prevail at trial. This Restatement takes no position regarding the effects of these requirements on local law concerning the adequacy of pleadings or pretrial demonstration of genuine issues of fact. It does, however, assume that plaintiff will have the opportunity to conduct reasonable discovery so as to ascertain whether an alternative design is practical.

A test that considers such a broad range of factors in deciding whether the omission of an alternative design renders a product not reasonably safe requires a fair allocation of proof between the parties. To establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm. Given the relative limitations on the plaintiff's access to relevant data, the plaintiff is not required to establish in detail the costs and benefits associated with adoption of the suggested alternative design.

In sum, the requirement of section 2(b) that a product is defective in design if the foreseeable risks of harm could have been reduced by a reasonable alternative design is based on the common sense notion that liability attaches only when harm is reasonably preventable. For justice to be achieved, section 2(b) should not be construed to create artificial and unreasonable barriers to recovery.

The necessity of proving a reasonable alternative design as a predicate for establishing design defect is addressed initially to the courts. Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted. Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact. This Restatement takes no position regarding the specifics of how a jury should be instructed. So long as jury instructions are generally consistent with the rule of law set forth in section 2(b), their specific form and content are matters of local law. [[89]](#footnote-90)88 **[\*533]**

The consumer expectations test has been eliminated as an independent element for liability and is found at comment f:

f. Consumer expectations: general considerations. Under section 2(b), consumer expectations do not constitute an independent standard for judging the defectiveness of product designs. Courts often use the term "reasonable consumer expectations" as an equivalent of "proof of a reasonable, safer design alternative," since reasonable consumers have a right to expect product designs that conform to the reasonableness standard in section 2(b). However, except as stated in Comment g, consumer expectations, as such, are not determinative of defectiveness. That concept does not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under section 2(b). See Comment e. Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Furthermore, products liability law derived in part from the law of warranty where consumer expectations have special significance. Thus, although consumer expectations are not determinative of whether a product is defectively designed, they constitute an important factor in determining the necessity for, or the adequacy of, a proposed alternative design.

Section 2(b) likewise rejects conformance to consumer expectations as a defense. The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective. It follows that while disappointment of consumer expectations may not serve as an independent basis for allowing recovery under section 2(b), neither may conformance with consumer expectations serve as an independent basis for denying recovery. Such expectations may be relevant in both con- **[\*534]** texts, but in neither are they controlling. See Comment c. [[90]](#footnote-91)89

Generic or categoric liability under comment d has been relegated to such a narrow area that it has almost been written out of existence:

d. Design defects: possibility of manifestly unreasonable design. Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of section 2(b). Toy guns that do not produce injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if consideration is limited to toy guns that are capable of causing injury, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant--the capacity to injure--is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, it could conclude that liability should attach without proof of a reasonable alternative design. The court would condemn the product design as defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product. [[91]](#footnote-92)90

Professor Roger C. Henderson summarized the feeling of a few of the members who were not taking a political stand for **[\*535]** their clients or a predisposed position on the elimination of strict liability in section 2(b):

I'm at the University of Arizona College of Law, and I represent no one other than myself. I do not have a specific amendment to offer, but I do have a concern that I would like to express. It was expressed partly yesterday by Dean Perlman, but I just want to emphasize it.

I have been concerned about, if not the tone, at least some of the outright statements in the Comments. As a Restatement, I am not going to argue about sections 1 and 2 as far as existing law, and that is our function here in the main, to restate the law.

The thing that troubles me most is some of the statement in the Comments which seal off growth in this area of law. To take the position that you can never have strict liability for design defects is not only contrary to at least some jurisdictions today--and we know what those jurisdictions are despite the efforts of the Reporters to minimize those. When you look in the Restatement, as we have it now before us, particularly on page 16, the last sentence of the first paragraph that's on page 16 says, "When a manufacturer reasonably designs a product, the responsibility for product risks that cannot be designed out of the product at acceptable cost is appropriately transferred to a user population that is in a better position than the manufacturer to manage those risks . . . [section 2, Comment a.] And I think of the daughters of the women who took DES and wonder whether or not those people are in a better position to shoulder and manage this risk.

Moreover, in the next paragraph, it says: "But such investment by definition would be a matter of guesswork. To insure against future claims, the manufacturer would be required to estimate the risks upon which claims would be based. A commercial insurer would be in no better position to make such an estimate." How the Reporters can assume that an insurer could estimate the risk of a faulty base design and yet not be able to estimate the risk of a strict liability design is beyond me. They do it, they do it today, and I am very concerned about the fact that the way the Comments are written to sections 1 and 2, they basically take the position that strict liability is never to be **[\*536]** had for design defects. We don't know what the future holds for us, but I think it's a big mistake for this institution to take that position. The courts, I predict, in the long run will not follow it. [[92]](#footnote-93)91

C. The Overwhelming Majority of States--A Rejection of the ALI's Proposed Requirement That Plaintiff Must Present Evidence of An Alternative Design

1. Only Three States' Common Law Acceptance of the ALI's Proposal

The ALI's proposal makes proof of reasonable alternative design an absolute requirement for liability for all design defect cases. Without such proof, there is no liability. The co-reporters state that an overwhelming majority of jurisdictions support this rule. [[93]](#footnote-94)92 This contention, however, is incorrect. Index 1 indicates that in those states which apply strict liability under common law, only Alabama and Maine have clearly adopted an absolute requirement of the alternative design evidence. If Michigan, which has rejected application of strict liability for design defects, [[94]](#footnote-95)93 is included, then the total is three. Three states obviously do not represent an overwhelming majority.

This proposition does not, however, mean that academic inquiry into such a requirement should end. There may be strong policy reasons for accepting or rejecting a rule which requires evidence of reasonable alternative design for cases based upon design defect. There is, however, a major difference between arguing what the law is and what it should be. Arguments about what the law should be are premised upon one's own view of policy. The co-reporters have expressed strong views on policy, arguing that negligence rather than strict liability should govern design defects. [[95]](#footnote-96)94 This viewpoint may be scholarly and well argued, but it is not determinative **[\*537]** of what the law is. It would appear that the co-reporters' contention that the "overwhelming majority" of courts require evidence of alternative design is colored by their views of what the law should be.

Faced with insufficient numbers, i.e., only three states have clearly adopted an absolute requirement of alternative design evidence under the common law, the co-reporters turned to states that have anti-consumer statutes which impose this rule: Illinois, Louisiana, Mississippi, Ohio, and Texas. [[96]](#footnote-97)95 However, even this inclusive process results in only eight states which clearly apply the rule under statutory or common law. Eight jurisdictions do not constitute a majority. At this point the coreporters turned to states which, they believe, reflect law which should support the rule. [[97]](#footnote-98)96 Oregon's Wilson v. Piper Aircraft Corp. [[98]](#footnote-99)97 is one such key case. However, a fair reading of this decision makes it clear the court does not adopt the rule for all design defect cases. [[99]](#footnote-100)98 Even conceding, for the moment, that the Wilson decision supports the rule, the jurisdiction count totals nine. Again, nine states do not constitute a majority.

From this point forward, the co-reporters' interpretation of the law is strained. They reach out to find further support for the rule in lower state court and federal decisions. [[100]](#footnote-101)99 It appears that the citations used by the co-reporters, in many instances, do not stand for the propositions stated. [[101]](#footnote-102)100 It also appears that the co-reporters utilize a single premise for interpreting strict liability law, risk-utility. [[102]](#footnote-103)101 According to the co-reporters, a risk-utility balancing test requires consideration of a reasonable alternative design. This premise assumes that the reasonable **[\*538]** alternative design factor is the sine qua non of the risk-utility balancing test and also assumes that the plaintiff always has the burden of proving that factor in detail. The co-reporters appear to take the position that any state which applies a riskutility balancing test to design defects would align with or support the proposed rule that evidence of alternative design is an absolute requirement of establishing liability. As will be shown, the decisions do not support this proposition.

2. American Common Law's Lack of Support for the ALI's Proposal

Part III examines the courts that have applied the following types of tests to design defect cases: (1) Consumer Expectation Test, [[103]](#footnote-104)102 (2) Wade Test, [[104]](#footnote-105)103 (3) Barker Test, [[105]](#footnote-106)104 (4) Pure Risk-Utility Test, [[106]](#footnote-107)105 (5) Other Tests, [[107]](#footnote-108)106 and (6) Unknown. [[108]](#footnote-109)107

In the Appendix to this Article, Index 11 lists four states which have not adopted strict liability. North Carolina and Virginia have never adopted strict liability either by common law or statute. Delaware applies strict liability only in bailment-lease cases, and Michigan applies negligence.

In those states which have adopted strict liability and apply one or more of the five tests listed above, considerable variations exist which require discussion. a. Consumer Expectation Test

(1) Ordinary Consumer Expectation Test [[109]](#footnote-110)108

As originally formulated, section 402A set forth a consumer expectation test. [[110]](#footnote-111)109 This test applied strict liability and **[\*539]** avoided negligence by measuring what an "ordinary consumer" would believe about the qualities of the product in question. [[111]](#footnote-112)110 If an ordinary consumer found the product unacceptable (i.e., too dangerous), then liability would follow. The ordinary consumer expectation test avoided focusing on the defendant's conduct which made the product "too dangerous." [[112]](#footnote-113)111 Thus, negligence was avoided because proof of the defendant's unreasonable conduct was unnecessary.

A great number of jurisdictions follow this rule. There are ten states presently applying the ordinary consumer expectation test listed in Index 3 of the Appendix. It seems clear that those states which apply section 402A's ordinary consumer expectation test would not support the proposed reasonable alternative design requirement.

The "ordinary" consumer expectation test failed to work well when the ordinary consumer knew about the product danger or when the product danger was obvious because there could be no expectation of safety. [[113]](#footnote-114)112 This "patent danger rule," sometimes referred to as the "open and obvious danger" rule, barred liability under application of the consumer expectation test. [[114]](#footnote-115)113 From the consumer's viewpoint, it was incongruous for a strict liability test, designed to avoid negligence proof requirements, to bar recovery when a product's danger **[\*540]** was open and obvious. The open and obvious danger rule did not necessarily bar recovery in negligence, but it did in strict liability. [[115]](#footnote-116)114 The practical effect of this rule nullified strict liability's benefits for the consumer. Thus, in product cases involving open and obvious dangers, the consumers who relied on strict liability either argued for changes in the application of the ordinary consumer expectation test or for application of an altogether different test. [[116]](#footnote-117)115 Sometimes the consumer even argued for a return to negligence. [[117]](#footnote-118)116

(2) Modified Consumer Expectation Test [[118]](#footnote-119)117

The primary method used by the courts to modify the consumer expectation test is to add risk-utility balancing. [[119]](#footnote-120)118 By adding risk-utility factors to the "ordinary" consumer expectation test, the test is changed to one of a "reasonable" consumer expectation. The test asks how a "reasonable" consumer views the product's dangers. The reasonable consumer is supplied with information about the product's risks and utilities, then the product's qualities are evaluated. [[120]](#footnote-121)119 This modification still allows the focus to remain on the product rather than on conduct. [[121]](#footnote-122)120 If the outcome of this evaluation is that the risks out- **[\*541]** weigh the utilities, liability follows. Washington applies this type of test.

Risk-utility factors may, however, be applied in a variety of ways. If the "focus" of the test is on conduct rather than the product, strict liability is lost because conduct is the focus of negligence law. [[122]](#footnote-123)121 Thus, modification of the consumer expectation test can result in the application of strict liability or negligence, depending on how the risk-utility factors are applied. Alabama, for example, applies a restrictive negligence rule; whereas, Washington applies a liberal strict liability rule.

b. Wade Test [[123]](#footnote-124)122

The Wade Test is simple: it imputes knowledge of the product's danger to the manufacturer. The imputed-knowledge rule originated in Dean John Wade's famous 1973 article. [[124]](#footnote-125)123 Dean Wade's test simply states that after imputing knowledge of the product's danger to the manufacturer, the question of liability becomes--would a manufacturer, knowing the product dangers, be negligent for marketing the product. [[125]](#footnote-126)124

It appears that courts have construed Dean Wade's test to involve two steps. First, knowledge of the product's danger is imputed to the manufacturer. The scope of this imputed knowledge includes product dangers which exist at the time of trial. Second, the product risks are then balanced against its utilities to determine liability. [[126]](#footnote-127)125 Nine states apply the imputed-knowledge rule: Kentucky, Minnesota, Mississippi, New Jersey, New Mexico, New York, North Dakota, Oregon, and South Dakota. [[127]](#footnote-128)126

There are other states which impute knowledge of the **[\*542]** product's danger; however, they apply the rule in the context of other liability tests. For example, Arizona applies imputed knowledge in a modified Barker test. Index 12 of the Appendix provides a list of all the states which impute knowledge of the product's danger to the manufacturer under any test for liability.

The first part of the Wade Test has generated a great deal of controversy. [[128]](#footnote-129)127 The imputed-knowledge element is said to be the only distinction between strict liability and negligence since it operates to impute knowledge of the product's danger to the manufacturer, regardless of whether or not it was known or knowable. [[129]](#footnote-130)128 The famous Beshada v. Johns-Manville Products Corp. [[130]](#footnote-131)129 and Feldman v. Lederle Laboratories [[131]](#footnote-132)130 cases in New Jersey describe, to some extent, the controversy surrounding the imputed-knowledge rule. [[132]](#footnote-133)131 However, Professor Ellen Wertheimer's insightful article best explains the difference between strict liability and negligence when the imputedknowledge rule is applied. [[133]](#footnote-134)132 This distinction is based upon what knowledge is being imputed. In strict liability, knowledge of the product's danger is imputed to the manufacturer, while knowledge of the technology or ability to "cure" the danger is not. [[134]](#footnote-135)133

This formulation of strict liability poses no problem when a manufacturer actually knows or should know about the product's danger. [[135]](#footnote-136)134 In this circumstance, the theories of negligence and strict liability are said to coincide; [[136]](#footnote-137)135 however, even in this situation, strict liability continues to benefit the consumer because under strict liability, the plaintiff does not **[\*543]** bear the burden of proving the defendant's knowledge of the danger; whereas, under negligence, this burden of proof must be met. [[137]](#footnote-138)136

Nevertheless, the rule has come under heavy attack by those who oppose strict liability in favor of negligence as the exclusive measure of liability for dangerous products. [[138]](#footnote-139)137 Opposition to strict liability's imputed-knowledge rule is often grounded on "logic" and "fairness" arguments which focus on the unknowable danger circumstance as asking the manufacturer to do the impossible--"cure" the unknowable danger in the product. [[139]](#footnote-140)138 How can one "cure" the unknown? If it is impossible to have knowledge of a danger, it is also impossible to do anything about it. The co-reporters for the ALI align with this argument. [[140]](#footnote-141)139

However, as Professor Wertheimer so cogently argues, the major flaw of such a contention is two-fold. [[141]](#footnote-142)140 First, it confuses the difference between knowledge of the danger and knowledge of the "cure." [[142]](#footnote-143)141 Second, it views the issue of fairness from only one perspective--that of the manufacturer. When the consumer's plight is also considered in the balance, it becomes clear that it is equally impossible for the consumer to be aware of an unknowable danger and guard against that danger. [[143]](#footnote-144)142 In other words, what is "bad" for the goose is also "bad" for the gander. When a product danger is unknowable, the manufacturer and consumer are in exactly equal positions. Any "fairness" question must be answered only after a balanced inquiry of the impact this circumstance has on both "innocent" parties. [[144]](#footnote-145)143 In the unknowable danger situation, "fairness" and "logic," determined only from the manufacturer's **[\*544]** viewpoint, result in an "unfair" and "illogical" answer which mandates that the consumer will always lose. [[145]](#footnote-146)144 On the other hand, should the answer come only from viewing the impact from the consumer's perspective, the manufacturer will always lose. Thus, an equal balancing between the "innocent" parties requires the courts to make a policy determination of which party should bear the risk of loss. [[146]](#footnote-147)145

Although Professor Wertheimer's article explores the imputed-knowledge rule in detail, it does not discuss the second step of the Wade Test which requires risk-utility balancing. How courts apply this step may also make the difference in determining whether the courts are applying, or intending to apply, strict liability or negligence. As previously discussed, courts vary the application of risk-utility balancing. If the balancing-process focus is on conduct, then negligence controls; however, if the focus is on the product's condition, then strict liability controls.

c. Barker Test

(1) Pure Barker Test [[147]](#footnote-148)146

In Barker v. Lull Engineering Co., [[148]](#footnote-149)147 the California Supreme Court established a two-step standard in an attempt to retain strict liability for design defects. [[149]](#footnote-150)148 The first step applies a consumer expectation test, while the second step applies a risk-utility balancing test. [[150]](#footnote-151)149 The second step also shifts the burden of proving the product's risk and utility to the defendant. [[151]](#footnote-152)150 The two tests are applied as alternatives. [[152]](#footnote-153)151 Under either test, courts have rejected making proof of a reasonable **[\*545]** alternative design an absolute requirement. Four states have adopted a pure form of the Barker test: Alaska, California, Hawaii, and Illinois. [[153]](#footnote-154)152

(2) Modified Barker Test [[154]](#footnote-155)153

Four states apply the Barker test but modify the second part. Under Arizona's and Ohio's common law, the burden of proof is not shifted to the defendant in the second part of the test. [[155]](#footnote-156)154 It is unclear whether Maryland and Massachusetts shift the burden of proof in balancing the risks and utilities in the second step. [[156]](#footnote-157)155 However, Arizona and Massachusetts impute the knowledge of the product dangers to the defendant. [[157]](#footnote-158)156

It appears unlikely that these four states would require proof of a reasonable alternative design to meet their test. A fair reading of decisions from these states affirms the fact that they have not made such proof an absolute requirement of design defect liability.

d. Pure Risk-Utility Test [[158]](#footnote-159)157

Seven states apply a pure risk-utility test: Colorado, Florida, Georgia, Maine, New Hampshire, Texas, and West Virginia. [[159]](#footnote-160)158 The pure test considers only risk-utility factors. It appears that these states would be the most inclined to adopt the ALI proposal. However, to date, only Maine has clearly done so through common law. [[160]](#footnote-161)159 Texas is now controlled by a statute imposing the ALI requirement. [[161]](#footnote-162)160 This situation likely **[\*546]** forecloses any common law answer to the question. Whether the remaining five states will require proof of a reasonable alternative design as the sole standard for determining design defects depends upon how they apply risk-utility. If the focus is on conduct, then negligence is applied, resulting in a strong possibility that the jurisdiction would follow the ALI proposal. If, however, the jurisdiction focuses on the product's condition during the risk-utility balancing process, then strict liability controls, and the common law is much less likely to follow the ALI proposal.

e. Others [[162]](#footnote-163)161

Four states apply strict liability rules which do not neatly fit within the established test categories: Louisiana, Missouri, Nevada, and Pennsylvania. [[163]](#footnote-164)162 All four states, however, have formulated strong strict liability rules. Louisiana's common law applied one of the most liberal rules of strict liability under its "unreasonably dangerous per se" test. [[164]](#footnote-165)163 Pennsylvania law is grounded on strong strict liability concepts, and the recent decision in Azzarello v. Black Brothers Co. [[165]](#footnote-166)164 shows no weakening of those concepts. [[166]](#footnote-167)165 Thus, none of these states appear likely to adopt the ALI's negligence based rule on alternative design.

The co-reporters attempt to bolster their cause is especially strained in their analysis of Pennsylvania's law. They claim Pennsylvania law supports the ALI's proposed rule. [[167]](#footnote-168)166 However, the Pennsylvania Supreme Court's decisions in Berkebile v. Brantly Helicopter Corp. [[168]](#footnote-169)167 and Azzarello clearly demonstrate **[\*547]** a strong acceptance of strict liability. [[169]](#footnote-170)168 The co-reporters justified their contention by citing to federal and intermediate appellate court decisions on Pennsylvania law. Yet, even these cases do not clearly support their contention. [[170]](#footnote-171)169 It appears that the mere mention of the term risk-utility in a decision may have been interpreted as aligning with an absolute requirement of proof of reasonable alternative design. Closer scrutiny, however, proves otherwise.

f. Unknown [[171]](#footnote-172)170

It is unclear what test is used to measure design defects in District of Columbia, Montana, and Wyoming. [[172]](#footnote-173)171 It is clear, however, that none of these jurisdictions have adopted the ALI rule for design defects.

D. Risk-Utility Balancing

Several problems arise in the risk-utility balancing process that alters implementation of strict liability. The term "riskutility" has been used in a variety of ways. Sometimes the term is used as a substitute for negligence while other times it is used to describe what a court is doing. The following provides a brief discussion of a few risk-utility issues raised by the ALI report on products liability.

1. The "Focus Rule" and Risk-Utility

Strict liability has been described as "focusing" on the condition of the product rather than on the conduct of the parties. [[173]](#footnote-174)172 This "focus rule" provides an excellent description of **[\*548]** how strict liability is applied by focusing attention on the product's condition, not on how the manufacturer created the condition.

The focus rule is applied in two, separate contexts. Under the imputed-knowledge rule, the product's danger is imputed to the manufacturer. In this case, the "focus" is then directed to the product's danger as it actually exists, regardless of whether the danger is known or knowable. The second context for the focus rule involves risk-utility. Under the risk-utility analysis, various factors are balanced to determine whether a product is safe or dangerous. In the risk-utility balancing process, the "focus" is on the product condition rather than the conduct which produced the condition.

Courts applying strict liability adhere to this focus rule regardless of the context in which it is used. On the other hand, courts which place the burden on the plaintiff to prove the defendant's unreasonable conduct in the risk-utility analysis are applying negligence.

2. Risk-Utility--A Process Courts' Use to Determine Liability and Not to Determine Who Has the Burden of Proof

Risk-utility has its origins in negligence law. [[174]](#footnote-175)173 It is an economic term used to describe what courts do in assessing liability. [[175]](#footnote-176)174 This economic term views the courts' function as the forum for using a balancing process which considers all available factors. [[176]](#footnote-177)175 For purposes of the economic view of this process, the origin of the factors is irrelevant. Also irrelevant is **[\*549]** how or why the court admitted the factors into evidence. [[177]](#footnote-178)176 From the economic perspective, the critical aspect of the riskutility balancing process is the proper evaluation of the evidence. [[178]](#footnote-179)177 Thus, the term "risk-utility" should not be used or understood to automatically determine legal burden of proof issues. [[179]](#footnote-180)178 Legal policy, not economics, determines the litigants' burden of proof. [[180]](#footnote-181)179

3. The ALI's Alternative Design Requirement--A Destruction of the Risk-Utility Balancing Process

Under negligence law, the plaintiff must prove the defendant's unreasonable conduct. Determination of this issue involves balancing the risks involved in such conduct against its utility. In a products case based upon negligence, determination of the negligence issue involves consideration of various factors; rarely, if ever, does a single factor dominate the balancing process.

The same should be true for strict liability. No single factor should be considered to the exclusion of all others during the balancing process. [[181]](#footnote-182)180 In many instances, a product may be unacceptable or too dangerous regardless of whether or not an alternative design is available. For example, the risk or dangers may so greatly outweigh the product's utility that a plaintiff should not have to prove an alternative design. [[182]](#footnote-183)181 Furthermore, even where the product's risks and utility are of, more or less, equal weight, proof of an alternative design should not always be required. Under such circumstances, plaintiffs should be allowed to present proof of readily available substitute products which afford the same or greater utility and the same or less risks than the product at issue. [[183]](#footnote-184)182 Furthermore, in those **[\*550]** cases where representations are made about the product's qualities, the plaintiff should not be required to present proof of an alternative design. [[184]](#footnote-185)183 Nevertheless, the ALI proposal destroys the multi-factor balancing test of liability. Instead, the proposed rule supplants the multi-factors with a single factor for determining the liability question--the alternative design. Although the co-reporters' alternative design requirements do not quite require proof that the alternative design is on the market or proof of a "prototype" alternative design, it does require proof far beyond that demanded in negligence. Because it is doubtful that the proposed rule would be accepted as a negligence standard, it should never be accepted as a strict liability standard.

E. Application of Risk-Utility Does Not Result in a Majority Consensus for the ALI Rule Under Section 2(b)

1. Risk-Utility

The co-reporters' conclusion that an overwhelming majority of jurisdictions support the ALI's reasonable alternative design requirement appears to result from their view of product liability law. They appear to view application of the risk-utility test as an application of negligence law which, in turn, would require proof of reasonable alternative design.

Index 13 of the Appendix shows that thirty-two states use some form of risk-utility examination in the test for design liability. At first glance, it would appear the co-reporters are correct in their assumptions. As Professor Madden, a self-professed "bean counter," stated, twenty-eight states clearly supported the adoption of section 2(b). [[185]](#footnote-186)184

Viewing risk-utility as the sine qua non of the reasonable alternative design requirement would result in a majority rule that would support section 2(b). However, even a cursory examination of the common law test for design defects reveals **[\*551]** this so called consensus or majority rule is nothing but smoke which masks the true nature of the accepted rule for design defect. If all the common law tests for design defects, as explained in Part III, are counted according to frequency of use, the following numbers result:

[SEE TABLE IN ORIGINAL]

**[\*552]**

The consumer expectation test involves two separate rules. Under the ordinary consumer expectation test, risk-utility is not applied; thus, those ten states which apply the ordinary consumer expectation test should not be counted as supporting the so-called majority rule espoused by the ALI. Alabama is the only state which has clearly accepted the ALI's position under its modified consumer expectation test. The five remaining states which use risk-utility factors to define consumer expectations do not support section 2(b).

The four states which apply the pure Barker test cannot support the ALI's position. Although these states apply riskutility factors in the second step of the test, this fact alone does not support the so called majority rule. The same is true for the four states which apply a modified Barker test, since any fair analysis of the cases in these states reveals the decisions do not support section 2(b) even though they apply a form of risk-utility in their test of design defect.

All nine states using the Wade test impute knowledge of the danger to the defendant, then apply risk-utility factors. None of these states, including Oregon, have accepted all the harsh provisions set forth by the ALI.

The seven states which apply a pure risk-utility test would appear to be the best candidates to support the ALI rule since many academics believe risk-utility is equivalent to negligence. However, only Maine has clearly accepted the ALI's absolute requirement of proof of a reasonable alternative design. Even Georgia, which recently changed from apparently applying an ordinary consumer expectation test to applying a risk-utility test, has not accepted all the provisions espoused by the ALI. Again, a fair reading of the common law in six of these seven states reveals that they have not joined the ALI's mythical majority rule.

The common law of four states categorized as "other" clearly do not support section 2(b) despite the tortious efforts of the co-reporters to characterize the law otherwise. Four states do not apply strict liability for design defects. Of these four states, Michigan appears to be the central focus for the co-reporters rejection of strict liability. Three jurisdictions--the **[\*553]** District of Columbia, Montana, and Wyoming--do not appear to have fully developed their common law, and their rules for design defects are unclear. However, none of these states appear to have adopted the ALI's regressive test for design defects.

Close examination of the common law used in all forms of risk-utility balancing in the tests for design defects as outlined above inevitably leads to the conclusion that a majority position or consensus does not exist. Even assuming some form of risk-utility analysis is used in thirty-two jurisdictions, there are only three states which have accepted the co-reporters extremely narrow view as set forth in section 2(b).

2. The True Consensus--Strict Liability Without Proof of Negligence

One of the primary problems with the ALI approach is that it unfairly attempts to impose a single, all-encompassing rule for design defects. It appears the co-reporters dismiss strict liability rules, at least in part, because courts have taken multiple approaches to it. As the above chart indicates, the common law courts have used at least six or seven, if not more, tests for strict liability design defect. The mere fact that the common law courts use a variety of tests in order to achieve strict liability should not be interpreted to mean there is no majority rule or consensus about design liability. If all the various rules are viewed as a whole, it becomes clear that the vast majority (forty-four states) of the common law courts accept some form of strict liability.

If the common law is viewed as a whole, the overwhelming majority of states have adopted strict liability. When a common law court chooses to adopt strict liability, it has several viable alternative tests to choose from to effect strict liability. Even after adopting one strict liability test, the common law courts are free to move to alternative tests. For example, courts which have adopted strict liability and apply the ordinary consumer expectations test may choose to apply an equally attractive alternative strict liability test when confronted with an open and obvious danger. New Mexico provides an excellent **[\*554]** example of a court moving from one strict liability test to another. The co-reporters' protestations that the consumer expectation test is mean spirited is true in some instances. What is not true, however, is the co-reporters' position that courts confronted with this mean-spirited aspect of the test should apply an even meaner-spirited law under section 2(b).

The ALI has failed to recognize the clear common law majority rule as one of strict liability. The ALI could establish a strict liability rule or a rule which provides several alternative forms of strict liability. However, as long as the governing body accepts the false premise that the majority rule is one of narrowly defined negligence under section 2(b), there is no hope of retaining strict liability in the Restatement.

3. The Role of Reasonable Alternative Design in Strict Liability

The co-reporters' approach to design defects in the new Restatement appears to stem from the exaggeration of a practical strategy used in many design cases. In many design defect cases, a plaintiff attorney may undertake the burden of proving what a manufacturer could have done to make the product safer. For example, in guarding cases, a plaintiff's counsel often presents evidence of an alternative to the existing or absent guard. The evidence is usually presented through expert testimony or through presentation of guards on other competing products. This strategy is logical and sometimes provides a rather efficient and easy method for convincing the trier of fact that the injury producing product was defective or unreasonably dangerous. However, the elevation of such a common practice to a rule of law which places extreme burdens of proof on all plaintiffs to show the marketing and feasibility of the alternative design, as is done in section 2(b), is completely unjustified and adverse to the common law.

Alternative design evidence has a definite place in strict liability cases. In particular cases, alternative design evidence takes a prominent role. Nevertheless, there are many instances when a plaintiff's attorney cannot prove, or chooses not to prove, an alternative design. For example, a case may be pre- **[\*555]** mised on the manufacturer's representations of the product. In other instances, the dangers in the existing product may be so great that it is unnecessary to show an alternative design. In such instances, the plaintiff should be allowed to show substitute products or use a modified consumer expectation test. As in all risk-utility balancing methods, even under negligence law, the various mix of factors ebb and flow such that one or more of the factors will rise to prominence, depending on the facts of a particular case.

The difference between strict liability and negligence may not be as stark as black and white. A good measure of whether a court accepts a form of strict liability is reflected by the type of burden of proof placed on a plaintiff. The basic tenant of section 402A is stated under subsection 2(b): "The rule stated in Subsection (1) applies although the seller has exercised all possible care in the preparation and sale of his product." [[186]](#footnote-187)185 Several courts have attempted to achieve strict liability using a variety of methods. At one end of the spectrum, courts shift the burden of proof to the defendant or disassociate design defect from the plaintiff's burden of proof by an imputedknowledge rule or a consumer expectations test. At the other extreme, courts apply a pure risk-utility analysis. Even application of a pure risk-utility analysis, however, does not preclude application of a some form of strict liability. Between the two extremes, the law moves into the gray area between negligence and strict liability. When a court allows the plaintiff to suggest an alternative design rather than present full blown proofs of feasibility, marketing and costs, the court is applying a rule that may be described as either expanded negligence or quasistrict liability. [[187]](#footnote-188)186 Academics may disagree arguing that appli- **[\*556]** cation of any risk-utility balancing test is application of pure negligence law; however, the burden of proof issue forms the gray area between negligence and strict liability. Under section 2(b) of the Restatement (Third) for Products Liability, the ALI has colored the gray to such an extent that it is blacker than a negligence rule.

F. Consumer Expectation Test as a Part of Strict Liability

Many states apply the consumer expectation test as the exclusive measure of determining liability for design defects. The states that apply some form of the consumer expectations test are listed in Index 2. This test is applied in the following ways: (1) Consumer Expectation Test (Index 3), (2) Modified Consumer Expectation Test (Index 4), (3) Barker Test (Index 6), and (4) Modified Barker Test (Index 7).

Index 2 reveals that twenty-five states apply some form of a consumer expectation test to design defect cases. Six of these states, listed in Index 4, apply a modified consumer expectation test which involves the use of risk-utility factors. Elimination of these six states leaves a total of nineteen jurisdictions which apply an ordinary consumer expectation test to design defect cases as an exclusive or independent and alternative measure of strict liability design defects.

It is clear that when the consumer expectation test is used to measure strict liability design defect, the plaintiff is not required to present evidence of a reasonable alternative design. Thus, those jurisdictions which utilize the ordinary consumer expectation test cannot be used to support the ALI rule which requires such proof as an absolute in all design defect cases.

The co-reporters' method of establishing a so-called majority rule through risk-utility may be easily criticized by comparing a similar approach using the consumer expectation test. The following analysis is not intended to promote the consumer expectation test as the sole test for design defects, nor is it an attempt to establish a foundation for a reasoned debate about strict liability. The consumer expectation test, as a form of contractual analysis of strict liability, must be recognized as **[\*557]** having several limitations.

Nineteen out of a possible fifty-one jurisdictions does not amount to a majority rule. Nevertheless, this number does represent a sizable minority. The number of states which apply the consumer expectation test without resorting to risk-utility; however, takes on much greater emphasis when compared with the number of states which have clearly adopted the ALI rule under a risk-utility analysis. This comparison results in nineteen to three, making it clear that the strict liability consumer expectations test is utilized over six times more often than the ALI rule.

This numerical comparison of jurisdictions which apply the ALI risk-utility test and the consumer expectation test is not intended to turn into an argument about which is the better test for design defect, but rather the fact that courts which do apply the consumer expectation test use it as a method for applying strict liability rather than negligence. The co-reporters have apparently missed this point. They argue that because the consumer expectation test has "warts," it should be replaced with negligence law. This position fails to recognize that the courts want to apply strict liability rather than negligence and seek the means to do so.

Support for the proposed rule applying negligence and riskutility to design defects and requiring proof of a reasonable alternative design is not found in the decisional law. Too many jurisdictions apply a consumer expectation test, which negates any support for an absolute evidentiary requirement with the burden of proof falling on the plaintiff. One may argue that the courts which use the consumer expectation test are wrong or that risk-utility is a better test. Nevertheless, the fact is that the courts continue to use the consumer expectation test, "warts" and all, as an independent measure of design defects in an attempt to apply strict liability rather than negligence. The ALI rule eliminates the consumer expectation test, replacing it instead with a negligence standard. However, courts appear to be seeking to replace a sometimes inadequate test with an adequate one that applies strict liability rather than negligence. **[\*558]**

G. Conclusion

Under the common law, courts have established a variety of ways to implement strict liability. By definition, strict liability rejects placing any burden on the plaintiff to prove negligence. Almost all jurisdictions accept and attempt to implement this fundamental policy of strict liability. The ALI appears to be in the process of adopting a rule for design defects which runs counter to American common law. The foundation for the ALI's proposed rule appears to lean so far along a slanted view of what courts have done, and are doing, in the field of strict liability design defect that the structure is about to crack. Support for this structure of the law cannot be based upon a consensus of three states which have accepted the ALI's proposal. Furthermore, the co-reporters' narrow view of existing law only creates support in the shadows, the strength of which melts away in the light of close scrutiny.

In the mid-1980s, the ALI changed from its prior, pro-consumer position, as reflected in section 402A, to a pro-manufacturer position. The basis for this change may be a reflection of its membership. Nevertheless, this change in position is not reflected in the common law. Courts still attempt to provide a measure of balance in their decisions by implementing some form of strict products liability. Under the decisional common law, courts have not expressed a desire to return to the nineteenth century immunities provided by negligence law. The ALI's new proposal for design defects appears to be an attempt to influence courts to do just that--return to negligence or beyond.

This Article reviews only one proposal among hundreds which are being made by the ALI for products liability and other areas of tort law. The other proposals seem to follow the same path as the proposal for reasonable alternative design. All the proposals need to be closely scrutinized. Until this is done, the proposals as they stand call into question the continued vitality of the Restatement as a source of reference for courts, attorneys, and scholars. This is unfortunate because the Institute has tremendous potential for assisting the bench, the bar, and the public to assess the structure and nature of American law. **[\*559]**

III. A Survey of the States

This part examines each jurisdiction's law on strict liability design defect. The jurisdictions are arranged in alphabetical order for easy reference. Each state's law on the topic is divided into the following subsections: (1) common law, (2) statutory law, and (3) pattern jury instructions.

Under the common law, the examination in each state begins with the first case which adopted strict liability, regardless of whether it involved a design defect. Thereafter, the state's key cases involving design defect are examined in chronological order, ending with the most recent decision.

Examination of state statutes is primarily limited to assessment of whether the statute changes the strict liability common law for design defect, with some cursory commentary on the whole statutory scheme.

Finally, a cursory examination of the state's pattern jury instructions is undertaken to determine whether they conform with the common law and statutory strict liability design defect requirements.

A. Alabama

1. Common Law

In 1976, Alabama adopted strict liability for product injuries in Casrell v. Altec Industries [[188]](#footnote-189)187 and Atkins v. American Motors Corp. [[189]](#footnote-190)188 The Supreme Court of Alabama stated that both cases should be read together for a full understanding of the court's holdings. [[190]](#footnote-191)189 The court refused to adopt what it called the "no fault" concepts of section 402A but instead retained the tort fault concept without applying negligence proofs for liability. [[191]](#footnote-192)190 In both Casrell and Atkins, the consumer alleged product design defects. In explaining its fault-based tort, **[\*560]** the Supreme Court of Alabama stated that manufacturer's liability was based upon a negligence per se rationale:

We do not intend to impose a no-fault concept. On the other hand, we adhere to the tort concept of fault. Under the "extended manufacturer's liability doctrine," we opine that a manufacturer, or supplier, or seller, who markets a product not reasonably safe when applied to its intended use in the usual and customary manner, constitutes negligence as a matter of law. As Dean Wade suggests, we hold scienter is supplied as a matter of law, and there is no need to prove its existence as a matter of fact. In other words, the fault or negligence of the defendant is that he has conducted himself in a negligent manner by placing a product on the market causing personal injury or property damage, when used to its intended purpose. [[192]](#footnote-193)191

Thus, the court focused the question of liability on the condition of the product rather than on the conduct of the defendant manufacturer. [[193]](#footnote-194)192 The consumer did not have to prove that the manufacturer had knowledge of the defect because it was supplied as a matter of law. [[194]](#footnote-195)193 **[\*561]**

The basis of the manufacturer's liability was to overcome two obstacles to a consumer's recovery: (1) the intricacies of the law of sales (privity, disclaimer, and notice) and (2) the difficulties of proving standards of care and negligence within the complex manufacturing system. [[195]](#footnote-196)194 Thus, Alabama appeared to have adopted a "true" form of strict liability under its Alabama Extended Manufacturers Liability Doctrine (AEMLD) for all types of defects, including those for design. [[196]](#footnote-197)195 The court defined a defect as "that which renders a product 'unreasonably dangerous,' i.e., not fit for its intended purpose" [[197]](#footnote-198)196 and defined both defect and unreasonable danger by the consumer expectation test found within section 402A. [[198]](#footnote-199)197 In addition, unreasonable danger could be defined by a seller oriented standard of what a reasonable man would not sell if he knew of the risks involved (imputed-knowledge test). [[199]](#footnote-200)198

All of the language of the Supreme Court of Alabama seemed to refer to a pure form of strict liability. However, the court stated that it objected to section 402A's "no fault" concepts on two grounds: (1) no-fault precepts which impose liability on all sellers without regard to culpability causally related in fact to the defective condition of the product and (2) the abolition of the distinction between the remedies of tort and contract. [[200]](#footnote-201)199 The court attempted to explain these differences when setting forth the proof requirements for plaintiff's prima facie cases as well as the defenses available in an AEMLD action. According to the Supreme Court of Alabama, the plaintiff's proof was as follows: **[\*562]**

Developing case law in accord with the announced public policy of the State has always been conceded to be a proper role for this Court. Proving want of due care in products liability cases involving complicated manufacturing processes can be almost impossible; the plaintiff should not be forced to prove more than that the defendants placed on the market a product not reasonably safe when used for its intended purpose and that, as a proximate result, injury ensued. [[201]](#footnote-202)200

The defenses under AEMLD were to be divided into (1) general denials and (2) affirmative defenses. In the general denials, the defendant could counter the plaintiff's prima facie case. For example, under a general denial the defendant could provide evidence tending to prove the defect occurred while in possession or control of the distributor or retailer. To assert an affirmative defense, the defendant could show (1) he did not contribute to the defective condition, had no knowledge of it, and had no opportunity to inspect the product (i.e., there was no causal relation in fact between the defendant's activities and the product defect); (2) plaintiff's misuse or material alteration; [[202]](#footnote-203)201 or (3) assumption of risk. [[203]](#footnote-204)202

At first glance, the affirmative defense under number (1) above appears to be in direct conflict with the imputed-knowledge concept the court adopted for its version of strict liability. But, such a conflict does not exist when it is within the exceptions the court has recognized regarding the so-called "no fault" concepts of section 402 concerning all sellers. It is quite apparent that the Supreme Court of Alabama wanted strict **[\*563]** liability to apply only to manufacturers--not distributors and retailers or other parties in the stream of commerce. [[204]](#footnote-205)203 Such an affirmative defense could be a "causal relation" concept which allows all but the manufacturer to escape liability. In 1979, the Alabama legislature passed statutes which limited consumer recovery by implementing a statute of limitations and a ten-year statute of repose and by curtailing the collateral source rule. [[205]](#footnote-206)204

In 1981, the Supreme Court of Alabama reversed a verdict in favor of the plaintiff in a tire blowout case where the plaintiff presented no evidence of defect other than the accident itself. [[206]](#footnote-207)205 In Sears, Roebuck & Co. v. Haven Hills Farm, Inc., the court made it quite clear that expert testimony was helpful but not necessary in order to prove a defect. [[207]](#footnote-208)206

In General Motors v. Edwards, [[208]](#footnote-209)207 a second collision or enhanced injury case, the Supreme Court of Alabama recognized the uniqueness of the problems associated with such cases. [[209]](#footnote-210)208 The court refused to follow either of the leading cases, [[210]](#footnote-211)209 rather the court found a middle course which modified the Atkins and Casrell rule for a plaintiff's prima facie case and required the plaintiff to prove some feasible alternative design without proving the exact amount of enhanced injuries when such injuries are indivisible. [[211]](#footnote-212)210 At that time, Alabama law could be understood to have a separate rule for enhanced injury cases which naturally involve alternative designs and resulting proofs from "regular" design defect cases which impose no such proof requirements. **[\*564]**

But, in 1990, the United States Court of Appeals for the Eleventh Circuit decided Elliott v. Brunswick Corp. [[212]](#footnote-213)211 In Elliott, a 14-year-old jumped from a pier and was severely injured by a boat propeller. The injured child brought an action against the designer/manufacturer of the boat's drive mechanism, alleging that a propeller guard would have prevented the injuries. After two trials, a jury found in favor of the plaintiff. [[213]](#footnote-214)212 On appeal, the Eleventh Circuit reversed on the basis that the plaintiff had failed to prove a defect in the propeller. [[214]](#footnote-215)213 According to Elliott, the unguarded propeller was not dangerous beyond a normal consumer's expectations. In other words, under the consumer expectation test, there were no expectations of safety because the dangers were known or apparent to a normal consumer. [[215]](#footnote-216)214 The plaintiff presented evidence that a guard could have been placed around the propeller. [[216]](#footnote-217)215 The Elliott court said this evidence was not sufficient to prove a defect because such a guard was only theoretically possible. [[217]](#footnote-218)216 According to the Elliott court, the suggested alternative design of the guard was not practical and would develop other dangers and affect the operation of the boat. [[218]](#footnote-219)217 The Elliott court cited Edwards as requiring that the plaintiff prove an available and feasible alternative design in design defect cases. [[219]](#footnote-220)218

Remarkably, very similar facts to those presented in Elliott were later presented to the Supreme Court of Alabama in Beech Through Beech v. Outboard Marine Corp. [[220]](#footnote-221)219 The Beech court agreed with the Eleventh Circuit in Elliott. The court found that the enhanced injury rule of Edwards applied to the allegation that a propeller lacking a theoretically feasible **[\*565]** guard was not defective. [[221]](#footnote-222)220 The Beech court said that the plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time the product was manufactured. [[222]](#footnote-223)221

At this point in time, it is clear that from the consumer's viewpoint, hard cases make bad law. The requirement that the plaintiff prove an alternative design that is safer and practical is a heavy burden. Before Elliott and Beech, such a burden could arguably be limited to second collision or enhanced injury cases, which by their nature usually involve such allegations. After Elliott and Beech, the burden is much more difficult because these cases invoked a guarding issue.

In later cases, the Supreme Court of Alabama reaffirmed its holding that the plaintiff must prove an alternative feasible design. In Bean v. BIC Corp., [[223]](#footnote-224)222 the defendant conceded feasibility of the design of child-proof lighters, but argued it had no duty to design child-proof lighters intended to be used by adults. [[224]](#footnote-225)223 Discussing the issue of the duty, [[225]](#footnote-226)224 the Bean court stated that the scope of a manufacturer's duty depends upon two factors (1) the foreseeability of the danger and (2) the feasibility of an alternative design that averts the danger. [[226]](#footnote-227)225 The Supreme Court of Alabama stated this proposition on three **[\*566]** separate occasions on the same page, but cited no prior authority for the statement. [[227]](#footnote-228)226

In Kelly v. M. Trigg Enterprises, [[228]](#footnote-229)227 the court repeated the two step requirement of duty in a design case citing Bean as authority. [[229]](#footnote-230)228 Both Bean and Kelly could be construed as discussions of the duty element of negligence and thus not be applicable to AEMLD actions. However, in late 1993, the Supreme Court of Alabama decided Yarbrough v. Sears, Roebuck & Co. [[230]](#footnote-231)229 In Yarbrough, the injured consumer alleged that a kerosene heater should have contained a different design to avoid misfueling. [[231]](#footnote-232)230 In discussing the requirements under strict liability per AEMLD, the Yarbrough court cited both Edwards and Beech for the proposition that the plaintiff must prove the existence of a safer, feasible, available alternative design. [[232]](#footnote-233)231

The requirement that the plaintiff prove a feasible alternative design was further supported in the 1995 decision of Graham v. Sprout-Waldron & Co. [[233]](#footnote-234)232 The Graham case did not involve an issue of enhanced injury, but it did involve an alleged defective design resulting in hazards which were fully known by everyone involved. [[234]](#footnote-235)233 The Graham court referred to its 1988 decision in Hawkins v. Montgomery Industries Interna- **[\*567]** tional, [[235]](#footnote-236)234 which appeared to involve very similar factual issues. The Hawkins court decided against the plaintiff based upon the fact that the product defect was fully contemplated by everyone; thus, the plaintiff failed to prove a defect under the consumer expectation test. [[236]](#footnote-237)235 However, the plaintiff in the Graham case asserted that the Hawkins case was distinguishable because it did not address the issue of feasible alternative design. [[237]](#footnote-238)236 Thus, the Graham court was confronted with the issue of whether a design defect claim survives when the consumer expectation test cannot be met and the plaintiff is attempting to establish liability by showing a feasible alternative design.

The Graham court, without citation or expression of any rules, appeared to accept the plaintiff's proposition that proof of a feasible alternative design would support design liability when the plaintiff cannot meet the consumer expectation test. [[238]](#footnote-239)237 Nevertheless, the Graham court affirmed summary judgment against the plaintiff for lack of sufficient evidence to support the existence of a genuine issue of material fact. [[239]](#footnote-240)238 What remains unclear is whether Alabama will continue to use a consumer expectation test to determine design defect liability since the Graham court seems to have examined liability based upon both rules in the alternative. [[240]](#footnote-241)239

The Supreme Court of Alabama seems to have developed extremely rigid proof requirements for consumers in design defect cases. These proof requirements seem to contradict the original basis for liability as described in both Casrell and Atkins in which the court stated that its adoption of strict lia- **[\*568]** bility under AEMLD was to overcome the obstacles to the consumers' recovery concerning the difficulties of proving standards of care and negligence within the complex manufacturing system. The requirements that the consumer prove a feasible, practical, safer alternative design at the time a product is manufactured ignores such difficulties and also ignores the imputedknowledge rule as espoused by the Supreme Court of Alabama. [[241]](#footnote-242)240 In effect, the Supreme Court of Alabama has changed a strict liability rule into a requirement that custom and usage be the proof requirements for design defects. [[242]](#footnote-243)241

2. Statutes

In 1979, the Alabama legislature passed statutes which limited consumer recovery by imposing a statute of limitations and a ten-year statute of repose [[243]](#footnote-244)242 and by modifying the collateral source rule. [[244]](#footnote-245)243 Other statutes placed limitations on consumer recovery of punitive damages [[245]](#footnote-246)244 and for blood products. [[246]](#footnote-247)245 However, the statutes did not affect the common law relating to defect requirement.

3. Pattern Jury Instructions

The Alabama Pattern Jury Instructions still indicate only general duty instructions for negligence and design defect. The defect definition follows the law as originally formulated in Casrell and Atkins. No apparent requirements are indicated for design defects; however, a separate instruction is set forth for crashworthiness. [[247]](#footnote-248)246 **[\*569]**

B. Alaska

1. Common Law

Alaska adopted strict liability in Clary v. Fifth Avenue Chrysler Center. [[248]](#footnote-249)247 In Clary, the consumer alleged both design and manufacturing defects in her automobile which allowed carbon monoxide to enter the car as it idled with the heater turned on. The Supreme Court of Alaska did not discuss the elements of defect, but merely adopted strict liability as expressed in Greenman v. Yuba Power Products [[249]](#footnote-250)248 rather than the Restatement version. [[250]](#footnote-251)249

The Supreme Court of Alaska set forth a detailed description of this test for design defects in Caterpillar Tractor Co. v. Beck (Beck I). [[251]](#footnote-252)250 In Beck I, the operator of a front-end loader was killed when it rolled over. [[252]](#footnote-253)251 The operator's widow brought an action and recovered a jury verdict. [[253]](#footnote-254)252 Caterpillar appealed on the basis that the trial court failed to instruct the jury concerning the definition of design defect. [[254]](#footnote-255)253 The Beck I court agreed with defendant and reversed. [[255]](#footnote-256)254 In setting forth Alaska's standard for design defect, the Beck I court adopted the two-pronged test of Barker v. Lull Engineering Co., [[256]](#footnote-257)255 stating that

"A trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves **[\*570]** that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design." [[257]](#footnote-258)256

The alleged defect in Beck I was the lack of roll-over protection (ROP) on the front-end loader. Caterpillar argued (1) that ROPs were not readily available on the market; (2) that ROPs at the time Caterpillar designed and marketed the frontend loader were too expensive and would cause other safety problems to the user; (3) that the front-end loader was a multipurpose product and therefore the end user should make the design choice of adding ROPs; and (4) that Caterpillar had made a deliberate decision based upon its technical knowledge not to include ROPs in its design. [[258]](#footnote-259)257 Caterpillar urged the Beck I court to adopt a risk-utility basis for design defects. [[259]](#footnote-260)258

In adopting the Barker test, the Beck I court reviewed all prior design defect tests and the policy basis for strict liability. [[260]](#footnote-261)259 Beck I recognized the heavy burden that a risk-utility test would place upon the consumer, but also recognized that merely applying a causation test (mere proof that the product caused the injury) was tantamount to absolute liability. [[261]](#footnote-262)260 Although it approved the multiple-factor, risk-utility analysis of both Deans John Wade and Page Keeton, the Beck I court disapproved of the negligence language and the evaluation of such factors by a court prior to a jury determination. [[262]](#footnote-263)261 The Beck I court examined the Wade/Keeton imputed-knowledge rule (strict liability consists of imputing knowledge of the defect to the manufacturer then asking whether the manufacturer was reasonable in marketing the product) as inadequate because this rule was too close to negligence. [[263]](#footnote-264)262 The Beck I court stressed that the consumer should not be laden with too heavy **[\*571]** a burden of proof as required in any of the risk-utility analyses previously used by other tests of strict liability. [[264]](#footnote-265)263

In addition, the Beck I court said the consumer expectation test had several inadequacies including a finding of no liability when a product's danger is patent (open and obvious dangers) or when the consumer has no valid expectations. [[265]](#footnote-266)264 In adopting its two step approach, the Beck I court stressed that a trial court should not attempt to formulate mechanistic definitions applicable to all situations but should, within the framework of the two-pronged test, formulate jury instructions which elucidate the circumstances of the case before it. [[266]](#footnote-267)265

Thus, Beck I adopted a two-step approach that includes the consumer expectation test in the first prong and a risk-utility test in the second prong where the defendant has the burden to show that "on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." [[267]](#footnote-268)266 The Beck I court reasoned:

This will require the fact-finder to consider and compare a number of competing factors, including but not limited to, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

Besides lessening the burdens of the plaintiff's prima facie case, this allocation puts the burden of producing the relevant complex and technical evidence on the party who has the most access to and is the most familiar with such evidence. [[268]](#footnote-269)267

In Heritage v. Pioneer Brokerage & Sales, [[269]](#footnote-270)268 the defendant presented expert testimony concerning the scientific **[\*572]** unknowability of formaldehyde exposure as a cause of the consumer's injury. [[270]](#footnote-271)269 The Heritage court stated that such expert testimony was admissible under the two-pronged test of Beck I to enable the jury to consider the various trade-offs in the design process. However, the court found such that scientific unknowability should not turn upon the particular manufacturer's level of expertise, but rather upon the general state of scientific knowledge. [[271]](#footnote-272)270 In discussion of the issue, the Heritage court stated:

In Beck, we held that the defendant in a strict liability case may prove that the product was not defective by introducing evidence showing the various trade-offs in the design process. We stated there that the fact-finder is required "to consider and compare a number of competing factors, including but not limited to '. . . the mechanical feasibility of a safer alternative design . . . .'" A determination of the "scientific knowability" of the unsafe character of the product is relevant to the above inquiry in that it underlies evaluation of the manufacturer's ability to eliminate the harmful aspects of the product. [[272]](#footnote-273)271

After Heritage, the Beck I case was brought before the Supreme Court of Alaska for a second time for review of a pre-trial order on the retrial of Caterpillar Tractor Co. v. Beck (Beck II). [[273]](#footnote-274)272 In Beck II, the Supreme Court of Alaska stated that the scientific unknowability defense was inapplicable to the factual circumstances of the case; however, it reaffirmed that scientific unknowability could be an issue in other cases. [[274]](#footnote-275)273 Thus, if a defendant can prove that a particular risk is scientifically unknowable when the product is marketed, then the manufacturer generally cannot be held liable. [[275]](#footnote-276)274 Beck II also discussed the issue concerning the admissibility of evidence con- **[\*573]** cerning post-manufacture accidents and design modifications. [[276]](#footnote-277)275 Under Alaska Rule of Evidence 407, all such evidence is admissible to show the existence of a defect and the feasibility of an alternative design. [[277]](#footnote-278)276

The first prong of the Beck I test was explored in Lamer v. McKee Industries, [[278]](#footnote-279)277 where a jury found against the plaintiff on the issue of defect. [[279]](#footnote-280)278 The Supreme Court of Alaska reversed stating that there was uncontroverted evidence that the product was defective under the consumer expectation test. [[280]](#footnote-281)279 First, the use of the particular product by the plaintiff was objectively foreseeable. [[281]](#footnote-282)280 Once foreseeability was met, the second question under the consumer expectation test must be asked: Did the product perform as safely as an ordinary consumer would expect? According to the overwhelming evidence, the product did not meet this prong of the test; thus, the Lamer court reversed the jury's verdict on the design defect issue. [[282]](#footnote-283)281

The Supreme Court of Alaska has consistently retained the two-pronged test of Beck I with little modification. [[283]](#footnote-284)282 In Colt Industries v. Frank W. Murphy Manufacturer, [[284]](#footnote-285)283 the Supreme Court of Alaska made it clear that it would permit a plaintiff to submit evidence of an alternative design; however, such evidence would not be an element of plaintiff's case under **[\*574]** Beck I since the burden of proof on the risk-utility factors would be on the defendant. [[285]](#footnote-286)284 In addition, the Colt court recognized the problem of categorizing defects into those of manufacturing and design:

The delineation between design and manufacturing defects is undoubtedly blurry. However, we have long recognized that overlap between the two categories is unavoidable. We have clearly stated that rigid delineation of the two categories is neither necessary nor desirable. In Beck we specified:

Manufacturing defects and design errors are not mutually exclusive. . . . As the California court noted in Cronin, whether a defect results from manufacture or design is not always obvious. . . . The categories not only overlap, but they may also operate simultaneously or be alleged in the alternative.

Here, the two theories operate simultaneously; we see no reason to arbitrarily assign defects resulting from processes which are prone to error to one category or the other. [[286]](#footnote-287)285

The Beck I test has also been extended to design defects for prescription drugs. In Shanks v. Upjohn Co., [[287]](#footnote-288)286 the court rejected the holding and reasoning of the Supreme Court of California [[288]](#footnote-289)287 in Brown v. Superior Court. [[289]](#footnote-290)288 In Shanks, the Supreme Court of Alaska modified the consumer expectation test of the first prong to that of the ordinary physician, [[290]](#footnote-291)289 but otherwise allowed the risk-utility balance test of the second prong to remain intact. [[291]](#footnote-292)290 **[\*575]**

2. Statutes

Although there are no statutes applicable to design defects, the Alaska legislature has passed limitations on punitive damages, [[292]](#footnote-293)291 noneconomic damages, [[293]](#footnote-294)292 and blood products. [[294]](#footnote-295)293

3. Pattern Jury Instructions

Alaska's pattern jury instructions 7.03 and 7.03A reflect the Beck I test as it has developed under the various decisions. [[295]](#footnote-296)294

C. Arizona

1. Common Law

Arizona adopted strict liability pursuant to section 402A in O.S. Stapley Co. v. Miller. [[296]](#footnote-297)295 However, the Miller case did not discuss the defect requirement, and it was unclear from the opinion exactly what type of defect was alleged. In Byrns v. Riddell Inc., [[297]](#footnote-298)296 a football helmet case, the Supreme Court of Arizona rejected the California approach to strict liability and firmly established that section 402A was to be followed. [[298]](#footnote-299)297 The Byrns case also rejected the open and obvious danger rule as a complete bar to liability and accepted the principal that circumstantial evidence would be sufficient to prove a defect. [[299]](#footnote-300)298 The Byrns court quoted both the consumer expectation test under comment i and the Wade seven-factor test as appropriate means of establishing unreasonable danger in a design **[\*576]** defect case. [[300]](#footnote-301)299 The Supreme Court of Arizona also stated that knowledge of the defect was to be imputed to the manufacturer when balancing risk and utility. [[301]](#footnote-302)300 With so many tests available for unreasonable danger in a design case, the Byrns court cautioned:

No all-encompassing rule can be stated with respect to the applicability of strict liability in tort to a given set of facts. Each case must be decided on its own merits. The foregoing analysis is offered as an approach to the question of whether a defect is unreasonably dangerous. [[302]](#footnote-303)301

In the same year that the Products Liability Act was adopted, the Court of Appeals of Arizona decided Brady v. Melody Homes Manufacturer. [[303]](#footnote-304)302 Brady rejected any prior conceptions that a design defect would be based solely upon strict liability. Instead, Brady set forth a two-step approach for design defects. [[304]](#footnote-305)303 The consumer expectation test would remain a test for liability in those instances where it could be established that the ordinary consumer had reasonable expectations. [[305]](#footnote-306)304 However, in situations where the consumer had no expectations, a design defect was measured by a risk-benefit analysis based upon negligence. [[306]](#footnote-307)305 The risk-benefit analysis included balancing several pertinent factors including those listed in the Byrns case. [[307]](#footnote-308)306 Liability for a design defect is "imposed on the grounds that the manufacturer could have feasibly made the product safer." [[308]](#footnote-309)307 Feasibility, however, has the same meaning as risk-benefit analysis. [[309]](#footnote-310)308

The Brady court approved of the two-pronged test estab- **[\*577]** lished in California under Barker v. Lull Engineering Co., [[310]](#footnote-311)309 but modified the second prong. Under the Brady test, the burden of proof remained on the plaintiff, and in addition to showing a feasible safer product (or safer design), the plaintiff had to prove the defendant's design choice was negligent. The second prong of feasibility under the risk-utility test imposes a very heavy burden on the consumer. [[311]](#footnote-312)310 The requirements under the second prong of the Brady rule appear especially harsh in light of the court's recognition that strict liability was adopted in order to overcome the difficulty of proof of lack of due care in negligence. [[312]](#footnote-313)311

In 1985, however, the Supreme Court of Arizona decided Dart v. Wiebe Manufacturing, Inc., [[313]](#footnote-314)312 which overruled the apparently harsh second-prong of the test. [[314]](#footnote-315)313 The Dart court recognized the Arizona Court of Appeals' apparent dislike and confusion in attempting to apply the Brady test. [[315]](#footnote-316)314 The Dart court stated that there was a difference between strict liability and negligence when a risk-benefit analysis is applied in a design defect case. [[316]](#footnote-317)315 The court found that in strict liability, the focus is on the quality of the product; whereas, in negligence, the focus is on the defendant's conduct in making its design choice. [[317]](#footnote-318)316 To distinguish the two theories, the focus is on the time frame in which the risk-benefit analysis is made. [[318]](#footnote-319)317 In negligence, the consumer must show that the "manufacturer acted unreasonably at the time of manufacture or design." [[319]](#footnote-320)318 **[\*578]** Thus, in negligence, the risk-utility test is confined to information or knowledge regarding the product as of the date of manufacture or design as compared to a later date. [[320]](#footnote-321)319 In strict liability, the risk-benefit analysis will be measured by the information and knowledge available up until the time of trial. [[321]](#footnote-322)320 In other words, strict liability imposes what amounts to constructive knowledge of the condition of the product. [[322]](#footnote-323)321 The test is whether a manufacturer with knowledge of the potential dangers, as revealed at trial, would have marketed this product in the same condition as it was sold to the plaintiff. [[323]](#footnote-324)322

The test for design defect under Dart is a two-pronged test: (1) The consumer expectation test is used where possible, but if inapplicable, (2) the risk-benefit test is applied using various factors. The knowledge of the danger/defect, however, is imputed to the manufacturer. [[324]](#footnote-325)323 The Dart court called this a hindsight test because all knowledge about the product's danger/defect is imputed to the manufacturer. [[325]](#footnote-326)324 The Dart rule remains intact. [[326]](#footnote-327)325 **[\*579]**

2. Statutes

On September 3, 1978, the Arizona legislature adopted a products liability act, [[327]](#footnote-328)326 which, on its face, severely limits consumer rights. The Act provides for defenses or limitations in state-of-the-art, [[328]](#footnote-329)327 misuse, [[329]](#footnote-330)328 and post-manufacturing design changes. [[330]](#footnote-331)329 Other legislation placed limitations on the consumer for remedial measures, [[331]](#footnote-332)330 for drug manufacturer for punitive damages, [[332]](#footnote-333)331 joint and several liability, [[333]](#footnote-334)332 and blood products. [[334]](#footnote-335)333

3. Pattern Jury Instructions

Arizona's pattern jury instructions reflect the Dart twoprong rule. However, they also recognize the unresolved conflict between the imputed-knowledge rule of Dart and Arizona's Products Liability Act which creates a state-of-the-art defense. [[335]](#footnote-336)334 **[\*580]**

D. Arkansas

1. Common Law

The Supreme Court of Arkansas has never adopted strict liability as part of its common law. [[336]](#footnote-337)335

2. Statutes

Arkansas adopted strict liability by statute in 1973. [[337]](#footnote-338)336 Prior to that time, the Supreme Court of Arkansas avoided the adoption of strict liability, [[338]](#footnote-339)337 and it was only after the Arkansas Bar Association sponsored the bill that the legislature passed the "Arkansas Product Liability Act of 1979." [[339]](#footnote-340)338 The Act is patterned after section 402A and applies a consumer expectation test. [[340]](#footnote-341)339 Under its unreasonable danger requirement, the Act modifies the consumer expectation test as found in section 402A to include a subjective element and makes other adjustments for minor plaintiffs. [[341]](#footnote-342)340 This Act and other legislation placed further limitations on the consumer for state-of-theart, [[342]](#footnote-343)341 government standards, [[343]](#footnote-344)342 alteration or modifications, [[344]](#footnote-345)343 and blood products. [[345]](#footnote-346)344

In Forrest City Machine Works v. Aderhold, [[346]](#footnote-347)345 the Supreme Court of Arkansas rejected the open and obvious danger rule in design defect cases. [[347]](#footnote-348)346 The Aderhold court stated that **[\*581]** the Arkansas Product Liability Act merely changed the burden of proof requirement from pre-statutory law. [[348]](#footnote-349)347 Under the Products Liability Act, the consumer does not have the burden of proving negligence in a design defect case. [[349]](#footnote-350)348

In 1981, the United States Court of Appeals for the Eighth Circuit decided French v. Grove Manufacturing Co. [[350]](#footnote-351)349 The French court reversed a verdict against the plaintiff based upon a jury instruction which required the injured victim to prove "that an alternative safer design was available and feasible from the standpoint of cost, practicality and technological possibility." [[351]](#footnote-352)350 Under the Arkansas Product Liability Act of 1979, the legislature added definition sections which were not in the original Act. [[352]](#footnote-353)351 The French court stated that the definition section for a defective condition which renders the product unreasonably dangerous under the consumer expectation test "contains no requirement that a feasible and safer alternative be proven by the plaintiff and we see no reason to impose that requirement." [[353]](#footnote-354)352 The 1979 Act also contained a section entitled "Considerations for trier of fact" which included state-ofthe-art, customs, and standards. [[354]](#footnote-355)353 The French court said the state-of-the-art factors are considerations that may be weighed by the trier of fact; thus, "the existence, practicality, and technological feasibility of an alternative safer design are not necessary elements of the plaintiff's cause of action, but rather are merely factors that may be considered by the jury." [[355]](#footnote-356)354

Under Arkansas law, "strict liability is not intended to apply to all products supplied in a defective condition." [[356]](#footnote-357)355 The product must be both defective and unreasonably dangerous--measured by a modified consumer expectation test with **[\*582]** consideration of state-of-the-art, custom, and standards in the industry. [[357]](#footnote-358)356

3. Pattern Jury Instructions

Arkansas Model Jury Instructions provide only general wording without setting forth specifics about either the defect or unreasonably dangerous requirements. [[358]](#footnote-359)357

E. California

1. Common Law

On January 24, 1962, the Supreme Court of California decided the famous case of Greenman v. Yuba Power Products, Inc. [[359]](#footnote-360)358 which adopted strict liability over three years prior to the ALI's implementation of section 402A. [[360]](#footnote-361)359 The consumer in Greenman alleged he was injured by the defective design and "construction" of a Shopsmith [[361]](#footnote-362)360 and presented evidence that there was a better way of fastening the parts of the product together, the use of which would have prevented the accident. [[362]](#footnote-363)361 The Greenman court, however, did not define the parameters of either a design defect or the consumer's burden of proof. [[363]](#footnote-364)362 **[\*583]**

On October 17, 1972, the Supreme Court of California decided Luque v. McLean [[364]](#footnote-365)363 and Cronin v. J.B.E. Olson Corp., [[365]](#footnote-366)364 which summarized prior California decisions under strict liability and refined the definition of defect. [[366]](#footnote-367)365 The Cronin case rejected the unreasonably dangerous requirement of section 402A as a limitation on defect. The rejection was based, to a great extent, on the increased burden of proof on the consumer. [[367]](#footnote-368)366 Under section 402A, if "an 'ordinary consumer' would have expected the defective condition of a product, the seller is not strictly liable regardless of the expectations of the injured plaintiff." [[368]](#footnote-369)367 If such a test were applied, "another Greenman might be denied recovery." [[369]](#footnote-370)368 According to the Cronin court, the unreasonably dangerous requirement rarely leads to results different from those reached under negligence: "Yet the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence." [[370]](#footnote-371)369 Cronin also recognized the inherent problems in the artificial categorization of defects into those of design and manufacturing, and the difficulties in distinguishing the two. The court stated:

The most obvious problem we perceive in creating any such distinction is that thereafter it would be advantageous to characterize a defect in one rather than the other category. It is difficult to prove that a product ultimately caused injury because a widget was poorly welded--a defect in manufacture--rather than because it was made of inexpensive metal difficult to weld, chosen by a designer **[\*584]** concerned with economy--a defect in design. The proof problem would, of course, be magnified when the article in question was either old or unique, with no easily available basis for comparison. We wish to avoid providing such a battleground for clever counsel. Furthermore, we find no reason why a different standard, and one harder to meet, should apply to defects which plague entire product lines. We recognize that it is more damaging to a manufacturer to have an entire line condemned, so to speak, for a defect in design, than a single product for a defect in manufacture. But the potential economic loss to a manufacturer should not be reflected in a different standard of proof for an injured consumer. [[371]](#footnote-372)370

The Luque court rejected the latent/patent distinction (open and obvious danger rule) where only latent dangers are subject to liability. Such a rule did not conform to the policy of strict liability and could, the court concluded, lead to rather absurd results:

It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while subjecting to such liability those who innocently market products with latent defects. [[372]](#footnote-373)371

Following the Cronin and Luque decisions, California courts were left with the problem of defining a defect without the assistance of any reference to "unreasonably dangerous" design cases. This proved difficult because the consumer expectation test was unworkable in instances where the consumer had no expectations about a product's design, and a risk-utility or risk-benefit analysis would lead to the consumer's difficult burden of proof in negligence. [[373]](#footnote-374)372 For example, the California **[\*585]** Court of Appeals' decision in Baker v. Chrysler Corp. [[374]](#footnote-375)373 applied a risk-utility examination in a second collision or enhanced injury situation. [[375]](#footnote-376)374 The Baker court not only placed the burden of proving the various factors of the risk-utility evaluation on the consumer, but also required the consumer to prove that an alternative design could have been developed. [[376]](#footnote-377)375 The consumer's burden of proof regarding a feasible alternative design, according to the Baker court, included proof of "whether the design can actually be produced, the materials for production are available, the costs are not prohibitive, etc." [[377]](#footnote-378)376 The Baker decision appeared to violate both Greenman and Cronin mandates that the consumer was not to be burdened with problems inherent in proving negligence. [[378]](#footnote-379)377

The Supreme Court of California attempted to resolve the design defect problem in Barker v. Lull Engineering Co. [[379]](#footnote-380)378 In Barker, the defendant argued that the Cronin decision which eliminated the unreasonably dangerous requirement should be limited to manufacturing defect cases. [[380]](#footnote-381)379 The defendant argued that the facts in Cronin indicated that the flawed clasp was in reality a manufacturing defect rather than a design defect. [[381]](#footnote-382)380 By limiting the Cronin decision to manufacturing defects, the court could avoid the "dual burden" problem where the consumer had to prove both a defect and unreasonable danger. [[382]](#footnote-383)381 This would be possible because in design cases, the term "defect" is defined by the term "unreasonably dangerous." In other words, the terms are equivalent. Thus, no additional burden is **[\*586]** placed on the consumer. [[383]](#footnote-384)382

The Barker court rejected the defendant's contentions, noting with skepticism that although the defendant might be theoretically correct concerning the "dual burden" issue, there were other concerns about the Restatement's unreasonably dangerous language. [[384]](#footnote-385)383 Such language was adopted by the Restatement to restrict liability. [[385]](#footnote-386)384 Limiting liability only to situations where the "product is more dangerous than contemplated by the average consumer" creates a circumstance where the manufacturer's responsibility is unduly limited by the low esteem consumers may have for obviously dangerous products. [[386]](#footnote-387)385 Both Luque (patent-latent distinction) and Cronin attempted to avoid the anomaly of limiting a manufacturer's liability when consumers' expectations are so minimal. The Barker court noted that the unreasonably dangerous language was not limited to manufacturing defects, but was especially pronounced in design cases because a defendant could argue that "its product satisfied ordinary consumer expectations since it was identical to other items of the same product line with which the consumer may well have been familiar." [[387]](#footnote-388)386

The Barker court recognized that the consumer expectation test could be applicable in design defect cases when consumers have reasonable expectations about the product's qualities, dangers, or design. [[388]](#footnote-389)387 In such situations, the consumer will frequently be able to demonstrate a defect by resorting to circumstantial evidence. [[389]](#footnote-390)388 The consumer expectation test could be retained in such situations and as a reflection of the warranty and representational heritage, would provide strict liability without reference to negligence. [[390]](#footnote-391)389 However, when the consumer expectations were unduly high or low, an alternative was need- **[\*587]** ed. The Barker court looked to numerous prior California decisions which noted:

A product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. [[391]](#footnote-392)390

Thus, a risk-benefit evaluation must be made, and such evaluation should consider a number of factors, including the following:

the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design. [[392]](#footnote-393)391

The Barker court sought to preserve the basic doctrine that the consumer should not be burdened with the proof of negligence which was inherent in a risk-benefit standard. [[393]](#footnote-394)392 Such evidence, including that of feasible alternative designs, was typically within the knowledge of the manufacturer. [[394]](#footnote-395)393 Thus, the Barker court decided to shift the burden of proof concerning risk-utility to the defendant. [[395]](#footnote-396)394 The result of the Barker court's analysis of the defect requirement in design defect cases was a two-pronged test:

A product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary **[\*588]** consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. [[396]](#footnote-397)395

The Barker two-pronged test remains the law of California. [[397]](#footnote-398)396 However, the operation of the test has been clarified by some recent decisions. For example, the Barker rule consists of a two-step approach, but if the consumer expectation test under the first prong is applicable, the second step of Barker need not be presented to the jury. [[398]](#footnote-399)397 The use of consumer expectation test as a sole measure of strict liability may be applied to rather complicated design defect cases and expert testimony may not be required. [[399]](#footnote-400)398 It is clear that in the second prong of the Barker test, the consumer does not have the burden of proof concerning any of the risk-benefit factors, [[400]](#footnote-401)399 but need only show a prima facie case consisting of proof that the design feature was a proximate cause of the injury. [[401]](#footnote-402)400

2. Statutes

Although California has not passed any comprehensive products liability legislation, it does have statutes which provide immunity to certain products which an ordinary consumer knows to be unsafe, [[402]](#footnote-403)401 prevent firearms and ammunition as **[\*589]** being "generically" defective, [[403]](#footnote-404)402 and limit liability for blood products. [[404]](#footnote-405)403 In addition, the California legislature passed special statutes of repose for asbestos [[405]](#footnote-406)404 and Dalkon Shield actions [[406]](#footnote-407)405 and several liability for noneconomic damages. [[407]](#footnote-408)406

3. Pattern Jury Instructions

California's pattern jury instruction BAJI 9.00.5 reflects the Barker two-pronged test. [[408]](#footnote-409)407

F. Colorado

1. Common Law

On December 15, 1975, the Supreme Court of Colorado adopted the Restatement's section 402A version of strict liability in Hiigel v. General Motors Corp. [[409]](#footnote-410)408 The Hiigel decision primarily discussed the warning requirements under strict liability; however, the court made general reference to the policy provisions of section 402A and the consumer expectation test under comment i. [[410]](#footnote-411)409

In 1978, the Supreme Court of Colorado decided its first design defect case in Union Supply Co. v. Pust. [[411]](#footnote-412)410 The Pust court found that failure to provide a guard or provide safety equipment could be a basis of liability under a design defect theory. [[412]](#footnote-413)411 The court stated that it could find no valid reason for not extending strict liability for design defects: **[\*590]**

A defective product may be equally hazardous to the ultimate user or consumer whether its defect arises from a flaw in manufacture or from a flaw in design. We observe that if a defect is in the design of a complete product line it is potentially dangerous to many more people than a physical flaw in one product would be. [[413]](#footnote-414)412

The Supreme Court of Colorado rejected the defendant's contention that any danger in the product which is open and obvious should be a defense to strict liability:

We hold that the alleged patent nature of a defect is not in and of itself a defense to strict liability. Simply because a hazard is "open and obvious" does not prevent it from being unreasonably dangerous to the user or consumer. Approval of the rule would be contrary to sound public policy. As the Washington Court of Appeals has commented: "\* \* \* The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form." [[414]](#footnote-415)413

The initial decisions of the Supreme Court of Colorado in Hiigel and Pust appeared to give some affect to strict liability's purpose of affording some degree of consumer protection. However, in Kysor Industrial Corp. v. Frazier, [[415]](#footnote-416)414 the Supreme Court of Colorado rejected the rationale of the Supreme Court of California in Cronin v. J.B.E. Olson Corp. [[416]](#footnote-417)415 and held that the plaintiff must prove that a product is both "defective" and "unreasonably dangerous" to state a claim under strict liability. [[417]](#footnote-418)416

The Frazier case was followed by Ortho Pharmaceutical Corp. v. Heath, [[418]](#footnote-419)417 wherein the Supreme Court of Colorado al- **[\*591]** lowed a design defect action for a prescription drug (oral contraceptive) and allowed a comment k defense only on a case by case basis. [[419]](#footnote-420)418 However, the Heath court reversed a jury verdict in favor of the consumer based upon an improper instruction on both the design defect and comment k. [[420]](#footnote-421)419 The trial court had given instructions based upon the consumer expectation test. [[421]](#footnote-422)420 The Heath court cited the Barker [[422]](#footnote-423)421 twoprong test adopted by the Supreme Court of California as an appropriate standard. [[423]](#footnote-424)422 However, the court stated that only the second prong of Barker (risk-benefit) should be applied to the present case. [[424]](#footnote-425)423 It was unclear whether the Heath case had adopted the entire Barker rule including the shifting of the burden of proof to the defendant in the risk-benefit part of the test.

The Supreme Court of Colorado clarified its position on design defects in Camacho v. Honda Motor Co. [[425]](#footnote-426)424 In Camacho, the plaintiff was riding a motorcycle and received severe leg injuries when the motorcycle struck an automobile. The plaintiff alleged the motorcycle's design was defective because it lacked "crash bars" which would have mitigated or eliminated his leg injury. [[426]](#footnote-427)425 The defendant, Honda, argued there could be no liability because under the consumer expectation test the danger of a motorcycle without crash bars "would have been fully anticipated by or within the contem- **[\*592]** plation of" the ordinary consumer. [[427]](#footnote-428)426 The Supreme Court of Colorado was again faced with the problems associated with the consumer expectation test and open and obvious dangers in a design case. In resolving the issue, the Camacho court cited its prior Heath decision and stated that resolution of whether a product is unreasonably dangerous is best decided by "balancing the attendant risks and benefits of a product." [[428]](#footnote-429)427 The factors to be considered are those enumerated by Dean Wade and relied upon by Heath. [[429]](#footnote-430)428

In Camacho, the defendant argued vigorously that the consumer expectation test was the appropriate standard because it would relieve Honda of liability when the danger was open and obvious or known to the consumer. [[430]](#footnote-431)429 The consumer, on the other hand, argued just as vigorously for a risk-benefit standard so that liability could attach for lack of guard or safety devices when the danger is known to the consumer. The Camacho court chose the risk-benefit standard and reversed the trial court's summary judgment against the plaintiff. [[431]](#footnote-432)430 However, the Camacho court did not make it clear whether the defendant or the plaintiff had the burden of proof under the risk-benefit test. [[432]](#footnote-433)431 **[\*593]**

In a recent decision, the Supreme Court of Colorado resolved the issue of the standard for design defect cases. In Armentrout v. FMC Corp., [[433]](#footnote-434)432 the plaintiff was severely injured in a crane accident. Whether the danger to the plaintiff was open and obvious was "hotly disputed at trial." [[434]](#footnote-435)433 The plaintiff alleged the crane was defective because of both warning defects and design defects. [[435]](#footnote-436)434 The Armentrout court held that the plaintiff had the burden of proof concerning whether the product's benefits outweigh its inherent risks and, to the extent that the Heath case placed such burden on the manufacturer, it was overruled. [[436]](#footnote-437)435

The Armentrout court again approved Wade's seven factors as measures of the risk-benefit test as it previously set forth in Camacho. [[437]](#footnote-438)436 However, the Supreme Court of Colorado emphasized:

Neither Heath nor Camacho suggest that these factors are to be strictly applied in every case. This list is not exclusive, but merely illustrative of factors which may assist in determining whether or not a design is unreasonably dangerous. Depending on the circumstances of each case, flexibility is necessary to decide which factors are to be applied, and the list of factors mentioned in Heath and Camacho may be expanded or contracted as needed. [[438]](#footnote-439)437

Whether Colorado would demand that the plaintiff prove the existence of a practicable alternative design in design defect cases was answered by Armentrout in the following manner: "We agree that the existence of a feasible alternative is a factor in the risk-benefit analysis of the unreasonable dangerous of the product design." [[439]](#footnote-440)438 This statement was carefully footnoted **[\*594]** with the following:

We also note, however, that evidence of a feasible design alternative is not always necessary. As the Supreme Court of Oregon stated:

The court's task is to weigh the factors bearing on the utility and the magnitude of the risk and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. Our holding should not be interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury. There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). [[440]](#footnote-441)439

Although the Supreme Court of Colorado defined unreasonably dangerous in design cases as dependent upon the risk-benefit test, it left the term defect undefined. According to the Armentrout court, the term defect "refers to an aspect of the product which, according to the plaintiffs, causes the product to be 'unreasonably dangerous.' A defect does not mean a mere mechanical or functional defect but is anything that makes the product 'unreasonably dangerous.'" [[441]](#footnote-442)440

The Armentrout court seemed concerned that a jury, applying a common sense approach to the term "defect," might require that the product contain some type of manufacturing de- **[\*595]** fect or lack something essential to its completeness before finding a defect. However, irregularities or incompleteness are not essential to liability and, according to the Armentrout court, would prevent the application of the risk-benefit analysis. [[442]](#footnote-443)441 It is difficult to understand why the court did not just eliminate the term defect in design cases since the terms defect and unreasonably dangerous seem equivalent. [[443]](#footnote-444)442

In Fireboard Corp. v. Fenton, [[444]](#footnote-445)443 the Supreme Court of Colorado made it clear that the risk-benefit test, as explained in Armentrout, requires factors that are flexible, expanding or contracting as needed. [[445]](#footnote-446)444 State-of-the-art, an additional factor mentioned in Armentrout, would be an issue if the suggested alternative design was not practically feasible. [[446]](#footnote-447)445 Furthermore, state-of-the-art would be considered as a factor in a warning defect case. [[447]](#footnote-448)446

The effect of the Camacho-Armentrout-Fenton rule is that Colorado applies a flexible and changeable risk-benefit test that is difficult to distinguish from a simple negligence rule. [[448]](#footnote-449)447 Several Colorado decisions dealing with the defect requirement prior to Fenton have not had any effect on the Colorado rule. [[449]](#footnote-450)448 **[\*596]**

2. Statutes

Effective July 1, 1977, the Colorado legislature passed a comprehensive products liability act which effected severe restrictions on consumers' rights. [[450]](#footnote-451)449 These restrictions included limitations on suits against parties other than manufacturers, [[451]](#footnote-452)450 extremely restrictive state-of-the-art provisions, [[452]](#footnote-453)451 and a tenyear statute of repose. [[453]](#footnote-454)452 Other legislation precludes any actions for defective firearms and ammunition [[454]](#footnote-455)453 and provides limitations on punitive damages, [[455]](#footnote-456)454 noneconomic damages, [[456]](#footnote-457)455 joint and several liability, [[457]](#footnote-458)456 and blood products. [[458]](#footnote-459)457

3. Pattern Jury Instructions

Colorado's jury instructions reflect both the risk-benefit rule and state-of-the-art requirements in design cases. [[459]](#footnote-460)458

G. Connecticut

1. Common Law

On December 30, 1965, the Supreme Court of Connecticut adopted section 402A in Garthwait v. Burgio. [[460]](#footnote-461)459 The consumer in Garthwait incurred an injury as a result of a hair tinting treatment she received at a beauty parlor. [[461]](#footnote-462)460 The action was **[\*597]** based upon warranties and the representational aspects of the product, and the sole issue on appeal was whether privity of contract was essential for the consumer to maintain the action. [[462]](#footnote-463)461 It was almost ten years later that the Supreme Court of Connecticut, in Slepski v. Williams Ford, Inc., [[463]](#footnote-464)462 made it clear that the standard for strict liability would be the consumer expectation test. [[464]](#footnote-465)463 The consumer expectation test adopted by Connecticut is based upon comment i to section 402A, providing that a jury is allowed "to draw its own reasonable conclusions as to the expectations of the ordinary consumer and the knowledge common in the community at large." [[465]](#footnote-466)464

2. Statutes

Effective June 4, 1976, the Connecticut legislature passed a highly restrictive statute of repose and, by 1979, enacted several anti-consumer statutes. [[466]](#footnote-467)465 The severe restrictions on consumer rights included limiting punitive damages to twice the compensatory award, [[467]](#footnote-468)466 limiting warning actions to basic negligence principles, [[468]](#footnote-469)467 and limiting the consumer to a simple **[\*598]** cause of action within statutory confines. [[469]](#footnote-470)468 Later, more anticonsumer legislation limited contingent fees. [[470]](#footnote-471)469 Although some of the legislation passed in Connecticut might be considered "benign" in relation to the consumer [[471]](#footnote-472)470 and a few sections concerning chemicals and asbestos even helpful, [[472]](#footnote-473)471 on the whole the legislature adopted much of the anti-consumer elements of the model Uniform Product Liability Act (UPLA). [[473]](#footnote-474)472 However, Connecticut did not pass any legislation which affected either design or manufacturing defects. Thus, these issues remain open to common law development.

3. Pattern Jury Instructions

Although Connecticut has pattern jury instructions, none are applicable to design defects except one regarding defective seat belts. [[474]](#footnote-475)473

H. Delaware

1. Common Law

In 1976, the Supreme Court of Delaware decided Martin v. Ryder Truck Rental, [[475]](#footnote-476)474 which adopted strict liability in a tortbailment-lease situation. [[476]](#footnote-477)475 The Martin court extended the protection of strict liability to a plaintiff who was a bystander. [[477]](#footnote-478)476 **[\*599]** The Martin court thus appeared to have joined the growing number of jurisdictions which had adopted strict liability in tort. However, the Martin court was concerned about whether Delaware's Uniform Commercial Code (UCC) preempted the field of law involving products liability, but avoided deciding the issue directly by finding that the bailment-lease situation was not within the UCC provisions. [[478]](#footnote-479)477

The Supreme Court of Delaware revisited the preemption issue in Cline v. Prowler Industries [[479]](#footnote-480)478 and decided that the UCC did in fact preempt the area of strict liability for products. [[480]](#footnote-481)479 In Cline, a propane heater in the consumer's traveltrailer exploded causing the plaintiff severe injury. [[481]](#footnote-482)480 The plaintiff alleged the heater was defective and that strict liability in tort applied to his claim. [[482]](#footnote-483)481 In rejecting strict liability, the Cline court said that the limitation of consumer strict liability claims to a UCC remedy was based upon the legislative intent. [[483]](#footnote-484)482 In addition, the Cline court said that the UCC limitations, such as privity, notice, and disclaimers, have in large measure become ineffective in this state. [[484]](#footnote-485)483 Believing that any attempt to explain strict liability beyond the UCC would be "impermissible judicial legislation," [[485]](#footnote-486)484 the court stated that any hardship or unfairness as a result of the defenses in the UCC must be born by the consumer. [[486]](#footnote-487)485 The court found that **[\*600]**

although these defenses may still work hardship and unfairness in some product liability cases, their continued existence in the face of harsh judicial and academic criticism, addressed to them throughout the years of the development of the doctrine of strict tort liability, suggests a legislative intent that these defenses should continue to exist in sales cases. It is not the function of this Court, however, to reject legislative doctrine on the basis of its wisdom, fairness, appropriateness, or desirability. [[487]](#footnote-488)486

The harshness of the Cline rule could be reduced by the expansion of UCC remedies; however, this does not appear to be the path of development in Delaware. The courts have applied a very restrictive UCC statute of limitations, [[488]](#footnote-489)487 and the expansion of strict liability beyond the bailment-lease situation has not shown much progress beyond rented products. [[489]](#footnote-490)488 Since Delaware has applied strict liability in so few cases, and in such limited situations, it is unclear what standard it would apply in a design case.

2. Statutes

Delaware has no general legislation concerning products liability. However, a "sealed container" defense provides protection to a "downstream" non-manufacturer seller of defective products. [[490]](#footnote-491)489 Legislation has also limited consumer rights for blood products. [[491]](#footnote-492)490

3. Pattern Jury Instructions

Delaware has no applicable pattern jury instructions. **[\*601]**

I. District of Columbia

1. Common Law

The District of Columbia does not appear to have a distinct point in time nor a specific case that suddenly marks the transition from warranty law to strict liability in tort. [[492]](#footnote-493)491 In 1970, the District of Columbia Court of Appeals decided Cottom v. McGuire Funeral Service, Inc., [[493]](#footnote-494)492 which cited with approval strict liability in tort. [[494]](#footnote-495)493 The Cottom court, however, did not find it necessary to adopt such theory because the warranty law as developed by the District of Columbia had achieved the essential equivalent. [[495]](#footnote-496)494 The concept that warranty law and strict liability in tort were basically equivalent was explored in detail in Payne v. Soft Sheen Products. [[496]](#footnote-497)495 The Payne court determined that a failure to warn claim [[497]](#footnote-498)496 under strict liability is essentially the same as a failure to warn claim under negligence. However, in discussing the general theories of warranty and strict lability, the Payne court found that the warranty theory, when stripped of its contractual baggage, is strict liability in tort. [[498]](#footnote-499)497 The Payne court then stated:

Moreover, warranty liability was to be imposed without regard to "concepts of negligence and fault, as defined by negligence standards." This warranty liability was instead to be a form of strict liability: a plaintiff could recover if he established, first, that the product was defective, i.e., not reasonably fit for its intended purpose or not of merchantable quality; and second, that as a result of the defect, the product caused injury. [[499]](#footnote-500)498 **[\*602]**

The theory of strict liability was explored in some detail by the District of Columbia Court of Appeals in Bowler v. Stewart-Warner Corp. [[500]](#footnote-501)499 In Bowler, the consumer was injured by the defective design of an office chair on which ball casters would not allow full rolling. [[501]](#footnote-502)500 The trial court submitted the design defect case to the jury under both strict liability in tort and warranty theories. [[502]](#footnote-503)501 The trial court's instructions to the jury on strict liability were made pursuant to the consumer expectation test:

The first theory under which the plaintiff seeks to recover is the theory of strict liability in tort. In connection with that theory, you are instructed: that the law imposes liability upon a seller of a product . . . unreasonably dangerous. It is not necessary for the plaintiff to show that the defendant acted unreasonably or negligently; rather, the focus is upon the product itself. A product is unreasonably dangerous when it is dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases the product. Thus, if you find that the product--in this case it was a caster--had a defect in its design which made the product unreasonably dangerous and that the design defect proximately caused injury to the plaintiff, then you should find, and your verdict should be, for the plaintiff. [[503]](#footnote-504)502

The trial court also gave an instruction on the implied warranty of merchantability, which also rejected negligence as a basis for liability. [[504]](#footnote-505)503 However, the jury returned a verdict finding liability under implied warranty, but denying liability under the strict liability claim. On appeal, the Bowler court discussed the apparently inconsistent verdicts and determined **[\*603]** that it was error to give both instructions to the jury. [[505]](#footnote-506)504 Judge Ferren, in a concurring opinion in Bowler, set forth an excellent history of the development of both warranty and tort strict liability in the District of Columbia. [[506]](#footnote-507)505 Judge Ferren's opinion succinctly described the problems with section 402A's "unreasonably dangerous" language and how such language created a somewhat more difficult standard than the standard of liability required under implied warranty. [[507]](#footnote-508)506 In addition, Judge Ferren noted that the Restatement's standard, if read literally, might lead to application of negligence principals and an increased burden of proof. [[508]](#footnote-509)507 The unreasonably dangerous language "was not intended as the formulation of an instruction for jurors [but was] intended exclusively to guide judges and lawyers in deciding questions of law." [[509]](#footnote-510)508

Under negligence law, the District of Columbia has adopted a risk-utility balancing test for the duty element. [[510]](#footnote-511)509 In Westinghouse Electric Corp. v. Nutt, [[511]](#footnote-512)510 the plaintiff alleged a design defect in an elevator. [[512]](#footnote-513)511 The plaintiff's expert testified that alternative design features could have been adopted for the elevator. According to the plaintiff's expert, these alternative design features were feasible but not utilized by any elevator manufacturer. [[513]](#footnote-514)512 The Nutt court reversed a jury verdict in favor of the plaintiff on the basis that the plaintiff failed to show competent evidence that the manufacturer created an unreasonable danger and, thus, deviated from the applicable standard of care. [[514]](#footnote-515)513 The Nutt court noted that neither industry**[\*604]** standards nor custom determines the standard of care, but such evidence is relevant and may be conclusive on the issue. [[515]](#footnote-516)514 The mere fact that the plaintiff produces evidence of a design alternative, by itself, is not sufficient to impose liability. [[516]](#footnote-517)515 The basis of the Nutt decision is difficult to discern. It could have been based upon the fact that the plaintiff's expert did not know of the design factors involved in the elevator safety features or of their feasibility. The decision could also have been based upon the necessity of any suggested alternative design to be based upon only those which have been adopted in practice. If the Nutt decision was based upon the later, such a requirement would conflict with the premise that industry custom and practice is not determinative of the issue of due care.

Federal court decisions have recognized the application of strict liability under District of Columbia common law, [[517]](#footnote-518)516 and the consumer expectation test has been used in instructions in such cases. [[518]](#footnote-519)517 However, in Hull v. Eaton Corp., [[519]](#footnote-520)518 the court applied a risk-utility test for design defects in strict liability. The Hull court looked to Maryland law since the District of Columbia had not set forth the elements of strict liability in a design case. [[520]](#footnote-521)519 According to the Hull court, Maryland has adopted a risk-utility test for design defects. [[521]](#footnote-522)520 However, the court then applied what appeared to be a negligence test. [[522]](#footnote-523)521 **[\*605]** The test required the plaintiff to prove not only that an alternative design was safer, but also the risks and utilities of such alternative, including the costs in adopting such design. [[523]](#footnote-524)522

District of Columbia law for design defects was clarified to a great extent in the 1995 decision of Warner Fruehauf Trailer Co. v. Boston. [[524]](#footnote-525)523 The Boston plaintiff was injured when a truck's liftgate malfunctioned. [[525]](#footnote-526)524 At trial, the plaintiff presented evidence that several liftgates of the same design had also failed along with expert evidence of alternative designs which would have prevented the accident. [[526]](#footnote-527)525 On review of the trial court's directed verdict in favor of the plaintiff, the Boston court reviewed the application of strict liability for design defect. [[527]](#footnote-528)526 At the outset of its review, the Boston court made it clear that it would follow a risk-utility analysis in this particular case:

To establish strict liability in tort, a plaintiff must establish that the defendant sold the product in question in a defective and unreasonably dangerous condition. In design defect cases, most jurisdictions decide this issue by applying some form of a risk-utility balancing test. We follow that approach in this case. [[528]](#footnote-529)527

The Boston court carefully footnoted that it would not rule out using a consumer expectation test and that risk-utility was appropriate because of the manner in which the plaintiff presented the issue:

Another test frequently used in design defect cases is the consumer expectation test: a product is unreasonably dangerous when it fails to perform in the manner reasonably to be expected by the ordinary consumer. Many jurisdictions do not view the risk-utility test and the consumer expectation test as mutually exclusive, but as alternative **[\*606]** tests. Given the type of product involved in this case, a risk-utility analysis is more appropriate than one which focusses on the expectations of an ordinary consumer. The Bostons presented the evidence necessary for an effective risk-utility analysis. [[529]](#footnote-530)528

The Boston court set forth the general principles of a riskutility test. The court stated:

In general, the plaintiff must "show the risks, costs and benefits of the product in question and alternative designs and that the magnitude of the danger from the product outweighed the costs of avoiding the danger." [[530]](#footnote-531)529

Again the Boston court carefully footnoted its application of risk-utility in relation to the defendant's burden of proof under the test: "After the plaintiff satisfies the prima facie burden of production, the burden then shifts to the defendant to show that the benefits of the design outweigh its risks." [[531]](#footnote-532)530

The Boston court cited Taggart v. Richards Medical Co., [[532]](#footnote-533)531 which involved the issue of whether the risk-utility analysis was an affirmative defense where the burden of proof is on defendant. The Taggart court concluded that Colorado followed the Barker rule in California and as such

imposes an initial burden upon the plaintiff to adduce evidence which cold permit a jury to infer plaintiff's injuries are attributable to a design defect in the product. Once this prima facie burden has been discharged, a burden falls on the defendant to establish the benefits of such design outweigh the risk of danger posed by the particular design.

. . . .

. . . If . . ."a plaintiff proves causation, the manufacturer is required to establish that the product's benefits **[\*607]** outweigh its inherent risks." [[533]](#footnote-534)532

The Boston court discussed the various factors in a riskutility balancing emphasizing that they must be utilized in a flexible manner:

There are many different factors that may be considered by the jury in applying a risk-utility analysis. In order to weigh properly the interests of manufacturers (or distributors), consumers, and the public, the risk-utility analysis must be applied in a flexible manner that is necessarily case specific. [[534]](#footnote-535)533

The Boston court also carefully footnoted two separate issues. First, the court described some of the factors which could be relied upon, citing the Wade seven-factor test as described in New Jersey law. [[535]](#footnote-536)534 Second, the court presented a lengthy discussion about its view of strict liability under the focus rule:

In a strict liability case, the focus is on the product itself (i.e., whether the product as designed was reasonably safe in light of the risks, costs, and benefits) and not on the manufacturer's conduct. Thus, even though the same factors can be considered in a negligent design case, the application of these factors if very different. However, the reasonableness of the manufacturer's act of placing the product as designed on the market is determined by the risk-utility analysis. [[536]](#footnote-537)535

After setting forth its reasoning on risk-utility, the Boston court applied it in the context of the particular case:

In the context of this case, the risk side of the equation is comprised of the danger of death or serious injury presented by the use of a single-cylinder liftgate with no safety backup, less the extent to which that danger might have been reduced by the warning decals routinely placed on the liftgates. On the other side of the balance is the avail- **[\*608]** ability of commercially feasible design alternatives, a factor which indicates the utility or benefit derived from marketing the product with the design at issue in this case. [[537]](#footnote-538)536

The Boston decision clarified existing law on strict liability design defects in the District of Columbia. The court said the law allows a plaintiff to prove design defect liability by showing an alternative feasible design; however, it does not mandate it. Under existing law, the consumer expectation test remains a viable alternative test. When a risk-utility test is employed, there is an examination of the various and flexible factors. According to the Boston court, strict liability can be retained under its risk-utility balancing process. First, the burden of proof of the risk-utility factors can be either shifted to the defendant or, if it remains on the plaintiff, the burden can be relaxed. Second, the Boston court indicated it would employ strict liability by invoking a "focus rule" in an attempt to lessen the emphasis on conduct.

2. Statutes

The District of Columbia has not adopted any general legislation concerning products liability. However, specific legislation concerning firearms and assault weapons applies strict liability for violation of the statutes. [[538]](#footnote-539)537

3. Pattern Jury Instructions

The District of Columbia pattern jury instructions are somewhat dated and do not reflect recent decisions. However, it is interesting that sections 11-12A [[539]](#footnote-540)538 and 11-12B [[540]](#footnote-541)539 set **[\*609]** forth alternative instructions for design cases under strict liability neither of which apply a negligence standard. Section 1112B adopts the Barker two-step approach which places the burden of proof on the defendant in the risk-utility test under the second step.

J. Florida

1. Common Law

On July 21, 1976, the Supreme Court of Florida adopted strict liability in West v. Caterpillar Tractor Co. [[541]](#footnote-542)540 The issue of strict liability was presented to the West court through a certified question from the United States Court of Appeals for the Fifth Circuit. [[542]](#footnote-543)541 The West case involved the alleged negli- **[\*610]** gent design of a Caterpillar grader. In adopting strict liability, the West court sought support from section 402, Greenman v. Yuba Power Products, [[543]](#footnote-544)542 and Florida's famous warranty case, [[544]](#footnote-545)543 Green v. American Tobacco Co. [[545]](#footnote-546)544 However, the West court specifically adopted the Restatement version of strict liability as set forth in section 402A. [[546]](#footnote-547)545 The plaintiff in West was a "bystander" in relation to the product; however, the court did not hesitate to apply strict liability. [[547]](#footnote-548)546 Although the West court did not detail any specifics about the test or criteria concerning design defects, it did set forth several important factors in its adoption of section 402A:

With the continued increase of products liability cases, the strict liability doctrine adapts the law to the marketing condition of today's marketing consumer.

. . . .

. . . In today's world, it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose.

. . . .

Strict liability does not make the manufacturer or seller an insurer. Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence. [[548]](#footnote-549)547

A few years after the West decision, the Supreme Court of Florida rejected the open and obvious danger rule as a bar to liability in a design case in Auburn Machine Works Co. v. Jones. [[549]](#footnote-550)548 In rejecting the open and obvious danger rule, the Jones court set forth an extensive quote from Dorsey v. **[\*611]** Yoder [[550]](#footnote-551)549 which explained why patent dangers should not bar liability. [[551]](#footnote-552)550 According to the Jones court, Dorsey's reasoning provided the following explanation of unreasonable danger: "The proper test of 'unreasonable danger' is whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the potential dangerous consequences the trial just revealed." [[552]](#footnote-553)551 When applying the risk-utility test, the Dorsey court noted Dean Wade's seven-factor analysis and explained why knives could not be considered defective when these factors were considered. [[553]](#footnote-554)552

The Jones court then set forth its own description of the patent danger rule:

The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards. This example of the fan differs from the example of the knife in Dorsey v. Yoder Co., supra, wherein the court explained that the utility of the knife would be eliminated by placing a guard over the blade. As the New York court in Micallef pointed out in discussing reasonable care, the defendant may show as relevant defensive matter the cost, function, and competition as narrowing design choices, the unworkability of the product when the alleged missing feature is added, or that the product would be so expensive as to price it out of the market. [[554]](#footnote-555)553

Although the Jones court did not make specific holdings on the above issues, the emphasis placed upon the language in **[\*612]** Dorsey and the court's own example would support a strong presumption that Florida would consider such issues as a basis for design defects. Thus, the imputed-knowledge rule, where knowledge of the danger is imputed to the defendant, would seem appropriate in design cases. In addition, in negligence cases the burden of proving the costs, function, and unworkability or the expense of an alternative design is on the defendant.

In 1981, the Court of Appeals of Florida decided Cassisi v. Maytag Co., [[555]](#footnote-556)554 which involved an allegedly defective dryer that caused a fire in the home of a consumer. Because the consumer was unable to pinpoint a specific defect in the dryer, the defendant moved for summary judgment, which was granted by the trial court. [[556]](#footnote-557)555 On appeal, the Cassisi court developed the "malfunction" theory for certain manufacturing defect cases. The malfunction theory is a sufficiency of proof issue concerning a manufacturing defect. [[557]](#footnote-558)556 Proof under the malfunction theory may be based upon circumstantial evidence analogous to a res ipsa loquitur inference in a negligence action. [[558]](#footnote-559)557 Under the malfunction theory, evidence of the nature of the accident itself may, under certain circumstances, give rise to a reasonable inference that the product is defective. [[559]](#footnote-560)558 This result is based upon the premise that the product's failure may not meet ordinary consumers' expectations of the product's continued performance. [[560]](#footnote-561)559 Typically, the consumer presents evidence that the product was used in a normal, foreseeable manner and that the accident occurred during such usage. However, problems may arise because there may be "several possible explanations for the accident, not all of which point to the product's defective condition." [[561]](#footnote-562)560 If the consumer fails to negate the other **[\*613]** possible causes, then liability may not attach. [[562]](#footnote-563)561 In response to this situation, the Cassisi court stated:

In effect, those decisions place on the plaintiff both the burden of producing evidence as well as the burden of persuasion as to that issue. To so hold, however, ignores the practical evidentiary problems which are common to products liability actions, and the policy considerations of Section 402A which were designed to assist the plaintiff in his quest for the jury's consideration of the issues alleged. [[563]](#footnote-564)562

The Cassisi court resolved this evidentiary problem by reference to the Pennsylvania case of Greco v. Bucciconi Engineering Co.: [[564]](#footnote-565)563

We approve the Greco rule and apply it to the case now before us. That rule, applying Pennsylvania law, simply states that when a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration. [[565]](#footnote-566)564

Although the Cassisi malfunction rule was based upon manufacturing defects, the court also examined the issues concerning design defects and the consumer expectation test. [[566]](#footnote-567)565 During its examination, the Cassisi court noted the problems with the "unreasonably dangerous language" of section 402A as expressed in both Cronin and Barker. [[567]](#footnote-568)566

In Ford Motor Co. v. Hill, [[568]](#footnote-569)567 the Supreme Court of Florida held that strict liability was applicable to second collision or enhanced injury cases. In Hill, the defendant, Ford, asserted **[\*614]** that strict liability should not apply in design cases:

Ford Motor Company (Ford) contends there are such significant differences between manufacturing flaws (where products do not conform to planned specifications due to manufacturing error) and design defects (where products are produced as designed but the design itself is defective) that this Court should utilize a negligence standard for design defects and permit strict liability for manufacturing errors. Ford reasons that in manufacturing flaws there is a guide, the plan or blueprint of the product, to aid jurors in determining defectiveness, but that no such comparison guide is available for design defects. Instead, Ford contends that the highly technical issues involved in an engineering design choice are too complex for jurors with no engineering training or manufacturing experience. Thus, Ford asserts that the product must be evaluated in terms of how well it performed, taking into account all of the practical and technical problems of the designer's options--a negligence standard. [[569]](#footnote-570)568

In rejecting Ford's contentions, the Hill court noted that "the policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged." [[570]](#footnote-571)569 "We feel that the better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing. If so choosing, however, a plaintiff may also proceed in negligence." [[571]](#footnote-572)570

The Supreme Court of Florida clarified its position on the meaning of unreasonable danger in Radiation Technology v. Ware Construction Co. [[572]](#footnote-573)571 The Radiation Technology court found that under section 402A, the term "unreasonably dangerous" depicts liability by analyzing factors which are equivalent to those set forth by Dean Wade. [[573]](#footnote-574)572 **[\*615]**

Neither the Supreme Court of Florida nor the Court of Appeals of Florida has defined a design defect beyond those described in West, Jones, Cassisi, Hill, and Radiation Technology. [[574]](#footnote-575)573 In Norton v. Snapper Power Equipment, [[575]](#footnote-576)574 the United States Court of Appeals for the Eleventh Circuit, applying Florida law, decided that state-of-the-art (feasibility of alternative designs) is only one factor in the overall analysis of a design case and is relevant to both the plaintiff's case-in-chief and to a defense. The Norton court based its opinion concerning state-of-the-art on the Supreme Court of Florida's decision in Radiation Technology. [[576]](#footnote-577)575

2. Statutes

Florida does not have a general products liability statute; however, the legislature has enacted anti-consumer statutes which limit punitive damages, [[577]](#footnote-578)576 economic damages, [[578]](#footnote-579)577 an offer of judgment, [[579]](#footnote-580)578 joint and several liability, [[580]](#footnote-581)579 and liabili- **[\*616]** ty for blood products. [[581]](#footnote-582)580 The Florida legislature also established a twelve-year statute of repose. [[582]](#footnote-583)581

3. Pattern Jury Instructions

There is a close association between Florida's case law and its pattern jury instructions. In a footnote in the Hill decision, the Supreme Court of Florida stated that it believed that pattern (standard) jury instructions could be improved and directed the committee on standard instructions for civil trials to develop appropriate instructions. [[583]](#footnote-584)582 This directive in the footnote was aimed directly at the issue of the Florida Supreme Court's statement that strict liability should apply "without distinction as to whether the defect was caused by design or manufacturing." [[584]](#footnote-585)583 In addition, the plaintiff could also choose to proceed in negligence. [[585]](#footnote-586)584

The results of the commission's efforts in developing a standard instruction concerning products liability actions, including design defects, were completed and published in 1983. [[586]](#footnote-587)585 The pattern instruction on design defects is basically **[\*617]** the Barker two-pronged test; however, the burden of proof is not shifted to the defendant in the second prong of the test. [[587]](#footnote-588)586 Thus, the test consists of the consumer expectation test in the first part and a risk-benefit in the second part. The two prongs of the standard instructions are separated by a bracketed "or," but the committee's notes do not recommend whether either test should be given to the exclusion of the other or whether they should be given alternatively or together. [[588]](#footnote-589)587

K. Georgia

1. Common Law

The Supreme Court of Georgia has refused to adopt strict liability under its common law; thus, all development of strict liability is based upon statutes and their interpretation. [[589]](#footnote-590)588

2. Statutes

In 1968, the Georgia legislature enacted a statute providing strict liability for defective products. [[590]](#footnote-591)589 The specific section of the statute which relates to strict liability states the following: **[\*618]**

The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained. [[591]](#footnote-592)590

In Ellis v. Rich's, Inc., [[592]](#footnote-593)591 the Supreme Court of Georgia interpreted this statute and Georgia's version of the UCC as establishing the limits of strict liability beyond which the court may not enter. The Ellis court stated that strict liability under the statute does not require privity and eliminates any question of negligence. [[593]](#footnote-594)592 The Ellis court made it clear, however, that strict liability is limited to product manufacturers and does not apply to other entities within the stream of commerce. [[594]](#footnote-595)593 The Supreme Court of Georgia expanded its explanation of statutory strict liability in Center Chemical Co. v. Parzini. [[595]](#footnote-596)594 However, the Parzini court's description of strict liability was made in a negative form stating what elements are not relevant, rather than positive expressions of what elements are relevant. [[596]](#footnote-597)595 According to the Parzini court the statutory phrase "not merchantable and reasonably suited to the use intended" is language attributable to sales contracts; however, such statutory language does not incorporate the various constructions from sales contracts. [[597]](#footnote-598)596 The court stated that this language should be construed to mean that the plaintiff must prove that the product is **[\*619]** defective. [[598]](#footnote-599)597 The Parzini court defined defect or defective condition by stating the negative: "A product is not in a defective condition when it is safe for normal handling and consumption." [[599]](#footnote-600)598 This position was based upon comment h of section 402A. While it would seem logical for the court, having relied on one comment, to look to other comments, the Parzini court chose to be selective in its application of section 402A and rejected the unreasonably dangerous requirement. [[600]](#footnote-601)599

Other courts have also rejected the unreasonably dangerous requirement of section 402A because that phrase may improperly inject negligence principles into strict liability thus limiting the scope of liability of the manufacturer by requiring an increased burden of proof on the consumer. [[601]](#footnote-602)600 The Parzini court's rejection of the unreasonably dangerous requirement, however, appears to be based upon a desire to limit manufacturers' liability for dangerous products. The Parzini court expressed its rejection of unreasonably dangerous with negative and limiting language:

Strict liability is not imposed under the statute merely because a product may be dangerous. Many products can not be made completely safe for use and some can not be made safe at all. However, such products may be useful and desirable. If they are properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions, they can not be said to be defective. To hold otherwise would discourage the marketing of many products because some danger attended their use. [[602]](#footnote-603)601

Although the Parzini court indicated that under strict liability the consumer is not required to prove negligence, the court's assertion was immediately qualified by stating "however, the manufacturer is not an insurer." [[603]](#footnote-604)602 **[\*620]**

In Ford Motor Co. v. Carter, [[604]](#footnote-605)603 the Supreme Court of Georgia reversed the court of appeals decision which allowed a consumer recovery for wrongful death in a strict liability action. [[605]](#footnote-606)604 The Carter court held that strict liability did not amount to negligence per se. [[606]](#footnote-607)605 Under Georgia's wrongful death statutes, the death must be attributable to negligence. [[607]](#footnote-608)606 Since strict liability is not based upon negligence and since it cannot be construed as a form of negligence per se, a wrongful death action cannot be maintained based upon that theory. [[608]](#footnote-609)607 The Carter court stated that because the strict liability statute is in derogation of the common law, it is to be strictly construed. [[609]](#footnote-610)608 Therefore, because the strict liability act stated that a manufacturer's liability was for injury to persons or property, no action would be cognizable for death. [[610]](#footnote-611)609

In Wansor v. George Hantscho Co., [[611]](#footnote-612)610 a consumer brought an action for a product sold in 1961 which caused injury to the consumer in 1971. [[612]](#footnote-613)611 The Wansor court stated that the strict liability statute applied to "the manufacturer of any personal property sold as new property." [[613]](#footnote-614)612 The Wansor court asserted that because the product was sold in 1961, the 1968 strict liability act would not apply because it would violate Georgia statutes forbidding retrospective application of laws. [[614]](#footnote-615)613 The Wansor court must have either been mistaken or have forgotten the example it gave one and a half years earlier in Carter, where the court found "under the statute, a manufacturer could possibly be held responsible in 1977 for a defect in a motor vehicle manufactured in 1930." [[615]](#footnote-616)614 **[\*621]**

The Supreme Court of Georgia took further steps to restrict consumer actions concerning design defects in Mann v. Coast Catamaran Corp. [[616]](#footnote-617)615 In Mann the consumer was killed when the mast of his sailboat came into contact with an uninsulated overhead power line. The plaintiff brought a strict liability action alleging the boat contained a design defect because it failed to incorporate safety devices to ground or insulate against electrical contact. The Mann court said that the "boat as manufactured was reasonably suited for its intended purpose of sailing," [[617]](#footnote-618)616 and because the lack of grounding or insulation device did not prevent the sailboat from functioning properly, it could not be considered defective in design. [[618]](#footnote-619)617

The Mann decision was based upon the court's prior interpretation in Parzini that a product was not defective if it was "safe for normal handling and consumption." [[619]](#footnote-620)618 The Mann court bolstered its interpretation by citing its litany of negative statements about strict liability, such as the following:

(1) Many products cannot be made completely safe and some cannot be made safe at all.

(2) Products that are not made safe are useful and desirable.

(3) If products are properly prepared and accompanied by warnings and instructions they cannot be defective.

(4) To find properly prepared products defective would discourage the marketing of many products because some danger attended their use. [[620]](#footnote-621)619 **[\*622]**

The Mann court's interpretation of design defects appears to establish that as long as a product will perform its intended function, the product cannot be defective no matter what danger it presents to the consumer. If a lawn mower mows grass, a fan supplies wind, a boat sails or propels through the water, or an automobile provides transportation, then it is "reasonably suited for its intended use." The Mann court placed great reliance upon function or utility, while at the same time ignoring risk. There does not appear to be any balancing of function or utility against hazards or risks; a one-sided function analysis suffices. The Mann decision goes a long way towards eliminating any hope a consumer may have to recover for lack of guards, safer designs or for any increase of undue risk. One justice of the Supreme Court of Georgia attempted to point out this lack of balancing to the Mann majority, however, his cautionary dissent was ignored. [[621]](#footnote-622)620

The Mann court's decision may have been heavily influenced by the finding that the plaintiffs "were aware of the power line but somehow sailed the boat directly into it." [[622]](#footnote-623)621 Thus, the plaintiff's knowledge of the risk or knowledge that the boat would not protect against such hazard eliminated the possibility of a defect. Stated in another manner, the Mann court found that any open and obvious danger eliminates the possibility of a design defect as a matter of law. This position can be reached by applying a consumer expectation analysis, based upon the Mann court's definition of defect under the Parzini court's reference to comment g. [[623]](#footnote-624)622

In 1992, the Supreme Court of Georgia decided Polston v. Boomershine Pontiac-GMC Truck, Inc. [[624]](#footnote-625)623 and held that the burden of proving indivisible damages in a second collision case should be on the defendant. In late 1994, the Supreme Court of Georgia made a dramatic change in the products **[\*623]** liability law in Banks v. ICI Americas Inc. [[625]](#footnote-626)624 Before reviewing the Banks decision, it is worthwhile reviewing the state of Georgia law that preceded Banks.

Both the federal courts [[626]](#footnote-627)625 and the lower Georgia courts have been extremely active in developing strict liability. The Court of Appeals of Georgia developed highly refined, no-duty concepts and a consumer expectation test that almost eliminated any viable design defect litigation. [[627]](#footnote-628)626 A defect had to be hidden or latent before an action would lie for either a design or warning defect. [[628]](#footnote-629)627 The test for strict liability was based upon a highly restrictive consumer expectation test. Under the consumer expectation test, any open and obvious danger eliminates the defect. [[629]](#footnote-630)628 The open and obvious danger rule was an independent test which was established separate from any risk-utility analysis or any other factor. [[630]](#footnote-631)629 As an independent test, the open and obvious danger rule did not look to the subjective knowledge of the consumer concerning awareness of the hazard or danger. Rather, it made an objective evaluation whether the danger was observable or could possibly be discovered. [[631]](#footnote-632)630 **[\*624]** Thus, under the open and obvious danger rule, if the defendant did not attempt to keep a highly dangerous product a secret, it could not be defective. It was the consumer's burden of proof to show that the danger or hazard was latent. [[632]](#footnote-633)631

Although the Supreme Court of Georgia said it was adopting strict liability (or a type of strict liability) independent of negligence principles, this did not appear to be the interpretation placed on the statutes by Georgia's federal and lower courts. Their version of strict liability was riddled with no-duty rationales and restrictive foreseeability concepts. [[633]](#footnote-634)632 The Georgia Court of Appeals closely associated strict liability with negligence as indicated by one of their favorite phrases with regard "to a product-design case, only semantics distinguishes between a cause of action for negligence and liability under the strict liability statute." [[634]](#footnote-635)633 Thus, their highly restrictive interpretation of strict liability was used to hinder any development of liability under negligence. [[635]](#footnote-636)634

Almost all development of strict liability in Georgia was attributable to the original negative concepts developed by the Supreme Court of Georgia; however, the lower courts and the federal courts added a few of their own. [[636]](#footnote-637)635 According to their decision, even when a consumer proved a latent defect and proved an alternative design would eliminate or reduce the harm, the consumer did not establish a defective design. [[637]](#footnote-638)636 The result of such an approach was to render almost complete **[\*625]** immunity to product manufacturers for design defects in Georgia.

Under Georgia law, prior to the Banks decision, the only logical conclusion that could be drawn was that in some instances under strict liability, the consumer would be denied recovery because Georgia law says strict liability and negligence are separate and distinct; [[638]](#footnote-639)637 whereas, in other instances, the consumer would be denied recovery under either negligence or strict liability because in essence they are the same. [[639]](#footnote-640)638 For the consumer this was a lose-lose proposition.

In December 1994, the Supreme Court of Georgia made an abrupt about face in Banks v. ICI Americas Inc. by overruling the Mann decision. [[640]](#footnote-641)639 In Banks, the parents of a boy who died after ingesting a rodenticide called "Talon-G" brought suit alleging the product was defectively designed and inadequately labeled. [[641]](#footnote-642)640 Under the Mann decision, the plaintiffs could not recover; however, the Banks court recognized that Mann relied upon Parzini and that the Parzini manufacturing defect analysis was inappropriate in a design defect case. [[642]](#footnote-643)641

The Banks court conducted "an exhaustive review of foreign jurisdictions and learned treatises" and concluded that it was a general consensus that a risk-utility analysis should be applied in design defect cases. [[643]](#footnote-644)642 Rejecting its prior reliance **[\*626]** upon a narrow consumer expectation test, the court stated:

This risk-utility analysis incorporates the concept of "reasonableness," i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk. [[644]](#footnote-645)643

According to the Banks court, the "heart" of a design defect is the availability of an alternative design:

Numerous lists of factors to be considered by the trier of fact in balancing the risk of the product against the utility or benefit derived from the product have been complied by various authorities. One factor consistently recognized as integral to the assessment of the utility of a design is the availability of alternative designs, in that the existence and feasibility of a safer and equally efficacious design diminishes the justification for using a challenged design. The alternative safer design factor reflects the reality that:

it often is not possible to determine whether a safer design would have averted a particular injury without considering whether an alternative design was feasible. The essential inquiry, therefore, is whether the design chosen was a reasonable one from among the feasible choices of which the manufacturer was aware or should have been aware. . . .

We agree with the importance placed on the alternative safer design factor and now hold that in determining whether a product was defectively designed, the trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design and was a marketable reality and technologically feasible. Anything to the contrary in Mann is disapproved. [[645]](#footnote-646)644 **[\*627]**

Although the Banks court placed great emphasis on the alternative design requirement, it did not make it the sole factor in its design defect analysis:

We recognize that in setting forth a test under the risk-utility analysis for the determination whether a manufacturer should be liable for an entire product line, no finite set of factors can be considered comprehensive or applicable under every factual circumstance, since such matters must necessarily vary according to the unique facts of each case. [[646]](#footnote-647)645

The Banks court set forth, in a footnote, a non-exhaustive list of general factors for its risk-utility analysis:

The usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate the danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance. [[647]](#footnote-648)646

The Banks court noted that "manufacturer's proof of compliance with industry-wide practices, state-of-the-art, or federal regulations does not eliminate conclusively its liability for its design of allegedly defective products." [[648]](#footnote-649)647

In addition, the factors relevant to a safer alternative design in Banks appeared much broader than those recommended by the ALI because they included substitute products.

Alternative safe design factors include: the feasibility of an alternative design; the availability of an effective substitute **[\*628]** for the product which meets the same need but is safer; the financial cost of the improved design; and the adverse effects from the alternative. [[649]](#footnote-650)648

On the "benefit" side of the relevant factors, the court stated:

In regard to the benefits aspect of the balancing test, factors that could be considered include the appearance and aesthetic attractiveness of the product; its utility for multiple uses; the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and the collateral safety of a feature other than the one that harmed the plaintiff. [[650]](#footnote-651)649

In an opinion dissenting in part, Justice Fletcher recognized that the majority had not made the existence of an alternative design the sole factor for design defects and urged the court to return to a more restrictive standard consistent with the Parzini case. [[651]](#footnote-652)650 According to the dissent, the alternative design requirement should be the "essential element" considered and the plaintiff should have the burden of proving that an alternative design "would have" prevented or reduced the injury rather than "could have" as required by the majority opinion. [[652]](#footnote-653)651

The interpretation of defect under the strict liability statute is not the only restriction placed upon consumer recovery. The consumer faces a ten-year statute of repose, limitations under comparative negligence, punitive damage limitations, and several other anti-consumer limitations. [[653]](#footnote-654)652 **[\*629]**

3. Pattern Jury Instructions

Georgia's pattern jury instructions follow the Parzini decision in rejecting the unreasonably dangerous test. They state: "A machine which is safe if handled in a normal manner is not ordinarily a defective machine." [[654]](#footnote-655)653

L. Hawaii

1. Common Law

In Stewart v. Budget Rent-A-Car Corp., [[655]](#footnote-656)654 the Supreme Court of Hawaii adopted strict liability in tort. In Stewart, the consumer was injured while driving a rental car which suddenly veered out of control. [[656]](#footnote-657)655 The consumer presented evidence on how the accident occurred and expert evidence concerning the condition of the vehicle before and after the accident. [[657]](#footnote-658)656 However, the rental car had been "cannibalized" before the consumer's experts had a chance to inspect the vehicle. [[658]](#footnote-659)657 Thus, the consumer's experts could not testify as to the defect in the vehicle. [[659]](#footnote-660)658 The Stewart court affirmed a jury verdict for the plaintiff, allowing circumstantial evidence as a basis for proof of a defect. [[660]](#footnote-661)659 In its adoption of strict liability, the Stewart court quoted section 402A [[661]](#footnote-662)660 as the rule to be applied and extended the rule to lease situations. [[662]](#footnote-663)661

In Ontai v. Straub Clinic & Hospital, [[663]](#footnote-664)662 the Supreme Court of Hawaii adopted the two-pronged Barker test in design **[\*630]** defect cases. The Ontai court cited with approval the California cases of Greenman and Corwin which preceded the Barker decision. [[664]](#footnote-665)663 In addition, the Ontai court said that in a design action, the plaintiff may proceed on both negligence and strict liability theories. [[665]](#footnote-666)664

In 1987, the Supreme Court of Hawaii held that state-ofthe-art evidence was inadmissible in a strict liability action in Johnson v. Raybestos-Manhattan, Inc. [[666]](#footnote-667)665 The Johnson court stated that whether a seller knew or reasonably should have known of dangers inherent in the product is irrelevant to the issue of strict liability. [[667]](#footnote-668)666 However, state-of-the-art evidence is highly relevant in negligence actions. [[668]](#footnote-669)667 The defendant in Johnson argued that any rule which eliminates state-of-the-art or eliminates scienter would make the manufacturers absolutely liable for all harm caused by their products. [[669]](#footnote-670)668 The Johnson court found that the defendant's contentions lacked merit since the consumer must still show the product was defective, i.e., that it does not meet reasonable consumer expectations as to its safety. [[670]](#footnote-671)669 Because the defendant's knowledge of its product's dangers was irrelevant, the Johnson court found "no need to adopt the fiction that the defendant is presumed to know of the dangers inherent in his product such fiction is a by-product of the unwarranted interjection of negligence concepts into strict liability doctrine." [[671]](#footnote-672)670

The Barker test was reaffirmed as the law in Hawaii in Masaki v. General Motors Corp. [[672]](#footnote-673)671 In Masaki, the defendant argued that the trial court's instruction on design defect erroneously placed on the defendant the burden of proving the design **[\*631]** was not defective. [[673]](#footnote-674)672 The Masaki court rejected the defendant's contentions and stated that under the second prong of the Barker test, adopted in Ontai, the plaintiff need only prove the product's design was a legal cause of the injuries, then the burden of proof shifts to the defendant to prove that "the benefits of the design outweigh the risk of danger inherent in the design." [[674]](#footnote-675)673

In addition, the defendant asserted that in a warning defect case, the "feasibility and beneficial effect" of including a warning must be a factor. The Masaki court disagreed and said that it is not error for a trial court to refuse to instruct a jury to consider the feasibility and beneficial effects of warnings. [[675]](#footnote-676)674

The Masaki court allowed the plaintiff to present evidence of a proposed alternative design. [[676]](#footnote-677)675 The evidence that the defendant presented at trial contradicted the proposed design; however, the Masaki court stated that a jury could disregard such testimony and accept the proposed alternative. [[677]](#footnote-678)676 It was clear the Masaki court did not require the plaintiff to prove feasibility in a warnings case, nor did it place the burden of proof under the second prong of the Ontai (Barker) test on the plaintiff. However, if the plaintiff desires to present proof of either feasibility or an alternative design, then he or she may do so.

In Larsen v. Pacesetter Systems, [[678]](#footnote-679)677 the Supreme Court of Hawaii stated that the elimination of the burden of proving negligence is one of the policies justifying strict liability in tort. **[\*632]**

2. Statutes

Hawaii has no statutes applicable to design defects; however, there are legislative limitations on noneconomic damages, [[679]](#footnote-680)678 joint and several liability, [[680]](#footnote-681)679 and blood products. [[681]](#footnote-682)680

3. Pattern Jury Instructions

There are no pattern jury instructions for design defects in Hawaii.

M. Idaho

1. Common Law

The Supreme Court of Idaho first adopted strict liability in Shields v. Morton Chemical Co. [[682]](#footnote-683)681 as expressed in section 402A. Less than a month after adopting section 402A, the Supreme Court of Idaho found strict liability applicable in design defect cases in Rindlisbaker v. Wilson. [[683]](#footnote-684)682 In Rindlisbaker, the defendant asserted that a distinction should be drawn between manufacturing and design defects and that strict liability should not apply to the later. [[684]](#footnote-685)683 The Rindlisbaker court rejected the defendant's contention: "We fail to see any logical reason to distinguish between the two. The risk to the user will be just as great with an unreasonably dangerous design defect as with a manufacturing defect." [[685]](#footnote-686)684 In Peterson v. Idaho First National Bank, [[686]](#footnote-687)685 however, the court refused to extend strict liability to commercial sellers that deal in used **[\*633]** products in substantially the same condition as when the products were purchased for sale. [[687]](#footnote-688)686

In defective design cases, Idaho allows proof of a defect by circumstantial evidence under a malfunction theory. [[688]](#footnote-689)687 The plaintiff need not prove a specific defect under a malfunction theory, but must show the other circumstances surrounding the malfunction and exclude all possible causes of the defect. [[689]](#footnote-690)688 The standard for determining whether a product is defective in design in strict liability is the consumer expectation test, found in Rojas v. Lindsay Manufacturing Co. [[690]](#footnote-691)689 The expectations are those of the ordinary user or consumer for whose use the product is intended, not the expectations of the injured consumer. [[691]](#footnote-692)690 The Supreme Court of Idaho makes a clear distinction between strict liability and negligence concerning the "unreasonably dangerous" requirement:

Unreasonable dangerousness, as used in this context, is an element of a strict liability cause of action, not of a negligence cause of action. There is no dispute that negligence and strict liability are separate, non-mutually exclusive theories of recovery, and that "the failure to prove one theory does not preclude proving another theory." As the Washington Supreme Court stated: "Negligence and strict liability are not mutually exclusive because they differ in focus: negligence focuses upon the conduct of the manufacturer while strict liability focuses upon the product and the consumer's expectation." [[692]](#footnote-693)691

2. Statutes **[\*634]**

In 1980, the Idaho legislature implemented several anticonsumer provisions under its Idaho Products Liability Reform Act. [[693]](#footnote-694)692 None of the provisions of the Act changed Idaho's common law determination that design defects are determined by an application of the consumer expectation test. However, the Act provides for the open and obvious danger rule to be used as a factor in determining comparative responsibility (negligence) [[694]](#footnote-695)693 and provides that subsequent changes in state-ofthe-art or design are inadmissible to prove defect. [[695]](#footnote-696)694 In addition, legislation has placed limitations on consumer recovery concerning the useful safe life of a product, [[696]](#footnote-697)695 sellers other than manufacturers, [[697]](#footnote-698)696 firearms and ammunition, [[698]](#footnote-699)697 noneconomic damages, [[699]](#footnote-700)698 punitive damages, [[700]](#footnote-701)699 collateral sources, [[701]](#footnote-702)700 and blood products. [[702]](#footnote-703)701

3. Pattern Jury Instructions

Idaho's pattern instruction, IDJI 1007, uses a consumer expectation test to define whether or not a product is in an "unreasonable dangerous defective condition." [[703]](#footnote-704)702 **[\*635]**

N. Illinois

1. Common Law

On May 20, 1965, the Supreme Court of Illinois adopted strict liability in tort in Suvada v. White Motor Co. [[704]](#footnote-705)703 Later, the court found strict liability applied in second collision cases. [[705]](#footnote-706)704 In Anderson v. Hyster Co., [[706]](#footnote-707)705 the defendant appealed a jury verdict in favor of the plaintiff in a design defect case. [[707]](#footnote-708)706 The defendant contended on appeal that the plaintiff failed, as a matter of law, to prove the product was not reasonably safe and that the trial court erroneously admitted irrelevant safety standards. [[708]](#footnote-709)707 In affirming the verdict for the plaintiff, the Anderson court set forth the following concerning proof of design defects:

That a product was not reasonably safe by reason of defective design may be proved, inter alia, by evidence of the availability and feasibility of alternate designs at the time of its manufacture, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation. [[709]](#footnote-710)708

The Anderson court's statement was clearly based upon what proof may be presented, not what proof must be presented in a design case. The Anderson court was careful to state, inter alia, that feasibility of alternative designs and standards was sufficient to prove design defect. The major focus of the An- **[\*636]** derson court was the admissibility of industry standards rather than general proof requirements of design cases. [[710]](#footnote-711)709

In ***Kerns*** v. Engelke, [[711]](#footnote-712)710 the plaintiff was injured as a result of the defendant/manufacturer's failure to provide a device to secure its product while it was being moved. Thus, the plaintiff's sole contention was that the lack of a safety device created an unreasonably dangerous design defect. [[712]](#footnote-713)711 The defendant contended it was error for the plaintiff to fail to prove a feasible alternative design under the state-of-the-art at the time the product was manufactured. [[713]](#footnote-714)712 The defendants maintained that in a defective design case, the plaintiff must plead and prove feasible alternative designs or the action fails, citing as authority Lolie v. Ohio Brass Co., [[714]](#footnote-715)713 a Seventh Circuit Court of Appeals decision. The Lolie decision was based upon two Illinois appellate court decisions which the Seventh Circuit believed required proof of an alternative design which is economical, practical and effective, i.e., technologically and economically feasible. [[715]](#footnote-716)714

The ***Kerns*** court examined the authority relied upon by the defendant concerning the requirement of a feasible alternative design.

Neither Lolie, Wright nor Sutkowski holds that a plaintiff must plead alternative design, as Fox River argues. Whether Lolie, which holds that a plaintiff must prove al- **[\*637]** ternative design, correctly states our law is a question which does not have to be answered here. The plaintiff proved, as he must, to the satisfaction of the fact finder, the unreasonably dangerous nature of the defect in design; and here he did so by presenting pertinent evidence such as feasible alternative design. [[716]](#footnote-717)715

As authority for rejecting the defendant's position, the ***Kerns*** court relied upon its earlier decision in Anderson. [[717]](#footnote-718)716

In Palmer v. Avco Distributing Corp., [[718]](#footnote-719)717 a verdict in favor of the plaintiff for defective design of a fertilizer spreader was affirmed by the Supreme Court of Illinois. In affirming, the Palmer court recited the consumer expectation test as the test for deciding when a product is unreasonably dangerous. [[719]](#footnote-720)718 At trial, the plaintiff presented evidence sufficient to meet the consumer expectation test; however, the plaintiff also presented evidence that the product lacked a guard or screen which could have prevented his injury. [[720]](#footnote-721)719 The plaintiff's experts testified that alternative designs (guarding) were possible for an additional fifty dollars; however, the plaintiff's experts admitted that these design alternatives needed further testing to determine their ultimate form and feasibility. [[721]](#footnote-722)720 The Palmer court found that the plaintiff's proof was sufficient for liability under two possible tests:

Thus evidence was introduced to prove the unreasonable danger of the fertilizer spreader in the two ways this is ordinarily proved: (1) introducing evidence that people customarily rode in spreaders to break up fertilizer lumps and for other purposes, that they could do so in other spreaders without risk of harm and that their expectation would be that they could do so in the Avco spreader, and (2) introducing evidence that the Avco spreader could have been designed to prevent a foreseeable harm without hin- **[\*638]** dering its function or increasing its price. [[722]](#footnote-723)721

The two-step test was almost identical to the Barker rule, which the Palmer court cited with approval. [[723]](#footnote-724)722 Although the Palmer court made no reference to shifting of the burden of proof in the second prong of the Barker test, it was clear that the Supreme Court of Illinois found that a plaintiff could establish liability for a design defect by using either a consumer expectation test or by showing an alternative design.

In 1990, the Supreme Court of Illinois adopted the entire Barker rule, including shifting the burden of proof to the defendant, in Lamkin v. Towner. [[724]](#footnote-725)723 The Lamkin court set forth its test for defective design as follows:

A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs. [[725]](#footnote-726)724

The lower Illinois courts and federal courts interpreting Illinois law developed a few concepts that do not appear to be entirely consistent with the Illinois Supreme Court's interpretation of design defects under strict liability. For example, the Lolie decision from the Seventh Circuit Court of Appeals which attempted to impose an absolute requirement that the plaintiff had the burden of proving an alternative design, including detailed proofs on costs and practicalities, was rejected in ***Kerns***. The ***Kerns*** approach seems justifiable considering the source of the rule upon which the Lolie court based its decision. Lolie relied to a great extent on Sutkowski v. Universal **[\*639]** Marion Corp. [[726]](#footnote-727)725

In Sutkowski, the plaintiff urged the court to allow a riskutility analysis which included proof of an alternative design. [[727]](#footnote-728)726 The Sutkowski court's ruling allowed, but did not require, evidence of a safer design as one method for proving a defect. [[728]](#footnote-729)727 Allowing a plaintiff to prove design defect by proving alternative designs under a risk-utility test was accepted by the Illinois Court of Appeals. [[729]](#footnote-730)728 After the ***Kerns*** decision, the issue of whether the plaintiff must prove an alternative design seems resolved:

Clearly, evidence of alternative design feasibility is relevant to the issue that must be proved. In light of the ***Kerns*** decision, and until the Illinois Supreme Court determines otherwise, we believe the rule of law in Illinois is that evidence of alternative design feasibility is relevant and admissible in a design defect case, but it is not an essential element of such a case if the finder of fact can be persuaded in the absence of such evidence that the defect in design rendered the product unreasonably dangerous. [[730]](#footnote-731)729

Another rule developed in both federal courts and Illinois lower courts was the open and obvious danger rule. [[731]](#footnote-732)730 The **[\*640]** open and obvious danger rule developed from the consumer expectation test of section 402A. If an ordinary consumer would be aware of the danger, there can be no reasonable expectations of safety. To many, this is the natural result of the consumer expectation test. As developed in Illinois and other jurisdictions, a consumer would be deprived of recovery when a manufacturer makes a product openly dangerous. Under section 402A, the open and obvious danger rule can be measured by an objective test--knowledge of an ordinary consumer rather than the subjective knowledge of the injured consumer. Thus, measured by the objective test, the rule bars liability because a product cannot be considered unreasonably dangerous. Under a negligence analysis, the manufacturer has no duty to alter its obviously dangerous product. Although the open and obvious danger rule has been accepted by the Illinois Court of Appeals in many decisions, it appears that the rule's life span has almost expired.

In Harnischfeger v. Gleason Crane Rentals, [[732]](#footnote-733)731 Justice Chapman critically examined the open and obvious danger rule and its foundations. [[733]](#footnote-734)732 After explaining the origins and history of all Illinois decisions on the rule, Justice Chapman noted that almost all of the cases following the rule "simply reiterate that an open and obvious danger equals no recovery without any serious discussion of the rationale for the rule." [[734]](#footnote-735)733 Noting all of the criticism of the rule by commentators and the recent Illinois Supreme Court holding that the obviousness of the danger does not necessarily justify the risk of harm, [[735]](#footnote-736)734 Justice Chapman proceeded to perform an in-depth analysis of the rule and set forth the following:

"A duty limitation is proper for those dangers which are always outside the defendant's scope of duty, but obvious dangers are not always found there. The argument that the obviousness always takes the danger beyond the scope of defendant's duty does not **[\*641]** address the simple fact that the same hole in the ground, perfectly obvious by day, is not obvious under cover of total darkness."

. . .

"The patent danger rule flies in the face of the calculus of risk analysis by insulating defendants with the per se position that obvious flaws are not actionable. Obviousness of danger, which should be but one factor in determining foreseeability and reasonableness of risk, becomes the factor in determining whether the defendant's conduct is actionable. The position that a risk is automatically reasonable by virtue of being obvious is indefensible under ordinary negligence analysis." [[736]](#footnote-737)735

Examining the duty element in detail, Justice Chapman reviewed the historical movement from the no-duty nineteenthcentury view towards the expanded duty rationale of the twentieth century. Under a negligence risk-utility analysis, the balancing is based upon numerous policies. [[737]](#footnote-738)736 Dean Wade's seven-factor analysis, detailing the policy basis for products liability, also approached liability on a multi-faceted basis similar to negligence. [[738]](#footnote-739)737 Since liability is determined by weighing the policy factors of any given test, Justice Chapman stated:

To the extent that a court weighs one or more of the policy bases more heavily than the others, it may or may not recognize a duty. For example, if a court stresses Professor Wade's factor number seven, the feasibility of spreading the loss, the plaintiff, in general, may be favored, while in a court that more heavily weighs Professor Wade's factor number 5, a user's ability to avoid danger in the use of the product, the defendant is more likely to prevail. When we turn from products liability cases to a negligence setting, we see similar policy considerations behind the recognition of a duty and a greater or less likelihood of a duty being imposed depending upon which factors are more **[\*642]** heavily weighted. [[739]](#footnote-740)738

In the open and obvious danger rule, the focus is on one factor only--foreseeability. However, foreseeability is only one of the elements that must be considered under either negligence or strict liability. [[740]](#footnote-741)739 In addition, Justice Chapman stated the greatest problem of the rule is that it focuses on foreseeability from the viewpoint of the plaintiff:

The fact that courts are viewing open and obvious dangers through plaintiffs' eyes becomes clear when we realize that in adopting it as a duty-denial tool they are in essence saying, "The more obvious the danger, the less the duty to warn." If the duty issue is viewed from the defendant's standpoint, such a rule makes no sense at all. Juries would forgive a defendant's failure to warn if the defendant knew nothing of the hazard. [[741]](#footnote-742)740

Justice Chapman also noted two other types of analyses. First, assumption of the risk can deprive the consumer of recovery because the degree of awareness of the danger is viewed from the plaintiff's standpoint rather than that of the defendant. [[742]](#footnote-743)741 Assumption of the risk can be justified depending upon the factual circumstances; however, if this conclusion is reached, the reasons should be clearly stated, rather than merely regurgitating that there is "no duty to warn because the danger is open and obvious." [[743]](#footnote-744)742 Second, some courts have focused solely upon factors four, five, and six and have skipped several necessary steps in the analysis. [[744]](#footnote-745)743 According**[\*643]** to Justice Chapman, obviousness of the danger is merely one of many factors that should be considered and foreseeability alone is an inadequate foundation upon which to base the existence of a legal duty. [[745]](#footnote-746)744

The application of the Barker two-pronged test under the Palmer/Lamkin decisions should eliminate any question of the open and obvious danger rule since the risk-utility test under the second prong is made without reference to the consumer's expectations. [[746]](#footnote-747)745

2. Statutes

Illinois statute 5/2-1107.1 provides:

Jury instructions in tort actions. In all actions on account of bodily injury or death or physical damage to property based on negligence, or product liability based on strict tort liability, the court shall instruct the jury in writing that the defendant shall be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. [[747]](#footnote-748)746

A statute of repose was enacted in 1979 which places restrictions on the ability of a consumer to recover. [[748]](#footnote-749)747 In 1995, the **[\*644]** Illinois legislature passed what appears to be the most anticonsumer acts in the country concerning tort law. Among these acts were provisions applicable to products liability. The product provisions are so regressive that they restrict liability beyond that recommended by the ALI.

Under the Illinois statutes, a plaintiff must obtain a written report by a "qualified expert" before filing suit. [[749]](#footnote-750)748 The expert report must opine that a feasible alternative design exists or that the injury-producing product failed to comply with an applicable government or industry standard. [[750]](#footnote-751)749 In addition, the expert must establish causation between the defect and injury. [[751]](#footnote-752)750 There is a presumption that all products are non-defective or reasonably safe unless the plaintiff proves a reasonably feasible alternative design. [[752]](#footnote-753)751 The feasibility requirements are limited to what the defendant manufacturer knew at the time the product was marketed. [[753]](#footnote-754)752 In addition, the plaintiff must prove the alternative design was "available and developed for commercial use and available in the marketplace." [[754]](#footnote-755)753 Thus, in essence, the standard in Illinois is less than that of negligence since it measures design liability by what manufacturers have marketed.

Punitive damages must be shown by clear and convincing evidence [[755]](#footnote-756)754 and are limited to three times the plaintiff's economic damages. [[756]](#footnote-757)755 A defendant may demand an absolute separation of the punitive and compensatory damage claims at trial. [[757]](#footnote-758)756 What appears most amazing is that compliance with government statutes or regulations is an absolute defense to **[\*645]** punitive damages. [[758]](#footnote-759)757 Under the new Illinois statutes, non-manufacturers are excluded from liability if the manufacturer is identified and can pay the judgment. [[759]](#footnote-760)758 A jury is informed that any award to the plaintiff is not taxable, [[760]](#footnote-761)759 and the plaintiff is not allowed any recovery if his or her contributory fault exceeds fifty percent. [[761]](#footnote-762)760 In addition, the noneconomic damages cannot exceed $ 500,000, [[762]](#footnote-763)761 and hedonic damages are disallowed. [[763]](#footnote-764)762 The damages a plaintiff does recover are reduced by the non-subrogable amounts in excess of $ 25,000 paid by other sources. [[764]](#footnote-765)763 In addition, the defendant's liability payments may be reduced by the amounts paid by an employer who is partially at fault. [[765]](#footnote-766)764 Subsequent remedial measures are excluded as a source of proof of defect. [[766]](#footnote-767)765 Any generic or category liability for dangerous products are not allowed. [[767]](#footnote-768)766

The Illinois legislature created extremely restrictive provisions for warning defects. Under the statutes, a manufacturer need only advise consumers of the risk of danger and need not inform them of how they should avoid the risk. [[768]](#footnote-769)767 Warnings to non-user intermediaries are sufficient to avoid liability. [[769]](#footnote-770)768 Manufacturers receive complete immunity if the danger in the product is open and obvious. [[770]](#footnote-771)769 In addition, there is complete immunity if the warnings or instructions comply with industry standards. [[771]](#footnote-772)770

Illinois law provides an absolute statute of repose of ten years if the product is delivered to a user or consumer, and **[\*646]** twelve years if sold or delivered to a seller, whether or not a user ever received the product. [[772]](#footnote-773)771 Illinois statutes of limitations are restricted to a two-year discovery rule; however, the statute places an outside limit of eight years which cannot be exceeded, whether or not the plaintiff has discovered the injury. [[773]](#footnote-774)772

3. Pattern Jury Instructions

In Illinois Pattern Jury Instructions, No. 400.06, "unreasonably dangerous" is defined as "unsafe when put to a use that is reasonably foreseeable considering the nature and function of the product." [[774]](#footnote-775)773 This instruction does not reflect the Barker test adopted in Palmer and Lamkin.

O. Indiana

1. Common Law

The Supreme Court of Indiana was not active during the early growth of strict liability, leaving its development to the federal and lower Indiana courts. [[775]](#footnote-776)774 The Supreme Court of Indiana first accepted strict liability in its 1973 decision of Ayr-Way Stores v. Chitwood. [[776]](#footnote-777)775 The Ayr-Way Stores court decided the case on procedural grounds. Thus, little discussion was made concerning the elements of liability. The court, however, adopted Section 402A as the standard for strict liability in **[\*647]** tort.

In Shanks v. A.F.E. Industries, [[777]](#footnote-778)776 the plaintiff alleged that a component in a grain complex was defective in design because it lacked feasible, alternative warning devices. [[778]](#footnote-779)777 The Supreme Court of Indiana rejected the plaintiff's contention because a party other than the defendant made the overall design. [[779]](#footnote-780)778 The Shank court's discussion of design issues, however, indicated that a design defect action may have been viable if the factual situation were different. [[780]](#footnote-781)779 A portion of the Shanks discussion stressed the fact that the design defects were not hidden and were well known to the owner. [[781]](#footnote-782)780

The supreme court carried the hidden defect concept of Shanks to its ultimate extreme in Bemis Co. v. Rubush, [[782]](#footnote-783)781 which set forth Indiana's open and obvious danger rule. In Bemis, the plaintiff alleged design defects in a batt-packing machine produced by the defendant. [[783]](#footnote-784)782 Plaintiff presented expert witnesses who testified that the product presented unreasonable hazards which could be removed through the adoption of a variety of alternative designs. [[784]](#footnote-785)783 These alternative designs would involve lesser cost and would not have seriously interfered with the function of the batt-packing machine. [[785]](#footnote-786)784 The defendants presented expert evidence refuting the plaintiff's design evidence. [[786]](#footnote-787)785 At trial, the plaintiff received a jury verdict in his favor. In a 3-2 decision, with extremely strong dissenting opinions, the Bemis court decided, as a matter of law, that any defect or danger which is open and obvious cannot be the basis for a defect or for liability under section 402A. [[787]](#footnote-788)786 The Bemis majority applied the consumer expecta- **[\*648]** tion test and construed it to mean that under either negligence or strict liability the defect must be "hidden and not normally observable, constituting a latent danger." [[788]](#footnote-789)787

The two dissenters in Bemis set forth a barrage of criticism toward the majority holding that an open and obvious danger precluded the finding of a defect. In his dissent, Justice DeBruler stated that the trial court's instruction included the open and obvious danger of the product as a factor for the jury's consideration, and the instruction stated that this fact alone would not preclude recovery. [[789]](#footnote-790)788 Justice DeBruler found this instruction was appropriate since the obviousness of a danger is only one factor in the calculus of liability. [[790]](#footnote-791)789 According to Justice DeBruler, the focus under strict liability was no longer on hidden and concealed defects, but upon whether they were unreasonably dangerous. "Open and obvious dangers may be reasonable, and again they may not be." [[791]](#footnote-792)790 Dangers in products may be both open and obvious and dangerous. [[792]](#footnote-793)791

Justice Hunter, in his dissenting opinion, also stated that the open and obvious rule is but one factor to consider when determining whether a product is defective. [[793]](#footnote-794)792 Justice Hunter noted that the majority based its decision upon dicta in federal cases anticipating Indiana law and that such federal decisions were founded on a "harsh and anachronistic rule." [[794]](#footnote-795)793 Justice Hunter continued:

It is a proposition replete with irony. Whereas Section 402A has universally been interpreted to require manufacturers to avoid latent dangers, they are nonetheless told all they need do to escape liability is to make those dangers **[\*649]** patent. It is to say that a manufacturer should refrain from installing protective guards on a product, for those guards might only serve to make the danger less "open and obvious." The rule ignores the focus of Section 402A--whether the manufacturer, without impairing the functional capacities of the product and with reasonable additional costs--could have rendered the product reasonably safe. The rule, in short, as many jurisdictions have expressly recognized, encourages misdesign in its obvious form. [[795]](#footnote-796)794

In Hoffman v. E.W. Bliss Co., [[796]](#footnote-797)795 the plaintiff was injured when his hand was caught in a punch press which "double tripped." [[797]](#footnote-798)796 The danger of the punch press operation (i.e., its function to close with tremendous force) was open and obvious to all. [[798]](#footnote-799)797 However, the Supreme Court of Indiana found that this situation did not fit within the rule since the unexpected double tripping was a hidden danger or latent flaw. [[799]](#footnote-800)798 The Hoffman court stressed the definition of "danger" in the open and obvious danger rule, which was distinguished in the Bemis decision. [[800]](#footnote-801)799 According to the court, Hoffman's accident was possibly caused by an internal defect which neither the plaintiff nor anyone else could see. The court remanded the case for a new trial. [[801]](#footnote-802)800 The Hoffman court's definition of danger is extremely difficult to square with the facts since several of plaintiff's co-workers stated that they were in fact aware that the punch press which injured the plaintiff would frequently and inadvertently double trip. [[802]](#footnote-803)801 If the Hoffman decision was based upon the fact that the plaintiff was personally unaware of the "danger" (inadvertent double tripping), then the open and obvious danger rule espoused in Bemis would be equivalent to **[\*650]** assumption of the risk. [[803]](#footnote-804)802 The Bemis court based its decision, however, upon the defect or unreasonably dangerous issue, not the defense of assumption of the risk. [[804]](#footnote-805)803 Bemis was interpreted by the lower courts as applying an objective rather than a subjective standard which precluded defects as a matter of law whenever the "danger" was open and obvious. [[805]](#footnote-806)804

Justice Hunter, in a concurring opinion in Hoffman, made it clear that the open and obvious danger rule was based upon the consumer expectation test of section 402A. [[806]](#footnote-807)805 However, Justice Hunter believed that under the consumer expectation test, "a consumer may reasonably contemplate that a manufacturer will provide feasible safety devices for foreseeable mishaps." [[807]](#footnote-808)806

The Hoffman decision indicated a loosened grip of the open and obvious danger rule, however, the rule had enough life to assist in depriving a consumer of recovery in the failure to warn case American Optical Co. v. Weidenhamer. [[808]](#footnote-809)807 In a subsequent negligence action, the Supreme Court of Indiana narrowed its application. In Bridgewater v. Economy Engineering Co., [[809]](#footnote-810)808 the plaintiff alleged that a negligent design defect, the lack of safety devices, caused him injury. [[810]](#footnote-811)809 The trial court granted summary judgment in defendant's favor based upon two grounds: lack of foreseeability and the open and obvious danger rule. [[811]](#footnote-812)810 The Supreme Court of Indiana upheld the summary judgment on the foreseeability grounds but chose to change the law regarding the open and obvious danger rule. The Bridgewater court held that the open and obvious danger rule was applicable in products liability actions but was inap- **[\*651]** plicable in non-product negligence actions. [[812]](#footnote-813)811

Under the Bridgewater decision, an injured plaintiff could bring a non-products "general negligence action," such as a premises action for a fall, and the open and obvious danger rule would not be applied. [[813]](#footnote-814)812 However, in any products action the rule would bar recovery. The Bridgewater majority based its decision on the grounds that in general negligence actions for non-products cases, the defenses of contributory negligence and assumption of the risk would provide adequate protection. [[814]](#footnote-815)813 The adequate protection provided by the two negligence defenses based upon knowledge and appreciation of a danger was equivalent to the requirements of the open and obvious danger rule. [[815]](#footnote-816)814 The end result of Bridgewater is extremely difficult to understand since plaintiffs in "general negligence actions" are in reality possibly afforded more protection than consumers in products actions. [[816]](#footnote-817)815 The result of the Bridgewater decision conflicts with the avowed goals of strict liability under section 402A. [[817]](#footnote-818)816

The common law development of strict liability in Indiana was heavily influenced by both the federal and lower Indiana courts. [[818]](#footnote-819)817 The United States Court of Appeals for the Seventh Circuit was especially influential in establishing extremely limited liability and its decisions appeared to be a major factor in the Indiana Supreme Court's adoption of the open and obvious danger rule in Bemis. [[819]](#footnote-820)818 The Seventh Circuit set forth very narrow foreseeability and limited-duty doctrines, including a highly restrictive "intended use" concept. [[820]](#footnote-821)819 The result was the highly criticized case of Evans v. General Motors **[\*652]** Corp., [[821]](#footnote-822)820 which found no liability in second collision cases. Although the Evans case was eventually overruled, [[822]](#footnote-823)821 the concepts which promulgated it flowed throughout Indiana law.

The Indiana Court of Appeal's common law decisions were more flexible than the Seventh Circuit's; however, the open and obvious rule was followed as directed by the Supreme Court of Indiana in Bemis. [[823]](#footnote-824)822 The court of appeals, following the language of the Supreme Court of Indiana decisions, applied the open and obvious danger rule based upon an objective standard--whether the consumer knew or should have known about the danger in the product. [[824]](#footnote-825)823 In addition, the Indiana Court of Appeals applied the common law rule to actions brought under Indiana's Product Liability Statute. [[825]](#footnote-826)824

At the same time the open and obvious danger rule was being developed, Indiana decisions also recognized design defects based upon on a feasible alternative design basis. [[826]](#footnote-827)825 Thus, Indiana simultaneously developed consumer expectation and feasible alternative design criteria. **[\*653]**

2. Statutes

Indiana adopted a comprehensive products liability act in 1978 [[827]](#footnote-828)826 which was amended in 1983. [[828]](#footnote-829)827 The 1978 Act basically followed the language of section 402A and provided that the consumer law of Indiana was codified under the statute. [[829]](#footnote-830)828 However, the Act had two anti-consumer sections: state-of-theart and a ten-year statute of repose that completely barred any action under negligence or strict liability. [[830]](#footnote-831)829 The 1983 Act was even more restrictive toward the consumer in some of its language, however, the basic elements and defenses remained the same. [[831]](#footnote-832)830

The Indiana Supreme Court's interpretation of Indiana's product liability act defect requirement began with a bang. In Koske v. Townsend Engineering Co., [[832]](#footnote-833)831 the court determined that the Indiana Products Liability Act preempted the field of strict liability in tort and excluded the open and obvious danger rule previously developed in Indiana's common law. [[833]](#footnote-834)832 It is somewhat ironic that Indiana's product liability act, promoted as tort reform to restrict consumers' rights, provided the basis for eliminating the manufacturer's greatest protective common law rule.

In Koske, the consumer alleged design defects including lack of adequate guards and presented expert testimony as to the feasibility of such designs. [[834]](#footnote-835)833 With the removal of the open and obvious danger rule, the consumer was successful. After examining prior decisions, the Koske court approved the **[\*654]** consumer expectation test under comments g and i. [[835]](#footnote-836)834 It appeared that the court would determine liability under a consumer expectation test which focused on the product's condition by applying a risk-utility balancing or by applying riskutility balancing as an alternative test.

Twenty-one days after the Koske decision, the Supreme Court of Indiana decided Miller v. Todd. [[836]](#footnote-837)835 In Miller, the plaintiff brought a design action under the enhanced injury or crashworthiness (second collision) doctrine. [[837]](#footnote-838)836 The Miller court adopted the reasoning of the classic negligence case of Larsen v. General Motors Corp. [[838]](#footnote-839)837 and allowed plaintiff's action. In Miller, the plaintiff proceeded under both negligence and strict liability. [[839]](#footnote-840)838 The design defect in Miller was open and obvious. The Miller court followed its prior decision in Koske and held that the open and obvious danger did not bar the strict liability action under the Indiana Products Liability Act. Because the Act did not apply to negligence actions, however, the common law rule would still apply that theory. [[840]](#footnote-841)839 The Koske and Miller decisions, when combined with the prior Bridgewater decision, result in an anomaly. This may, however, change with Indiana's new statute which codifies the open and obvious danger rule.

In FMC Corp. v. Brown, [[841]](#footnote-842)840 the plaintiff was electrocuted and killed when a crane came into contact with a power line. [[842]](#footnote-843)841 The widow brought an action alleging the crane contained design defects by failing to incorporate alternative designs, i.e., a proximate warning device or insulated link. [[843]](#footnote-844)842 The widow was successful at trial. However, the defendant appealed contending that, to a large degree, the open and obvi- **[\*655]** ous danger rule eliminated the design claim. [[844]](#footnote-845)843 The FMC court followed the Koske decision and affirmed the jury verdict in the widow's favor. The FMC court said that any evidence tending to show a danger is obvious would only be a factor, not a complete determination of the design issue. [[845]](#footnote-846)844 In addition, the obvious danger may also be a factor for consideration in assumption of the risk. [[846]](#footnote-847)845

The ALI co-reporters cite to Indiana as a state which requires proof of a reasonable alternative design. [[847]](#footnote-848)846 The co-reporters based this statement upon the Indiana Supreme Court's decision in Miller v. Todd [[848]](#footnote-849)847 and two Indiana appellate court decisions in Jackson v. Warrum [[849]](#footnote-850)848 and Rogers v R.J. Reynolds Tobacco Co. [[850]](#footnote-851)849 None of these cases support this proposition. The Miller case involved the second collision theory where the plaintiff undertook the burden of proving an alternative design. The Miller court never stated that there was a general requirement to prove an alternative design. On appeal, the issues in this case were confined to the open and obvious danger rule as applied to a crashworthiness theory. The Miller court stated:

The sole issue in Miller's petition to transfer is whether the open and obvious danger rule applies to relieve the manufacturer of a motorcycle of the duty to design and make a crashworthy vehicle by installing rear passenger crash bars. Suzuki attempts to define the issues as whether the dangers involved in riding a motorcycle without rear passenger crash bars are open and obvious to a passenger on a motorcycle and whether the crashworthiness doctrine applies to defeat the affirmative defense of open and obvious danger.

Both parties argue their positions concerning the open **[\*656]** and obvious doctrine as applied to a claim of enhanced injuries. We grant transfer to determine whether an injured party can recover for enhanced injures under either negligence or strict liability. [[851]](#footnote-852)850

Thereafter, the court eliminated the open and obvious danger rule as a bar to liability and adopted the crashworthiness doctrine. Next, the court dealt with strict liability:

The Indiana open and obvious danger rule does not apply to strict liability claims under the Indiana Product Liability Act. Koske v. Townsend Engineering Co. (1990), Ind., 551 N.E.2d 437. Since the 1978 Product Liability Act was in effect at the time of Miller's collision, her central burden is to prove that the motorcycle was in a "defective condition unreasonably dangerous." The General Assembly's enactment of strict liability did not explicitly incorporate the open and obvious concept or require that a defect be latent. Nonetheless, the relative obviousness of a defect is certainly pertinent to determining whether or not a product is defective and whether or not a defect is unreasonably dangerous.

"Defectiveness" from a crashworthiness standpoint is not merely the conclusion that a product failed and caused injury, but that the product failed to provide the consumer with reasonable protection under the circumstances surrounding a particular accident. A claimant should be able to demonstrate that a feasible, safer, more practicable product design would have afforded better protection. Note, Litigating Enhanced Injury Cases: Complex Issues, Empty Precedents and Unpredictable Results, 54 U. Cin. L. Rev. 1257, 1273 (1986).

It is apparent that the parties to this case prepared for and litigated the motion for summary judgment largely on the basis of case law written before the legislature's codification of strict liability. Because the parties necessarily presented the issue in this way, it would be unfair for us to enter a final judgment on appeal either affirming or reversing the trial court's action. The parties should have **[\*657]** the opportunity to litigate Suzuki's motion under the standards enacted by the legislature, explaining how factors such as the obviousness of the product's condition, and others, may reflect on whether Suzuki is entitled to summary judgment.

Accordingly, we direct the trial court to vacate its order with respect to the strict liability claim and rehear the motion, affording the parties appropriate opportunity to amend their pleadings and supplement the record. [[852]](#footnote-853)851

Considering the entire opinion on strict liability and crashworthiness, it seems clear the court was allowing, but not requiring, the plaintiff to prove an alternative design. In this case, the plaintiff voluntarily undertook the burden to prove a safer alternative design; the court's focus on appeal was not on the burden of proof but on the open and obvious danger rule as a bar to recovery. This becomes even more apparent because of the court's discussion of the negligence claim under the crashworthiness doctrine. [[853]](#footnote-854)852 Under Indiana law, the open and obvious danger rule remains a bar to liability in product actions based upon negligence.

Although the co-reporters also rely upon two appellate court decisions for the proposition that Indiana requires proof of alternative design, neither of those cases support the proposition. The Jackson court focused on whether or not a crashworthiness claim would be recognized in Indiana and, if so, whether the plaintiff had the burden of proving damages which were enhanced by the second collision. [[854]](#footnote-855)853 In discussing the burden of separating the damages, the court stated that the plaintiff had the burden of proving a safer alternative design. [[855]](#footnote-856)854 The court made this statement because the nature of crashworthiness or second collision cases requires such proof. In crashworthiness cases, the plaintiffs' claims are necessarily **[\*658]** based upon proofs of safer alternative design; thus, cases based upon this theory cannot be used to determine whether a jurisdiction requires proof of a safer alternative design in all defective design cases.

Finally, in Rogers, the plaintiff alleged that cigarettes were defectively designed. [[856]](#footnote-857)855 In discussing the preemption issue, the court stated: "Therefore, negligence and strict liability claims which assert Defendants failed to expeditiously explore and develop design alternatives which would make their products less addictive do not thwart the Act's purpose of promoting uniformity in warning labels and are not preempted." [[857]](#footnote-858)856 The court allowed, but did not require, the plaintiff to pursue design claims based upon proof of a safer alternative design.

In 1995, the Indiana legislature revised several statutes toward an anti-consumer stance. These statutes change prior product liability law. Under the new statutes, only a manufacturer can be liable when a seller or lessor in the stream of commerce names the product manufacturer. [[858]](#footnote-859)857 Warning defects are limited to negligence actions. [[859]](#footnote-860)858 Limitations are imposed on the consumer by tightening the assumption of risk defense [[860]](#footnote-861)859 and the misuse defense. [[861]](#footnote-862)860 When a manufacturer complies with either state-of-the-art or government codes, standards, regulations or specifications, a rebuttable presumption that the product is not defective arises. [[862]](#footnote-863)861

The statutes provide that a manufacturer is limited to several liability only, [[863]](#footnote-864)862 and a jury may assess any percentage of liability to entities which are not part of the litigation. [[864]](#footnote-865)863 Under the statutes, the non-party or "ghost entity" need only con- **[\*659]** tribute to the plaintiff's harm in some manner. [[865]](#footnote-866)864 Punitive damages are limited to three times the plaintiff's compensatory award or $ 50,000, whichever is greater. [[866]](#footnote-867)865 Any punitive damages recovered is distributed between the injured plaintiff (twenty-five percent) and the state (seventy-five percent). [[867]](#footnote-868)866

An offer of settlement procedure is established. [[868]](#footnote-869)867 If the plaintiff refuses to accept an offer and receives less than the offer at trial, then the court will award attorney fees, costs, and expenses to the defendant with a maximum amount of $ 1,000 being shifted. [[869]](#footnote-870)868

3. Pattern Jury Instructions

Indiana's pattern jury instructions reflect the consumer expectation test as the standard for defects. [[870]](#footnote-871)869

P. Iowa

1. Common Law

Iowa adopted strict liability in Hawkeye-Security Insurance Co. v. Ford Motor Co. [[871]](#footnote-872)870 Hawkeye was a subrogation action by the insurers of a truck which rear-ended a tractor. The insurance company made payments for the damages caused in the accident and then sought indemnity from Ford Motor Company, who was the manufacturer of the truck, on the basis that the truck's defective braking system caused the accident. [[872]](#footnote-873)871 The insurance company proved the defect through circumstantial evidence similar to the type used in the "malfunction **[\*660]** doctrine." [[873]](#footnote-874)872 In adopting strict liability, the Hawkeye court set forth the black letter rules of section 402A and the reasoning of several cases from other jurisdictions, including Greenman. [[874]](#footnote-875)873 The Hawkeye court made it clear that negligence was a separate cause of action that could be plead and proved in conjunction with strict liability. [[875]](#footnote-876)874 Although the Hawkeye decision seemed to be based upon a manufacturing defect, the malfunction of the truck's brakes may have been the result of its design. [[876]](#footnote-877)875

Three years after its Hawkeye decision, the Supreme Court of Iowa confirmed its opinion that strict liability was not predicated on negligence in Kleve v. General Motors Corp. [[877]](#footnote-878)876 The Kleve court seemed to base its formulation of strict liability pursuant to a consumer expectation test under section 402A. [[878]](#footnote-879)877

The Supreme Court of Iowa set forth its reasoning concerning the consumer expectation test in Aller v. Rodgers Machinery Manufacturing Co. [[879]](#footnote-880)878 Aller was a design defect case where the consumer alleged the phrase "unreasonably dangerous" incorrectly injected negligence principles into strict liability. [[880]](#footnote-881)879 The consumer relied to a great extent on the Oregon Supreme Court decision of Phillips v. Kimwood Machine Co. [[881]](#footnote-882)880 The Aller court rejected the consumer's contentions and **[\*661]** said unreasonably dangerous does not inject considerations of negligence and that strict liability and negligence are not the same. [[882]](#footnote-883)881 The Aller court stated that the consumer expectation test was the test for defect; however, proof of "unreasonable danger" required a risk-utility balancing process. [[883]](#footnote-884)882 The court found that this risk-utility balancing process was the same process used in negligence actions. The focus in strict liability, however, is on the product; whereas, the focus in negligence is on the defendant's conduct. [[884]](#footnote-885)883 The consumer correctly pointed out to the Aller court that the Phillips decision focused on knowledge of the product's danger or risk and imputed such knowledge to the manufacturer. [[885]](#footnote-886)884 The consumer objected to the trial court's state-of-the-art instruction which asked the jury to only consider the manufacturer's knowledge and duty at the time the product was manufactured. [[886]](#footnote-887)885 The consumer again correctly pointed out that such an instruction would be a negligence test. [[887]](#footnote-888)886 The Aller court completely failed to understand **[\*662]** this contention and said it failed to understand or see how this could be a negligence concept. [[888]](#footnote-889)887 The court then intermixed the common knowledge of the community concept of the consumer expectation test with the duty and knowledge of the manufacturer. [[889]](#footnote-890)888 According to the Aller court, the knowledge was that which existed at the time the product was manufactured. [[890]](#footnote-891)889

The Aller court's failure to understand the knowledge issue in the trial court's state-of-the-art instruction reflects its failure to understand the Phillips decision. The Phillips decision was not based upon the opinion that the consumer expectation test and the imputed-knowledge test were the same but that the test results of each were the same; i.e., they were opposite sides of the same coin arriving at a test for strict liability from two opposing views. [[891]](#footnote-892)890 According to the Phillips opinion, the imputed-knowledge test was from the manufacturer's view, focusing on the product and assuming the manufacturer had full knowledge of the product's dangers. [[892]](#footnote-893)891 The consumer expectation test ignores the manufacturer's knowledge and looks to the consumer's common knowledge. [[893]](#footnote-894)892 The Phillips decision recognized that the consumer expectations test was independent of **[\*663]** the manufacturer's knowledge. [[894]](#footnote-895)893 The Aller decision cited much of the language used to separate strict liability from negligence, but the court's lack of understanding of these principles and its intermixing of concepts has led to a test that "speaks" in terms of strict liability but appears to apply negligence. [[895]](#footnote-896)894

In Chown v. USM Corp., [[896]](#footnote-897)895 the Supreme Court of Iowa appeared to distinguish the consumer expectation test from a risk-utility test when it stated the following:

One test of unreasonableness is whether the danger is greater than an ordinary consumer with knowledge of the product's characteristics would expect it to be. Another test is whether the danger outweighs the utility of the product. **[\*664]** In a design case, the risk-utility analysis involves balancing of "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." [[897]](#footnote-898)896

However, the Chown court prefaced its statement with the remark that the "unreasonable danger element is explained in Aller." [[898]](#footnote-899)897 Thus, even if the Chown court recognized the difference between a consumer expectation test and a risk-utility test, the Aller definition of unreasonableness in the consumer expectation test would make the two tests equivalent. One authority that the Chown court cited for the two different tests--consumer expectation and risk-utility--is the Barker case in California. [[899]](#footnote-900)898 However, the Chown court did not state that Barker shifts the burden of proof to the defendant in the riskutility prong of the two tests, nor did the court recognize the Barker rule as treating the two tests as completely independent. In addition, the Chown court did not state that the consumer expectation test in Barker does not use either a risk-utility analysis or unreasonable danger analysis as qualifying elements. In addition to its discussion of the test for a design defect, the Chown court examined state-of-the-art. The Chown court correctly pointed out that state-of-the-art involves technological feasibility rather than custom and usage. [[900]](#footnote-901)899

The Aller concept of unreasonably dangerous in a consumer expectation test was employed in Fell v. Kewanee Farm Equipment Co. [[901]](#footnote-902)900 Fell involved a design defect of a component of a farm elevator. [[902]](#footnote-903)901 In defining "defective condition unreasonably dangerous," the Fell court used the consumer ex- **[\*665]** pectation test under comments g and i of section 402A. [[903]](#footnote-904)902 However, when defining unreasonable danger in the consumer expectation test, the Fell court used the risk-utility balancing test of Aller. [[904]](#footnote-905)903

The Supreme Court of Iowa accepted the crashworthiness doctrine in Hillrichs v. Avco Corp. [[905]](#footnote-906)904 and applied it to a corn picker. [[906]](#footnote-907)905 The Hillrichs court employed a negligence test for enhanced injuries or crashworthiness and placed the burden of proof of the extent of enhanced injuries on the plaintiff. [[907]](#footnote-908)906 In addition, the Hillrichs court applied comparative fault to the plaintiff's conduct in the original accident and did not confine it to the second "collision" or enhanced injury portion of the claim. [[908]](#footnote-909)907 However, in a later decision the Supreme Court of Iowa overruled the portion of the Hillrichs decision which applied comparative fault to the original accident and confined comparative fault to only the enhanced injury portion of second collision or crashworthy cases. [[909]](#footnote-910)908

As Iowa law stands today, the tests applied to design defect are unclear. [[910]](#footnote-911)909 Iowa could employ three separate and distinct tests for a design defect: first, a consumer expectation test; second, a danger-utility test; and third, a risk-utility test. However, Iowa law could be interpreted to mean that all three tests are somehow combined with the danger-utility test forming the basis of the consumer expectation test. A mixture of all three tests was applied by a federal court in Burke v. Deere & Co. [[911]](#footnote-912)910 However, mixing the three tests together may be an **[\*666]** attempt to adopt a rule similar to the one adopted by the Supreme Court of Washington. [[912]](#footnote-913)911 Under the Washington test, a consumer's expectation is evaluated on the basis that the product's risks and utilities are supplied to the consumer. Then, the determination of liability is based upon the evaluation of whether the product is safe or unsafe solely through the eyes of a reasonable consumer. No consideration is given to the views of the manufacturer or the manufacturer's conduct. Strict liability is kept strict by the consumer's focus on the values of the product. Thus, all negligence concepts including foreseeability, state-of-the-art, and other conduct of the defendant are excluded. By supplying the risks and utility to the consumer, the test avoids the pitfalls of the open and obvious danger rule and the lack of the "ordinary" consumer's expectations or knowledge concerning the product.

2. Statutes

Iowa has not adopted a comprehensive products liability act. It has enacted statutes which limit consumer recovery against non-manufacturers, [[913]](#footnote-914)912 for products which meet stateof-the-art, [[914]](#footnote-915)913 punitive damages, [[915]](#footnote-916)914 and blood products. [[916]](#footnote-917)915

3. Pattern Jury Instructions

Iowa's pattern instruction for design defects is found under section 1000.4 which defines unreasonably dangerous. [[917]](#footnote-918)916 The **[\*667]** pattern instruction lists three tests. It does not explain, however, whether these three tests are to be given together or whether they are to be given separately. [[918]](#footnote-919)917 In addition, the pattern instructions do not indicate whether one test modifies the others. [[919]](#footnote-920)918 Thus, the pattern instructions reflect the uncertain state of Iowa law and leave the trial courts to deal with the confusion.

Q. Kansas

1. Common Law

Kansas adopted strict liability in 1976 in the case of Brooks v. Dietz. [[920]](#footnote-921)919 The plaintiff in Brooks alleged both design and manufacturing defects in a home furnace relay switch. [[921]](#footnote-922)920 In adopting strict liability, the Brooks court specifically adopted section 402A but did not define the elements of a design defect. [[922]](#footnote-923)921 **[\*668]**

In Lester v. Magic Chef, Inc., [[923]](#footnote-924)922 the Supreme Court of Kansas set forth the consumer expectation test of section 402A as the standard for design defects. [[924]](#footnote-925)923 In Lester, the plaintiff urged the Supreme Court of Kansas to adopt an alternative to the consumer-expectation instruction. [[925]](#footnote-926)924 The plaintiff asked the court to adopt a dual standard similar to the Barker rule. [[926]](#footnote-927)925 According to the plaintiff, a defective design could be assessed by a consumer expectation test or an excessive preventable danger test. [[927]](#footnote-928)926 The preventable danger test is a multi-factored risk-utility test. One of the factors for consideration in this test is the feasibility of a safer alternative design. [[928]](#footnote-929)927 The Lester court found no error in instructing a jury solely on the basis of the consumer expectation test and rejected plaintiff's dual standard for design defects. [[929]](#footnote-930)928

In Siruta v. Hesston Corp., [[930]](#footnote-931)929 the plaintiff lost his left arm when it was pulled into the moving parts of a hay bailer manufactured by the defendant. The plaintiff alleged several defects in the bailer, [[931]](#footnote-932)930 but he primarily relied upon a design defect based on failure to guard the moving parts of the machine from human contact or failure to choose a design which eliminated such hazards. [[932]](#footnote-933)931

The plaintiff presented evidence of feasible alternative designs and guards as evidence of the hay bailer's design defect. [[933]](#footnote-934)932 The plaintiff's expert testified that a product is unreasonably defective if the product contains a hazard which could feasibly be avoided by a different design or guarding of the moving parts. [[934]](#footnote-935)933 If an alternative design or guarding were **[\*669]** not feasible, then an adequate warning would be required. [[935]](#footnote-936)934 Plaintiff's expert presented evidence of several alternative designs and guards he said would be feasible at little extra cost, [[936]](#footnote-937)935 and although the defendant presented evidence to the contrary, the jury granted a verdict in favor of the plaintiff. [[937]](#footnote-938)936

On appeal, the defendant alleged that the bailer was not defective as a matter of law because the danger was open and obvious. [[938]](#footnote-939)937 The Siruta court easily rejected the open and obvious danger rule:

Simply because the hazard on a piece of equipment is open and obvious does not prevent it from being dangerous to the operator or consumer. The fact that the danger is patent and obvious may be an important factor in determining whether plaintiff's fault contributed to his own injury. Here the trial court submitted the issue of plaintiff's fault to the jury and the jury by its verdict found the plaintiff to be 34% at fault. However, such a finding of some percentage of fault on the part of the plaintiff did not preclude the jury from finding that the defendant was 66% at fault in failing to take reasonable steps to guard the "nip points" in the machine to prevent injury to the operator. [[939]](#footnote-940)938

In addition, the Siruta court stated that in strict liability actions a plaintiff may sustain his burden of proof concerning design defects by showing the feasibility of a safer design. [[940]](#footnote-941)939 In Siruta, the defendant had requested a risk-benefit instruction, but the trial court denied the use of it. [[941]](#footnote-942)940 **[\*670]**

After the Siruta decision, it was unknown whether the Supreme Court of Kansas would adhere to its rule, espoused in Lester, that only a consumer expectation standard would be applied, or whether Siruta had adopted a dual or bifurcated standard similar to Barker. However, in Barnes v. Vega Industries, [[942]](#footnote-943)941 the Supreme Court of Kansas affirmed its ruling in Lester which set forth a consumer expectation test derived from comment i. Finally, in Betts v. General Motors Corp., [[943]](#footnote-944)942 the Supreme Court of Kansas explained its rulings under the apparently conflicting cases of Lester, Siruta, and Barnes.

In a design defect case, the proper jury instruction for whether a design is unreasonably dangerous is the consumer expectation test. [[944]](#footnote-945)943 However, the Betts court said that jury instructions have nothing to do with the evidence which may be offered at trial. [[945]](#footnote-946)944 In a products liability action, the parties may present evidence on risk-utility, including feasibility of safer designs along with many other factors. [[946]](#footnote-947)945 According to the Betts court, evidence concerning these factors is allowed but is not necessarily required in a design case. Regardless of the evidence produced, [[947]](#footnote-948)946 the jury will receive a consumer expectation instruction. [[948]](#footnote-949)947

Federal cases following the Betts decision have allowed proof of safer alternative designs [[949]](#footnote-950)948 in strict liability actions, but these decisions make it clear such proofs are allowed while not required:

Defendant's next attack on plaintiff's strict liability claim is that plaintiffs have failed to show a feasible design alternative to that employed on the tower which collapsed. **[\*671]** Garst v. General Motors Corp., 207 Kan.2 484 P.2d 47 (1971), provides that in evaluating whether a design is defective, a jury may consider whether a safer design is available and feasible. Id. at 21, 484 P.2d at 61. However, it does not require that plaintiff establish the existence of a feasible alternative design as an element of the cause of action. While the absence of a feasible alternative may provide strong evidence that a product was not defective, the existence of such a design is not an essential element of a strict liability claim. Summary judgment is therefore inappropriate on this point. [[950]](#footnote-951)949

In Jenkins v. Amchem Products, [[951]](#footnote-952)950 the Supreme Court of Kansas seemed to confirm modification of its consumer expectation test for design defects. The plaintiffs in this case contracted cancer through long-term use of 2,4-D, a herbicide manufactured by the defendant. [[952]](#footnote-953)951 After finding plaintiffs' warning claim was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, [[953]](#footnote-954)952 the Jenkins court examined the design defect claim. [[954]](#footnote-955)953 The Supreme Court of Kansas found that the design claim was not controlled by comment k because the defendant did not claim the product was unavoidably unsafe. [[955]](#footnote-956)954 Thus, the claim was controlled by "normal" examination of design defects.

The Jenkins court reviewed its prior decision in Siruta and the Kansas Pattern Instructions, in regard to the design defects issue. [[956]](#footnote-957)955 Under the pattern instructions, both unreasonably dangerous and defective condition are defined by consumer expectations. [[957]](#footnote-958)956 The plaintiff argued that since he had no knowledge that the product could cause, this evidence would meet his burden of proof on consumer expectations; thus, all **[\*672]** he needed to prove for liability would be that the defendants product caused his injury. [[958]](#footnote-959)957 However, the Jenkins court rejected the plaintiff's interpretation, stating that for a design defect claim, plaintiff must prove "some specific defect." [[959]](#footnote-960)958 The Jenkins court set forth the specific facts in Siruta where plaintiff introduced evidence of alternative designs. [[960]](#footnote-961)959 The court then stated:

Generally, evidence of a safer alternative design seems to lend itself to a risk-benefit analysis. The risk-benefit analysis looks in part to whether there is a safer feasible alternative, whether such an alternative is cost effective, and whether there are risks associated with the alternative design. Evidence of a safer alternative design seems to have no place under the consumer expectations test, which merely looks to whether the product was more dangerous than the ordinary consumer expected. However, Siruta clearly approves proof of a safer alternative design in design defect cases. Siruta was decided after this court adopted the comment i consumer expectations test for design defect strict liability claims. It is clear from Siruta that even though Kansas had adopted the consumer expectations test, evidence of a feasible alternative design is admissible in design defect cases, though it probably is not required. Under the plaintiff's construction, however, there would be sic never be a need to show an alternative design because there is no need to show what about the design was defective. Clearly this is not a proper construction. While evidence of a safer alternative design is not required in all cases, there must be a specific claim concerning what aspect of the design was defective for a plaintiff to prevail on a strict liability design defect claim.

Plaintiff's allegation that the defendants' 2,4-D products cause cancer is not sufficient to raise a claim of design defect, and the trial court erred in so holding. Plaintiff need not specifically prove a safer, cost-effective alternative unless defendants claim their products are unavoidably **[\*673]** unsafe. Defendants have not claimed their products were unavoidably unsafe. (Defendants might not receive such protection because the doctrine requires proper warnings, and defendants here did not warn that their products could cause non-Hodgkin's lymphoma). However, the fact that defendants do not claim their products were unavoidably unsafe does not relieve plaintiff from his burden of proving that defendants' products were defective. Plaintiff has failed to identify what aspect of defendants' products was defectively designed. Therefore, plaintiff cannot prevail on a strict liability design defect claim. [[961]](#footnote-962)960

Thus, Kansas requires some type of proof of specific defect beyond consumer expectations for a design defect claim. It is still somewhat vague what proof the Supreme Court of Kansas requires. It is possible that Kansas may apply some type of risk-utility test which contains proof of an alternative design as one of several factors in such a balancing test. At the present, however, it is clear that proof of reasonable alternative design is merely allowed, not required.

2. Statutes

In 1981, Kansas adopted a comprehensive Products Liability Act which severely limited consumers' rights. [[962]](#footnote-963)961 The 1981 Act was amended several times to extend its anti-consumer aspects. [[963]](#footnote-964)962 The Act as it presently stands has limitations on consumer actions including a statute of repose, useful safe life, state-of-the-art defense, defenses based upon compliance with government standards, limitations for non-manufacturers and limitations on the manufacturer's duties, including the duty to warn, and limitations for a seller's lack of knowledge of a de- **[\*674]** fect. [[964]](#footnote-965)963 Other legislation places limitations for pain and suffering, [[965]](#footnote-966)964 punitive damages, [[966]](#footnote-967)965 and blood products. [[967]](#footnote-968)966 Whether these limitations will affect a design defect case is open to future judicial interpretation.

3. Pattern Jury Instructions

Under PIK 13.21, the Kansas pattern instructions reflect a consumer expectation test for all types of defects. [[968]](#footnote-969)967

R. Kentucky

1. Common Law

In June 1965, the Kentucky Court of Appeals adopted strict liability in Dealers Transport Co. v. Battery Distributing Co. [[969]](#footnote-970)968 The court extended strict liability to design defects in Jones v. Hutchinson Manufacturing. [[970]](#footnote-971)969 The plaintiff in Jones, a five-year-old who lost her left leg in a grain auger, alleged that the auger was defectively designed due to inadequate guarding. [[971]](#footnote-972)970 Although the Jones court extended strict liability to a design case, the court stated that in design cases, liability rests primarily on a negligence standard. [[972]](#footnote-973)971 In Jones, the injured child was a non-user bystander. The Jones court, in resolving the issue of "bystander recovery," explained its findings concerning design defects:

We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the **[\*675]** standard of conduct required of the defendant is concerned. In either event the standard required is reasonable care. Hence, it is unnecessary in this case to consider whether Section 402A extends to "bystanders". If the manufacturer failed to observe the standard required, he is subject to liability to those whom he should expect to use the product or to be endangered by its probable use under the principles of Section 398. Section 402A imposes possible liability only upon failure to observe the same standard of conduct where the claim is for deficient design of the product. Therefore, in deficient design claims the "bystander" or "nonconsumer" or "nonuser" problem resolves itself. [[973]](#footnote-974)972

The Jones court found no liability based upon negligence principles. [[974]](#footnote-975)973 This result reflects what many courts recognize--that negligence in a products action is often impossible to prove. The Jones plaintiff presented evidence of several similar accidents. [[975]](#footnote-976)974 In addition, the plaintiff presented expert evidence that an alternative design or guarding would eliminate the danger without interfering with the auger's function and that these alternatives would involve little additional cost. [[976]](#footnote-977)975 However, there was also evidence that no auger manufacturer used the suggested guarding which, according to the manufacturer, would intrude upon the product's function. [[977]](#footnote-978)976

The Jones rule, applying negligence as the basis of recovery in strict liability design cases, met its death in Nichols v. Union Underwear Co. [[978]](#footnote-979)977 In Nichols, the plaintiff alleged injury caused by a defectively designed shirt. The jury returned a verdict in favor of the shirt manufacturer. [[979]](#footnote-980)978 On appeal, the **[\*676]** plaintiff asserted that the trial court committed error in giving an instruction on consumer expectations as the sole determinant of unreasonably dangerous. [[980]](#footnote-981)979 The Nichols court reviewed its prior decisions on design defect under section 402A. Pursuant to section 402A, the "unreasonably dangerous" requirement is a condition precedent to a finding of strict liability. However, according to Nichols, the consumer expectation test is only one of many factors used to determine whether, in fact, a product is unreasonably dangerous. [[981]](#footnote-982)980 Under comment i of section 402A, a consumer's expectation becomes the sole factor for finding a product defective, and according to the Nichols court:

Under this instruction, the obviousness of the danger becomes the sole determinant of the reasonableness of a danger, rather than simply being one of many factors.

The effect of this instruction is to insulate a product from liability simply because it is patently dangerous, or because it is no more dangerous than would be anticipated by the ordinary person. . . . We now join those which have considered and rejected "patent danger" or "consumer expectation" as an absolute defense to strict liability for defective design. . . .

. . . .

We believe that consumer knowledge, the factor considered below, is only one of the factors that should be before the jury in determining whether a product is unreasonably dangerous. We will not set out an exclusive list of the factors which lead to this determination. . . . In Kasco Abrasives, supra, we recognized the obviousness of the danger and presence of a warning as relevant. Noted commentators have suggested many factors. But the facts of the individual case will determine what is relevant to each action. [[982]](#footnote-983)981

The Nichols court's rejection of the consumer expectation test was not based solely on the open and obvious danger or patent danger rule. The Nichols court indicated a desire to in- **[\*677]** clude multiple factors, according to the evidence presented, as a basis for determining design defects. However, a multiple-factor test was not the only rule adopted by the Nichols court. [[983]](#footnote-984)982 The court reviewed the standards for design defect and accepted the imputed-knowledge rule. The following jury instruction was promulgated by the majority in Nichols:

You will find for the plaintiff only if you are satisfied from the evidence that the material of which the T-shirt was made created such a risk of its being accidentally set on fire by a child wearing it that an ordinarily prudent company engaged in the manufacture of clothing, being fully aware of the risk, would not have put it on the market; otherwise, you will find for the defendant. [[984]](#footnote-985)983

The imputed-knowledge rule of Nichols was explained in Montgomery Elevator Co. v. McCullough. [[985]](#footnote-986)984 According to the McCullough court, the imputed-knowledge rule separates strict liability from negligence by focusing on the condition of the product rather than the conduct of the defendant. [[986]](#footnote-987)985 The McCullough court restated the imputed-knowledge rule as follows:

The manufacturer is presumed to know the qualities and characteristics, and the actual condition, of his product at the time he sells it, and the question is whether the product creates "such a risk" of an accident of the general nature of the one in question "that an ordinarily prudent company engaged in the manufacture" of such a product "would not have put it on the market." [[987]](#footnote-988)986

The Supreme Court of Kentucky emphasized that the multiple factors that a court considers, such as feasibility of other designs, are not to be considered as separate legal questions:

Considerations such as feasibility of making a safer prod- **[\*678]** uct, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured "in a defective condition unreasonably dangerous," are all factors bearing on the principal question rather than separate legal questions. In a particular case, as with any question of substantial factor or intervening cause, they may be decisive. [[988]](#footnote-989)987

The Nichols' imputed-knowledge rule was further explained by the Supreme Court of Kentucky in the 1991 case of Ford Motor Co. v. Fulkerson. [[989]](#footnote-990)988 The Fulkerson court was confronted with an alleged design defect in a Ford pick-up. The trial court attempted to explain the imputed-knowledge rule to the jury with detailed instructions. [[990]](#footnote-991)989 The Fulkerson court affirmed the appellate court's reversal and explained that the multiple factors which are considerations in a design case are "evidentiary factors" which should not be part of the jury instructions but should be left to arguments of counsel. [[991]](#footnote-992)990

2. Statutes

In 1978, the Kentucky legislature passed products liability legislation limiting consumer rights. [[992]](#footnote-993)991 By 1988, the Kentucky Products Liability Act expanded its anti-consumer statute which presently contains limitations on punitive damages, [[993]](#footnote-994)992 a statute of repose, [[994]](#footnote-995)993 alteration and modification of a product, [[995]](#footnote-996)994 subsequent remedial measures and changes in design [[996]](#footnote-997)995 limitations for non-manufacturers, [[997]](#footnote-998)996 and others. [[998]](#footnote-999)997 However, **[\*679]** statutory law has not modified the imputed-knowledge rule as expressed by the Supreme Court of Kentucky.

3. Pattern Jury Instructions

Kentucky's jury instructions reflect the imputed-knowledge rule as developed in Nichols, McCullough, and Fulkerson. [[999]](#footnote-1000)998

S. Louisiana

1. Civil Law

The origin of liability without fault (strict liability) for products in Louisiana is the 1971 case of Weber v. Fidelity & Casualty Insurance Co. [[1000]](#footnote-1001)999 In Weber, the plaintiffs were injured from excessive amounts of arsenic in a manufacturer's cattle dip. [[1001]](#footnote-1002)1000 The Weber court set forth its liability requirements as follows:

A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. However, the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of **[\*680]** the defect.

If the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them. [[1002]](#footnote-1003)1001

Louisiana law is based upon a civil code [[1003]](#footnote-1004)1002 rather than common law; however, the Weber decision made no reference to any code articles. The language of Weber was amazingly close to common law interpretations of strict liability under section 402A. The similarity of common law strict liability and liability without fault under Weber was noted by the Fifth Circuit Court of Appeals' decision in Welsh v. Outboard Marine Corp. [[1004]](#footnote-1005)1003 After the Welsh decision, federal courts interpreting Louisiana law regarding products actions relied to a great extent upon common law interpretations of strict liability. [[1005]](#footnote-1006)1004

The code basis of Weber is attributed to two distinct areas of the Louisiana Civil Code article 2315 and the contractual warranty against redhibitory defects. [[1006]](#footnote-1007)1005 Article 2315 of the Louisiana Civil Code sets forth the principles of fault which contemplate both negligence and strict liability. [[1007]](#footnote-1008)1006 Redhibito- **[\*681]** ry actions were traditionally a type of implied warranty action for avoidance of a sale because of a "vice" or defect in the thing sold. [[1008]](#footnote-1009)1007 Prior to Weber, it was assumed that article 2315 actions involving products were limited to situations where negligence could be demonstrated and redhibitory actions were limited to situations where privity existed. [[1009]](#footnote-1010)1008 Thus, the civil law in Louisiana had a similar background to the common law situation prior to Greenman and section 402A. [[1010]](#footnote-1011)1009 The imputed-knowledge language of Weber is derived from early twentieth-century interpretations of redhibitory actions which held that a seller is presumed to know the vice of the thing sold. [[1011]](#footnote-1012)1010 Weber, in effect, was a case which combined redhibition actions with an expanded interpretation of fault to arrive at a no-fault or strict liability basis for products cases. [[1012]](#footnote-1013)1011

Louisiana appellate court decisions which immediately followed Weber were not precise concerning the basis of strict liability--some decisions would cite Weber, while others ignored it and based their interpretation of liability on pre-Weber strict liability or negligence. [[1013]](#footnote-1014)1012

Eventually the Supreme Court of Louisiana developed a line of decisions which defined its version of strict liability for products. In Chappuis v. Sears Roebuck & Co., [[1014]](#footnote-1015)1013 the plaintiff was injured by a steel chip from a claw hammer. A jury returned a verdict in favor of the defendant which was affirmed by the Louisiana Court of Appeals. [[1015]](#footnote-1016)1014 The Supreme Court of Louisiana reversed on the basis that the hammer should have contained a warning to users that chipped hammers should be **[\*682]** discarded. [[1016]](#footnote-1017)1015 Although the Chappuis case is generally premised upon a failure to warn, it was also based upon the broad language of Weber stating that a "plaintiff need not prove defective design or manufacture, if he proves he was injured by a product 'unreasonably dangerous to normal use.'" [[1017]](#footnote-1018)1016 In addition, Chappuis made it clear that its decision was rooted in both a broad interpretation of fault under article 2315 and the redhibition action under article 2545. [[1018]](#footnote-1019)1017

The standard upon which strict liability is measured was discussed in Hunt v. Aty Stores. [[1019]](#footnote-1020)1018 The Hunt case involved a defective escalator which severely injured a child when his tennis shoe was caught between the escalator's moving tread and a side panel. [[1020]](#footnote-1021)1019 An action was brought on behalf of the child for strict liability against the department store under article 2317 [[1021]](#footnote-1022)1020 and a products strict liability action against the escalator manufacturer under the Weber interpretation of article 2315. [[1022]](#footnote-1023)1021 The Hunt court stated that in both negligence and strict liability actions under article 2317, "the probability and magnitude of the risk are to be balanced against the utility of the thing." [[1023]](#footnote-1024)1022 The only distinction between negligence and strict liability is "the inability of the defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence." [[1024]](#footnote-1025)1023 The same risk-utility **[\*683]** test was applied in the products strict liability action against the escalator company where the Hunt court noted, "again, a balance test is mandated: if the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous." [[1025]](#footnote-1026)1024 It would appear that the Hunt decision interpreted Weber as requiring a riskbenefit or risk-utility test after imputing knowledge of the risk to the manufacturer.

However, a year after the Hunt decision, the Supreme Court of Louisiana decided DeBattista v. Argonaut-Southwest Insurance Co. [[1026]](#footnote-1027)1025 In DeBattista, the plaintiff contracted hepatitis from a blood transfusion and brought an action against the blood bank which supplied the tainted blood. [[1027]](#footnote-1028)1026 It was clear that the blood bank was not negligent in supplying the tainted blood. Therefore, the trial court dismissed the plaintiff's action based upon lack of negligence and the inapplicability of any implied warranty. [[1028]](#footnote-1029)1027 The appellate court affirmed the trial court's decision. [[1029]](#footnote-1030)1028 The Supreme Court of Louisiana reversed both the trial court and court of appeals' decisions based primarily upon its interpretation of "unreasonably dangerous." [[1030]](#footnote-1031)1029 The defendant argued that the tainted blood could not be considered unreasonably dangerous for these reasons: First, "unreasonably dangerous" is based upon an examination of the defendant's entire line or total activity rather than the single product used by the plaintiff. [[1031]](#footnote-1032)1030 Second, the social utility of distributing blood greatly outweighs the risk of harm. [[1032]](#footnote-1033)1031 Third, blood banks have no way of preventing the distribution of relatively small amounts of tainted blood. [[1033]](#footnote-1034)1032 The DeBattista court said that, in essence, the defendant was argu- **[\*684]** ing that the distribution of blood involves danger. Such danger is reasonable and should be tolerated because of the benefits; thus, the consumer must bear the costs of the risks. [[1034]](#footnote-1035)1033 The DeBattista court rejected such interpretation of "unreasonable danger" and noted that the term "unreasonably dangerous" was created to prevent manufacturers from becoming insurers. [[1035]](#footnote-1036)1034 The term "unreasonably dangerous" means simply that a product is dangerous beyond that which is contemplated by an ordinary consumer. [[1036]](#footnote-1037)1035

According to the DeBattista court, Louisiana products liability law was influenced by section 402A and closely approximates its common law development. [[1037]](#footnote-1038)1036 Louisiana law aligned itself with such common law concern for consumer interests; thus, any interpretation of "unreasonably dangerous" which burdens a plaintiff with elements which ring of negligence cannot be tolerated. [[1038]](#footnote-1039)1037 The court stated: "The very purpose of strict liability is to relieve the plaintiff from problems of proof inherent in pursuing negligence and warranty remedies, and thereby to insure that the costs of injuries resulting from defective things are borne by those responsible for them." [[1039]](#footnote-1040)1038 The DeBattista court retained the unreasonably dangerous requirement with the reservation that "it must be carefully applied, however, with its true purpose in mind." [[1040]](#footnote-1041)1039

The culmination of the Louisiana Supreme Court's interpretation of liability without fault for products was made in the 1986 case of Halphen v. Johns-Manville Sales Corp. [[1041]](#footnote-1042)1040 Halphen involved a certified question from the Fifth Circuit Court of Appeals in an asbestos case on whether the manufacturer's lack of knowledge concerning a product's dan- **[\*685]** ger would bar liability. [[1042]](#footnote-1043)1041 The Supreme Court of Louisiana set forth a detailed summary of strict liability in its response to the question. The Halphen court said that the plaintiff need not prove negligence in a products action and could recover even though a manufacturer has exercised all possible care in the preparation and sale of the product. [[1043]](#footnote-1044)1042 In a product liability action, the classification or theory may determine the application of strict liability in relation to the conduct and knowledge of the defendant. [[1044]](#footnote-1045)1043 The Halphen court set forth four basic ways strict liability may be applied in a products action. [[1045]](#footnote-1046)1044 The particular theory chosen by the plaintiff would determine whether the manufacturer's knowledge of the danger was relevant. [[1046]](#footnote-1047)1045 Thus, it would be the plaintiff who controls the methods of proof necessary in an action designating the particular theory of recovery. However, the Halphen court made it clear that the theories were not mutually exclusive. Thus, the plaintiff could prove his case in one of several different ways; i.e., should the plaintiff fail in proving one theory, such lack of proof would not exclude proof under another theory. [[1047]](#footnote-1048)1046

The first category or theory is one of "unreasonably dangerous per se." Under this theory, liability is based solely on the intrinsic characteristics of the product, irrespective of the manufacturer's intent, knowledge, or conduct. [[1048]](#footnote-1049)1047 It is the purest form of strict liability and is based upon a danger-utility **[\*686]** test.

A product is unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. This theory considers the product's danger-in-fact, not whether the manufacturer perceived or could have perceived the danger, because the theory's purpose is to evaluate the product itself, not the manufacturer's conduct. Likewise, the benefits are those actually found to flow from the use of the product, rather than as perceived at the time the product was designed and marketed. The fact that a risk or hazard related to the use of a product was not discoverable under existing technology or that the benefits appeared greater than they actually were are both irrelevant. Under this theory, the plaintiff is not entitled to impugn the conduct of the manufacturer for its failure to adopt an alternative design or affix a warning or instruction to the product. [[1049]](#footnote-1050)1048

The "unreasonably dangerous per se" rule looks at the "danger-in-fact" of the product. This appears to mean that whatever danger exists in the product, irrespective of whether the manufacturer knew, should have known, or could have discovered, such danger is measured against the product's utility. Thus, foreseeability is not a factor in the danger portion of this test. Benefits of the product are measured by the benefits which actually develop rather than any alleged or supposed benefits. Liability will attach even when the manufacturer could not discover the defect or danger because it is the danger which is proved at the time of trial which controls. The injured consumer may use this theory to prove any type of defect, including design defect. [[1050]](#footnote-1051)1049 Therefore, the "unreasonably dan- **[\*687]** gerous per se" theory is an overall test that the plaintiff may use at his discretion and is independent of any other test or measurement of strict liability. [[1051]](#footnote-1052)1050

The Halphen court then set forth three other tests or theories that the injured consumer could employ in a products liability action. These three theories paralleled the division of types of defects found in common law jurisdictions: (1) a construction or composition flaw (manufacturing defect), (2) a design defect, and (3) a warning defect. [[1052]](#footnote-1053)1051

In a construction defect case, the plaintiff need not prove any negligence, but need only show that the product failed to conform to the manufacturer's own specifications or standards. Thus, the manufacturer's knowledge of the defect or danger is not relevant in such an action. [[1053]](#footnote-1054)1052

In a warning defect action, the Halphen court recognized the relationship between warnings and the choice of design when it stated the following: "Although a product is not unreasonably dangerous per se or flawed by a construction defect, it may still be an unreasonably dangerous product if the manufacturer fails to adequately warn about a danger related to the way the product is designed." [[1054]](#footnote-1055)1053

In a warning case, the manufacturer is required to provide a warning of any danger inherent in the normal use of a product which is not within the knowledge of or obvious to the ordinary consumer. [[1055]](#footnote-1056)1054 In fulfilling this duty, the manufacturer is held to the knowledge and skill of an expert and must keep abreast of scientific knowledge, discoveries, and advances. [[1056]](#footnote-1057)1055 The Halphen court included testing and inspection as a part of the warning defect theory when it said that a manufacturer has "a duty to test and inspect its product, and the extent of research and experiment must be commensurate with the dangers **[\*688]** involved." [[1057]](#footnote-1058)1056

In the design defect category or theory, the Halphen court set forth three alternative tests. First, the plaintiff could prove the design defect by using the "unreasonably dangerous per se" test. The Halphen court explained the reason for such a test:

This first reason for concluding that a design is defective is governed by the same criteria for deciding whether a product is unreasonably dangerous per se. The overlap in categories makes it unnecessary to decide whether a product's defect is one of design or of another kind if the product is proven to be unreasonably dangerous per se. [[1058]](#footnote-1059)1057

Second, the injured consumer could prove a design defect by showing there are safer alternative products available to meet the same needs or desires. [[1059]](#footnote-1060)1058 Third, the consumer must show that there was a feasible way to design the product with less harmful consequences. [[1060]](#footnote-1061)1059 In the second and third methods of proving a design defect, the manufacturer's knowledge is relevant; however, the measurement of such knowledge, as in a warning case, is that of an expert. [[1061]](#footnote-1062)1060 Also, inspection, testing, research, and experiments as duty factors are included in the feasible alternatives or feasible alternative design categories:

In regard to the failure to use alternative products or designs, as in the duty to warn, the standard of knowledge, skill and care is that of an expert, including the duty to test, inspect, research and experiment commensurate with the danger. Accordingly, evidence as to whether the manufacturer, held to the standard and skill of an expert, could know of and feasibly avoid the danger is admissible under a theory of recovery based on alleged alternative designs **[\*689]** or alternative products. Such evidence is not admissible, however, in a suit based on the first design defect theory, which is governed by the same criteria as proof that a product is unreasonably dangerous per se. [[1062]](#footnote-1063)1061

The Halphen court made it extremely clear that an injured consumer was not to be confined to a single method of proof nor was the consumer required to choose one theory of recovery over another in a products case: "The plaintiff may elect to try his case upon any or all of the theories of recovery. If he decides to pursue more than one, he is entitled to an instruction that evidence which is admissible exclusively under one theory may be considered only for that purpose." [[1063]](#footnote-1064)1062

The Halphen court placed a great deal of emphasis on the consumer's ability to use any or all of the four possible approaches to strict liability. For example, when explaining each category or theory, the Halphen court began its explanation with an introduction that although the consumer failed to prove the unreasonably dangerous per se/risk-utility test, the product could still be considered defective under one of the alternative tests. [[1064]](#footnote-1065)1063

The Halphen court set forth a well reasoned method for determining strict liability. Should the purest form of strict liability provide any barriers to recovery, the consumer could use several alternatives. The court gave strong reasons for setting forth its four methods for determining liability in a products action. The majority in Halphen made reference to both codal and empirical basis for its decision:

The strict liability or legal fault thus arising from our code provisions is more than a rebuttable presumption of negligence. The owner or guardian cannot be absolved from his strict liability even if he proves that he did not know and could not have known of the unreasonable risk of harm to others.

. . . . **[\*690]**

To further these goals within the framework of our civil code, we have concluded that as between an innocent consumer injured by a product which is unreasonably dangerous per se, i.e., too dangerous to be placed on the market, and the manufacturer who puts the product into commerce without being aware or able to know of its danger, the manufacturer must bear the cost of the damage caused by its product. On the other hand, if the consumer fails to prove that the product is unreasonably dangerous per se and seeks to prove his case by impugning the manufacturer's conduct, e.g., by contending that the manufacturer failed to warn or to adopt feasible alternative designs, in fairness the manufacturer should be permitted to introduce evidence and present argument as to the standard of knowledge and conduct by which its conduct is to be judged. [[1065]](#footnote-1066)1064

The Halphen court stated strong reasons for retaining an "unreasonably dangerous per se" category beyond mere production or construction defects:

The costs of administering the unreasonably dangerous per se category of products liability cases will be reduced by eliminating litigation over the date when a product's danger became scientifically knowable. In unreasonably dangerous per se cases, as in construction defect cases now, the parties should not be forced to produce experts in the history of science and technology to speculate, and possibly confuse jurors, as to what knowledge was available and what improvements were feasible in a given year.

Further, a sense of justice also requires that a manufacturer not be permitted to subsidize its production of a product which is unreasonably dangerous per se at the expense of innocent accident victims. Just as our civil code requires that a custodian of a dangerous thing compensate a victim for the unforeseen harm it causes, so should a manufacturer bear the unforeseen costs that its product inflicts on the helpless user. Moreover, great injustice will result if a manufacturer who knew that a product was **[\*691]** unreasonably dangerous per se before it was marketed escapes liability because the plaintiff cannot carry the difficult burden of proving when scientific knowledge was available to the manufacturer. [[1066]](#footnote-1067)1065

Until anti-consumer legislation, the Halphen opinion provided a reasoned method for determining liability in products liability actions in Louisiana.

2. Statutes

The Louisiana legislature enacted the "Louisiana Products Liability Act," which became effective September 1, 1988. [[1067]](#footnote-1068)1066 The Act eliminated the Halphen decision and set forth numerous barriers to a consumer's products liability action. [[1068]](#footnote-1069)1067 The overall effect of the Louisiana Act has been described as a return to negligence by those favoring the Act. [[1069]](#footnote-1070)1068 But, in reality, the Act is so anti-consumer that it places burdens on the plaintiff beyond those required under a negligence system. In effect, the Louisiana Products Liability Act parallels the present suggestions of the ALI.

The Louisiana Products Liability Act provides the exclusive remedy to a consumer. [[1070]](#footnote-1071)1069 Under a design defect, the only way the consumer can prove liability is to show the existence of an alternative design which is capable of preventing the consumer's injury. [[1071]](#footnote-1072)1070 In addition, the consumer must **[\*692]** prove that the product's design caused the consumer's damage and that such damage outweighs the burden on the manufacturer of adopting the alternative design. [[1072]](#footnote-1073)1071 In addition, any adverse effect that the alternative design has on the utility of the manufacturer's product must be considered. Finally, adequate warnings may prevent recovery altogether under a riskutility analysis. [[1073]](#footnote-1074)1072

This new risk-utility balancing formula under the Louisiana Act completely destroys strict liability law. First, by requiring proof of an alternative design, it eliminates the unreasonably dangerous per se category of strict liability under the Halphen decision. [[1074]](#footnote-1075)1073 Second, as an exclusive theory, the Act provides one method for proving a design defect rather than the three methods allowed under the Halphen decision. [[1075]](#footnote-1076)1074 Finally, the Act requires a risk-utility balancing test between the product, as originally designed, and the characteristics of an existing alternative design. [[1076]](#footnote-1077)1075 If the Supreme Court of Louisiana interprets the "existence" language of an alternative design as requiring the actual implementation of the suggested alternative design, such interpretation would be equivalent to mere custom **[\*693]** and usage. If custom and usage is required, then the Act sets a standard more restrictive than any common law negligence rule. [[1077]](#footnote-1078)1076

Finally, the warnings are considered to be part of the riskutility balancing formula in a design defect case. [[1078]](#footnote-1079)1077 This could result in a warning replacing good design. For example, prior Louisiana law stated that a manufacturer has a duty to "design out" a hazard or defect if it is feasible to do so. [[1079]](#footnote-1080)1078 In such situations the manufacturer cannot substitute a warning for proper design. This approach, that warnings cannot replace feasible designs, has a sound basis in both legal and engineering principles concerning proper design. [[1080]](#footnote-1081)1079 When a hazard or defect exists, a warning, even an adequate one, does not eliminate it. [[1081]](#footnote-1082)1080 A warning merely asks the consumer to avoid the hazard. "Designing out" the hazard eliminates any danger; whereas, a warning has no effect on the existence of the hazard or defect. [[1082]](#footnote-1083)1081 As empirical data now shows, "good" warnings should never be substituted for "good" designs. [[1083]](#footnote-1084)1082

The Louisiana Act provides the following affirmative defenses: (1) lack of knowledge of the defect or hazard, (2) lack **[\*694]** of knowledge of an alternative design, and (3) lack of both technological or economic feasibility in developing an alternative design, i.e., state-of-the-art defense. [[1084]](#footnote-1085)1083 Under the affirmative defenses, the Act destroys the imputed-knowledge rule of strict liability. Thus, the primary foundation of prior Louisiana strict liability law is eliminated. [[1085]](#footnote-1086)1084

There is little doubt that the Louisiana Products Liability Act has placed almost impossible burdens of proof on the consumer. The awesome risk-utility burden of design defects under the Act was explained in Lavespere v. Niagara Machine & Tool Works. [[1086]](#footnote-1087)1085 The consumer in Lavespere presented expert testimony that there was a feasible safeguard for the product which had caused the severe injury. [[1087]](#footnote-1088)1086 According to the consumer's expert, the manufacturer knew that the guarding techniques and the technology for designing and installing appropriate guards were readily available. [[1088]](#footnote-1089)1087 In addition, the expert testified that, prior to the defendant's manufacture of the product, both foreign and domestic manufacturers had adopted the suggested alternative design. [[1089]](#footnote-1090)1088 However, according to the Lavespere court, the Louisiana Products Liability Act required more detailed evidence concerning the risks and utility of both the existing and proposed alternative design. [[1090]](#footnote-1091)1089 The Lavespere court said that the consumer must prove the frequency of similar accidents in the proposed design, the economic costs entailed by such accidents, and the extent of the reduction in the frequency of accidents in the proposed design. [[1091]](#footnote-1092)1090 Moreover, the consumer must prove the costs the defendant manufacturer would incur in switching to the alternative design. [[1092]](#footnote-1093)1091 In addition, the consumer must prove the "loss of **[\*695]** product utility that the use of the alternative design would have occasioned." [[1093]](#footnote-1094)1092 These items of proof include the loss of function to the original design and include such consequences to the entire industry which produced the product. [[1094]](#footnote-1095)1093 Also, the consumer must prove the costs to the entire industry should the alternative design be adopted. [[1095]](#footnote-1096)1094 In short, the Lavespere court required a complete functional and economic analysis of both the challenged product and the suggested alternative design. This analysis included an examination of both the defendant's operation and a technical and economic evaluation of the entire industry. The Lavespere decision provides an excellent preview of the suggestions being made by the ALI.

3. Pattern Jury Instructions

Louisiana's pattern jury instructions for products liability are based on exclusive theories of recovery under the Louisiana Products Liability Act. [[1096]](#footnote-1097)1095

T. Maine

1. Common Law

The Supreme Judicial Court of Maine never adopted strict liability.

2. Statutes

Maine first adopted strict liability through statutory law in 1973. [[1097]](#footnote-1098)1096 Maine Revised Statutes title 14 section 221 sets **[\*696]** forth Maine's legislation which almost duplicates the language in section 402A. [[1098]](#footnote-1099)1097 There was very little judicial interpretation of design defects under section 221 for almost ten years. The major dispute during the formative years of strict liability in Maine was whether lack of privity barred any tort action. [[1099]](#footnote-1100)1098 Pursuant to two major cases decided by the Supreme Judicial Court of Maine, lack of privity seemed to bar any tort action for products liability despite the clear language contained in section 221 that contractual relations were not required. [[1100]](#footnote-1101)1099 Finally, in 1982, Maine made it clear that lack of privity would not bar a consumer's tort action. [[1101]](#footnote-1102)1100

In the following year, Maine set forth its standard for design defects in Stanley v. Schiavi Mobile Homes. [[1102]](#footnote-1103)1101 The Stanley court adopted a risk-utility analysis which included as a factor the feasibility of alternative designs. [[1103]](#footnote-1104)1102 According to the Stanley court, the theories of negligence and strict liability "overlap" in design defect cases since both require a risk-utility examination. [[1104]](#footnote-1105)1103 The only difference in strict liability is that knowledge of the danger is not a factor of the risk-benefit **[\*697]** balancing test. [[1105]](#footnote-1106)1104

The Stanley risk-utility test was again applied by the court in the 1988 case of St. Germain v. Husqvarna Corp. [[1106]](#footnote-1107)1105 In St. Germain, a design defect was analyzed as part of the unreasonably dangerous requirement. [[1107]](#footnote-1108)1106 The choice of standard for design defects was between the danger-utility test and the consumer contemplation test. [[1108]](#footnote-1109)1107 According to the St. Germain court, the Stanley decision was based upon a "dangerutility test" (risk-utility). [[1109]](#footnote-1110)1108 The St. Germain court reviewed both the utility and danger of the product in question and concluded that the trial court erred in directing a verdict in favor of the defendant, however, the error was harmless. [[1110]](#footnote-1111)1109 The St. Germain court said that since the trial court gave instructions on the same danger-utility test for a negligence issue, the plaintiff was not harmed by the dismissal of the strict liability theory. [[1111]](#footnote-1112)1110

The St. Germain decision was decided by a three-two split in the Supreme Judicial Court of Maine. Two justices gave a strong dissent pointing out to the majority that there is a great difference between the danger-utility test of negligence and the danger-utility test under strict liability. [[1112]](#footnote-1113)1111 Thus, Maine seems **[\*698]** to have adopted a negligence type of danger-utility test for design defects and ignores its statute which states that liability will attach despite all possible care by a manufacturer. [[1113]](#footnote-1114)1112

3. Pattern Jury Instructions

In the Maine Jury Instruction Manual, Instruction No. 136 for products liability seems to combine a consumer expectation test with a risk-utility test for design defects. [[1114]](#footnote-1115)1113 To the ex- **[\*699]** tent that Maine's pattern instructions apply, the consumer expectation test appears erroneous in light of Stanley and St. Germain.

U. Maryland

1. Common Law

Maryland first recognized strict liability in tort in the 1976 case of Phipps v. General Motors Corp. [[1115]](#footnote-1116)1114 Phipps involved alleged defects in an automobile's accelerator, carburetor, and motor mounts. [[1116]](#footnote-1117)1115 In adopting strict liability, the Phipps court looked to section 402A and decisions in other jurisdictions. [[1117]](#footnote-1118)1116 Among the justifications cited by Phipps for adopting strict liability was the difficulty confronted by the consumer in proving negligence. The Phipps decision made continuous references to such proof problems:

And still another reason advanced is that the requirement of proof of a defect rendering a product unreasonably dangerous is a sufficient showing of fault on the part of the seller to impose liability without placing an often impossible burden on the plaintiff of proving specific acts of negligence. . . .

. . . However, in an action founded on strict liability in tort, as opposed to a traditional negligence action, the plaintiff need not prove any specific act of negligence on **[\*700]** the part of the seller. The relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself. . . . [[1118]](#footnote-1119)1117

. . . .

. . . As we have previously discussed, the major distinction between an action in strict liability in tort and one founded on traditional negligence theory relates to the proof which must be presented by the plaintiff. Although the plaintiff need not prove any specific act of negligence on the part of the seller, as in other product liability cases, proof of a defect existing in the product at the time it leaves the seller's control must still be presented. . . .

. . . .

. . . In our view there is no reason why a party injured by a defective and unreasonably dangerous product, which when placed on the market is impliedly represented as safe, should bear the loss of that injury when the seller of that product is in a better position to take precautions and protect against the defect. Yet this may be the result where injured parties are forced to comply with the proof requirements of negligence actions or are confronted with the procedural requirements and limitations of warranty actions. Therefore, we adopt the theory of strict liability as expressed in section 402A of the Restatement (Second) of Torts. [[1119]](#footnote-1120)1118

The standard adopted for proving defects, including those of design, was the consumer expectation test. [[1120]](#footnote-1121)1119 However, the Phipps court recognized that it is less difficult to apply the consumer expectation test in a manufacturing defect situation than in a design defect situation. [[1121]](#footnote-1122)1120 As an historical account, the Phipps court recognized that some courts and commentators suggested that traditional negligence standards still apply in a design defect situation. For example, section 402A may still require a weighing of the utility inherent in the design against **[\*701]** the magnitude of the risk. [[1122]](#footnote-1123)1121 Immediately after such recognition, the Phipps court cited Dean Wade's seven-factor test for design defects. [[1123]](#footnote-1124)1122

It is clear that the Phipps court's reference to commentators and foreign jurisdictions' recognition of the applicability of a risk-utility standard was mere dicta and not a holding or adoption of such standard. [[1124]](#footnote-1125)1123 As a matter of historical note, the Phipps court said there were conditions caused by defects in design or manufacturing which could never involve a reasonable risk. [[1125]](#footnote-1126)1124 As classic examples of risks which could never be considered reasonable, the Phipps court cited three situations which had arisen in other jurisdictions. [[1126]](#footnote-1127)1125 The three exceptions cited by Phipps were examples found in famous cases and were clearly not intended to set forth exclusive limitations. [[1127]](#footnote-1128)1126

Several years after Phipps, the Maryland Court of Appeals decided Anthony Pools v. Sheehan. [[1128]](#footnote-1129)1127 The Anthony Pools case involved alleged defects in the design of an in-ground swimming pool and its diving board. [[1129]](#footnote-1130)1128 The consumer in Anthony Pools based his action on both strict liability and implied warranty. [[1130]](#footnote-1131)1129 The trial court directed a verdict in favor of the defendant on the warranty issue, and the case went to the jury on the strict liability issue. [[1131]](#footnote-1132)1130 The jury returned a verdict in favor of the defendant. [[1132]](#footnote-1133)1131 The court of appeals reversed and remanded for a new trial. [[1133]](#footnote-1134)1132

The decision of the Maryland Court of Appeals focused on **[\*702]** the warranty issue; however, the court adopted the opinion of the court of special appeals concerning strict liability because according to Maryland's highest court, the lower court's opinion correctly applied the principles laid down in the Phipps decision "concerning the conduct of a plaintiff as a defense in a case of strict liability in tort." [[1134]](#footnote-1135)1133 A major portion of the lower court's opinion in Anthony Pools involved what type of consumer conduct would provide a defense; however, part of the decision discussed the trial court's instructions on design defect. [[1135]](#footnote-1136)1134

Although the court of special appeals' decision concerning the design defect was probably not adopted by the Maryland Court of Appeals, this issue is somewhat vague. [[1136]](#footnote-1137)1135 Thus, a cursory examination of the design defect issue seems appropriate, especially since such decision does not add or detract from the holdings in Phipps. The lower court cited a portion of the Phipps opinion concerning risk-utility balancing and, in a footnote, cited Dean Wade's seven-factor balancing test. [[1137]](#footnote-1138)1136 At the beginning of the footnote, the court of special appeals stated that the plaintiffs/appellants "allude to the risk/utility analysis in their brief;" however, the appellants made no mention of the risk-utility analysis at the trial. [[1138]](#footnote-1139)1137 After citing Dean Wade's seven-factor test, the court of special appeals stated: "These factors rationalize what most courts do in deciding cases, although not all the factors are necessarily weighed nor **[\*703]** is the risk/utility analysis denominated as such." [[1139]](#footnote-1140)1138

The issue presented in Anthony Pools concerning the design defect, however, involved an instruction to the jury which made no reference to any risk-utility analysis. [[1140]](#footnote-1141)1139 The trial court gave an instruction based solely on the consumer expectation test. [[1141]](#footnote-1142)1140 The court of special appeals made no holding one way or the other concerning the applicability of either the consumer expectation test or the risk-utility test. [[1142]](#footnote-1143)1141 The sole basis for reversal on the issue of strict liability was the court's holding concerning the plaintiff's contributory negligence. [[1143]](#footnote-1144)1142 Neither the court of appeals nor the court of special appeals criticized the trial court's use of the consumer expectation test in a design defect situation.

In 1985, the Maryland Court of Appeals decided Kelley v. R.G. Industries. [[1144]](#footnote-1145)1143 In Kelley, the plaintiff was injured by a small handgun used in the commission of a crime. [[1145]](#footnote-1146)1144 In deciding a certified question from the United States District Court, the Kelley court held that manufacturers of "Saturday Night Specials" could be strictly liable under section 402A. [[1146]](#footnote-1147)1145 In its discussion of strict liability, the Kelley court made reference to its prior decision in Phipps: "In determining whether a product is defective, in its design or its manufacture, Maryland cases have generally applied the 'consumer expectation' test." [[1147]](#footnote-1148)1146 However, the Kelley court said that a handgun manufacturer could not be held liable under the consumer expectation test since a consumer would expect a handgun to be dangerous. [[1148]](#footnote-1149)1147 The Kelley court said that a product's normal function may be dangerous; however, this **[\*704]** may not be the equivalent of a defect in strict liability. [[1149]](#footnote-1150)1148 For example, automobiles may be dangerous if used to run down pedestrians, but the injury results from the nature of the product--its ability to be propelled with great force at great speed. [[1150]](#footnote-1151)1149 This is different from the same automobile which may be defective in design or construction (e.g., the misplacement of the gasoline tank which can easily explode). [[1151]](#footnote-1152)1150 Only in the second instance is the product defective. [[1152]](#footnote-1153)1151 Thus, a handgun's normal function to propel bullets with deadly force is insufficient to incur liability under section 402A. [[1153]](#footnote-1154)1152

The Kelley court said that another test used to determine defects under section 402A is the risk-utility test applied in Barker v. Lull Engineering Co. [[1154]](#footnote-1155)1153 The Kelley court then explained the facts of Barker and set forth the entire Barker twostep rule. [[1155]](#footnote-1156)1154 The court in Kelley then stated, "since the Barker decision numerous jurisdictions have adopted a risk-utility test as an alternate standard for the determination of design defect under section 402A." [[1156]](#footnote-1157)1155 The Kelley court continued:

While no decision of this Court in a product liability case has expressly rested upon an application of the risk/utility test, we did state in Phipps that "in some circumstances the question of whether a particular design is defective may depend upon a balancing of the utility of the design and other factors against the magnitude of that risk." 278 Md. at 348, 363 A.2d 955. Also, the Court of Special Appeals in Sheehan v. Anthony Pools, supra, 50 Md. App. at 620 n. 6, 440 A.2d 1085, in referring to the factors used in the risk/utility analysis, said that "these factors rationalize what most courts do in deciding design **[\*705]** cases, although not all the factors are necessarily weighed nor is the risk/utility analysis denominated as such." [[1157]](#footnote-1158)1156

The Kelley court stated that, regardless of the standard used, handguns cannot be considered defective because the hand gun is functioning as intended and expected. [[1158]](#footnote-1159)1157 But the court did not cease its examination of the possible liability of "certain" handguns merely because prior principles of strict liability would not recognize liability:

This Court has repeatedly said that "the common law is not static; its life and heart is its dynamism--its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems." The common law is, therefore, subject to judicial modification in light of modern circumstances or increased knowledge. [[1159]](#footnote-1160)1158

The court in Kelley made an exhaustive review of the public policy underlying legislation in Maryland and United States Congress concerning "Saturday Night Specials." [[1160]](#footnote-1161)1159 The court concluded "that it is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from criminal use of their products." [[1161]](#footnote-1162)1160

There is little doubt that the Kelley decision is significant in relation to its decision concerning handguns. However, the Kelley decision also presents significant insight into Maryland's highest courts' views of the standard for design defects under strict liability. The Kelley decision made it very clear that the most prominent test under its prior decision in Phipps was a consumer expectation test, not a risk-utility test. [[1162]](#footnote-1163)1161 In addition, the Kelley court ignored both federal and Maryland's **[\*706]** lower courts' decisions when it sought an alternative to the consumer expectation test. The Kelley decision sought assistance from California in formulating an appropriate risk-utility analysis. [[1163]](#footnote-1164)1162 Finally, the Kelley decision made it extremely clear that the risk-utility standard was an alternative rather than an exclusive standard which can be applied in a design case. [[1164]](#footnote-1165)1163 The reference to the Barker decision in California set forth the entire Barker rule, including the shifting of the burden of proof under the risk-utility branch of the dual test. [[1165]](#footnote-1166)1164

In 1994, the court of appeals continued its expansive approach to strict liability in A.J. Decoster Co. v. Westinghouse Electric Corp. [[1166]](#footnote-1167)1165 The Decoster court allowed recovery of property damage under strict liability. [[1167]](#footnote-1168)1166 In Decoster, the plaintiff alleged that the defendant's defective product caused a power failure which resulted in the death of 140,000 chickens. [[1168]](#footnote-1169)1167 The defendant asserted that the Maryland legislature's enactment of the UCC provided an exclusive comprehensive liability scheme for commercial losses. [[1169]](#footnote-1170)1168 Thus, the sole remedy for the plaintiff was a contractual remedy, not strict liability. [[1170]](#footnote-1171)1169 The Decoster court rejected the defendant's arguments and allowed recovery under strict liability. [[1171]](#footnote-1172)1170 One basis for the Decoster holding was a concern about the burden of proof which would be placed upon the plaintiff under negligence and warranty actions:

There is no reason why a party injured by a defective and unreasonably dangerous product, which when placed on the market is impliedly represented as safe, should bear the loss of that injury when the seller of that **[\*707]** product is in a better position to take precautions and protect against the defect. Yet this may be the result where injured parties are forced to comply with the proof requirements of negligence actions or are confronted with the procedural requirements and limitations of warranty actions. [[1172]](#footnote-1173)1171

It would appear that Maryland law, as defined by its highest court, applies a Barker-type of test for design defects. Under this rule, the consumer expectation test is applicable to design defects; however, should such a test prove inappropriate, the consumer can use the risk-utility test as a viable alternative. The development of this dual standard by Maryland's highest court is based, to a great extent, on its concern that consumers should not be confronted with the almost impossible burden in proving negligence. [[1173]](#footnote-1174)1172 The Maryland Court of Appeals has indicated a strong public policy approach to such issues and seems to be willing to develop new remedies when none are available under existing law. It would be a natural presumption that both the federal and lower courts in Maryland would follow the lead of Maryland's highest court and adhere to its dictates. But, in the area of strict liability for design defects, the mandates of the Maryland Court of Appeals appears to have been ignored.

In Singleton v. International Harvester Co., [[1174]](#footnote-1175)1173 the United States Court of Appeals for the Fourth Circuit affirmed a trial court's directed verdict in favor of the defendant concerning a design issue. [[1175]](#footnote-1176)1174 In Singleton, the plaintiff alleged that a tractor was defective because it failed to employ a roll-over protective structure (ROPS). [[1176]](#footnote-1177)1175 The plaintiff urged the Fourth Circuit to consider the Barker case in California as applicable to the issues since Maryland law was unclear on the particular design issue. [[1177]](#footnote-1178)1176 Nevertheless, the Singleton court did not ref- **[\*708]** er to California law. According to the Singleton court, the Phipps decision provided clear authority to decide the issue. [[1178]](#footnote-1179)1177 However, the Singleton court parsed the Phipps case in an extremely curious manner. It divided design defects into two areas: those which are "inherently unreasonable" and those which are not. [[1179]](#footnote-1180)1178 For all design defects which are determined to be "inherently unreasonable," there is no need to apply a risk-utility balancing analysis. [[1180]](#footnote-1181)1179 For design defects that do not meet the "inherently unreasonable" category, a riskutility analysis is mandatory. [[1181]](#footnote-1182)1180 The Singleton court derived its rule for design defects from the historical dicta contained in the Phipps decision. [[1182]](#footnote-1183)1181 The Singleton court elevated the three examples of classical cases referred to in Phipps as the "inherently unreasonable" category. The Singleton Court assigned all other design defects to a risk-utility examination. However, the Singleton court did not cease its analysis of design defects; it elaborated on its risk-utility analysis by assigning almost impossible burdens of proof on the plaintiff:

The failure of the defendant to incorporate a ROPS on the 1948 tractor is not an inherently unreasonable risk. Thus, the plaintiffs could create a jury issue on liability for defective design by producing evidence upon which a jury could determine the manufacturer's reasonableness in marketing a tractor without a ROPS in 1948. Such evidence should encompass matters such as the technological feasibility of manufacturing a tractor with a ROPS in 1948, the availability of material for producing such a structure in 1948, the cost of producing such a structure in 1948, the price to a consumer of a ROPS in 1948, and the chances for consumer acceptance of a tractor with a ROPS in 1948. [[1183]](#footnote-1184)1182

The Singleton decision may have been based upon the **[\*709]** court's concern about both the age of the allegedly defective product and the quality of the plaintiff's expert witness. [[1184]](#footnote-1185)1183 However, such concern should not be the basis for the creation of a rule which is based upon dicta and which ignores both the clear statements and policy issues espoused by Maryland's highest court in the Phipps decision. Nowhere does the Singleton decision make any reference to the Phipps holding that the consumer expectation test is the applicable standard for design defects. Nor does the Singleton court make reference to the Phipps court's concern over the burden of proof in negligence as bar to a consumer's recovery. By setting forth almost impossible burdens of proof for a consumer, the Singleton court expressed a complete lack of concern about the Phipps court's views concerning strict liability and design defects.

The Singleton decision, standing alone, would create little disturbance in Maryland law. However, the Maryland Court of Special Appeals invoked the Singleton rule in Troja v. Black & Decker Manufacturing Co. [[1185]](#footnote-1186)1184 In fact, the Troja decision almost adopted word for word the Singleton opinion concerning the test for design defects. [[1186]](#footnote-1187)1185 Since the Singleton and Troja decisions, numerous Maryland decisions in the federal and lower Maryland courts have doggedly followed what is essentially a Fourth Circuit rule based upon dicta. [[1187]](#footnote-1188)1186 Like the Energizer Rabbit, the Singleton rule goes on and on and on. Whether the Maryland Court of Appeals will correct the misapplication of its rules is yet to be determined. **[\*710]**

2. Statutes

Maryland has not enacted a comprehensive statute controlling products actions or design defects. However, there are statutes limiting consumer rights concerning sealed containers, [[1188]](#footnote-1189)1187 actions arising in foreign jurisdictions, [[1189]](#footnote-1190)1188 noneconomic damages, [[1190]](#footnote-1191)1189 firearms, [[1191]](#footnote-1192)1190 and blood products. [[1192]](#footnote-1193)1191

3. Pattern Jury Instructions

Maryland's pattern jury instructions for design defects under strict liability are found at MPJI 26:13. [[1193]](#footnote-1194)1192 The pattern instruction sets forth what is basically the risk-utility analysis as found in Singleton and Troja. [[1194]](#footnote-1195)1193

V. Massachusetts

1. Common Law

The Supreme Judicial Court of Massachusetts has never adopted section 402A. Instead, it has developed strict liability based upon the UCC. [[1195]](#footnote-1196)1194

2. Statutes

On several occasions bills have been introduced which would affect products' actions; however, all of these bills have **[\*711]** been rejected. [[1196]](#footnote-1197)1195 Massachusetts' interpretation of strict liability under the UCC parallels the development of strict liability under the Restatement. [[1197]](#footnote-1198)1196 For example, the Supreme Judicial Court of Massachusetts in Back v. Wickes Corp. [[1198]](#footnote-1199)1197 stated that Massachusetts' warranty law was "congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts section 402A," and "for that reason [the court found] the strict liability cases of other jurisdictions to be a useful supplement to its warranty case law." [[1199]](#footnote-1200)1198 In its discussion of strict liability, the Back court viewed the unreasonably dangerous requirement in design defects as "depending largely, although not exclusively, on reasonable consumer expectations." [[1200]](#footnote-1201)1199 The Back court's view of the consumer expectation test was as follows:

In deciding this issue, the jury must weigh competing factors much as they would in determining the fault of the defendant in a negligence case. The inquiry focuses on product characteristics rather than on the defendant's conduct, but the nature of the decision is essentially the same. In evaluating the adequacy of a product's design, the jury should consider, among other factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." [[1201]](#footnote-1202)1200

The authority for the danger-utility test included citation to both the Phillips case from Oregon and the Barker case from California. [[1202]](#footnote-1203)1201 However, the Back court made no reference to **[\*712]** the Barker dual-prong test, nor to its proof shifting portion of the second prong. [[1203]](#footnote-1204)1202 In addition, the Back court made no reference to the imputed-knowledge rule of Phillips. [[1204]](#footnote-1205)1203 Thus, the Back court could be interpreted as applying its standard for strict liability design defects in a number of ways, including the use of both negligence and strict liability as a unified rule under a danger-utility balancing test with proof of a safer alternative design as an absolute criteria. [[1205]](#footnote-1206)1204

Massachusetts' highest court shed some light on its Back decision when it decided Correia v. Firestone Tire & Rubber Co. [[1206]](#footnote-1207)1205 The Correia court held that comparative negligence did not apply in strict liability. [[1207]](#footnote-1208)1206 In addition, the Correia court refused to judicially create any type of comparative fault in strict liability. [[1208]](#footnote-1209)1207 Finally, the Correia court refused to recognize any type of fault on the part of the plaintiff as bar to recovery other than those factors set forth in comment n of section 402A. [[1209]](#footnote-1210)1208 As a basis for its opinion, the Correia court indicated it would not mix the theories of negligence and strict liability. [[1210]](#footnote-1211)1209 Citing both the black letter rule and the comments to section 402A, the Correia court stated:

As Restatement (Second) of Torts section 402A, comment n, indicates, actions for strict liability are not actions in negligence. The defendant may be liable "even though he has exercised all possible care in the preparation and sale of the product." . . .

If the comparative negligence statute does not literally apply, the question remains whether its underlying principles should be given effect by judicial adoption. This is **[\*713]** the course of action most strongly urged by Firestone. We decline to take such action. To do so would be to meld improperly the theory of negligence with the theory of warranty as expressed in G.L. c. 106, sections 2-314--2-318, and thereby to undercut the policies supporting these statutes.

. . . .

. . . Recognizing that the seller is in the best position to ensure product safety, the law of strict liability imposes on the seller a duty to prevent the release of "any product in a defective condition unreasonably dangerous to the user or consumer," into the stream of commerce. Restatement (Second) of Torts section 402A(1) (1965). This duty is unknown in the law of negligence and it is not fulfilled even if the seller takes all reasonable measures to make his product safe. The liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller. . . .

The policies of negligence and warranty liability will best be served by keeping the spheres in which they operate separate until such time as the Legislature indicates how and to what extent they should be melded. The standards of care and the duties are well defined in each sphere. [[1211]](#footnote-1212)1210

Based upon the strong language used in Correia, there was, or should have been, a great deal of doubt as to whether Massachusetts would adopt a negligence standard to control design defects in strict liability actions. Thus, the Back decision should not have been interpreted as melding design defect theories of negligence and strict liability.

The Correia decision that maintained a separation between negligence and strict liability was reinforced in Hayes v. Ariens Co. [[1212]](#footnote-1213)1211 In Hayes, the consumer alleged that the defendant's product contained both a design and warning defect. [[1213]](#footnote-1214)1212 The consumer relied upon both negligence and warranty as a basis **[\*714]** for liability. [[1214]](#footnote-1215)1213 The jury found both the defendant and the consumer negligent, but also found that there was no breach of warranty. [[1215]](#footnote-1216)1214 The consumer appealed on the basis that the jury decision was inconsistent because it was impossible for the defendant to be negligent and not to have breached its warranty. [[1216]](#footnote-1217)1215 The Hayes court agreed and revised the judgment: "A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability." [[1217]](#footnote-1218)1216

As part of its reasoning, the Hayes court discussed both the strict liability design defect and the warning criteria. The defendant asserted that the jury decision was not inconsistent because it could have reached its decision on a post-sale duty to warn. [[1218]](#footnote-1219)1217 The Hayes court stated that even assuming a post-sale duty to warn was the basis of the jury's decision, the decision was still inconsistent:

For strict liability purposes, and therefore for purposes of our warranty law, the adequacy of a warning is measured by the warning that would be given at the time of sale by an ordinarily prudent vendor who, at that time, is fully aware of the risks presented by the product. A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant. Goods that, from the consumer's perspective, are unreasonably dangerous due to lack of adequate warning, are not fit for the ordinary purposes for which such goods are used regardless of the absence of fault on **[\*715]** the vendor's part. [[1219]](#footnote-1220)1218

The authority cited by the Hayes court included its own prior decisions of Back and Correia, as well as Beshada v. Johns-Manville Products [[1220]](#footnote-1221)1219 from New Jersey and the Phillips case from Oregon. [[1221]](#footnote-1222)1220 The Hayes court then made further comment concerning the burden of proof required in strict liability and rejected the burden-shifting rule in Barker. [[1222]](#footnote-1223)1221

The imputed or presumed knowledge rule referred to in Hayes could be viewed in several ways. Strictly speaking, it was dicta because the court was not confronted with the issue in Hayes. [[1223]](#footnote-1224)1222 The imputed-knowledge language could also be viewed as pertaining only to warning defects and not to design defects. But, either of these interpretations is strained because the Hayes court completely rejected the use of comparative negligence and comparative fault on the basis that negligence and strict liability must be treated separately. [[1224]](#footnote-1225)1223 Hayes did, however, reject the proof-shifting rule of the second prong in Barker; thus, it could not be used as a way to distinguish negligent design from design defects in strict liability. It seemed clear at the time of the Hayes decision that any reasonable interpretation of Massachusetts law would be based upon a clear separation of negligence and strict liability theories. What was unclear is exactly how the supreme court would treat its Barker-like two-pronged test and whether it would somehow integrate an imputed-knowledge rule into its test. [[1225]](#footnote-1226)1224 Despite **[\*716]** the strong language in both Correia and Hayes, the federal courts interpreting Massachusetts law refused to separate negligence from strict liability in both warning and design defect cases. In In re Massachusetts Asbestos Cases, [[1226]](#footnote-1227)1225 the federal district court for the District of Massachusetts rejected Hayes and held that state-of-the-art evidence would be allowed in a failure to warn case. [[1227]](#footnote-1228)1226 The district court said Hayes would not follow Beshada, which Hayes cited as authority, and interpreted the Phillips case in Oregon as not actually imputing knowledge to the defendant. [[1228]](#footnote-1229)1227 Finally, the district court interpreted the Hayes language on imputed knowledge as dicta. [[1229]](#footnote-1230)1228 In its final analysis, the district court treated the failure to warn issue as one of negligence instead of strict liability. [[1230]](#footnote-1231)1229

The In re Massachusetts Asbestos Cases decision was supported by the United States Court of Appeals for the First Circuit in Anderson v. Owens-Illinois, Inc. [[1231]](#footnote-1232)1230 The Anderson court rejected the imputed-knowledge rule based upon an economic/insurance analysis. [[1232]](#footnote-1233)1231 The district court case of Collins v. Ex-Cell-O Corp. [[1233]](#footnote-1234)1232 rejected the Hayes decision and held that the feasibility of alternative designs was relevant in war- **[\*717]** ranty strict liability cases. Finally, in Kotler v. American Tobacco Co., [[1234]](#footnote-1235)1233 the First Circuit held that, in essence, a strict liability design defect case is dependent upon proof of the existence of a safer alternative design. [[1235]](#footnote-1236)1234

The Supreme Judicial Court of Massachusetts laid to rest any doubts about the viability of its imputed-knowledge rule in strict liability cases when it decided Simmons v. Monarch Machine Tool Co. [[1236]](#footnote-1237)1235 The Simmons decision involved both negligence and breach of warranty concerning the product's design. [[1237]](#footnote-1238)1236 The jury returned a verdict for the consumer and the defendant appealed. [[1238]](#footnote-1239)1237 The Simmons court upheld the verdict based upon its examination of the negligence count. [[1239]](#footnote-1240)1238 However, in a lengthy footnote, the Simmons court examined the quoted language from its Hayes decision setting forth the imputed-knowledge rule. [[1240]](#footnote-1241)1239 The Simmons court also noted the federal court decisions which refused to recognize the rule. The Simmons court stated:

Because we find no error on the negligence count, resolution of this case does not require us to discuss Monarch's various claims of error pertaining to the breach of warranty count. We note, however, that most of Monarch's claims of error with regard to the warranty count arise from the judge's instruction which quoted portions of our decision in Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273 (1984). In Hayes, we said, "For strict liability purposes, and therefore for purposes of our warranty law, the adequacy of a warning is measured by the warning that would be given at the time of sale by an ordinarily prudent vendor who, at that time, is fully aware of the risks presented by the product. A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had **[\*718]** when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant. Goods that, from the consumer's perspective, are unreasonably dangerous due to lack of adequate warning, are not fit for the ordinary purposes for which such goods are used regardless of the absence of fault on the vendor's part." Following the lead of two United States District Court judges, see In re Massachusetts Asbestos Cases, 639 F.Supp. 1 (D.Mass.1985); Collins v. Ex-Cell-O Corp., 629 F.Supp. 540, 542-543 (D.Mass.1986), aff'd without opinion, 815 F.2d 691 (1st Cir.1987), and of the United States Court of Appeals, see Anderson v. OwensIllinois, Inc., 799 F.2d 1 (1st Cir. 1986), Monarch argues that the quoted passage from Hayes is not an accurate statement of Massachusetts law. In order to dissipate any confusion on this matter, we take this occasion to emphasize that the quoted language does indeed state Massachusetts law accurately, and, we think, clearly. As we said in Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 355, 446 N.E.2d 1033 (1983), in connection with the application of strict liability principles to breach of warranty cases, "the liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller." We adhere to these views. [[1241]](#footnote-1242)1240

The Simmons court made it clear that it believed its statement in Hayes concerning the imputed-knowledge and the inapplicability of state-of-the-art in strict liability was both an accurate and clear statement of Massachusetts law. [[1242]](#footnote-1243)1241 Most importantly, Simmons involved a design defect not a warning issue. Thus, the court's sole reference concerning the imputedknowledge rule and the inapplicability of state-of-the-art was in reference to design defects. [[1243]](#footnote-1244)1242 **[\*719]**

In summary, the Back, Correia, and Hayes decisions indicate that negligence and strict liability are to be clearly separated and defined. Design defects in a negligence action require a risk-utility balancing approach which involves reasonable alternative designs. [[1244]](#footnote-1245)1243 Warranty strict liability may include a consumer expectation test for design defects; however, the distinguishing factor of strict liability for consideration of risk-utility or danger-utility balancing factors is imputed knowledge of the danger. The focus of strict liability is on the product; whereas, the focus of negligence is on the defendant's conduct. State-ofthe-art evidence is allowed in negligence but is not a factor for consideration in strict liability. The imputed-knowledge rule applies to both design and warning defects in strict liability.

3. Pattern Jury Instructions

There are no Massachusetts pattern jury instructions applicable to design defects.

W. Michigan

1. Common Law

At a very early stage, Michigan began to develop strict liability for products. For a period of time, Michigan's version of strict liability under its interpretation of the UCC appeared to parallel the development of strict liability in Massachusetts. However, during the mid-1980s, the Supreme Court of Michigan made an abrupt change and eliminated strict liability for **[\*720]** design and warning cases. Michigan's elimination of strict liability was heavily influenced by key members of the ALI and by the present co-reporters for the Institute's revision of section 402A. [[1245]](#footnote-1246)1244

Beginning in 1958, the Supreme Court of Michigan was the forerunner in the elimination of privity and the allowance of warranty liability without requiring any proof of negligence. [[1246]](#footnote-1247)1245 In 1965, the Supreme Court of Michigan decided the cases of Piercefield v. Remington Arms Co. [[1247]](#footnote-1248)1246 and Browne v. Fenestra, Inc., [[1248]](#footnote-1249)1247 both of which continued the movement of implied warranties toward strict liability and **[\*721]** included recovery for non-purchasing bystanders.

In 1982, the Supreme Court of Michigan decided Owens v. Allis-Chalmers Corp. [[1249]](#footnote-1250)1248 The Owens decision involved the issue of a forklift's crashworthiness. The plaintiff alleged that although the forklift had roll-over protection, it should have included some type of restraint to prevent the forklift driver from being ejected. [[1250]](#footnote-1251)1249 The trial court granted a directed verdict against the plaintiff. [[1251]](#footnote-1252)1250 The appellate court affirmed the trial court's decision and relied, to a great extent, upon Professor James Henderson's view that courts are not competent to review manufacturer's design decisions because of their polycentric nature of such decisions. [[1252]](#footnote-1253)1251 The result of following Professor Henderson's suggestion effected a limitation for design defects which placed greater restrictions than required under general negligence principles. According to the Supreme Court of Michigan, the court of appeals' decision limited liability to the following: "In order to provide the necessary focus in design defect cases, the Court of Appeals limited liability to instances in which the manufacturer had not complied with governmental or industrial standards or had failed to warn of a latent defect." [[1253]](#footnote-1254)1252

The Supreme Court of Michigan affirmed the trial court's directed verdict against the plaintiff, but based its decision upon grounds different from those applied by the Michigan Court of Appeals. According to the Owens court, the plaintiff failed to present sufficient evidence concerning the unreasonably dangerous element. [[1254]](#footnote-1255)1253 The applicability of crashworthiness was not the issue. [[1255]](#footnote-1256)1254 The true issue was the plaintiff's failure to present sufficient evidence for a prima facia case. The plaintiff must present evidence concerning both the magnitude of the risk involved and the reasonableness of **[\*722]** the proposed alternative design. [[1256]](#footnote-1257)1255 The Owens court placed a heavy evidentiary burden on plaintiffs in design defect cases:

Although from the testimony of plaintiff's expert one might infer that a forklift rollover and the injuries resulting from being pinned under the overhead protective guard were foreseeable, neither his testimony nor any other evidence on the record gave any indication how likely such an event might be. In conjunction with this uncertainty, the record also produces no indication how the use of any of the driver restraints would affect a forklift operator's ability to do his or her job or the operator's safety in other circumstances.

. . . Especially in a case such as this, where the magnitude of the risks is quite uncertain because it is dependent upon the unknown incidence of forklift rollovers, an examination of the effects of any proposed alternative design must bear a heavy burden in determining whether the chosen design was unreasonably dangerous.

. . . No evidence was provided concerning the effects of the use of the other restraints, and no cost estimates were provided for any of the restraints.

. . . Even if this Court could take judicial notice that the costs involved in attaching a seat belt or other designated restraint to a forklift would not be great, we cannot take judicial notice that their use by forklift drivers would be likely, practical, or more safe. Neither the costs nor the effects of the other restraints were established. [[1257]](#footnote-1258)1256

Although the Owens court provided a comprehensive list of evidentiary requirements necessary for fulfilling the unreasonably dangerous element of design defects, the court did not provide a single citation to any authority in support of the requirements nor did it cite any authority as guidance as to whether there should be any differences in proof between negligence and strict liability. [[1258]](#footnote-1259)1257

The Supreme Court of Michigan eliminated strict liability **[\*723]** for design defects in Prentis v. Yale Manufacturing Co. [[1259]](#footnote-1260)1258 The Prentis case involved the design of a hand operated forklift. [[1260]](#footnote-1261)1259 The plaintiff brought the action alleging both negligence and breach of warranty. [[1261]](#footnote-1262)1260 However, the trial court refused to give the jury instructions on the implied warranty theory. [[1262]](#footnote-1263)1261 The jury returned a verdict in favor of the defendant. [[1263]](#footnote-1264)1262 The Prentis court upheld the trial court's decision based upon a finding that there is no difference between the standards for negligence and strict liability in a design defect case. [[1264]](#footnote-1265)1263 The Prentis majority found that both the negligence and defect requirements in design cases based upon strict liability require a risk-utility analysis. [[1265]](#footnote-1266)1264 According to the Prentis court, the distinction between the risk-utility analysis under the two theories "appears to be nothing more than semantic." [[1266]](#footnote-1267)1265 The Prentis court, relying upon the model Uniform Product Liability Act (UPLA), found support for its adoption of negligence as a standard for design defects. [[1267]](#footnote-1268)1266

However, a very strong dissenting opinion, written by Justice Levin, pointed out the differences between negligence and strict liability in design cases. [[1268]](#footnote-1269)1267 Justice Levin noted that in strict liability the "focus" is on the condition of the product, not on the defendant's negligent conduct. [[1269]](#footnote-1270)1268 The consumer expectation test, rejected by the majority, allowed strict liability by focusing on the condition of the product. [[1270]](#footnote-1271)1269 Even the risk-utility analysis used by some jurisdictions in design defect cases would focus on the product rather than on defendant's conduct. For example, strict liability could be achieved under a **[\*724]** risk-utility analysis by weighing the risks and utility as they exist at the time of trial. [[1271]](#footnote-1272)1270 Another method would be to impute the knowledge of the risk to the manufacturer, then assess the risks and utility of the product. [[1272]](#footnote-1273)1271 In both strict liability applications, knowledge is not at issue; whereas, in negligence the knowledge of the defendant may be the sole issue in determining liability.

The Prentis majority found support for its decision to return to negligence by noting that modern discovery rules could give plaintiffs access to evidence of defendants' wrongdoing:

Unlike manufacturing defects, design defects result from deliberate and documentable decisions on the part of the manufacturers, and plaintiffs should be able to learn the facts surrounding these decisions through liberalized modern discovery rules. Access to expert witnesses and technical data are available to aid plaintiffs in proving the manufacturer's design decision was ill considered. [[1273]](#footnote-1274)1272

The dissent pointed out the difficulties involved in such a view:

Nor is it true that there is a basis for distinguishing between design defect and other products liability cases. Evidence of negligence is not more readily uncovered in design defect cases than in manufacturing defect cases. Professors Twerski and Weinstein observed that "there is perhaps no issue more difficult for a plaintiff to litigate than what the state of knowledge should have been for a manufacturer with expertise in his field."

In a manufacturing defect case, there may be documents, technical data, and expert witness testimony demonstrating that the manufacturer took all reasonable and, indeed, extraordinary precautions to avoid manufacturing defects. Such a manufacturer deserves no less protection than a manufacturer who used reasonable care in designing a product which nevertheless was not reasonably fit. If we are to return to an incentive-deterrence model, there is **[\*725]** arguably as much to be gained, from a societal point of view, in extending that concept to manufacturing defects. [[1274]](#footnote-1275)1273

The Prentis opinion and its decision to return to negligence in design cases presently remains the law in Michigan. [[1275]](#footnote-1276)1274

2. Statutes

In 1978, the Michigan legislature passed statutes which allow evidence that a manufacturer's design complied with nongovernmental [[1276]](#footnote-1277)1275 and governmental standards. [[1277]](#footnote-1278)1276 In addition, any evidence of a change in philosophy, theory, knowledge, technique, or procedures in regard to the manufacturing, construction, design, formula, standards, preparation, processing, assembly, inspection, testing, warning, instruction and other actions after the accident and injury to the consumer is not admissible to prove liability. [[1278]](#footnote-1279)1277 Statutes also provide that evidence of any alteration or modification of the product may be admitted into evidence, [[1279]](#footnote-1280)1278 as well as any warnings concerning the product's risks. [[1280]](#footnote-1281)1279 Furthermore, consumer limitations have been made for blood products [[1281]](#footnote-1282)1280 and statutes of repose. [[1282]](#footnote-1283)1281

3. Pattern Jury Instructions

Michigan Standard Jury Instructions for civil cases reflect the negligence standard for design defects as defined in the Prentis case. [[1283]](#footnote-1284)1282 **[\*726]**

X. Minnesota

1. Common Law

In 1967, the Supreme Court of Minnesota adopted strict liability in McCormack v. Hankscraft Co. [[1284]](#footnote-1285)1283 The plaintiff in McCormack sought recovery for a defective design of an electric steam vaporizer. [[1285]](#footnote-1286)1284 The plaintiff based her action on negligence and breach of implied and express warranties; however, the trial court refused to submit the implied warranties to the jury. [[1286]](#footnote-1287)1285 The jury returned a verdict in favor of the plaintiff based upon both negligence and breach of express warranties. [[1287]](#footnote-1288)1286 The Supreme Court of Minnesota upheld the jury verdict, finding sufficient evidence to support both negligence and breach of express warranty. [[1288]](#footnote-1289)1287 The defendants argued that the plaintiff's failure to give reasonable notice of the breach barred recovery and also suggested that a lack of privity of contract would also be a complete defense to the warranty claim. [[1289]](#footnote-1290)1288 The McCormack court rejected such defenses. [[1290]](#footnote-1291)1289 However, instead of expanding the sales law, the McCormack court adopted strict liability as a basis for eliminating the contractual bars to plaintiff's recovery. [[1291]](#footnote-1292)1290 The Supreme Court of Minnesota adopted strict liability in full recognition that the plaintiff had not directly plead strict liability. [[1292]](#footnote-1293)1291 The McCormack court said its adoption of strict liability created no prejudice to the defendant because liability was established on the negligence theory. [[1293]](#footnote-1294)1292

The minor plaintiff in McCormack presented detailed evi- **[\*727]** dence in support of the negligence claim, including two expert witnesses who testified that several alternative designs could eliminate the defect in the vaporizer. [[1294]](#footnote-1295)1293 Thus, the plaintiff was able to meet the burden of proving negligence by investing considerable time, expense, and investigation into the defendant's specific conduct.

The McCormack court was mindful of the burden of proof problems associated with a negligence action and noted that strict liability could help alleviate these burdens.

If traditional commercial contractual limitations, such as the requirement of notice or the doctrine of privity, were applied to this case, defendant's liability upon the ground of breach of an express warranty could not be upheld. Plaintiff would be denied recovery despite adequate proof that the vaporizer was "in a defective condition unreasonably dangerous to the user"; that plaintiff was injured thereby; and that defendant represented the vaporizer as "safe" and did everything by advertising and otherwise to induce that belief while creating the risk and reaping the profit from its sales. Recovery would be denied unless, as here, the injured plaintiff is able to investigate fully, hire experts, and marshal evidence sufficiently persuasive to convince a jury that evidence of elaborate precautions employed by the manufacturer to make its product safe did not measure up to the standard of reasonable care. [[1295]](#footnote-1296)1294

Despite its observation in McCormack that negligence creates an extremely heavy burden of proof for the consumer, the Supreme Court of Minnesota continued to closely associate its version of strict liability with the risk-utility requirements of negligence law. For example, in Halvorson v. American Hoist & Derrick Co., [[1296]](#footnote-1297)1295 the court stated the following:

"It has been argued that a rule of 'strict liability' which permits recovery for injuries arising out of de- **[\*728]** fects in products only when those defects give rise to unreasonable dangers is borrowed from negligence theory. That is an apt observation, since both traditional negligence analysis and the 'unreasonable danger' analysis make liability depend upon whether the utility of the product or conduct in question outweighs, in light of all of the circumstances, the risk of injury and the burden of taking precautions to prevent it." [[1297]](#footnote-1298)1296

The Halvorson court also came very close to adopting an open and obvious danger rule that would bar liability in design cases as a matter of law when the danger is obvious to the consumer:

We hold that American Hoist did not owe this injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against in American Hoist's operations manual. While no Minnesota case has expressly faced this issue in a negligence context, one of our cases did deny strict liability when plaintiff was aware of the defect. The general rule in other jurisdictions is that there is no recovery for negligent design where the danger is obvious. [[1298]](#footnote-1299)1297

The Supreme Court of Minnesota defined its position on the standard for design defects in Holm v. Sponco Manufacturing. [[1299]](#footnote-1300)1298 In Holm, the consumer sustained severe injuries from electrocution when he came into contact with a high voltage line while operating an aerial ladder manufactured by the defendant. [[1300]](#footnote-1301)1299 The plaintiff presented an expert witness who stated the aerial ladder was defective because it lacked several safety devices, such as insulation, sensors, and proximity warning devices that would have "warned [the plaintiff] of the proximity of the electrical wires or would have prevented elec- **[\*729]** trical current from passing through [the plaintiff] to the ground." [[1301]](#footnote-1302)1300 In addition, defendant's expert said that the failure to include such safety devices was not a good "engineering practice." [[1302]](#footnote-1303)1301 However, the plaintiff testified that he was fully aware of the danger and realized the aerial ladder did not contain any safety devices to prevent electrocution. [[1303]](#footnote-1304)1302 Based upon the plaintiff's knowledge of the danger, the defendant moved for summary judgment. [[1304]](#footnote-1305)1303 The trial court granted summary judgment in the defendant's favor based upon the open and obvious danger rule expressed in Halvorson. [[1305]](#footnote-1306)1304

The Holm majority rejected the open and obvious danger rule as expressed in Halvorson and reversed the trial court. [[1306]](#footnote-1307)1305 In its decision, the Holm court focused on the prior Minnesota decisions interpreting Halvorson and the action by the New York Court of Appeals in overruling its open and obvious danger rule [[1307]](#footnote-1308)1306 as expressed in Campo v. Scofield. [[1308]](#footnote-1309)1307 The Holm court observed that its decision in Halvorson was based primarily on the Campo decision. [[1309]](#footnote-1310)1308 The Campo open and obvious danger rule was highly criticized as an illogical and overly harsh rule:

The latent-patent rule of Halvorson protects manufacturers who sell products with dangerous, but obvious, design defects. It "encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious." Auburn Machine Works Co. v. Jones, 366 So.2d 1167, 1170 (Fla. 1979). Moreover, the rule shifts the entire economic loss to the injured party, notwithstanding the fact that the manufacturer was, to some degree, at fault.

This result is inconsistent with the underlying policy **[\*730]** rationale supporting the strict products liability doctrine espoused in McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967), and in Lee v. Crookston CocaCola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971). As the Washington Supreme Court correctly noted: "The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form." Palmer v. Massey-Ferguson, Inc., 3 Wash.App. 508, 519, 476 P.2d 713, 719 (1970). There is little evidence to support respondent's contention that the competition of the marketplace will motivate manufacturers to make their products better and safer. [[1310]](#footnote-1311)1309

After rejecting the open and obvious danger rule, the Holm court set forth its standard for design defects: "Therefore, the latent-patent danger rule, as set out in Halvorson, is rejected and a 'reasonable care' balancing test substituted therefore in the same manner that the courts of New York and Florida have done. Accordingly, this case is reversed and remanded for a trial consistent with this opinion." [[1311]](#footnote-1312)1310

In a concurring and dissenting opinion, Justice Simonett made it quite clear that, in his opinion, strict liability was a carbon copy of negligence when an unsafe design or warning defect is asserted. [[1312]](#footnote-1313)1311 According to Justice Simonett, the difference, if any, between strict liability and negligence involved the burden of proof issue. [[1313]](#footnote-1314)1312 In strict liability, the plaintiff need not prove the defendant's negligence. [[1314]](#footnote-1315)1313 Justice Simonett stated:

It is said the distinctive feature of strict liability is that plaintiff does not have to establish negligence and that the focus is on the condition of the product, not the conduct of the manufacturer. This is not, however, quite true. **[\*731]** To say the plaintiff does not have to prove negligence does not mean the manufacturer is not in some sense at fault, only that the plaintiff does not have to prove it. And it is not the product that is sued, but the person who makes or markets it. At the bottom of a strict liability theory is still the notion (certainly shared by jurors) that the manufacturer did something wrong and, therefore, should pay. [[1315]](#footnote-1316)1314

Justice Simonett also recognized the problem with the consumer expectation test when a consumer is confronted with patent dangers:

This notion of "wrongness" surfaces when the law attempts to define what it means by a defect. A defect is something which makes the product "unreasonably dangerous." And something is unreasonably dangerous "if the product is dangerous when used by an ordinary user who uses it with knowledge common to the community as to the product's characteristics and common usage." So we come full circle back to something with negligence overtones, and even more ironically, by adapting the consumer expectation test of what is "unreasonably dangerous" we have reincorporated the old tort rule of patent danger. The above-quoted definition of "unreasonably dangerous" is taken from Halvorson, which perhaps explains why that jury found no strict liability for an uninsulated crane without sensors being operated by an experienced operator in a situation of obvious danger. [[1316]](#footnote-1317)1315

It is quite clear that consumers, in a struggle to escape the proof burdens of negligence, would urge adoption of a consumer expectation test. The consumer expectation test can assess liability completely independent of any question of the defendant's conduct. But, under this test many courts will have a strong inclination to deny liability when the consumer has no expectation or when the expectation is one of danger. Thus, the consumer expectation test can lead courts to apply a burden **[\*732]** greater than is required under simple negligence when the facts reveal an open and obvious danger. In these situations, it is the consumer who urges the courts to adopt a negligence risk-utility test rather than a strict liability test. This is what occurred when the Halvorson case was rejected in Holm.

Justice Simonett also recognized Dean Wade's seven-factor balancing test as a policy guide for courts rather than a definition of strict liability:

Strict liability performs a great service in emphasizing the manufacturer's duty of care to put out a safe product. It continues to perform that service. Professor Wade's seven-point balancing test for a utility-risk standard (quoted in the court's opinion) is not, it seems to me, a definition of strict liability but only a guide to enable courts, as a matter of policy, to draw a line as to liability, whether that liability be characterized as negligence or strict liability or both. [[1317]](#footnote-1318)1316

As a policy guide, the seven factors should not be presented to the jury. [[1318]](#footnote-1319)1317 However, Justice Simonett's recommendations concerning jury instructions may also lead to a burden of proof which is inappropriate under strict liability or, possibly, even negligence. [[1319]](#footnote-1320)1318 **[\*733]**

The Holm standard for design defects was given additional explanation in Bilotta v. Kelley Co. [[1320]](#footnote-1321)1319 In Kelley, the trial court instructed the jury on design defects by submitting a pattern jury instruction which set forth the consumer expectation test. [[1321]](#footnote-1322)1320 The defendant alleged the instruction was in error in light of the Holm decision. [[1322]](#footnote-1323)1321 The Bilotta court agreed with the defendant. [[1323]](#footnote-1324)1322 The Bilotta court confined the consumer expectation test to manufacturing defect situations and substantiated the risk-utility test for design cases. [[1324]](#footnote-1325)1323 The court stated:

In overruling Halvorson, we adopted in its place a reasonable-care balancing test and quoted with approval the definition of that test set out by the Court of Appeals in New York:

A manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.

What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve "a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." [[1325]](#footnote-1326)1324 **[\*734]**

The Micallef case in New York was based solely on negligence issues. [[1326]](#footnote-1327)1325 Thus, in Bilotta, the Supreme Court of Minnesota seemed to have moved to a purely negligence standard for jury instructions. [[1327]](#footnote-1328)1326 However, the Bilotta court recognized that there is a difference between the theories of negligence and strict liability on one important issue--the plaintiff's burden of proving defendant's knowledge of the risks in the product. [[1328]](#footnote-1329)1327

The distinction between strict liability and negligence in design-defect and failure-to-warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.

Whether strict liability or negligence affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and on the jury instructions given under each theory. [[1329]](#footnote-1330)1328

The Bilotta decision moved in the direction of a unified theory for design and warning defect cases.

Thus, we note that, assuming proper instruction to ensure the broadest theory of recovery, a trial court could properly submit a design-defect or failure-to-warn case to a jury on a single theory of products liability. Submission of a single theory of recovery may avoid the confusion and inconsistent verdicts spawned by submission of multiple overlapping theories without restricting a plaintiff's ability to benefit from the elements of proof which make strict liability a broader theory of recovery than traditional negligence. [[1330]](#footnote-1331)1329 **[\*735]**

However, in Bilotta, neither the majority opinion nor the concurring opinion of Justice Simonett clarified the effect of the imputed-knowledge rule. It was unclear whether the plaintiff had the burden of proving the defendant's knowledge of the product's condition and risks and whether a jury should be instructed that such knowledge was imputed to the defendant. [[1331]](#footnote-1332)1330 If the imputed-knowledge language of the Bilotta majority is taken seriously, then the plaintiff would be relieved from proving the defendant's knowledge of such risks even when such risks are unknowable. This position would be both logical and fair to both the manufacturer and the consumer. In the unknowable danger or risk situations, defendant manufacturers argue that it would be unfair and illogical to hold them liable for an undiscoverable risk. [[1332]](#footnote-1333)1331 This position is based upon the fact that the defendant manufacturer cannot remedy the danger because the risk was unknowable. [[1333]](#footnote-1334)1332 This is absolutely true. However, it is equally true that the consumer is in an identical situation--the consumer cannot discover the risk or danger in the product either. [[1334]](#footnote-1335)1333 In situations where both the consumer and the manufacturer are "innocent" of knowledge of the product's risk, fairness and logic do not always dictate that the consumer should bear the risk. [[1335]](#footnote-1336)1334 As between such "innocent" parties, strict liability would protect the consumer; whereas, negligence would always protect the manu- **[\*736]** facturer. [[1336]](#footnote-1337)1335 The Supreme Court of Minnesota did not resolve this issue in the Bilotta decision.

The Bilotta decision resolved one issue that has a profound affect on design cases. The defendant had offered, as an option, safety devices which could have prevented plaintiff's injury. [[1337]](#footnote-1338)1336 The defendants offering safety as an option had been accepted in a New York decision where a multi-use product was at issue. [[1338]](#footnote-1339)1337 Since Minnesota used both New York and Florida law as a source for its risk-utility standard, the defendant argued that the New York decision should be applicable precedent. [[1339]](#footnote-1340)1338 In essence, the defendant argued the following as an absolute defense in design cases: "(1) the purchaser is aware of both the hazard and the available option, (2) the operator could have avoided the accident through use of the due care, (3) the possibility of the accident is statistically minimal, and (4) the option was a feature beyond that normally provided by the industry." [[1340]](#footnote-1341)1339

The Bilotta court rejected such defense in design cases and found that a non-delegable duty on the part of manufacturer to design a reasonably safe product:

The fact that installation or standardization of a safety device will cost more money and take more time, thus decreasing sales, should be a factor considered within the balancing approach given to the jury but should not provide an absolute defense for the manufacturer. As respondent notes, such a defense would permit an entire industry to market unreasonably dangerous "stripped down" devices and offer as optional all safety devices. Liability for improper choice of a safety device or failure to purchase a particular safety device would then fall on the purchaser. This result would circumvent the general duty of the manufacturer to provide a reasonably safe design for its **[\*737]** products. [[1341]](#footnote-1342)1340

Although the Supreme Court of Minnesota appears to have accepted a design standard which seems close to that of negligence, it has specifically rejected the ALI's suggestion that design defects be measured by requiring the consumer to prove a reasonable alternative design. [[1342]](#footnote-1343)1341 In Kallio v. Ford Motor Co., [[1343]](#footnote-1344)1342 the defendant [[1344]](#footnote-1345)1343 alleged the trial court erred by failing to require the consumer to prove a feasible, practicable, and safer alternative design and failing to give a jury instruction setting forth such requirements. [[1345]](#footnote-1346)1344 The defendant relied on precedents from New York, Oregon, and Nebraska. [[1346]](#footnote-1347)1345

The Kallio court agreed with the defendant that all three jurisdictions required application of a risk-utility test similar to Minnesota's application. [[1347]](#footnote-1348)1346 However, the Kallio court rejected defendant's contention that the consumer must prove a feasible and practicable alternative design. [[1348]](#footnote-1349)1347 The Supreme Court of Minnesota stated that although such proof may be presented by the consumer, the proof is not required in all cases and is not an element of plaintiff's prima facia design defect case. [[1349]](#footnote-1350)1348

Although normally evidence of a safer alternative design will be presented initially by the plaintiff, it is not necessarily required in all cases. Such evidence is relevant to, and certainly may be an important factor in, the determination of whether the product was unreasonably defective. **[\*738]** However, existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case.

Defendant's requested Instruction No. 11 is overly broad, not only because, in essence, it tends to elevate proof of the existence of a feasible alternative safer design from a factor properly for jury consideration to an element of the plaintiff's claim, but also because it tended to overemphasize that factor. [[1350]](#footnote-1351)1349

In a footnote, the Kallio court also recognized that some situations may exist where a product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned. [[1351]](#footnote-1352)1350 The Kallio court cited the Oregon case of Wilson v. Piper Aircraft Corp. [[1352]](#footnote-1353)1351 as authority for this proposition. [[1353]](#footnote-1354)1352 Minnesota cases decided after Holm, Bilotta, and Kallio have presented a mixed bag of standards employed in design cases. For example, some courts have applied a simple negligence test [[1354]](#footnote-1355)1353 while others have used Dean Wade's seven-factor balancing test [[1355]](#footnote-1356)1354 and one court has applied the imputed-knowledge rule to warning defects. [[1356]](#footnote-1357)1355

2. Statutes

Minnesota has not enacted statutes which have changed the common law interpretation of design defects. However, the legislature has passed statutes providing defenses concerning the useful life [[1357]](#footnote-1358)1356 of a product and requiring the notice of **[\*739]** claim by the consumer. [[1358]](#footnote-1359)1357 In addition, limitations have been placed on actions against nonmanufacturers [[1359]](#footnote-1360)1358 and punitive damages. [[1360]](#footnote-1361)1359

3. Pattern Jury Instructions

The Minnesota Jury Instruction Guides provide for a riskutility instruction as set forth in Holm, Bilotta, and Kallio. [[1361]](#footnote-1362)1360 The instruction does not provide any information on the imputed-knowledge rule, and the comments to the pattern instructions suggest that the imputed-knowledge rule should not be applied when the risk is undiscoverable. [[1362]](#footnote-1363)1361 The comments also take the position that implied warranty should not be a theory separate from the apparently unified theories of negligence and strict liability. [[1363]](#footnote-1364)1362

Y. Mississippi

1. Common Law

Mississippi adopted strict liability in the 1966 case of State Stove Manufacturing Co. v. Hodges. [[1364]](#footnote-1365)1363 In Hodges, the Supreme Court of Mississippi emphasized that strict liability was a theory separate and apart from negligence. The primary factor which separated strict liability from negligence was the burden of proof placed upon the consumer.

The manufacturer is liable strictly in tort only if (a) he puts on the market a product which is not reasonably safe, and (b) the plaintiff is injured as a result of a contemplated use of it. The action is different from negligence mainly in the element of scienter; Plaintiff will not need to **[\*740]** prove either that defendant negligently created the unsafe condition of the product or that he was aware of it. [[1365]](#footnote-1366)1364

The Hodges court seemed to take the position that scienter or knowledge would be imputed or supplied to the defendant in strict liability. In addition to the scienter language, the Hodges court made reference to the consumer expectation test as set forth in comment g of section 402A. [[1366]](#footnote-1367)1365 However, the Supreme Court of Mississippi stated that its standard would be based upon considerable flexibility which could respond to the particular facts of any case. [[1367]](#footnote-1368)1366

Twenty years after the Hodges' decision, the Supreme Court of Mississippi expressed in some detail of its standard for design defects in Toliver v. General Motors Corp. [[1368]](#footnote-1369)1367 The consumer in Toliver alleged that he received enhanced injuries from the defective design of the gas tank in his vehicle. [[1369]](#footnote-1370)1368 Based upon prior decisions of the Supreme Court of Mississippi, the trial court dismissed the plaintiff's action. [[1370]](#footnote-1371)1369 The Toliver court overruled its prior decisions which denied recovery in "second impact" cases and reversed the trial court's dismissal of the plaintiff's claim. [[1371]](#footnote-1372)1370

In its description of section 402A, the Toliver court stated:

This Section imposes liability, but not exclusive, on manufacturers who sell products to consumers, if the products are: (1) defective; and (2) unreasonably dangerous. The plaintiff need not prove negligence; in fact, (2)(a) imposes liability although the seller "has exercised all possible care . . . ." Negligence is supplied as a matter of law if the defendant markets a defective and unreasonably dangerous product which injures a consumer.

The rationale for the imposition of this absolute liability is two-fold: to shift the cost of injuries from the public **[\*741]** to the manufacturer, and to assist the plaintiff in establishing what would otherwise be a near-impossible burden of proof. [[1372]](#footnote-1373)1371

The Toliver court found it simple to apply strict liability in manufacturing defect situations where the product does not function as intended. [[1373]](#footnote-1374)1372 In such cases, the consumer is relieved from the almost impossible burden of proving negligence. [[1374]](#footnote-1375)1373 However, design cases are more difficult to resolve because the product functions as intended. In a design case, the proof issues can create a rather bizarre situation for the consumer. [[1375]](#footnote-1376)1374 The doctrine of strict liability differs from negligence because the focus is on the condition of the product rather than the conduct of the defendant. Thus, the consumer may be precluded from introducing evidence as to how and why the defendant designed the product as it did. Such preclusion of evidence can thwart the very essence of the consumer's claim that the product was unreasonably dangerous. The Toliver court stated:

The problem that we encounter with this application of the doctrine of strict liability to cases involving design is that it precludes the consideration of evidence from the manufacturer as to the rationale for designing the product the way it was designed. As stated in Hamilton, the defendants were liable because the humidifier did not function properly, and injured the plaintiffs. The care which the manufacturer took to design the product was irrelevant to the issue of liability. The Alabama Supreme Court recognized this distinction in Atkins v. American Motors Corp., 335 So.2d 134 (Ala.1976), when it noted that strict liability "looks to the dangerous characteristics of the end product, rather than the methods or processes by which it was produced. This represents a shift in emphasis from the manufacturer's or retailer's conduct to the performance of his product. Id. at 140. **[\*742]**

Some might argue that the submission of the issue of whether the product is unreasonably dangerous to the jury allows some consideration of the manufacturer's conduct--or alternatives--in designing the product. However, we view with concern Section 402A(2)(a), which imposes liability although "the seller has exercised all possible care in the preparation and sale of his product . . . ." This subsection creates liability for a product solely due to its performance, without regard to the care taken in its design. [[1376]](#footnote-1377)1375

The Toliver court resolved the proof dilemma by allowing the consumer to present evidence on industry standards and feasibility of alternative designs. [[1377]](#footnote-1378)1376 However, the Supreme Court of Mississippi was very careful to indicate that it was not limiting strict liability to manufacturing defects and using negligence in design cases:

Dean Wade advocated the desirability of limiting the strict liability doctrine when he stated that the doctrine should be "confined to the product which has its 'defect' developed unintentionally in the manufacturing process, thus leaving the design and warning cases to be handled under the negligence technique." . . .

We do not adopt this view, and we believe that such distinctions muddy the waters. Strict liability is a viable, desirable doctrine, and it has been adopted by this Court. The problem with its application in this case goes back to our interpretation of Section 402A in State Stove: that the terms "defective condition" and "unreasonably dangerous" can somehow be separated from each other. They cannot. [[1378]](#footnote-1379)1377

The Supreme Court of Mississippi further refined its interpretation of strict liability for design defects in its 1993 decision of Sperry-New Holland v. Prestage. [[1379]](#footnote-1380)1378 In Prestage, the consumer received a jury verdict based upon design defects in **[\*743]** a combine manufactured by the defendant. [[1380]](#footnote-1381)1379 On appeal, the defendant alleged that the trial court committed reversible error for applying a risk-utility, rather than a consumer expectation, analysis for evaluating liability for the design defect. [[1381]](#footnote-1382)1380 The defendant cited a series of Fifth Circuit decisions as controlling authority for application of the consumer expectation test. [[1382]](#footnote-1383)1381 These Fifth Circuit opinions continuously denied recovery to consumers in design defect cases when the danger was open and obvious. [[1383]](#footnote-1384)1382 The sole basis of the Fifth Circuit opinions was the circuit's interpretation of prior Supreme Court of Mississippi decisions. [[1384]](#footnote-1385)1383 The Prestage court rejected the defendant's arguments and refused to recognize the Fifth Circuit's interpretation of Mississippi law. [[1385]](#footnote-1386)1384 In holding a risk-utility standard as the basis for liability in strict liability, the Prestage court held that a defendant is under a "duty to make its product reasonably safe regardless of whether the plaintiff is aware of the product's dangerousness." [[1386]](#footnote-1387)1385 In footnote form, the Prestage court held that in balancing a product's utility against the risk of injury it creates, a trial court may find it helpful to refer to the Wade seven-factor test. [[1387]](#footnote-1388)1386

Although the Prestage court accepted a risk-utility analysis as a basis for strict liability, it clearly stated that such standard was not one of negligence:

In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product cre- **[\*744]** ates. Under the "risk-utility" test, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product. [[1388]](#footnote-1389)1387

It seems apparent from the language in Prestage that negligence foreseeability is rejected. In addition, the danger-in-fact language is a reflection of the Mississippi Supreme Court's prior language in Hodges that scienter is not an issue. Thus, the measure of liability would view the danger as it actually exists in a product, not whether the defendant knew or should have known of its existence. Under this interpretation, riskutility would have a different meaning in strict liability from the risk-utility standard in negligence. In addition, such interpretation would comply with the Mississippi Supreme Court's clear desire to keep the two theories distinct from one another and to allow both to be plead in the same action. [[1389]](#footnote-1390)1388

2. Statutes

In 1993, the same year that Prestage was decided, the Mississippi legislature passed a products liability act. [[1390]](#footnote-1391)1389 Under section 11-1-63 of the 1993 Products Liability Act, the Act incorporates the open and obvious danger rule under the consumer expectation test and eliminates the imputed-knowledge test, a scienter rule. [[1391]](#footnote-1392)1390 In addition, the consumer is required to prove the existence of a feasible alternative design. [[1392]](#footnote-1393)1391 Thus, the statute seems to have converted Mississippi strict liability into a negligence standard with very onerous burdens of proof on the consumer. Finally, section 11-1-65 of the 1993 Products Liability Act has placed severe restrictions on punitive damages. [[1393]](#footnote-1394)1392 Prior legislation limited consumer actions in **[\*745]** blood products. [[1394]](#footnote-1395)1393

3. Pattern Jury Instructions

Mississippi's pattern jury instructions give a generalized instruction based upon section 402A language. [[1395]](#footnote-1396)1394 The instruction uses foreseeability language and does not reflect either Prestage or the 1993 Products Liability Act.

Z. Missouri

1. Common Law

Although the Supreme Court of Missouri has adopted strict liability for products, it has consistently refused to adopt any particular standard for the term "defective condition unreasonably dangerous." In Keener v. Dayton Electric Manufacturing Co., [[1396]](#footnote-1397)1395 the Supreme Court of Missouri adopted the Restatement version of strict liability as set forth in section 402A. [[1397]](#footnote-1398)1396 The plaintiff in Keener alleged liability based upon the failure of the defendant to include safety devices with the product. [[1398]](#footnote-1399)1397 The Keener court did not define what failure would equate, in terms of types of defect; however, one could infer that a lack of safety devices would be considered a design defect. The Keener decision did not establish any particular standard for defects but did find it essential that there be a finding that the product be defective "when put to a use reasonably anticipated." [[1399]](#footnote-1400)1398

In Blevins v. Cushman Motors, [[1400]](#footnote-1401)1399 the defendant asserted that strict liability did not apply in design defect cases. The Blevins court specifically held that strict liability was applicable to design cases because "there is no rational distinction be- **[\*746]** tween design and manufacture in this context, since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risks as if its manufacture does so." [[1401]](#footnote-1402)1400

Undoubtedly, the Blevins court based its decision on the desire to keep strict liability separate from negligence and to eliminate the heavy burden of proof required in negligent design cases.

Our acceptance of strict liability in tort in defective design cases "eliminates proof as to violation of the standard of reasonable care" with respect to the adoption by a manufacturer of a particular product design. . . .

Second, with reference to the application of strict liability in tort to defective design cases, Cushman maintains that in such cases strict liability and negligence are essentially the same; thus, that Cushman's conduct should be examined in the light of traditional negligence. Admittedly, in one jurisdiction which has adopted strict liability in tort in defective design cases, it has been conceded that the application of strict liability or of negligence will usually produce the same result.

Nonetheless, there exists an important distinction between the two concepts. In negligence cases the duty owed is based on the foreseeable "or reasonable anticipation that harm or injury is a likely result of acts or omissions." On the other hand, strict liability in tort is based in part on the foreseeable or "reasonably anticipated" use of the product, rather than on the reasonably anticipated harm the product may cause.

Stated another way, the difference between negligence and strict liability in tort in defective design cases,

" . . . is in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. The article can have a degree of **[\*747]** dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article." [[1402]](#footnote-1403)1401

In Elmore v. Owens-Illinois, Inc., [[1403]](#footnote-1404)1402 the Supreme Court of Missouri reaffirmed its position that proof of negligence is not required in strict liability design defect cases. The defendant in Elmore alleged that it had no knowledge nor did it have any way of knowing that Kaylo, its asbestos product, contained any dangers to the public. [[1404]](#footnote-1405)1403 Thus, if the plaintiff's design defect claim would be considered a warning defect claim, the defendant could assert state-of-the-art as a defense. Under state-of-the-art, there could be no liability for unknowable dangers. [[1405]](#footnote-1406)1404 The Elmore court rejected state-ofthe-art as a defense in strict liability because

the law in Missouri holds that state of the art evidence has no bearing on the outcome of a strict liability claim; the sole subject of inquiry is the defective condition of the product and not the manufacturer's knowledge, negligence or fault. Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. App. 1978. The manufacturer's standard of care is irrelevant because it relates to the reasonableness of the manufacturer's design choice; fault is an irrelevant consideration on the issue of liability in the strict liability context. Thus, plaintiffs established that Kaylo was "defective" when they proved that it was unreasonably dangerous as designed; they were not required to show additionally that the manufacturer or designer was "at fault," as that concept is employed in the negligence context. [[1406]](#footnote-1407)1405

Clearly under Missouri law as expressed in both Blevins and Elmore, the consumer does not have to prove negligence, and the theories of strict liability and negligence are to be **[\*748]** treated as distinct theories. However, Missouri had not set any standard to measure a design defect. The Supreme Court of Missouri explained this lack of definite standards for design defects in Nesselrode v. Executive Beechcraft, Inc. [[1407]](#footnote-1408)1406 The Nesselrode court reviewed the history of Missouri strict liability law and concluded: "Though obviously abbreviated, the foregoing explanation describes the heart and soul of a strict tort liability design defect case--unreasonable danger and causation." [[1408]](#footnote-1409)1407

The Nesselrode court also reviewed the legal trend in applying the two competing tests or standards in design cases--consumer expectations and risk-utility multi-factored standard. [[1409]](#footnote-1410)1408 The Supreme Court of Missouri stated that although it had not adopted either of the two design defect standards, such rejection was a fully reasonable approach.

Under our model of strict tort liability the concept of unreasonable danger which is determinative of whether a product is defective in a design case, is presented to the jury as an ultimate issue without further definition. . . .

Notwithstanding the minority character of this approach, Professor Leon Green . . . explains why an approach that avoids the use of an external standard by which to determine unreasonable danger--i.e., defectiveness--is preferable to one which does not use an external standard. He points out first that juries do not have a "fictitious standard by which to determine assault, battery, false imprisonment, nuisance, entry upon land, or the taking of a chattel" and then he suggests that "nor do juries need an external standard by which to determine the danger of a product in an unreasonably dangerous defective condition. He concludes his discussion with the judgment that "the ritual indulged in by the giving of abstract, abstruse standards, impossible to comply with, only perpetuates the mystical trial by ordeal and may conceal a hook in a transcendental lure that will snag an appellate court. **[\*749]**

As we noted previously, at the trial of a design defect case, the concept of unreasonable danger is treated as an ultimate issue. The jury gives this concept content by applying their collective intelligence and experience to the broad evidentiary spectrum of facts and circumstances presented by the parties. [[1410]](#footnote-1411)1409

The Missouri Supreme Court's well-reasoned refusal in adopting external standards for design defects remains the law of Missouri. [[1411]](#footnote-1412)1410

2. Statutes

In 1987, the Missouri legislature passed a products liability act. The 1987 Act is somewhat of a "mixed bag" because it limits and expands consumer's rights. The statute limits recovery against "sellers" who are sued merely because they are in the stream of commerce, [[1412]](#footnote-1413)1411 allows state-of-the-art as a complete defense, [[1413]](#footnote-1414)1412 and limits punitive damages. [[1414]](#footnote-1415)1413 However, the 1987 Act also eliminates contributory negligence as a complete defense and substitutes comparative fault. [[1415]](#footnote-1416)1414 Furthermore, prior legislation limited actions based upon blood products. [[1416]](#footnote-1417)1415

3. Pattern Jury Instructions

Missouri Approved Jury Instructions [[1417]](#footnote-1418)1416 appears to follow **[\*750]** the common law as expressed in Nesselrode.

AA. Montana

1. Common Law

Montana first adopted strict liability in Brandenburger v. Toyota Motor Sales. [[1418]](#footnote-1419)1417 The Brandenburger case involved the defective design of a vehicle roof under a second collision or enhanced injury doctrine. [[1419]](#footnote-1420)1418 The Brandenburger court adopted section 402A and listed eight policy reasons, including the almost impossible burden of proving negligence, as a basis for the adoption of the Restatement version of strict liability. [[1420]](#footnote-1421)1419 The Brandenburger court was well aware that the burden of proof placed upon the consumer could negate the beneficial effect of strict liability. Thus, the Supreme Court of Montana approved the use of circumstantial evidence in a design case and cautioned against overburdensome proof requirements:

"There would be little gain to the consuming public if the courts would establish a form of recovery with one hand and take it away with the other by establishing impossible standards of proof. The proof required in a strict liability case must be realistically tailored to the circumstances which caused the form of action to be created." [[1421]](#footnote-1422)1420

In keeping with a desire to lessen the burden of proof on the consumer, the Brandenburger court allowed proof of a defect through circumstantial evidence.

The consumer's burden of proving a defect was raised in Brown v. North American Manufacturing Co. [[1422]](#footnote-1423)1421 In Brown, the consumer lost his leg in a grain auger manufactured by the **[\*751]** defendant. [[1423]](#footnote-1424)1422 A jury returned a verdict in the consumer's favor based upon design and warning defects. [[1424]](#footnote-1425)1423 On appeal, the defendant asserted that the evidence at trial failed to satisfy the basic elements of section 402A. According to the defendant, the danger in the auger was open and obvious to the plaintiff. The defendant maintained that such patent dangers were a complete defense because a product could not be "defective" or "unreasonably dangerous" when the danger was obvious to the plaintiff. [[1425]](#footnote-1426)1424

The Brown court prefaced its examination of the open and obvious danger rule with a reference to its decision in Brandenburger concerning the consumer's burden in proving a defect in the product:

"The essential rationale for imposing the doctrine of strict liability in tort is that such imposition affords the consuming public the maximum protection from dangerous defects in manufactured products by requiring the manufacturer to bear the burden of injuries and losses enhanced by such defects in its products. If this be so, it requires little imagination to see that if a strict rule of direct evidence was required, the supposed benefit of the theory of strict liability would be lost to the consuming public. " [[1426]](#footnote-1427)1425

With such proof issues in mind, the Brown court addressed the open and obvious danger rule. According to the Brown court, the open and obvious danger rule was based upon the New York decision of Campo v. Scofield; [[1427]](#footnote-1428)1426 however, such a rule could not be found in section 402A or its comments. [[1428]](#footnote-1429)1427 Noting the severe criticism of the Campo case in other jurisdictions [[1429]](#footnote-1430)1428 and the New York Court of Appeals' **[\*752]** recent rejection of Campo in Micallef v. Miehle Co., [[1430]](#footnote-1431)1429 the Brown court stated:

We reject any rule which would operate to encourage misdesign. The fact that a danger is patent does not prevent a finding the product is in a defective condition, unreasonably dangerous to the particular plaintiff. Rather, the obvious character of a defect or danger is but a factor to be considered in determining whether the plaintiff in fact assumed the risk. [[1431]](#footnote-1432)1430

The open and obvious danger rule as a complete defense was again raised by a defendant manufacturer in Stenberg v. Beatrice Foods Co. [[1432]](#footnote-1433)1431 As in Brown, the Stenberg case involved a grain auger which the plaintiff alleged was defectively designed. [[1433]](#footnote-1434)1432 Again, the Supreme Court of Montana refused to adopt the open and obvious danger rule as complete immunity for design defects:

We emphasize that this Court adopted the rule as set out in the Restatement, but we did not and do not intend the restraints in the comments to this rule to hamstring us in developing and defining the rule of strict liability. To the extent that the comments are helpful in our development of the law, we shall accept them; but we will reject them where we believe a more appropriate explanation of the rule of strict liability can be provided. [[1434]](#footnote-1435)1433

The problem with using the Restatement definition of "unreasonably dangerous" is well illustrated by what happened in this case. Defendant manufacturer consistently maintained it was not liable as a matter of law because the unshielded intake end of the grain auger could be seen by an ordinary consumer or user of the product, and therefore the danger could be contemplated. . . . At the close of all evidence defendant moved for a directed verdict precisely on those grounds. . . . **[\*753]**

Although the trial court denied this motion, defendant, later armed with an instruction which stated in effect that an open and obvious danger is not "unreasonably dangerous" if it can be contemplated by the user, was able to make a more convincing argument to the jury. Under this type of instruction it would be virtually impossible for an open and obvious condition to be unreasonably dangerous. [[1435]](#footnote-1436)1434

Thus, the Stenberg court expressed a flexible position for determining a design defect. In addition, the Supreme Court of Montana seems cautious against setting forth rigid standards for design cases. The best example of this cautious approach is found in Rix v. General Motors Corp. [[1436]](#footnote-1437)1435 In Rix, the plaintiff alleged that a General Motors truck contained a defectively designed brake system. As part of his proof of defect, the plaintiff presented evidence that there was a technologically feasible alternative design for the truck's braking system. [[1437]](#footnote-1438)1436 In its discussion of whether the brake system contained a design defect, the Rix court carefully restricted its decision to cases where the plaintiff presents alternative design evidence and refused to set forth any general rules on design defects where such evidence is not presented. [[1438]](#footnote-1439)1437 When the plaintiff does in fact present evidence concerning alternative design, the Rix court stated that a jury should then base its decision on a number of factors:

We concur with the Uniform Act that a balancing of various factors is required on the part of a jury. A jury should be instructed to weigh various factors according to the facts of each case and their own judgment. We conclude that the following elements should be considered for instructional purposes in an alternative design products liability case, recognizing that not all factors may be appropriate in every case, and also recognizing that additional factors should be considered where appropriate: **[\*754]**

(1) A manufacturer who sells a product in a defective condition unreasonably dangerous because of a design defect is subject to liability for harm thereby caused to the ultimate user.

(2) A product may be in a defective condition unreasonably dangerous if the manufacturer should have used an alternative design.

(3) In determining whether an alternative design should have been used, the jury should balance so many of the following factors as it finds to be pertinent at the time of manufacture:

(a) The reasonable probability that the product as originally designed would cause serious harm to the claimant.

(b) Consideration of the reasonable probability of harm from the use of the original product as compared to the reasonable probability of harm from the use of the product with the alternative design.

(c) The technological feasibility of an alternative design that would have prevented claimant's harm.

(d) The relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design.

(e) The time reasonably required to implement the alternative design. [[1439]](#footnote-1440)1438

Although the Rix court recommended the above factors when there is evidence of an alternative design, the court made it quite clear that a trial court had a great deal of flexibility in either limiting or expanding the factors that a jury should consider in a design case:

We emphasize that it would be appropriate for the District Court to supplement the foregoing factors based upon the proof submitted in the course of trial. We reemphasize that the foregoing factors should be applied where a manufac- **[\*755]** tured product is claimed to be unreasonably dangerous because a safer alternative design was available to the manufacturer. We do not rule upon other facets of this complex area of the law. [[1440]](#footnote-1441)1439

The Montana Supreme Court's desire that design defects be based upon a flexible standard was re-enforced in McJunkin v. Kaufman & Broad Home Systems. [[1441]](#footnote-1442)1440 The McJunkin court criticized the Restatement's apparent requirement that a product be both defective and unreasonably dangerous stating "we believe the central issue is whether the product is defective. We therefore chart a separate course." [[1442]](#footnote-1443)1441 The "separate course" for strict liability defects in Montana was set out as follows: "The proper test of a defective product is whether the product was unreasonably unsuitable for its intended or foreseeable purpose. If a product fails this test, it will be deemed defective." [[1443]](#footnote-1444)1442

At present, the Supreme Court of Montana is in the process of developing rules for design defects. Montana's common law development does not appear to have reached any definitive conclusion as to a precise standard or test. However, it seems apparent that whatever rule is developed will be based upon a flexible standard that will consider a wide range of factors. In addition, the test for design defects will be chosen with a great concern that the consumer is not burdened with proving negligence.

2. Statutes

Montana adopted legislation affecting products actions in 1987. [[1444]](#footnote-1445)1443 The statutes provide for affirmative defenses of open and obvious danger [[1445]](#footnote-1446)1444 and misuse. [[1446]](#footnote-1447)1445 Specific stat- **[\*756]** utes limit liability for design defects in firearms and ammunition [[1447]](#footnote-1448)1446 and limit recovery of punitive damages. [[1448]](#footnote-1449)1447 Prior legislation placed restrictions on consumer actions in blood products. [[1449]](#footnote-1450)1448

3. Pattern Jury Instructions

Montana's pattern instructions MPI 7.00 through 7.02 reflect the "unreasonably unsuitable" test found in the McJunkin opinion. [[1450]](#footnote-1451)1449

BB. Nebraska

1. Common Law

Nebraska adopted strict liability in Kohler v. Ford Motor Co. [[1451]](#footnote-1452)1450 The Kohler case involved a manufacturing defect in the steering apparatus of a Ford Falcon. The Supreme Court of Nebraska extended strict liability to design cases in the crashworthiness case of Hancock v. Paccar, Inc. [[1452]](#footnote-1453)1451 In Hancock, the jury returned a verdict in favor of the widow whose husband was killed while operating a tractor trailer. [[1453]](#footnote-1454)1452 The plaintiff alleged the tractor contained design defects in its front bumper that enhanced the driver's injuries. [[1454]](#footnote-1455)1453 On appeal, the defendant asserted several errors, including those involving state-of-the-art and the requirement that the product be "unreasonably dangerous." [[1455]](#footnote-1456)1454 According to the defendant, the plain- **[\*757]** tiff failed to prove that the defendant did not comply state-ofthe-art standards because the design of their tractor bumper was the same as that of all other manufacturers. [[1456]](#footnote-1457)1455 The Hancock court rejected defendant's argument because "inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined." [[1457]](#footnote-1458)1456 The Hancock standard for state-of-the-art was whether the evidence disclosed that anything more could be done. [[1458]](#footnote-1459)1457 Since the plaintiff presented evidence of feasible alternative designs which could have prevented the enhanced injuries, the evidence was sufficient to show the defendant's non-compliance with state-of-theart standards. [[1459]](#footnote-1460)1458

The defendant also asserted that the plaintiff failed to prove that the product was "unreasonably dangerous" because the alleged defect in the bumper was open and obvious to the drivers. [[1460]](#footnote-1461)1459 The Hancock court found that although it adopted the consumer expectation test as defining unreasonably dangerous, the test did not bar recovery merely because a defect could be obvious to a consumer:

Again, it can be argued that if the drivers had thought about all of the consequences the defect would be obvious. That, of course, is not what is meant by an obvious defect. An examination of all the various cases that have been brought to our attention concerning strict liability and enhanced injury fails to disclose any obligation or requirement on the plaintiff's part to anticipate and think out all the consequences which may come from a defect. The manufacturer has this obligation, not the operator. A defect is not obvious simply because, had one thought about it, one would recognize the problem. [[1461]](#footnote-1462)1460

The Supreme Court of Nebraska reaffirmed its determination in Hancock that unreasonable danger is measured by con- **[\*758]** sumer expectations in Nerud v. Haybuster Manufacturing. [[1462]](#footnote-1463)1461 However, the Nerud court also stated that in strict liability design cases, the plaintiff must also prove that the product was defective. [[1463]](#footnote-1464)1462 The Nerud court said that proof of such defect requires a showing of some practical way in which the product could have been made safer. [[1464]](#footnote-1465)1463 The Nerud decision required a risk-utility analysis in cases of negligent design. [[1465]](#footnote-1466)1464 Such a risk-utility test also required the plaintiff to show the existence of a practicable alternative design. [[1466]](#footnote-1467)1465 Thus, it appeared that the Supreme Court of Nebraska was establishing a negligence standard which required the plaintiff to prove a practicable alternative design in strict liability actions.

Four years later, the Supreme Court of Nebraska decided Rahmig v. Mosley Machinery Co., [[1467]](#footnote-1468)1466 which overruled Nerud insofar as it required the plaintiff to prove a feasible or reasonable alternative design in either negligence or strict liability. [[1468]](#footnote-1469)1467 In Rahmig, the plaintiff argued that subsequent remedial measures taken by the defendant were admissible in both negligence and strict liability because of the feasible alternative design requirements set forth in Nerud. [[1469]](#footnote-1470)1468 In effect, the plaintiffs contended that Nerud set forth a new element of proof requiring that the plaintiff show the feasibility of an alternative design as part of the plaintiff's case in chief, in order to rebut defenses such as state-of-the-art. The plaintiff argued that since feasibility was an absolute requirement, evidence of defendant's post-accident measures was admissible as the best evidence of feasibility. [[1470]](#footnote-1471)1469

The Rahmig court responded to plaintiff's assertions with an in-depth examination of the basis for design defects and the **[\*759]** requirement for proof of a feasible alternative design. The Supreme Court of Nebraska noted the significant distinction between negligence and strict liability. In negligence, the question involves a manufacturer's conduct and whether such conduct is considered reasonable in view of foreseeable risks of injury; whereas, in strict liability "the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous." [[1471]](#footnote-1472)1470 The user-contemplation test embodied in section 402A as a test for unreasonable danger has received severe criticism, especially when the test denies liability for a design hazard which is open and obvious. [[1472]](#footnote-1473)1471 In response to the inadequacies of the user-contemplation test, some jurisdictions established the risk-utility test as an alternative method for determining liability. [[1473]](#footnote-1474)1472 Under the risk-utility test, a product is defective in design "only if the magnitude of the risk or danger outweighs the utility of the product, when various factors are considered." [[1474]](#footnote-1475)1473 But the Rahmig court found that the risk-utility test created an almost insurmountable burden of proof on the consumer:

One reason for adopting strict liability in tort regarding products liability claims is exoneration of a claimant from what is frequently an insurmountable burden of proof.

Through Judge Tobriner, the Supreme Court of California stated in In Barker v. Lull Engineering Co., 20 Cal.3d 413, 431, 573 P.2d 443, 455 143 Cal.Rptr. 225, 237 (1978):

One of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the "risk-benefit" standard--e.g., the feasibility and cost of alternative designs--are similar to issues **[\*760]** typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer . . . .

Accord Toliver v. General Motors Corp., 482 So.2d 213 (Miss. 1985).

In his frequently quoted article, On the Nature of Strict Tort Liability for Products, Professor John W. Wade observes:

It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof. 44 Miss. L. J. 825, 826 (1973). [[1475]](#footnote-1476)1474

The Supreme Court of Nebraska said that its opinion in Nerud relied to a great extent on the Oregon case of Wilson v. Piper Aircraft Corp. [[1476]](#footnote-1477)1475 However, even the Wilson case did not make proof of an alternative feasible design an absolute requirement:

As pointed out above, the court's task is to weigh the factors bearing on the utility and the magnitude of the risk and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. Our holding should not be interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury. There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable **[\*761]** alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable. [[1477]](#footnote-1478)1476

The Rahmig court found that several other jurisdictions which applied a risk-utility test for design defects had rejected proof of a feasible alternative design as an absolute requirement. [[1478]](#footnote-1479)1477 Among those courts which rejected the alternative design requirement was the Supreme Court of New Jersey, which stated the following remark: "To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it is not necessary for a plaintiff to prove the existence of alternative, safer designs." [[1479]](#footnote-1480)1478

The Rahmig court concluded that it would not adopt a rule which placed such a heavy burden on the consumer:

A requirement that a plaintiff prove feasibility, as a part of the plaintiff's burden of proof in a case based on strict liability for design defect, weighs down the plaintiff with the onus to provide evidence of those matters which are usually within the knowledge of the manufacturer, and is restoration of the exact burden to be avoided by the doctrine of strict liability in tort for a product's design defect.

. . . .

Therefore, insofar as Nerud v. Haybuster Mfg., supra at 614, 340 N.W.2d at 375, requires that "a plaintiff, in order to prove that a particular product is defective in its **[\*762]** design, must show that there was some practicable way in which the product could have been made safer," Nerud v. Haybuster Mfg., supra, is disapproved and overruled. [[1480]](#footnote-1481)1479

The Rahmig court's rejection of risk-utility in strict liability design cases established the user-contemplation test as the standard in Nebraska. However, the Supreme Court of Nebraska hinted that it could modify the user-contemplation test in the future. [[1481]](#footnote-1482)1480 Any such modification would appear to be dependent upon the elimination of undue proof burdens on the consumer. The Rahmig court's concern about overwhelming proof burdens was not limited to strict liability actions. The Supreme Court of Nebraska stated that its rule in Nerud created an unnecessary fifth element in negligence actions which invited violation of the evidentiary exclusion of subsequent remedial measures:

As a result of Nerud, in products liability cases there has been a fifth element added to the otherwise standard four elements of negligence, namely, the additional essential element of a feasible substitute product free from defect or a practical and reasonable alternative but safer design.

. . . .

In cases other than products liability based on negligence, a plaintiff need only prove the basic four elements in a negligence case, namely, duty, breach of duty, proximate causation, and damages. . . .

At the present, therefore, we find there is a five-element requirement to establish negligence in a products liability claim for defective design, while simultaneously **[\*763]** other claims based on negligence are governed by the long-established requirements--duty, breach of that duty, proximate causation, and damages. Injecting a new requirement into a negligent design case, namely, the plaintiff's proof of a reasonable alternative design to avoid a dangerous product, obliterates a well-defined demarcation between negligence and strict liability in tort for design defect. Also, in cases for negligent design, where a plaintiff is required to prove an alternative and safer design or other feasible substitute for a manufacturer's product, evidence of feasibility in the form of the manufacturer's postaccident remedial measures, alterations, or precautions will provide classic evidence to establish the manufacturer's liability. [[1482]](#footnote-1483)1481

Thus, the Rahmig court completely eliminated requiring proof of feasible alternative design in both strict liability and negligence. The Rahmig decision, which eliminates proof of alternative feasible designs and established the user-contemplation test as the standard in design defects, remains the law in Nebraska. [[1483]](#footnote-1484)1482

2. Statutes

In 1978, the Nebraska legislature passed product liability statutes which established a state-of-the-art defense [[1484]](#footnote-1485)1483 and required that a seller also be the manufacturer of the product. [[1485]](#footnote-1486)1484 In addition, the "slight" contributory negligence of the consumer would not be a bar to recovery; however, consumer negligence in excess of a slight degree would mitigate recovery of damages for actions accruing prior to February 8, 1992. [[1486]](#footnote-1487)1485 Prior legislation limited actions concerning blood products. [[1487]](#footnote-1488)1486 **[\*764]**

3. Pattern Jury Instructions

The Nebraska Jury Instructions NJI 11.20 [[1488]](#footnote-1489)1487 sets forth the generalized elements as expressed in Kohler and Rahmig. Section 11.20 does not contain any requirement that the plaintiff prove a feasible alternative design.

CC. Nevada

1. Common Law

Nevada first adopted strict liability in Shoshone Coca-Cola Bottling Co. v. Dolinski. [[1489]](#footnote-1490)1488 In Dolinski, the plaintiff became ill when he discovered a decomposed mouse in his bottle of Squirt. [[1490]](#footnote-1491)1489 The defendant insisted that the plaintiff had the burden to prove that there was no tampering with the product after it left the manufacturer. [[1491]](#footnote-1492)1490 The Dolinski court rejected the defendant's suggestion concerning the plaintiff's burden of proof and held that the sole burden on the plaintiff is to show the defect is traceable to the defendant. [[1492]](#footnote-1493)1491 No direct proof is necessary to establish the defect existed while the product was in the defendant's control, and the plaintiff could rely upon inferences drawn from the evidence produced. [[1493]](#footnote-1494)1492

The Supreme Court of Nevada extended strict liability to design defects in Ginnis v. Mapes Hotel Corp. [[1494]](#footnote-1495)1493 The consumer in the Ginnis case was injured by the unexpected closing of an automatic door manufactured by Dor-O-Matic. [[1495]](#footnote-1496)1494 The consumer alleged that the automatic door contained design defects and presented expert testimony that there were feasible alternative designs which would have prevented the injury. [[1496]](#footnote-1497)1495 **[\*765]** The Ginnis court set forth the following standard for design defects:

After examining a multitude of cases and legal writers, we think the most accurate test for a "defect" within strict tort liability is set forth in Dunham v. Vaughan & Bushnell Manufacturing. Co., 247 N.E.2d 401, 403 (Ill. 1969), where it was held: "Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function."

As shown by the evidence admitted at trial through Professor Baker, and under the authority of Shoshone and Dunham, appellant adduced sufficient proof to be entitled to instruction of the jury on the doctrine of strict tort liability for defect in design of the door by Dor-O-Matic, because it failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community. See also Greeno v. Clark Equip. Co., 237 F.Supp. 427, 429 (N.D.Ind.1965). [[1497]](#footnote-1498)1496

The Ginnis court's test for design defects seemed to associate intended function with consumer expectations. The Ginnis rule was repeated in Ward v. Ford Motor Co., [[1498]](#footnote-1499)1497 a design case involving a motor vehicle. The Supreme Court of Nevada in Ward associated its intended function/consumer expectation standard with the requirement that a product be "unreasonably dangerous." [[1499]](#footnote-1500)1498 Thus, the Ginnis/Ward test related to both defects and unreasonable dangers.

In Stackiewicz v. Nissan Motor Corp., [[1500]](#footnote-1501)1499 the consumer was injured when the steering of her vehicle failed to function. The consumer hired experts to examine the vehicle to discover **[\*766]** the cause of its malfunction, however, they were unable to find any defects in the steering mechanism. [[1501]](#footnote-1502)1500 The defendant asserted that the plaintiff was required to "produce direct evidence of a specific defect, and was further required to negate any alternative causes of the accident." [[1502]](#footnote-1503)1501 The Stackiewicz court held that such onerous proof was not required of the consumer and circumstantial evidence could be sufficient to show that a product contained a defect:

Thus we have held that proof of an unexpected, dangerous malfunction may suffice to establish a prima facie case for the plaintiff of the existence of a product defect. The origins of this approach in the implied warranty branch of the antecedents of strict liability is illustrated in the following language found in Lindsay v. McDonnell Douglas Aircraft Corporation., 460 F.2d 631, 639 (8th Cir. 1972), which adopted the doctrine of strict liability in tort in federal maritime law:

"Proof of the specific defect in construction or design causing a mechanical malfunction is not an essential element in establishing breach of warranty. 'When machinery "malfunctions," it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the "sin" is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery.' Greco v. Bucciconi Engineering Co., [283 F.Supp. 978, 982 (W.D.Pa.1967), aff'd, 407 F.2d 87 (3d Cir. 1969)]." [[1503]](#footnote-1504)1502

The Stackiewicz court's position on circumstantial evidence seems equivalent to a "malfunction theory" as a method of proving both defect and unreasonable danger under the court's intended function test. [[1504]](#footnote-1505)1503 **[\*767]**

In another design case, McCourt v. J.C. Penney Co., [[1505]](#footnote-1506)1504 the Supreme Court of Nevada allowed the consumer to prove a product defect by showing feasible alternative designs. The consumer in McCourt presented expert testimony that the fabric manufactured by the defendant, J.C. Penney, was unreasonably dangerous because of its highly flammable nature. [[1506]](#footnote-1507)1505 The consumer's experts presented several non-flammable fabrics as alternatives to the product in question. [[1507]](#footnote-1508)1506 However, J.C. Penney Co. contested the consumer's position on the basis that such alternative fabrics were not commercially feasible. [[1508]](#footnote-1509)1507 The consumer attempted to impeach J. C. Penney Co.'s experts with evidence that the alternative fabric was in fact feasible; however, the trial court excluded the evidence. [[1509]](#footnote-1510)1508 The McCourt court reversed the trial court:

We find similar error in the exclusion of pages from the J.C. Penney catalogue from the appropriate years. The Penney Co.'s expert testified that modacrylic, a safer fabric, was not commercially feasible because it was not "wash and wear." The proposed advertising admitted that modacrylic is a "wash and wear" fabric. Had the jury been presented with this evidence they might well have found that there was a safer, alternative fabric available that was commercially feasible. Alternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous. [[1510]](#footnote-1511)1509

The Supreme Court of Nevada again allowed the consumer to prove design defects by showing feasible alternative designs in Robinson v. G.G.C., Inc. [[1511]](#footnote-1512)1510 In Robinson, the product contained a removable safety device, and the plaintiff was injured **[\*768]** because the device was absent. [[1512]](#footnote-1513)1511 The defendant had placed warning decals on the product and alleged that the product could not be defective because it had provided adequate warnings. [[1513]](#footnote-1514)1512 The trial court set forth an instruction to the jury which, in effect, agreed with the defendant's position. [[1514]](#footnote-1515)1513 The Robinson court disagreed with defendant's position and set forth the following guidelines:

The question before us now is when, in spite of an adequate warning, a manufacturer is still liable for a foreseeable misuse. When the defect in the product is the lack of a safety device, the misuse is often an accidental misuse. In these situations, a warning, although it adequately informs of the danger, is of no help to the consumer. Strict products liability law should not punish manufacturers for unanticipated injuries from reasonably safe products, but it should encourage manufacturers to take all measures to avoid accidents from product misuse. Therefore, we must require manufacturers to make their products as safe as commercial feasibility and the state of the art will allow.

Many jurisdictions have adopted the rule that a manufacturer may be liable for the failure to provide a safety device if the inclusion of the device is commercially feasible, will not affect product efficiency, and is within the state of the art at the time the product was placed in the stream of commerce. Titus v. Bethlehem Steel Corp., 91 Cal.App.3d 372, 154 Cal.Rptr. 122 (1979) (***oil*** well pumping unit designed without adequate safety features may be considered defective). . . .

. . . The Titus court recognized that factfinders must consider existing technology and commercial feasibility when evaluating whether a product is defective. Notwithstanding these factors, manufacturers are in the best position to include devices to make their products safe. If the technology is available, the cost is not prohibitive, and the product remains efficient, then a potentially dangerous **[\*769]** product which lacks a safety device is in a defective condition.

This case differs from Titus because here the machine that caused the injury had warning decals. However, a warning is not an adequate replacement when a safety device will eliminate the need for the warning. If manufacturers have the choice between providing an effective safety screen or simply placing a decal on the product, cost will encourage the latter. Therefore, Instruction 22A, which informed the jury that an adequate warning will always shield manufacturers from liability, is not a correct statement of the law. Instead, warnings should shield manufacturers from liability unless the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce.

. . . .

Robinson tried to offer evidence of safety devices on analogous machines to show that the interlocking guard that Enterprise should have included in the baler had been available for many years. This court has recognized that alternative safer designs are a factor in determining the existence of a design defect. McCourt v. J.C.Penney Co., 103 Nev. 101, 734 P.2d 696 (1987). In McCourt, we reversed a defense verdict because the jury was not given the opportunity to feel alternative safer fabrics, even though the defense expert claimed that such fabrics were uncomfortable and therefore not commercially feasible. We noted that when commercial feasibility is in dispute, the court must permit the plaintiff to impeach the defense expert with evidence of alternative design. Id. at 103, 734 P.2d at 698. [[1515]](#footnote-1516)1514

The Robinson court clearly stated that it would allow proof of alternative designs as one method of establishing a design defect; however, such proof was not an absolute requirement. In addition, warnings were not to be considered substitutes for safe designs or safety devices. The Supreme Court of Nevada reaffirmed its decision in Robinson in Fyssakis v. Knight **[\*770]** Equipment Corp. [[1516]](#footnote-1517)1515 and in Eads v. R.D. Werner Co. [[1517]](#footnote-1518)1516

The most recent decision of the Supreme Court of Nevada, Allison v. Merck & Co., [[1518]](#footnote-1519)1517 sets forth an extremely strong position concerning the defect requirement under Nevada's intended function test. In Allison, a child sustained severe injuries from a measles, mumps, and rubella vaccine (MMR II) manufactured by Merck and administered by a local health district. [[1519]](#footnote-1520)1518 The trial court granted summary judgment in favor of Merck. [[1520]](#footnote-1521)1519 The Allison court, in reversing the trial court, reflected on what it had established in past cases as the foundation for the defect requirements in strict liability cases:

To establish liability under a strict tort liability theory, Thomas must establish that his injury "was caused by a defect in the product, and that such defect existed when the product left the hands of the defendant." Shoshone Coca-Cola Co. v. Dolinski, 82 Nev. 439, 443, 420 P.2d 855, 858 (1966). In this case, whether any defect in the vaccine that might have caused Thomas's disabilities was present "when the product left the hands of the defendants" is not a matter of controversy; so, if the Allisons can prove that Thomas' encephalitis "was caused by a defect in the product," then plaintiffs should be able to recover from Merck.

We have already considered the meaning of the word "defect" in connection with strict products liability. In Ginnis v. Mapes Hotel Corp., we adopted a definition of "defect" that is still useful and applicable to the case at hand: "'Although the definitions of the term "defect" in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.'" 86 Nev. 408, 413, 470 P.2d 135, 138 (1970) (quoting Dunham v. Vaughn & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401, 403 (1969)). If Thomas can establish that the vaccine caused him to suffer permanent brain damage, then surely the vaccine failed to perform in the manner reasonably to be expected "in light of its nature and intended function." The nature and intended function of this vaccine, of course, is to create an immunity to measles, mumps and rubella without attendant blindness, deafness, mental retardation and permanent brain damage.

. . . .

In Stackiewicz, we allowed a strict liability case to go to the jury on the plaintiff's claim of an idiopathic steering defect in an automobile which the plaintiff claimed was the cause of her injuries. We said in Stackiewicz that when "'machinery "malfunctions," it obviously lacks fitness regardless of the cause of the malfunction.'" Id. at 448-49, 686 P.2d at 928 (quoting Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 639 (8th Cir. 1972)). In the case before us, plaintiffs are claiming in effect that the vaccine "malfunctioned;" and, if we are to follow Stackiewicz, then a vaccine which causes permanent brain damage "obviously lacks fitness regardless of the cause of the malfunction." If the vaccine is found by a factfinder to have caused Thomas to develop the disabling encephalitis, then Merck's "'"sin" is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer.'" Id. 100 Nev. at 449, 686 P.2d at 928 (quoting Lindsay, 460 F.2d at 639).

. . . .

If we are going to follow Shoshone Coca-Cola and Stackiewicz, we must send this case back to the trial court. A vaccine that causes blindness and deafness is a defective product. [[1521]](#footnote-1522)1520

The Allison majority continued its strong stance that strict liability was measured by an intended function test when it considered the unavoidably unsafe immunity under comment k to section 402A of the Restatement (Second) of Torts: [[1522]](#footnote-1523)1521 **[\*772]**

Merck claims that it is free from strict manufacturer's liability by virtue of the dictum stated in comment k to section 402A of the Restatement (Second) of Torts. This comment suggests that a drug manufacturer should not be held liable for "the unfortunate consequences attending" the use of its drugs if: (1) the manufacturer supplies "the public with an apparently useful and desirable product, attended by a known but apparently reasonable risk," (2) the drug is "properly prepared and marketed," and (3) "proper warning is given."

It is not easy to divine just why the framers of the comment thought that a drug manufacturer should be excused in cases in which it manufactured a drug that was "known" to be dangerous. The whole idea behind strict tort liability is that the manufacturer, not the consumer, should bear the responsibility for injuries, even when the product is ostensibly properly prepared and marketed and when the plaintiff is not in a position to prove the origin of the defect. See Stackiewicz, 100 Nev. at 443, 686 P.2d at 925.

What the question in this case really gets down to is whether an exception should be made in a case in which a drug manufacturer injures a consumer with a drug that it knows is dangerous, but not too ("unreasonably") dangerous. That is to say, should a drug manufacturer be allowed to profit with impunity from the distribution of a drug that it knows is capable of resulting in physical injury, so long as the drug can somehow be certified as not being unreasonably dangerous? We answer that question in the negative and say that a drug manufacturer should, under the strict liability jurisprudence of this state, be held liable in tort even when the drug is "properly prepared and marketed" (that is to say, non-negligently) and even when the known danger inherent in the drug may be what the comment calls "reasonable."

The apparent rationale of comment k in relieving drug manufacturers from liability is that where the manufacturer is free from fault, that is to say it produces a product that is unsafe because of a claim by the manufacturer that it is "incapable of being made safe," the manufacturer should not be responsible for injuries resulting from use of the **[\*773]** drug. The comment itself gives as an example of such an "unavoidably unsafe" drug the Pasteur treatment of rabies "which not uncommonly leads to very serious and damaging consequences when it is injected." We would note, however, that the reason why serious and damaging consequences of the Pasteur rabies treatment do not result in tort liability is not because of the "unreasonably dangerous" doctrine proposed by comment k, but, rather, because the victim chooses to be injected with a drug having known "damaging consequences" rather than to die from rabies. It is the voluntary choice to take the antirabies serum that eliminates tort liability and not the serum's being said to be unavoidably or reasonably dangerous. There is no need to make an exception to the rules of strict liability such as that suggested by comment k in the rabies example because the rabies victim waives tort claims by accepting what the victim knows to be the necessary risk involved in the treatment.

Speaking of "unavoidable" danger or fault-free infliction of harm, or speaking of reasonable (and therefore acceptable) risk of harm, is very much alien to strict liability theory and should have no place in the Restatement provisions relating to strict liability. Mixing concepts of fault-free ("unavoidable") manufacture and "reasonable risk" into the context of non-negligent, strict liability is entirely inconsistent with our products liability cases and with the law established in this state for almost thirty years. . . .

The Dissent and Merck urge that the imposition of liability on Merck for Thomas' injuries in this case would act as a deterrent to necessary and beneficial research and development of new drugs. The Dissent and Merck appear to be arguing that if Merck were to be held liable for statistically infrequent injuries such as the one at bar, society would be the worse because Merck and other drug manufacturers would be fearful and retarded in the development of new and greatly needed immunological products. If Merck were to have to pay for what its vaccine has done to Thomas, this would, Merck says, necessarily inhibit the development and marketing of immunological products which are helpful to many and "unfortunately" devastating **[\*774]** to others.

Although, on policy grounds, Merck might talk some legislative body into immunizing it from liability, it would be certainly inappropriate for the court to make such a radical change in our well-established products liability law. Further, one would think that if a legislature were going to give such special benefits to drug manufacturers, most certainly the resultant legislation, to be just, would have to afford some kind of compensation or relief to the victims of "unavoidably unsafe" drugs. If, for example, a legislature provided that automobile manufacturers would be held to a standard of strict liability for manufacturing defects, even if injuries caused by a given defect are statistically infrequent and perhaps "unavoidable," and at the same time immunized drug manufacturers from liability for injuries caused by their vaccines, the legislature would, as mentioned, very probably and properly include in such discriminatory legislation some kind of no-fault victim compensation plan to set off the advantage given to drug manufacturers over other kinds of manufacturers. [[1523]](#footnote-1524)1522

In a footnote, the Allison court expressed its displeasure with the consumer expectation test:

We find it very difficult to understand what dangerous to an extent beyond that contemplated by the ordinary consumer means. Does it mean that out of the millions of consumers of this vaccine we must search for the prototypical, "ordinary" consumer and ask if that consumer "contemplated" the vaccine to be dangerous? If the expression has any intelligible meaning at all, it is certainly a retreat from traditional products liability principles and a move toward a negligence standard in which the consumer's choice is measured on the basis of what a reasonable and "ordinary" consumer would do under the circumstances. The more we look at the hodgepodge created by the Restatement (Second) of Torts in the area of consumer rights, the more comfortable we feel with following our precedent and the traditional principles of strict **[\*775]** liability. [[1524]](#footnote-1525)1523

Nevada common law appears to have established a very strong position concerning strict liability for design defects. The Supreme Court of Nevada is quite clear that strict liability is a theory separate and apart from negligence. In addition, the Supreme Court of Nevada is very reluctant to place impossible proof burdens on the consumer. However, the Supreme Court of Nevada will allow, but not require, the consumer to prove a product defect by showing feasible alternative designs or feasible safety devices. Proof of a defect may be accomplished through circumstantial evidence or use of the malfunction theory. The "intended function test" appears devoid of any relationship to either consumer expectations or the negligence riskutility test.

2. Statutes

Nevada has not adopted statutes which affect design defects; however, legislation has limited recovery for blood products, [[1525]](#footnote-1526)1524 subsequent remedial measures, [[1526]](#footnote-1527)1525 punitive damages, [[1527]](#footnote-1528)1526 and handguns and ammunition. [[1528]](#footnote-1529)1527

3. Pattern Jury Instructions

Nevada civil jury instructions concerning design defects are found in three separate instructions. Instruction No. 7.02 sets forth the general instruction for strict liability. [[1529]](#footnote-1530)1528 Instruction No. 7.03 gives the definition of design defect as "a product is defective in its design if, as a result of its design, the product is unreasonably dangerous." [[1530]](#footnote-1531)1529 Unreasonably dangerous is defined in Instruction No. 7.06: "A product is unreasonably dangerous if it failed to perform in the manner reasonably to **[\*776]** be expected in light of its nature and intended function, and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." [[1531]](#footnote-1532)1530

The comments to Instruction No. 7.06 conclude that a product could be unreasonably dangerous even though it satisfies ordinary consumer expectations. [[1532]](#footnote-1533)1531 The citations listed as authorities for this conclusion do not include the Allison case. Thus, future pattern instructions may have to exclude altogether the consumer expectation language or highly modify the language to reflect Allison's disapproval of the consumer expectation test.

DD. New Hampshire

1. Common Law

The Supreme Court of New Hampshire first adopted strict liability in Elliott v. Lachance. [[1533]](#footnote-1534)1532 In Elliott, the consumer lost her hair after a permanent wave was administered at a beauty parlor. [[1534]](#footnote-1535)1533 The Elliott court did not establish definitive standards for strict liability other than stating that the consumer must adduce proof that a product was "unwholesome or not fit for the purpose for which it was intended." [[1535]](#footnote-1536)1534 This proof was associated with the requirement that the product be "defective for its intended use." [[1536]](#footnote-1537)1535 Shortly after Elliott, the Supreme Court of New Hampshire decided Buttrick v. Arthur Lessard & Sons, Inc., [[1537]](#footnote-1538)1536 which involved the malfunction of a vehicle's headlights. The Buttrick court quoted section 402A and based its acceptance of the Restatement, to a great extent, on the desire to eliminate the burden on the consumer to prove **[\*777]** negligence:

The rule requiring a person injured by a defective product to prove the manufacturer or seller negligent was evolved when products were simple and the manufacturer and seller generally the same person. Knowledge of the then purchaser, if not as complete as the sellers, was sufficient to enable him to not only locate the defect but to determine whether negligence caused the defect and if so whose. The purchaser of the present day is not in this position. How the defect in manufacture occurred is generally beyond the knowledge of either the injured person or the marketer or manufacturer. . . .

To require plaintiff to prove negligence would impose in cases like the instant one an impossible burden since here neither plaintiff nor defendant was able to locate even the cause of the malfunction. [[1538]](#footnote-1539)1537

Neither Elliott nor Buttrick clearly involved design defects; however, in 1978 the Supreme Court of New Hampshire decided Thibault v. Sears, Roebuck & Co., [[1539]](#footnote-1540)1538 which involved both design and warning defects in a lawn mower. The consumer in Thibault was injured when his foot slipped under the lawn mower. [[1540]](#footnote-1541)1539 At the time of the accident, the consumer was mowing a steep slope in contravention of clear warnings on the mower and in the instruction booklet. [[1541]](#footnote-1542)1540 The consumer alleged that the mower was defective because it lacked a rear trailing guard that would have prevented his injury. [[1542]](#footnote-1543)1541

In its explanation of strict liability, the Thibault court expressed a deep concern for the economic consequences to corporations and manufacturers of products. [[1543]](#footnote-1544)1542 Because of these concerns, the Thibault court restricted liability to the fault principles of the risk-utility analysis. [[1544]](#footnote-1545)1543 **[\*778]**

In a strict liability case alleging defective design, the plaintiff must first prove the existence of a "defective condition unreasonably dangerous to the user." In determining unreasonable danger, courts should consider factors such as social utility and desirability. The utility of the product must be evaluated from the point of view of the public as a whole, because a finding of liability for defective design could result in the removal of an entire product line from the market. Some products are so important that a manufacturer may avoid liability as a matter of law if he has given proper warnings. In weighing utility and desirability against danger, courts should also consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing cost. For example, liability may attach if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a significantly useful and desirable product. [[1545]](#footnote-1546)1544

The Thibault risk-utility test required the balancing of a variety of factors. The factors included foreseeability of the product's use and the open and obvious danger. [[1546]](#footnote-1547)1545 The court stated:

Inquiry into the dangerousness of a product requires a multifaceted balancing process involving evaluation of many conflicting factors. A court will rarely be able to say as a matter of law that a product has no social utility, or that the purpose or manner of its use that caused the injury was not foreseeable. The jury must decide whether the potentiality of harm is open and obvious. Reasonableness, foreseeability, utility, and similar factors are questions of fact for jury determination. [[1547]](#footnote-1548)1546

The Thibault court expressed a strong commitment to application of its multi-factor/risk-utility test to design defects and made it very clear that neither adequate warnings nor the obvi- **[\*779]** ousness of the product's danger should overwhelm the balancing process:

The duty to warn is concomitant with the general duty of the manufacturer, which "is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated." Nevertheless, when an unreasonable danger could have been eliminated without excessive cost or loss of product efficiency, liability may attach even though the danger was obvious or there was adequate warning. A manufacturer "is not obliged to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe." The obviousness of the danger should be evaluated against the reasonableness of the steps which the manufacturer must take to reduce the danger. [[1548]](#footnote-1549)1547

In 1993, the Supreme Court of New Hampshire decided Chellman v. Saab-Scania AB. [[1549]](#footnote-1550)1548 In Chellman, a jury returned a verdict in favor of the defendants. [[1550]](#footnote-1551)1549 The plaintiff appealed, in part, on the basis of improper instructions concerning failure to warn and design defects. [[1551]](#footnote-1552)1550 The Chellman court agreed with the plaintiff and reversed and remanded for a new trial. [[1552]](#footnote-1553)1551 In examining design and warning defects, the Chellman court repeated its risk-utility balancing test as set forth in Thibault. The Chellman court noted that its decision in Thibault considered the duty to warn as part of the general design duty. [[1553]](#footnote-1554)1552 Thus, warnings are relevant in any determination of whether a product is defectively designed and unreasonably dangerous. The court stated:

The issue of the trial court's refusal to give a jury instruction on "failure to warn" focuses on the first element of strict products liability: whether a design defect **[\*780]** caused the car to be unreasonably dangerous. An analysis of whether a product is unreasonably dangerous requires evaluating many possible factors including a product's social utility balanced against the risk of danger, the cost and practicality of reducing the risk of danger, and the presence or absence and efficacy of a warning of hidden danger. Thibault, 118 N.H. at 807-08, 395 A.2d at 847. The duty to warn is part of the general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses. Id. If the design of a product makes a warning necessary to avoid an unreasonable risk of harm from a foreseeable use, the lack of warning or an ineffective warning causes the product to be defective and unreasonably dangerous. Reid supra; Restatement (Second) of Torts section 402-A comments h and j.

The trial court decided that "failure to warn" was not an issue in the case, in part because the defendants had not raised the defense of warning. The court refused to give a "failure to warn" jury instruction as requested by the plaintiffs. As we have clarified above, the absence of a warning may be relevant in determining whether or not a product is defectively designed and unreasonably dangerous. . . .

. . . .

. . . Although the court instructed the jury on the general rule of strict liability for a design defect, the charge did not explain that the jury could consider whether failure to warn of a foreseeable danger made the product defective. The jury answered the first special question, finding no design defects that made the car defective and unreasonably dangerous, without considering whether warnings were necessary and whether the absence of warnings may have made the car defective and unreasonably dangerous. Consideration of a warning, or lack thereof, as part of the analysis of design defect, is not obvious to a jury and must be explained through proper instruction when applicable to a case. [[1554]](#footnote-1555)1553

New Hampshire law applies a risk-utility balancing test to **[\*781]** design defects. This test requires an examination of numerous factors, including warnings. In almost all cases the balancing test is left to the jury. [[1555]](#footnote-1556)1554

2. Statutes

The New Hampshire legislature passed a products liability act in 1978. [[1556]](#footnote-1557)1555 The Act placed severe restrictions on the consumer's right to recover in a products action. [[1557]](#footnote-1558)1556 However, the entire Act was declared unconstitutional in Heath v. Sears, Roebuck & Co. [[1558]](#footnote-1559)1557 Other legislation has placed limits for consumers for state-of-the-art [[1559]](#footnote-1560)1558 and blood products. [[1560]](#footnote-1561)1559

3. Pattern Jury Instructions

The New Hampshire Civil Jury Instructions concerning design defects are based upon the Thibault case; thus, they do not reflect the Chellman decision. [[1561]](#footnote-1562)1560 However, the pattern instructions set forth a fairly accurate description of the riskutility test required under New Hampshire common law. [[1562]](#footnote-1563)1561

EE. New Jersey

1. Common Law

New Jersey was a pioneer in the development of strict liability in tort. The now famous case of Henningsen v. Bloomfield Motors. [[1563]](#footnote-1564)1562 led the country in the development of **[\*782]** consumer recovery under implied warranties. The Henningsen case is still instructive concerning the effect of advertising, the mass marketing of consumer goods, and the manufacturers' use of contractual roadblocks to thwart consumer recovery. [[1564]](#footnote-1565)1563

About a decade after the Henningsen case, the Supreme Court of New Jersey began to develop its strict liability for design defects based upon tort principles rather than warranty. In Bexiga v. Havir Manufacturing Corp., [[1565]](#footnote-1566)1564 the Supreme Court of New Jersey found that the lack of safety devices would support a design defect claim. In Bexiga, the defendant argued that the purchaser had the duty to install safety devices on a multi-purpose product--power punch press. [[1566]](#footnote-1567)1565 Because the manufacturer could not predict the exact use of the multipurpose product, the duty to choose the proper safety device for any particular use should be on the purchaser. [[1567]](#footnote-1568)1566 The Bexiga court found no trouble in deviating from section 402A when it prevented liability for feasible safety devices, which could be installed by the manufacturer:

As we previously said on the issue of strict liability, the Appellate Division applied that rule set forth in the Restatement. To the extent that that rule absolves the manufacturer of liability where he may expect the purchaser to provide safety devices (Restatement, supra, section 402A(1) (b)), it should not be applied. Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate **[\*783]** purchaser. The only way to be certain that such devices will be installed on all machines--which clearly the public interest requires--is to place the duty on the manufacturer where it is feasible for him to do so. [[1568]](#footnote-1569)1567

In another case involving the defective design of a guard, Cepeda v. Cumberland Engineering Co., [[1569]](#footnote-1570)1568 the Supreme Court of New Jersey adopted the imputed-knowledge rule in strict liability. The court stated:

Authoritative interpretation of Rest.2d Sec. 402A, to which provisions this Court has broadly committed itself in this area, . . . justifies our adopting the rule that knowledge of the dangerous potentiality of a machine design as reflected by the evidence at trial is imputable to the manufacturer, and that the remaining determinative question as to affirmative liability is whether a reasonably prudent manufacturer with such foreknowledge would have put such a product into the stream of commerce after considering the hazards as well as the utility of the machine, the ease of incorporating a remedial interlock, the likelihood vel non that the machine would be used only with the guard, and such other factors as would bear upon the prudence of a reasonable manufacturer in so deciding whether to market the machine. [[1570]](#footnote-1571)1569

Analyzing "unreasonably dangerous," the court distinguished manufacturing defects from design defects. Proof of unreasonable danger is generally not required in manufacturing defects. In design defect cases, the danger is imputed to the manufacturer. [[1571]](#footnote-1572)1570

In the case of a defect of a product in the sense of an abnormality unintended by the manufacturer, there would appear to be prima facie liability for physical harm proximately resulting from the defect to a user or consumer without any need for showing of unreasonable danger in any other sense. "The product [would be] unreasonably **[\*784]** dangerous as a matter of law and this would be true of virtually any fabrication or construction defect." . . .

. . . At this point of the discussion, the point to be made is that in design defect liability analysis the Section 402A criterion of "unreasonably dangerous" is an appropriate one if understood to render the liability of the manufacturer substantially coordinate with liability on negligence principles. The only qualification is as to the requisite of foreseeability by the manufacturer of the dangerous propensity of the chattel manifested at the trial--this being imputed to the manufacturer. [[1572]](#footnote-1573)1571

The imputed-knowledge rule established by the Cepeda court relied upon articles published by Deans Wade and Keeton. [[1573]](#footnote-1574)1572 The analysis established in Cepeda was one of risk-utility balancing after imputing knowledge of the danger to the manufacturer. Dean Wade's seven-factor risk-utility balancing test was cited with approval; however, the test was to be evaluated by the court rather than by the jury. [[1574]](#footnote-1575)1573 The role of the seven-factor test and the imputed-knowledge rule in relation to the jury was explained:

If the case is sent to the jury, since it would not always be appropriate for the court to include in the instructions to the jury all seven of the factors mentioned above, Dean Wade suggests the following model instruction:

A product is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer supplier, who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the product in order to determine that it was not duly safe.

Subject to substituting the Section 402A language, "defective condition unreasonably dangerous," for the **[\*785]** Wade-preferred "not duly safe," we approve and adopt this instruction for incorporation into a charge in an action against a manufacturer for strict liability in tort based upon the design defect of a product. Such a charge would be usefully amplified by the judge calling to the attention of the jury for their consideration any of the Wade factors mentioned above going into the risk/utility analysis for which there is specific proof in the case and especial significance (e.g., here, the manufacturer's ability to eliminate the unsafe character of the product without impairing its utility or incurring too much expense; the manufacturer's asserted expectation that the machine would be operated only with the guard). [[1575]](#footnote-1576)1574

In yet another guarding case, Suter v. San Angelo Foundry & Machine Co., [[1576]](#footnote-1577)1575 the Supreme Court of New Jersey reaffirmed its application of its imputed-knowledge rule. The primary issue before the Suter court was whether the plaintiff's conduct should be considered as a complete defense or as part of comparative negligence. [[1577]](#footnote-1578)1576 The Suter court held that contributory negligence, of the type commonly found under comment n of section 402A, would not be a defense when an accident arises in an industrial setting. [[1578]](#footnote-1579)1577 However, comparative negligence would apply in all other situations where contributory negligence would normally be considered a defense. [[1579]](#footnote-1580)1578 The Suter court's holding that contributory negligence would not be a defense in the industrial setting was made on the basis of policy and the determination of what constitutes a defect. The court stated:

The imposition of a duty on the manufacturer to make the machine safe to operate whether by installing a guard or, as in Cepeda, by making it inoperable without a guard, means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of inter- **[\*786]** ests which society seeks to protect. The policy justification for Bexiga is sound. We see no reason to depart from Bexiga's elimination of contributory negligence where an employee is injured due to a defect (whether design or otherwise) in an industrial accident while using a machine for its intended or foreseeable purposes. The defendant manufacturer should not be permitted to escape from the breach of its duty to an employee while carrying out his assigned task under these circumstances when observance of that duty would have prevented the very accident which occurred. [[1580]](#footnote-1581)1579

In its discussion of design defects, the Suter court undertook a comprehensive review of the history of strict liability and the policy reasons for its adoption.

Implicit in the product's presence on the market is the representation that it will safely perform the functions for which it was constructed. Fitness and suitability are terms largely synonymous with safety.

The principle of strict liability, shifting the focus from conduct, as in negligence law generally, to the product, may be summarized as follows. If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes so that users or others who may be expected to come in contact with the product are injured as a result thereof, then the seller shall be responsible for the ensuing damages. [[1581]](#footnote-1582)1580

The Suter court also discussed the burden of proof necessary to show a product defect:

It is incumbent upon plaintiff in proving strict liability to demonstrate that the product was defective when placed by defendant into the commercial stream. It is not necessary to show that defendant created the defect. What is important is that the defect did in fact exist when the product was distributed by and was under the control of defendant. **[\*787]**

In many situations the nature of the alleged defect is clear. Imperfect material, a defective weld, or some physical damage in the product exemplify the usual claim. Proof of such defects may be demonstrated by direct evidence, by reasonable inferences which may be drawn from the circumstances or by exclusion of other causes.

We perceive that the only additional question to be put to the jury in a case involving a design defect, vis-avis other defects, is whether the product design was improper. In some improper design situations the nature of the proofs will be the same as in other unintended defect cases. This occurs when it is self-evident that the product is not reasonably suitable and safe and fails to perform, contrary to the user's reasonable expectation that it would "safely do the jobs for which it was built." Thus, if one purchased a bicycle whose brakes did not hold because of an improper design, the manufacturer's responsibility would be clear without more. The product would not satisfy the reasonable expectations of the purchaser. [[1582]](#footnote-1583)1581

Thus, the Suter court appeared to approve a type of consumer expectation test for design defects when there were appropriate consumer expectations. However, when such expectations were lacking, the Suter court said that the imputedknowledge rule should be applied:

In a design defect case when this factor is absent, other than assuming that the manufacturer knew of the harmful propensity of the product, "the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it." . . .

The proofs in this respect relate to the conduct of the manufacturer. Did the manufacturer act as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition, or should he have designed it to incorporate certain safety features or some other modifications? Depending upon the proofs, some factors which may be considered by the jury in **[\*788]** deciding the reasonableness of the manufacturer's conduct include the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art; and the likelihood that the product will cause injury and the probable seriousness of the injury. We observe in passing that the state of the art refers not only to the common practice and standards in the industry but also to other design alternatives within practical and technological limits at the time of distribution. [[1583]](#footnote-1584)1582

The risk-utility balancing suggested by the Suter court included consideration of factors such as feasibility and stateof-the-art. The court did not mention the possible conflict between imputing knowledge of a product's danger and state-ofthe-art or feasibility. The Suter court did discuss its imputedknowledge/risk-utility rule in relation to the functions of the court and jury:

However, it is the function of the court to decide whether the manufacturer has the duty and obligation imposed by the strict liability principle. As in tort law generally, determination of existence of a duty depends upon a balancing of the nature of the risk, the public interest and the relationship of the parties. We have previously adverted in Cepeda, supra, to some of the factors to be considered. The question is ultimately one of public policy, the answer being dependent upon a consideration of all relevant factors to decide what is fair and just.

. . . .

Although the considerations for the jury are somewhat comparable to those of the trial court, their decisional functions differ. The court decides what protection should be given and the jury is concerned with reaching a just result as between the parties.

. . . .

The same principles should apply whether the manufacturing defect is due to error or mischance or design. Though the nature of the proof to demonstrate that the **[\*789]** product was defective may differ, the ultimate jury test is the same. Suitability and safety are implicated whether the defect in the product is due to an imperfection in the material or improper design. [[1584]](#footnote-1585)1583

However, when a jury is instructed, the Suter court held the phrase "defective condition unreasonably dangerous" inappropriate and confusing:

Incorporation of the "defective condition unreasonably dangerous" language in the jury charge appears to impose a greater burden on plaintiff than is warranted, for it seems to require that plaintiff not only establish a defect but that in addition the condition created be unreasonably dangerous. It has been said inclusion of the phrase "unreasonably dangerous" in the Restatement formula is partially responsible for the confusion currently existing in products liability law.

. . . .

Defining the strict liability principle in terms of a defect and an unreasonably dangerous condition does not advance an understanding of the concept and will not assist a jury's comprehension of the issues which it must resolve. Accordingly, the jury should be charged in terms of whether the product was reasonably fit, suitable and safe for its intended or foreseeable purposes when inserted by defendant into the stream of commerce and, if not, whether as a result damage or injury was incurred by the contemplated users or others who might reasonably be expected to come in contact with it. This is not to say that the jury should not receive additional instructions relative to the nature of the alleged defect. For example, a product may be unsafe because of inadequate instructions or, as in this case, the absence of safety features. The instruction should be tailored to the factual situation to assist the jury in performing its fact finding responsibility. [[1585]](#footnote-1586)1584

The imputed-knowledge rule was extended to warning **[\*790]** defects in Freund v. Cellofilm Properties. [[1586]](#footnote-1587)1585 In Freund, the trial court refused to instruct the jury on strict liability because, according to the trial court, any defect in the adequacy of a warning necessarily resulted from conduct or negligence. [[1587]](#footnote-1588)1586 The jury returned a verdict in favor of the defendant, and the plaintiff appealed. [[1588]](#footnote-1589)1587 On appeal, the Freund court examined the basis for the trial court's determination that warning defects should be measured by negligence law:

The trial court's perception of this case as one involving negligence is not uncommon. The problem stems in large measure from the terminology that historically has been used to define a defective product for strict liability purposes. In instructing juries as to what constitutes a defective product, judges routinely borrow terminology from the law of warranty and negligence. In the case of design and, in particular, improper warning defects, the use of negligence terminology is virtually unavoidable since the adequacy of a design or warning necessarily depends upon its "reasonableness." Hence the use of this terminology has led to confusion over what precise differences, if any, exist between the negligence and strict liability theories of recovery in defective product cases, especially where the defect consists of an inadequate warning. [[1589]](#footnote-1590)1588

Despite the confusion in terminology, the Freund court stated that there is a substantial difference between negligence and strict liability even in a warning case:

[In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning.] In other words, these courts have viewed the strict liability approach as product-oriented, as opposed to the negligence approach which is con- **[\*791]** duct-oriented. [[1590]](#footnote-1591)1589

The Freund court relied, to a great extent, on the Oregon case of Phillips v. Kimwood Machine Co. [[1591]](#footnote-1592)1590 and cited, with approval, its imputed-knowledge rule for warning defects: "A way to determine the dangerousness of the article, as distinguished from the seller's culpability, is to assume the seller knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, he would have been negligent in selling it without a warning." [[1592]](#footnote-1593)1591

The Freund court also realized that in a warning defect situation the risk-utility balancing is usually not necessary:

As we noted in Suter, in the instruction or warning situation, safety is the predominant factor in determining the adequacy of the manufacturer's efforts. The reason for this is that where the design defect consists of an inadequate warning as to safe use, the utility of the product, as counterbalanced against the risks of its use, is rarely at issue. Consequently, the elements of product fitness or suitability, relating to utility, are not particularly germane. Though, in a sense, inadequate warning is related to fitness and suitability, it appears preferable to charge the jury in terms of safety, for fitness and suitability are subsumed by the concept of safety where the design defect consists of an inadequate warning involving safety of the product. [[1593]](#footnote-1594)1592

The defendant in Freund admitted that it knew of its product's dangerous conditions. This admission could be the basis for arguing application of the imputed-knowledge rule was unnecessary. However, the Freund court rejected the position because the general negligence instruction given by the trial court was "riddled with references to negligence, knowledge, and reasonable care on the part of the manufacturer and industry standards." [[1594]](#footnote-1595)1593 In addition, the Freund court believed **[\*792]** that a consumer should be relieved of the burden of proving such knowledge:

Finally, even though defendant Hercules admitted knowledge of the dangers of nitrocellulose, the plaintiffs were never relieved of the burden of proving knowledge. Moreover, the jury was never expressly informed of this concession in terms of the burden of proof. The plaintiffs were entitled to a strict liability charge that clearly and unmistakenly imputed knowledge of the dangers of the product to the defendant. [[1595]](#footnote-1596)1594

Shortly after Freund, the Supreme Court of New Jersey decided Beshada v. Johns-Manville Products Corp. [[1596]](#footnote-1597)1595 In Beshada, the plaintiffs moved to strike a state-of-the-art defense based upon the imputed-knowledge rule in warning cases as set forth in Freund. [[1597]](#footnote-1598)1596 The trial court denied the plaintiffs' motion on the basis that it interpreted Freund as merely raising a rebuttable presumption that the defendants had knowledge of the danger in its asbestos product. [[1598]](#footnote-1599)1597 Although it was hotly contested as to whether the defendant knew about the dangers of asbestos, for purposes of appeal it was assumed that the defendant did not have such knowledge. [[1599]](#footnote-1600)1598

On appeal, the defendant argued that the danger in its asbestos product was not only unknown but also scientifically undiscoverable. [[1600]](#footnote-1601)1599 Under these circumstances, Freund could not logically be applied because the imputed-knowledge rule would require the defendant to do the impossible--warn of an unknowable. [[1601]](#footnote-1602)1600 According to the defendant, the only logical meaning which could be attributed to the Freund decision would be that imputing knowledge of risks was in fact discoverable. [[1602]](#footnote-1603)1601 The defendant's position was that state-of-the-art **[\*793]** defined what was scientifically discoverable; thus, state-of-theart would provide a defense to a warning defect. [[1603]](#footnote-1604)1602

The Beshada court rejected state-of-the-art because it was essentially a defense which converted strict liability into negligence. [[1604]](#footnote-1605)1603 In support of its rejection of state-of-the-art, the Beshada court relied upon the policies underlying strict liability, such as risk spreading and accident avoidance. [[1605]](#footnote-1606)1604 However, one of the strongest policies cited by Beshada in support of its decision to reject the defense of state-of-the-art was the burden of proving what was knowable:

Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. Each side will have to produce experts in the history of science and technology to speculate as to what knowledge was feasible in a given year. . . .

The concept of knowability is complicated further by the fact, noted above, that the level of investment in safety research by manufacturers is one determinant of the stateof-the-art at any given time. Fairness suggests that manufacturers not be excused from liability because their prior inadequate investment in safety rendered the hazards of their product unknowable. Thus, a judgment will have to be made as to whether defendants' investment in safety research in the years preceding distribution of the product was adequate. If not, the experts in the history of technology will have to testify as to what would have been knowable at the time of distribution if manufacturers had spent the proper amount on safety in prior years. To state the issue is to fully understand the great difficulties it would engender in a courtroom. [[1606]](#footnote-1607)1605

The most compelling reason the Beshada court stated for rejecting state-of-the-art was that consumers could not discover or protect themselves against unknown hazards. Thus, as between the innocent consumer and the distributors of defective **[\*794]** products, liability should be assessed to the makers of such products:

Defendants have argued that it is unreasonable to impose a duty on them to warn of the unknowable. Failure to warn of a risk which one could not have known existed is not unreasonable conduct. But this argument is based on negligence principles. We are not saying what defendants should have done. That is negligence. We are saying that defendants' products were not reasonably safe because they did not have a warning. Without a warning, users of the product were unaware of its hazards and could not protect themselves from injury. We impose strict liability because it is unfair for the distributors of a defective product not to compensate its victims. As between those innocent victims and the distributors, it is the distributors--and the public which consumes their products--which should bear the unforeseen costs of the product. [[1607]](#footnote-1608)1606

The Beshada decision appears to be a logical extension of the New Jersey Supreme Court's past position that strict liability, not negligence, should be the measure of liability for defective products. In its efforts to separate the two theories, it should have been no surprise that the Supreme Court of New Jersey would extend the imputed-knowledge rule to warning cases even when knowledge of a danger is unknowable. However, the Beshada court made one unfortunate statement that appears to be the basis of a tremendous amount of adverse commentary: [[1608]](#footnote-1609)1607 "By imposing strict liability, we are not requiring defendants to have done something that is impossible." [[1609]](#footnote-1610)1608

Shortly after Beshada, the Supreme Court of New Jersey decided O'Brien v. Muskin Corp. [[1610]](#footnote-1611)1609 In O'Brien, the plaintiff alleged that an in-ground swimming pool was defectively de- **[\*795]** signed and that its warnings were inadequate. [[1611]](#footnote-1612)1610 Specifically, the plaintiff alleged that the pool contained a defective vinyl liner even though no alternative material was available. [[1612]](#footnote-1613)1611 As part of the analysis, the O'Brien court appeared to have reinstated state-of-the-art as part of the risk-utility analysis:

By implication, risk-utility analysis includes other factors such as the "state-of-the-art" at the time of the manufacture of the product. The "state-of-the-art" refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed. . . .

State-of-the-art relates to both components of the riskutility equation. Although the focus is on the product, our attention is drawn to the reasonableness of the manufacturer's conduct in placing the product on the market. In that regard, the risk side of the equation may involve, among other factors, risks that the manufacturer knew or should have known would be posed by the product, as well as the adequacy of any warnings. The utility side generally will include an appraisal of the need for the product and available design alternatives. Furthermore, some products are unavoidably unsafe: the need for a product may be great, but the existing state of human knowledge may not make it safe. [[1613]](#footnote-1614)1612

The O'Brien court made specific reference to Beshada in its analysis of state-of-the-art as part of its risk-utility balancing process:

Although state-of-the-art evidence may be dispositive on the facts of a particular case, it does not constitute an absolute defense apart from risk-utility analysis. The ultimate burden of proving a defect is on the plaintiff, but the burden is on the defendant to prove that compliance with state-of-the-art in conjunction with other relevant evidence, justifies placing a product on the market. Compliance with proof of state-of-the-art need not, as a matter of law, com- **[\*796]** pel a judgment for a defendant. State-of-the-art evidence, together with other evidence relevant to risk-utility analysis, however, may support a judgment for a defendant. In brief, state-of-the-art evidence is relevant to, but not necessarily dispositive of, risk-utility analysis. That is, a product may embody the state-of-the-art and still fail to satisfy the risk-utility equation. [[1614]](#footnote-1615)1613

In addition to its apparent revival of state-of-the-art, the O'Brien court also determined that proof of safer alternatives are not necessarily part of the risk-utility balancing process:

The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible. Indeed, plaintiff contends that above-ground pools with vinyl liners are such products and that manufacturers who market those pools should bear the cost of injuries they cause to foreseeable users. [[1615]](#footnote-1616)1614

However, the choice of whether the court or jury should determine the risk-utility test when there is no reasonable alternative design created a dispute between the judges. The dissenting opinion argued that the risk-utility decision should be left to the court; [[1616]](#footnote-1617)1615 whereas, the majority would leave the decision to the jury. The O'Brien majority stated:

A critical issue at trial was whether the design of the pool, calling for a vinyl bottom in a pool four feet deep, was defective. The trial court should have permitted the **[\*797]** jury to consider whether, because of the dimensions of the pool and slipperiness of the bottom, the risks of injury so outweighed the utility of the product as to constitute a defect. In removing that issue from consideration by the jury, the trial court erred. To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it was not necessary for plaintiff to prove the existence of alternative, safer designs. Viewing the evidence in the light most favorable to plaintiff, even if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility. [[1617]](#footnote-1618)1616

The Beshada decision concerning state-of-the-art was resolved in Feldman v. Lederle Laboratories. [[1618]](#footnote-1619)1617 The Feldman court determined that strict liability for design defects applied to prescription drug cases. [[1619]](#footnote-1620)1618 Thus, comment k was rejected as an absolute limitation on liability, leaving application of comment k to a case-by-case analysis:

Comment k immunizes from strict liability the manufacturers of some products, including certain drugs, that are unavoidably unsafe. However, we see no reason to hold as a matter of law and policy that all prescription drugs that are unsafe are unavoidably so. Drugs, like any other products, may contain defects that could have been avoided by better manufacturing or design. Whether a drug is unavoidably unsafe should be decided on a case-by-case basis; we perceive no justification for giving all prescription drug manufacturers a blanket immunity from strict liability manufacturing and design defect claims under comment k. [[1620]](#footnote-1621)1619

After deciding that prescription drugs were subject to strict liability, the Feldman court restated its imputed-knowledge rule for strict liability:

Constructive knowledge embraces knowledge that should **[\*798]** have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act. Put another way, would a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public?

. . . .

This test does not conflict with the assumption made in strict liability design defect and warning cases that the defendant knew of the dangerous propensity of the product, if the knowledge that is assumed is reasonably knowable in the sense of actual or constructive knowledge. A warning that a product may have an unknowable danger warns one of nothing. Neither Cepeda nor Suter stated that the manufacturer would be deemed to know of the dangerous propensity of the chattel when the danger was unknowable. In our opinion Besheda, supra, would not demand a contrary conclusion in the typical design defect or warning case. [[1621]](#footnote-1622)1620

The Feldman court seemed very sensitive to adverse commentary on its Beshada decision.

If Beshada were deemed to hold generally or in all cases, particularly with respect to a situation like the present one involving drugs vital to health, that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree. Many commentators have criticized this aspect of the Beshada reasoning and the public policies on which it is based. [[1622]](#footnote-1623)1621

The Feldman court refused to overrule Beshada, but limited the decision to the facts and circumstances in asbestos cases which gave rise to its holding. [[1623]](#footnote-1624)1622 According to the Feldman court, the new strict liability imputed-knowledge rule would allow state-of-the-art evidence. The imputed-knowledge rule **[\*799]** would still apply; however, the defendant had the burden of proving state-of-the-art as part of the risk-utility balancing process. [[1624]](#footnote-1625)1623 The Feldman decision to backtrack on the imputedknowledge rule is, at least partially, due to rather one-sided criticisms and the unfortunate statement by the Beshada court that it was not asking the defendant to do what is impossible. [[1625]](#footnote-1626)1624 A different view of Beshada has been expressed in an excellent article by Professor Ellen Wertheimer. [[1626]](#footnote-1627)1625 Professor Wertheimer states that the primary problem with Beshada was not its conclusion, but the approach it used in reaching its conclusion. [[1627]](#footnote-1628)1626 According to Professor Wertheimer, the Beshada court should have stated the obvious: it was in fact asking the defendant to do the impossible. [[1628]](#footnote-1629)1627 However, asking the defendant to do the impossible must be measured against the impossible burden placed on the consumer in the unknowable defect situation. [[1629]](#footnote-1630)1628 When the defect is unknowable it is also impossible for the consumer to discover or guard against such defect. Faced with two equally "innocent parties," the defendant and the consumer, it becomes a policy question concerning who should bear the loss. [[1630]](#footnote-1631)1629 If strict liability is applied, the manufacturer will bear the loss. [[1631]](#footnote-1632)1630 However, if negligence is applied by allowing state-of-the-art evidence, then the consumer will always bear the loss. The problem that existed at the time of the Feldman decision was that the commentaries were rather one-sided in their criticism. [[1632]](#footnote-1633)1631 It will always appear illogical or unfair if the only issue presented is that of asking a defendant to do the impossible. Only when it is clear that a contrary rule asks the impossible of the consumer is balance restored to the examination. With this **[\*800]** balance restored, the Beshada decision is quite logical and supportable. [[1633]](#footnote-1634)1632

The Feldman rule, which retains imputed knowledge in a risk-utility balancing test with state-of-the-art as a factor, remains the common law rule in New Jersey [[1634]](#footnote-1635)1633 and has only been modified by recent legislation.

2. Statutes

The New Jersey legislature passed a comprehensive products liability act in 1987. [[1635]](#footnote-1636)1634 The Act is basically anti-consumer legislation which highly limits the common law development. [[1636]](#footnote-1637)1635 The Act, under section 2A:58c-3(a)(2), provides a hybrid consumer expectation/obvious danger analysis. [[1637]](#footnote-1638)1636 Obvious dangers have been transformed into a defense rather than a mere factor to consider under the common law risk-utility approach. [[1638]](#footnote-1639)1637 Failure to warn actions have been modified to allow an absolute defense for commonly known dangers. [[1639]](#footnote-1640)1638 In addition, approval of drugs, devices, and foods by federal agencies provides a rebuttable presumption that the product is not defective. [[1640]](#footnote-1641)1639 "Generic" design defects, allowed under the O'Brien decision, have been eliminated by the Act. [[1641]](#footnote-1642)1640 Finally, the Act places severe restraints on punitive damages. [[1642]](#footnote-1643)1641 In 1995, the New Jersey legislature furthered its anti-consumer **[\*801]** legislation by limiting recovery against nonmanufacturers, [[1643]](#footnote-1644)1642 further restricting punitive damages, [[1644]](#footnote-1645)1643 and limiting actions concerning medical devices. [[1645]](#footnote-1646)1644

3. Pattern Jury Instructions

New Jersey's pattern jury instructions accurately reflect the common law imputed-knowledge/risk-utility test including Dean Wade's seven-factor analysis and state-of-the-art consideration. [[1646]](#footnote-1647)1645 In addition, the pattern jury instructions provide for cases which come under the New Jersey Product Liability Act. [[1647]](#footnote-1648)1646

FF. New Mexico

1. Common Law

Strict liability was first adopted by the Supreme Court of New Mexico in Stang v. Hertz Corp. [[1648]](#footnote-1649)1647 The Stang court approved of strict liability as set forth in section 402A, and as applied in several leading decisions in other jurisdictions. [[1649]](#footnote-1650)1648 Although the Stang court did not establish defect criteria or tests in strict liability, it did state that two policy considerations supported the adoption of strict liability. The first policy consideration was loss distribution where the "loss should be placed on those most able to bear it and they can then distribute the risk of loss to users of the product in the form of higher prices." [[1650]](#footnote-1651)1649 A second consideration concerns the difficulties a consumer has in proof where "the main problem with the negligence theory was the practical one of establishing **[\*802]** the failure to exercise due care." [[1651]](#footnote-1652)1650

The Supreme Court of New Mexico extended strict liability to design defects in Skyhook Corp. v. Jasper. [[1652]](#footnote-1653)1651 Section 402A was again confirmed as the appropriate strict liability theory. [[1653]](#footnote-1654)1652 The Skyhook court held that a manufacturer's failure to provide optional safety devices could be the basis of a design defect. [[1654]](#footnote-1655)1653 The Skyhook court denied recovery on the basis that the plaintiff failed to prove that the product was unreasonably dangerous. [[1655]](#footnote-1656)1654 The plaintiff in Skyhook alleged that a crane rig was defective because it failed to include safety devices which would have prevented the electrocution of the deceased when the boom of the crane came into contact with an overhead high voltage wire. [[1656]](#footnote-1657)1655 Although the crane lacked the safety devices, it did have a warning of electrocution danger; the deceased knew of such danger; and the danger was open and obvious. [[1657]](#footnote-1658)1656 Applying the consumer contemplation test of section 402A comment i, the Skyhook court stated:

The crane rig had been used by Signs, Inc. for five years, had performed well, and no injury had resulted. Obviously, it was not unreasonably dangerous within the contemplation of the ordinary consumer or user of such a rig when used in the ordinary ways and for the ordinary purposes for which such a rig is used. [[1658]](#footnote-1659)1657

In addition, the Skyhook court held there was no duty to warn of dangers actually known to a consumer. [[1659]](#footnote-1660)1658 Finally, the court quoted from the Supreme Court of Minnesota:

"We hold that American Hoist did not owe the injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the **[\*803]** record demonstrated that risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against in American Hoist's operations manual." [[1660]](#footnote-1661)1659

The consumer expectation test was again applied by the Supreme Court of New Mexico in Rudisaile v. Hawk Aviation, Inc. [[1661]](#footnote-1662)1660 In defining its consumer expectation test, the Rudisaile court placed great emphasis on comments g and i. [[1662]](#footnote-1663)1661 In addition, the court quoted from the Supreme Court of Washington: "If a product is unreasonably dangerous, it is necessarily defective. The plaintiff may, but should not be required to prove defectiveness as a separate matter." [[1663]](#footnote-1664)1662 The court also quoted the Supreme Court of Alabama: "The product either is or is not 'unreasonably dangerous' to a person who should be expected to use or to be exposed to it. . . . The important factor is whether it is safe or dangerous when the product is used as it was intended to be used." [[1664]](#footnote-1665)1663

In Livingston v. Begay, [[1665]](#footnote-1666)1664 the court stated that one of the reasons for adoption of strict liability was a particularly onerous burden of proving that a manufacturer was negligent. [[1666]](#footnote-1667)1665 In the 1992 decision of Klopp v. The Wackenhut Corp., [[1667]](#footnote-1668)1666 the Supreme Court of New Mexico eliminated the open and obvious danger rule as a bar to recovery. [[1668]](#footnote-1669)1667 In addition, the Klopp court overruled "cases that appear to have held the duty to avoid unreasonable risk of injury to others is satisfied by an adequate warning." [[1669]](#footnote-1670)1668

Among the cases overruled by Klopp was Skyhook, insofar **[\*804]** as it held there was "no duty to make products safe when risk is obvious, known, and specifically warned against." [[1670]](#footnote-1671)1669 In addition, the Klopp court overruled Garrett v. Nissen Corp., [[1671]](#footnote-1672)1670 holding that "if a duty to warn is satisfied, then there is no defect in a product." [[1672]](#footnote-1673)1671

In June 1995, the Supreme Court of New Mexico set forth a definitive statement on design defects in Brooks v. Beech Aircraft Corp. [[1673]](#footnote-1674)1672 The Brooks court overruled the court of appeals decision in Duran v. General Motors Corp., [[1674]](#footnote-1675)1673 which held that "enhanced-injury claims sound only in negligence and that negligence in design must be proved by showing the product violated government regulations or industry standards applicable at the time of design." [[1675]](#footnote-1676)1674 The Brooks court recognized that crashworthiness or second collision claims may involve either design or manufacturing defects and saw no merit in limiting liability to negligence for manufacturing flaws as was done in Duran. [[1676]](#footnote-1677)1675 The Brooks court stated the primary issue which should be addressed is the proper standard of liability for design defects regardless of whether those injuries occur in a second collision. [[1677]](#footnote-1678)1676

The defendant in Brooks set forth arguments almost identical to those proffered by corporations and insurance company representatives at the ALI. [[1678]](#footnote-1679)1677 The Brooks court rejected both **[\*805]** the Beech and the corporately sponsored Product Liability Advisory Council Inc. (PLAC) arguments. According to the Brooks court, nearly every jurisdiction in the United States had adopted some form of strict liability based upon at least four basic policy considerations:

Thus the law of New Mexico and the law of other jurisdictions disclose four primary policies supporting the imposition of strict products liability: placing the cost of **[\*806]** injuries caused by defective products on the manufacturer who is in a better position to pass the true product cost on to all distributors, retailers, and consumers of the product; relieving the injured plaintiff of the onerous burden of establishing the manufacturer's negligence; providing full chain of supply protection; and, in the interest of fairness, providing relief against the manufacturer who--while perhaps innocent of negligence--cast the defective product into the stream of commerce and profited thereby. [[1679]](#footnote-1680)1678

The problems in proving negligence were articulated by the Brooks court as follows:

In addition to the cost-distribution rationale of Greenman, the other courts have approved specifically the rationale that imposing strict liability relieves plaintiffs of the burden of proving ordinary negligence under circumstances in which such negligence is likely to be present but difficult to prove. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts section 98, at 693 (5th ed.1984). As observed by one commentator:

It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss.L.J. 825, 826 (1973); cf. O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298, 303 (1983) (noting in case involving alleged defective design of swimming pool that "one of the policy considerations supporting the imposition of strict liability is easing the burden of proof"); Barker, 143 Cal.Rptr. at 237, 573 P.2d at 455 (allocating burden of proof to manufacturer to show that product not defectively designed because "the feasibility **[\*807]** and cost of alternative designs . . . involve technical matters peculiarly within the knowledge of the manufacturer"). [[1680]](#footnote-1681)1679

The Brooks court expanded its explanation of the problems in proving negligence in design cases with the following:

Despite Beech's contention to the contrary, design cases present plaintiffs with the same proof problems that manufacturing flaw cases do. Negligence focuses on conduct. Strict liability focuses on the product. Proof of what a manufacturer knew or should have known is the measure of conduct. It is largely dependent upon memories of employees and consultants, and upon the retention and production of business records. Proof of the risks of harm from a product's condition or from the manner of its use is the measure of a product defect. The Mississippi Supreme Court partially justified its decision to adopt a cause of action sounding in strict liability for defective design of an automobile gasoline tank with the observation that in a negligence cause of action "the plaintiff would face the insurmountable burden of proving exactly at what point [the product] became defective, and which agent of the defendant was negligent either in causing the condition, or in failing to detect it." Toliver, 482 So.2d at 216. Hence, adopting strict liability for defective design removes an onerous burden of proving negligence. [[1681]](#footnote-1682)1680

The Brooks court astutely observed that under the policy consideration of "fairness," the balance between possibly "two innocent parties" weighs in favor of the consumer and there is no distinction between manufacturing and design defects in this policy choice:

Finally, imposition of strict liability against manufacturers for injuries caused by defective product design also furthers the goal of achieving a fair allocation of the risk of loss. The precise nature of the product defect does not alter the balance of equities present in the relationship **[\*808]** between the manufacturer and the injured user of a product. Whether the product user's injury is caused by a manufacturing flaw or a design defect, this Court must still answer a fundamental policy question: To whom as between two innocent parties should the risk of loss from product-related injuries be allocated? When answering this policy question in cases involving manufacturing flaws, courts have concluded almost unanimously that although the manufacturer may have exercised reasonable care in its manufacturing and quality control operations, because the manufacturer is in a better position than the consumer to control product risks and because the manufacturer had profited from the sale of the injury-producing product, the manufacturer should bear the risk of loss.

We find nothing in the difference between manufacturing flaws and design defects that would alter this conclusion. In the case of design defects, as in the case of manufacturing flaws, the manufacturer controls the design decision and is in a better position than the consumer to control the amount of risk that the product contains. Similarly, as in the case of a defectively manufactured product, the manufacturer of a defectively designed product has profited from its sale. Under these circumstances, it is only fair that the manufacturer bear the loss from product related injuries that are proved to result from an unreasonable risk of injury attributable to product design. [[1682]](#footnote-1683)1681

After setting forth its acceptance of strict liability based upon its policy considerations outweighing those favoring negligence, the Brooks court explained its standard for design defects. According to Brooks, New Mexico has adopted an "unreasonable risk of injury test." Citing extensively to its pattern jury instructions for products, the Brooks court stated:

Under the current product liability jury instructions, SCRA 1986, 13-1401 to 13-1433 (Repl.Pamp.1991), the jury is instructed that a supplier's liability is measured by "an unreasonable risk of injury resulting from a condition of the product or from a manner of its use." UJI 13-1406. **[\*809]** As to either flaw or design, the jury is informed that "an unreasonable risk of injury is a risk which reasonably prudent person having full knowledge of the risk would find unacceptable." UJI 13-1407. Lastly, the jury is instructed specifically that in determining whether a product design poses an unreasonable risk of injury, "you should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." Id. By requiring the jury to make a risk-benefit calculation, these instructions adequately define "defect" so as to focus jury attention on evidence reflecting meritorious choices made by the manufacturer on alternative design and so as to minimize the risk that the public will be deprived needlessly of beneficial products for the sake of compensating injured victims.

When UJI 13-1407 was published for the first time in 1981, the trial judge was directed to determine, based upon developing law, whether it was relevant to design-defect cases that, at the time of supplying the product, the supplier could not have known of an unreasonable risk in the design. This Court had not yet addressed whether strict products liability for an unreasonably dangerous design should be restricted to what the supplier could reasonably know at the time the product was placed on the market. The UJI approach to analyzing the question of defect is that

a product is defective is it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceived danger as it is proved to be at the time of the trial outweighed the benefit of the way the product was so designed and marketed.

UJI 13-1407 comm. cmt. (quoting, with removal of underscoring, Page Keeton, Product Liability and the Meaning of Defect, 5 S. Mary's L.J. 30, 37-38 (1973)). Further,

the way to remedy the problem inherent in foreseeability is to supply knowledge as a matter of law, even if the defect was scientifically unknowable at the time of manufacture, and to allow the jury to decide if the ordinary person would have put the **[\*810]** product on the market as designed.

Id. This method of analyzing whether a product is defective--using evidence of product risk available at the time of trial--has been called the Wade-Keeton approach. [[1683]](#footnote-1684)1682

Thus, the Brooks court noted that New Mexico's standard for design defects was a risk-utility analysis with imputed knowledge of the danger. The jury would measure liability, not by what the defendant knew or should have known at the time of the manufacture or design, but rather by the plaintiff's proof at the time of trial. This standard has been called the WadeKeeton approach. However, the Brooks court recognized that both Wade and Keeton, although initially setting forth the test, later rejected strict liability in favor of negligence standard measuring risk and utility in light of technology available at the time of design or distribution. With great insight, the Brooks Court noted that the ALI's proposed Restatement was nothing less than a negligence test:

The proposed Restatement (Third) of Torts: Products Liability section 2(b), at 9, 13 cmt. a (Tentative Draft No. 1, 1994) adopts a similar position, reasoning that

For the liability system to be fair and efficient, most observers agree that the balancing of risk in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. . . . Imposing liability for [unforeseeable or incalculable risks] would arguably violate a manufacturer's right, in fairness, to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform.

Hence, Wade, Keeton, and the proposed Restatement advocate a negligence approach to design defects. [[1684]](#footnote-1685)1683

Rejecting the ALI's approach, the Brooks court went to what it considered the heart of a design defect case: **[\*811]**

At the heart of this issue lies a scenario not present in this case--a defect in design or formulation about which a prudent supplier should not be expected to have had knowledge at the time of supply. As observed above, our existing uniform jury instructions allow proof and argument on all of the factors suggested by the Restatement (Third) of Torts as relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury. The distinction between the negligence approach proposed by the Restatement and strict liability is the time frame in which the risk-benefit calculation is made. [[1685]](#footnote-1686)1684

The Brooks court then opted for a strict liability standard that rejects the negligence approach which focuses on conduct and succinctly explained the focus rule of strict liability:

As stated by the Arizona Supreme Court in Dart v. Wiebe Manufacturing, Inc., 147 Ariz. 242, 247, 709 P.2d 876, 881 (1985) (en banc):

In a strict liability risk/benefit analysis . . . it is not the conduct of the manufacturer or designer which is primarily in question, but rather the quality of the end result; the product is the focus of the inquiry. The quality of the product may be measured not only by the information available to the manufacturer at the time of design, but also by the information available to the trier of fact at the time of trial.

See also Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033, 1036 (1974) (in banc) ("Strict liability imposes what amounts to constructive knowledge of the condition of the product."). [[1686]](#footnote-1687)1685

The Brooks court then confronted the argument generally proposed by manufacturers that imposing strict liability for unknown and unknowable dangers is asking the impossible; thus, strict liability should be rejected. The Brooks court noted that there is generally a lack of any evidence, outside of aca- **[\*812]** demic argument, that, in reality, any real problem exists with unknowable risks:

In most instances a manufacturer is aware of the risks posed by any given design and of the availability of an alternative design. This case is a perfect example; Dr. Snyder testified that Beech had developed and used a workable shoulder harness prior to the design and manufacture of Mr. Brooks' plane. Thus we disagree with the premise that fairness requires the rejection of strict liability in design cases; when the manufacturer is aware of product risk and alternative designs at the time of supply, it is certainly not unfair to judge the manufacturer's design according to principles of strict liability rather than by conduct at the time of supply.

Further, in those hypothetical instances in which technology known at the time of trial and technology knowable at the time of distribution differ--and outside of academic rationale we find little to suggest the existence in practice of unknowable design considerations--it is more fair that the manufacturers and suppliers who have profited from the sale of the product bear the risk of loss. Given the risk-benefit calculation on which the jury is instructed in New Mexico, and the policy considerations that favor strict products liability, we believe that it is logical and consistent to take the same approach to design defects as to manufacturing flaws. If in some future case we are confronted directly with a proffer of evidence on an advancement or change in the state of the art that was neither known nor knowable at the time the product was supplied, we may at that time reconsider application of a state-ofthe-art defense to those real circumstances, properly developed under the proffer with applicable briefs and argument. [[1687]](#footnote-1688)1686

Based upon its analysis of the New Mexico standard for design defects, the Brooks court confronted the issue of whether regulations, codes, or standards should set the outer parameters of the standard. The defendant Beech argued that juries **[\*813]** should not be allowed to set various standards for design defects:

Echoing concerns similar to those articulated by the Court of Appeals in Duran, Beech cautions that allowing juries to determine on a case-by-case basis whether a manufacturer is liable for adopting a particular design "permits individual juries applying varying laws in different jurisdictions to set nationwide . . . safety standards and to impose on . . . manufacturers conflicting requirements." Duran, 101 N.M. at 745, 688 P.2d at 782 (quoting Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3d Cir.1980), cert. denied, 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981)). It is speculated that a manufacturer held liable in one case for designing an excessively rigid frame may be held liable in another case because the frame was not rigid enough; one jury may decide that a windshield should have been designed to "pop out" on impact, while another may determine that the windshield should have been designed to stay in place. Id. [[1688]](#footnote-1689)1687

The Brooks court rejected the defendant's argument and cited several famous negligence decisions which recognized that acceptance of defendant's argument would allow manufacturers and corporations to set their own standards for reasonable care:

We are persuaded to the contrary, that--unless Congress or the New Mexico Legislature were to preempt the standard against which to measure products liability--the courts should continue to apply to products the general and traditional rules of relevance and materiality for all evidence upon which negligence and unreasonable risk of harm is to be decided. In such cases, we agree with the general principle established by the United States Supreme Court regarding the weight to be given industry custom and usage.

What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is **[\*814]** complied with or not.

Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903). We hesitate to embrace a standard that would allow an industry to set its own standard of reasonable care and to determine how much product-related risk is reasonable. As noted by Judge Learned Hand in The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662, 53 S.Ct. 220, 77 L.Ed. 571 (1932):

Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. [[1689]](#footnote-1690)1688

2. Statutes

No comprehensive statutes exist in New Mexico which affect the common law development of design defects; however, legislation has restricted consumer recovery for blood products [[1690]](#footnote-1691)1689 and joint and several liability. [[1691]](#footnote-1692)1690

3. Pattern Jury Instructions

New Mexico has very comprehensive Uniform Civil Jury Instructions for products liability actions. [[1692]](#footnote-1693)1691 Under section 13-1407, dealing with "unreasonable risk of injury for strict liability," the pattern instruction follows New Mexico's common law according to the Brooks decision. [[1693]](#footnote-1694)1692 **[\*815]**

GG. New York

1. Common Law

The Court of Appeals of New York took its first step towards strict liability in its 1962 decision of Randy Knitwear v. American Cyanamid Co. [[1694]](#footnote-1695)1693 The Randy Knitwear decision eliminated the privity requirement in breach of express warranty actions. [[1695]](#footnote-1696)1694 The elimination of privity was based, to a great extent, on the mass advertising and mass media communications. [[1696]](#footnote-1697)1695 The court of appeals shifted its emphasis from warranty to tort strict liability in Codling v. Paglia [[1697]](#footnote-1698)1696 where the court stated:

We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages. [[1698]](#footnote-1699)1697

The court uses extremely confusing language which is subject to at least two opposing interpretations. First, the failure to discover or guard against a defect in a product could be interpreted to completely bar recovery. Second, a user's contributory negligence, which amounts to assumption of risk as described in comment n of section 402A, could be interpreted **[\*816]** as a defense. [[1699]](#footnote-1700)1698 The first interpretation--that ordinary contributory negligence is a defense to strict liability--does not appear logical, nor does it seem to comply with the manner in which the court examines the issue. [[1700]](#footnote-1701)1699 In addition, the Codling court set forth an extensive rationale for its adoption of strict liability which would seem to negate any reliance upon negligence:

Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. By way of direct illustration, how many automobile purchasers or users have any idea how a power steering mechanism operates or is intended to operate, with its "circulating worm and piston assembly and its cross shaft splined to the Pitman arm"? Further, as has been noted, in all this the by-stander, the nonuser, is even worse off than the user--to the point of total exclusion from any opportunity either to choose manufacturers or re- **[\*817]** tailers or to detect defects. We are accordingly persuaded that from the standpoint of justice as regards the operating aspect of today's products, responsibility should be laid on the manufacturer, subject to the limitations we set forth.

Consideration of the economics of production and distribution point in the same direction. We take as a highly desirable objective the widest feasible availability of useful, nondefective products. We know that in many, if not most instances, today this calls for mass production, mass advertising, mass distribution. It is this mass system which makes possible the development and availability of the benefits which may flow from new inventions and new discoveries. Justice and equity would dictate the apportionment across the system of all related costs--of production, of distribution, of postdistribution liability. Obviously, if manufacturers are to be held for financial losses of nonusers, the economic burden will ultimately be passed on in part, if not in whole, to the purchasing users. But considerations of competitive disadvantage will delay or dilute automatic transferral of such added costs. Whatever the total cost it will then be borne by those in the system, the producer, the distributor and the consumer. Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection. [[1701]](#footnote-1702)1700

Thus, it would appear that the Codling court was attempting to set forth a statement which clearly adopted strict liability. However, the court's attempt to combine the statement with the comment n defense and bystander recovery confused the issue. [[1702]](#footnote-1703)1701 This may have been due to the importance of both **[\*818]** issues in the case. If so, the rule could be restated in simple language: A manufacturer of a defective product is liable when the defect is a substantial factor in causing injury or damages, provided the product is used for a purpose and manner normally intended.

The Codling rule was addressed by the court of appeals in Bolm v. Triumph Corp. [[1703]](#footnote-1704)1702 Bolm involved second collision or enhanced injuries. [[1704]](#footnote-1705)1703 In Bolm, the primary issue was whether the court of appeals would follow the lower court's opinion in Edgar v. Nachman, [[1705]](#footnote-1706)1704 which denied liability in second collision cases because the alleged defect was not a cause of the accident. To a great extent the Edgar decision was based upon the 1950 court of appeals decision, Campo v. Scofield. [[1706]](#footnote-1707)1705 The Campo decision took an extremely narrow view of negligence law, including approval of the archaic patent danger rule. [[1707]](#footnote-1708)1706

The Bolm court rejected the Edgar decision and held that liability could be assessed for defects which enhance injuries to a consumer without being the cause of the accident. [[1708]](#footnote-1709)1707 Although the plaintiff's cause of action was premised upon three theories--negligence, warranty, and strict liability--Bolm's second collision theory was clearly based upon negligence. [[1709]](#footnote-1710)1708 This was evidenced by the primary authority cited by Bolm: Larsen v. General Motors Corp., [[1710]](#footnote-1711)1709 section 395 of the Restatement (Second) of Torts, and Professor Noel's article on manufacturers' negligent design. [[1711]](#footnote-1712)1710 The Bolm court's citation to its strict liability rule in Codling was only an additional support which indicated a liberalization of the law for consumer **[\*819]** recovery. [[1712]](#footnote-1713)1711 Thus, the Bolm decision, based upon negligence principles, did not seem to limit or change strict liability.

The Campo case with its open and obvious danger rule (patent danger rule) was overruled in Micallef v. Miehle Co., [[1713]](#footnote-1714)1712 In Micallef, the plaintiff brought an action for the defective design of a printing press based upon both negligence and warranty theories. [[1714]](#footnote-1715)1713 At trial, the jury found the defendant liable under both theories. [[1715]](#footnote-1716)1714 However, as in Codling, contributory negligence created an issue on liability. [[1716]](#footnote-1717)1715 In a detailed examination of the critical commentary of Campo, the Micallef court rejected its prior patent danger rule. [[1717]](#footnote-1718)1716 Immediately thereafter, the Micallef court quoted the rationale for its adoption of strict liability under Codling. [[1718]](#footnote-1719)1717 However, it was abundantly clear that the Micallef court was basing its decision to overrule Campo on negligence grounds. This was emphasized by the court's separate discussion of strict liability under the plaintiff's second theory of warranty. [[1719]](#footnote-1720)1718 Only after overruling Campo did the court consider the warranty theory. In addition, after overruling Campo and before discussing the warranty count, the Micallef court discussed what rules should be applied. [[1720]](#footnote-1721)1719 These post-Campo rules only involved the reasonable care standard of negligence. "What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve 'a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm.'" [[1721]](#footnote-1722)1720

Immediately after citing its risk-utility concept of reasonable care under negligence, the Micallef court set forth practical **[\*820]** examples of how the parties might litigate the issue of negligence:

Under this approach, "the plaintiff endeavors to show the jury such facts as that competitors used the safety device which was missing here, or that a 'cotter pin costing a penny' could have prevented the accident. The defendant points to such matters as cost, function, and competition as narrowing the design choices. He stresses 'trade-offs'. If the product would be unworkable when the alleged missing feature was added, or would be so expensive as to be priced out of the market, that would be relevant defensive matter." In this case, there was no evidence submitted at trial to show the cost of guards that could have been attached in relation to the entire cost of the machine. [[1722]](#footnote-1723)1721

The court's use of language such as "such facts as" and "such matters as" seemed to indicate that the court's practical examples were neither exclusive nor absolute indicators of the burden of proof of either party. [[1723]](#footnote-1724)1722 In addition, the court followed the above examples with language that clearly showed the non-exclusive nature of the rigid burdens of proof: "Also relevant, but by no means exclusive, in determining whether a manufacturer exercised reasonable skill and knowledge concerning the design of the product is whether he kept abreast of recent scientific developments and the extent to which any tests were conducted to ascertain the dangers of the product." [[1724]](#footnote-1725)1723

After discussing reasonable care under negligence, the Micallef court discussed contributory negligence. The court of appeals again made it clear that it was speaking about negligence:

We next examine the duty owing from a plaintiff or, in other words, the conduct on a plaintiff's part which will bar recovery from a manufacturer. As now enunciated, the patent-danger doctrine should not, in and of itself, prevent a plaintiff from establishing his case. That does not mean, **[\*821]** however, that the obviousness of the danger as a factor in the ultimate injury is thereby eliminated, for it must be remembered that in actions for negligent design, the ordinary rules of negligence apply. Rather, the openness and obviousness of the danger should be available to the defendant on the issue of whether plaintiff exercised that degree of reasonable care as was required under the circumstances. [[1725]](#footnote-1726)1724

It was only after the discussion of negligence that the court turned its attention to strict liability.

The second cause of action, for breach of an implied warranty, fails to mention section 2-314 of the Uniform Commercial Code. Since service of the complaint, it has been recognized, in fact patterns similar to that here, that such a claim, based on tortious behavior is more correctly treated under the theory of strict products liability. [[1726]](#footnote-1727)1725

In 1980, the Court of Appeals of New York began to transform strict liability into negligence. In Robinson v. ReedPrentice Division of Package Machine Co., [[1727]](#footnote-1728)1726 the court held that a manufacturer could not be liable in negligence or strict liability when injuries were caused by a substantial change in the product. [[1728]](#footnote-1729)1727 The plaintiff's action in Robinson was based upon an allegedly defectively designed safety gate of a molding machine. [[1729]](#footnote-1730)1728 The plaintiff's employer modified the safety gate to facilitate its own production needs; however, these modifications nullified the safety features. [[1730]](#footnote-1731)1729 As part of its discussion concerning substantial change, the Robinson court set forth its principles of strict liability:

A cause of action in strict products liability lies where a manufacturer places on the market a product which has a defect that causes injury. As the law has developed thus **[\*822]** far, a defect in a product may consist of one of three elements: mistake in manufacturing, improper design, or by the inadequacy or absence of warnings for the use of the product. Plaintiff maintains that the safety gate of the molding machine was improperly designed for its intended purpose.

Where a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed. [[1731]](#footnote-1732)1730

While the Robinson court followed rather traditional approaches to strict liability, it stated the following:

This rule, however, is tempered by the realization that some products, for example knives, must by their very nature be dangerous in order to be functional. Thus, a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce. [[1732]](#footnote-1733)1731

The above suggests that the Robinson court mixed the consumer expectation test with a risk-utility test. The court then stated:

Design defects, then, unlike manufacturing defects, involve products made in the precise manner intended by the manufacturer. Since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm. [[1733]](#footnote-1734)1732

The risk-utility test given by the court was taken from the negligence rules for reasonable conduct or care as set forth in Micallef. If, as it appears, the Robinson court is establishing **[\*823]** negligence as the sole standard for strict liability, it does so without comment.

At this juncture in the development of New York's common law, the Court of Appeals of New York appears to be making a shift from strict liability to negligence. Such a major change in the law would appear to require at least some reasoning or explanation. The impression given by the Robinson court is that it did not realize what it was doing. The court apparently believed that the consumer expectation test was dependent upon negligence. In addition, the court cited the prior negligence risk-utility test in Micallef as an ultimate question in strict liability. Eliminating strict liability in favor of negligence is an option which has profound consequences deserving much more than confusing statements and misapplied citations.

One possible source of the Robinson court's confusing statements may have been due to the struggle between the majority opinion and Justice Fuchsberg's strong dissent concerning the facts surrounding the modification of the product. [[1734]](#footnote-1735)1733 According to Justice Fuchsberg, the manufacturer was fully aware of the employer's modification. [[1735]](#footnote-1736)1734 In fact, the injury producing product was the fourth such product modified by the employer. [[1736]](#footnote-1737)1735 Based upon the manufacturer's actual knowledge of prior modifications and the employer's request that the manufacturer redesign the safety gate to meet specific production needs, Justice Fuchsberg believed a negligence action separate from strict liability was viable. [[1737]](#footnote-1738)1736

The Robinson majority, on the other hand, believed that the employer's change in the product, even if known by the manufacturer, was not a basis for the manufacturer's liability. [[1738]](#footnote-1739)1737 This position required an examination of both negligence and strict liability. Thus, in setting forth its position on **[\*824]** substantial change, the Robinson majority may have inadvertently mixed the theory of negligence with strict liability.

In its 1981 decision of Caprara v. Chrysler Corp., [[1739]](#footnote-1740)1738 the Court of Appeals of New York had an opportunity to clarify its statements on strict liability. Justice Fuchsberg, the dissenting justice in Robinson, wrote the Caprara majority opinion. However, in Caprara three judges set out lengthy dissents. [[1740]](#footnote-1741)1739 The primary issue in Caprara was the admissibility of post-accident design changes in the product. [[1741]](#footnote-1742)1740 The plaintiff alleged that his Dodge Coronet contained a defect which caused a loss of steering. [[1742]](#footnote-1743)1741 The action was based upon both negligence and strict liability. [[1743]](#footnote-1744)1742 At trial, the plaintiff presented detailed evidence concerning the circumstances of the accident including the low mileage of the vehicle and the unexpected failure of the steering under normal usage. [[1744]](#footnote-1745)1743 In addition, the plaintiff's expert indicated that a defective front ball joint was the cause of the steering failure which led to the accident. [[1745]](#footnote-1746)1744 The ball joint was intended to last at least 80,000 to 150,000 miles without excessive wear. [[1746]](#footnote-1747)1745 However, after only 9,000 miles, the ball joint was so worn that it needed replacement. [[1747]](#footnote-1748)1746 The plaintiff's expert examined all other components of the vehicle which could have contributed to the loss of steering and found them to be in good condition. [[1748]](#footnote-1749)1747

The evidence presented by the plaintiff at this point in the trial was easily recognized as sufficient to support liability based upon the malfunction theory. Thus, the plaintiff's case appeared to be based upon a manufacturing defect. [[1749]](#footnote-1750)1748 During the sixteenth day of trial, however, the plaintiff called **[\*825]** Chrysler's supervisor of steering and suspension as a witness. [[1750]](#footnote-1751)1749 His testimony revealed that four years after the plaintiff's accident, Chrysler modified the ball joints to eliminate possible excessive wear. [[1751]](#footnote-1752)1750 In addition, he said that eight years prior to plaintiff's accident, Chrysler was aware that General Motors had adopted a substantially similar design change on its vehicles' ball joints. [[1752]](#footnote-1753)1751 Thus, at this time of the trial, the failure of the plaintiff's steering could have taken on the characteristics of a design defect. [[1753]](#footnote-1754)1752 At the urging of Chrysler, however, the trial court refused to instruct the jury on design defects. [[1754]](#footnote-1755)1753 Instead the trial court let the jury decide liability solely on the issue of a manufacturing defect. [[1755]](#footnote-1756)1754 The jury found Chrysler negligent and strictly liable, and Chrysler appealed. [[1756]](#footnote-1757)1755 Error was based upon the admission of the postaccident design changes. [[1757]](#footnote-1758)1756

Thus, the issue on appeal was framed under rather strange facts: the post-accident design changes were admitted in a manufacturing defect case. The majority approached its decision by demonstrating the differences between the theories of negligence and strict liability. [[1758]](#footnote-1759)1757 Under this approach, the policy reasons for excluding post-accident design changes in negligence were not applicable to strict liability actions. [[1759]](#footnote-1760)1758

Central to the majority's decision was the rationale for the adoption of strict liability:

Meeting this issue, we do not track unknown terrain. When we adopted the theory of strict products liability as the basis for a cognizable cause of action, we hearkened to the fact that a "developing and more analytical sense of **[\*826]** justice, as regards both the economics and the operational aspects of production and distribution has imposed a heavier and heavier burden of responsibility on the manufacturer." In this response to a growing societal commitment to product safety, we stressed the need to overcome the inordinately difficult problems of proof which face contemporary consumers who suffer at the hands of articles of commerce whose proclivities to injure so often are within the sole ken of those who design and manufacture them. [[1760]](#footnote-1761)1759

Thus, according to the majority, strict liability was adopted in order to avoid placing undue burdens of proof on the plaintiff. [[1761]](#footnote-1762)1760 The burden of proving negligence involved, to a great extent, the proof of whether the defendant knew, or should have known, about the defect in the product:

To that end, under the evolved doctrine of strict products liability, the scienter that is so vital to the negligence suit need not be shown. The shift so wrought is from fault to defect. No longer does anything turn on whether the defendant knew or reasonably could have been expected to know of the defect. Stigmatizing the manufacturer as negligent serves no legal purpose. In easing the path to proof, we have even gone so far as to announce that it is not even essential to a prima facie strict products case that the defect be isolated, for, if a plaintiff "has proven that the product has not performed as intended and excluded all causes of the accident not attributed to defendant, the fact finder may . . . infer that the accident could only have occurred due to some defect. [[1762]](#footnote-1763)1761

According to the majority, scienter, knowledge of the defect, should be imputed to the manufacturer. Thus, the exclusionary rule which prohibits post-accident design changes in negligence would have little or no basis in strict liability.

It follows that the logic behind the exclusionary rule, **[\*827]** born in a negligence setting, where, absent negligence, liability could not exist, affords little, if any, support for the slavish application of the rule to cases brought on a legal theory so antithetical to the strictures of negligence law that respected scholars have suggested that "the determination of whether a reasonably prudent manufacturer would put the product on the market must be made with the assumption that the manufacturer knew of the dangerous condition of the product." One need not adopt this statement to recognize that it breathes the spirit of strict products liability. [[1763]](#footnote-1764)1762

The majority clearly stated that there was a substantial difference between the theory of negligence and strict liability.

This contrast between negligence and strict products liability law is dramatic. In the former, that a defendant acted with due care will exonerate it from liability to the most seriously injured plaintiff. But, in strict products liability, it is no longer any answer that the defendant injured the plaintiff carefully. Those who market products must stand behind them. [[1764]](#footnote-1765)1763

Based upon the differing rationales behind the two theories, the majority rejected application of the exclusionary rule in strict liability.

However, the dissent took a completely different approach. Its focus was on the policies that support the exclusionary rule. [[1765]](#footnote-1766)1764 In addition, the dissent focused on the categories of defect under strict liability rather than its policy basis:

The theory upon which the action was submitted to the jury, as the majority concedes . . . , was a defect in manufacture and assembly. Straining to sustain the admission of evidence of subsequent design change in a case not submitted to the jury on a design defect theory, the majority fails to recognize the essential difference between the two, a distinction re-emphasized only last year in Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 426 N.Y.S.2d 717, 403 N.E.2d 440, and muddies not only the law of evidence but the rules governing product liability as well. [[1766]](#footnote-1767)1765

While focusing on categorizing the types of defects, the dissent failed to distinguish between negligence and strict liability. The dissent set forth definitions generally applied by courts when defining the defect categories:

Although sometimes difficult to delineate, a real distinction exists, both in law and in fact, between manufacturing defects and design defects. Manufacturing defects, by definition, are "imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process. A [defectively manufactured] product does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design." . . .

In contrast, a design defect is one which "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to the detailed plans and specifications" of the manufacturer. Thus, unlike manufacturing defects, design defects involve products which are made in precise conformity with the manufacturer's design but nevertheless result in injury to the user because the design itself was improper. [[1767]](#footnote-1768)1766

At this stage, the dissent had done little more than define manufacturing and design defects. However, the dissent's comments immediately following the definitions are significant:

Moreover, unlike manufacturing defect cases where the decisive issue is the existence of the defect without regard to the care exercised by the manufacturer, a defendant in a design defect case can avoid liability by demonstrating that he used that "degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is **[\*829]** likely to be exposed to the danger when the product is used in the manner for which the product was intended." [[1768]](#footnote-1769)1767

Again, the dissent cites the negligence discussion of Micallef in support of strict liability concepts. This, however, was not the end of the dissent's mixing of negligence and strict liability: "Indeed, it has been said that 'the standards for imposing liability for such unreasonably dangerous design defects are . . . generally negligence principles.'" [[1769]](#footnote-1770)1768 Of course, the Bolm decision stated that general negligence principles applied because it was discussing negligence not strict liability. The cited portion of Bolm dealt with whether the court would continue to adhere to the archaic open and obvious danger rule or apply normal negligence rules in a second collision case. [[1770]](#footnote-1771)1769 The dissent argued that the majority muddied the waters concerning the rules of strict liability: the dissent implied that it would clarify those muddied waters. [[1771]](#footnote-1772)1770 The dissent's definitions of design and manufacturing defects add little to otherwise generally accepted categories; however, its misapplication of negligence authority as a basis for strict liability adds nothing but more mud. The dissent's mixture of negligence authority is especially unforgivable in light of the majority's opinion that focused on distinguishing theories not categories. If the dissent wished to counter the majority's approach, it could have clearly stated the reasons for adopting a negligence over a strict liability rule for design defects.

One month after Caprara, the court of appeals affirmed a lower court opinion in Rainbow v. Albert Elia Building Co. [[1772]](#footnote-1773)1771 and adopted Judge Simon's opinion which relied on the Caprara dissent argument that design strict liability was **[\*830]** controlled by negligence. [[1773]](#footnote-1774)1772 The Rainbow court considered state-of-the-art as a limitation on the liability part of negligence. [[1774]](#footnote-1775)1773

In 1983, Justice Jasen, one of the three dissenting justices in Caprara, wrote the majority decision in Voss v. Black & Decker Manufacturing Co. [[1775]](#footnote-1776)1774 In Voss, a jury returned a verdict against the plaintiff on the issue of negligence. [[1776]](#footnote-1777)1775 The plaintiff appealed claiming error in excluding the plaintiff's strict liability action. [[1777]](#footnote-1778)1776 Thus, Voss implicated only strict liability issues. In reversing the trial court's exclusion of the strict liability count, the Voss court restated its holding in Codling:

In recognizing a cause of action for strict products liability, we stated that "the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used . . . for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages." [[1778]](#footnote-1779)1777

The Voss court set forth the three categories of defects. [[1779]](#footnote-1780)1778 The court then repeated the mixture of consumer expectations and risk-utility statement from Robinson:

We have held that a "defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; **[\*831]** that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." [[1780]](#footnote-1781)1779

Next, the Voss court stated that the manufacturer's actual knowledge about the condition of its product is irrelevant.

Strict products liability for design defect thus differs from a cause of action for a negligently designed product in that the plaintiff is not required to prove that the manufacturer acted unreasonably in designing the product. The focus shifts from the conduct of the manufacturer to whether the product, as designed, was not reasonably safe. A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public. Liability attaches when the product, as designed, presents an unreasonable risk of harm to the user. [[1781]](#footnote-1782)1780

At this point in its discussion, the Voss court appears to be adopting a true form of strict liability where knowledge of a defect is imputed to the manufacturer. This imputed-knowledge rule seems reinforced by the Voss court when it defines "unreasonably dangerous" in terms of what is "not reasonably safe":

Therefore, we conclude that the proper standard to be applied should be whether the product as designed was "not reasonably safe"--that is, whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner. [[1782]](#footnote-1783)1781

In the risk-utility balancing process, the Voss court recommended that Dean Wade's seven factors be considered by the jury. [[1783]](#footnote-1784)1782 At this stage in its examination of strict liability, the **[\*832]** Voss court appears to have adopted Dean Wade's risk-utility balancing process which includes the imputed-knowledge rule. [[1784]](#footnote-1785)1783 The prior statement concerning consumer expectations could be explained in at least two different ways. The court may be adopting a modified Barker rule in design cases--the design defect may be established by application of the consumer expectations test, but if this test proves inappropriate, the plaintiff may establish design defect through Dean Wade's balancing process where knowledge of the defect is imputed to the manufacturer. An alternative interpretation is that the consumer expectation test is used for manufacturing defects, and the risk-utility test is used for design cases.

However, the Voss court made one rather disturbing statement concerning the proof necessary in the risk-utility test:

It will be for the jury to decide whether a product was not reasonably safe in light of all the evidence presented by both the plaintiff and defendant. The plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product--that is, one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost. [[1785]](#footnote-1786)1784

The quote concerning feasibility of an alternative design is attributable to Micallef. [[1786]](#footnote-1787)1785 However, the language in Micallef involved discussion of the requirements of reasonable care under negligence law. [[1787]](#footnote-1788)1786 Worse yet, the Voss court changed Micallef's "practical examples" of what may take place at trial into "obligations" or burdens of proof on the plaintiff to show **[\*833]** the feasibility of an alternative design. [[1788]](#footnote-1789)1787 If the Voss court is setting forth absolute burdens of proof on the plaintiff to establish a reasonable alternative design, then the burdens dominate the entire balancing process. If so, the risk-utility balancing rule with its strict liability concept of imputed knowledge may be converted into a negligence rule with burdens beyond proving unreasonable conduct.

The 1984 decision of Cover v. Cohen [[1789]](#footnote-1790)1788 did not resolve the unanswered issues left by the Voss decision. However, in Denny v. Ford Motor Co., [[1790]](#footnote-1791)1789 the New York Court of Appeals shed greater light on its design defects rule. The Denny decision resulted from a certified question from the United States Court of Appeals for the Second Circuit. [[1791]](#footnote-1792)1790 At trial, the plaintiffs asserted that a Ford Bronco II was unstable and relied on theories of negligence, strict liability, and implied warranty of merchantability. [[1792]](#footnote-1793)1791 The district court submitted the strict liability and warranty claims to the jury. [[1793]](#footnote-1794)1792 The jury found the Bronco II was not defective under strict liability; however, it found in favor of the plaintiffs on the warranty theory. [[1794]](#footnote-1795)1793

On appeal, Ford argued the verdict was inconsistent because the strict liability and warranty claims were either identical or strict liability, as a broader theory, encompassed the warranty theory. The United States Court of Appeals for the Second Circuit certified this issue to the New York Court of Appeals. The Denny court decided that strict liability and warranty were two distinct and viable theories available to litigants under New York law. [[1795]](#footnote-1796)1794 The Denny court explained that a UCC warranty claim has its heritage in contract law; this theory focuses on consumer expectations about the product, without **[\*834]** reference to feasible expectations about the product, without reference to feasible alternative designs or the manufacturer's reasonableness in marketing it in an unsafe condition. Strict liability, however, requires a balancing of the product's dangers and utility. According to the Denny court, there may be some overlap between the two theories, but under some factual circumstances the two theories are distinct and separate.

The facts in the Denny case indicated the Bronco II rolled over while being used as a normal passenger vehicle. The plaintiffs presented evidence that the Bronco II's higher center of gravity resulted in an unreasonable risk. [[1796]](#footnote-1797)1795 Ford presented evidence that the higher center of gravity was a necessary design feature to accommodate the "off-road" capabilities. [[1797]](#footnote-1798)1796 According to Ford, the vehicle was not designed as a conventional passenger vehicle to be used primarily on paved streets since it was inherently less stable when used in this manner. [[1798]](#footnote-1799)1797 However, the plaintiffs presented evidence from Ford's marketing manual which indicated many consumer would be attracted to the vehicle because of its suitability for commuting, suburban and city driving. [[1799]](#footnote-1800)1798 The manual also stated many buyers would be attracted to the Bronco II because utility were "suitable to contemporary life styles" and were "considered fashionable" in some suburban areas. [[1800]](#footnote-1801)1799 Additionally, the manual indicated "the vehicle's ability to switch between two-wheel and four-wheel drive would 'be particularly appealing to women who may be concerned about driving in snow and ice with their children.'" [[1801]](#footnote-1802)1800 The plaintiffs testified these attributes attracted them to the Bronco II, and they were not interested in the vehicle's off-road capabilities or use. [[1802]](#footnote-1803)1801 Based on these facts, the Denny court concluded there was no inconsistency in a jury finding for Ford on the strict liability **[\*835]** risk-utility issue while also finding for the plaintiffs on the warranty issue. [[1803]](#footnote-1804)1802

In its analysis of the distinguishing characteristics between warranty and strict products liability, the Denny court revealed the following about its strict liability standard for design defects:

Although the products-liability theory sounding in tort and the breach-of-implied warranty theory authorized by the UCC co-exist and are often invoked in tandem, the core element of "defect" is subtly different in the two causes of action. Under New York law, a design defect may be actionable under a strict products liability theory if the product is not reasonably safe. Since this Court's decision in Voss v. Black & Decker Mfg. Co. (59 N.Y.2d 102, 108), the New York standard for determining the existence of a design defect has required an assessment of whether "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." This standard demands an inquiry into such factors as (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safetyrelated design changes. The above-described analysis is rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits. In such circumstances, a weighing of the product's benefits against its risks is an appropriate and necessary component of the liability assessment under the policy-based principles associated with tort **[\*836]** law. [[1804]](#footnote-1805)1803

The Denny court recognized the strict liability risk-utility balancing test was "negligent-like" or was negligence inspired; however, the court never expressed an opinion that the two theories were identical. [[1805]](#footnote-1806)1804 The rule as applied in the Denny decision appears to be the Wade test where knowledge of the defect is imputed to the defendant. Under this test, once scienter is imputed, liability is determined by weighing multiple factors concerning both the product's risks and utility.

Justice Simon's dissent argued that strict liability subsumed warranty law. [[1806]](#footnote-1807)1805 In his examination, Justice Simon critically attacked the concept of consumer expectations as an independent standard for determining liability. [[1807]](#footnote-1808)1806 To a great extent, he relied on an cited the position taken by the ALI in section 2(b).

On this issue, the majority made an insightful observation:

Importantly, what makes this case distinctive is that the "ordinary purpose" for which the product was marketed and sold to the plaintiff was not the same as the utility against which the risk was to be weighed. It is these unusual circumstances that give practical significance to the ordinarily theoretical difference between the defect concepts in tort and statutory breach-of-implied warranty causes of action. [[1808]](#footnote-1809)1807

The Denny majority had previously explained that the warranty/consumer expectation test was an independent basis for recovery that relied upon factual evidence of representations make by Ford concerning the qualities of the Bronco II to provide normal transportation over paved roads. [[1809]](#footnote-1810)1808 The evidence was completely separate and distinct from the evidence presented on the risk-utility balancing test for the Bronco II's **[\*837]** capabilities as an off-road vehicle. [[1810]](#footnote-1811)1809

Although both the majority and dissenting opinions cited section 2(b) as expressed in the ALI Tentative Draft No. 2, neither adopted its extremely restrictive test. [[1811]](#footnote-1812)1810 Under the Denny decision, New York law follows a mainstream approach by attempting to implement strict liability. The Denny decision does so by imputing knowledge of the defect to the defendant and by balancing a variety of factors in its risk-utility test. However, New York law not appears to relegate the consumer expectation test to the separate legal theory of warranty.

2. Statutes

New York has not adopted statutes which affect the common law development of design defects by the Court of Appeals of New York. However, legislation has placed restrictions for consumers concerning the discovery rule for statutes of limitations, [[1812]](#footnote-1813)1811 joint several liability, [[1813]](#footnote-1814)1812 damages, [[1814]](#footnote-1815)1813 punitive damages, [[1815]](#footnote-1816)1814 and blood products. [[1816]](#footnote-1817)1815

3. Pattern Jury Instructions

New York has pattern jury instructions on strict liability and design defects which have extensive and detailed commentaries. [[1817]](#footnote-1818)1816 These instructions generally follow the common law as developed in Voss. **[\*838]**

HH. North Carolina

The Supreme Court of North Carolina has rejected strict liability in tort [[1818]](#footnote-1819)1817 and has never developed a warranty action free of privity or contributory negligence. [[1819]](#footnote-1820)1818 The North Carolina legislature adopted a products liability act in 1979; however, this Act also rejected strict liability. [[1820]](#footnote-1821)1819

II. North Dakota

1. Common Law

On December 20, 1974, the Supreme Court of North Dakota adopted the Restatement section 402A in Johnson v. American Motors Corp. [[1821]](#footnote-1822)1820 Three years later, the court added substance to strict liability in Olson v. A.W. Chesterton Co. [[1822]](#footnote-1823)1821 Following comment h to section 402A, the Olson court found misuse to be a defense to strict liability; however, foreseeable misuse would not bar recovery. [[1823]](#footnote-1824)1822 The Olson court also rejected the open and obvious danger rule as a bar to warning defects. [[1824]](#footnote-1825)1823 From the extensive citations concerning the basis for rejecting the open and obvious danger rule, it appeared clear that the Olson court would not bar a design defect because the user could observe the dangerous de- **[\*839]** fect. [[1825]](#footnote-1826)1824 In addition, the Olson court indicated that strict liability should be completely separated from negligence. In response to the argument it was error to exclude state-of-the-art evidence, the Olson court stated:

All of this evidence might be relevant to the issue of negligence. While Chesterton suggests, by citation to section 388, Restatement, Second, Torts, that there is little distinction between the burden of proof in a negligence action and one based upon inadequacy of warning in strict liability in tort, we think the distinction is significant and should be preserved. In actions based upon strict liability in tort, the focal issue is the condition of the product, not the conduct of the defendant. The trial court could properly conclude that the probative value of the state-of-the-art evidence, as offered on the issue of the condition of the product, was negligible. Recognizing that even in actions based on negligence, state-of-the-art evidence is not conclusive, we think such evidence in actions predicated upon strict liability possesses even less probative value, and under the particular facts of this case exclusion of that evidence by the trial court was not an abuse of discretion and does not constitute prejudicial or reversible error. [[1826]](#footnote-1827)1825

On the same day in 1984, the Supreme Court of North Dakota decided the twin cases of Day v. General Motors Corp. [[1827]](#footnote-1828)1826 and Mauch v. Manufacturers Sales & Service, Inc. [[1828]](#footnote-1829)1827 Both Day and Mauch held that comparative causation applied in strict liability actions. [[1829]](#footnote-1830)1828 In these cases, the Supreme Court of North Dakota rejected the legislative fifty percent comparative negligence rule and applied a judicially created pure comparative contribution on causation. [[1830]](#footnote-1831)1829 Although both cases stressed the importance of separating the strict liability theory from that of negligence in the application of com- **[\*840]** parative causation, the Mauch decision placed special emphasis on the distinction. [[1831]](#footnote-1832)1830 In Mauch, the trial court instructed the jury on a negligent failure to warn theory, but refused to instruct on strict liability on the ground that in failure-to-warn cases the two theories are indistinguishable. [[1832]](#footnote-1833)1831 The Mauch court found that the trial court erred:

Although the authorities disagree over this issue, we believe that recovery sought under a negligent failure-towarn theory and recovery sought under a products liability theory of marketing a product which is defective and unreasonably dangerous because it is not accompanied by adequate warnings are two separate and distinct theories of recovery. Thus the trial court must instruct on each where there is evidence to support both theories. [[1833]](#footnote-1834)1832

According to the Mauch court the primary reason for separating the two theories was the harsh burden on a consumer in proving negligence. [[1834]](#footnote-1835)1833 Quoting from Berkebile v. Brantly Helicopter Corp., [[1835]](#footnote-1836)1834 the Mauch court stated:

"The law of products liability developed in response to changing societal concerns over the relationship between the consumer and the seller of a product. The increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products." [[1836]](#footnote-1837)1835

Adding even more emphasis to a desire to keep strict liability separate from negligence, the Mauch court cited the following from Louis Frumer and Melvin Friedman: [[1837]](#footnote-1838)1836 **[\*841]**

"While the distinction drawn between a negligent failure to warn and the warning requirements for strict tort purposes might seem illusive, and this has been so stated by some courts, it is nonetheless quite significant because it clearly points out the different bases for the two theories. Under the strict tort doctrine the emphasis is on the product and the danger it poses to the public, while under the negligence concept the emphasis is on the reasonableness of the conduct of the manufacturer. The degree of care exercised by the manufacturer is irrelevant for strict tort purposes."

Under a negligence theory, the question is whether or not the conduct of the manufacturer or seller in providing a certain warning with its product, or in providing no warning at all, falls above or below the standard of reasonable care. Under a products-liability theory, the question is whether or not the warnings, if any, which accompany a product are adequate to render the product not unreasonably dangerous to the ordinary user of it. Under the latter theory, the reasonableness of the defendant's conduct is not at issue. Thus, the products-liability theory shifts the focus from the defendant's conduct to the nature of the product:

"The objective of the rule of strict liability with respect to dangerous products is defeated if a plaintiff is required to prove that the defendant was negligent, or the latter is allowed to defend upon the ground that he was free of negligence. It is the adequacy of warning which is given, or the necessity of such a warning, which must command the jury's attention, not the defendant's conduct." [[1838]](#footnote-1839)1837

Later in 1984, the Supreme Court of North Dakota decided Kaufman v. Meditec, Inc. [[1839]](#footnote-1840)1838 Based upon two prior decisions, the Kaufman court held that "unreasonably dangerous" is an integral part of strict liability. [[1840]](#footnote-1841)1839 Because the trial court's ju- **[\*842]** ry instruction did not contain this requirement, there was reversible error. [[1841]](#footnote-1842)1840 The supreme court expanded its reliance on section 402A and its comments in Morrison v. Grand Forks Housing Authority. [[1842]](#footnote-1843)1841 The Morrison court again reaffirmed its prior holdings that strict liability and negligence are distinct and separate theories and liability could not be denied based solely on the obviousness of a product's danger. [[1843]](#footnote-1844)1842

In 1991, the court decided Oanes v. Westgo, Inc. [[1844]](#footnote-1845)1843 which concerned warning defects and design defects under both negligence and strict liability. Although the Oanes court was bound by the applicable statutes of the North Dakota Products Liability Act, [[1845]](#footnote-1846)1844 the court set forth several significant statements about design defects which were not controlled by the statutes:

We have recognized that negligence and strict liability in tort are separate and distinct theories of products liability and that each theory has a different focus. Strict liability in tort focuses on whether or not a product is defective and unreasonably dangerous. Negligence focuses on whether or not the conduct of the manufacturer or seller falls below the standard of reasonable care. The essential difference between negligence and strict liability is that in negligence the foreseeability of harm by the manufacturer or seller is a question of fact for the jury while in strict liability knowledge of the product's propensity to inflict harm is assumed regardless of whether the danger was foreseeable by the manufacturer or seller. [[1846]](#footnote-1847)1845

Thus, the Oanes court adopted an imputed-knowledge rule which assumes that manufacturers know about the products' dangers. Although the Oanes court was addressing design de- **[\*843]** fects when it adopted the imputed-knowledge rule, there is little doubt about the pervasiveness of the rule in strict liability actions because the court applied it to a warning defect.

The Oaneses also contend that the trial court erred in instructing the jury that, under strict liability, a duty to warn arises only if the fact that "the product would be considered defective and unreasonably dangerous in the absence of such a warning is or should be known to the manufacturer or seller." [Emphasis added]. The Oaneses contend that the instruction improperly injected negligence principles into their strict liability claim.

In a strict liability failure-to-warn case, the focus is on whether the warnings, if any, which accompany a product are adequate so that the product is not unreasonably dangerous to the ordinary user. The focus is not on the knowledge or reasonableness of the conduct of the manufacturer or seller. It has generally been held that instructions on duty to warn under strict liability are erroneous if they inject negligence principles. We agree with the Oaneses that the trial court's instruction, standing alone, injected negligence concepts about the manufacturer's knowledge into the strict liability failure-to-warn claim. [[1847]](#footnote-1848)1846

2. Statutes

In 1979, the North Dakota legislature passed a products liability act [[1848]](#footnote-1849)1847 which limited recovery in several areas. The Act contained a ten-year statute of repose, [[1849]](#footnote-1850)1848 limited recovery when the product was altered or modified, [[1850]](#footnote-1851)1849 established a rebuttable presumption that products were not defective when they complied with government standards, [[1851]](#footnote-1852)1850 and limited the **[\*844]** lability of non-manufacturers. [[1852]](#footnote-1853)1851 In 1986, the Supreme Court of North Dakota found the statute of repose unconstitutional. [[1853]](#footnote-1854)1852 In Oanes, the court interpreted the alteration or modification defense in the Act to include a foreseeability element. [[1854]](#footnote-1855)1853 Thus, whenever an alteration or modification is reasonably foreseeable, the statute will not bar recovery.

In addition to the above anti-consumer sections, the Act sets forth a consumer expectation test for defects. [[1855]](#footnote-1856)1854 However, the Supreme Court of North Dakota seems to interpret the language of the statute to be comparable with prior common law construction of "unreasonably dangerous." [[1856]](#footnote-1857)1855 Thus, the Act has not revived the open and obvious danger rule. [[1857]](#footnote-1858)1856 Later legislation further restricted consumer recovery for statute of limitations and repose, [[1858]](#footnote-1859)1857 a rebuttable presumption against defects, [[1859]](#footnote-1860)1858 nonmanufacturers, [[1860]](#footnote-1861)1859 noneconomic damages, [[1861]](#footnote-1862)1860 collateral sources, [[1862]](#footnote-1863)1861 punitive damages, [[1863]](#footnote-1864)1862 blood products, [[1864]](#footnote-1865)1863 and claims against aviation products. [[1865]](#footnote-1866)1864

3. Pattern Jury Instructions

North Dakota Pattern Jury Instructions--Civil [[1866]](#footnote-1867)1865 conforms with state statutes and the imputed-knowledge rule of **[\*845]** Oanes. However, the pattern instructions also set forth Dean Wade's seven-factor balancing test as a test for unreasonable danger. [[1867]](#footnote-1868)1866

JJ. Ohio

1. Common Law

Ohio has a rich history [[1868]](#footnote-1869)1867 of strict liability development. Beginning in 1958 in Rogers v. Toni Home Permanent Co., [[1869]](#footnote-1870)1868 the Supreme Court of Ohio eliminated privity in an express warranty action. The Rogers case was significant because it allowed recovery based on tort rather than contract. [[1870]](#footnote-1871)1869 Because Rogers depended, to a great extent, on the defendant's representations in advertising as a basis of recovery, [[1871]](#footnote-1872)1870 it is arguable that true strict liability in tort, independent of any express warranty, was not adopted by the Supreme Court of Ohio until it decided Lonzrick v. Republic Steel Corp. [[1872]](#footnote-1873)1871 The Lonzrick decision allowed recovery in tort for a breach of an implied warranty without the need of any express representation to the consumer. [[1873]](#footnote-1874)1872 The Supreme Court of Ohio broke its ties with a warranty as a basis for strict liability in Temple v. Wean United, Inc. [[1874]](#footnote-1875)1873 Here the court adopted section 402A as a basis of recovery. According to the Temple court, the shift to section 402A was a natural progression:

Because there are virtually no distinctions between Ohio's "implied warranty in tort" theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative **[\*846]** comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d. [[1875]](#footnote-1876)1874

Strict liability was extended to design defects in a "second collision" or "enhanced injury" case in Leichtamer v. American Motors Corp. [[1876]](#footnote-1877)1875 In Leichtamer, the defendant, American Motors, argued that liability for design defects in second collision cases should be limited to negligence. [[1877]](#footnote-1878)1876

In rejecting the defendant's argument, the Leichtamer court examined whether design defects should be treated differently from manufacturing defects:

We see no difficulty in also applying Section 402A to design defects. As pointed out by the California Supreme Court, "a defect may emerge from the mind of the designer as well as from the hand of the workman." Cronin v. J.B.E. Olson Corp. (1972), 8 Cal.3d 121, 134, 104 Cal. Rptr. 433, 501 P.2d 1153. A distinction between defects resulting from manufacturing processes and those resulting from design, and a resultant difference in the burden of proof on the injured party, would only provoke needless questions of defect classification, which would add little to the resolution of the underlying claims. A consumer injured by an unreasonably dangerous design should have the same benefit of freedom from proving fault provided by Section 402A as the consumer injured by a defectively manufactured product which proves unreasonably dangerous.

The doctrine of strict liability evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product. Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict **[\*847]** liability in tort when the products cause harm. [[1878]](#footnote-1879)1877

Addressing how a design defect could be established, the court stated:

With regard to design defects, the product is considered defective only because it causes or enhances an injury. "In such a case, the defect and the injury cannot be separated, yet clearly a product cannot be considered defective simply because it is capable of producing injury." Kimble & Lesher, Products Liability, at page 80. Rather, in such a case the concept of "unreasonable dangerous" is essential to establish liability under strict liability in tort principles.

The concept of "unreasonable danger," as found in Section 402A, provides implicitly that a product may be found defective in design if it is more dangerous in use than the ordinary consumer would expect. Another way of phrasing this proposition is that "a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Barker v. Lull Engineering Co., Inc. (1978), 20 Cal.3d 413, 429, 143 Cal.Rptr. 225, 573 P.2d 443. [[1879]](#footnote-1880)1878

The court explained the basis for adopting the consumer expectation test for design defects:

This standard reflects the commercial reality that "implicit in . . . [a product's] presence on the market . . . is a representation that it will safely do the jobs for which it was built."

Moreover, a consumer-expectation test of unreasonable danger recognizes the legitimacy of one of the fundamental values in the law of torts: "the protection of the individuality of persons, by according formal respect for their fairly developed expectations of product safety. . . ." [[1880]](#footnote-1881)1879 **[\*848]**

Justice Holmes dissented, arguing that only negligence should be applied in second collision cases. [[1881]](#footnote-1882)1880 Under negligence law, the plaintiff had failed to prove any "alternate safer design practicable under the circumstances." [[1882]](#footnote-1883)1881 Thus, according to Justice Holmes, liability was inappropriate. Although the Leichtamer majority did not address the alternative design issue, the court implicitly rejected such a requirement, because liability under the consumer expectation test was found sufficient.

The Supreme Court of Ohio revised its rule for design defects in Knitz v. Minster Machine Co. [[1883]](#footnote-1884)1882 The Knitz court affirmed its holding in Leichtamer because the factual setting of that case supported reasonable consumer expectations created by the defendant's advertising. [[1884]](#footnote-1885)1883 However, liability under this rule might be denied when no such expectations are present:

Unlike the factual setting of Leichtamer, there are situations in which "the consumer would not know what to expect, because he would have no idea how safe the product could be made." Such is the case sub judice. Difficulty could arise, for example, where the injured party is an innocent bystander who is ignorant of the product and has no expectation of its safety, or where a new product is involved and no expectation of safety has developed. Conversely, liability could be barred hypothetically where industrial workmen "gradually learn of the dangerous involved in the machinery they must use to make a living and come to 'expect' the dangers." [[1885]](#footnote-1886)1884

Finding the denial of liability unacceptable when a consumer has no expectations of safety, the Knitz court turned to risk-utility analysis.

In such cases, the policy underlying strict liability in tort, **[\*849]** requires that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." Barker v. Lull Engineering Co. (1978), 20 Cal.3d 413, 430, 143 Cal.Rptr. 225, 573 P.2d 443.

Accordingly, we hold that a product design is in a defective condition to the user or consumer if (1) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the benefits of the challenged design do not outweigh the risk inherent in such design. Factors relevant to the evaluation of the defectiveness of the product design are the likelihood that the product design will cause injury, the gravity of the danger posed, and the mechanical and economic feasibility of an improved design. [[1886]](#footnote-1887)1885

The parameters of the two-pronged rule were set forth in Cremeans v. International Harvester Co., [[1887]](#footnote-1888)1886 where the court made it clear that it had eliminated the "unreasonably dangerous" requirement for design defects:

The test set forth in Knitz does not impose a dual requirement that an injured plaintiff prove that a product design is both in a defective condition and unreasonably dangerous. As this court aptly noted in Knitz, at page 464, fn. 2, 432 N.E.2d 814, " . . . to require an injured plaintiff to prove both that a product contained a defect, and that the defect rendered the product 'unreasonably dangerous' would place a greater requirement upon him than required by . . . [this court's] initial formulation of strict liability in tort announced in Lonzrick v. Republic Steel Corp., supra [(1966), 6 Ohio St.2d 227, 218 N.E.2d 185 (35 O.O.2d 404]. . . ." [[1888]](#footnote-1889)1887

In addition, the court appeared to deviate from a pure **[\*850]** Barker rule by placing the burden of proving the risk-utility factors on the plaintiff:

Rather, Knitz sets forth a single, two-pronged test for determining whether a product design is in a defective condition. Under the first prong, commonly referred to as the consumer expectation standard, a defendant will be subject to liability if the plaintiff proves that the product design is in a defective condition because the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

Under the second prong, a defendant will be subject to liability if the plaintiff proves, by using relevant criteria, that the product design is in a defective condition because the benefits of the challenged design do not outweigh the risks inherent in such design. This standard is often referred to as the risk-benefit standard. [[1889]](#footnote-1890)1888

Finally, the court made it clear that the factors in the riskutility analysis could vary according to the particular facts of a case, and no one factor should dominate over others:

In Knitz, 69 Ohio St.2d at page 466, 432 N.E.2d 814, this court listed three criteria that it deemed relevant in weighing the merits of a particular design: " . . . the likelihood that the product design will cause injury, the gravity of the danger posed, and the mechanical and economic feasibility of an improved design." The listing of these three factors was not meant to be, nor should it be construed to be, exclusive and exhaustive.

For, as this court stated in Knitz, at 465, fn. 2, 432 N.E.2d 814, the focus of our inquiry in determining whether a particular product design is in a defective condition under the risk-benefit standard is on " . . . the nature of the 'defect' . . . ." In focusing on the product design, basic justice requires that all parties have the right to have attention directed to all relevant factors for consideration in determining whether the particular product is in a defective condition. Other factors relevant to the evaluation of the **[\*851]** defectiveness of the product design may include the relative costs of producing, distributing and selling an alternative design and new or additional harms that may result from an alternative design.

As this court refrains from setting forth an exclusive test of relevant factors, it likewise refrains from according any priority to these factors. The appropriate factors, and the weight allocated to each factor, will vary with the facts of each case. [[1890]](#footnote-1891)1889

In Bowling v. Heil Co., [[1891]](#footnote-1892)1890 the Supreme Court of Ohio refused to apply comparative negligence or comparative fault in strict liability actions. [[1892]](#footnote-1893)1891 In addition, the court retained joint and several liability. [[1893]](#footnote-1894)1892 As part of its reasoning, the Bowling court set forth a detailed summary of Ohio's development of strict liability [[1894]](#footnote-1895)1893 and reaffirmed its determination to eliminate negligence from the strict liability theory:

We believe that the better-reasoned decisions are those that decline to inject a plaintiff's negligence into the law of products liability. . . .

. . . .

We agree with Justice Mosk of the California Supreme Court, who stated in his dissent in Daly v. General Motors Corp., supra:

The defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminantly, the righteous and the evil, the careful and the careless. Thus, when a faulty design or otherwise defective product is involved, the litigation should not be diverted to consideration of the negligence of the plaintiff. The liability issues are simple: was the product or its design faulty, did the defendant inject the defective product into the stream of commerce, and did the defect cause the injury? The conduct of the ultimate consumer-victim who used the **[\*852]** product in the contemplated or foreseeable manner is wholly irrelevant to those issues. [[1895]](#footnote-1896)1894

Recently, in Queen City Terminals v. General American Transportation Corp., [[1896]](#footnote-1897)1895 the Supreme Court of Ohio affirmed that Leichtamer and Restatement section 402A were the law in Ohio. [[1897]](#footnote-1898)1896 The Queen City court found that "the policies underlying products liability doctrine are noted within the Restatement and have been consistently recognized by this court." [[1898]](#footnote-1899)1897 According to the court, the "public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm." [[1899]](#footnote-1900)1898 In addition, "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production." [[1900]](#footnote-1901)1899 Finally, the court noted that "proving negligence can be difficult and costly for the average consumer." [[1901]](#footnote-1902)1900

2. Statutes

In 1988, the Ohio legislature adopted a comprehensive anti-consumer products liability act. [[1902]](#footnote-1903)1901 The Act, with its laundry list of limitations, may have been worse for the consumer but for the intervention of Ohio's governor in prior bills. [[1903]](#footnote-1904)1902 The Act makes significant changes to Ohio common law. [[1904]](#footnote-1905)1903 **[\*853]**

Ohio's Product Liability Act was a result of extensive lobbying efforts by an alliance of insurance, manufacturing, and business groups. [[1905]](#footnote-1906)1904 These groups pushed so-called tort "reform" based upon (1) the increase in insurance premiums [[1906]](#footnote-1907)1905 and (2) the widespread public perception that a litigation explosion was the cause of the increased premiums. Although study after study has shown that there is no litigation explosion and the cause of increased premiums lay at the door of insurance industry itself, [[1907]](#footnote-1908)1906 Ohio still passed its bill.

Ohio's experience is not unique because the alliance of anti-consumer groups were successful in enacting tort legislation in at least twenty-three other states. [[1908]](#footnote-1909)1907 It is extremely interesting that the anti-consumer measures proposed by the business/insurance alliance as adopted by Ohio and other states clearly resemble the ALI's proposals. For example, Ohio's Act eliminates "generic" design defects as a basis of liability. [[1909]](#footnote-1910)1908 The Act also requires "a practical and technologically feasible alternative design," otherwise no liability will attach to design defects. [[1910]](#footnote-1911)1909 In addition, the Ohio Act places restrictions on punitive damages, [[1911]](#footnote-1912)1910 actions against suppliers, [[1912]](#footnote-1913)1911 and establishes the open and obvious danger defense for warnings. [[1913]](#footnote-1914)1912 Other legislation limits action for blood products. [[1914]](#footnote-1915)1913

3. Pattern Jury Instructions

Ohio jury instructions accurately reflect both the common law and statutory tests for design defects. Pattern Instruction **[\*854]** 351.01 [[1915]](#footnote-1916)1914 sets forth the two-pronged standard which conforms to the Knitz/Cremeans rule, and pattern instruction 351.09 [[1916]](#footnote-1917)1915 sets forth the statutory standard.

KK. Oklahoma

1. Common Law

Oklahoma first adopted strict liability in Kirkland v. General Motors Corp., [[1917]](#footnote-1918)1916 a design defect case involving a vehicle seat. The Kirkland court said section 402A would control strict liability, and therefore, the court completely excluded the use of either negligence or warranty as a theory of recovery in products liability actions. [[1918]](#footnote-1919)1917 The court identified the exclusive theory of recovery as "manufacturer's products liability" and set forth the following elements:

First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.

Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. If the action is against the retailer or supplier of the article, then the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.

Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term "unreasonably dangerous" is above defined. [[1919]](#footnote-1920)1918

Proof of a defect would be based upon the consumer expectation test under comment g of section 402A. [[1920]](#footnote-1921)1919 The burden of proving a defect under the consumer expectation ap- **[\*855]** peared to be a major concern to the Kirkland court which provided the following guidelines:

The practicing lawyer identified with the Plaintiff will seldom be able to produce actual or absolute proof of the defect so necessary in manufacturers' products liability since this information in the final analysis is usually within the peculiar possession of the Defendant. Carefully prepared interrogatories or depositions may be helpful to a Plaintiff, but more than likely Plaintiff may be forced to rely on circumstances and proper inferences drawn therefrom in making his proof. We note that in some accidents the surrounding circumstances and human experience should make Plaintiff's burden less arduous; he may be able to sustain his burden, but more than likely if the Defendant is a manufacturer or assembler of some highly complex product such as an automobile, human experience will play little or no part in reducing his burden, and he will be relying upon the inference drawn from circumstantial evidence. [[1921]](#footnote-1922)1920

The Kirkland court encouraged plaintiffs to name all possible defendants and stated:

The fact that the plaintiff may not be able to ascertain whether the manufacturer or some other party who handled the product before it reached the ultimate consumer is responsible is a good reason for naming all of them as parties defendant, Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953). Several courts have held that this practice should be adopted, and that the parties defendant should then determine between themselves where the final responsibility lies. . . . This procedure is entirely compatible with the methods of proof described above for products liability recovery, and which Defendant is responsible for an alleged defect may be determined in the trial court, as it frequently has been in Oklahoma actions. [[1922]](#footnote-1923)1921

The Kirkland court expressed a clear desire for its new **[\*856]** theory be kept completely separate from negligence actions and refused to apply comparative negligence:

The recent enactment of the comparative negligence statutes by the Oklahoma Legislature, 23 O.S.1973 section 11 and section 12, has no application to manufacturers' products liability, for its application is specifically limited to negligence actions. We have stated that manufacturers' products liability is not negligence, nor is it to be treated as a negligence action, but a new theory of recovery. Likewise, we have dealt elsewhere herein with pleas of contributory negligence and assumption of risk and their application to negligence actions only, and not to manufacturers' products liability. [[1923]](#footnote-1924)1922

However, the court approved both misuse and the limited type of assumption of risk described in comment n as defenses to strict liability. [[1924]](#footnote-1925)1923

The consumer expectation test as a measure of unreasonable danger was extended to warning defects in Smith v. United States Gypsum Co. [[1925]](#footnote-1926)1924 In Smith, the plaintiffs were injured when explosive hexane vapors from an adhesive called Wal-lite ignited. [[1926]](#footnote-1927)1925 The Wal-lite adhesive had extensive instructions and warnings about flammability. [[1927]](#footnote-1928)1926 The plaintiffs read these instructions and warnings and attempted to comply with them; [[1928]](#footnote-1929)1927 however, the product presented almost irreconcilable problems between its danger and use. If used in an enclosed area, the product would quickly release explosive vapors against which they could not be guarded. [[1929]](#footnote-1930)1928 Thus, the manufacturer's instructions stated that the product should only be used with "cross ventilation." [[1930]](#footnote-1931)1929 In addition, the instruc- **[\*857]** tions warned the user to eliminate ignition sources. [[1931]](#footnote-1932)1930 The plaintiffs attempted to eliminate all sources of ignition by turning off all the appliances and electrical devices. [[1932]](#footnote-1933)1931 However, since the area where the product was used had no windows or other sources of ventilation, the plaintiffs turned on a fan to provide air movement, [[1933]](#footnote-1934)1932 and an explosion occurred. [[1934]](#footnote-1935)1933 The court believed that the facts raised issues on design and warning defects: "There is no question the Wal-lite exploded, probably due to ignition of the vapors by the electric fan. But was the proximate cause an unreasonably dangerous product due to defective design and inadequate warnings, or was it plaintiff's ignoring the warnings on the can?" [[1935]](#footnote-1936)1934

In discussing the requirements for liability under a warning defect, the court stated:

If a product is potentially dangerous to consumers, a manufacturer is required to give directions or warnings on the container as to its use. If these warnings cover all foreseeable use and if the product is not unreasonably dangerous if the warnings and directions are followed, the product is not defective in this respect. If warnings are unclear or inadequate to apprise the consumer of the inherent or latent danger, the product may be defective; particularly where a manufacturer has reason to anticipate danger may result from the use of his product and the product fails to contain adequate warning of such danger, the product is sold in a defective condition. [[1936]](#footnote-1937)1935

The court then discussed the foreseeability requirement:

Foreseeability as applied to manufacturer's products liability is a narrow issue. A manufacturer must anticipate all foreseeable uses of his product. In order to escape being unreasonably dangerous, a potentially dangerous prod- **[\*858]** uct must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe. Foreseeability as used here is not to be confused with foreseeability involved in the concept of proximate cause under a negligence theory. [[1937]](#footnote-1938)1936

The Smith court upheld a verdict in favor of the plaintiffs based upon the inadequate warnings. [[1938]](#footnote-1939)1937 The facts in the Smith case provide a good illustration of how the design defect requirements now being suggested by the ALI become overly burdensome for the consumer. The ALI suggests that the plaintiff be required to prove the existence of a reasonable alternative design before a product can be considered defective in design. [[1939]](#footnote-1940)1938 If this requirement were to be applied to the facts of Smith, the consumer's action would likely have failed for the following reasons: (1) utility as an adhesive, (2) high risk because of extreme flammability, (3) warnings unlikely to cause the risk, and (4) no alternative design. [[1940]](#footnote-1941)1939 However, such conclusions are blocked by the ALI proposals because category or generic defects are forbidden. [[1941]](#footnote-1942)1940

The Supreme Court of Oklahoma extended "manufacturer's liability" to second collision actions in Lee v. Volkswagen of America. [[1942]](#footnote-1943)1941 Again, the court affirmed usage of the consumer expectation test:

"Second impact" cases present no unique problems in reference to the actual defect. Plaintiff has the same burden as in other products cases as to whether the product was in a defective condition that was unreasonably dangerous as defined by ordinary consumer expectations when it left the control of the manufacturer. [[1943]](#footnote-1944)1942

When the court examined whether the plaintiff had the burden of proving which injuries were attributable to the sec- **[\*859]** ond collision, it recognized a dilemma. [[1944]](#footnote-1945)1943 If the injuries were easily divisible between those caused by the first collision and those caused by the defect in the second collision, there were no real problems of proof. [[1945]](#footnote-1946)1944 However, if the injuries would be incapable of such apportionment, then, consequently, a real proof barrier to recovery arises. [[1946]](#footnote-1947)1945

The Lee court refused to follow the Third Circuit Court of Appeals' decision in Huddell v. Levin [[1947]](#footnote-1948)1946 because it raised almost impossible proof barriers for the plaintiff.

The Huddell court indicated that its test would require plaintiff to prove that the design was defective, the existence of a practical alternative design, what injuries would have resulted with the alternative design, and a method to evaluate the extent of the enhanced injury.

. . . .

. . . The standard represented by Huddell requires a precise, certain, almost mathematical, level of proof . . . .

We expressly reject the Huddell standard for several reasons. To require that exacting level of proof would make reasoning impossible. The goal of limiting a manufacturer's liability to a manageable burden can be accomplished without mandating an almost rigid level of proof. There are other standards that can be used without making insurers out of the manufacturers. There is no justifiable reason for placing this type of burden on one area of products liability and not on the other. [[1948]](#footnote-1949)1947

Instead, the Lee court applied a type of joint and several liability where the plaintiff need only prove that each collision was a contributing factor in producing the plaintiff's indivisible injury. [[1949]](#footnote-1950)1948 Once such proof was presented, it would be the defendant's burden to segregate the injuries. [[1950]](#footnote-1951)1949 **[\*860]**

The Supreme Court of Oklahoma has not been presented with the question of whether proof of alternative designs are absolute requirements under its manufacturer's liability action. However, the United States Court of Appeals for the Tenth Circuit addressed the issue in Karns v. Emersen Electric Co., [[1951]](#footnote-1952)1950 where the court, applying Oklahoma law, rejected an absolute requirement. [[1952]](#footnote-1953)1951 Interestingly, the Karns court was presented with a product called a brush cutter which had little, if any, alternative designs. [[1953]](#footnote-1954)1952 Thus, any absolute requirement of alternative design proofs, as proposed by the ALI, would have precluded liability in Karns. In Tansy v. Dacomed Corp., [[1954]](#footnote-1955)1953 the Supreme Court of Oklahoma extended section 402A comment k to include "medical devices, particularly those which are implanted." [[1955]](#footnote-1956)1954 In Tansy, the majority noted that under the Restatement (Second) version of comment k, the defendant has the burden of proving the elements of comment k because it is an affirmative defense. [[1956]](#footnote-1957)1955 Justice Opala's concurring opinion points out the proposed Restatement (Third) version of comment k is much narrower and places the burden of proof on the plaintiff. [[1957]](#footnote-1958)1956 **[\*861]**

2. Statutes

No statutes which affect design defects have been enacted in Oklahoma. Legislation has been passed which limits actions for blood products [[1958]](#footnote-1959)1957 and punitive damages. [[1959]](#footnote-1960)1958

3. Pattern Jury Instructions

Oklahoma Uniform Jury Instructions Nos. 12.2 [[1960]](#footnote-1961)1959 and 12.3 [[1961]](#footnote-1962)1960 accurately reflect the common law adoption of the consumer expectation test. [[1962]](#footnote-1963)1961

LL. Oregon

1. Common Law

Strict liability pursuant to section 402A was first adopted by the Supreme Court of Oregon in Heaton v. Ford Motor Co. [[1963]](#footnote-1964)1962 The facts presented in Heaton failed to reveal the exact nature of the alleged defect; however, the court said strict liability would apply to both design and manufacturing defects. [[1964]](#footnote-1965)1963 Under section 402A, the court adopted the consumer expectation test as a measure of liability. [[1965]](#footnote-1966)1964

In 1974, the Supreme Court of Oregon modified its consumer expectation test in Roach v. Kononen. [[1966]](#footnote-1967)1965 In Roach, the plaintiff asserted that there was a design defect in his car's hood; however, a jury found in favor of the defendant. [[1967]](#footnote-1968)1966 On appeal, the plaintiff urged the court to abandon the consumer expectation test asserting that, in design defect situations, **[\*862]** strict liability and negligence are essentially the same. [[1968]](#footnote-1969)1967 Thus, according to the plaintiff, traditional negligence concepts should be utilized for liability. [[1969]](#footnote-1970)1968 However, the Roach court refused to adopt negligence as the applicable standard. [[1970]](#footnote-1971)1969 Instead, the court chose to apply Dean Wade's seven-factor riskutility balancing test with its imputed-knowledge rule. [[1971]](#footnote-1972)1970 Commenting on the reasons for such a rule, the court stated:

However, be all this as it may, it is generally recognized that the basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article. As Professor Wade points out, a way of determining whether the condition of the article is of the requisite degree of dangerousness to be defective (unreasonably dangerous; greater degree of danger than a consumer has a right to expect; not duly safe) is to assume that the manufacturer knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, something should have been done about the danger before the product was sold. In other words, a greater burden is placed on the manufacturer than is the case in negligence because the law assumes he has knowledge of the article's dangerous propensity which he may not reasonably be expected to have, had he been charged with negligence. [[1972]](#footnote-1973)1971

Less than one month after the Roach case, the Supreme **[\*863]** Court of Oregon reaffirmed the use of Dean Wade's test in Phillips v. Kimwood Machine Co. [[1973]](#footnote-1974)1972 The Phillips court restated its rule for design defects as the following:

A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product. [[1974]](#footnote-1975)1973

The essence of strict liability under the Wade risk-utility test was the imputation of the knowledge of the danger or risk to the manufacturer. According to the Phillips court, the test was not different from strict liability's consumer expectation test, rather it was the same rule applied from a different viewpoint.

On the surface such a test would seem to be different than the test of 2 Restatement (Second) of Torts section 402A, Comment i, of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." This court has used this test in the past. These are not necessarily different standards, however. As stated in Welch v. Outboard Marine Corp., where the court affirmed an instruction containing both standards:

We see no necessary inconsistency between a selleroriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.

To elucidate this point further, we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a reasonable **[\*864]** consumer believes he is purchasing. That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers, and jurors customarily deal. [[1975]](#footnote-1976)1974

The Phillips court did not believe the imputed-knowledge rule would automatically impose liability merely because a manufacturer was deemed to know of the danger.

To some it may seem that absolute liability has been imposed upon the manufacturer since it might be argued that no manufacturer could reasonably put into the stream of commerce an article which he realized might result in injury to a user. This is not the case, however. The manner of injury may be so fortuitous and the chances of injury occurring so remote that it is reasonable to sell the product despite the danger. In design cases the utility of the article may be so great, and the change of design necessary to alleviate the danger in question may so impair such utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale. Again, the cost of the change necessary to alleviate the danger in design may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility. Such an article is not dangerously defective despite its having inflicted injury. [[1976]](#footnote-1977)1975

After adopting the risk-utility test with its accompanying imputed-knowledge rule, the Phillips court discussed how it **[\*865]** should be applied. [[1977]](#footnote-1978)1976 Referencing to strict liability as applied in abnormally dangerous activities and Rylands v. Fletcher, [[1978]](#footnote-1979)1977 the court stated:

It is important to point out, as indicated in the above quotation, that while the decision is made by the court whether an activity is abnormally dangerous and strict liability of the Rylands v. Fletcher type is to be applied, the determination of whether a product is dangerously defective and strict liability is to be applied has been treated as one primarily for the jury, similar to the manner in which negligence is determined. Therefore, the factors set forth by Wade and used in Roach v. Kononen, supra, are not the bases for instructions to the jury but are for the use of the court in determining whether a case has been made out which is submissible to the jury. If such a case has been made out, then it is submitted to the jury for its determination under instructions as to what constitutes a "dangerously defective" product, much in the same manner as negligence is submitted to the jury under the "reasonable man" rule. [[1979]](#footnote-1980)1978

The court set out, in a footnote, a jury instruction that would be appropriate after the trial court balanced the product's risks and utilities:

"The law imputes to a manufacturer supplier knowledge of the harmful character of his product whether he actually knows of it or not. He is presumed to know of the harmful characteristics of that which he makes [supplies]. Therefore, a product is dangerously defective if it is so harmful to persons [or property] that a reasonable prudent manufacturer supplier with this knowledge would not have placed it on the market." [[1980]](#footnote-1981)1979

The Phillips court also applied its imputed-knowledge rule to warning defects: **[\*866]**

In Anderson v. Klix Chemical, 256 Or. 199, 472 P.2d 806 (1970), we came to the conclusion that there was no difference between negligence and strict liability for a product that was unreasonably dangerous because of failure to warn of certain characteristics. We have now come to the conclusion that we were in error. The reason we believe we were in error parallels the rationale that was expressed in the previously quoted material from Roach v. Kononen, supra, where we discussed the difference between strict liability for misdesign and negligence. In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it. A way to determine the dangerousness of the article, as distinguished from the seller's culpability, is to assume the seller knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, he would have been negligent in selling it without a warning. [[1981]](#footnote-1982)1980

In Lynd v. Rockwell Manufacturing Co., [[1982]](#footnote-1983)1981 the court applied the imputed-knowledge/risk-utility test to a design defect case where the plaintiff failed to present expert testimony. [[1983]](#footnote-1984)1982 The court established distinct boundaries to the test under certain circumstances. [[1984]](#footnote-1985)1983

The Supreme Court of Oregon overturned a jury verdict in favor of the plaintiffs in Wilson v. Piper Aircraft Corp. [[1985]](#footnote-1986)1984 The Wilson court found the plaintiffs' proof of a plane crash insufficient since the suggested alternative designs lacked **[\*867]** practicability. [[1986]](#footnote-1987)1985 The plaintiff had alleged that the small airplane contained two design defects. [[1987]](#footnote-1988)1986 First, the engine was defective because it was susceptible to carburetor icing; thus, a fuel injected engine should have been employed. [[1988]](#footnote-1989)1987 Second, the plane seats had lapbelts which had broken in the crash. [[1989]](#footnote-1990)1988 The plaintiffs argued that crashworthy shoulder harnesses and seat belt brackets should have been provided. [[1990]](#footnote-1991)1989

In regard to the engine defect, there was evidence that the plane's engine had been approved by the Federal Aviation Administration (FAA) and was used in about eighty to ninety percent of all small airplanes. [[1991]](#footnote-1992)1990 The plaintiff presented no evidence of the cost, economy of operation, maintenance, performance, or safety aspects of the alternative engine as compared to the alleged defective engine other than icing. [[1992]](#footnote-1993)1991 The court, holding that the engine was not defective, stated:

Taking into account all of the evidence, including the FAA determination that this aircraft design included adequate protection against carburetor icing, we hold that plaintiffs did not produce sufficient evidence that a reasonably prudent manufacturer who was aware of the risks of carburetor icing would not have designed this model of aircraft with a carbureted engine, or that substitution of a fuel injected engine was practicable. On this ground alone, defendant is entitled to a new trial. [[1993]](#footnote-1994)1992

However, the Wilson court did not require the plaintiff to prove a practicable and reasonable alternative design in a strict liability case in all situations. In footnote five of the above quote, the court stated:

As pointed out above, the court's task is to weigh the factors bearing on the utility and the magnitude of the risk **[\*868]** and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. Our holding should not be interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury. There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable. [[1994]](#footnote-1995)1993

The Wilson court then cited the Passwaters v. General Motors Corp. [[1995]](#footnote-1996)1994 decision as an example of when proof of alternative design is unnecessary.

In some cases, because of the relatively uncomplicated nature of the product or the design feature in question, evidence of the dangerous nature of the design in question or of a safer alternative design may be sufficient to permit the court to consider this factor adequately. An extreme example is found in the facts of Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972). There a passenger on a motorcycle which was involved in a collision with an automobile was injured by purely ornamental blades on the automobile's hubcap. The evidence that the blades were ornamental only would suffice in such a case; the court and the jury could find from that fact alone that it would have been practicable to supply hubcaps of a **[\*869]** safer design. [[1996]](#footnote-1997)1995

Applying this reasoning to the case at hand, the Wilson court said that the plaintiffs' second allegation of defect in the seat restraints would not require proof of the practicability of the alternative design suggested.

Also by way of example, plaintiffs alleged in this case that the aircraft was not equipped with crashworthy shoulder harnesses and crashworthy seat belt brackets and attachments. There was evidence that workable shoulder harnesses and safer seat belt attachment designs were available when the airplane was manufactured. A court and jury could infer, on the basis of common knowledge, that the addition of shoulder harnesses and improved seat belt attachments would not significantly affect the over-all engineering of the airplane and would not be unduly expensive. (Defendant would, of course, be permitted to offer evidence to the contrary.) [[1997]](#footnote-1998)1996

Since the Wilson decision, both the Oregon Court of Appeals and the United States Court of Appeals for the Ninth Circuit have discussed the practicability of alternative designs. [[1998]](#footnote-1999)1997

In a recent decision, Ewen v. McLean Trucking Co., [[1999]](#footnote-2000)1998 the Supreme Court of Oregon interpreted a section of the Oregon Products Liability Act, which adopted section 402A and part of its comments, as controlling law. [[2000]](#footnote-2001)1999 The Ewen court's analysis of comment i raises doubt as to whether Oregon will return to the consumer expectation test or will continue to apply the common law rule under the risk-utility/imputedknowledge test. [[2001]](#footnote-2002)2000 **[\*870]**

2. Statutes

In 1977, the Oregon legislature at the urging of business groups, passed an anti-consumer Products Liability Act. [[2002]](#footnote-2003)2001 The Act affects several restrictions on consumer recovery which were unknown under Oregon's common law development. The Act set out an eight-year statute of repose, [[2003]](#footnote-2004)2002 a disputable presumption that products are not unreasonably dangerous, [[2004]](#footnote-2005)2003 a restrictive alteration or modification defense, [[2005]](#footnote-2006)2004 and a limitation on punitive damages. [[2006]](#footnote-2007)2005 One of the more interesting sections of the statute enacted in 1979 [[2007]](#footnote-2008)2006 basically restates the black-letter language of section 402A, then states that it was the legislature's intent that the rule should be construed in accordance with comments a to m of section 402A. [[2008]](#footnote-2009)2007 Thus, the basic effect of this section may have returned Oregon to the consumer expectation test as indicated in Ewen v. McLean Trucking Co. [[2009]](#footnote-2010)2008 In 1995 the legislature further limited consumer recovery in joint and several liability [[2010]](#footnote-2011)2009 and punitive damages. [[2011]](#footnote-2012)2010 Prior legislation limited recovery in blood products. [[2012]](#footnote-2013)2011

3. Pattern Jury Instructions

Oregon's jury instructions for defective condition [[2013]](#footnote-2014)2012 and **[\*871]** unreasonably dangerous [[2014]](#footnote-2015)2013 reflect both the common law and the new products liability act. [[2015]](#footnote-2016)2014

MM. Pennsylvania

1. Common Law

The Supreme Court of Pennsylvania first adopted strict liability under section 402A in Webb v. Zern. [[2016]](#footnote-2017)2015 Eight years later in Salvador v. Atlantic Steel Boiler Co., [[2017]](#footnote-2018)2016 the court eliminated horizontal privity as a barrier to recovery under a warranty version of strict liability. [[2018]](#footnote-2019)2017 Overruling prior precedent which held that the privity barrier prevented a manufacturer from becoming a guarantor of his product, the Salvador court stated:

Today, as the Superior Court correctly recognized, a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect. He may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process. Neither may the manufacturer defeat the claim by arguing that the purchaser has no contractual relation to him. Why then should the mere fact that the injured party is not himself the purchaser deny recovery? [[2019]](#footnote-2020)2018 **[\*872]**

One year after Salvador, the court decided Berkebile v. Brantly Helicopter Corp. [[2020]](#footnote-2021)2019 which involved the design [[2021]](#footnote-2022)2020 of a small, two person helicopter marketed for both "beginners" and professional pilots. [[2022]](#footnote-2023)2021 The Berkebile court eliminated both foreseeability and the unreasonably dangerous requirement in strict liability in an effort to prevent injection of negligence principles. In its analysis of the issues, the court stressed that plaintiff should not be burdened with proving negligence:

The law of products liability developed in response to changing societal concerns over the relationship between the consumer and the seller of a product. The increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his products. [[2023]](#footnote-2024)2022

The court then repeated the guarantor language in Salvador:

We therefore held in Webb v. Zern, supra, that the seller of a product would be responsible for injury caused by his defective product even if he had exercised all possible care in its design, manufacture and distribution. We emphasized the principle of liability without fault most recently by stating that the seller is "effectively the guarantor of his product's safety." in Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 32, 319 A.2d 903, 907 (1974).

"Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid **[\*873]** responsibility for damages caused by the defect." [[2024]](#footnote-2025)2023

The court again stressed that a plaintiff should not be burdened with proving negligence:

The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product." Restatement (Second) of Torts section 402A(2)(a). As we declared in Salvador, supra, 457 Pa. at 32, 319 A.2d at 907, the seller "may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process." What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory. In attempting to articulate the definition of "defective condition" and to define the issue of proximate cause, the trial court here unnecessarily and improperly injected negligence principles into this strict liability case. [[2025]](#footnote-2026)2024

Deviating from section 402A, the Berkebile court rejected the unreasonably dangerous requirement in the consumer expectation test under comment i.

Section 402A recognizes liability without fault and properly limits such liability to defective products. The seller of a product is not responsible for harm caused by such inherently dangerous products as whiskey or knives that despite perfection in manufacture, design or distribution, can cause injury. See Restatement (Second) of Torts, section 402A, comment i. At first glance, however, it would appear that the section does impose a contradictory burden of proof in that the defect also be "unreasonably dangerous." An examination of comment i indicates that the purpose of the drafters of the clause was to differentiate those products which are by their very nature unsafe but not defective from those which can truly be called defective. The late Dean Prosser, the reporter of the Restatement **[\*874]** (Second) of Torts, has suggested that the only purpose for the clause was to foreclose any argument that the seller of a product with inherent possibilities for harm would become "automatically responsible for all the harm that such things do in the world." Prosser, Strict Liability to the Consumer in California, 18 Hast.L.J. 9, 23 (1926). [[2026]](#footnote-2027)2025

The court also rejected Dean Wade's imputed-knowledge test: "Commentators and courts, attempting to define 'defective condition' have suggested tests based upon the negligence-oriented 'reasonable man' that have further diluted the strict liability concept. The purpose of the 'unreasonably dangerous' clause would appear to be best served by its inclusion in the issue of proximate cause." [[2027]](#footnote-2028)2026

In its holding, the Berkebile court stated:

We hold today that the "reasonable man" standard in any form has no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's action and knowledge, even if merely to define "defective condition" undermines the policy considerations that have led us to hold in Salvador that the manufacturer is effectively the guarante sic of his product's safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him **[\*875]** the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on "reasonableness." [[2028]](#footnote-2029)2027

The court made it clear that it would not accept any aspect of negligence, including foreseeability, to dilute strict liability.

The trial court further confused the standards of strict liability in its charge on proximate cause. The court charged that, in order for it to be said that a defect caused plaintiff's injury, "such a consequence, under all the surrounding circumstances of the case, must have been foreseeable by the seller." To require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care. Restatement (Second) of Torts, section 402A(2)(a). Foreseeability is not a test of proximate cause; it is a test of negligence. Hoover v. Sackett, 221 Pa.Super.447, 451, 292 A.2d 461, 463 (1972). Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or defective product is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural sequence of events. [[2029]](#footnote-2030)2028

Finally, the court relegated abnormal use or misuse to evidence rebutting the elements of defect or proximate cause rather than recognizing it as a separate defense. [[2030]](#footnote-2031)2029

The Pennsylvania Supreme Court's formation of strict liability continued in Azzarello v. Black Brothers Co. [[2031]](#footnote-2032)2030 The issue before the court was whether a jury instruction should include the unreasonably dangerous language of section 402A. The Azzarello court held such language was inappropriate for jury determination. [[2032]](#footnote-2033)2031 The court's reasoning for rejecting the **[\*876]** language provides a great deal of insight into both the nature of strict liability and its application under Pennsylvania law. The court begins with a discussion of the key phrase in section 402A strict liability--"defective condition, unreasonably dangerous." [[2033]](#footnote-2034)2032

While this expansion of the supplier's responsibility for injuries resulting from defects in his product has placed the supplier in the role of a guarantor of his product's safety, it was not intended to make him an insurer of all injuries caused by the product. It is this distinction that rests at the core of the problem raised in this appeal. Although the expansion of the supplier's liability has been developed through a breach of warranty analysis as well as that of tort, the Restatement elected strict liability in tort as an explanation for imposing this liability. We must focus upon two requirements set forth in Section 402A for liability (physical injury) that the product be "in defective condition" and that it be "unreasonably dangerous." It is the propriety of instructing the jury using the term of "unreasonably dangerous" which forms the basis of appellee's objection to the jury instructions given below. [[2034]](#footnote-2035)2033

According to the court, in its effort to prevent making manufacturer's insurers, the Restatement used negligence language which can mislead a jury.

In an effort to assure that a supplier of chattels would not become an insurer, the authors of the Restatement described the characteristic which would justify the imposition of liability in terms of a "defect." However, this word is not limited to its usual meaning i.e., a fault, flaw or blemish in its manufacture or fabrication. Rather, the critical factor under this formulation is whether the product is "unreasonably dangerous." Under the Restatement approach a product may be deemed to be "defective" even though it comports in all respects to its intended design. One difficulty arises from the fact that the term, "unrea- **[\*877]** sonably dangerous" tends to suggest considerations which are usually identified with the law of negligence.

. . . .

It must be understood that the words, "unreasonably dangerous" have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier. It is for this reason that a mere change in terminology does not supply the answer to the basic question as to what instructions should be given to the jury. The answer to the proceeding question rests upon the more fundamental question whether the determination as to the risk of loss is a decision to be made by the finder of fact or by the court. While a lay finder of fact is obviously competent in resolving a dispute as to the condition of a product, an entirely different question is presented where a decision as to whether that condition justifies placing liability upon the supplier must be made. [[2035]](#footnote-2036)2034

The court recognized that the terms "unreasonably dangerous" and "defective" were conclusions or labels for determining if strict liability will apply. In other words, it is the function of a court, based upon policy, to make a determination whether strict liability applies, and it is the function of the jury to decide whether the facts support such conclusion. The Restatement language was formulated to guide the courts, not juries, in determining whether strict liability applies in a given case. Thus, the separation of a court's function and a jury's function in strict liability is similar to a negligence case. In a negligence case, the jury is not asked to weigh specific risk and utility factors; rather, the court performs the balancing of these factors to determine whether the case should go to the jury. The court explained:

Furthermore, we must not lose sight of the fact that regardless of the utility of the Restatement formulation in predicting responsibility, it is primarily designed to provide guidance for the bench and bar, and not to illuminate the issues for laymen. As Dean Wade aptly observed: **[\*878]**

The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. This analysis is most helpful and can be used with profit by trial and appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead, they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances. Occasionally, when one of the factors has especial significance, it may be appropriate for the judge to make reference to it in suitable language. [[2036]](#footnote-2037)2035

The court then set forth guidelines for strict liability cases:

Thus the mere fact that we have approved Section 402A, and even if we agree that the phrase "unreasonably dangerous" serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration. Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy. Restated, the phrases "defective condition" and "unreasonably dangerous" as used in the Restatement formulation are terms of art invoked when strict liability is appropriate. It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution. A standard suggesting the existence of a "defect" if the arti- **[\*879]** cle is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions. [[2037]](#footnote-2038)2036

Thus, a trial court must first determine whether a case is one which is appropriate for application of strict liability. In making this determination, the trial court could employ a wide range of factors, including those set forth in section 402A, social policy, and risk-utility.

The Azzarello court's rejection of using the Restatement's negligence language was based upon its belief that manufacturers were "guarantors" of safety.

For the term guarantor to have any meaning in this context the supplier must at least provide a product which is designed to make it safe for the intended use. Under this standard, in this type of a case, the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use. It is clear that the term "unreasonably dangerous" has no place in the instructions to a jury as to the question of "defect" in this type of case. We therefore agree with the court en banc that the use of the term "unreasonably dangerous" in the charge was misleading and that the appellee was entitled to a new trial. [[2038]](#footnote-2039)2037

Within the above quote, the court footnoted the appropriate language for a jury instruction:

We believe than sic an adequate charge to the jury, one which expresses clearly and concisely the concept of "defect," while avoiding interjection of the "reasonable man" negligence terminology, is the jury instruction directed to the definition of a "defect," which was fashioned in large part by the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Civil Instruction Subcommittee:

The supplier of a product is the guarantor of its safety. The product must, therefore, be provided with **[\*880]** every element necessary to make it safe for [its intended] use, and without any condition that makes it unsafe for [its intended] use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for [its intended] use or contained any condition that made it unsafe for [its intended] use, then the product was defective, and the defendant is liable for all harm caused by such defect. [[2039]](#footnote-2040)2038

The Azzarello decision remains the law in Pennsylvania. [[2040]](#footnote-2041)2039 An excellent article by Ellen Wertheimer [[2041]](#footnote-2042)2040 sets forth Pennsylvania's practice under the Azzarello decision. Professor Wertheimer describes the trial court's decisionmaking process as generally employing a risk-utility analysis before sending the issue to the jury. [[2042]](#footnote-2043)2041 Under this practice, Pennsylvania has been able to retain a true form of strict liability and provide manufacturers with equal, if not greater, protection than other jurisdictions which apply less than true strict liability. [[2043]](#footnote-2044)2042 Professor Wertheimer's analysis of Pennsylvania practice rejects much of the criticism of the Azzarello decision by commentators who are significantly involved in the ALI project for a new Restatement. [[2044]](#footnote-2045)2043

2. Statutes

Pennsylvania has not adopted comprehensive products liability statutes; however, it has placed restriction on actions for blood products. [[2045]](#footnote-2046)2044 **[\*881]**

3. Pattern Jury Instructions

Pennsylvania Standard Jury Instructions [[2046]](#footnote-2047)2045 follow the common law, including Azzarello.

NN. Rhode Island

1. Common Law

The Supreme Court of Rhode Island first adopted strict liability in Ritter v. Narragansett Electric Co., [[2047]](#footnote-2048)2046 which involved an alleged design defect in a stove. The Ritter court employed section 402A's consumer expectation test as a measure of liability. [[2048]](#footnote-2049)2047 Forecasting some dispute over the unreasonably dangerous requirement of the consumer expectation test, the court stated:

Assuming that the meaning to be attributed to the phrase "unreasonably dangerous" may generate considerable dispute, we direct attention to an opinion discussing the meaning of the term as it is set out in section 402A. In Drummond v. General Motors Corp., No. 771098, filed July 29, 1966, the Superior Court of California took the view that the phrase "unreasonably dangerous" is to be viewed as meaning that the defect in the product establishes a strong likelihood of injury to the user or consumer thereof. The court said: "The emphasis upon the likelihood of injury takes into account the consumer's or user's knowledge of danger. This approach seeks to protect the consumer or user who is unaware of the danger involved in the use of a product in a way it was intended to be used or in using the product in a normal manner. This approach does not protect the consumer who uses the product in a different way than that intended nor does it protect the consumer or user when he uses a product in a way in which he knows requires certain precautions be **[\*882]** taken to make the product safe in such a use." [[2049]](#footnote-2050)2048

Part of the court's reasoning for adopting strict liability was the elimination of the consumer's burden of proof in negligence. [[2050]](#footnote-2051)2049 The Supreme Court of Rhode Island applied its consumer-expectation test in Jackson v. Corning Glass Works [[2051]](#footnote-2052)2050 and Castrignano v. E.R. Squibb & Sons, Inc. [[2052]](#footnote-2053)2051 In Castrignano, the court rejected blanket application of comment k to all prescription drugs and limited its application to a case-by-case basis. [[2053]](#footnote-2054)2052 In its discussion of comment k, the court provided some insight on its general, consumer-expectation test.

To determine whether the product would be deemed "defective" under section 402A, this court embraced the consumer-expectation test. This approach seeks to protect the consumer or user who was unaware of the danger involved in using a product in a way that it was intended to be used. Furthermore, we defined the term "unreasonably dangerous" to mean that "the defect in the product establishes a strong likelihood of injury to the user or consumer thereof." These elements are crucial for the plaintiff to recover from a manufacturer under section 402A, regardless of the manufacturer's fault. [[2054]](#footnote-2055)2053

The court set forth guidelines for determining when comment k should apply:

With an allegation of defective design, it must be determined whether the drug is exempt from no-fault liability pursuant to comment k. In order to qualify for a comment-k exemption, the apparent benefits of the drug must exceed the apparent risks, given the scientific knowledge available when the drug was marketed. If the benefits outweigh the risks, then recovery for design-defect liability is precluded. If, however, the apparent risks exceed the **[\*883]** apparent benefits, then the product is not exempt from design-defect liability and will be subject to the traditional design-defect analysis set forth in section 402A.

Establishing design-defect liability under section 402A requires only that the product be defective and unreasonably dangerous. Traditional strict-liability analysis uses the "consumer expectation" test to determine whether the defective condition of the product renders it unreasonably dangerous. The test is harsher than the risk-benefit standard that qualifies a drug for the comment-k exemption. Therefore, if the facts do not support a comment-k exemption, the traditional analysis, which focuses on the product's defects rather than the reasonableness of the manufacturer's decision to distribute the drug, determines liability. [[2055]](#footnote-2056)2054

The Castrignano court then explained the functions of the court and jury relating to comment k:

This court, however, will take a different approach. We recognize that some drugs, like the rabies vaccine, definitely deserve the comment-k exemption. If a trial judge concludes that reasonable minds could not differ in deciding that a drug's benefits exceed its risks, then as a matter of law the trial judge can extend comment k's protection to that drug. If, however, the judge finds that an application of the risk-benefit analysis allows reasonable minds to differ in their conclusions, then the trial judge should submit the issue to the trier of fact.

In these cases the plaintiff will need only to establish that the drug was defective and unreasonably dangerous. The defendant must establish comment k as an affirmative defense. This approach burdens the defendant with proving that the benefits outweigh the risks at the time the product was prescribed for the plaintiff. The instant defendant argues that this approach is exceedingly burdensome since traditional product-liability law puts the burden of proof on plaintiffs. We are not convinced by defendant's argument. Public policy justifies shifting the burden of proof to a defendant because the manufacturer may be exempt from strict liability and because that defendant will invariably be **[\*884]** expert in the field and have superior knowledge. [[2056]](#footnote-2057)2055

The Castrignano court also decided to treat strict liability warning defects differently from other types of defects, holding that a negligence standard should apply to warnings. [[2057]](#footnote-2058)2056

2. Statutes

The Rhode Island legislature passed products liability statutes that limited consumer recovery for product alterations, [[2058]](#footnote-2059)2057 ten-year statute of repose, [[2059]](#footnote-2060)2058 and blood products. [[2060]](#footnote-2061)2059 However, the Supreme Court of Rhode Island found the statute of repose unconstitutional in Kennedy v. Cumberland Engineering Co. [[2061]](#footnote-2062)2060

3. Pattern Jury Instructions

Rhode Island has no pattern jury instructions on products liability.

OO. South Carolina

1. Common Law

The Supreme Court of South Carolina has never adopted strict liability as part of its common law. [[2062]](#footnote-2063)2061

2. Statutes

In 1974, the South Carolina legislature passed a products liability act which adopted, almost verbatim, section 402A and its comments. [[2063]](#footnote-2064)2062 The Supreme Court of South Carolina ap- **[\*885]** pears to have interpreted the Act as using the consumer expectation test as a measure of liability for design defects. In Marchant v. Mitchell Distributing Co., [[2064]](#footnote-2065)2063 the plaintiff alleged that a crane was defectively designed because it failed to include a safety device. [[2065]](#footnote-2066)2064 The court, however, affirmed a summary judgment in favor of the defendant. The Supreme Court of South Carolina made its approach to strict liability under the Act in the following statement:

Marchant argues that his showing supports the inference that the crane, absent the optional safety device, was a defective product unreasonably dangerous. We think, however, that the fact the crane was without the optional safety device, does not tend to prove that it was defective. Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous. [[2066]](#footnote-2067)2065

The court then adopted the following rule, first announced by the Supreme Court of New Mexico:

"We are of the opinion that a failure to incorporate into a product a safety feature or device may constitute a defective condition of the product. Obviously, the test of whether or not such a failure constitutes a defect is whether the product, absent such feature or device, is unrea- **[\*886]** sonably dangerous to the user or consumer or to his property." [[2067]](#footnote-2068)2066

Although the Marchant court believed that unreasonable danger controlled design defect liability, it did not define the term. Instead, the court seemed to affirm summary judgment on the basis of the plaintiff's improper use of the crane. [[2068]](#footnote-2069)2067

In Young v. Tide Craft, Inc., [[2069]](#footnote-2070)2068 the plaintiff claimed defective design of a bass boat for lack of a "kill switch." The plaintiff's husband was killed after being thrown overboard. [[2070]](#footnote-2071)2069 The plaintiff contended a "kill switch" would have prevented the death by stopping the motor. [[2071]](#footnote-2072)2070 However, the Young court found no design defect based upon the absence of the safety device, [[2072]](#footnote-2073)2071 citing its prior rule set forth in Skyhook v. Jasper. [[2073]](#footnote-2074)2072 Explaining its definition of "unreasonably dangerous," the court stated:

The question that presents itself is whether the absence of the kill switch per se rendered the boat "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics," Restatement (Second) of Torts, section 402A, com. i (1965). . . . It is common knowledge that a normal risk of boating is that of being thrown overboard. While the test set out above is an objective one and knowledge common to the community must be attributed to Young, there can, nevertheless, be no question of his awareness of this risk. His wife testified that Young had fished almost every weekend for the past ten years. He had often used boats and his wife felt he was relatively familiar with them. Young being aware of the normal risks of boating, the danger posed by the obvious lack of a kill switch could **[\*887]** hardly be beyond his contemplation. Accordingly, the lack of a kill switch does not constitute a defect within the meaning of the strict liability in tort statute. [[2074]](#footnote-2075)2073

The consumer expectation test as applied by the court bars recovery whenever product dangers are generally known by consumers. In Claytor v. General Motors Corp., [[2075]](#footnote-2076)2074 the court repeated its opinion that a defect is not measured by mere proof that products may be made safer. [[2076]](#footnote-2077)2075 However, on this occasion, the court seemed to drift away from its consumer expectation test:

Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed "unreasonably dangerous." In the final analysis, we have another of the law's balancing acts and numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger. [[2077]](#footnote-2078)2076

The plaintiff was denied recovery in the design defect case; however, the Claytor court seemed to base its decision, at least to some extent, on the acts of a third party in creating the defect. [[2078]](#footnote-2079)2077 The "balancing" language used by the Claytor court has been interpreted by one federal court in Reed v. Tiffin Motor Homes [[2079]](#footnote-2080)2078 to mean that a form of risk-utility balancing is included as part of the consumer expectation **[\*888]** test. [[2080]](#footnote-2081)2079 On this basis, the Reed court included state-of-the-art as an element of deciding design defects. [[2081]](#footnote-2082)2080

In Schall v. Sturm, Ruger Co., [[2082]](#footnote-2083)2081 the plaintiff was injured after enactment of the Products Liability Act by a product placed into the stream of commerce before the Act took effect. [[2083]](#footnote-2084)2082 The Schall court denied liability, holding no action can exist for products placed on the market prior to the Act's inception date. [[2084]](#footnote-2085)2083

In Barnwell v. Barber-Colman Co., [[2085]](#footnote-2086)2084 the court held punitive damages cannot be recovered in an action based solely on strict liability. In Fleming v. Borden, Inc., [[2086]](#footnote-2087)2085 the Supreme Court of South Carolina explained the meaning of "substantial change" under its statutory version of strict liability. [[2087]](#footnote-2088)2086 Following the generally recognized interpretation of the term, the Fleming court held that any product alteration which is reasonably foreseeable will not bar liability. [[2088]](#footnote-2089)2087

3. Pattern Jury Instructions

There are no applicable pattern instructions in South Carolina. **[\*889]**

PP. South Dakota

1. Common Law

The Supreme Court of South Dakota adopted section 402A in Engberg v. Ford Motor Co. [[2089]](#footnote-2090)2088 Engberg involved the "second collision" theory based upon a defective design of seatbelts. [[2090]](#footnote-2091)2089 Upholding a verdict in the plaintiff's favor, the Engberg court set forth the following standard:

Before there could be a recovery under any of the three theories of products liability, the plaintiff had the burden of proving that the product was defective at a time when the defendant had possession, control, or responsibility for its condition. A product is deemed defective when it is not reasonably fit for the purpose for which it was intended to be used. [[2091]](#footnote-2092)2090

The Supreme Court of South Dakota restated its Engberg intended-purpose rule in Shaffer v. Honeywell, Inc. [[2092]](#footnote-2093)2091 The plaintiff used circumstantial evidence to establish a defect [[2093]](#footnote-2094)2092 in a home furnace safety valve and received a favorable verdict. [[2094]](#footnote-2095)2093 The Shaffer court affirmed the verdict stating that "a product is defective when it fails to perform reasonably and safely the function for which it was intended. No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect." [[2095]](#footnote-2096)2094

In rejecting contributory negligence as a defense to strict liability in Smith v. Smith, [[2096]](#footnote-2097)2095 the court discussed the policy behind strict liability: **[\*890]**

We cannot determine whether justice requires or permits a defense of contributory negligence without looking at the purpose upon which strict liability is founded. All courts that have considered the question find that purpose to be as articulated in Engberg: "to protect the public and insure that damages resulting from defective products are borne by those who market the product." Strict liability is an abandonment of the fault concept in product liability cases. No longer are damages to be borne by one who is culpable; rather they are borne by one who markets the defective product. The question of whether the manufacturer or seller is negligent is meaningless under such a concept; liability is imposed irrespective of his negligence or freedom from it. Even though the manufacturer or seller is able to prove beyond all doubt that the defect was not the result of his negligence, it would avail him nothing. We believe it is inconsistent to hold that the user's negligence is material when the seller's is not.

In our highly productive society there is an ever increasing number of persons injured by defective products. More frequently, the product is manufactured hundreds or thousands of miles away. The difficulties and expense of proof plus the plethora of injuries due to defective products have shown that the traditional concept of negligence and contributory negligence is no longer a viable manner of allocating responsibility for the increasing volume of damages resulting from defective products. We hold that the plaintiff's or the defendant's negligence is irrelevant and contributory negligence is not a defense in strict liability. [[2097]](#footnote-2098)2096

The court confirmed its policy decision that the plaintiff need not be burdened with proving negligence in Jahnig v. Coisman. [[2098]](#footnote-2099)2097 There, the court extended strict liability to warning cases and found jury instructions based upon negligence inappropriate.

Strict liability is unique because it relieves the plain- **[\*891]** tiff of the burden of proving negligence. Engberg v. Ford Motor Co., supra. We concluded, however, in Smith v. Smith, supra, that the concept is not a negligence action with the elements of proof changed, but is a wholly new and different tort action which is substantive rather than procedural in nature. While we can assume that the court's instructions on the duty to warn and proximate cause as elements of negligence would also reach the issue of strict liability, we cannot agree that appellant was not prejudiced when the requested instruction was refused. Instruction 20 is expressly tied to negligence. Other instructions defined negligence and made it an issue which the plaintiff had the burden to prove by a preponderance of the evidence against the defendant Coleman. The elements of strict liability to be proved as adapted to the facts in this case were not defined or expressed in the instructions. By refusing to instruct on strict liability, the court excluded a separate tort action which could have supported a recovery absent a finding of negligence. Considering the instructions a whole, it is possible the jury concluded that plaintiff carried a burden of proof of which she was relieved under the strict liability doctrine. Consequently, the prejudicial effect of the refusal was not neutralized by the instructions which were given. [[2099]](#footnote-2100)2098

The assessment of liability based upon the open and obvious danger rule was rejected in Berg v. Sukup Manufacturing Co. [[2100]](#footnote-2101)2099 In Berg, the defendant argued that the defenses of contributory negligence and assumption of the risk were established as a matter of law whenever the danger in a product was open and obvious. [[2101]](#footnote-2102)2100 The Berg court rejected the defendant's contentions, stating that the open and obvious danger of a product was merely a factor to consider. [[2102]](#footnote-2103)2101

The South Dakota Supreme Court continued its development of strict liability in Zacher v. Budd Co., [[2103]](#footnote-2104)2102 where it **[\*892]** held that any foreseeable alterations or modifications would not constitute a defense to strict liability [[2104]](#footnote-2105)2103 and that compliance with industry standards would not preclude a negligence action. [[2105]](#footnote-2106)2104

The common law development of strict liability in South Dakota appears to have reached its present day form in Peterson v. Safway Steel Scaffolds Co., [[2106]](#footnote-2107)2105 where the court adopted an imputed-knowledge rule. The sole theory discussed in Peterson was strict liability. [[2107]](#footnote-2108)2106 Reviewing the history of its common law development the court stated:

In strict liability the plaintiff need not prove scienter of the defendant, i.e., that defendant knew or should have known of the harmful character of the product without a warning. Liability arises from selling any product in a defective condition unreasonably dangerous to the user or consumer. It is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability.

"In a products liability action based on negligence, the proof must show that the manufacturer or seller failed to exercise reasonable care to inform those expected to use the product of its condition or the facts which make it likely to be dangerous." "Strict liability in products liability cases, on the otherhand sic, relieves the plaintiff of the burden of proving negligence by the manufacturer." [[2108]](#footnote-2109)2107

The imputed-knowledge or imputed-scienter rule differentiated strict liability from negligence, and, according to the Peterson court, the rule would apply in warning cases.

The issue under strict liability is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the **[\*893]** reasonableness of the failure to warn judged by negligence standards. Hamilton v. Hardy, 37 Colo.App. 375, 549 P.2d 1099 (1976). "For purposes of the strict tort claims, but not for purposes of the negligence claim, knowledge of the potential risk is imputed to the manufacturer. The manufacturer cannot defend, as he could in a negligence case, on grounds that, at the time of production he neither knew nor could have known of the risk." [[2109]](#footnote-2110)2108

There was little doubt that imputing knowledge of product danger to the manufacturer was the rule to be applied to all types of defects, and its application was based, at least in part, on relieving the consumer from the burden of proving such knowledge.

Whether a manufacturer knew or should have known of a particular risk involves technical issues which do not easily admit to evidentiary proof and which lie beyond the comprehension of most jurors. By placing the risk of ignorance upon the manufacturer, the rule advances the policy of enterprise liability underlying strict tort liability.

It provides the manufacturer with an incentive to conduct the research necessary to provide safer design and warnings, matters uniquely with in sic his control. Through insurance and increased product prices, this approach shifts the cost of unknowable and unpreventable risks from the injured party to the consuming public. On the other hand, in that risk-utility-cost considerations remain relevant for the manufacturers ultimate liability, the rule accords with the sentiment against insurer-like liability for manufacturers. Finally, the distinction overcomes the anomaly that, as applied without regard to the distinction, section 402A adds little or nothing to the manufacturer's negligence liability in the most **[\*894]** common products cases. [[2110]](#footnote-2111)2109

Thus, the Supreme Court of South Dakota appears to have adopted a risk-utility analysis which imputes knowledge of a product's danger to the manufacturer. However, a different rule applied when misuse is introduced as an issue in the case:

Hi-Lo argues that plaintiff misused its product and therefore it should not be strictly liable. Misuse may involve using a product for an unintended function or using the product for its intended purpose but in an improper manner. Simply because the product is misused does not necessarily bar a cause of action based on strict liability. "'One who manufactures or sells a product has a duty not only to warn of dangers inherent in a product's intended use but also to warn of dangers involved in a use which can be reasonably anticipated.'" This duty to warn applies in cases based on negligence and strict liability in tort. However, a different test is applied under strict liability when the defendant manufacturer attempts to defend on the basis of a misuse of his product. Instead of imputing knowledge of all potential misuses of the product, when a misuse occurs it becomes a question of whether there was "reason to anticipate" or if it was "foreseeable." "Where a manufacturer or seller has reason to anticipate that danger may result from a particular use of his product, and he fails to give adequate warnings of such a danger, the product sold without such warning is in a defective condition within the strict liability doctrine." "A manufacturer may be held liable where the misuse by the customer was reasonably foreseeable . . . . Whether the use or misuse was reasonably foreseeable is ultimately a jury question."

The issues of "unreasonably dangerous" under Section 402A and "foreseeable misuse" are an introduction of negligence concepts to strict liability theory. However, a manufacturer or seller is not an insurer, and so there is a standard by which the value in a product is compared with the level of dangerousness it may possess. There is also a **[\*895]** standard to determine what types of misuse the consumer public would find to be foreseeable. These issues of reasonableness and foreseeability in strict liability are usually jury issues. [[2111]](#footnote-2112)2110

Thus, the court appears to impute knowledge of a product "danger" but not knowledge of the "use" whenever a misuse assertion is made.

2. Statutes

The South Dakota legislature adopted several statutes limiting consumer recovery. None of the statutes, however, directly affect the common law development of design defect tests. The statutes did establish a six-year statute of repose, [[2112]](#footnote-2113)2111 immunity for sellers other than manufacturers, [[2113]](#footnote-2114)2112 immunity when a product is altered or modified, [[2114]](#footnote-2115)2113 and the state-of-the-art defense in product liability actions. [[2115]](#footnote-2116)2114 The statute of repose was held unconstitutional in Daugaard v. Baltic Coop. Building Supply Ass'n. [[2116]](#footnote-2117)2115 The statute which provided limitations on non-manufacturers was interpreted by the Supreme Court of South Dakota in the Peterson case to mean that knowledge of the danger is not imputed to non-manufacturers. The court stated:

We interpret SDCL 20-9-9 that a seller may be strictly liable, but only if he knew or through "ordinary care" should have known of the defective condition of the product. In essence SDCL 20-9-9 says there may be strict liability, but as a matter of proof, knowledge of the defective condition will not be imputed to a nonmanufacturing middleman as would otherwise be the case under strict liability. [[2117]](#footnote-2118)2116 **[\*896]**

Non-manufacturers, therefore, may only be held liable for negligence. As the statute states, they are provided with immunity from strict liability.

Section 20-9-10 provides immunity for product alterations and modifications. The Peterson court interpreted section 20-910 as follows:

The statute removes a manufacturer, assembler or seller from liability for defects where there is "an alteration or modification of such product." . . . The statute covers situations where a consumer makes modifications of a product which defeat the safety which is engineered into that product. A consumer creates manufacturer immunity under SDCL 20-9-10 by changing the product from its original form, not by using it improperly. [[2118]](#footnote-2119)2117

Under Peterson, misuse includes the way a product is used, product alterations, modifications, or changes that involve safety. [[2119]](#footnote-2120)2118 That holding implies that where alteration does not affect product safety or is not the cause of plaintiff's injury, such alteration or modification would not bar recovery.

At present, South Dakota statutes set limitations for alterations or modifications, [[2120]](#footnote-2121)2119 state-of-the-art, [[2121]](#footnote-2122)2120 joint and several liability, [[2122]](#footnote-2123)2121 and punitive damages. [[2123]](#footnote-2124)2122

3. Pattern Jury Instructions

As of the date of this writing, South Dakota's pattern jury instructions do not apply the Peterson imputed scienter riskutility rule for defects. Instead, the pattern instructions apply the intended purpose rule which pre-dates Peterson. [[2124]](#footnote-2125)2123 As **[\*897]** South Dakota updates its instructions, the Peterson decision will undoubtedly be reflected.

QQ. Tennessee

1. Common Law

Tennessee first adopted section 402A in Olney v. Beaman Bottling Co., [[2125]](#footnote-2126)2124 although the Supreme Court of Tennessee had "foreshadowed" its adoption in a prior decision. [[2126]](#footnote-2127)2125 The court extended section 402A to second collision cases in Ellithorpe v. Ford Motor Co. [[2127]](#footnote-2128)2126 In Browder v. Pettigrew, [[2128]](#footnote-2129)2127 the court allowed circumstantial evidence as one form of proof which could sustain a design defect. [[2129]](#footnote-2130)2128 The Browder court recognized that proof of the defendant's knowledge of the product's condition was the basic difference between negligence and strict liability.

We agree with counsel that in a products liability action in which recovery is sought under the theory of negligence, the plaintiff must establish the existence of a defect in the product just as he does in an action where recovery is sought under the strict liability theory or for breach of warranty, either express or implied. The only significant difference is that under the negligence theory the plaintiff has the additional burden of proving that the defective condition of the product was the result of negligence in the manufacturing process or that the manufacturer or seller knew or should have known of the defective condition. [[2130]](#footnote-2131)2129

The court quoted from the Supreme Court of New Jersey as succinctly stating the proof requirements for defects:

In Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673 (1974), it was pointed out that:

"A product is defective if it is not fit for the ordinary purposes for which such articles are sold and used . . . [citations omitted]. Establishing this element requires only proof, in a general sense and as understood by a layman, that 'something was wrong' with the product. As a rule the mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes. However, additional circumstantial evidence, such as proof of proper use, handling or operation of the product and the nature of the malfunction, may be enough to satisfy the requirement that something was wrong with it . . . [citations omitted]. Further, a defective condition can also be proven by the testimony of an expert who has examined the product or who offers an opinion on the products sic design." [[2131]](#footnote-2132)2130

In Gann v. International Harvester Co., [[2132]](#footnote-2133)2131 the court adopted the consumer expectation test to determine whether a product is in a "defective condition unreasonably dangerous" under section 402A. [[2133]](#footnote-2134)2132 Because the only issue presented in Gann involved design defect, there is no doubt that the consumer expectation test applied to that category of defects. [[2134]](#footnote-2135)2133 There is also no doubt that the court recognized the criticism of the application of a consumer expectation test, and other possible tests, to design defects:

The definitions in comments (g) and (i) are referred to as the "consumer expectation" test. That test has been criticized by text writers and in opinions from our sister states. It is said that it is based on the assumption that the ordinary consumer knows what he is buying when in fact the consumer does not have adequate information upon which **[\*899]** to base his expectations. In a design defect case, it is said that the consumer would not know what to expect because he or she would have no idea how safe the product could be made.

In design defect cases some jurisdictions have adopted the risk-utility test, while others have adopted the reasonably prudent manufacturer test. California eliminated the unreasonably dangerous requirement in design defect cases . . . . The courts differ on whether the focus should be on the condition of the product, or on the manufacturer's conduct, or on the manufacturer's knowledge or the constructive knowledge, or the consumer's knowledge, or various combinations thereof. In short, it is an area of law characterized by much confusion and little agreement. . . .

However, as indicated, the tests for determining what products are defective and unreasonably dangerous in Tennessee are those prescribed in comments (g) and (i) to 402A of the Restatement Second. [[2135]](#footnote-2136)2134

The Gann court rejected the defendant's contention that, under a consumer expectation test, no liability could attach when the danger in the product is open and obvious. [[2136]](#footnote-2137)2135 The court found that such rule would conflict with the defendant's burden of proof for the assumption of risk defense.

That rule relieves the manufacturer of liability for patently dangerous defects, imposing only a duty to make a product free from latent defects and concealed dangers. Such a rule would conflict with our holding in Ellithorpe v. Ford Motor Co., supra, that although the defense of assumption of the risk is available in Tennessee it must be shown that the plaintiff, (1) discovered the defect, (2) fully understood the danger it presented, and (3) disregarded this known danger and voluntarily exposed himself or herself to it. 503 S.W.2d at 522. The burden of establishing those requirements is on the defendant, whereas under the patent danger rule the defendant would not be required to prove that the plaintiff was aware of the danger presented and **[\*900]** voluntarily exposed himself or herself to it. [[2137]](#footnote-2138)2136

In addition, the Gann court that found the facts showed an ordinary consumer would not have been aware of the dangers in the defendant's product. [[2138]](#footnote-2139)2137 According to the court, open and obvious dangers should only be one factor in determining whether a defect is unreasonably dangerous. [[2139]](#footnote-2140)2138

In May of 1995, the Supreme Court of Tennessee decided two questions certified to it by the United States District Court for the Eastern District of Tennessee in Whitehead v. Toyota Motor Corp.: [[2140]](#footnote-2141)2139

1. Whether the affirmative defense of comparative fault can be raised in a products liability action based on strict liability in tort?

2. If the affirmative defense of comparative fault may be raised in a products liability action based upon strict liability in tort, is this defense applicable to an enhanced injury case where it is undisputed that the alleged defect in the defendants product did not cause or contribute to the underlying accident? [[2141]](#footnote-2142)2140

After discussing Tennessee's recent adoption of comparative fault [[2142]](#footnote-2143)2141 and explaining the law of strict liability in Tennessee prior to the adoption of comparative fault, [[2143]](#footnote-2144)2142 the court decided that the principles of comparative fault should apply to product liability actions based in strict liability in tort. [[2144]](#footnote-2145)2143 In response to the second certified question, the court stated that "comparative fault principles will apply to enhanced injury cases in which the defective product does not cause or contrib- **[\*901]** ute to the underlying accident." [[2145]](#footnote-2146)2144

2. Statutes

In 1978, the Tennessee legislature enacted the Tennessee Products Liability Act of 1978 [[2146]](#footnote-2147)2145 involving numerous restrictions on consumer recovery including the following: (1) tenyear statute of repose, [[2147]](#footnote-2148)2146 (2) state-of-the-art, [[2148]](#footnote-2149)2147 (3) considerations of custom and usage and of industry standards evidence for determining defects, [[2149]](#footnote-2150)2148 (4) compliance with governmental standards raises a rebuttal presumption that a product is not unreasonably dangerous, [[2150]](#footnote-2151)2149 (5) application of the open and obvious danger rule to warning defects, [[2151]](#footnote-2152)2150 (6) a sealed container defense, [[2152]](#footnote-2153)2151 (7) limitations for non-manufacturers, [[2153]](#footnote-2154)2152 (8) limitations for alteration, modifications and improper maintenance, [[2154]](#footnote-2155)2153 and (9) limitations considering the anticipated life of the product. [[2155]](#footnote-2156)2154

In addition, under the Act, "unreasonably dangerous" is defined under the consumer expectation test or imputed-knowledge rule. [[2156]](#footnote-2157)2155 Furthermore, the Act sets forth the following under Tennessee Code Annotated section 29-28-105(a): "A manufacturer or seller of a product shall not be liable for any injury to person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller." [[2157]](#footnote-2158)2156 **[\*902]**

The legislative intent of the Act clearly indicates a consumer may recover if he/she proves either a defective condition or unreasonable danger. [[2158]](#footnote-2159)2157 However, to date the Supreme Court of Tennessee has not decided exactly how these two conditions will make a difference in a products action. [[2159]](#footnote-2160)2158 Legislation prior to the 1978 Act limited actions concerning blood products [[2160]](#footnote-2161)2159 and livestock. [[2161]](#footnote-2162)2160

3. Pattern Jury Instructions

Tennessee's pattern instructions seem to appropriately apply the provisions of the Products Liability Act as integrated into Tennessee common law. [[2162]](#footnote-2163)2161

RR. Texas

1. Common Law

The Supreme Court of Texas first adopted strict liability in McKisson v. Sales Affiliates. [[2163]](#footnote-2164)2162 based upon section 402A. [[2164]](#footnote-2165)2163 The Supreme Court of Texas extended section 402A to design defects in Henderson v. Ford Motor Co. [[2165]](#footnote-2166)2164 where the plaintiff alleged that the air filter housing of a 1968 Lincoln was defectively designed. The Henderson court appeared to adopt an imputed-knowledge rule for design defects:

The question is whether this filter housing, and all hous- **[\*903]** ings of the same design, were unreasonably dangerous from the time of installation. Did some feature of the form or material or operation of the housing threaten harm to persons using the automobile to the extent that any automobile so designed would not be placed in the channels of commerce by a prudent manufacturer aware of the risks involved in its use or to the extent that the automobile would not meet the reasonable expectations of the ordinary consumer as to its safety? [[2166]](#footnote-2167)2165

Less than two years after Henderson, the court appeared to apply a type of bifurcated test for design defects in General Motors Corp. v. Hopkins. [[2167]](#footnote-2168)2166 The plaintiff in Hopkins alleged that the carburetor of a Chevrolet pick-up was defectively designed. [[2168]](#footnote-2169)2167 The supreme court upheld a jury verdict in the plaintiff's favor but established a new comparative causation rule to be applied when misuse combines with a defect. [[2169]](#footnote-2170)2168 The court, in a footnote, approved of the following jury instruction:

The jury was instructed that "defective design," as used in the charge, "meant a carburetor so designed . . . that it would create an 'unreasonable risk of harm.'" Then: "You are instructed that by the term 'unreasonable risk of harm' as applied to the design of a product is meant that the product, as manufactured according to such design, threatens harm to persons using the product to the extent that any product so designed would not be placed in the channels of commerce by a prudent manufacturer aware of the risks involved in its use, and to the extent that the product so manufactured would not meet the reasonable expectations of the ordinary consumer as to safety." The use of "and" here emphasized is of no consequence in the present case, but the proper definition would be disjunctive--using "or" rather than "and." Henderson v. Ford Motor Co., 519 S.W. 2d 87, 92 (Tex. 1974). The objective **[\*904]** of the alternate test of unreasonable danger, i.e., from the vantage of the prudent supplier, is to avoid completely foreclosing liability because of either the visibility or the complexity of the alleged defect from the vantage of the consumer. [[2170]](#footnote-2171)2169

Thus, it appears that Hopkins would measure design defects by either a consumer expectation test or by an imputedknowledge rule. The Hopkins court stated that the reason for employing the "prudent manufacturer standard" was to avoid the bar of the patent danger or open and obvious danger rule under a consumer expectation test. [[2171]](#footnote-2172)2170 The imputed-knowledge/prudent manufacturer standard would also allow liability on complex product cases where consumers had no expectations.

Shortly after the Hopkins decision, the Supreme Court of Texas decided Gonzales v. Caterpillar Tractor Co. [[2172]](#footnote-2173)2171 The court upheld a jury verdict in the plaintiff's favor based upon a design defect as measured by the consumer expectation test. [[2173]](#footnote-2174)2172 The trial court's instruction said:

"By the term 'defectively designed' is meant such a design as would create an unreasonable risk of harm to the ordinary user of the product involved when the product is used in the manner in which it was intended to be used.

By the term 'unreasonable risk of harm' is meant such a risk of harm as is more dangerous than would be contemplated by the ordinary user who uses the product with ordinary knowledge." [[2174]](#footnote-2175)2173

The Gonzales court noted the instruction along with the following comment:

This submission is in terms of one of the alternate tests **[\*905]** articulated in Henderson v. Ford Motor Company, 519 S.W.2d 87 (Tex.1974), and General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex.1977). [[2175]](#footnote-2176)2174

Thus, at the time of the Gonzales decision, it seemed that a consumer expectation test or an imputed-knowledge rule (with risk-utility factors) could be used either independently or together as alternative tests.

Less than a year after deciding Gonzales, however, the court decided Turner v. General Motors Corp. [[2176]](#footnote-2177)2175 The plaintiff in Turner alleged a design defect under the crash-worthiness doctrine. [[2177]](#footnote-2178)2176 The plaintiff received a favorable jury verdict, and the defendant appealed. [[2178]](#footnote-2179)2177 The defendant argued that all design cases should be measured by negligence standards and crash-worthiness cases, as a special category, should be treated differently from all other design cases. [[2179]](#footnote-2180)2178 The Texas Court of Appeals reversed the trial court, ruling that the jury should have received the following instruction to balance certain factors in order to determine a design defect:

We are of the opinion that the following factors should be balanced, as directed by Turner, in making the determination of whether the design is or is not defective: (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warn- **[\*906]** ings or instructions. [[2180]](#footnote-2181)2179

However, the Supreme Court of Texas stated the risk-utility factors should not normally be submitted to a jury:

The difficulty of formulating a series of specific factors which the fact finders will be instructed to balance is obvious. The majority of the Court of Civil Appeals enumerated four factors it would require to be balanced in determining the fact issue of defective design; the dissenting justice would require a fifth factor. These suggested factors were apparently derived from two cited law review articles: that of Dean Wade, Strict Tort Liability of Manufacturers, 19 Sw.L.J. 5, 17 (1965) suggesting seven factors; and that of Dean Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L.Rev. 559, 565 (1969), suggesting four factors. Dean Wade, in a later article, On the Nature of Strict Tort Liability for Products, 44 Miss.L.J. 825, 838, 840 (1973), offered a revised list of seven factors which seemed to him to be of significance in applying the unreasonably dangerous standard. He posed the question of how the proposed standards are actually to be used in the trial of a case and wrote that "it is here [unsafe design] that the policy issues become very important, and the factors which were enumerated above must be collected and carefully weighed. It is here that the court--whether trial or appellate--does consider these issues in deciding whether to submit the case to a jury. . . . Should the jury be told about the list of seven factors which were set forth above? The answer should normally be 'no.'" His conclusion is that the analysis is most helpful and can be used by appellate and trial judges, and by students and commentators, but that it is not normally given to the jury. [[2181]](#footnote-2182)2180

The defendant also argued that unreasonable danger under the consumer expectation test required a finding that the expectations be "reasonable." [[2182]](#footnote-2183)2181 The Turner court responded: **[\*907]**

As indicated earlier, we have re-examined the manner in which a conscious design strict liability case is to be hereafter submitted to the jury. In so doing, we have determined that the bifurcated test and the writing as to this in Henderson and Hopkins will no longer govern. We are persuaded to this conclusion by the inclusiveness of the idea that jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside that of their own experiences and expectations. The stated reason for the alternative test of the prudent manufacturer does not justify its continued use. [[2183]](#footnote-2184)2182

The above quotation does not make any sense because of the word "inclusiveness." Prior to the publication of this opinion, the Turner court's original opinion on this point read: "We are persuaded to these conclusions by the 'inconclusiveness' of the idea that jurors would know . . . ." [[2184]](#footnote-2185)2183 Because this opinion was withdrawn from publication, the term 'inclusive' may have been a typing or spelling error. In any event, the majority eliminated both the consumer expectation test [[2185]](#footnote-2186)2184 and the imputed-knowledge test from jury instructions:

Upon re-examination of these previous writings we have determined that henceforth in the trial of strict liability cases involving design defects the issue and accompanying instruction will not include either the element of the ordinary consumer or of the prudent manufacturer; to the extent of any conflict in such respects, Henderson and Hopkins are overruled. The jury may be instructed in general terms to consider the utility of the product and the risks involved in its use. [[2186]](#footnote-2187)2185 **[\*908]**

In a footnote, the Turner court set forth the appropriate jury instructions for design defects:

Do you find from a preponderance of the evidence that at the time the product in question was manufactured by [the manufacturer] the product was defectively designed?

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer: "We do" or "We do not." [[2187]](#footnote-2188)2186

The court, however, held that evidence on both consumer expectations and the risk-utility factors were admissible as evidence at trial:

The rules of strict liability govern in cases where the defect caused the accident and the resulting injuries, and in crashworthiness cases where the defect is the cause of injuries only. Evidence upon the factors of risk and utility such as those enumerated by the Court of Civil Appeals, as well as upon the expectations of the ordinary consumer, may be admissible in the trial of such cases. As to this, however, we disapprove the holding of the Court of Civil Appeals that the jury is to be instructed to balance specifically enumerated factors, whether those listed by the Court of Civil Appeals, or otherwise. [[2188]](#footnote-2189)2187

Although the Turner court held that neither the consumer expectation test nor the prudent manufacturer test (imputedknowledge rule) could be submitted in a jury instruction, it failed to discuss whether a trial court should use either test to determine if the case should go to the jury.

In Boatland of Houston, Inc. v. Bailey, [[2189]](#footnote-2190)2188 the Supreme Court of Texas decided that evidence of state-of-the-art was ad- **[\*909]** missible in a design defect case. [[2190]](#footnote-2191)2189 In Boatland, the decedent was killed when he was thrown from his boat and run over by it. [[2191]](#footnote-2192)2190 The plaintiff argued that the boat was defective due to the lack of a kill switch which would have prevented the accident. [[2192]](#footnote-2193)2191 The plaintiff presented evidence that a kill switch was technologically feasible for use on boats at the time of manufacture. [[2193]](#footnote-2194)2192 The defendant countered with evidence that kill switches were not commonly used by boat manufacturers. [[2194]](#footnote-2195)2193 The jury returned a verdict in favor of the manufacturer, and the plaintiff appealed arguing that evidence regarding whether kill switches were unavailable was improper in a design defect case based upon strict liability. [[2195]](#footnote-2196)2194

Evidence that manufacturers were not using a particular safety device appears to come precariously close to arguing that custom and usage sets the standard for strict liability design defects. The Boatland court stated this issue in terms of state-of-the-art:

The primary dispute concerning the feasibility of an alternative design for Bailey's boat was the "state of the art" when the boat was sold. The admissibility and effect of "state of the art" evidence has been a subject of controversy in both negligence and strict product liability cases. In negligence cases, the reasonableness of the defendant's conduct in placing the product on the market is in issue. Evidence of industry customs at the time of manufacture may be offered by either party for the purpose of comparing the defendant's conduct with industry customs. An offer of evidence of the defendant's compliance with custom to rebut evidence of its negligence has been described as the "state of the art defense." . . . In this connection, it is argued that the state of the art is equivalent to industry custom and is relevant only to the issue of the defendant's **[\*910]** negligence and irrelevant to a strict liability theory of recovery. [[2196]](#footnote-2197)2195

However, the Boatland court distinguished custom from stateof-the-art:

In our view, "custom" is distinguishable from "state of the art." The state of the art with respect to a particular product refers to the technological environment at the time of its manufacture. This technological environment includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured. Evidence of this nature is important in determining whether a safer design was feasible. The limitations imposed by the state of the art at the time of manufacture may affect the feasibility of a safer design. [[2197]](#footnote-2198)2196

Thus, according to the court, state-of-the-art included what is both technologically and economically feasible. Industry custom and practice evidence was allowed to combat or rebut plaintiff's evidence of feasibility under the guise of "practicalities of implementation." Although the court made no determination as to which party had the burden of proving the issues, it seemed apparent it was concerned with allowing the defendant to present the issues. [[2198]](#footnote-2199)2197 The court found that stateof-the-art should not be a total defense:

This opinion, insofar as it holds that certain evidence of the state of the art is admissible on the issue of defectiveness in product design cases, is not intended to suggest that such evidence constitutes a defense, such as do misuse and assumption of the risk. Nor does evidence of the state of the art entitle the defendant to a defensive issue inquiring whether it complied with the state of the art at the time of manufacture. [[2199]](#footnote-2200)2198

Although the feasibility element of state-of-the-art dominated **[\*911]** the court's opinion, the general rules for design defects were also addressed:

Whether a product was defectively designed requires a balancing by the jury of its utility against the likelihood of and gravity of injury from its use. The jury may consider many factors before deciding whether a product's usefulness or desirability are outweighed by its risks. Their finding on defectiveness may be influenced by evidence of a safer design that would have prevented the injury. [[2200]](#footnote-2201)2199

The use of the word "may" in the court's opinion indicates that evidence of safer designs may be only one factor among many that a jury can consider. The court emphasized in its opinion that many factors were relevant to determine whether a product has a design defect:

In Turner, this court stated that a number of evidentiary factors may be considered in determining whether a product's design is defective. The product's usefulness and desirability, the likelihood of gravity of injury from its use, the ability to eliminate the risk without seriously increasing the product's usefulness or cost, and the expectations of the ordinary consumer are some of these factors. [[2201]](#footnote-2202)2200

The court made it clear that, for the case at issue, safer alternatives and feasibility greatly influenced the outcome: "Because defectiveness of the product in question is determined in relation to safer alternatives, the fact that its risks could be diminished easily or cheaply may greatly influence the outcome of the case." [[2202]](#footnote-2203)2201 At no time did the court state or infer that feasibility of alternative design evidence was required in a design defect case nor that plaintiff had the burden to prove such.

The Supreme Court of Texas again addressed feasibility of alternative designs in Kindred v. Con/Chem, Inc. [[2203]](#footnote-2204)2202 The **[\*912]** plaintiffs were injured in a fire allegedly caused by the highly flammable nature of the product manufactured by the defendant. [[2204]](#footnote-2205)2203 The plaintiffs presented expert testimony of alternative design; however, defendants argued the evidence was insufficient for failure to prove the costs of such alternative. [[2205]](#footnote-2206)2204 The court said that plaintiffs were not required to make a showing of such proof:

Con/Chem also argues that Kindred's and Kurtz's reasoning assumes that the cost of ingredients was the only variable in the change to a safer alternative and that there was no evidence of the cost of the final product of the safer alternative. Kurtz and Kindred do not have to prove the final cost of the safer alternative to get to the jury. They are only required to present some evidence of probative value. [[2206]](#footnote-2207)2205

In 1984, the Supreme Court of Texas decided Jampole v. Touchy. [[2207]](#footnote-2208)2206 The plaintiff brought a mandamus proceeding seeking to vacate a trial court's order denying certain pre-trial discovery. [[2208]](#footnote-2209)2207 The plaintiff argued that the discovery was relevant to show the availability and feasibility of safer alternative designs as required under Boatland. [[2209]](#footnote-2210)2208 The plaintiff focused on the feasibility issue as a means of obtaining the requested information. The Jampole court agreed with the plaintiff and granted the writ of mandamus. [[2210]](#footnote-2211)2209 While restating its general rule on design defects, however, the court made a seemingly slight change which, in fact, completely altered its prior holdings: "In Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex.1980), we held that whether a product is defectively designed must be determined in relation to the safer alternatives; thus, evidence of the actual use of, or capacity to use, **[\*913]** safer alternatives is relevant." [[2211]](#footnote-2212)2210

The Jampole court, either purposefully or inadvertently, changed the word "may" as used in its Boatland holding, to the word "must." [[2212]](#footnote-2213)2211 This changed the whole nature of the test for design defects. Instead of a safer alternative design being one of many factors for consideration, it became the only factor to determine design defects. The sole focus in Jampole was whether plaintiff was entitled to discover alternative design evidence. The court's change of terms ("may" to "must") may have been intended to stress the relevancy of alternative design evidence rather than making it the sole test for design defects. To date, the Supreme Court of Texas has not clarified the issue. In Temple Eastex v. Old Orchard Creek Partners, [[2213]](#footnote-2214)2212 however, the Texas Court of Appeals appeared to view the Jampole language as an inadvertent change. In Temple, the plaintiff alleged that flammable fiberboard was defectively designed. [[2214]](#footnote-2215)2213 The defendant argued that the plaintiff failed to prove defective design because no evidence of alternative design was presented. [[2215]](#footnote-2216)2214 The Temple court addressed this issue, emphasizing that resolution of design defects did not necessarily require proof of each of the risk-utility factors. [[2216]](#footnote-2217)2215 The Temple court affirmed the plaintiffs' recovery and placed special emphasis on the rule as stated in Boatland: "The jury may consider many factors before deciding whether a product's usefulness or desirability is outweighed by its risks." [[2217]](#footnote-2218)2216 After italicizing the words "may" and "many," the court stated: "Some relevant factors are the product's usefulness and desirability, the likelihood and gravity of injury from the product's use, and the expectations of the ordinary consumer. . . . It is not essential, however, to establish each factor as the basis for **[\*914]** recovery." [[2218]](#footnote-2219)2217

The Temple court then referred to the Jampole decision, but followed the reference with qualifying language:

The defectiveness of the product in question is determined in relation to safer alternatives, and evidence of the actual use of, or capacity to use, the safer alternatives is relevant. We must judge whether a product was defectively designed against the technological contest existing at the time of its manufacture. The feasibility is a relative, not an absolute, concept. The more scientifically and economically feasible the alternative was, the more likely that a jury may find that the product was defectively designed. Evidence of actual use of a safer design by the defendant or others at the time of manufacture is admissible on the issue of defective design and is strong evidence of feasibility. [[2219]](#footnote-2220)2218

The Supreme Court of Texas never fully developed the meaning of design defect. Rather, the state legislature addressed this issue by setting forth the burden of proof on the claimant in a design defect case.

2. Statutes

In 1993, the Texas legislature adopted a Products Liability Act which severely limits consumer recovery. [[2220]](#footnote-2221)2219 The Act clearly places the burden of proof on the plaintiffs to prove the existence of an alternative design to establish a design defect. [[2221]](#footnote-2222)2220 The burden on the plaintiff is extremely onerous since there must be proof of both economic and technical feasibility. [[2222]](#footnote-2223)2221 This, in effect, changes the negligence defense of state-of-the-art into a positive burden of proof on the plaintiff. Other restrictions were placed on consumer recovery for actions **[\*915]** involving firearms and ammunition, [[2223]](#footnote-2224)2222 damages, [[2224]](#footnote-2225)2223 punitive damages, [[2225]](#footnote-2226)2224 blood products, [[2226]](#footnote-2227)2225 and statute of repose. [[2227]](#footnote-2228)2226

3. Pattern Jury Instructions

The Texas Pattern Jury Charges presently sets forth the risk-utility instruction approved by Turner. [[2228]](#footnote-2229)2227 When the updated versions are released, they will undoubtedly reflect the new burdens of proof required under the Products Liability Act.

SS. Utah

1. Common Law

In 1979, the Supreme Court of Utah adopted section 402A in Ernest W. Hahn, Inc. v. Armco Steel Co. [[2229]](#footnote-2230)2228 The plaintiff in Hahn alleged that a roof collapsed because of various defects. [[2230]](#footnote-2231)2229 The Hahn court focused on the defenses to strict liability actions and did not address the applicable standard for design defects. [[2231]](#footnote-2232)2230 Since Hahn, the Supreme Court of Utah has decided several strict liability cases involving design defects; however, to date the court has not established a standard for design defects. [[2232]](#footnote-2233)2231 In Dowland v. Lyman Products For Shooters, [[2233]](#footnote-2234)2232 however, the court indicated in a footnote that, under comment g, a defective product was one not contem- **[\*916]** plated by an ordinary consumer. [[2234]](#footnote-2235)2233 Additionally, in House v. Armour of America, Inc., [[2235]](#footnote-2236)2234 the Utah Court of Appeals held that an open and obvious danger did not operate as a bar to design defects, but was "merely one factor for the trier of fact to consider." [[2236]](#footnote-2237)2235 One federal case, Allen v. Minnstar, Inc., [[2237]](#footnote-2238)2236 in which Utah law was applied, the court found plaintiff had the burden of proving a reasonable alternative design under the facts of the case. [[2238]](#footnote-2239)2237

2. Statutes

In 1977, before the Supreme Court of Utah adopted strict liability in Hahn, the Utah legislature passed a Products Liability Act. [[2239]](#footnote-2240)2238 However, in Berry ex rel. Beny v. Beech Aircraft Corp., [[2240]](#footnote-2241)2239 the Supreme Court of Utah held the Act unconstitutional. In Berry, the court found the statute of repose unconstitutional, and because it was not severable from the remaining portions of the Act, the court held the entire Act to be unconstitutional. [[2241]](#footnote-2242)2240 However, in 1989, the legislature amended the statute to include alterations and modifications as a defense to strict liability. [[2242]](#footnote-2243)2241 Section 78-15 of the Utah Products Liability Act defines "unreasonably dangerous" as meaning

that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer. [[2243]](#footnote-2244)2242 **[\*917]**

The Utah Code also sets forth a rebuttable presumption that a product is free from any defect if "the designs . . . or the methods and techniques of manufacturing, inspecting and testing of the product were in conformity with government standards established for that industry." [[2244]](#footnote-2245)2243 Additionally, Utah legislation also places limitations on the consumer for punitive damages, [[2245]](#footnote-2246)2244 blood products, [[2246]](#footnote-2247)2245 and joint and several liability. [[2247]](#footnote-2248)2246

3. Pattern Jury Instructions

The Model Utah Jury Instructions provide alternate instructions for design defects. Alternate A [[2248]](#footnote-2249)2247 applies a consumer expectation test whereas Alternate B [[2249]](#footnote-2250)2248 applies a two-step Barker rule.

TT. Vermont

1. Common Law

In 1975, the Supreme Court of Vermont adopted section 402A in Zaleskie v. Joyce. [[2250]](#footnote-2251)2249 The plaintiff alleged his motorcycle was defective in design and manufacture. [[2251]](#footnote-2252)2250 A jury returned a verdict for the plaintiff which the Zaleskie court upheld. [[2252]](#footnote-2253)2251 However, the court did not delineate any standards for design defects. Since the Zaleskie case, the Supreme Court **[\*918]** of Vermont has not had the opportunity to fully examine and define its design defect standard. In Menard v. Newhall, [[2253]](#footnote-2254)2252 the court appeared to adopt a consumer expectation test for all types of defects. The Menard court held the defendant was not required to warn of those dangers generally known and recognized (open and obvious danger rule). [[2254]](#footnote-2255)2253 Addressing the issue of warnings, the court stated: "An obligation to warn arises when the product manufactured is dangerous to an extent beyond that which would be contemplated by the ordinary purchaser, i.e. a consumer possessing the ordinary and common knowledge of the community as to the product's characteristics." [[2255]](#footnote-2256)2254 The consumer expectation test appears to be Vermont's standard for determining defects. [[2256]](#footnote-2257)2255

2. Statutes

There are no Vermont statutes which apply to strict liability design actions.

3. Pattern Jury Instructions

The general jury instruction on Products Liability can be found at section 7.24 of Vermont Jury Instructions. [[2257]](#footnote-2258)2256

UU. Virginia

The Supreme Court of Virginia has never adopted strict liability in tort. [[2258]](#footnote-2259)2257 Furthermore, no Virginia statutes have **[\*919]** adopted strict liability; however, several restrictions have been placed upon consumer recovery for punitive damages, [[2259]](#footnote-2260)2258 subsequent remedial measures, [[2260]](#footnote-2261)2259 and blood products. [[2261]](#footnote-2262)2260

VV. Washington

1. Common Law

The Supreme Court of Washington first adopted strict liability under section 402A in Ulmer v. Ford Motor Co. [[2262]](#footnote-2263)2261 The plaintiff alleged she was injured in an automobile accident caused by a manufacturing defect. [[2263]](#footnote-2264)2262 The Supreme Court of Washington extended section 402A to design defects in a second collision case in Seattle-First National Bank v. Tabert. [[2264]](#footnote-2265)2263 In Tabert, the court said strict liability applied to all forms of design defects because all defects were equally dangerous:

A product may be just as dangerous and capable of producing injury whether its condition arises from a defect in design or from a defect in the manufacturing process. While a manufacturing defect may be more easily identified or proved, a design defect may produce an equally dangerous product. The end result is the same--a defective product for which strict liability should attach. [[2265]](#footnote-2266)2264

The Tabert court undertook an extensive examination of the cases and commentaries discussing the applicable standard for design defects, especially the controversy surrounding the "defective condition and unreasonably dangerous" language of section 402A and its consumer expectation test. [[2266]](#footnote-2267)2265 The court chose the following standard: **[\*920]**

If a product is unreasonably dangerous, it is necessarily defective. The plaintiff may, but should not be required to prove defectiveness as a separate matter.

Likewise, unreasonably dangerous implies a higher and different standard than what we conceive to be the intended thrust of section 402A strict liability. The emphasis is upon the consumer's reasonable expectation of buying a product which is reasonably safe. The ordinary consumer evaluates a product in terms of safety, recognizing that virtually no product is or can be made absolutely safe. Certainly that is the case with the automobile and all of its potential for injury.

Thus, we hold that liability is imposed under section 402A if a product is not reasonably safe. This means that it must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer. This evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of the fact to take into account the intrinsic nature of the product. The purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac. It must be borne in mind that we are dealing with a relative, not an absolute concept.

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue. [[2267]](#footnote-2268)2266

Under the Tabert court's rule, the focus of strict liability is on product safety. "Unreasonable danger" determines whether a product is in an "unsafe condition"; it has no independent meaning since proof of unreasonable danger necessarily proves a product is defective. However, "unreasonably dangerous" as defined under comments g and i of section 402A requires a **[\*921]** "higher and different standard" than intended by the Tabert court. The court measured consumers' expectations by viewing the intrinsic nature of a product in light of various risk-utility factors. Thus, the Tabert consumer expectation test supplies the product's risks and utility, then asks whether a consumer would consider the product safe or unsafe. This type of consumer expectation test is different from section 402A's test.

Under section 402A, a consumer's expectations are measured by what is generally known in the community about the product. When consumers may not have any knowledge about a product, the test becomes unworkable. [[2268]](#footnote-2269)2267 Worse yet, consumer expectations could be too low when a danger is known or obvious, or too high when any danger is assumed to exist. [[2269]](#footnote-2270)2268 By supplying the risks and utility, the Tabert consumer expectation test overrides the problems in section 402A.

The Tabert rule could be interpreted as applying a negligence standard because it uses a risk-utility balancing test. However, the court attempts to retain strict liability by focusing on the product from the consumer's view, eliminating any manufacturing perspective. After establishing the standard for design defect, the court addressed the defendant's assertion that an open and obvious danger in the product precluded liability. [[2270]](#footnote-2271)2269 Relying upon one of its past decisions and its standard for design defects, the Tabert court stated: "The fact that a danger is patent does not automatically free the manufacturer from liability, but does so only if the plaintiff voluntarily and unreasonably encounters it." [[2271]](#footnote-2272)2270 Thus, the open and obvious danger rule could only bar recovery under the assumption of risk defense.

In 1983, the Supreme Court of Washington addressed the issue of whether a consumer must prove a reasonable alternative design in design defect cases in Connor v. Skagit **[\*922]** Corp. [[2272]](#footnote-2273)2271 The jury returned a verdict against the plaintiff who appealed on the basis of a jury instruction which required plaintiff to prove the availability of "a feasible and practical alternative design" that would have prevented the accident:

Plaintiff argues that this instruction increased his burden of proof by elevating the availability of feasible alternative design to an element of the cause of action. He argues that alternative design is merely one of a number of factors which the jury may consider in determining whether a product is unreasonably dangerous. [[2273]](#footnote-2274)2272

The Connor court reviewed two prior decisions which, according to the court, aligned with Tabert in declaring that the availability of alternative designs is a factor which may, not must, be considered: [[2274]](#footnote-2275)2273

While both these decisions consider alternative designs as relevant to the design defect issue, neither suggests that alternative design is an essential element to be proved in every case. We conclude, therefore, that the rule continues to be that the existence of an alternative, safe design is a factor which the jury may consider in determining whether a product is unreasonably dangerous. A plaintiff may, therefore, establish that a product is unreasonably dangerous by means of factors other than the existence of alternative design. [[2275]](#footnote-2276)2274

Although the Connor court said proof of alternative design was not required in a design defect case, it upheld the jury verdict against the plaintiff because he had relied solely on this issue to establish liability. [[2276]](#footnote-2277)2275

In 1981, the Washington legislature passed a Products Liability Act. [[2277]](#footnote-2278)2276 In Lenhardt v. Ford Motor Co. [[2278]](#footnote-2279)2277 the **[\*923]** court was asked by a federal court to interpret whether Washington's common law would follow the statutes concerning the admissibility of evidence on industry customs and standards evidence. [[2279]](#footnote-2280)2278 The Lenhardt court restated the question and answered it:

After reviewing the record we believe the question we must answer is the following:

"In a strict liability cause of action arising prior to the effective date of the Washington tort reform act, codified in RCW 7.72.010 et seq., is evidence of compliance with industry customs and standards always admissible as a relevant factor in evaluating the reasonable expectation of the ordinary consumer."

We answer no. [[2280]](#footnote-2281)2279

In holding that industry custom and standards were not always admissible in a strict liability case, the court first distinguished custom from state-of-the-art:

At the outset we must distinguish between two types of evidence that may be introduced in a product liability action, state of the art evidence and evidence of industry custom. These concepts are not always synonymous and, as such, involve different types of evidence. The former relates to the technological feasibility of alternative safer designs in existence at the time the product was originally manufactured while the latter refers to a practice or custom regarding a particular design or manufacturing technique utilized by most manufacturers in that industry. In some factual situations the concepts may merge; however, in this case the distinction is appropriate. Accordingly, the only issue before us is the admissibility of industry custom when offered by the defendant as evidence of the reasonable expectation of the ordinary consumer. [[2281]](#footnote-2282)2280

The court disagreed with the defendant's argument that custom, represented by manufacturing design choices, is rele- **[\*924]** vant to determine the consumer's reasonable expectations:

As has been made clear in numerous cases, our jurisdiction utilizes a buyer oriented approach, and the focus is on the buyer's expectation. Thus, our rule of strict liability focuses attention upon the product and not upon the actions of the seller or manufacturer. Introducing evidence of industry and/or manufacturer's customs and practices shifts the jury's focus from what the consumer expects to what the manufacturers are doing. By focusing the jury's attention on the custom of the industry, implicitly the jury's attention is focused on the defendant's design choice and the reasonableness of that choice. In effect, such evidence incorporates negligence concepts and the seller oriented approach we rejected in Estate of Ryder v. Kelly-Springfield Tire Co. This is not appropriate in actions alleging strict liability under section 402A. [[2282]](#footnote-2283)2281

The court then re-emphasized the as distinction between strict liability and negligence by the following:

The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. [[2283]](#footnote-2284)2282

In strict liability the plaintiff's proof concerns the condition (dangerous) of a product which is designed or manufactured in a particular way. In negligence the proof concerns the reasonableness of the manufacturer's conduct in designing and selling the product as he did.

In strict liability the plaintiff takes the design as it was finalized in the finished product and shows it was both dangerous and that it was unreasonable to subject the user to this danger because the user would not contemplate the danger in the normal and innocent use of the product or consumption of the product. In negligence the plaintiff shows the manufacturer was unreasonable in designing the product as he did. [[2284]](#footnote-2285)2283 **[\*925]**

Industry custom could be admissible under certain conditions. If a plaintiff raised the issue of custom or feasibility, then the evidence is admissible.

This opinion should not be understood to mean that evidence of industry custom or standard is never admissible in a strict liability action. If the plaintiff presents evidence that puts in issue the custom of the industry or feasibility of alternative design the defendant should be allowed to meet that evidence. [[2285]](#footnote-2286)2284

However, when the plaintiff's claim does not rely upon custom or feasibility, the defendant cannot present such evidence.

But when a plaintiff establishes at trial that a particular design allows a certain event to occur and alleges that event is not reasonably safe based upon the reasonable consumer expectation concerning that product, the defendant may not introduce evidence that his design comports with the design of other manufactures, i.e., industry custom, and therefore, is reasonably safe because the other designs allow the same event to occur. If a product as designed is not reasonably safe liability attaches and a defendant is liable no matter how reasonable his conduct. [[2286]](#footnote-2287)2285

After Lenhardt, the Washington Supreme Court's decisions on design defects were controlled by the 1981 Washington Products Liability Act. [[2287]](#footnote-2288)2286 However, in Couch v. Mine Safety Appliances Co. [[2288]](#footnote-2289)2287 the court held that the Act essentially adopted the court's common law consumer expectation standard established in Tabert. [[2289]](#footnote-2290)2288 **[\*926]**

2. Statutes

As part of the Tort Reform Act of 1981, [[2290]](#footnote-2291)2289 the Washington legislature passed a Products Liability Act. [[2291]](#footnote-2292)2290 The Act restated liability for design defects using the term negligence [[2292]](#footnote-2293)2291 and specifically limited liability for firearms and ammunition. [[2293]](#footnote-2294)2292 In addition, the Act limited liability for nonmanufacturers, [[2294]](#footnote-2295)2293 allowed evidence of industry custom and compliance with governmental and non-governmental standards, [[2295]](#footnote-2296)2294 and set forth a useful safe life defense. [[2296]](#footnote-2297)2295

In 1986, the Supreme Court of Washington was presented with its first defect case under the Products Liability Act in Couch v. Mine Safety Appliances Co. [[2297]](#footnote-2298)2296 In Couch, the plaintiff's husband was killed in a logging accident when a tree struck his helmet. The plaintiff brought a design action against the helmet manufacturer and received a favorable verdict. [[2298]](#footnote-2299)2297 The defendant appealed, asserting error in the trial court's refusal to give a jury instruction requiring the plaintiff to prove an alternative design. [[2299]](#footnote-2300)2298 The defendant, confronted with the Connor decision, argued a different result should be reached under the Products Liability Act. [[2300]](#footnote-2301)2299 In support of its position, the defendant cited a law review article by one of the sponsors of the Products Liability Act which stated the statute now required the plaintiff to prove the existence of a practical and feasible alternative design. [[2301]](#footnote-2302)2300 The Couch court said the plain language of the Act indicated no change from the com- **[\*927]** mon law and, in fact, reinforced the Tabert decision. [[2302]](#footnote-2303)2301 Although the legislative history of the tort and product liability reform act states the Act establishes a "negligence standard" for design cases, [[2303]](#footnote-2304)2302 the court found the history clarified the language.

The legislative history itself clarifies the meaning of the term negligence as used by the Act's drafters. The Select Committee believed that "the Washington court, while terming the liability in such cases as one of strict liability, has articulated a test which upon closer analysis involves the balancing of factors more akin to negligence." Senate Journal, 47th Legislature (1981), at 624 (citing Seattle First National Bank v. Tabert, 86 Wash.2d 145, 542 P.2d 774 (Wash. 1975). The Select Committee then stated that the Tabert test reflected "essentially a negligence standard in design and warning/instruction cases" and advocated its adoption. Senate Journal, 47th Legislature (1981), at 625 .

The following sections of the Act define not reasonably safe in terms of Tabert's balancing of the risk of harm versus product utility, RCW 7.72.030(1)(a), and Tabert's consumer expectation test, RCW 7.72.030(3). The Select Committee report itself again recognizes this fact in discussing the Act: "Thus, both tests are adopted here as relevant considerations which the trier of fact should consider." Senate Journal, 47th Legislature (1981), at 631. We find that the Act adopted the Tabert tests for defective design cases against manufacturers, notwithstanding its reference to negligence. A negligence standard does appear to have been adopted for actions against manufacturers which allege failure to give adequate warnings or instructions. RCW 7.72.030(1)(c). [[2304]](#footnote-2305)2303

In addition, the court approved the trial court's instruction on design defects which used statutory language almost verbatim as well as some language from the Tabert decision.

A product manufacturer is subject to liability to a **[\*928]** claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed at the time it left the manufacturer's control.

A product is not reasonably safe as designed, if, at the time of manufacture, it is unsafe as designed to an extent beyond that which would be contemplated by the ordinary user, or if the likelihood that the product would cause injury or damage and the seriousness of the injury or damage, outweighed the burden on the manufacturer to design a product that would have prevented the injury or damage and outweighed the adverse effect that an alternate design that was practical and feasible would have on the usefulness of the product.

In determining what an ordinary user would reasonably expect, you should consider the relative cost of the product, the cost and feasibility of eliminating or minimizing the risk, the circumstances and conditions under which the helmets will normally be used, and such other factors as the nature of the product and the claimed defect indicate are appropriate. [[2305]](#footnote-2306)2304

The instruction appears to allow liability based upon alternate tests. Liability may be predicated upon the consumer expectation test, measured by the factors listed in the last paragraph of the instruction. However, the instruction also appears to allow for liability based upon an independent test of riskutility. These two tests are separated by the word "or" in the instruction. [[2306]](#footnote-2307)2305 Thus, the Couch court seemed to adopt a dual standard for design defects under the statute.

After finding the Act did not change the common law, the Couch court then examined whether the plaintiff restricted the allegations of design defects based solely on an alternative design. [[2307]](#footnote-2308)2306 The plaintiff's allegations were stated as follows:

Plaintiff alleges that the helmet was not reasonably designed to minimize the injury-producing effect of im- **[\*929]** pacts such as that which hit decedent, Lonnie Ray Couch. Plaintiff alleges that one or more of the following deficiencies rendered the helmet not reasonably safe:

(1) Inadequate structural and energy-absorbing materials used to construct the shell of the helmet;

(2) Inadequate structural and energy-absorbing materials from which the suspension of the helmet was constructed;

(3) Inadequate or defective design to minimize the energy of foreseeable impacts;

(4) Considering the design of the helmet in question, it did not conform to the implied warranty which accompanied it.

Plaintiff claims that because of the helmet's design and condition, Plaintiff's husband suffered damages over and above the minor damage he would have suffered if the helmet had been reasonably safe, thus causing his death. [[2308]](#footnote-2309)2307

The specific allegations were important to the Couch court because the Connor decision stated that a plaintiff had to prove the alternative design when relying solely on that ground for liability. [[2309]](#footnote-2310)2308 After stating the plaintiff's contentions, the court found:

Couch did not limit her claim to alternative design as did the plaintiff in Connor. She presented testimony that the rivets are less likely to pull out if six or eight, rather than four, are used to attach the internal suspension of the helmet to its shell. Overall, however, the jury was presented with general claims of inadequate design by the instruction. Following Connor and the Act, Couch did not have the burden of proving that an alternative, reasonably safe design was available to the helmet manufacturer. Thus, the trial court's failure to give a jury instruction to that effect was not error. [[2310]](#footnote-2311)2309 **[\*930]**

The Couch decision is extremely significant for several reasons. It holds that the Product Liability Act did not establish negligence as an Act for design defects. It found the statute consistent with the Tabert consumer expectation test. It found that under both common law and the Products Liability Act, plaintiff does not have to prove an alternative design. Finally, Couch appears to have established a bifurcated standard for design defects governed by the statute.

Despite the clear language of Couch, the supreme court was again confronted with the allegation the products liability statutes set forth a negligence standard in design cases. In Falk v. Keene Corp. [[2311]](#footnote-2312)2310 the deceased plaintiff alleged the asbestos products to which he was exposed were defective in design. [[2312]](#footnote-2313)2311 The trial court gave a series of jury instructions containing numerous references to ordinary negligence as the standard for liability. [[2313]](#footnote-2314)2312 After an adverse jury verdict, the plaintiff appealed alleging error in the instructions. [[2314]](#footnote-2315)2313 The Falk court reversed, holding ordinary negligence was not the standard adopted by the legislature for determining design defects. [[2315]](#footnote-2316)2314 The court held that a plaintiff could establish design defects in two ways:

Following RCW 7.72, a plaintiff seeking to establish manufacturer liability for defective product design will establish liability by proving that, at the time of manufacture, the likelihood that the product would cause plaintiff's harm or similar harms, and the seriousness of those harms, outweighs the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative design would have on the product's usefulness. RCW 7.72.030(1)(a). If the plaintiff fails to establish this, the plaintiff may nevertheless establish manufacturer liability by showing the product was **[\*931]** unsafe to an extent beyond that which would be contemplated by the ordinary consumer. RCW 7.72-030(3). If the product design results in a product which does not satisfy this consumer expectations standard, then the product is not reasonably safe. [[2316]](#footnote-2317)2315

The court emphasized the distinction by approving the following pattern jury instruction:

A manufacturer has a duty to design products which are reasonably safe. A manufacturer is subject to liability if the product was not reasonably safe as designed at the time it left the manufacturer's control and this was a proximate cause of the plaintiff's injury and or damage.

A product is not reasonably safe as designed if:

[At the time of manufacture, the likelihood that the product would cause injury or damage similar to that claimed by the claimant, and the seriousness of such injury or damage, outweighed the burden on the manufacturer to design a product that would have prevented the injury or damage and outweighed the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product;] or

[the product is unsafe to an extent beyond that which would be contemplated by an ordinary user. In determining what an ordinary user would reasonably expect, you should consider [the relative cost of the product] [the seriousness of the potential harm from the claimed defect] [the cost and feasibility of eliminating or minimizing the risk] and such other factors as the nature of the product and the claimed defect indicate are appropriate.] [[2317]](#footnote-2318)2316

Thus, the Falk court reinforced Couch by determining the products liability statute provides two independent tests for design defects--risk-utility and consumer expectations under Tabert. [[2318]](#footnote-2319)2317 **[\*932]**

A recent case involving design defects decided by the Supreme Court of Washington is Ayers v. Johnson & Johnson Baby Products Co. [[2319]](#footnote-2320)2318 In Ayers, a fifteen-month-old child accidentally aspirated baby ***oil*** and suffered extremely serious injury. [[2320]](#footnote-2321)2319 The plaintiff brought an action against the manufacturer of the baby ***oil*** based upon a failure to warn of aspiration dangers. [[2321]](#footnote-2322)2320 A jury returned a verdict in the plaintiff's favor, and the manufacturer moved for judgment notwithstanding the verdict on the grounds the evidence failed to establish proximate causation and foreseeability. [[2322]](#footnote-2323)2321 The trial court granted the motion, and the plaintiff appealed. [[2323]](#footnote-2324)2322 The Ayers court affirmed the court of appeals decision and reinstated the verdict in favor of the plaintiff. [[2324]](#footnote-2325)2323

The Ayers court found that the products liability statute is based upon strict liability which does not require the negligence element of foreseeability. [[2325]](#footnote-2326)2324 The court's holding that warning defects under the statute reflected strict liability was based, to a great extent, on its similar analysis of design defects in Couch and Falk. [[2326]](#footnote-2327)2325 The analysis was almost inevitable since section (1) of the statute combines both design and warning defects before separately defining a warning defect.

Under RCW 7.72.030(1), "a product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided." The definition of "not reasonable safe", for purposes of a suit alleging failure to warn of dangers existing at the time of manufacture, is provided by RCW 7.72.030(1)(b) (hereafter "subsection (b)"): **[\*933]**

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate. [[2327]](#footnote-2328)2326

In addition, the Ayers court said the statutory section dealing with consumer expectations applied to warning defects:

Also relevant to a determination of "not reasonably safe" is the consumer expectation test of RCW 7.72.030(3), which states:

In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer. [[2328]](#footnote-2329)2327

Once it established warning defects were measured by strict liability standards, the court turned to causation, defining the cause in fact issue as follows:

Expert testimony established that once David inhaled the ***oil*** there was no way to get it out, and medical attention would not have prevented injury to his lungs. Therefore, the issue as regards cause in fact does not concern whether had there been an adequate warning, Mrs. Ayers would have been alerted to the danger when she inspected the label on the bottle and so sought immediate medical help. Rather, the issue concerns whether had there been an adequate warning, David never would have inhaled the ***oil*** because the Ayerses would have kept it out of his reach. This was what the parties contested at trial and is the issue we examine here. [[2329]](#footnote-2330)2328 **[\*934]**

Because there was abundant factual testimony at trial that the child's parents and family would have prevented the child's exposure to dangerous items such as baby ***oil***, the Ayers court said the issue was properly presented to the jury. [[2330]](#footnote-2331)2329 The defendant argued that since the parents knew baby ***oil*** was "for external use only and should be kept out of reach of children, a warning on the product would not have changed their behavior." [[2331]](#footnote-2332)2330 The Ayers court easily rejected the defendant's argument because the parents only knew that the baby ***oil*** could cause diarrhea if swallowed; they did not know of the extremely dangerous risks of aspiration. [[2332]](#footnote-2333)2331

The defendant also argued plaintiffs were required to prove the exact wording of an adequate warning. [[2333]](#footnote-2334)2332 This argument mirrors that of the defendants in Connor and Couch that the plaintiff had the burden of proving an alternative design. The Ayers court rejected this argument as follows:

We reject Johnson & Johnson's argument and hold that the language of RCW 7.72.030(1)(b) does not require a claimant to establish the exact wording of the alternative warning. The statute's requirement that "the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate" is satisfied if the claimant specifies the substance of the warning. Here, the Ayerses contend that had they been warned of the dangers of aspirating baby ***oil***, the accident would have been avoided. This suffices to indicate the nature of the warning the Ayerses allege Johnson & Johnson should have provided and therefore satisfies the requirement of RCW 7.72.030(1)(b). Moreover, requiring claimants in failure to warn cases to establish the exact wording of an alternative warning would impose too onerous a burden. The members of the jury might agree that a certain type of warning should have been provided, but they might not agree among themselves as to exactly how that warning **[\*935]** should have been worded. [[2334]](#footnote-2335)2333

The defendant also argued that because the likelihood of children aspirating baby ***oil*** was extremely low, any duty to warn of remote risks would require manufacturers to deluge consumers with indiscriminate warnings which would be ignored, i.e., the "boy who cried wolf" syndrome. [[2335]](#footnote-2336)2334 A plethora of anti-consumer/pro-manufacturer groups joined in this argument:

Various amici, in briefs submitted in support of Johnson & Johnson's petition for review of the Court of Appeals' decision, also make this argument. Thus, the Product Liability Advisory Council, Inc. and the Cosmetic, Toiletry and Fragrance Association argue that over-warning increases the likelihood that important warnings will not be read and heeded, and that it causes some consumers to overreact. The American Tort Reform Association makes the same argument, and also contends that the result of upholding the Court of Appeals' decision would lead to tremendous potential liability and uncertainty for manufacturers. Such a situation, the American Tort Reform Association argues, would impede the development of new products and cause manufacturers to withdraw existing products. [[2336]](#footnote-2337)2335

The Ayers court responded to the over-warning issue as follows:

We are unpersuaded by this argument. The evidence presented at trial indicates that baby ***oil*** is distinguishable from other products. Baby ***oil***, which is comprised of 99 percent mineral ***oil***, poses special risks if inhaled, and the manner of its use--on babies and around water--creates a significant risk of aspiration. . . .

In short, uncontroverted evidence presented at trial demonstrates the danger of aspirating baby ***oil***. We recognize that other ***oils*** may be equally as dangerous, and that **[\*936]** other products may have attributes that render them no less dangerous than baby ***oil***. What makes baby ***oil*** unique, and what is the sine qua non of our decision, is that baby ***oil*** is intended for use on babies. When he drank the ***oil***, David Ayers was acting in conformity with the behavior to be expected of any 15 month-old-child. It is the kind of predictable infant behavior which necessitates that consumers and parents be alerted to the dangers of a product promoted for use on babies. [[2337]](#footnote-2338)2336

Turning to the argument that foreseeability was required under the products liability statutes, the Ayers court reviewed Couch and Falk and concluded that foreseeability was a negligence element and not part of strict liability: [[2338]](#footnote-2339)2337

Foreseeability is not an element of strict liability, which focuses not on the conduct of the manufacturer but upon the product and the consumer's expectation. Therefore, Falk implies that foreseeability is not an element of a design defect claim under subsection (a). The similarities between the design defect claim in subsection (a) and the failure to warn test in subsection (b) indicate that subsection (b)'s test should also be interpreted as one of strict liability, not common law negligence, and therefore as not including an element of foreseeability. [[2339]](#footnote-2340)2338

In addition, the Ayers court noted the statute used the word "likelihood" rather than "foreseeability."

Moreover, foreseeability is a matter of what the actor knew or should have known under the circumstances; it turns on what a reasonable person would have anticipated. The likelihood, or probability, that an event would occur, on the other hand, does not depend on what a reasonable person would have anticipated under the circumstances, but on an assessment of all relevant facts, including those available only in hindsight. Thus harm might be likely but unforeseeable, or foreseeable but unlikely. Therefore, foreseeability is not simply a matter of likelihood, and the **[\*937]** occurrence of the phrase containing the term "likelihood" in subsection (b) does not show that foreseeability is an element of a claim arising under that statute. [[2340]](#footnote-2341)2339

The Washington Supreme Court's decisions in Couch, Falk, and Ayers clearly set forth strict liability rather than negligence as the standard adopted by the legislature. However, there seems to remain an issue concerning the two separate tests for defects under sections (1) and (3) of the statute. [[2341]](#footnote-2342)2340 The court has specifically held that both sections are based upon strict liability. [[2342]](#footnote-2343)2341 Strict liability under Tabert is different from negligence because of its "focus rule." This rule requires one to focus on the qualities of the product, not the conduct of the parties. The qualities of the product are measured by risk-utility balancing. The question then becomes whether a reasonable consumer would consider this product too dangerous. [[2343]](#footnote-2344)2342 It appears that supplying risk-utility factors for the consumer expectation test of Tabert, combined with the "focus rule," also separates Washington's strict liability test from section 402A's consumer expectation test. [[2344]](#footnote-2345)2343 Section (1), however, does not use the term consumer expectation; thus, the court supplied it by inference. Section (3) does not use risk-utility terms so the court supplied them by inference. Once the above inferences are made, the two sections would appear to be almost identical.

However, the Supreme Court of Washington could possibly be giving a different meaning to section (3). They could be stating section (3) is a strict liability test identical to the consumer expectation test under section 402A. This test does not require examination of risk-utility factors, but is based upon the ordinary consumer expectations. Under this interpretation strict liability applies; however, the test is plagued with the problems **[\*938]** of the lack of consumer expectations and the open and obvious danger rule. [[2345]](#footnote-2346)2344 Under this analysis, a consumer could proceed under section (3). However, if liability is barred under the test for section (3), the consumer could proceed under the alternative test under section (1).

At least one other question arises regarding interpretation of the two sections of the statute. Section (1) appears to limit the risk-utility factors to those stated. Under Washington common law, the number of risk-utility factors is not so limited, nor is emphasis placed on any one factor. [[2346]](#footnote-2347)2345 Thus, section (1)'s risk-utility factors could be interpreted to be limited to those stated in the section. Section (3)'s risk-utility factors are only present because of an inference; thus, these factors could be interpreted more broadly. Under this analysis, a consumer could attempt to recover under section (1) limited to the stated risk-utility factors. Should the consumer fail under section (1) the alternative test in section (3) would remain available. Only time will tell whether the Supreme Court of Washington will interpret its statutes under the above or some other analysis.

In addition to the 1981 Products Liability Act, the Washington legislature has limited consumer recovery in the areas of joint and several liability, [[2347]](#footnote-2348)2346 noneconomic damages, [[2348]](#footnote-2349)2347 and blood products. [[2349]](#footnote-2350)2348 **[\*939]**

3. Pattern Jury Instructions

Washington Pattern Jury Instructions--Civil WPI 110.02 sets forth the two alternate tests applied in Falk. [[2350]](#footnote-2351)2349

WW. West Virginia

1. Common Law

The Supreme Court of West Virginia has had little opportunity to develop a standard for design defects in strict liability. It first adopted strict liability in 1979 in Morningstar v. Black & Decker Manufacturing. Co. [[2351]](#footnote-2352)2350 in answering a certified question from a federal court. [[2352]](#footnote-2353)2351 In Morningstar, the court chose to adopt the Greenman version of strict liability rather than section 402A. [[2353]](#footnote-2354)2352 In the process of choosing the Greenman rule, the court undertook an extensive analysis of past cases and commentaries and arrived at the following reason for adopting strict liability:

The cause of action covered by the term "strict liability in tort" is designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability. [[2354]](#footnote-2355)2353

The court repeated the idea that the "key component" of strict liability is to remove the plaintiff's burden of proving negligence:

Our rule is therefore not substantially different from either Section 402A or Greenman, as the key component of each is to remove the burden from the plaintiff of es- **[\*940]** tablishing in what manner the manufacturer was negligent in making the product. Once it can be shown that the product was defective when it left the manufacturer and that the defect proximately caused the plaintiff's injury, a recovery is warranted absent some conduct on the part of the plaintiff that may bar his recovery. [[2355]](#footnote-2356)2354

The court addressed the difficulty in defining both defect and unreasonable danger and apparently chose, at least in some degree, a risk-utility standard for determining product safety:

We believe that a risk/utility analysis does have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product. In a product liability case, the expert witness is ordinarily the critical witness. He serves to set the applicable manufacturing, design, labeling and warning standards based on his experience and expertise in a given product field.

Through his testimony the jury is able to evaluate the complex technical problems relating to product failure, safety devices, design alternatives, the adequacy of warnings and labels, as they relate to economic costs. In effect, the expert explains to the jury the risk/utility standards and gives the jury reasons why the product does or does not meet such standards, which are essentially standards of product safeness. [[2356]](#footnote-2357)2355

It was unclear whether the risk-utility analysis would be the only standard applied for known defects; however, the court did agree with Dean Wade's statement concerning the imputedknowledge rule:

"The time has now come to be forthright in using a tort way of thinking and tort terminology [in cases of strict liability in tort]. There are several ways of doing it, and it is not difficult. The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then **[\*941]** negligent in putting it on the market or supplying it to someone else. In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact . . . " [Wade, On the Nature of Strict Tort Liability for Products, 44 Miss.L.J. 825, 834-35 (1973)]. [[2357]](#footnote-2358)2356

When the court set forth the standard, however, it failed to mention the imputed-knowledge rule:

The term "unsafe" imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.

We thus conclude in this jurisdiction that the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made. [[2358]](#footnote-2359)2357

The court's language seems to imply that defect or safety is measured by a "reasonably prudent manufacturer" which appears to be nothing more than a simple negligence standard. If so, the court has not adhered to its reasons for adopting strict liability to remove plaintiff's burden of proving negligence. Worse yet, the decision does not seem to comply with the court's intent to adopt strict liability under the Greenman decision.

In conclusion, we find that the rule expressed in Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963), permitting recovery in a tort product liability case, where a defective product **[\*942]** causes personal injury, is a more appropriate rule than Section 402A of the Restatement, Second, Torts (1965), which requires the defective condition to be unreasonably dangerous. We acknowledge that our definition of a defective condition differs from that followed by the California court in Barker v. Lull Engineering Co., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978), in that ours is somewhat more restrictive. [[2359]](#footnote-2360)2358

It may be that the Morningstar court set forth only general principles of law in answering the certified question. The court next addressed strict liability in Church v. Wesson. [[2360]](#footnote-2361)2359 In Church, the plaintiff alleged he was injured by a defective wrench. The trial court directed verdict for defendants on the design and warning theories and the jury found in defendant's favor on the manufacturing defect claim. [[2361]](#footnote-2362)2360 In affirming the judgment against the plaintiff, the court restated its Morningstar holding:

In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made. [[2362]](#footnote-2363)2361

Immediately after quoting Morningstar, the court quoted a federal decision which used a negligence standard: "The question is: did the manufacturer use reasonable care in designing and manufacturing the product at the time it was marketed, not whether it could possibly have been made better or more safe, or later has been made better or more safe." [[2363]](#footnote-2364)2362

In 1991, the court accepted the second collision theory in **[\*943]** Blankenship v. General Motors Corp. [[2364]](#footnote-2365)2363 and again addressed the issue in its 1993 decision of Johnson v. General Motors Corp. [[2365]](#footnote-2366)2364 In the Johnson decision, the court addressed the issue of a post-sale duty to warn. [[2366]](#footnote-2367)2365 The plaintiff argued that there was a difference between strict liability and negligence theories in a post-sale warnings case. [[2367]](#footnote-2368)2366 Under negligence law, the consumer appeared to have a valid cause of action. Nevertheless, the Morningstar approach rejects post-sale warning actions brought under strict liability. [[2368]](#footnote-2369)2367

At present, the Supreme Court of West Virginia appears to apply a risk-utility standard which is equivalent to or more harsh than the standard applied in negligence. [[2369]](#footnote-2370)2368

2. Statutes

There are no statutes applicable to strict liability design defects; however, legislation has been passed which limits recovery for blood products. [[2370]](#footnote-2371)2369

3. Pattern Jury Instructions

West Virginia has no applicable pattern jury instructions.

XX. Wisconsin

1. Common Law

The Supreme Court of Wisconsin adopted section 402A in its 1967 decision of Dippel v. Sciano. [[2371]](#footnote-2372)2370 The Dippel court **[\*944]** noted that the most beneficial aspect of the rule was to relieve the plaintiff's burden of proving negligence. [[2372]](#footnote-2373)2371 However, the court said its version of strict liability was related to negligence per se and applied the comparative negligence rule. [[2373]](#footnote-2374)2372 In order to establish strict liability, the court said a plaintiff must prove:

(1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it. [[2374]](#footnote-2375)2373

The court extended strict liability to second collision design cases in Arbet v. Gussarson. [[2375]](#footnote-2376)2374 In Arbet, the court clearly adopted a consumer expectation test for defects, including those of design defects:

It must be noted also that the design characteristics complained of in the instant case were hidden dangers, not apparent to the buyer of the car, and not the subject of a manufacturer's warning. This is a different case, therefore, then a case where a plaintiff sues the manufacturer of a Volkswagen and complains that the car was designed too small to be safe. Such a defect could hardly be said to be hidden. To be an "unreasonably dangerous" defect for strict products liability purposes, comment i to sec. 402A, **[\*945]** Restatement, 2 Torts 2d, says in part: ". . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." [[2376]](#footnote-2377)2375

The Supreme Court of Wisconsin continues to rely upon the consumer expectation test to the present. For example, in Sumnicht v. Toyota Motor Sales, [[2377]](#footnote-2378)2376 a second collision case, the court applied the consumer expectation test to both the defect and unreasonably dangerous requirements of section 402A. [[2378]](#footnote-2379)2377

Wisconsin is committed to the consumer-contemplation test for determining whether a product is defective. In Vincer v. Esther Wms. All-Alum. S. Pool Co., 69 Wis.2d 326, 230 N.W.2d 794 (1975), this court adopted comment g to the Restatement (Second) of Torts section 402A at 351, which defines "defective condition" in part as follows:

"'g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.'" [[2379]](#footnote-2380)2378

The Sumnicht court did allow some flexibility in the test:

Although these comments serve as a guideline, the term "defect" is not susceptible to any general definition, and a decision on whether a defect exists must be made on a case-by-case basis. [[2380]](#footnote-2381)2379

The second element that must be proven is that the product is "unreasonably dangerous." Comment i to section 402A of the Restatement (Second) of Torts, at 352, defines **[\*946]** "unreasonably dangerous," in part as follows: . . . . [[2381]](#footnote-2382)2380

The court then highlighted the following portions of comment i: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." [[2382]](#footnote-2383)2381

After establishing that a consumer expectation test controlled both defect and unreasonable danger, the court reaffirmed its commitment that a defect must be hidden and not apparent to the user. In other words, the Sumnicht court reaffirmed its denial of liability for open and obvious danger under the consumer expectation test. [[2383]](#footnote-2384)2382

The defendant argued that there could be no defective design unless the plaintiff proved "an alternative, safer design, practicable under the circumstances." [[2384]](#footnote-2385)2383 The court disagreed:

Although evidence of an alternative safer design may be relevant and admissible in a products liability case, our state's strict products liability rule does not mandate such evidence. A product may be defective and unreasonably dangerous even though there are no alternative, safer designs available. . . .

This court has refrained from adopting mandatory factors that must be weighed when determining if a product is defective and unreasonably dangerous. Since product defects are unique in each case, the factors that will be beneficial in assessing defectiveness and unreasonableness will differ from case to case. The United States Court of Appeals for the Seventh Circuit, in applying Wisconsin law, has suggested five factors which should be examined when determining the reasonableness of a design. This list may be beneficial to plaintiffs in proving their case, but these factors are clearly permissive. The relevant factors are:

1) Conformity of defendant's design to the practices **[\*947]** of other manufacturers in its industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; . . . 3) the extent of the claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident. . . . 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design. [[2385]](#footnote-2386)2384

In a recent decision, Griebler v. Doughboy Recreational, Inc., [[2386]](#footnote-2387)2385 the court affirmed the open and obvious danger rule as a bar to liability for design defects under its consumer expectation test. [[2387]](#footnote-2388)2386

2. Statutes

There are no Wisconsin statutes applicable to design defects; however, legislation has been passed which limits consumer recovery in blood products, [[2388]](#footnote-2389)2387 joint and several liability, [[2389]](#footnote-2390)2388 and punitive damages. [[2390]](#footnote-2391)2389

3. Pattern Jury Instructions

Although Wisconsin's Jury Instructions are somewhat dated, they have recently been edited and still reflect the common law consumer expectation test for design defects. [[2391]](#footnote-2392)2390 **[\*948]**

YY. Wyoming

1. Common Law

The Supreme Court of Wyoming adopted section 402A in the 1986 case of Ogle v. Caterpillar Tractor Co. [[2392]](#footnote-2393)2391 and set out the following elements:

(1) That the sellers were engaged in the business of selling the product that caused the harm;

(2) that the product was defective when sold;

(3) that the product was unreasonably dangerous to the user or consumer;

(4) that the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; and

(5) that the product caused physical harm to the plaintiff/consumer. [[2393]](#footnote-2394)2392

The court again applied strict liability in Sims v. General Motors Corp. [[2394]](#footnote-2395)2393 In Sims, the plaintiff appealed an adverse judgment claiming error in an instruction on "unreasonably dangerous." [[2395]](#footnote-2396)2394 The trial court's instruction stated: "A product is defective when it is in an unreasonably dangerous condition. The term 'unreasonably dangerous' means unsafe when put to a use that is reasonably foreseeable considering the nature and function of the product and its uses." [[2396]](#footnote-2397)2395 The plaintiff argued that the instruction was erroneous because it improperly imposed a risk-benefit theory which required proof of an alternative design. [[2397]](#footnote-2398)2396 Plaintiff argued that the proper rule was the consumer expectation test of section 402A. [[2398]](#footnote-2399)2397 The Sims court disagreed:

After review of the instruction given by the trial **[\*949]** court, all of the instructions as a whole allowed to go before the jury, and the facts of this case, we determine that the jury was instructed properly regarding the doctrine of strict liability as expressed in section 402A, supra, adopted by this Court. We fail to recognize any merit in plaintiffs' contention that the instruction given by the trial court did not conform with W.C.P.J.I., No. 11.04. While we admit that this Court does not follow a risk-benefit theory, we cannot see how the instruction given by the trial court imposed such a burden on plaintiffs or the jury. [[2399]](#footnote-2400)2398

Both Ogle and Sims were design cases; however, the Supreme Court of Wyoming has not succinctly set forth a standard for such defects. According to the Sims court, it is not a risk-benefit standard. The instruction approved in Sims, however, gives very little clue as to what the actual standard should be. If the Supreme Court of Wyoming follows the Restatement, it will probably adopt its consumer expectation test.

2. Statutes

There are no Wyoming statutes which apply to design defects; [[2400]](#footnote-2401)2399 however, legislation limits consumer recovery in blood products, [[2401]](#footnote-2402)2400 the sale of livestock, [[2402]](#footnote-2403)2401 and joint and several liability. [[2403]](#footnote-2404)2402 **[\*950]**

3. Pattern Jury Instructions

Although Wyoming has pattern jury instructions, it has no pattern jury instruction for design defects. [[2404]](#footnote-2405)2403

[SEE APPENDIX IN ORIGINAL]

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**End of Document**

1. \*The American Law Institute has acquired such respect over the years that its status can be likened to the "Emperor" of interpretation of American law. The "Emperor" has, however, robed itself with new clothes woven from a cloth supposedly based on a majority view. While most spectators of this robe hesitate to protest for fear of accusations of treason, this Article cries out: "The Emperor does not have anything on." [↑](#footnote-ref-2)
2. 1 See Aaron Twerski, From a Reporter's Perspective: A Proposed Agenda, 10 Touro L. Rev. 5, 5 n.2 (1993). [↑](#footnote-ref-3)
3. 2 Restatement (Third) of Torts: Products Liability (Preliminary Draft No. 1, 1993) [hereinafter Preliminary Draft No. 1]; Restatement (Third) of Torts: Products Liability (Preliminary Draft No. 2, 1994) [hereinafter Preliminary Draft No. 2]. [↑](#footnote-ref-4)
4. 3 Restatement (Third) of Torts: Products Liability (Council Draft No. 1, 1993) [hereinafter Council Draft No. 1]; Restatement (Third) of Torts: Products Liability (Council Draft No. 1A, 1994) [hereinafter Council Draft No. 1A]; Restatement (Third) of Torts: Products Liability (Council Draft No. 2, 1994) [hereinafter Council Draft No. 2]; Restatement (Third) of Torts: Products Liability (Council Draft No. 3, 1995) [hereinafter Council Draft No. 3]. [↑](#footnote-ref-5)
5. 4 Restatement (Third) of Torts: Products Liability (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft No. 1]; Restatement (Third) of Torts: Products Liability (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2]. [↑](#footnote-ref-6)
6. 5 Tentative Draft No. 2, supra note 4, section 2(b), at 12. [↑](#footnote-ref-7)
7. 6 See James A. Henderson, Jr. & Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L. Rev. 1512, 1513 (1992); Twerski, supra note 1, at 19; Frank J. Vandall, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 Tenn. L. Rev. 1407 (1994) [hereinafter Vandall, The Reasonable Alternative Design Requirement]; Frank J. Vandall, The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect, 68 Temp. L. Rev. 167 (1995) [hereinafter Vandall, Design Defect]. [↑](#footnote-ref-8)
8. 7 Vandall, Design Defect, supra note 6; see also Howard C. Klemme, Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability, 61 Tenn. L. Rev. 1173 (1994). [↑](#footnote-ref-9)
9. 8 Vandall, Design Defect, supra note 6; Klemme, supra note 7. [↑](#footnote-ref-10)
10. 9 Vandall, Design Defect, supra note 6; Klemme, supra note 7. [↑](#footnote-ref-11)
11. 10 During discussion of section 2(b) at the 1994 Annual Meeting, some members of the ALI attempted to point out that the co-reporters' research did not, in fact, reflect a majority view and that the co-reporters' research did not reflect what the cases actually revealed. See 71st Annual Meeting The American Law Institute Proceedings 1994, 71 A.L.I. Proc. 104-41, 153-214 (1995) [hereinafter 71st Annual Meeting]. For example, John Vargo directed the members' attention to both a law review article and a letter which Professor Klemme submitted to the Council. 71st Annual Meeting, supra, at 122-23.

    Nevertheless, some members stated their research reflected support for the coreporters' view. See, e.g., 71st Annual Meeting, supra, at 126-27 (statement by Professor M. Stuart Madden). Immediately after Professor Madden's comments, Professor Jerry Phillips made the following statement: "I think it is interesting that we have such disagreement as to what the cases hold out there. Perhaps we should all take adjournment and read the cases ourselves." 71st Annual Meeting, supra, at 127. After further debate about this subject, Professor Phillips again stated:

    I think substantial question was raised yesterday, both from the letter of Professor Klemme and from other sources, as to whether or not the alternative reasonable design represents the overwhelming majority position in this country or whether, on the contrary, it represents only a distinct minority position, as the exclusive way of determining design defect.

    I had the impression that most members here had not studied that matter in detail, and for these reasons I think it would be unwise for us to proceed forward until we have all had time to deliberate and review the cases and the materials submitted by Professor Klemme and others. Thank you.

    71st Annual Meeting, supra, at 202. [↑](#footnote-ref-12)
12. 11 Klemme, supra note 7. [↑](#footnote-ref-13)
13. 12 See Vandall, The Reasonable Alternative Design Requirement, supra note 6, at 1408 n.11. [↑](#footnote-ref-14)
14. 13 James A. Lowe, Products Liability in Ohio After Tort Reform section 1.2, at 3 (1988); Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 1, 5-7 (1995); Philip H. Corboy, The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Product Liability, 61 Tenn. L. Rev. 1043, 1068-84 (1994). See generally Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1 (1990); Charles P. Kindregan & Edward M. Swartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform, 18 St. Mary's L.J. 673 (1987); Robert L. Habush, The Insurance "Crisis": Reality or Myth? A Plaintiffs' Lawyer's Perspective, 64 Denv. U. L. Rev. 641 (1988); Ralph Nader, The Corporate Drive to Restrict Their Victims' Rights, 22 Gonz. L. Rev. 15 (1986). [↑](#footnote-ref-15)
15. 14 See sources cited supra note 13. [↑](#footnote-ref-16)
16. 15 See sources cited supra note 13; see also Kenneth J. Chesebro, Galileo's Retort: Peter Huber's Junk Scholarship, 42 Am. U. L. Rev. 1637 (1993); Marc Galanter, Public View of Lawyers: Quarter-Truths Abound, 28 Trial 71 (1992); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983); Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986); Kenneth Jost, Tampering With Evidence, The Liability and Competitiveness Myth, 78 A.B.A. J. 44 (1992); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147 (1992); Michael J. Saks, If There Be a Crisis, How Shall We Know It?, 46 Md. L. Rev. 63 (1986). [↑](#footnote-ref-17)
17. 16 See infra Appendix, Index 14. [↑](#footnote-ref-18)
18. 17 See George L. Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301 (1989); Marshall S. Shapo, In Search of the Law of Products Liability: The ALI Restatement Project, 48 Vand. L. Rev. 631 (1995); Twerski, supra note 1. [↑](#footnote-ref-19)
19. 18 See 38th Annual Meeting The American Law Institute Proceedings 1961, 38 A.L.I. Proc. 50 (1962). [↑](#footnote-ref-20)
20. 19 See, e.g., 39th Annual Meeting The American Law Institute Proceedings 1962, 39 A.L.I. Proc. 227-28 (1963). [↑](#footnote-ref-21)
21. 20 See Priest, supra note 17. [↑](#footnote-ref-22)
22. 21 See Lechuga, Inc. v. Montgomery, 467 P.2d 256, 262 (Ariz. Ct. App. 1970) (citing Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964)) (Jacobson, J., concurring); Joseph E. Linehan, Note, The Recovery of Economic Loss Damages in Tort: Pennsylvania Law and "Social Adjustment", 51 U. Pitt. L. Rev. 203 (1989). [↑](#footnote-ref-23)
23. 22 See W. Page Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 34-35 (1973); see also Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1962) (decided prior to the Restatement (Second) of Torts, but advocating the same black-letter law). [↑](#footnote-ref-24)
24. 23 W. Page Keeton et al., Prosser and Keeton on the Law of Torts section 98, at 693-94 (5th ed. 1984). [↑](#footnote-ref-25)
25. 24 See Keeton, supra note 22; Camacho v. Honda Motor Co., 741 P.2d 1240 (Colo. 1987) (en banc); Ritter v. Narragansett Elec. Co., 283 A.2d 255, 262 (R.I. 1971); Smith v. Smith, 278 N.W.2d 155, 159 (S.D. 1979). [↑](#footnote-ref-26)
26. 25 David A. Fischer & William Powers, Jr., Products Liability, Cases and Materials 136-37 (1994). [↑](#footnote-ref-27)
27. 26 See Project on Compensation and Liability for Product and Process Injuries, 63 A.L.I. Proc. 459 (1987). [↑](#footnote-ref-28)
28. 27 American Law Inst., Compensation and Liability for Product and Process Injuries: Proposed Final Report (Council Draft No. 1, 1990) [hereinafter Proposed Final Report] (describing the Enterprise Project). [↑](#footnote-ref-29)
29. 28 See Jerry J. Phillips, Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury, 30 San Diego L. Rev. 241 (1993). [↑](#footnote-ref-30)
30. 29 Id. The Enterprise Project was published in a two volume report which was riddled with economic and insurance perspectives. See Proposed Final Report, supra note 27. Both volumes of the report covered recommendations for tort law in general; however, a great proportion of the report either directly or indirectly impacted upon products liability law. Professor Marshall Shapo, during the 1991 Annual Meeting, expressed his opinion that the entire impetus of the Enterprise Project stemmed from products liability law. See 68th Annual Meeting The American Law Institute Proceedings 1991, 68 A.L.I. Proc. 27 (1992) [hereinafter 68th Annual Meeting]. The economic/insurance view of tort liability and products liability is set forth on almost every page of Volume I. Volume II adopts this economic/insurance view in discussing various tort principles. Products liability is directly addressed in Volume II. Proposed Final Report, supra note 27, at 10-66.

    A great number of other tort issues, however, directly affect and reference product liability law, such as regulatory compliance, id. at 67-98; joint and several liability, id. at 119-56; collateral sources, id. at 157-83; workers' compensation, id. at 184-201; pain and suffering, id. at 202-40; punitive damages, id. at 241-84; attorney fees, id. at 285-351; environmental and mass torts, id. at 352-543; contractual alternatives to torts, id. at 581-605; and social insurance, id. at 628-54.

    When presenting the Enterprise Project to the membership at the 1991 Annual Meeting, the reporter, Paul Weiler, commented on the tort crisis caused by the unavailability of insurance coverage in the mid-1980s. 68th Annual Meeting, supra, at 21.

    A summary of just a few of the economic/insurance bias in the Enterprise Project were listed in a twelve page letter sent by John Vargo to the Council and various, other ALI members. See Letter from John Vargo, Attorney, to ALI Council (on file with The University of Memphis Law Review) [hereinafter Vargo letter]. This letter was accompanied by an extensive comment (103 pages) on the project authored by Professor Jerry Phillips. See Jerry J. Phillips, Comments on The American Law Institute Study of Enterprise Liability for Personal Injury (April 1991) (on file with The University of Memphis Law Review). The Vargo letter requested that the ALI Council refrain from using the anti-consumer procedures found in the Enterprise Project in the upcoming Restatement (Third) on Products Liability. Vargo letter, supra. [↑](#footnote-ref-31)
31. 30 Vargo letter, supra note 29, at 2. [↑](#footnote-ref-32)
32. 31 Proposed Final Report, supra note 27, at 21-38. [↑](#footnote-ref-33)
33. 32 Walter Hull Beckham, Jr., Remarks at the American Law Institute Proceedings, 64 A.L.I. Proc. 68-70 (1988). [↑](#footnote-ref-34)
34. 33 Gerald T. Wetherington, Remarks at the American Law Institute Proceedings, 64 A.L.I. Proc. 70-71 (1988). [↑](#footnote-ref-35)
35. 34 See 68th Annual Meeting, supra note 29, at 18-56, 153-222, for discussion and debate at the 1991 Annual Meeting. Although some members expressed at least partial support for the Enterprise Project, there was substantial opposition to it, especially to the economic/insurance perspectives used as a foundation for the views expressed in the report. Professor Marshall Shapo summed up the overall attitude of those opposing the Enterprise Project's suggestions on products liability: "Since according to the Report itself, much of the impetus of the Report has stemmed from products liability law, I must say that it seems to me that the discussion of products is so inaccurate that it introduces doubt as to the fundamental concepts that generally guide the Report." Id. at 27.

    The discussions and debate at the 1991 Annual Meeting revealed that some members, generally those representing corporate/insurance interests, supported, at least in part, some of the anti-consumer recommendations found in the Enterprise Project. Nevertheless, a great number of the members opposed the contents of the Enterprise Project's economic/insurance foundation and its conclusion. See 68th Annual Meeting, supra note 29, at 18-56, 153-222. An academic analysis of the Enterprise Project which expresses several differing views, including those of some of the document's authors, can be found in a symposium issue. See Tort Reform Symposium, Perspectives on Institute's Reporters' Study on Enterprise Responsibility for Personal Injury, 30 San Diego L. Rev. 213 (1993). [↑](#footnote-ref-36)
36. 35 The Enterprise Project was somewhat unusual since the ALI never approved it as an official position of the Institute. Then-President Perkins explained:

    I call the session to reconvene. Today has been set aside for a discussion of an important Reporters' Study. When I say discussion, I mean discussion only. As stated on page 13 of the Program, the substantive agenda of the Annual Meeting provides that no action by the membership is sought. Any motions will simply not be in order and will be so ruled. To step back a bit, let me emphasize that the document before you does not have the Council's approval of its substance. The only vote the Council has taken is to adopt the resolution that appears at page xii of Volume I, and I shall read that resolution. It says:

    RESOLVED, that the two-volume Report on Compensation and Liability for Product and Process Injuries (subject to such revisions as the Reporters may make) be published as a Reporters' Study, be made available for public distribution, and be brought before the membership of the Institute for discussion in May, 1991, with a view to no action being taken by the membership at such meeting and with consideration by the Council in the fall of 1991 as to what further action by the Institute might be appropriate.

    The reason this Reporters' Study has not been considered by the Council and has not ripened into a Tentative Draft is simply that the Council needs help. The Council needs help from the membership, and indeed from all concerned segments of the field of Enterprise Responsibility for Personal Injury, in deciding where to go from here. . . .

    . . . .

    Having commissioned the study, the Council authorized its publication pursuant to the second sentence of Bylaw V.1. The first sentence of that section states the rule that documents representing the position of the Institute require the dual approval to which I have referred. The second sentence says--and this, incidentally, is printed in your Annual Reports, the larger of the two volumes, where all the Bylaws are set out--"use of the name of the Institute in connection with other publications may be authorized by the Council without specific approval of their contents by the membership or the Council." This is exactly what we have here, a document commissioned by the Council, the contents of which do not have the approval, or disapproval, I should add, of either the Council or the membership.

    68th Annual Meeting, supra note 29, at 18-19. Nevertheless, after heavy opposition to the project by various members, the ALI took no further action on the Enterprise Project. [↑](#footnote-ref-37)
37. 36 Twerski, supra note 1, at 5 n.2. [↑](#footnote-ref-38)
38. 37 Id. at 5 n.1. [↑](#footnote-ref-39)
39. 38 See Henderson & Twerski, supra note 6. [↑](#footnote-ref-40)
40. 39 Id. at 1514. [↑](#footnote-ref-41)
41. 40 Henderson & Twerski, supra note 6; James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263 (1991); James A. Henderson, Jr. & Aaron D. Twerski, Stargazing: The Future of American Products Liability Law, 66 N.Y.U. L. Rev. 1332 (1991); James A. Henderson, Jr. & Aaron D. Twerski, Will a New Restatement Help Settle Troubled Waters: Reflections, 42 Am. U. L. Rev. 1257 (1993). For an extensive list of the co-reporters' articles, see Jerry J. Phillips, Achilles' Heel, 61 Tenn. L. Rev. 1265, 1265-66 n.3 (1994). [↑](#footnote-ref-42)
42. 41 See sources cited supra notes 2-4. [↑](#footnote-ref-43)
43. 42 See sources cited supra notes 2-4. [↑](#footnote-ref-44)
44. 43 See sources cited supra notes 2-4. [↑](#footnote-ref-45)
45. 44 Section 2 of Tentative Draft No. 1 reads, in pertinent part, as follows:

    section 2. Categories of Product Defect

    For purposes of determining liability under section 1:

    . . . .

    (b) A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe.

    Tentative Draft No. 1, supra note 4, section 2, at 9. The evidence which plaintiff must marshall to prove a design defect is listed in comment d:

    d. Design defects: factors relevant in determining whether omission of reasonable alternative design renders product not reasonably safe. Subsection (b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. These include, without limitation, the magnitude of foreseeable risks of harm, the nature and strength of consumer expectations, the effects of the alternative design on costs of production, the effects of the alternative design on product function, the relative advantages and disadvantages of proposed safety features, product longevity, maintenance and repair, esthetics, and marketability. On the other hand, it is inappropriate to take into account whether the imposition of liability would have a negative effect on corporate earnings, or would reduce employment in a given industry. These considerations do not speak to whether a product is reasonably designed.

    When evaluating the reasonableness of a design alternative, the overall safety of the entire product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also introduce into the product other dangers of equal or greater magnitude. Such an alternative design could not be considered to be reasonable.

    A test that considers such a broad range of factors in deciding whether the omission of an alternative design renders a product not reasonably safe requires a fair allocation of proof between the parties. To establish a prima facie case of defect, plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm. Given the relative limitations on the plaintiff's access to relevant data, the plaintiff should not be required to establish in detail the costs and benefits associated with adoption of the suggested alternative design. Analysis and conclusions reasonably advanced by a qualified expert should suffice to allow the plaintiff to reach the trier of fact on the issue of whether or not failure to adopt the suggested alternative rendered the design not reasonably safe. Whether instructions to the trier of fact should include reference to these factors is beyond the scope of this Restatement and is to be determined under local law.

    Id. section 2 cmt. d, at 19-20. [↑](#footnote-ref-46)
46. 45 William A. Trine, Products Liability: Unreasonably Dangerous versus Risk Utility Analysis, 36 Trial Talk 348, 355 (1987). A good example of such concern was expressed in Barker v. Lull Engineering Co., 573 P.2d 443, 454 (Cal. 1978). [↑](#footnote-ref-47)
47. 46 See Tentative Draft No. 1, supra note 4. [↑](#footnote-ref-48)
48. 47 See supra note 10. [↑](#footnote-ref-49)
49. 48 The concept of "leaving one's client at the door" is one of the best known phrases at the ALI. Roswell B. Perkins, the immediate past-President of the ALI, best described this concept:

    The precept of leaving one's client at the door must be honored if we are to preserve our integrity as an organization . . . . The Institute cannot become a forum for power plays by clients, and I will do everything in my capacity during my tenure to prevent that result. Any member who does not have the stomach for voting in a way that an important client would not like simply should not vote . . . . Our Membership Committee endeavors to select members whose careers bespeak confidence, intellectual integrity, and independence as thinkers on legal matters. If you believe that you might find it within yourself to vote so as to respect a client's interest because it is the client's interest or perceived interest, rather than to reach your own independent and informed conclusions, you owe it to yourself and the Institute not to participate.

    Roswell B. Perkins, The President's Letter, 14 The ALI Rep., no. 3, at 3 (April 1992). [↑](#footnote-ref-50)
50. 49 See supra note 10. [↑](#footnote-ref-51)
51. 50 Bill Wagner, Products Liability: Reviewing the Restatement, Trial, Nov. 1995, at 44, 46. [↑](#footnote-ref-52)
52. 51 All of the Preliminary Drafts and Council Drafts that preceded Tentative Draft No. 1 contain a progression of the research and authority the co-reporters provide for the elimination of the consumer expectation test. See sources cited supra notes 2-3. [↑](#footnote-ref-53)
53. 52 Both the 1994 and 1995 Annual Meetings hosted heated debate over those who believed that consumer expectations had a greater role in a design defect test and those who desire to eliminate it. See supra note 10; infra notes 59-91 and accompanying text. [↑](#footnote-ref-54)
54. 53 See supra note 10; infra notes 59-91 and accompanying text. [↑](#footnote-ref-55)
55. 54 Council Draft No. 2, supra note 3, section 2(b) cmt. 3, at 34-35. [↑](#footnote-ref-56)
56. 55 Id. [↑](#footnote-ref-57)
57. 56 Id. section 2 cmts. a, c, d & illustrations, at 15-34. [↑](#footnote-ref-58)
58. 57 Id. at 35. [↑](#footnote-ref-59)
59. 58 Id. section 2 cmt. d, at 30, 35. [↑](#footnote-ref-60)
60. 59 Tentative Draft No. 2, supra note 4. [↑](#footnote-ref-61)
61. 60 Id. at 12. A detailed list of the submitted amendments, debate, and votes on the changes adopted in Tentative Draft No. 2 may be found in a transcript of the ALI annual proceedings in May 1995. See 72nd Annual Meeting The American Law Institute Proceedings 1995, 72 A.L.I. Proc. (forthcoming 1996) [hereinafter 72nd Annual Meeting]. [↑](#footnote-ref-62)
62. 61 See 72nd Annual Meeting The American Law Institute Proceedings 1995, Wednesday Afternoon Session, May 17, 1995, 72 A.L.I. Proc. (forthcoming 1996) [hereinafter 72nd Annual Meeting, Wednesday Afternoon Session, May 17, 1995]. [↑](#footnote-ref-63)
63. 62 Id. [↑](#footnote-ref-64)
64. 63 President Wright presented Professor Shapo's amendments in his initial address to ALI members on the afternoon of May 17, 1995. Id. [↑](#footnote-ref-65)
65. 64 Id. [↑](#footnote-ref-66)
66. 65 Id. [↑](#footnote-ref-67)
67. 66 Id. [↑](#footnote-ref-68)
68. 67 Id. [↑](#footnote-ref-69)
69. 68 Id. [↑](#footnote-ref-70)
70. 69 For example, Mr. John W. Martin, Jr., General Counsel of Ford Motor Company, supported the Restatement version of section 2(b), as did defense and/or corporate attorneys Robert S. Daggett, Sheila Birnbaum, Mark G. Arnold, and George M. Newcombe. Attorneys representing the consumers supporting the amendment were Mr. Anthony Z. Roisman and Mr. Larry Stewart. Academics took a variety of positions on the subject which probably reflected a variety of beliefs and research in the area. Id. [↑](#footnote-ref-71)
71. 70 See id. [↑](#footnote-ref-72)
72. 71 The afternoon session began at 3:32 p.m. and ended at 4:55 p.m. Id. [↑](#footnote-ref-73)
73. 72 Id. [↑](#footnote-ref-74)
74. 73 See 72nd Annual Meeting The American Law Institute Proceedings 1995, Thursday Morning Session, May 18, 1995, 72 A.L.I. Proc. (forthcoming 1996) [hereinafter 72nd Annual Meeting, Thursday Morning Session, May 18, 1995]. President Wright made the comment that a total time of debate and discussion on sections 1 and 2 would be eight hours and eight minutes. Id. [↑](#footnote-ref-75)
75. 74 Id. [↑](#footnote-ref-76)
76. 75 Id. [↑](#footnote-ref-77)
77. 76 Id. [↑](#footnote-ref-78)
78. 77 Id. [↑](#footnote-ref-79)
79. 78 Id. [↑](#footnote-ref-80)
80. 79 Several of the states mentioned by Professor Madden have adopted a reasonable alternative design as a result of anti-consumer statutes. See Appendix, Index 1. Of the non-statute states listed by Professor Madden (Oregon, Minnesota, Pennsylvania, Kansas, West Virginia and Massachusetts), none have adopted the extreme version of section 2(b) as an absolute requirement for design defect liability to attach. For a discussion of these states' common law, see infra Parts III.LL, III.X, III.MM, III.Q, III.WW, III.V, respectively. The co-reporters' "prodigious research," according to Professor Madden, adds 13 additional states; however, this view is not supported by examination of the common law. [↑](#footnote-ref-81)
81. 80 See supra note 79. [↑](#footnote-ref-82)
82. 81 See infra text accompanying note 95. [↑](#footnote-ref-83)
83. 82 72nd Annual Meeting, Thursday Morning Session, May 18, 1995, supra note 73. [↑](#footnote-ref-84)
84. 83 Id. [↑](#footnote-ref-85)
85. 84 Id. [↑](#footnote-ref-86)
86. 85 Id. [↑](#footnote-ref-87)
87. 86 Id. [↑](#footnote-ref-88)
88. 87 Tentative Draft No. 2, supra note 4, at 12. Tentative approval was given during the Thursday morning session of May 18, 1995. See 72nd Annual Meeting, Thursday Morning Session, May 18, 1995, supra note 73. Final approval was given during the afternoon session. See 72nd Annual Meeting The American Law Institute Proceedings 1995, Thursday Afternoon Session, May 18, 1995, 72 A.L.I. Proc. (forthcoming 1996). [↑](#footnote-ref-89)
89. 88 Tentative Draft No. 2, supra note 4, at 24-26. [↑](#footnote-ref-90)
90. 89 Id. at 29-30. [↑](#footnote-ref-91)
91. 90 Id. at 21-22. [↑](#footnote-ref-92)
92. 91 Id. at 37-38. [↑](#footnote-ref-93)
93. 92 Id. section 2 cmt. c, at 50-51. [↑](#footnote-ref-94)
94. 93 Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984); see infra notes 10871203 and accompanying text. [↑](#footnote-ref-95)
95. 94 See supra note 40 and accompanying text. [↑](#footnote-ref-96)
96. 95 See infra Appendix, Index 1. The Illinois statute recently changed its common law and was not part of the co-reporters' original count concerning a "majority rule." See infra notes 747-72 and accompanying text. [↑](#footnote-ref-97)
97. 96 See Preliminary Draft No. 1, supra note 2, at 43-64; Council Draft No. 1, supra note 3, at 54-93; Council Draft No. 2, supra note 3, section 2 cmt. c, at 59-89. [↑](#footnote-ref-98)
98. 97 577 P.2d 1322 (Or. 1978). [↑](#footnote-ref-99)
99. 98 See infra notes 1984-96 and accompanying text. [↑](#footnote-ref-100)
100. 99 See supra note 96. [↑](#footnote-ref-101)
101. 100 See supra note 96. One can determine such by comparing the co-reporters' citations and comments with Part III. See also supra note 7. [↑](#footnote-ref-102)
102. 101 See supra notes 2-4. [↑](#footnote-ref-103)
103. 102 See infra Appendix, Index 2. [↑](#footnote-ref-104)
104. 103 See infra Appendix, Index 5. [↑](#footnote-ref-105)
105. 104 See infra Appendix, Indices 6 and 7. [↑](#footnote-ref-106)
106. 105 See infra Appendix, Index 8. [↑](#footnote-ref-107)
107. 106 See infra Appendix, Index 9. [↑](#footnote-ref-108)
108. 107 See infra Appendix, Index 10. [↑](#footnote-ref-109)
109. 108 See infra Appendix, Index 3. [↑](#footnote-ref-110)
110. 109 Restatement (Second) of Torts section 402A cmt. i (1965); W. Page Keeton et al., Prosser and Keeton on the Law of Torts section 99, at 698 (5th ed. 1984); Sheila L. Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 611-18 (1980); W. Page Keeton, The Meaning of Defect in Products Liability Law--A Review of Basic Principles, 45 Mo. L. Rev. 579, 588-92 (1980); John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 829-33 (1973). [↑](#footnote-ref-111)
111. 110 Restatement (Second) of Torts section 402A cmt. i (1965). [↑](#footnote-ref-112)
112. 111 Id.; see also Brown v. Superior Court, 751 P.2d 470, 474 (Cal. 1988); Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 517 P.2d 406, 413 (Colo. Ct. App. 1973); Savina v. Sterling Drug, Inc., 795 P.2d 915, 927-28 (Kan. 1990); Teagle v. Fischer & Porter Co, 570 P.2d 438, 441 (Wash. 1977); Lundberg v. All-Pure Chem. Co., 777 P.2d 15 (Wash. Ct. App. 1989). [↑](#footnote-ref-113)
113. 112 Louise B. Maehler, Glittenberg v. Doughboy Recreational Industries: The "Open and Obvious Danger" Rule, 1993 Det. C.L. Rev. 1357 (1993); Judge Todd M. Thornhill, Products Liability: The Open and Obvious Danger Rule, 51 J. Mo. B. 203 (1995). [↑](#footnote-ref-114)
114. 113 See sources cited supra note 112. [↑](#footnote-ref-115)
115. 114 Negligence depended on balancing all risk-utility factors, not just one. Historically, under the open and obvious danger rule, only one factor was examined. Therefore, under the open and obvious danger rule, it was possible to recover under negligence and not strict liability, if there was no contributory negligence or assumption of risk found. Compare Christina M. Moylan, In Pursuit of the Appropriate Standard of Liability for Defective Product Designs, 42 Me. L. Rev. 453, 466-68 (1990) with Maehler, supra note 112, at 1358-73 (discussing the history of the "open and obvious danger" rule generally); Thornhill, supra note 112, at 205-07 (discussing the traditional application of the "open and obvious danger" rule). [↑](#footnote-ref-116)
116. 115 David A. Fischer, Products Liability--The Meaning of Defect, 39 Mo. L. Rev. 339, 348-52 (1974); see also Gary T. Schwartz, Foreword: Understanding Products Liability, 67 Cal. L. Rev. 435 (1979). [↑](#footnote-ref-117)
117. 116 See, e.g., Roach v. Kononen, 525 P.2d 125, 127 (Or. 1974) (citing Anderson v. Klix Chemical, 472 P.2d 806 (Or. 1970)). [↑](#footnote-ref-118)
118. 117 See infra Appendix, Index 4 (listing states which add risk-utility). [↑](#footnote-ref-119)
119. 118 Other states, however, turn to other tests, such as the Barker Test, see infra Appendix, Indices 6 and 7, the Wade Test, see infra Appendix, Index 5. [↑](#footnote-ref-120)
120. 119 See infra Part III.VV (describing Washington's law of strict liability for design defects). [↑](#footnote-ref-121)
121. 120 See infra Part III.VV (describing Washington's law of strict liability for design defects). [↑](#footnote-ref-122)
122. 121 See Moylan, supra note 114, at 464-65. [↑](#footnote-ref-123)
123. 122 See infra Appendix, Index 5. [↑](#footnote-ref-124)
124. 123 See John W. Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965); Wade, supra note 109. [↑](#footnote-ref-125)
125. 124 Wade, supra note 109, at 834-35. An excellent description of the rule is found in the Oregon case of Phillips v. Kimwood Machine Co., 525 P.2d 1033 (Or. 1974). [↑](#footnote-ref-126)
126. 125 Phillips, 525 P.2d at 1037. [↑](#footnote-ref-127)
127. 126 See infra Appendix, Index 5. [↑](#footnote-ref-128)
128. 127 See Ellen Wertheimer, Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back, 60 U. Cin. L. Rev. 1183 (1992). [↑](#footnote-ref-129)
129. 128 Id. at 1192-96; see also Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 1, 9-30 (1995). [↑](#footnote-ref-130)
130. 129 447 A.2d 539 (N.J. 1982). [↑](#footnote-ref-131)
131. 130 479 A.2d 374 (N.J. 1984). [↑](#footnote-ref-132)
132. 131 Wertheimer, supra note 127, at 1213-27. [↑](#footnote-ref-133)
133. 132 Id. at 1210-12. [↑](#footnote-ref-134)
134. 133 Id. [↑](#footnote-ref-135)
135. 134 Id. at 1196. [↑](#footnote-ref-136)
136. 135 Id. [↑](#footnote-ref-137)
137. 136 Id. at 1193. [↑](#footnote-ref-138)
138. 137 Id. at 1216 n.108. [↑](#footnote-ref-139)
139. 138 Id. at 1213-27. Professor Wertheimer explains the "fairness" arguments. See id.; see also Bogus, supra note 128. [↑](#footnote-ref-140)
140. 139 James A. Henderson Jr. & Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 271-75 (1990). [↑](#footnote-ref-141)
141. 140 Wertheimer, supra note 127, at 1213-27. [↑](#footnote-ref-142)
142. 141 See id. at 1192-96, 1203-06, 1213-27. [↑](#footnote-ref-143)
143. 142 Id. at 1213-27. [↑](#footnote-ref-144)
144. 143 Id. [↑](#footnote-ref-145)
145. 144 Id. [↑](#footnote-ref-146)
146. 145 Id. [↑](#footnote-ref-147)
147. 146 See infra Appendix, Index 6. [↑](#footnote-ref-148)
148. 147 573 P.2d 443 (Cal. 1978). [↑](#footnote-ref-149)
149. 148 For a discussion of Barker and its two-step rule, see infra notes 378-95 and accompanying text. [↑](#footnote-ref-150)
150. 149 Barker, 573 P.2d at 455-56. [↑](#footnote-ref-151)
151. 150 Id. [↑](#footnote-ref-152)
152. 151 Id. [↑](#footnote-ref-153)
153. 152 See infra Appendix, Index 6. [↑](#footnote-ref-154)
154. 153 See infra Appendix, Index 7. [↑](#footnote-ref-155)
155. 154 For a discussion of Arizona's and Ohio's common law, see infra Parts III.C, III.JJ, respectively. [↑](#footnote-ref-156)
156. 155 For a discussion of Maryland's, Massachusetts', and New York's common law, see infra Parts III.U, III.V, III.GG, respectively. [↑](#footnote-ref-157)
157. 156 For a discussion of Arizona's, Massachusetts', and New York's common law, see infra Parts III.C, III.V, III.GG, respectively. [↑](#footnote-ref-158)
158. 157 See infra Appendix, Index 8. [↑](#footnote-ref-159)
159. 158 See infra Appendix, Index 8. [↑](#footnote-ref-160)
160. 159 For a discussion of Maine's common law, see infra Part III.T. [↑](#footnote-ref-161)
161. 160 See infra notes 2219-21 and accompanying text. [↑](#footnote-ref-162)
162. 161 See infra Appendix, Index 9. [↑](#footnote-ref-163)
163. 162 For a discussion of Louisiana's, Missouri's, Nevada's and Pennsylvania's strict liability rules, see infra Parts III.S, III.Z, III.CC, III.MM, respectively. [↑](#footnote-ref-164)
164. 163 See infra Part III.S.1. [↑](#footnote-ref-165)
165. 164 391 A.2d 1020 (Pa. 1978). [↑](#footnote-ref-166)
166. 165 For a discussion of Azzarello, see infra notes 2030-43 and accompanying text. [↑](#footnote-ref-167)
167. 166 Council Draft No. 2, supra note 3, at 69-71. [↑](#footnote-ref-168)
168. 167 337 A.2d 893 (Pa. 1975). For a discussion of Berkebile, see infra notes 180010 and accompanying text. [↑](#footnote-ref-169)
169. 168 See infra notes 2019-29 and accompanying text. [↑](#footnote-ref-170)
170. 169 The co-reporters cite cases on crashworthiness and guarding. In both of these type of cases, the plaintiff bases a claim on a reasonable alternative design. It is the nature of these types of cases that give rise to the requirement. See infra Part III.MM.1 (discussing Pennsylvania's common law). [↑](#footnote-ref-171)
171. 170 See infra Appendix, Index 10. [↑](#footnote-ref-172)
172. 171 For a discussion of District of Columbia's, Montana's, and Wyoming's design defect rules, see infra Parts III.I, III.AA, III.YY, respectively. [↑](#footnote-ref-173)
173. 172 See Moylan, supra notes 114, at 464-65; see, e.g., Back v. Wickes Corp., 378 N.E.2d 964, 968 (Mass. 1978); Mauch v. Manufacturers Sales & Servs., 345 N.W.2d 338 (N.D. 1984). [↑](#footnote-ref-174)
174. 173 See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); see also Moylan, supra note 114, at 462-64; John Vargo, Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?, 10 Touro. L. Rev. 21, 48-50 (1993); Barbara Ann White, Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?, 32 Ariz. L. Rev. 77, 83-87 (1990) (economic analysis is to provide a reasoning process to bring stated priorities to a maximum). [↑](#footnote-ref-175)
175. 174 Moylan, supra note 114, at 460-61. [↑](#footnote-ref-176)
176. 175 Id. at 461-62. [↑](#footnote-ref-177)
177. 176 Id. at 464-65. [↑](#footnote-ref-178)
178. 177 Id. [↑](#footnote-ref-179)
179. 178 See id. at 461-68. [↑](#footnote-ref-180)
180. 179 White, supra note 173, at 85-86. [↑](#footnote-ref-181)
181. 180 See Byrns v. Riddell, Inc., 550 P.2d 1065 (Ariz. 1976); Brown v. North Am. Mfg. Co., 576 P.2d 711 (Mont. 1978). [↑](#footnote-ref-182)
182. 181 See, e.g., O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1983). [↑](#footnote-ref-183)
183. 182 See, e.g., Banks v. ICI Americas, Inc., 450 S.E.2d 671, 674-75 (Ga. 1994); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 115 (La. 1986). [↑](#footnote-ref-184)
184. 183 The Ohio decision of Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981), provides an excellent example of this situation. [↑](#footnote-ref-185)
185. 184 See supra note 78 and accompanying text. [↑](#footnote-ref-186)
186. 185 Restatement (Second) of Torts section 402A(2) (1965). [↑](#footnote-ref-187)
187. 186 There have been several authors who have suggested that as the negligence concept is expanded to allow recovery, the expansion comes closer and closer to the strict liability concept. See, e.g., Gary Schwartz, Foreword: Understanding Products Liability, 67 Cal. L. Rev. 435, 455 (1979); John Vargo, Strict Liability for Products: An Achievable Goal, 24 Ind. L. Rev. 1197, 1222-25 (1991). Neither of these articles examines an expanded negligence rule solely on a close examination of the burden of proof issue. [↑](#footnote-ref-188)
188. 187 335 So. 2d 128 (Ala. 1976). [↑](#footnote-ref-189)
189. 188 335 So. 2d 134 (Ala. 1976). [↑](#footnote-ref-190)
190. 189 Id. at 136 n.1. Both Casrell and Atkins were released simultaneously. [↑](#footnote-ref-191)
191. 190 Id. at 137; see also Casrell, 335 So. 2d at 132. [↑](#footnote-ref-192)
192. 191 Casrell, 335 So. 2d at 132 (second emphasis added); see also Atkins, 335 So. 2d at 140. The Atkins court stated:

     By this rule, we do not abandon the fault concept as has been done in some jurisdictions. By holding that selling a dangerously unsafe product is negligence per se, we are not adopting a "no-fault" concept. The fault of the manufacturer, or retailer, is that he has conducted himself unreasonably in placing a product on the market which will cause harm when used according to its intended purpose. The manufacturer, or retailer, is held liable because he has created an unreasonable risk of harm.

     Atkins, 335 So. 2d at 140. [↑](#footnote-ref-193)
193. 192 See Atkins, 335 So. 2d at 140. The Atkins court stated:

     The historical and traditional purpose of tort law has been to protect individuals against such risks. The only real difference between strict tort liability and the traditional negligence theory in products liability cases is that those courts which have adopted the rule of strict liability look to the dangerous characteristics of the end product, rather than the methods or processes by which it was produced. This represents a shift in emphasis from the manufacturer's or retailer's, conduct to the performance of his product.

     Id. This language was repeated in Casrell, 335 So. 2d at 131. [↑](#footnote-ref-194)
194. 193 Casrell, 335 So. 2d at 131 (quoting John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 828 (1973)); Casrell, 335 So. 2d at 132; Casrell, 335 So. 2d at 133 n.2 (quoting Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973)); see also Atkins, 335 So. 2d at 141. [↑](#footnote-ref-195)
195. 194 Atkins, 335 So. 2d at 137. [↑](#footnote-ref-196)
196. 195 Casrell, 335 So. 2d at 133 (stating clearly that "unreasonably dangerous" applies to design cases). [↑](#footnote-ref-197)
197. 196 Id. [↑](#footnote-ref-198)
198. 197 Id. [↑](#footnote-ref-199)
199. 198 Id. at 133 n.2 (citing Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973)). [↑](#footnote-ref-200)
200. 199 Atkins v. American Motors Corp., 335 So. 2d 134, 138 (Ala. 1976). [↑](#footnote-ref-201)
201. 200 Id. at 142; see also Casrell, 335 So. 2d at 132-133 (setting forth, in different language, the same proof requirements). [↑](#footnote-ref-202)
202. 201 See Hicks v. Commercial Union Ins. Co., 652 So. 2d 211, 219 (Ala. 1994). The Hicks court quoted Kelly v. M. Trigg Enters., Inc., 605 So. 2d 1185 (Ala. 1992), regarding the plaintiff's misuse: "When asserting misuse as a defense under the AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer. Stated differently, the plaintiff's misuse of the product must not have been 'reasonably foreseeable by the seller or manufacturer.'" Hicks, 652 So. 2d at 219 (quoting Kelly, 605 So. 2d at 1192). [↑](#footnote-ref-203)
203. 202 Casrell, 335 So. 2d at 134; See also Atkins, 335 So. 2d at 143; Hicks, 652 So. 2d at 220 (adopting the Atkins court's definition of assumption of risk). [↑](#footnote-ref-204)
204. 203 See Casrell, 335 So. 2d at 134; Atkins, 335 So. 2d at 143. [↑](#footnote-ref-205)
205. 204 Ala. Code sections 6-5-500 to -525 (1975). [↑](#footnote-ref-206)
206. 205 Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991 (Ala. 1981). [↑](#footnote-ref-207)
207. 206 Id. at 995. [↑](#footnote-ref-208)
208. 207 482 So. 2d 1176 (Ala. 1985). [↑](#footnote-ref-209)
209. 208 Id. [↑](#footnote-ref-210)
210. 209 The Supreme Court of Alabama rejected both Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976) (requiring the plaintiff to prove the exact amount of enhanced injuries) and Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (requiring that the plaintiff only prove the existence of a defect by showing the utility of design against foreseeability of a collision and resulting injuries). [↑](#footnote-ref-211)
211. 210 Edwards, 482 So. 2d at 1191. [↑](#footnote-ref-212)
212. 211 903 F.2d 1505 (11th Cir. 1990). [↑](#footnote-ref-213)
213. 212 Id. at 1505. [↑](#footnote-ref-214)
214. 213 Id. at 1510. [↑](#footnote-ref-215)
215. 214 Id. at 1507. [↑](#footnote-ref-216)
216. 215 Id. at 1507-08. [↑](#footnote-ref-217)
217. 216 Id. at 1509. [↑](#footnote-ref-218)
218. 217 Id. at 1507-10. [↑](#footnote-ref-219)
219. 218 Id. at 1507. [↑](#footnote-ref-220)
220. 219 584 So. 2d 447 (Ala. 1991). [↑](#footnote-ref-221)
221. 220 Id. at 450. [↑](#footnote-ref-222)
222. 221 Id. at 450. The exact language of the court is taken from Edwards and states:

     The existence of a safer, practical, alternative design must be proved by showing that: "(a) The plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design; and that

     (b) taking into consideration such factors as the intended use of the vehicle, its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used."

     Id. (quoting Edwards, 482 So. 2d at 1191). [↑](#footnote-ref-223)
223. 222 597 So. 2d 1350 (Ala. 1992). [↑](#footnote-ref-224)
224. 223 Id. at 1351-52. [↑](#footnote-ref-225)
225. 224 Id. at 1352. It appears that the court was discussing the negligence claim only in its discussion of duty. [↑](#footnote-ref-226)
226. 225 Id. However, the court gives no citation to any authority for such a proposition. [↑](#footnote-ref-227)
227. 226 Id. [↑](#footnote-ref-228)
228. 227 605 So. 2d 1185 (Ala. 1992). [↑](#footnote-ref-229)
229. 228 Id. at 1190. [↑](#footnote-ref-230)
230. 229 628 So. 2d 478 (Ala. 1993). [↑](#footnote-ref-231)
231. 230 Id. at 479-80. [↑](#footnote-ref-232)
232. 231 Id. at 482. Cf. Graham v. Sprout-Waldron & Co., 657 So. 2d 868 (Ala. 1995). The Graham court applied the consumer expectation test of Casrell and Atkins in its review of the defendant's motion for summary judgment. Id. at 870-71. The court also relied on Hawkins v. Montgomery Indus. Int'l, 536 So. 2d 922 (Ala. 1988), a case with similar facts in which the court affirmed summary judgment for the defendant. In Hawkins, the court did not require proof of alternative feasible design in the plaintiff's prima facie case and did not address whether substantial evidence of alternative design could have presented a material issue of fact. Graham, 657 So. 2d at 872 (discussing Hawkins). The Graham court held that most of the evidence presented by the plaintiff did "not tend to establish the specific proposition that installation of vibrators would have, in fact, removed the allegedly unsafe condition." Id. at 873. In determining whether a material issue of fact existed, the court implicitly examined whether an alternative feasible design would extinguish the defective condition. Id. [↑](#footnote-ref-233)
233. 232 657 So. 2d 868 (Ala. 1995). [↑](#footnote-ref-234)
234. 233 Id. at 870-71. [↑](#footnote-ref-235)
235. 234 536 So. 2d 922 (Ala. 1988). [↑](#footnote-ref-236)
236. 235 Id. at 925-26. [↑](#footnote-ref-237)
237. 236 Graham, 657 So. 2d at 872. [↑](#footnote-ref-238)
238. 237 After restating the plaintiff's contention concerning the alternative design, the Graham court said, "It was incumbent upon the Grahams, therefore, to oppose the motion for summary judgment with substantial evidence specifically directed to the proposition that the [alternative design would have prevented the injury]." Id. at 873. Thereafter, the court discussed how plaintiff failed to present the necessary evidence. Id. at 873-74. [↑](#footnote-ref-239)
239. 238 Id. at 874. [↑](#footnote-ref-240)
240. 239 Id. at 870-74. [↑](#footnote-ref-241)
241. 240 If the Supreme Court of Alabama requires the consumer to prove an alternative feasible design available at the time of manufacture, such a holding could conflict with imputing knowledge of the danger or defect to the manufacturer. See generally Wertheimer, supra note 109. In addition, the "factors" listed by the court in Yarbrough and Edwards, if considered part of a consumer's proof requirements, will make a design case next to impossible. [↑](#footnote-ref-242)
242. 241 See, e.g., Townsend v. General Motors Corp., 642 So. 2d 411 (Ala. 1994). [↑](#footnote-ref-243)
243. 242 Ala. Code section 6-5-502 (1993). [↑](#footnote-ref-244)
244. 243 Ala. Code section 6-5-520 (1993). [↑](#footnote-ref-245)
245. 244 Ala. Code sections 6-11-20 to -30 (1993). [↑](#footnote-ref-246)
246. 245 Ala. Code section 7-2-314 (1993). [↑](#footnote-ref-247)
247. 246 See Alabama Pattern Jury Instructions Civil (2d ed. 1993) APJI 32.0 (negligence); APJI 32.12 (AEMLD defect); APJI 32.22 (AEMLD crashworthiness). [↑](#footnote-ref-248)
248. 247 454 P.2d 244 (Alaska 1969). [↑](#footnote-ref-249)
249. 248 377 P.2d 897 (Cal. 1962). [↑](#footnote-ref-250)
250. 249 Clary, 454 P.2d at 248. This approach was later reinforced in Butaud v. Suburban Marine & Sporting Goods, 543 P.2d 209, 213 (Alaska 1975). [↑](#footnote-ref-251)
251. 250 593 P.2d 871 (Alaska 1979). [↑](#footnote-ref-252)
252. 251 Id. at 871. [↑](#footnote-ref-253)
253. 252 Id. [↑](#footnote-ref-254)
254. 253 Id. at 876. [↑](#footnote-ref-255)
255. 254 Id. [↑](#footnote-ref-256)
256. 255 573 P.2d 443 (Cal. 1978). [↑](#footnote-ref-257)
257. 256 Beck, 593 P.2d at 884 (quoting Barker, 573 P.2d at 457-58). [↑](#footnote-ref-258)
258. 257 Id. at 875-76. [↑](#footnote-ref-259)
259. 258 Id. at 877. [↑](#footnote-ref-260)
260. 259 Id. at 877-79. [↑](#footnote-ref-261)
261. 260 Id. at 879. [↑](#footnote-ref-262)
262. 261 Id. at 883. [↑](#footnote-ref-263)
263. 262 Id. at 883-84. [↑](#footnote-ref-264)
264. 263 Id. at 881-86. [↑](#footnote-ref-265)
265. 264 Id. at 882. [↑](#footnote-ref-266)
266. 265 Id. at 884. [↑](#footnote-ref-267)
267. 266 Id. at 885 (quoting Barker v. Lull Eng'g Co., 573 P.2d 443, 458 (Cal. 1978)). [↑](#footnote-ref-268)
268. 267 Id. at 885-86 (quoting Barker, 573 P.2d at 455) (citation omitted). [↑](#footnote-ref-269)
269. 268 604 P.2d 1059 (Alaska 1979). [↑](#footnote-ref-270)
270. 269 Id. at 1063. [↑](#footnote-ref-271)
271. 270 Id. at 1064. [↑](#footnote-ref-272)
272. 271 Id. at 1063 (quoting Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885-86 (Alaska 1979)). [↑](#footnote-ref-273)
273. 272 624 P.2d 790 (Alaska 1981). [↑](#footnote-ref-274)
274. 273 Id. at 792. [↑](#footnote-ref-275)
275. 274 Id. at 792 n.3. [↑](#footnote-ref-276)
276. 275 Id. at 793. [↑](#footnote-ref-277)
277. 276 Id. at 793-94. The Beck II court followed the discussion of Ault v. International Harvester Co., 528 P.2d 1148 (Cal. 1975). [↑](#footnote-ref-278)
278. 277 721 P.2d 611 (Alaska 1986). [↑](#footnote-ref-279)
279. 278 Id. at 613. [↑](#footnote-ref-280)
280. 279 Id. at 617. [↑](#footnote-ref-281)
281. 280 Id. at 614-16. [↑](#footnote-ref-282)
282. 281 Id. at 617. [↑](#footnote-ref-283)
283. 282 In Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985), the court refined the proximate cause requirement to mean the defective product is more likely than not a substantial factor in bringing about the plaintiff's injury. Id. at 406. State-of-the-art and/or custom and usage are factors that may be considered by a jury, but are not dispositive of the issue. Keogh v. W. R. Grasle, Inc., 816 P.2d 1343, 1349 (Alaska 1991). In addition, state-of-the-art may be a consideration of feasibility, but is not a defense. Sturm, Ruger & Co. v. Day, 594 P.2d 38, 45 (Alaska 1979), modified on other grounds, 615 P.2d 621 (Alaska 1980); see also Dura Corp., 703 P.2d at 405 n.5 (overruling Day on other grounds). [↑](#footnote-ref-284)
284. 283 822 P.2d 925 (Alaska 1991). [↑](#footnote-ref-285)
285. 284 Id. at 930 n.4. [↑](#footnote-ref-286)
286. 285 Id. at 930 (quoting Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 878 n.15 (Alaska 1979) (citation omitted)). [↑](#footnote-ref-287)
287. 286 835 P.2d 1189 (Alaska 1992). [↑](#footnote-ref-288)
288. 287 Id. at 1195. [↑](#footnote-ref-289)
289. 288 751 P.2d 470 (Cal. 1988). [↑](#footnote-ref-290)
290. 289 Shanks, 835 P.2d at 1195. [↑](#footnote-ref-291)
291. 290 Id. at 1195-96. [↑](#footnote-ref-292)
292. 291 Alaska Stat. section 09.17.020 (1994). [↑](#footnote-ref-293)
293. 292 Alaska Stat. section 09.17.010 (1994). [↑](#footnote-ref-294)
294. 293 Alaska Stat. section 45.02.316(e) (1994). [↑](#footnote-ref-295)
295. 294 Alaska Civil Pattern Jury Instructions Committee, Alaska Civil Pattern Jury Instructions APJI 7.03 & 7.03A (1987) (defining defect and regarding scientific unknowability). [↑](#footnote-ref-296)
296. 295 447 P.2d 248 (Ariz. 1968). [↑](#footnote-ref-297)
297. 296 550 P.2d 1065 (Ariz. 1976). [↑](#footnote-ref-298)
298. 297 Id. [↑](#footnote-ref-299)
299. 298 Id. at 1069. [↑](#footnote-ref-300)
300. 299 Id. at 1068. [↑](#footnote-ref-301)
301. 300 Id. (citing Dorsey v. Yoder Co., 331 F. Supp. 753, 759-760 (E.D. Pa. 1971), aff'd, 474 F.2d 1339 (3d Cir. 1973)). [↑](#footnote-ref-302)
302. 301 Id. [↑](#footnote-ref-303)
303. 302 589 P.2d 896 (Ariz. Ct. App. 1979). [↑](#footnote-ref-304)
304. 303 Id. at 900-02. [↑](#footnote-ref-305)
305. 304 Id. at 900. [↑](#footnote-ref-306)
306. 305 Id. at 901-02. [↑](#footnote-ref-307)
307. 306 Id. at 902. [↑](#footnote-ref-308)
308. 307 Id. [↑](#footnote-ref-309)
309. 308 Id. [↑](#footnote-ref-310)
310. 309 573 P.2d 443 (Cal. 1978). [↑](#footnote-ref-311)
311. 310 Brady, 589 P.2d at 902. The Brady court stated: "Liability, however, does not end with a simple showing that a better mousetrap could be built. Liability only follows where a showing is made that the manufacturer was negligent in not adopting the better mousetrap design." Id. [↑](#footnote-ref-312)
312. 311 Id. at 901. [↑](#footnote-ref-313)
313. 312 709 P.2d 876 (Ariz. 1985). [↑](#footnote-ref-314)
314. 313 Id. at 879-81. [↑](#footnote-ref-315)
315. 314 Id. at 882 (examining the court of appeals decisions on design defect since Brady). [↑](#footnote-ref-316)
316. 315 Id. at 880. [↑](#footnote-ref-317)
317. 316 Id. [↑](#footnote-ref-318)
318. 317 Id. at 880-81. [↑](#footnote-ref-319)
319. 318 Id. at 881. [↑](#footnote-ref-320)
320. 319 Id. at 880-82. [↑](#footnote-ref-321)
321. 320 Id. at 881. [↑](#footnote-ref-322)
322. 321 Id. [↑](#footnote-ref-323)
323. 322 Id. (citing Byrns v. Riddell, Inc., 550 P.2d 1065, 1068 (Ariz. 1976)). [↑](#footnote-ref-324)
324. 323 Id. at 880-82. [↑](#footnote-ref-325)
325. 324 Id. at 881. [↑](#footnote-ref-326)
326. 325 Several Arizona cases have discussed the rule; however, no change has been made in the test. See Readenour v. Marion Power Shovel, 719 P.2d 1058 (Ariz. 1986) (resolving conflict between Ariz. Rev. Stat. Ann. section 12-686(2) post-sale, preinjury modifications, and defect); Boy v. I.T.T. Grinnell Corp., 724 P.2d 612 (Ariz. Ct. App. 1986) (holding that the risk-benefit analysis is inappropriate when consumer expectation test applies); Gosewisch v. American Honda Motor Co., 737 P.2d 376 (Ariz. 1987) (holding that a plaintiff does not have to elect between theories of design defect and failure to warn).

     In Gosewisch, the court also discussed Ariz. Rev. Stat. Ann. section 12-683(3) (affirmative defense in products liability action); Czarnecki v. Volkswagen of Am., 837 P.2d 1143 (Ariz. Ct. App. 1991) (crashworthiness case where the burden of proof of the enhanced injury is placed on defendant when there is an indivisible injury); and Salt River Project v. Westinghouse Elec. Corp., 861 P.2d 668 (Ariz. Ct. App. 1993) (discussion of assumption of the risk defense). [↑](#footnote-ref-327)
327. 326 Ariz. Rev. Stat. Ann. sections 12-681 to -686, 12-551 to -552 (1992 & Supp. 1994). Section 12-551 which provides for a twelve year statute of repose was declared unconstitutional by the Supreme Court of Arizona in Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993). [↑](#footnote-ref-328)
328. 327 Ariz. Rev. Stat. Ann. sections 12-683(1), -686 (1992 & Supp. 1994). [↑](#footnote-ref-329)
329. 328 Id. section 12-683(2); see also Gosewisch v. American Honda Motor Co. 737 P.2d 376 (Ariz. 1987); Salt River Project v. Westinghouse Elec. Corp., 861 P.2d 668 (Ariz. Ct. App. 1993); Czarnecki v. Volkswagen of America, 837 P.2d 1143 (Ariz. Ct. App. 1991). [↑](#footnote-ref-330)
330. 329 Ariz. Rev. Stat. Ann. section 12-686(2) (1992 & Supp. 1994); see also Readenour v. Marion Power Shovel, 719 P.2d 1058 (Ariz. 1986). [↑](#footnote-ref-331)
331. 330 Ariz. Rev. Stat. Ann. section 12-687 (Supp. 1994). [↑](#footnote-ref-332)
332. 331 Ariz. Rev. Stat. Ann. section 12-701 (1992). [↑](#footnote-ref-333)
333. 332 Ariz. Rev. Stat. Ann. sections 12-2506 to -2509 (1992 & Supp. 1994). [↑](#footnote-ref-334)
334. 333 Ariz. Rev. Stat. Ann. section 32-1481 (1992); Ariz. Rev. Stat. Ann. section 36-1151 (1993) . [↑](#footnote-ref-335)
335. 334 Arizona's Pattern Jury Instructions are found at Recommended Arizona Jury Instructions (Civil) (2d ed. 1991) [hereinafter RAJI (Civil 2d)]. In RAJI (Civil 2d) Product Liability Instruction 3, the committee on the instructions state that the seven factors listed by Dean Wade, see Wade, supra note 109, at 840-41, and approved in the Byrns case should not be given since they may conflict with the Dart case. In RAJI (Civil 2d) Product Liability 3 and Product Liability 7 the committee jury instructions recognizes the conflict between state-of-the-art defense in Ariz. Rev. Stat. Ann. sections 12-683(1), -686(1) and the imputed-knowledge test of Dart in design defect cases. Id. at 62, 67. [↑](#footnote-ref-336)
336. 335 See Gatlin v. Cooper Tire & Rubber Co., 481 S.W.2d 338 (Ark. 1973). [↑](#footnote-ref-337)
337. 336 Ark. Code Ann. sections 85-2-318.2 to -318.3 (Michie Supp. 1979) (now found at Ark. Code Ann. sections 16-116-101 to -107 (Michie 1987)). [↑](#footnote-ref-338)
338. 337 Note, The Arkansas Product Liability Act of 1979, 35 Ark. L. Rev. 364 (1981); Henry Woods, The Personal Injury Action in Warranty--Has the Arkansas Strict Liability Statute Rendered it Obsolete?, 28 Ark. L. Rev. 335 (1974). [↑](#footnote-ref-339)
339. 338 See Ark. Code Ann. sections 16-116-101 to -107 (Michie 1987). [↑](#footnote-ref-340)
340. 339 Id. [↑](#footnote-ref-341)
341. 340 See id. section 16-116-102(7). [↑](#footnote-ref-342)
342. 341 Id. section 16-116-104. [↑](#footnote-ref-343)
343. 342 Id. section 16-116-105. [↑](#footnote-ref-344)
344. 343 Id. section 16-116-106. [↑](#footnote-ref-345)
345. 344 Ark. Code Ann. sections 20-9-802, 4-2-316 (Michie 1991). [↑](#footnote-ref-346)
346. 345 616 S.W.2d 720 (Ark. 1981). [↑](#footnote-ref-347)
347. 346 Id. at 723. The Supreme Court of Arkansas retained the rule in manufacturing defects cases. Id. [↑](#footnote-ref-348)
348. 347 Id. at 725. [↑](#footnote-ref-349)
349. 348 Id. [↑](#footnote-ref-350)
350. 349 656 F.2d 295 (8th Cir. 1981). [↑](#footnote-ref-351)
351. 350 Id. at 297. [↑](#footnote-ref-352)
352. 351 Id. at 297-98. [↑](#footnote-ref-353)
353. 352 Id. (emphasis added). [↑](#footnote-ref-354)
354. 353 Id. at 298 (citing Ark. Code Ann. section 16-116-104 (1979)). [↑](#footnote-ref-355)
355. 354 Id. (emphasis added). [↑](#footnote-ref-356)
356. 355 See Purina Mills, Inc. v. Askins, 875 S.W.2d 843 (Ark. 1994). [↑](#footnote-ref-357)
357. 356 West v. Searle & Co., 806 S.W.2d 608 (Ark. 1991) (applying comment k on a case-by-case basis with burden of proof on defendant); Elk Corp. v. Jackson, 725 S.W.2d 829 (Ark. 1987), reh'g granted, 727 S.W.2d 856 (Ark. 1987) (banding of roofing product on truck is not "packaging" subject to strict liability); Petrus ChryslerPlymouth v. Davis, 671 S.W.2d 749 (Ark. 1984) (finding circumstantial evidence sufficient to prove defect); Berkeley Pump v. Reed-Joseph Land Co., 653 S.W.2d 128 (Ark. 1983) (requiring that both defect and unreasonable danger be shown); see also Farm Bureau Ins. Co. v. Case Corp., 878 S.W.2d 741 (Ark. 1994); Campbell Soup Co. v. Gates, 889 S.W.2d 250 (Ark. 1994). [↑](#footnote-ref-358)
358. 357 See Arkansas Model Jury Instructions Civil AMI 1008 (3d ed. 1989). [↑](#footnote-ref-359)
359. 358 377 P.2d 897 (Cal. 1962). [↑](#footnote-ref-360)
360. 359 Section 402A was adopted in 1965. Restatement (Second) of Torts section 402A (1965). [↑](#footnote-ref-361)
361. 360 Greenman, 377 P.2d at 899. [↑](#footnote-ref-362)
362. 361 Id. [↑](#footnote-ref-363)
363. 362 Id. at 901. The Greenman court stated:

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

     Id. [↑](#footnote-ref-364)
364. 363 501 P.2d 1163 (Cal. 1972). [↑](#footnote-ref-365)
365. 364 501 P.2d 1153 (Cal. 1972). [↑](#footnote-ref-366)
366. 365 Id. at 1159-61. [↑](#footnote-ref-367)
367. 366 Id. at 1162-63. [↑](#footnote-ref-368)
368. 367 Id. at 1162. [↑](#footnote-ref-369)
369. 368 Id. [↑](#footnote-ref-370)
370. 369 Id. (citations omitted). [↑](#footnote-ref-371)
371. 370 Id. at 1163. [↑](#footnote-ref-372)
372. 371 Id. at 1169. [↑](#footnote-ref-373)
373. 372 For an exclusive examination of the problems in defining defect under the Cronin and Luque criteria, see Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978). See also infra notes 378-400 and accompanying text. [↑](#footnote-ref-374)
374. 373 127 Cal. Rptr. 745 (Cal. Ct. App. 1976). [↑](#footnote-ref-375)
375. 374 Id. at 747-48. The consumer claimed that the design of the front of the vehicle was defective in design not because it caused the accident but because it enhanced the injuries to a pedestrian during the accident. Id. at 747. [↑](#footnote-ref-376)
376. 375 Id. at 749. [↑](#footnote-ref-377)
377. 376 Id. [↑](#footnote-ref-378)
378. 377 See supra text accompanying notes 363-69. [↑](#footnote-ref-379)
379. 378 573 P.2d 443 (Cal. 1978). [↑](#footnote-ref-380)
380. 379 Id. at 450. [↑](#footnote-ref-381)
381. 380 Id. [↑](#footnote-ref-382)
382. 381 Id. at 450-51. [↑](#footnote-ref-383)
383. 382 Id. at 450. [↑](#footnote-ref-384)
384. 383 Id. at 451. [↑](#footnote-ref-385)
385. 384 Id. [↑](#footnote-ref-386)
386. 385 Id. [↑](#footnote-ref-387)
387. 386 Id. [↑](#footnote-ref-388)
388. 387 Id. at 454. [↑](#footnote-ref-389)
389. 388 Id. [↑](#footnote-ref-390)
390. 389 Id. [↑](#footnote-ref-391)
391. 390 Id. [↑](#footnote-ref-392)
392. 391 Id. at 455. [↑](#footnote-ref-393)
393. 392 Id. [↑](#footnote-ref-394)
394. 393 Id. [↑](#footnote-ref-395)
395. 394 Id. [↑](#footnote-ref-396)
396. 395 Id. at 455-56. [↑](#footnote-ref-397)
397. 396 See Morton v. Owens-Corning Fiberglass Corp., 40 Cal. Rptr. 2d 22 (Cal. Ct. App. 1995); Bresnahan v. Chrysler Corp., 38 Cal. Rptr. 2d 446 (Cal. Ct. App. 1995). [↑](#footnote-ref-398)
398. 397 Akers v. Kelley Co., 219 Cal. Rptr. 513 (Cal. Ct. App. 1985); see also Soule v. General Motors Corp., 34 Cal. Rptr. 2d 607 (Cal. 1994). [↑](#footnote-ref-399)
399. 398 Akers, 219 Cal. Rptr. at 523; see also Soule v. General Motors Corp., 34 Cal. Rptr. 2d 607 (Cal. 1994); Campbell v. General Motors Corp., 649 P.2d 224 (Cal. 1982); Bresnahan v. Chrysler Corp., 38 Cal. Rptr. 2d 446 (Cal. Ct. App. 1995); Morton v. Owens-Corning Fiberglass Corp., 40 Cal. Rptr. 2d 22 (Cal. Ct. App. 1995); [↑](#footnote-ref-400)
400. 399 Moreno v. Fey Mfg. Corp., 196 Cal. Rptr. 487 (Cal. Dist. Ct. App. 1983). [↑](#footnote-ref-401)
401. 400 See, e.g., Campbell, 649 P.2d at 228. [↑](#footnote-ref-402)
402. 401 Cal. Civ. Code section 1714.45 (West 1994). [↑](#footnote-ref-403)
403. 402 Cal. Civ. Code section 1714.4 (West 1985). This statute provides that firearms and ammunition under a risk-benefit test cannot be defective in design merely because there is a potential for serious harm or death from the firearms discharge i.e., no generic liability or "Saturday Night Special" liability. See id. section 1714.4 n.1. [↑](#footnote-ref-404)
404. 403 Cal. Health & Safety Code section 1606 (West 1990). [↑](#footnote-ref-405)
405. 404 Cal. Civ. Proc. Code section 340.2 (West 1982). [↑](#footnote-ref-406)
406. 405 Cal. Civ. Proc. Code section 340.7 (West Supp. 1996). [↑](#footnote-ref-407)
407. 406 Cal. Civ. Code sections 1431-1431.2 (West 1982 & Supp. 1996). [↑](#footnote-ref-408)
408. 407 Book of Approved Jury Instructions BAJI 9.00.5 (1992). [↑](#footnote-ref-409)
409. 408 544 P.2d 983 (Colo. 1975). [↑](#footnote-ref-410)
410. 409 Id. at 988. [↑](#footnote-ref-411)
411. 410 583 P.2d 276 (Colo. 1978). [↑](#footnote-ref-412)
412. 411 Id. at 280. [↑](#footnote-ref-413)
413. 412 Id. [↑](#footnote-ref-414)
414. 413 Id. at 284 (citing Palmer v. Massey-Ferguson, Inc., 476 P.2d 713, 719 (Wash. Ct. App. 1970)). [↑](#footnote-ref-415)
415. 414 642 P.2d 908 (Colo. 1982). [↑](#footnote-ref-416)
416. 415 501 P.2d 1153 (Cal. 1972). [↑](#footnote-ref-417)
417. 416 Frazier, 642 P.2d at 911. [↑](#footnote-ref-418)
418. 417 722 P.2d 410 (Colo. 1986), overruled in part by Armetrout v. FMC Corp., 842 P.2d 175 (Colo. 1992). [↑](#footnote-ref-419)
419. 418 Heath, 722 P.2d at 415. The Heath court said that there was sufficient evidence presented to allow a jury to decide the issue of whether the oral contraceptive was an unavoidably unsafe drug. However, in adopting the comment k defense, the Heath court said the defendant must prove the following four factors: "The product's liability must greatly outweigh the risk created by its use; the risk must be a known one; the product's benefits must not be achievable in another manner; and the risk must be unavoidable under the present state of knowledge." Id. (quoting Belle Bonfils Memorial Blood Bank v. Hansen, 665 P.2d 118, 122 (Colo. 1983)). [↑](#footnote-ref-420)
420. 419 Id. at 416. [↑](#footnote-ref-421)
421. 420 Id. at 415. [↑](#footnote-ref-422)
422. 421 Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978). [↑](#footnote-ref-423)
423. 422 Heath, 722 P.2d at 414. [↑](#footnote-ref-424)
424. 423 Id. [↑](#footnote-ref-425)
425. 424 741 P.2d 1240 (Colo. 1987). [↑](#footnote-ref-426)
426. 425 Id. at 1242. [↑](#footnote-ref-427)
427. 426 Id. (quoting Camancho v. Honda Motor Co., 701 P.2d 628, 631 (Colo. Ct. App. 1985)). [↑](#footnote-ref-428)
428. 427 Id. at 1247. [↑](#footnote-ref-429)
429. 428 Id. at 1247-48. Dean John Wade's seven factors are: (1) the usefulness and desirability of the product--its utility to the user and to the public as a whole; (2) the safety aspects of the product--the likelihood that it will cause injury and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. Id. (quoting Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410, 414 (Colo. 1986)). [↑](#footnote-ref-430)
430. 429 Id. at 1242. [↑](#footnote-ref-431)
431. 430 Id. at 1249. [↑](#footnote-ref-432)
432. 431 In Camacho, the plaintiff had presented evidence concerning the lack of guards (alternative design), and the court did not discuss the burden of proof issue. Thus, the court left unresolved whether Camacho adhered to the shifting of the burden of proof on risk-utility as held in Barker. Id. at 1242. [↑](#footnote-ref-433)
433. 432 842 P.2d 175 (Colo. 1992). [↑](#footnote-ref-434)
434. 433 Id. at 180. [↑](#footnote-ref-435)
435. 434 Id. at 178. [↑](#footnote-ref-436)
436. 435 Id. at 183. [↑](#footnote-ref-437)
437. 436 Id. at 184. [↑](#footnote-ref-438)
438. 437 Id. [↑](#footnote-ref-439)
439. 438 Id. at 185. [↑](#footnote-ref-440)
440. 439 Id. at 185 n.11 (quoting Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1328 n.5 (Or. 1978)). [↑](#footnote-ref-441)
441. 440 Id. at 186 (quoting Anderson v. M.W. Kellogg, Co., 766 P.2d 637, 643 (Colo. 1988) (emphasis added)). It is difficult to understand the court's definition of "defect" since it, like the term "defective condition unreasonably dangerous" in section 402A, appears to define itself by mutual reference between the two terms. In other words, "defect" means whatever is unreasonably dangerous and unreasonably dangerous makes the product defective. [↑](#footnote-ref-442)
442. 441 Id. at 187. [↑](#footnote-ref-443)
443. 442 Plaintiff's counsel agreed that the trial court should instruct that the two terms were equivalent. Id. at 186. [↑](#footnote-ref-444)
444. 443 845 P.2d 1168 (Colo. 1993). [↑](#footnote-ref-445)
445. 444 Id. at 1174. [↑](#footnote-ref-446)
446. 445 Id. [↑](#footnote-ref-447)
447. 446 Id. [↑](#footnote-ref-448)
448. 447 Id. at 1174-75. [↑](#footnote-ref-449)
449. 448 See Curtis v. General Motors Corp., 649 F.2d 808 (10th Cir. 1981). Curtis was a second collision case involving roll-over protection where feasibility was admitted by the defendant. The Curtis court used the consumer expectation test and assigned the burden of proving the enhanced injury to the plaintiff. See also McHargue v. Stokes Div., 686 F. Supp. 1428 (D. Colo. 1988), (upholding a ten-year statute of repose); Taggart v. Richards Medical Co., 677 F. Supp. 1102 (D. Colo. 1988) (considering a risk-benefit test as an affirmative defense); Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Colo. 1991) (finding jurisdiction over manufacturer); Shaw v. General Motors Corp., 727 P.2d 1365 (Colo. Ct. App. 1986) (finding lack of restraint system); Union Ins. Co. v. RCA Corp., 724 P.2d 80 (Colo. Ct. App. 1986) (applying statutory presumption and considering state-of-the-art in a subrogation action). [↑](#footnote-ref-450)
450. 449 Colo. Rev. Stat. sections 13-21-401 to -406 (Supp. 1990). [↑](#footnote-ref-451)
451. 450 Id. sections 13-21-401(1), -402. [↑](#footnote-ref-452)
452. 451 Id. sections 13-21-403(1)(a), -404. [↑](#footnote-ref-453)
453. 452 Id. section 13-21-403(3). [↑](#footnote-ref-454)
454. 453 Colo. Rev. Stat. sections 13-21-501 to -505 (1992). [↑](#footnote-ref-455)
455. 454 Colo. Rev. Stat. section 13-21-102 (1992). The provisions of section 13-21-102(4) which provided that one third of all punitive damages be paid into the state general fund was declared unconstitutional in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991). [↑](#footnote-ref-456)
456. 455 Colo. Rev. Stat. section 13-21-102.5 (1992). [↑](#footnote-ref-457)
457. 456 Colo. Rev. Stat. section 13-21-111.5 (1992). [↑](#footnote-ref-458)
458. 457 Colo. Rev. Stat. section 13-22-104 (1992). [↑](#footnote-ref-459)
459. 458 See Colorado Jury Instructions 3d Civil section 14:19 (1990) (risk-benefit); Colorado Jury Instructions 3d Civil section 14:20A (Supp. 1995) (state-of-the-art). [↑](#footnote-ref-460)
460. 459 216 A.2d 189 (Conn. 1965). The Garthwait court stated: "We find ourselves in accord with the rule recently adopted in section 402A." Id. at 192. [↑](#footnote-ref-461)
461. 460 Id. at 190. [↑](#footnote-ref-462)
462. 461 Id. at 190-91. [↑](#footnote-ref-463)
463. 462 364 A.2d 175 (Conn. 1975). For a list of the few Connecticut cases discussing strict liability between 1965 and 1975, see the discussions within the following cases: Wachtel v. Rosol, 271 A.2d 84 (Conn. 1970); Gugliemo v. Klausner Supply Co., 259 A.2d 608 (Conn. 1969); Rossignol v. Danbury School of Aeronautics, Inc., 227 A.2d 418 (Conn. 1967); Liberty Mut. Ins. Co. v. Sears, Roebuck & Co., 406 A.2d 1254 (Conn. Super. Ct. 1979). [↑](#footnote-ref-464)
464. 463 See Giglio v. Connecticut Light & Power Co., 429 A.2d 486 (Conn. 1980) (restating the consumer expectation as a rule which applies generally then applies it to a warning defect); Liberty Mut. Ins. Co. v. Sears Roebuck & Co., 406 A.2d 1254 (Conn. Super. Ct. 1979) (subrogation action). [↑](#footnote-ref-465)
465. 464 Slepski, 364 A.2d at 178. For a very recent case which again supplies the consumer expectation test and allows a jury to draw conclusions about such expectations, see Elliot v. Sears Roebuck & Co., 621 A.2d 1371 (Conn. Super. Ct.), cert. granted on other grounds, 625 A.2d 826 (Conn. 1993), aff'd, 642 A.2d 709 (Conn. 1994). [↑](#footnote-ref-466)
466. 465 Conn. Gen. St. Ann. section 52-577a (West 1991). The statute of repose which applied generally to all products actions had some exceptions applying to (1) claimants not entitled to workers compensation, (2) express written warranties that a product can be used longer than ten years, and (3) asbestos claims. Id.; see also Robert B. Yules, An Analysis of Connecticut's New Product Liability Law, 56 Conn. B.J. 269 (1982). [↑](#footnote-ref-467)
467. 466 Conn. Gen. St. Ann. section 52-240b (West 1991). [↑](#footnote-ref-468)
468. 467 Conn. Gen. St. Ann. section 52-572q (West 1991). [↑](#footnote-ref-469)
469. 468 Conn. Gen. St. Ann. section 52-572n (West 1991); see Winslow v. Lewis-Shepard, Inc., 562 A.2d 517 (Conn. 1989). [↑](#footnote-ref-470)
470. 469 Conn. Gen. St. Ann. section 52-251c (West 1991). [↑](#footnote-ref-471)
471. 470 Connecticut enacted statutes which followed what most other jurisdictions have adopted: (1) contributory negligence and comparative negligence are not complete bars to recovery, Conn. Gen. St. Ann. section 52-572l (West 1991); (2) misuse is a defense, id.; (3) modified comparative responsibility, Conn. Gen. St. Ann. section 52-572o (West 1991); and (4) modification and alteration of the product bars liability, Conn. Gen. St. Ann. section 52-572p (West 1991). [↑](#footnote-ref-472)
472. 471 See Conn. Gen. Stat. Ann. section 52-577b (West 1991) (discovery rule on agent orange actions); id. section 52-577c (discovery rule concerning toxic substances). [↑](#footnote-ref-473)
473. 472 See Yules, supra note 465 (stating that Connecticut law is based upon the Model Uniform Product Liability Act). [↑](#footnote-ref-474)
474. 473 2 Connecticut Jury Instructions (Civil) section 547 (4th ed. 1993). [↑](#footnote-ref-475)
475. 474 353 A.2d 581 (Del. 1976). [↑](#footnote-ref-476)
476. 475 Id. at 582. [↑](#footnote-ref-477)
477. 476 Id. at 587-88. The alleged defective truck struck a vehicle in the rear which in turn collided with plaintiff's vehicle. Id. at 582. [↑](#footnote-ref-478)
478. 477 Id. at 583-84. [↑](#footnote-ref-479)
479. 478 418 A.2d 968 (Del. 1980). [↑](#footnote-ref-480)
480. 479 Id. at 974. [↑](#footnote-ref-481)
481. 480 Id. at 970. [↑](#footnote-ref-482)
482. 481 Id. [↑](#footnote-ref-483)
483. 482 Id. at 980. The Cline court discussed several other reasons for UCC preemption, but these reasons appear to be subordinate to the legislative intent rationale. Id. at 975-77. [↑](#footnote-ref-484)
484. 483 Id. at 976. [↑](#footnote-ref-485)
485. 484 Id. at 974. [↑](#footnote-ref-486)
486. 485 The court made it clear that it would not provide a consumer any relief because of the UCC defenses of privity, motive, disclaimers, statutes of limitations, and others when it stated: "If more fair and complete protective relief is to be forthcoming for consumers injured by defective products they have purchased, it must come from the General Assembly." Id. at 980. [↑](#footnote-ref-487)
487. 486 Id. at 977. [↑](#footnote-ref-488)
488. 487 See Johnson v. Hockessin Tractor, 420 A.2d 154 (Del. 1980) (applying the tender of delivery rule under section 2-725). [↑](#footnote-ref-489)
489. 488 See Wilson v. Dover Skating Center, 566 A.2d 1020 (Del. Super. Ct. 1989). [↑](#footnote-ref-490)
490. 489 Del. Code Ann. tit. 18, section 7001 (1989). [↑](#footnote-ref-491)
491. 490 Del. Code Ann. tit. 6, section 2-316(5) (1993). [↑](#footnote-ref-492)
492. 491 See Payne v. Soft Sheen Prods., 486 A.2d 712 (D.C. 1985) for a discussion of the gradual development of strict liability and the overlap between implied warranty and strict liability in tort. [↑](#footnote-ref-493)
493. 492 262 A.2d 807 (D.C. 1970). [↑](#footnote-ref-494)
494. 493 Id. at 808 (citing section 402 A and Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963)). [↑](#footnote-ref-495)
495. 494 Id. at 808-09. [↑](#footnote-ref-496)
496. 495 486 A.2d 712 (D.C. 1985). [↑](#footnote-ref-497)
497. 496 Id. at 721. [↑](#footnote-ref-498)
498. 497 Id. at 719-20. [↑](#footnote-ref-499)
499. 498 Id. at 720 (citations omitted). [↑](#footnote-ref-500)
500. 499 563 A.2d 344 (D.C. 1989). [↑](#footnote-ref-501)
501. 500 Id. at 345. [↑](#footnote-ref-502)
502. 501 Id. at 344. [↑](#footnote-ref-503)
503. 502 Id. at 347. [↑](#footnote-ref-504)
504. 503 Id. "In an action based upon breach of implied warranty, it makes no difference whether or not the defendant was negligent." Id. [↑](#footnote-ref-505)
505. 504 Id. at 348. [↑](#footnote-ref-506)
506. 505 Id. at 348-58. [↑](#footnote-ref-507)
507. 506 Id. at 356. [↑](#footnote-ref-508)
508. 507 Id. Judge Ferren's opinion cited several cases which criticized the Restatement's unreasonably dangerous requirement, including Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Ca. 1972); Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978); and Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979). [↑](#footnote-ref-509)
509. 508 Id. (citing Azzarello, 391 A.2d at 557-59). [↑](#footnote-ref-510)
510. 509 Westinghouse Elec. Corp. v. Nutt, 407 A.2d 606 (D.C. 1979). [↑](#footnote-ref-511)
511. 510 Id. [↑](#footnote-ref-512)
512. 511 Id. at 608. [↑](#footnote-ref-513)
513. 512 Id. at 609. [↑](#footnote-ref-514)
514. 513 Id. at 612. [↑](#footnote-ref-515)
515. 514 Id. at 610. [↑](#footnote-ref-516)
516. 515 Id. at 611. [↑](#footnote-ref-517)
517. 516 Young v. Up-Right Scaffolds, Inc., 637 F.2d 810 (D.C. Cir. 1980). [↑](#footnote-ref-518)
518. 517 Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993) (unclear whether defect was one of design or manufacture or whether such distinction would have made any difference). [↑](#footnote-ref-519)
519. 518 825 F.2d 448 (D.C. Cir. 1987). [↑](#footnote-ref-520)
520. 519 When there is no District of Columbia law on a specific issue, the federal courts will look to Maryland law for guidance. See Conseco Indus. v. Conforti & Eisele, Inc., 627 F.2d 315 (D.C. Cir. 1980). However, whether Maryland has adopted a "pure" negligence risk-utility test is questionable. See infra Part III.U. [↑](#footnote-ref-521)
521. 520 Hull, 825 F.2d at 454. [↑](#footnote-ref-522)
522. 521 After setting forth the rule, the Hull court cited the negligence case, Westinghouse Elec. Corp. v. Nutt, 407 A.2d 606 (D.C. 1979), for the applicable elements to be employed in a design case. Id. at 453. Nutt was the same case that the Hull court used for the negligence elements. Id. at 455. [↑](#footnote-ref-523)
523. 522 Id. [↑](#footnote-ref-524)
524. 523 654 A.2d 1272 (D.C. Cir. 1995). [↑](#footnote-ref-525)
525. 524 Id. at 1273. [↑](#footnote-ref-526)
526. 525 Id. at 1277-79. [↑](#footnote-ref-527)
527. 526 Id. at 1273. [↑](#footnote-ref-528)
528. 527 Id. at 1276 (emphasis added) (citation omitted). [↑](#footnote-ref-529)
529. 528 Id. at 1276 n.9 (emphasis added) (citations omitted). [↑](#footnote-ref-530)
530. 529 Id. at 1276-77 (quoting Hull v. Eaton Corp., 825 F.2d 448, 453 (D.C. Cir. 1987) (a design defect case which looked to Maryland law in the absence of D.C. case law "clearly setting out the necessary elements of a D.C. strict liability claim")) (citation omitted). [↑](#footnote-ref-531)
531. 530 Id. at 1277 n.11 (citing Taggart v. Richards Medical Co., 677 F. Supp. 1102, 1102-03 (D. Colo. 1988) (discussing the defendant's burden under the risk-utility test)). [↑](#footnote-ref-532)
532. 531 677 F. Supp. 1102 (D. Colo. 1988). [↑](#footnote-ref-533)
533. 532 Id. at 1103-04 (quoting Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410, 413 (Colo. 1986)). [↑](#footnote-ref-534)
534. 533 Boston, 654 A.2d at 1277. [↑](#footnote-ref-535)
535. 534 Id. at 1277 n.12. [↑](#footnote-ref-536)
536. 535 Id. at n.13 (citing O'Brien v. Muskin, 463 A.2d 298, 305 (N.J. 1983)). [↑](#footnote-ref-537)
537. 536 Id. at 1277. [↑](#footnote-ref-538)
538. 537 D.C. Code Ann. sections 6-2381 to -2384 (Michie Supp. 1993) (fire-arms and ammunition); D.C. Code Ann. sections 6-2391 to -2393 (Michie Supp. 1993) (assault weapons). [↑](#footnote-ref-539)
539. 538 Standardized Civil Jury Instructions for the District of Columbia Revised Edition section 11-12A (Supp. 1985) states:

     You are instructed that the law imposes an obligation upon a manufacturer to distribute products which are reasonably fit, suitable and safe for their intended or foreseeable purposes. If that obligation is violated and a user or others who may be expected to come in contact with the product are injured as a result, then the manufacturer is responsible for the ensuing damages.

     Id. This section is based upon Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979). [↑](#footnote-ref-540)
540. 539 Section 11-12B states:

     You are instructed that the law imposes liability upon a seller of products that are improperly designed when the improper design causes injury to another or his property. A design is improper or "defective" when the plaintiff has proved by a preponderance of the evidence that the product failed to perform as safely as an ordinary customer would expect when used in an intended or reasonably foreseeable manner, or the plaintiff has proved that the product's design proximately caused his injury and the defendant failed to prove, in light of all the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. Factors that you should consider in determining whether the benefits of the design outweighed the danger inherent in the design include the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial costs of an improved design and the adverse consequences to the product and the consumer that would result from an alternative design.

     Standardized Civil Jury Instructions for the District of Columbia Revised Edition section 11-12B (Supp. 1985). This section is based upon Barker v. Lull Engineering Co., 573 P.2d 143 (Cal. 1978). [↑](#footnote-ref-541)
541. 540 336 So. 2d 80 (Fla. 1976). [↑](#footnote-ref-542)
542. 541 West v. Caterpillar Tractor Co., 504 F.2d 967 (5th Cir. 1974). The Fifth Circuit decided the issues based upon the Florida Supreme Court's decision in West v. Caterpillar Tractor, Inc., 547 F.2d 885 (5th Cir. 1977). [↑](#footnote-ref-543)
543. 542 377 P.2d 897 (Cal. 1963). [↑](#footnote-ref-544)
544. 543 West, 336 So. 2d at 84-85. [↑](#footnote-ref-545)
545. 544 154 So. 2d 169 (Fla. 1963). [↑](#footnote-ref-546)
546. 545 West, 336 So. 2d at 87. [↑](#footnote-ref-547)
547. 546 Id. at 89. [↑](#footnote-ref-548)
548. 547 Id. at 88, 90 (citations omitted). [↑](#footnote-ref-549)
549. 548 366 So. 2d 1167 (Fla. 1979). [↑](#footnote-ref-550)
550. 549 331 F. Supp. 753 (E.D. Pa. 1971). [↑](#footnote-ref-551)
551. 550 Jones, 366 So. 2d at 1170. [↑](#footnote-ref-552)
552. 551 Id. (quoting Dorsey, 331 F. Supp. at 759-60). [↑](#footnote-ref-553)
553. 552 Id. (quoting Dorsey, 331 F. Supp. at 760). [↑](#footnote-ref-554)
554. 553 Id. at 1170-71 (emphasis added). [↑](#footnote-ref-555)
555. 554 396 So. 2d 1140 (Fla. Dist. Ct. App. 1981). [↑](#footnote-ref-556)
556. 555 Id. at 1142. [↑](#footnote-ref-557)
557. 556 Id. at 1146. [↑](#footnote-ref-558)
558. 557 Id. at 1149. [↑](#footnote-ref-559)
559. 558 Id. at 1146. [↑](#footnote-ref-560)
560. 559 Id. [↑](#footnote-ref-561)
561. 560 Id. at 1147. [↑](#footnote-ref-562)
562. 561 Id. [↑](#footnote-ref-563)
563. 562 Id. (emphasis added). [↑](#footnote-ref-564)
564. 563 283 F. Supp. 978 (W.D. Pa. 1967). [↑](#footnote-ref-565)
565. 564 Cassisi, 396 So. 2d at 1148. [↑](#footnote-ref-566)
566. 565 Id. at 1143-46. This examination was dicta, but the Cassisi court placed great emphasis on its conclusion that the second step of the Barker rule shifted the burden of proof to the defendant. Id. at 1146. [↑](#footnote-ref-567)
567. 566 Id. [↑](#footnote-ref-568)
568. 567 404 So. 2d 1049 (Fla. 1981). [↑](#footnote-ref-569)
569. 568 Id. at 1051. [↑](#footnote-ref-570)
570. 569 Id. at 1052 (quoting Louis R. Frumer & Melvin I. Friedman, Products Liability section 16A(4)(f)(iv)(d) at 3B paragraph 136.2 (1981)). [↑](#footnote-ref-571)
571. 570 Id. [↑](#footnote-ref-572)
572. 571 445 So. 2d 329 (Fla. 1983). [↑](#footnote-ref-573)
573. 572 Id. at 331. The factors listed by the Radiation Technology court are listed in a different order and vary slightly from Dean Wade's factors; however, it is obvious from most of the language that its origin and meaning come from the Wade Test. In addition, the source given for such analysis is the Jones case which set forth Wade's analysis in a lengthy quote from Dorsey v. Yoder Co., 366 So. 2d at 1170 (quoting Dorsey, 331 F. Supp. at 760). [↑](#footnote-ref-574)
574. 573 Florida has decided many issues in products liability actions outside of a design defect. See, e.g., Casa Clara Condominium Ass'n v. Charley Toppino & Sons, 620 So. 2d 1244 (Fla. 1992) (holding that economic loss not recoverable in tort actions); High v. Westinghouse Elec. Corp., 610 So. 2d 1259 (Fla. 1992) (holding that section 402A does not apply to disposal of goods); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990) (adopting market-share alternate theory of liability in a DES case); Dorse v. Armstrong World Indus., 513 So. 2d 1265 (Fla. 1987) (adopting "military contractor" in a defense asbestos case); United States Mineral Prods. Co. v. Waters, 610 So. 2d 20 (Fla. Dist. Ct. App. 1992) (holding that a consumer may bring a warning action under both strict liability and negligence). [↑](#footnote-ref-575)
575. 574 806 F.2d 1545 (11th Cir. 1987). [↑](#footnote-ref-576)
576. 575 Id. at 1549. [↑](#footnote-ref-577)
577. 576 Fla. Stat. Ann. sections 768.72-.74 (West Supp. 1995). Punitive damages may not exceed three times the amount of compensatory damages, and 35% of the award on punitive damages is payable to the state. [↑](#footnote-ref-578)
578. 577 Fla. Stat. Ann. section 768.78 (West Supp. 1995). [↑](#footnote-ref-579)
579. 578 Fla. Stat. Ann. section 768.79 (West Supp. 1995). [↑](#footnote-ref-580)
580. 579 Fla. Stat. Ann. section 768.81 (West Supp. 1995). [↑](#footnote-ref-581)
581. 580 Fla. Stat. Ann. section 672.316(5) (West 1993). [↑](#footnote-ref-582)
582. 581 Fla. Stat. Ann. section 95.031 (West 1995). The twelve-year limitation for filing products liability was repealed and held unconstitutional. See Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980). [↑](#footnote-ref-583)
583. 582 Ford Motor Co. v. Hill, 404 So. 2d 1049, 1052 n.4 (Fla. 1981). [↑](#footnote-ref-584)
584. 583 Id. at 1052. [↑](#footnote-ref-585)
585. 584 Id. [↑](#footnote-ref-586)
586. 585 See In re Standard Jury Instructions (Civil Cases), 435 So. 2d 782 (Fla. 1983). See also Florida Standard Jury Instructions (Civil Cases), Product Liability, note on use, PL 5 (1983) which states in pertinent part: "A product is unreasonably dangerous because of its design if (the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer) or [the risk of danger in the design outweighs the benefits]." The Committee's comments on this instruction state in pertinent part:

     PL 5 defines "unreasonably dangerous" both in terms of consumer expectations, see comment i to section 402A of the Restatement, and in terms weighing the design risk against its utility, as expressed in decisions from other jurisdictions. See, e.g. Cassisi v. Maytag Co., 396 So.2d 1140, 1145 (Fla. 1st DCA 1981) (dicta), quoting Barker v. Lull Engineering Co., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.

     The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. West, 336 So.2d at 87; but see Barker, 573 P.2d at 455-56, quoted in Cassisi, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.

     Id. [↑](#footnote-ref-587)
587. 586 Id. [↑](#footnote-ref-588)
588. 587 See also Hobart Corp. v. Siegle, 600 So. 2d 503 (Fla. Dist. Ct. App. 1992). [↑](#footnote-ref-589)
589. 588 See Wansor v. George Hantscho, Inc., 252 S.E.2d 623, 624 (Ga. 1979); Ellis v. Rich's, Inc., 212 S.E.2d 373, 376 (Ga. 1975); Friend v. General Motors Corp., 165 S.E.2d 734 (Ga. Ct. App. 1968). [↑](#footnote-ref-590)
590. 589 Ga. Code Ann. section 51-1-11 (1982 & Supp. 1995). Although the 1968 Act provides strict liability for consumers, other legislation has limited consumer recovery. See Ga. Code Ann. section 51-1-28 (1982) (blood products and human tissue); Ga. Code Ann. section 51-12-5.1 (Supp. 1995) (punitive damages); Ga. Code Ann. sections 51-12-31 to 33 (Supp. 1995) (joint and several liability). [↑](#footnote-ref-591)
591. 590 Ga. Code Ann. section 51-1-11(b)(1) (1982 & Supp. 1995). [↑](#footnote-ref-592)
592. 591 212 S.E.2d 373, 376 (Ga. 1975). [↑](#footnote-ref-593)
593. 592 Id. at 375-76. [↑](#footnote-ref-594)
594. 593 Id. The trial court granted summary judgment to the importer, distributor, and retailer of the product made in Taiwan. The Ellis court affirmed such dismissal since more of the defendants were "manufacturers" as required in the statute. [↑](#footnote-ref-595)
595. 594 218 S.E.2d 580 (Ga. 1975). [↑](#footnote-ref-596)
596. 595 Id. at 582. [↑](#footnote-ref-597)
597. 596 Id. [↑](#footnote-ref-598)
598. 597 Id. [↑](#footnote-ref-599)
599. 598 Id. (quoting Restatement (Second) of Torts section 402 cmt. h (1965)). [↑](#footnote-ref-600)
600. 599 Id. [↑](#footnote-ref-601)
601. 600 See, e.g., Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal 1972). [↑](#footnote-ref-602)
602. 601 Parzini, 218 S.E.2d at 582. [↑](#footnote-ref-603)
603. 602 Id. at 581-82. [↑](#footnote-ref-604)
604. 603 238 S.E.2d 361 (Ga. 1977). [↑](#footnote-ref-605)
605. 604 Id. at 365. [↑](#footnote-ref-606)
606. 605 Id. at 364-65. [↑](#footnote-ref-607)
607. 606 Id. at 362-63. [↑](#footnote-ref-608)
608. 607 Id. at 363. [↑](#footnote-ref-609)
609. 608 Id. [↑](#footnote-ref-610)
610. 609 Id. at 365. [↑](#footnote-ref-611)
611. 610 252 S.E.2d 623 (Ga. 1979). [↑](#footnote-ref-612)
612. 611 Id. at 624-25. [↑](#footnote-ref-613)
613. 612 Id. at 624 (emphasis added). [↑](#footnote-ref-614)
614. 613 Id. [↑](#footnote-ref-615)
615. 614 Carter, 238 S.E.2d at 365. The example given by the Carter court is doubly confusing since the Supreme Court of Georgia also states that the strict liability statute only applies to "new" products sold by a manufacturer. Id. It seems very improbable that a motor vehicle manufactured in 1930 sold as "new" shortly thereafter would remain with the same owner/consumer until 1977. It seems even more improbable that a manufacturer would retain possession of an automobile (or any other product) for over 38 years then sell it as a "new" product. These appear to be the implications of the example given by the court. [↑](#footnote-ref-616)
616. 615 326 S.E.2d 436 (Ga. 1985), overruled by Banks v. ICI Am. Inc., 450 S.E.2d 671 (Ga. 1994). [↑](#footnote-ref-617)
617. 616 Id. at 437. [↑](#footnote-ref-618)
618. 617 Id. [↑](#footnote-ref-619)
619. 618 Id. [↑](#footnote-ref-620)
620. 619 Id. [↑](#footnote-ref-621)
621. 620 Id. [↑](#footnote-ref-622)
622. 621 Id. at 436. [↑](#footnote-ref-623)
623. 622 Id. at 437. [↑](#footnote-ref-624)
624. 623 423 S.E.2d 659 (Ga. 1992). [↑](#footnote-ref-625)
625. 624 450 S.E.2d 671 (Ga. 1994). [↑](#footnote-ref-626)
626. 625 Lamb ex rel. Shepard v. Sears, Roebuck & Co., 1 F.3d 1184 (11th Cir. 1993); Pressley v. Sears, Roebuck & Co., 738 F.2d 1222 (11th Cir. 1984); Smith v. Garden Way, Inc., 821 F. Supp. 1486 (N.D. Ga. 1993); Floyd v. BIC Corp., 790 F. Supp. 276 (N.D. Ga. 1992). [↑](#footnote-ref-627)
627. 626 See, e.g., ICI Americas, Inc. v. Banks, 440 S.E.2d 38 (Ga. Ct. App. 1993), rev'd, 450 S.E.2d 671 (Ga. 1994); Vax v. Albany Lawn & Garden Center, 433 S.E.2d 365 (Ga. Ct. App. 1993); Weatherby v. Honda Motor Co., 393 S.E.2d 64 (Ga. Ct. App. 1990), overruling Ogletree v. Navistar Int'l Transp., 390 S.E.2d 61 (Ga. Ct. App. 1989); Honda Motor Co. v. Kimbrel, 376 S.E.2d 379 (Ga. Ct. App. 1988); Branton v. Draper Corp., 366 S.E.2d 206 (Ga. Ct. App. 1988); Fortner v. W.C. Cayne & Co., Inc., 360 S.E.2d 920 (Ga. Ct. App. 1987); Hunt v. Harley-Davidson Motor Co., 248 S.E.2d 15 (Ga. Ct. App. 1978). [↑](#footnote-ref-628)
628. 627 See cases cited supra note 626. [↑](#footnote-ref-629)
629. 628 See Weatherby v. Honda Motor Co., 393 S.E.2d 64 (Ga. Ct. App. 1990). Weatherby overruled Ogletree v. Navistar Int'l Transp., 390 S.E.2d 61 (Ga. Ct. App. 1989) on the basis that the open and obvious danger rule was based upon objective criteria. The Ogletree court held that the open and obvious danger rule was based upon the consumer's subjective knowledge. Id. at 65. [↑](#footnote-ref-630)
630. 629 Id. at 67. [↑](#footnote-ref-631)
631. 630 Id. at 66-67; see also Hunt v. Harley-Davidson Motor Co., 248 S.E.2d 15 (Ga. Ct. App. 1978). The Hunt decision discussed the open and obvious danger rule in relation to warnings and stated there was no duty to warn of product dangers which are obvious, generally known or of which a person has actual knowledge. Id. "The same rule applies where it appears that the person using the product should know of the danger or should in using the product discover the danger." Id. at 16 (citing 63 Am. Jur. 2d Products Liability section 51 (1984)) (emphasis added). [↑](#footnote-ref-632)
632. 631 See Fortner v. W.C. Cayne & Co., 360 S.E.2d 920 (Ga. Ct. App. 1987). The Fortner court said the defendants' failure to supply guarding devices against open and obvious dangers was not a "secret." Id. at 923. [↑](#footnote-ref-633)
633. 632 See cases cited supra note 626. [↑](#footnote-ref-634)
634. 633 Several cases from courts of appeal use this quote. See, e.g., Honda Motor Co. v. Kimball, 376 S.E.2d 379, 383 (Ga. Ct. App. 1988); Weatherby, 393 S.E.2d at 66. [↑](#footnote-ref-635)
635. 634 See supra note 633. [↑](#footnote-ref-636)
636. 635 See cases cited supra note 626. [↑](#footnote-ref-637)
637. 636 See cases cited supra note 626. [↑](#footnote-ref-638)
638. 637 In Ford Motor Co. v. Carter, 238 S.E.2d 361 (Ga. 1977), the Supreme Court of Georgia denied the consumer recovery because strict liability and negligence were separate and distinct. See supra notes 603-09 and accompanying text. In fact it took an act of the legislature to have strict liability apply to wrongful death actions. See Stiltjes v. Ridco Exterminating Co., 347 S.E.2d 568 (Ga. 1986). Thus, it is clear that the distinction between negligence and strict liability was a basis to deny the consumer recovery. [↑](#footnote-ref-639)
639. 638 If the opinions of the court of appeals decisions which state that only semantics separates strict liability from negligence, see supra note 633, then both negligence and strict liability may apply the same restrictive no-duty and consumer expectation tests developed in both the federal courts and the court of appeals. See supra notes 633-34. Under these cases the consumer cannot recover under either strict liability or negligence. [↑](#footnote-ref-640)
640. 639 450 S.E.2d 671 (Ga. 1994). [↑](#footnote-ref-641)
641. 640 Id. at 672. [↑](#footnote-ref-642)
642. 641 Id. at 672-73. [↑](#footnote-ref-643)
643. 642 Id. at 673. [↑](#footnote-ref-644)
644. 643 Id. [↑](#footnote-ref-645)
645. 644 Id. at 674-75 (citations omitted). [↑](#footnote-ref-646)
646. 645 Id. at 675. [↑](#footnote-ref-647)
647. 646 Id. at 675 n.6. [↑](#footnote-ref-648)
648. 647 Id. [↑](#footnote-ref-649)
649. 648 Id. [↑](#footnote-ref-650)
650. 649 Id. [↑](#footnote-ref-651)
651. 650 Id. at 676. [↑](#footnote-ref-652)
652. 651 Id. [↑](#footnote-ref-653)
653. 652 For an excellent survey of Georgia law including the statutory restrictions of a consumer both before and after the Tort Reform Act of 1987, see Robert M. Travis & Edward C. Brewer, III, Products Liability Law in Georgia Including Recent Developments, 43 Mercer L. Rev. 27 (1991). See also Chrysler Corp. v. Batten, 450 S.E.2d 208 (Ga. 1994) (concluding that subsection (c) of section 51-1-11 extends the ten-year statute of repose to negligence actions, but provides exceptions "where the manufacturer's negligence resulted in a product causing disease or birth defect, or where the injuries or damages arose out of conduct manifesting a 'willful, reckless, or wanton disregard for life or property.'"). [↑](#footnote-ref-654)
654. 653 Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions: Volume I: Civil Cases 257 (3d ed. 1991). [↑](#footnote-ref-655)
655. 654 470 P.2d 240 (Haw. 1970). [↑](#footnote-ref-656)
656. 655 Id. at 241. [↑](#footnote-ref-657)
657. 656 Id. at 242. [↑](#footnote-ref-658)
658. 657 Id. [↑](#footnote-ref-659)
659. 658 Id. [↑](#footnote-ref-660)
660. 659 Id. [↑](#footnote-ref-661)
661. 660 Id. at 243. [↑](#footnote-ref-662)
662. 661 Id. (citing Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 775 (N.J. 1965)). [↑](#footnote-ref-663)
663. 662 650 P.2d 734 (Haw. 1983). [↑](#footnote-ref-664)
664. 663 Id. at 739-40. [↑](#footnote-ref-665)
665. 664 Id. at 742. [↑](#footnote-ref-666)
666. 665 740 P.2d 548 (Haw. 1987). [↑](#footnote-ref-667)
667. 666 Id. at 549. [↑](#footnote-ref-668)
668. 667 Id. [↑](#footnote-ref-669)
669. 668 Id. at 550. [↑](#footnote-ref-670)
670. 669 Id. [↑](#footnote-ref-671)
671. 670 Id. [↑](#footnote-ref-672)
672. 671 780 P.2d 566 (Haw. 1989). [↑](#footnote-ref-673)
673. 672 Id. at 579. [↑](#footnote-ref-674)
674. 673 Id. [↑](#footnote-ref-675)
675. 674 Id. [↑](#footnote-ref-676)
676. 675 Id. at 580. [↑](#footnote-ref-677)
677. 676 Id. [↑](#footnote-ref-678)
678. 677 837 P.2d 1273 (Haw. 1992). The Larsen court found that three major policies justified both implied warranties and strict liability. The three policies justifying liability were (1) compensation for the frustration of consumer expectations, (2) cost shifting, and (3) eliminating proof of negligence as a promotion of safety. Id. at 1285. [↑](#footnote-ref-679)
679. 678 Haw. Rev. Stat. sections 663-8.5 to -8.9 (Supp. 1992). [↑](#footnote-ref-680)
680. 679 Haw. Rev. Stat. section 663-10.9 (Supp. 1992). [↑](#footnote-ref-681)
681. 680 Haw. Rev. Stat. sections 325-91, 327-51 (1985). [↑](#footnote-ref-682)
682. 681 518 P.2d 857 (Idaho 1974). In 1975, the Supreme Court of Idaho refused to apply strict liability to personal services in Hoffman v. Simplot Aviation, Inc., 539 P.2d 584 (Idaho 1975). [↑](#footnote-ref-683)
683. 682 519 P.2d 421 (Idaho 1974). [↑](#footnote-ref-684)
684. 683 Id. at 428. [↑](#footnote-ref-685)
685. 684 Id. [↑](#footnote-ref-686)
686. 685 791 P.2d 1303 (Idaho 1990). [↑](#footnote-ref-687)
687. 686 Id. at 1306. [↑](#footnote-ref-688)
688. 687 Mortensen v. Chevron Chem. Co., 693 P.2d 1038 (Idaho 1984). [↑](#footnote-ref-689)
689. 688 Id. at 1041. [↑](#footnote-ref-690)
690. 689 701 P.2d 210 (Idaho 1985). But see Tuttle v. Sudenga Indus., 868 P.2d 473 (Idaho 1994) (holding that, pursuant to Idaho Products Liability Act, alteration or misuse of a product by the employer will not necessarily serve as a bar to strict liability). [↑](#footnote-ref-691)
691. 690 Id. at 211-12. The Rojas court determined that "unreasonably dangerous" under comment i of section 402 was from the perspective of an "ordinary" user or consumer. [↑](#footnote-ref-692)
692. 691 Toner v. Lederle Lab., 732 P.2d 297, 303 n.5 (Idaho 1987) (quoting Chancler v. American Hardware Mutual Ins. Co., 712 P.2d 542 (Idaho 1986), and David v. Globe Mach. Mfg. Co., 684 P.2d 692 (Wash. 1984), respectively) (citations omitted). [↑](#footnote-ref-693)
693. 692 Idaho Code sections 6-1401 to -1410, -1602 to -1606 (1990). Section 6-1401 provides that the prior consumer law is modified only to the extent set forth in the Act. The Act limits liability to the useful life of a product, a ten-year statute of repose and a two year statute of limitations under section 6-1403. Several factors are to be considered under comparative responsibility including open and obvious dangers, misuse, alteration, and modification of the product. Section 6-1406 relates to the non-admissibility of post manufacturing changes in (1) design, (2) warnings or instructions, (3) technological feasibility, (4) state-of-the-art, and (5) industry custom. Section 6-1410 limits the liability of firearms and ammunition. In 1987, awards became subject to periodic payments under section 6-1602. In addition, the 1987 statutes limited non-economic damages to $ 400,000, and punitive damages were restricted. Id. sections 6-1603, -1604. In 1990, limitations were placed on collateral sources. Id. section 6-1606. [↑](#footnote-ref-694)
694. 693 Id. section 6-1405 (1990). [↑](#footnote-ref-695)
695. 694 Id. section 6-1406; see also supra note 692. [↑](#footnote-ref-696)
696. 695 Idaho Code section 6-1403 (1990). [↑](#footnote-ref-697)
697. 696 Id. section 6-1407. [↑](#footnote-ref-698)
698. 697 Id. section 6-1410. [↑](#footnote-ref-699)
699. 698 Id. section 6-1603. [↑](#footnote-ref-700)
700. 699 Id. section 6-1604. [↑](#footnote-ref-701)
701. 700 Id. section 6-1606. [↑](#footnote-ref-702)
702. 701 Idaho Code section 39-3702 (1993). [↑](#footnote-ref-703)
703. 702 Idaho Law Foundation, Inc., Idaho Civil Jury Instructions IDJI 1007 (1995). [↑](#footnote-ref-704)
704. 703 210 N.E.2d 182 (Ill. 1965). [↑](#footnote-ref-705)
705. 704 See Buehler v. Whalen, 374 N.E.2d 460 (Ill. 1978). [↑](#footnote-ref-706)
706. 705 385 N.E.2d 690 (Ill. 1979). The Anderson court did not state that the action was based upon strict liability; however, it is clear that the case was a strict liability action from the appellate court's decision. See Anderson v. Hyster Co., 371 N.E.2d 279 (Ill. App. Ct. 1977). [↑](#footnote-ref-707)
707. 706 Anderson, 385 N.E.2d at 691-92. [↑](#footnote-ref-708)
708. 707 Id. at 692. The defendants also alleged that the operator of the product was the sole proximate cause of plaintiff's injuries. Id. [↑](#footnote-ref-709)
709. 708 Id. at 692. [↑](#footnote-ref-710)
710. 709 Id. at 691-94. [↑](#footnote-ref-711)
711. 710 390 N.E.2d 859 (Ill. 1979). [↑](#footnote-ref-712)
712. 711 The product involved was a forage blower with a power take off assembly. Id. at 861. The forage blower, by design, had to be moved to a variety of locations. Id. at 862. When moved, the power take-off assembly had to be detached and placed into a hopper or carried separately. Id. However, for convenience, the plaintiff did not remove the power take off but just "wired it to the blower." The plaintiff was injured by the wire while attempting to reassemble the power take off after moving the entire blower. Id. The alleged design defect was a failure to supply an appropriate device to hold the power take off assembly while it was being moved. Id. at 861-62. [↑](#footnote-ref-713)
713. 712 Id. at 862. [↑](#footnote-ref-714)
714. 713 502 F.2d 741, 744 (7th Cir. 1974). [↑](#footnote-ref-715)
715. 714 The two Illinois appellate court decisions were Wright v. Massey-Harris, Inc., 215 N.E.2d 465 (Ill. App. Ct. 1966), and Sutkowski v. Universal Marion Corp., 281 N.E.2d 749 (Ill. App. Ct. 1972). See ***Kerns***, 390 N.E.2d at 863. [↑](#footnote-ref-716)
716. 715 ***Kerns***, 390 N.E.2d at 863-64. [↑](#footnote-ref-717)
717. 716 Id. at 864 (citing Anderson v. Hyster Co., 385 N.E.2d 690 (Ill. 1979)). [↑](#footnote-ref-718)
718. 717 412 N.E.2d 959 (Ill. 1980). [↑](#footnote-ref-719)
719. 718 Id. at 962. [↑](#footnote-ref-720)
720. 719 Id. at 962-64. [↑](#footnote-ref-721)
721. 720 Id. at 963. [↑](#footnote-ref-722)
722. 721 Id. at 963-64 (citations omitted). [↑](#footnote-ref-723)
723. 722 Id. at 963. [↑](#footnote-ref-724)
724. 723 563 N.E.2d 449 (Ill. 1990). [↑](#footnote-ref-725)
725. 724 Id. at 457 (citations omitted). [↑](#footnote-ref-726)
726. 725 281 N.E.2d 749 (Ill. App. Ct. 1972). [↑](#footnote-ref-727)
727. 726 Id. at 750-52. In Sutkowski, the defendant argued against allowing proof of alternative designs. Id. at 752. [↑](#footnote-ref-728)
728. 727 The Sutkowski court based its decision upon permitting the plaintiff to present evidence of alternative designs. In addition, the court made no ruling as to whether it was the plaintiff's burden to prove all of the feasibility elements of the alternative design. Id. at 753. [↑](#footnote-ref-729)
729. 728 See, e.g., Seward v. Griffin, 452 N.E.2d 558 (Ill. App. Ct. 1983); Genteman v. Saunders Archery Co., 355 N.E.2d 647 (Ill. App. Ct. 1976). [↑](#footnote-ref-730)
730. 729 Seward, 452 N.E.2d at 571. Other Illinois appellate court decisions have followed the ***Kern*** decision allowing but not requiring feasible alternative design. See Schaffner v. Chicago & North Western Transp. Co., 515 N.E.2d 298 (Ill. App. Ct. 1987); Murphy v. Chestnut Mountain Lodge, Inc., 464 N.E.2d 818 (Ill. App. Ct. 1984). [↑](#footnote-ref-731)
731. 730 See, e.g., Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill. 1993); Scoby v. Vulcan-Hart Corp., 569 N.E.2d 1147 (Ill. App. Ct. 1991); Smith v. American Motors Sales Corp., 576 N.E.2d 146 (Ill. App. Ct. 1991). For an excellent historical review of the Illinois Appellate Court decisions concerning the open and obvious danger rule, see Harnischfeger Corp. v. Gleason Crane Rentals, Inc., 585 N.E.2d 166 (Ill. App. Ct. 1991). [↑](#footnote-ref-732)
732. 731 585 N.E.2d 166 (Ill. App. Ct. 1991). [↑](#footnote-ref-733)
733. 732 Id. at 169-70. [↑](#footnote-ref-734)
734. 733 Id. at 170. [↑](#footnote-ref-735)
735. 734 Id. [↑](#footnote-ref-736)
736. 735 Id. at 170-71 (citations omitted). [↑](#footnote-ref-737)
737. 736 Id. at 171-72. [↑](#footnote-ref-738)
738. 737 Id. at 172-73 (citing Wade, supra note 109, at 837-38). [↑](#footnote-ref-739)
739. 738 Id. at 174. [↑](#footnote-ref-740)
740. 739 Id. [↑](#footnote-ref-741)
741. 740 Id. [↑](#footnote-ref-742)
742. 741 Id. [↑](#footnote-ref-743)
743. 742 Id. [↑](#footnote-ref-744)
744. 743 Id. In his criticism of the open and obvious danger rule, Justice Chapman referred to the time-honored example that a knife cannot be considered defective merely because it can cut or that no warning is needed concerning knives:

     To illustrate our discussion, we submit that the often-cited example of no duty to place a warning on a sharp knife because it is an open and obvious danger is actually based on either or both of the just stated but different tests. The first of these is that there is no duty under the consumerexpectation test because the danger of cutting oneself with a sharp knife is so well known that no consumer would expect to be warned of it. The second is that, under the risk/benefit test, the magnitude of the risk is so small and the utility of the warning so negligible that no duty to warn will be imposed. Again, while the answer to this question of duty may furnish an identical result, i.e., no recovery by the injured person, it is important for courts to realize the true basis for their decisions because different results may occur depending upon the facts of the case.

     Id. at 174-75. [↑](#footnote-ref-745)
745. 744 Id. at 175. [↑](#footnote-ref-746)
746. 745 See, e.g., Faucett v. Ingersoll-Rand Mining & Mach. Co., 960 F.2d 653 (7th Cir. 1992). However, the open and obvious danger rule still has some vestigial life even under the two-pronged test, and it may take some time before it is entirely eliminated. See, e.g., Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill. 1993); Malone v. BIC Corp., 789 F. Supp. 939 (N.D. Ill. 1992); Smith v. American Motors Sales Corp., 576 N.E.2d 146 (Ill. App. Ct. 1991); Scoby v. Vulcan-Hart Corp., 569 N.E.2d 1147 (Ill. App. Ct. 1991). [↑](#footnote-ref-747)
747. 746 Ill. Ann. Stat. ch. 735, para. 5/2-1107.1 (Smith-Hurd 1992). [↑](#footnote-ref-748)
748. 747 See Ill. Ann. Stat. ch. 735, para. 5/13-213 (Smith-Hurd 1992). The statute places a ten-year statute of repose on most products and a two-year statute of limitations. Id. [↑](#footnote-ref-749)
749. 748 Ill. Ann. Stat. ch. 735, para. 5/2-623 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-750)
750. 749 Id. para. 5/2-623(b). [↑](#footnote-ref-751)
751. 750 Id. para. 5/2-623(c). [↑](#footnote-ref-752)
752. 751 Ill. Ann. Stat. ch. 735, para. 5/2-2104 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-753)
753. 752 Id. [↑](#footnote-ref-754)
754. 753 Id. [↑](#footnote-ref-755)
755. 754 Ill. Ann. Stat. ch. 735, para. 5/2-2107 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-756)
756. 755 Ill. Ann. Stat. ch. 735, para. 5/2-1115.05(a),(b) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-757)
757. 756 Ill. Ann. Stat. ch. 735, para. 5/2-1115.05(c) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-758)
758. 757 Ill. Ann. Stat. ch. 735, para. 5/2-2107 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-759)
759. 758 Ill. Ann. Stat. ch. 735, para. 5/2-621 (Smith-Hurd 1992). [↑](#footnote-ref-760)
760. 759 Ill. Ann. Stat. ch. 735, para. 5/2-1107.1 (Smith-Hurd 1992). [↑](#footnote-ref-761)
761. 760 Ill. Ann. Stat. ch. 735, para. 5/2-1116 (Smith-Hurd 1992). [↑](#footnote-ref-762)
762. 761 Ill. Ann. Stat. ch. 735, para. 5/2-2105 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-763)
763. 762 Ill. Ann. Stat. ch. 735, para. 5/2-1115.1(a) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-764)
764. 763 Ill. Ann. Stat. ch. 735, para. 5/2-1205.1 (Smith-Hurd 1992). [↑](#footnote-ref-765)
765. 764 Ill. Ann. Stat. ch. 740, para. 100/3 (Smith-Hurd 1993). [↑](#footnote-ref-766)
766. 765 Ill. Ann. Stat. ch. 735, para. 5/2-2105 (Smith-Hurd 1992). [↑](#footnote-ref-767)
767. 766 Ill. Ann. Stat. ch. 735, para. 5/2-2106.5 (Smith-Hurd Supp. 1996). [↑](#footnote-ref-768)
768. 767 Ill. Ann. Stat. ch. 735, para. 5/2-2106(a) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-769)
769. 768 Id. [↑](#footnote-ref-770)
770. 769 Ill. Ann. Stat. ch. 735, para. 5/2-2106(c) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-771)
771. 770 Ill. Ann. Stat. ch. 735, para. 5/2-2106(b) (Smith-Hurd Supp. 1996). [↑](#footnote-ref-772)
772. 771 Ill. Ann. Stat. ch. 735, para. 5/13-213(b) (Smith-Hurd 1992). [↑](#footnote-ref-773)
773. 772 Ill. Ann. Stat. ch. 735, para. 5/13-213(d) (Smith-Hurd 1992). [↑](#footnote-ref-774)
774. 773 See Illinois Pattern Jury Instructions--Civil 400.06 (3d ed. 1992). [↑](#footnote-ref-775)
775. 774 See Jordan H. Leibman, Note, Indiana's Obvious Danger Rule for Products Liability, 12 Ind. L. Rev. 397 (1979); John F. Vargo & Jordan H. Leibman, Products Liability, Survey of Recent Developments in Indiana Law, 12 Ind. L. Rev. 227 (1979); John F. Vargo, Products Liability in Indiana--In Search of a Standard for Strict Liability in Tort, 10 Ind. L. Rev. 871 (1977); John F.Vargo, Products Liability, Survey of Recent Developments in Indiana Law, 10 Ind. L. Rev. 265 (1976); John F. Vargo, Products Liability, Survey of Recent Developments in Indiana Law, 11 Ind. L. Rev. 202 (1977); John F. Vargo, Products Liability, Survey of Recent Developments in Indiana Law, 9 Ind. L. Rev. 270 (1975). [↑](#footnote-ref-776)
776. 775 300 N.E.2d 335 (Ind. 1973). [↑](#footnote-ref-777)
777. 776 416 N.E.2d 833 (Ind. 1981). [↑](#footnote-ref-778)
778. 777 Id. at 836. [↑](#footnote-ref-779)
779. 778 Id. at 838. [↑](#footnote-ref-780)
780. 779 Id. [↑](#footnote-ref-781)
781. 780 Id. at 837-38. [↑](#footnote-ref-782)
782. 781 427 N.E.2d 1058 (Ind. 1981). [↑](#footnote-ref-783)
783. 782 Id. at 1061. [↑](#footnote-ref-784)
784. 783 Id. at 1063. [↑](#footnote-ref-785)
785. 784 Id. [↑](#footnote-ref-786)
786. 785 Id. at 1061. [↑](#footnote-ref-787)
787. 786 Id. at 1064. The majority ruled that because the trial court refused to instruct the jury about the open and obvious danger rule and failed to define unreasonably dangerous, the trial court was to enter a judgment in favor of the defendant. Id. This is a determination as a matter of law that open and obvious dangers bar both a defect and liability. See id. at 1066 (Hunter, J., dissenting). [↑](#footnote-ref-788)
788. 787 Id. at 1061. [↑](#footnote-ref-789)
789. 788 Id. at 1065 (DeBruler, J., dissenting). [↑](#footnote-ref-790)
790. 789 Id. (DeBruler, J., dissenting). [↑](#footnote-ref-791)
791. 790 Id. (DeBruler, J., dissenting). [↑](#footnote-ref-792)
792. 791 Id. (DeBruler, J., dissenting). [↑](#footnote-ref-793)
793. 792 Id. at 1066 (Hunter, J., dissenting). [↑](#footnote-ref-794)
794. 793 Id. (Hunter, J., dissenting). [↑](#footnote-ref-795)
795. 794 Id. at 1069 (Hunter, J., dissenting) (citation omitted). [↑](#footnote-ref-796)
796. 795 448 N.E.2d 277 (Ind. 1983). For a critical examination of the Hoffman decision, see John F. Vargo, Products Liability, Survey of Recent Components in Indiana Law, 17 Ind. L. Rev. 255, 258-69 (1984). [↑](#footnote-ref-797)
797. 796 Hoffman, 448 N.E.2d at 280. [↑](#footnote-ref-798)
798. 797 Id. at 285. [↑](#footnote-ref-799)
799. 798 Id. [↑](#footnote-ref-800)
800. 799 Id. [↑](#footnote-ref-801)
801. 800 Id. at 285-86. [↑](#footnote-ref-802)
802. 801 Id. at 280-81. [↑](#footnote-ref-803)
803. 802 See Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 440-41 (Ind. 1990). [↑](#footnote-ref-804)
804. 803 Hoffman, 448 N.E.2d at 284-85. [↑](#footnote-ref-805)
805. 804 Id. [↑](#footnote-ref-806)
806. 805 Id. at 287-88. [↑](#footnote-ref-807)
807. 806 Id. (citing Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976)). [↑](#footnote-ref-808)
808. 807 457 N.E.2d 181 (Ind. 1983). [↑](#footnote-ref-809)
809. 808 486 N.E.2d 484 (Ind. 1985). [↑](#footnote-ref-810)
810. 809 Id. at 485. [↑](#footnote-ref-811)
811. 810 Id. [↑](#footnote-ref-812)
812. 811 Id. at 488-89. [↑](#footnote-ref-813)
813. 812 Id. at 489 (citing Law v. Yukon Delta, Inc., 458 N.E.2d 677, 681 (Ind. Ct. App. 1984) (Staton, J., dissenting)). [↑](#footnote-ref-814)
814. 813 Bridgewater, 486 N.E.2d at 489. [↑](#footnote-ref-815)
815. 814 Id. [↑](#footnote-ref-816)
816. 815 See John F. Vargo, Strict Liability For Products: An Achievable Goal, 24 Ind. L. Rev. 1197 (1991). [↑](#footnote-ref-817)
817. 816 Id. [↑](#footnote-ref-818)
818. 817 See supra note 774. [↑](#footnote-ref-819)
819. 818 See supra note 793 and accompanying text. [↑](#footnote-ref-820)
820. 819 See supra note 774 and accompanying text. [↑](#footnote-ref-821)
821. 820 359 F.2d 822 (7th Cir. 1966), cert. denied, 385 U.S. 836 (1967). [↑](#footnote-ref-822)
822. 821 Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977). [↑](#footnote-ref-823)
823. 822 See supra note 793; see also FMC Corp. v. Brown, 526 N.E.2d 719 (Ind. Ct. App. 1988) (adopting in part by the Supreme Court of Indiana in FMC Corp. v. Brown, 551 N.E.2d 444 (Ind. 1990)); Miller v. Todd, 518 N.E.2d 1124 (Ind. Ct. App. 1988) (affirmed in part, vacated in part by the Supreme Court of Indiana in Miller v. Todd, 551 N.E.2d 1139 (Ind. 1990)); Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538 (Ind. Ct. App. 1987); Angola State Bank v. Butler Mfg. Co., 475 N.E.2d 717 (Ind. Ct. App. 1985); Ragsdale v. K-Mart Corp., 468 N.E.2d 524 (Ind. Ct. App. 1984). [↑](#footnote-ref-824)
824. 823 See supra note 822. [↑](#footnote-ref-825)
825. 824 See infra note 855-56. [↑](#footnote-ref-826)
826. 825 See Shanks v. A.F.E. Indus., Inc., 416 N.E.2d 833 (Ind. 1981). The court of appeals decision in FMC, 526 N.E.2d at 719 also agrees that safety devices as a design defect was viable in Shanks, 526 N.E.2d at 727. On the same basis, the supreme court's decision of Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981) could have found a design defect based upon an alternative design absent the open and obvious danger. See supra notes 781-94 and accompanying text. Court of appeals' decisions have stated that design defects based upon each of the safety devices are a basis for liability. See, e.g., Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976). [↑](#footnote-ref-827)
827. 826 Ind. Code Ann. sections 33-1-1.5-1 to -8 (Burns Supp. 1978). [↑](#footnote-ref-828)
828. 827 Ind. Code Ann. sections 33-1-1.5-1 to -5 (Burns Supp. 1983). [↑](#footnote-ref-829)
829. 828 For a complete review of the 1978 Act, see John F. Vargo & Jordan H. Leibman, Products Liability, Survey of Recent Developments in Indiana Law, 12 Ind. L. Rev. 227, 238-58 (1979). [↑](#footnote-ref-830)
830. 829 Ind. Code Ann. sections 33-1-1.5-1 to -5 (Burns Supp. 1983) [↑](#footnote-ref-831)
831. 830 For a complete review of the 1983 Act, see John F. Vargo, Products Liability, Survey of Recent Developments in Indiana Law, 17 Ind. L. Rev. 255, 273-82 (1984). [↑](#footnote-ref-832)
832. 831 551 N.E.2d 437 (Ind. 1990). [↑](#footnote-ref-833)
833. 832 For a review of Koske and other decisions eliminating the open and obvious danger rule, see Vargo, supra note 815. [↑](#footnote-ref-834)
834. 833 Koske, 551 N.E.2d at 439-40. [↑](#footnote-ref-835)
835. 834 Id. at 440-41. [↑](#footnote-ref-836)
836. 835 551 N.E.2d 1139 (Ind. 1990). [↑](#footnote-ref-837)
837. 836 Id. at 1140. [↑](#footnote-ref-838)
838. 837 391 F.2d 495 (8th Cir. 1968). [↑](#footnote-ref-839)
839. 838 Miller, 551 N.E.2d at 1143. [↑](#footnote-ref-840)
840. 839 Id. [↑](#footnote-ref-841)
841. 840 551 N.E.2d 444 (Ind. 1990). [↑](#footnote-ref-842)
842. 841 Id. at 445-46. [↑](#footnote-ref-843)
843. 842 Id. at 446. [↑](#footnote-ref-844)
844. 843 Id. [↑](#footnote-ref-845)
845. 844 Id. [↑](#footnote-ref-846)
846. 845 Id. [↑](#footnote-ref-847)
847. 846 See Council Draft No. 2, supra note 3, at 63-64. [↑](#footnote-ref-848)
848. 847 551 N.E.2d 1139 (Ind. 1990). [↑](#footnote-ref-849)
849. 848 535 N.E.2d 1207 (Ind. Ct. App. 1989). [↑](#footnote-ref-850)
850. 849 557 N.E.2d 1045 (Ind. Ct. App. 1990). [↑](#footnote-ref-851)
851. 850 Miller, 551 N.E.2d at 1141. [↑](#footnote-ref-852)
852. 851 Id. at 1143. [↑](#footnote-ref-853)
853. 852 Id. [↑](#footnote-ref-854)
854. 853 Jackson v. Warrum, 535 N.E.2d 1207, 1212-20 (Ind. Ct. App. 1989). [↑](#footnote-ref-855)
855. 854 Id. at 1220. The court set out the elements of a crashworthiness claim and discussed an element which did not involve the burden of proving a safer alternative design. Id. [↑](#footnote-ref-856)
856. 855 Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1051 (Ind. Ct. App. 1990). [↑](#footnote-ref-857)
857. 856 Id. [↑](#footnote-ref-858)
858. 857 Ind. Code Ann. section 33-1-1.5-3(c),(d) (Burns Supp. 1995). [↑](#footnote-ref-859)
859. 858 Id. section 33-1-1.5-3(b). [↑](#footnote-ref-860)
860. 859 Id. section 33-1-1.5-4(b)(1). [↑](#footnote-ref-861)
861. 860 Id. section 33-1-1.5-4(b)(2). [↑](#footnote-ref-862)
862. 861 Id. section 33-1-1.5-4.5. [↑](#footnote-ref-863)
863. 862 Id. sections 33-1-1.5-9 to -10. [↑](#footnote-ref-864)
864. 863 Ind. Code Ann. sections 34-4-33-1 to -12 (Burns Supp. 1995). [↑](#footnote-ref-865)
865. 864 Id. [↑](#footnote-ref-866)
866. 865 Ind. Code Ann. sections 34-4-34-4 to -5 (Burns Supp. 1995). [↑](#footnote-ref-867)
867. 866 Id. section 34-4-34-6. [↑](#footnote-ref-868)
868. 867 Ind. Code Ann. section 34-4-44.6 (Burns Supp. 1995). [↑](#footnote-ref-869)
869. 868 Id. section 34-4-44.6-9. [↑](#footnote-ref-870)
870. 869 Indiana Pattern Jury Instructions--Civil No. 7.02 (2nd ed. 1989). [↑](#footnote-ref-871)
871. 870 174 N.W.2d 672 (Iowa 1970), aff'd in part & rev'd in part on appeal of remand, 199 N.W.2d 373 (Iowa 1972). [↑](#footnote-ref-872)
872. 871 Hawkeye-Security Ins. Co., 174 N.W.2d at 674-76. [↑](#footnote-ref-873)
873. 872 Id. at 676-82. [↑](#footnote-ref-874)
874. 873 Id. at 683-84 (citing Greenman v. Yuba Prods., 373 P.2d 897 (Cal. 1963)). [↑](#footnote-ref-875)
875. 874 Id. at 685. [↑](#footnote-ref-876)
876. 875 The malfunction of the brakes of the truck was caused by a "hold-down" nut coming loose from the brake assembly. Id. at 677. Ford Motor Company had used a prior design which employed a cotter key arrangement to insure that the nut remained in place. Ford, however, changed its design and eliminated the cotter key design in the type of truck involved in the accident. Id. [↑](#footnote-ref-877)
877. 876 210 N.W.2d 568 (Iowa 1973). [↑](#footnote-ref-878)
878. 877 Id. at 571. However, the Kleve court based its language concerning consumer expectations on the "defect" definitions of comment h rather than the unreasonably dangerous elements in comments i and g. Id. [↑](#footnote-ref-879)
879. 878 268 N.W.2d 830 (Iowa 1978). [↑](#footnote-ref-880)
880. 879 Id. at 834. [↑](#footnote-ref-881)
881. 880 525 P.2d 1033 (Or. 1974) (superseded by Or. Rev. Stat. section 30.920(3) (1987)); see also Burns v. General Motors Corp., 891 P.2d 1354, 1357 (Or. Ct. App. 1995) (describing how the statute supersedes Phillips)); Aller, 268 N.W.2d at 836. [↑](#footnote-ref-882)
882. 881 Aller, 268 N.W.2d at 835. [↑](#footnote-ref-883)
883. 882 Id. [↑](#footnote-ref-884)
884. 883 Id. at 835-36. [↑](#footnote-ref-885)
885. 884 Id. at 836. [↑](#footnote-ref-886)
886. 885 Id. at 837. [↑](#footnote-ref-887)
887. 886 Id. Strict liability under the imputed knowledge rule of the Phillips case imputes knowledge of the danger of the product to the manufacturer. Phillips, 525 P.2d at 1037-38. Such knowledge consists of the dangers as they actually exist. In other words, the "danger-in-fact" that exists in the product is the same throughout the life of the product. The same danger in fact exists at the time of manufacture, at the time the product causes the injury, and at the time of trial.

     The Phillips decision also recognized a difference between two commentators' ideas on the imputed knowledge rule. Id. at 1036 n.6. Dean Wade imputed knowledge as it exists at the time of manufacture of the product whereas Professor Keeton imputes knowledge of the danger as it exists at trial. Id. The Phillips case says that the plaintiff does not have to prove that the manufacturer had such knowledge because it is presumed that the manufacturer does have knowledge of the danger or defect. Knowledge of the danger or defect is separate and apart from knowledge of the "cure" of such danger or defect. Id. at 1037. A manufacturer could have knowledge of a danger or defect but lack the knowledge of what can be done to remedy the defect. In other words, the manufacturer may not know how to eliminate the defect because, at the time of trial, the technology capable of remedying such defect may not exist. Strict liability merely imputes knowledge of the danger to the manufacturer not unknown technology for the remedy for such danger.

     It is the difference between these two types of knowledge that allows both strict liability and state-of-the-art to co-exist. However, the two types of knowledge must be carefully separated or negligence does in fact creep into strict liability. See generally Wertheimer, supra note 127; Vargo, supra note 173. [↑](#footnote-ref-888)
888. 887 Aller, 268 N.W.2d at 837. [↑](#footnote-ref-889)
889. 888 Id. [↑](#footnote-ref-890)
890. 889 Id. at 836. [↑](#footnote-ref-891)
891. 890 The Phillips decision makes it absolutely clear that it is discussing two standards of two tests. The Supreme Court of Oregon also makes it clear what the imputed knowledge rule of Dean Wade is by numerous citations to his articles and to other jurisdictions discussing the imputed knowledge rule. One such cite is Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973) where the court says "they are two sides of the same standard" [in relation to seller oriented standard (imputed knowledge rule) and user-oriented standard (consumer expectation test)]. The Phillips court emphasized that the results obtained from the two different tests should be the same, not that the two tests were in fact the same nor that the elements of the two tests should be combined or mixed together. See Phillips, 525 P.2d at 1036-39. [↑](#footnote-ref-892)
892. 891 Phillips, 525 P.2d at 1036-39. [↑](#footnote-ref-893)
893. 892 Id. at 1036 (citing Restatement (Second) of Torts section 402A cmt. i (1965)). [↑](#footnote-ref-894)
894. 893 Id. [↑](#footnote-ref-895)
895. 894 Aller, 268 N.W.2d at 834-37. Immediately after describing the consumer expectation test in very traditional tones, the Aller court described how one must prove "unreasonably dangerous." Bifurcating the phrase into dangerous and unreasonableness, the Aller court stated that unreasonableness involves a risk-utility balancing process. Id. at 835. Recognizing that this test is equivalent to negligence, the Aller court cited Phillips for the often quoted focus rule which states the difference between negligence and strict liability. "In strict liability the plaintiff's proof concerns the condition (dangerous) of a product which is designed or manufactured in a particular way. In negligence the proof concerns the reasonableness of the manufacturer's conduct in designing and selling the product as he did." Id. (citing Phillips, 525 P.2d at 1037).

     However, the Aller court failed to recognize the paraphrase from Phillips concerned the difference between the imputed knowledge rule and negligence. The Phillips court was describing the focus concept in relation to the imputed knowledge rule not the consumer expectation test. The actual manner in which the consumer expectation test differs from negligence is that negligence focuses on the manufacturer's conduct by employing risk-utility whereas the consumer expectation test "focuses" on the ordinary consumer's view of the product without any resort to risk-utility. See generally Wertheimer, supra note 127.

     The Aller court, while using the language which attempts to distinguish strict liability from negligence, in effect mixed the two. The Aller court used a consumer expectation test which is based upon the phrase "unreasonably dangerous" then employed a negligence risk-utility test for the unreasonableness portion of the phrase. The Aller definition of the consumer expectation test completely ignored the very basic premise of the consumer expectation test and imported the risk-utility portion of the imputed knowledge test without imputing the knowledge of the danger. The Aller decision set forth an excellent example of why the Cronin decision in California rejected the unreasonably dangerous language in strict liability. See Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972). [↑](#footnote-ref-896)
896. 895 297 N.W.2d 218 (Iowa 1980). [↑](#footnote-ref-897)
897. 896 Id. at 220-21 (quoting Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (Cal. 1978)). [↑](#footnote-ref-898)
898. 897 Id. at 220. [↑](#footnote-ref-899)
899. 898 Id. at 221. [↑](#footnote-ref-900)
900. 899 Id. at 221-23. [↑](#footnote-ref-901)
901. 900 457 N.W.2d 911 (Iowa 1990). [↑](#footnote-ref-902)
902. 901 Id. at 913. [↑](#footnote-ref-903)
903. 902 Id. at 916-17. [↑](#footnote-ref-904)
904. 903 Id. at 918. [↑](#footnote-ref-905)
905. 904 478 N.W.2d 70 (Iowa 1991), aff'd, Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994). [↑](#footnote-ref-906)
906. 905 Id. at 71. [↑](#footnote-ref-907)
907. 906 Id. at 75. Although the plaintiff brought her action in both strict liability and negligence, the court applied a negligence standard as used by the Iowa Court of Appeals in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (Iowa Ct. App. 1981). See Avco Corp., 478 N.W.2d at 75. [↑](#footnote-ref-908)
908. 907 Id. at 75-76. [↑](#footnote-ref-909)
909. 908 Reed v. Chrysler Corp., 494 N.W.2d 224, 226 (Iowa 1992). [↑](#footnote-ref-910)
910. 909 See Iowa Civil Jury Instructions ch. 1000.4 (Iowa State Bar Association, January 1994). [↑](#footnote-ref-911)
911. 910 780 F. Supp. 1225 (S.D. Iowa 1991), rev'd on other grounds, 6 F.3d 497 (8th Cir. 1993). [↑](#footnote-ref-912)
912. 911 Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774 (Wash. 1975). [↑](#footnote-ref-913)
913. 912 Iowa Code Ann. section 613.18 (West Supp. 1995); see also Erickson v. Wright Welding Supply, 485 N.W.2d 82 (Iowa 1992). [↑](#footnote-ref-914)
914. 913 Iowa Code Ann. section 668.12 (West 1987); see also Hulrichs v. Avco Corp., 478 N.W.2d 70, 76 (Iowa 1991). [↑](#footnote-ref-915)
915. 914 Iowa Code Ann. section 668A.1 (West 1987). [↑](#footnote-ref-916)
916. 915 Iowa Code Ann. section 142A.8 (West 1989). [↑](#footnote-ref-917)
917. 916 Iowa State Bar Ass'n, Iowa Civil Jury Instructions vol. 1 (1994). Section 1000.4 states:

     Unreasonably Dangerous - Definition. A defective product is unreasonably dangerous if:

     1. The danger is greater than an ordinary consumer with knowledge of the product's characteristics would expect it to be.

     2. The danger outweighs the utility of the product.

     3. The benefits of the design do not outweigh the risks. In determining whether the design benefits outweigh the risks, you may consider:

     a. The seriousness of the harm posed by the design.

     b. The likelihood that such danger would occur.

     c. The mechanical feasibility of a safer alternate design.

     d. The cost of an improved design.

     e. The adverse consequences to the product and the user that would result from an alternate design.

     f. Any other facts or circumstances shown by evidence having any bearing on the question.

     Id. [↑](#footnote-ref-918)
918. 917 See supra note 916. Under the comment section, the authors state: "Note: use paragraphs 1, 2 or 3 as they apply to the case. Paragraph 3 applies only to claims of defective design." Thus, any one, all three, or any combination of the three listed tests may be employed in a design case. See supra note 916. [↑](#footnote-ref-919)
919. 918 Other than listing case authorities, Iowa's Pattern Instructions give no guidance other than what is listed supra notes 916-17. [↑](#footnote-ref-920)
920. 919 545 P.2d 1104 (Kan. 1976). [↑](#footnote-ref-921)
921. 920 Id. at 1106. [↑](#footnote-ref-922)
922. 921 Id. at 1108. [↑](#footnote-ref-923)
923. 922 641 P.2d 353 (Kan. 1982). [↑](#footnote-ref-924)
924. 923 Id. at 361. [↑](#footnote-ref-925)
925. 924 Id. at 357-59. [↑](#footnote-ref-926)
926. 925 Id. at 358-59. [↑](#footnote-ref-927)
927. 926 Id. [↑](#footnote-ref-928)
928. 927 Id. at 359. [↑](#footnote-ref-929)
929. 928 Id. at 361. [↑](#footnote-ref-930)
930. 929 659 P.2d 799 (Kan. 1983). [↑](#footnote-ref-931)
931. 930 Id. at 801. [↑](#footnote-ref-932)
932. 931 Id. at 804-09. [↑](#footnote-ref-933)
933. 932 Id. [↑](#footnote-ref-934)
934. 933 Id. at 806. [↑](#footnote-ref-935)
935. 934 Id. at 805-06. [↑](#footnote-ref-936)
936. 935 Id. at 806. [↑](#footnote-ref-937)
937. 936 Id. at 806-07. [↑](#footnote-ref-938)
938. 937 Id. at 806. [↑](#footnote-ref-939)
939. 938 Id at 806-07. [↑](#footnote-ref-940)
940. 939 Id. at 808. But see Kan. Stat. Ann. section 60-3307 (West 1993) (enacted in response to Siruta, which states that "in a product liability claim, the following evidence shall not be admissible for any purpose: (1) Evidence of any advancements or changes in technical or other knowledge or techniques, in design theory or philosophy.") (emphasis added); see also Blackburn Inc. v. Harnischfeger Corp., 773 F. Supp. 296 (D. Kan. 1991) (explaining how Siruta has been superseded by statute). [↑](#footnote-ref-941)
941. 940 See William E. Westerbeke, Survey of Kansas Law: Torts, 33 Kan. L. Rev. 1, 48 (1984). This article is critical of the failure of the Kansas Supreme Court's allowance of a risk-benefit evidence without instructing on the issue. [↑](#footnote-ref-942)
942. 941 676 P.2d 761 (Kan. 1984). [↑](#footnote-ref-943)
943. 942 689 P.2d 795 (Kan. 1984). [↑](#footnote-ref-944)
944. 943 Id. at 801. [↑](#footnote-ref-945)
945. 944 Id. [↑](#footnote-ref-946)
946. 945 Id. [↑](#footnote-ref-947)
947. 946 Id. [↑](#footnote-ref-948)
948. 947 Id. [↑](#footnote-ref-949)
949. 948 E.g., Ponder v. Warren Tool Corp., 834 F.2d 1553 (10th Cir. 1987). [↑](#footnote-ref-950)
950. 949 Larry D. Hudson, LDH, Inc. v. Townsend Assoc., 704 F. Supp. 207, 211 (D. Kan. 1988). [↑](#footnote-ref-951)
951. 950 886 P.2d 869 (Kan. 1994). [↑](#footnote-ref-952)
952. 951 Id. at 872. [↑](#footnote-ref-953)
953. 952 Id. at 884; see also 7 U.S.C. section 136v(b) (1994). [↑](#footnote-ref-954)
954. 953 Id. at 886. [↑](#footnote-ref-955)
955. 954 Id. at 887. [↑](#footnote-ref-956)
956. 955 Id. at 889-90. [↑](#footnote-ref-957)
957. 956 Id. at 889. [↑](#footnote-ref-958)
958. 957 Id. [↑](#footnote-ref-959)
959. 958 Id. [↑](#footnote-ref-960)
960. 959 Id. at 889-90. [↑](#footnote-ref-961)
961. 960 Id. at 890 (citation omitted). [↑](#footnote-ref-962)
962. 961 Kan. Stat. Ann. sections 60-3301 to -3330 (1993). [↑](#footnote-ref-963)
963. 962 For a review of the Kansas Act and its provisions, see the authors' comments which accompany the annotations to the Act. See William E. Westerbeke, Some Observations on the Kansas Product Liability Act (Part 1), 53 J. Kan. Bar. Ass'n 296 (1984); William E. Westerbeke, Some Observations on the Kansas Product Liability Act (Part 2), 54 J. Kan. Bar. Ass'n 39 (1985). [↑](#footnote-ref-964)
964. 963 Westerbeke, supra note 962. [↑](#footnote-ref-965)
965. 964 Kan. Stat. Ann. section 60-19a01 (1994). [↑](#footnote-ref-966)
966. 965 Kan. Stat. Ann. section 60-3701 (1994). [↑](#footnote-ref-967)
967. 966 Kan. Stat. Ann. section 65-3701 (1992). [↑](#footnote-ref-968)
968. 967 Pattern Instructions for Kansas 2d PIK 13.21 (Supp. 1993). [↑](#footnote-ref-969)
969. 968 402 S.W.2d 441 (Ky. 1965). [↑](#footnote-ref-970)
970. 969 502 S.W.2d 66 (Ky. 1973). [↑](#footnote-ref-971)
971. 970 Id. at 68. [↑](#footnote-ref-972)
972. 971 Id. at 69-70. [↑](#footnote-ref-973)
973. 972 Id. [↑](#footnote-ref-974)
974. 973 The trial court granted summary judgment because strict liability did not extend to bystanders and because the plaintiff's father's negligence was the sole cause of the harm. Id. at 68. The Kentucky Court of Appeals affirmed the trial court's summary judgment, finding no negligence was shown in the design of the product. Id. at 70-71. [↑](#footnote-ref-975)
975. 974 Jones, 502 N.W.2d at 68. [↑](#footnote-ref-976)
976. 975 Id. at 68-69. [↑](#footnote-ref-977)
977. 976 Id. [↑](#footnote-ref-978)
978. 977 602 S.W.2d 429 (Ky. 1980). [↑](#footnote-ref-979)
979. 978 Id. at 430. [↑](#footnote-ref-980)
980. 979 Id. at 431-32. [↑](#footnote-ref-981)
981. 980 Id. at 433. [↑](#footnote-ref-982)
982. 981 Id. at 432-33 (footnote omitted). [↑](#footnote-ref-983)
983. 982 Id. at 433. [↑](#footnote-ref-984)
984. 983 Id. [↑](#footnote-ref-985)
985. 984 676 S.W.2d 776 (Ky. 1984). [↑](#footnote-ref-986)
986. 985 Id. at 780. [↑](#footnote-ref-987)
987. 986 Id. (quoting Nichols v. Onion Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980)). [↑](#footnote-ref-988)
988. 987 Id. at 780-81. [↑](#footnote-ref-989)
989. 988 812 S.W.2d 119 (Ky. 1991). [↑](#footnote-ref-990)
990. 989 Id. at 121-22. [↑](#footnote-ref-991)
991. 990 Id. at 123-24. One factor that the Fulkerson court listed as an evidentiary rather than legal question is the "feasibility of making a safer product." Id. [↑](#footnote-ref-992)
992. 991 Ky. Rev. Stat. Ann. sections 411.310-.340 (Michie 1992). [↑](#footnote-ref-993)
993. 992 Ky. Rev. Stat. Ann. section 411.184 (Michie 1992). [↑](#footnote-ref-994)
994. 993 Id. section 411.310. [↑](#footnote-ref-995)
995. 994 Id. section 411.320. [↑](#footnote-ref-996)
996. 995 Id. section 411.330 (repealed by Acts 1990, ch. 88, section 93). [↑](#footnote-ref-997)
997. 996 Id. section 411.340. [↑](#footnote-ref-998)
998. 997 See Ky. Rev. Stat. Ann. section 411.182 (Michie 1992) (allocation of fault); Ky. Rev. Stat. Ann. sections 411.184, .186 (Michie 1992) (punitive damages); Ky. Rev. Stat. Ann. section 139.125 (Michie 1991) (blood products). For a more complete explanation of Kentucky tort reform, see Robert R. Sparks, A Survey of Kentucky Tort Reform, 17 N. Ky. L. Rev. 473 (1990); Donald Miller, The Kentucky Law of Products Liability in a Nutshell, 12 N. Ky. L. Rev. 201 (1985). See also Reda Pump Co. v. Finck, 713 S.W.2d 818 (Ky. 1986) (holding that under Kentucky's statute, contributory negligence is a complete bar to recovery); Ingersoll-Rand Co. v. Rice, 775 S.W.2d 924 (Ky. Ct. App. 1988) (holding that contributory negligence may be part of comparative negligence). [↑](#footnote-ref-999)
999. 998 John S. Palmore & Ronald W. Eades, 2 Kentucky Instructions to Juries sections 49.01-.03 (1989). [↑](#footnote-ref-1000)
1000. 999 250 So. 2d 754 (La. 1971). [↑](#footnote-ref-1001)
1001. 1000 Id. at 755-56. [↑](#footnote-ref-1002)
1002. 1001 Id. at 755-56 (citations omitted). [↑](#footnote-ref-1003)
1003. 1002 For a general background of Louisiana products liability law in relation to its civil code, see David W. Robertson, Manufacturers' Liability For Defective Products in Louisiana Law, 50 Tul. L. Rev. 50 (1975); Note, Torts: Strict Liability For All Products, 18 Loy. L. Rev. 216 (1971-72). See also Boris Starck, The Foundation of Delictual Liability in Contemporary French Law: An Evaluation and a Proposal, 48 Tul. L. Rev. 1043 (1974). [↑](#footnote-ref-1004)
1004. 1003 481 F.2d 252 (5th Cir. 1973). [↑](#footnote-ref-1005)
1005. 1004 Robertson, supra note 1002, at 62-64. [↑](#footnote-ref-1006)
1006. 1005 Firmin, Inc. v. Denham Springs Floor Covering, 595 So. 2d 1164 (La. Ct. App. 1991). However, the basis of liability without fault or strict liability in Louisiana may be derived from three basic areas: (1) negligence with assistance of res ipsa loquitur; (2) implied warranties for food and products intended for intimate bodily use; and (3) implied contractual warranty against "redhibitory" defects. Robertson, supra note 1002, at 82-83. A redhibition defect or "vice" is one which renders the product "either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." Id. at 89 (quoting La. Civ. Code Ann. art. 2520 (West 1870)). [↑](#footnote-ref-1007)
1007. 1006 15 La. Civ. Code. Ann. art. 2315 (West 1995); Atchison v. Archer-DanielsMidland Co., 360 So.2d 599 (La. Ct. App. 1978); Quattlebaum v. Hy-Reach Equipment, 453 So. 2d 578 (La. Ct. App. 1984). See also Robertson, supra note 1002, at 8894. [↑](#footnote-ref-1008)
1008. 1007 See Robertson, supra note 1002, at 88-94. [↑](#footnote-ref-1009)
1009. 1008 Id. [↑](#footnote-ref-1010)
1010. 1009 Id.; see also Quattlebaum, 453 So. 2d at 578. [↑](#footnote-ref-1011)
1011. 1010 Robertson, supra note 1002, at 88-94. [↑](#footnote-ref-1012)
1012. 1011 Id. [↑](#footnote-ref-1013)
1013. 1012 See Robertson, supra note 1002. [↑](#footnote-ref-1014)
1014. 1013 358 So. 2d 926 (La. 1978). [↑](#footnote-ref-1015)
1015. 1014 Id. at 928. [↑](#footnote-ref-1016)
1016. 1015 Id. at 929. [↑](#footnote-ref-1017)
1017. 1016 Id. (quoting Wever v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971)). [↑](#footnote-ref-1018)
1018. 1017 Id. at 929-30. [↑](#footnote-ref-1019)
1019. 1018 387 So. 2d 585 (La. 1980). [↑](#footnote-ref-1020)
1020. 1019 Id. at 587. [↑](#footnote-ref-1021)
1021. 1020 Id. Strict liability may be assessed against parties responsible for the acts of others or for "things" in their custody under Article 2317. Loescher v. Parr, 324 So. 2d 441 (La. 1975). For an excellent explanation of strict liability under article 2317, see Wex S. Malone, Ruminations on Liability For the Acts of Things, 42 La. L. Rev. 979 (1982). See also David E. Verlander III, Article 2317 Liability: An Analysis of Louisiana Jurisprudence Since Loescher v. Parr, 25 Loy. L. Rev. 263 (1979). [↑](#footnote-ref-1022)
1022. 1021 The escalator manufacturer could not be strictly liable under Article 2317 because it did not have "custody" of the escalator. Id. However, as a manufacturer of a defective product, it was strictly liable under Article 2315. [↑](#footnote-ref-1023)
1023. 1022 387 So. 2d at 588. [↑](#footnote-ref-1024)
1024. 1023 Id. [↑](#footnote-ref-1025)
1025. 1024 Id. at 589. [↑](#footnote-ref-1026)
1026. 1025 403 So. 2d 26 (La. 1981). [↑](#footnote-ref-1027)
1027. 1026 Id. at 28. [↑](#footnote-ref-1028)
1028. 1027 Id. [↑](#footnote-ref-1029)
1029. 1028 Id. [↑](#footnote-ref-1030)
1030. 1029 Id. at 30-32. [↑](#footnote-ref-1031)
1031. 1030 Id. at 30. [↑](#footnote-ref-1032)
1032. 1031 Id. [↑](#footnote-ref-1033)
1033. 1032 Id. [↑](#footnote-ref-1034)
1034. 1033 Id. [↑](#footnote-ref-1035)
1035. 1034 Id. [↑](#footnote-ref-1036)
1036. 1035 Id. [↑](#footnote-ref-1037)
1037. 1036 Id. at 30-31. [↑](#footnote-ref-1038)
1038. 1037 Id. at 31. [↑](#footnote-ref-1039)
1039. 1038 Id. [↑](#footnote-ref-1040)
1040. 1039 Id. [↑](#footnote-ref-1041)
1041. 1040 484 So. 2d 110 (La. 1986). [↑](#footnote-ref-1042)
1042. 1041 Id. at 113. [↑](#footnote-ref-1043)
1043. 1042 Id. [↑](#footnote-ref-1044)
1044. 1043 Id. [↑](#footnote-ref-1045)
1045. 1044 Id. at 113-15. [↑](#footnote-ref-1046)
1046. 1045 Id. [↑](#footnote-ref-1047)
1047. 1046 Id. The Halphen court was extremely careful in its description of strict liability under each theory. For example, in addition to detailed explanations of each theory, the court began its description of an alternative theory with the phrase "although a product is not unreasonably dangerous per se or flawed by a construction defect, it may still be unreasonably dangerous product if." Id. at 114-15. After such a phrase, the court would then explain an alternative theory such as a failure to adequately warn. The Halphen court, when explaining the three methods a plaintiff should employ in a design defect case, again used the introductory phrase that although the plaintiff fails in proof of one method such failure does not negate any attempts to prove a design defect in the alternative method. Id. [↑](#footnote-ref-1048)
1048. 1047 Id. at 113. [↑](#footnote-ref-1049)
1049. 1048 Id. at 114 (citations omitted). [↑](#footnote-ref-1050)
1050. 1049 The Halphen court rejected any idea that, if the case is one of design defect, the plaintiff is rigidly confined to only one method of proving such design defect: "If a plaintiff proves that a product is unreasonably dangerous per se, it is not material that the case could have been tried as a design defect case or other type of defect case." Id. Whether a product has an alternative design or there are alternative products on the market the product may still be defective under the unreasonably dangerous per se theory. [↑](#footnote-ref-1051)
1051. 1050 Id. [↑](#footnote-ref-1052)
1052. 1051 Id. at 114-15. [↑](#footnote-ref-1053)
1053. 1052 Id. at 114. [↑](#footnote-ref-1054)
1054. 1053 Id. at 114-15. [↑](#footnote-ref-1055)
1055. 1054 Id. at 115. [↑](#footnote-ref-1056)
1056. 1055 Id. [↑](#footnote-ref-1057)
1057. 1056 Id. [↑](#footnote-ref-1058)
1058. 1057 Id. The Halphen court recognized that the categorization of defects is an artificial device that may prove detrimental to the consumer; thus, it allowed for a great deal of latitude especially because the legal "slotting" of defect into distinct pigeon holes ignores the essential overlap of the defect categories. See Vargo, supra note 173. [↑](#footnote-ref-1059)
1059. 1058 Halphen, 484 So. 2d at 115. [↑](#footnote-ref-1060)
1060. 1059 Id. [↑](#footnote-ref-1061)
1061. 1060 Id. [↑](#footnote-ref-1062)
1062. 1061 Id. (citations omitted). [↑](#footnote-ref-1063)
1063. 1062 Id.; see also supra note 1049. [↑](#footnote-ref-1064)
1064. 1063 484 So. 2d at 115. [↑](#footnote-ref-1065)
1065. 1064 Id. at 116-18. [↑](#footnote-ref-1066)
1066. 1065 Id. at 119 (citations omitted). [↑](#footnote-ref-1067)
1067. 1066 La. Rev. Stat. Ann sections 9:2800.51-.59 (West 1991). [↑](#footnote-ref-1068)
1068. 1067 The Act does not apply retroactively. See Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1265 (La. 1991). Therefore, the Halphen decision is still cited as the authority for cases which originated prior to 1988; however, other legislation limits consumer recovery for blood products, La. Civ. Code Ann. art. 2322.1 (West Supp. 1995), and by a statute of limitations, La. Civ. Code Ann. art. 3492 (West Supp. 1994). [↑](#footnote-ref-1069)
1069. 1068 See William E. Crawford & Jesse D. McDonald, Product Liability for Design in Louisiana, 50 La. L. Rev. 531 (1990). [↑](#footnote-ref-1070)
1070. 1069 La. Rev. Stat. Ann. section 9:2800.52 (West 1991). [↑](#footnote-ref-1071)
1071. 1070 La. Rev. Stat. Ann section 9:2800.56 (West 1991), states:

      A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:

      (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and

      (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

      Id. section 9:2800.56. There is little doubt that it was the intent of the drafters to make an alternative design the exclusive manner for proving a design defect. See Crawford & McDonald, supra note 1068, at 533-35. [↑](#footnote-ref-1072)
1072. 1071 See, e.g., Morgan v. Gaylord Container Corp., 30 F.3d 586 (5th Cir. 1994). [↑](#footnote-ref-1073)
1073. 1072 See Crawford & McDonald, supra note 1068, at 539-40. [↑](#footnote-ref-1074)
1074. 1073 See id. at 546. [↑](#footnote-ref-1075)
1075. 1074 The Halphen decision provided three different approaches to a design defect (1) unreasonably dangerous per se, (2) alternative designs, and (3) alternative products. See supra notes 856-82 and accompanying text. The Louisiana Act has eliminated both the unreasonably dangerous per se and the alternative products categories of defect. See Crawford & McDonald, supra note 1068, at 545-47. [↑](#footnote-ref-1076)
1076. 1075 See supra notes 1070-72 and accompanying text. [↑](#footnote-ref-1077)
1077. 1076 Although the authors of a recent article argue that adopting industry custom and usage would be inconsistent with the language of the Act, especially the language found in the Act's defenses, such arguments may not be persuasive when the language of the design defect portion of the Act is examined. See Crawford & McDonald, supra note 1068, at 535. The Act clearly states that there "existed an alternative design for the product that was capable of preventing the claimant's damage." Id. Such language could easily mean that only a design which is implemented can be one which is capable of preventing damages. Id. [↑](#footnote-ref-1078)
1078. 1077 Id. at 539-40. [↑](#footnote-ref-1079)
1079. 1078 See Perkins v. Emerson Elec. Co., 482 F. Supp. 1347 (W.D. La. 1980); Thomas v. Black & Decker, Inc., 502 So. 2d 157 (La. Ct. App. 1987). [↑](#footnote-ref-1080)
1080. 1079 See Alvin Weinstein & John Vargo, Society of Automotive Engineers (SAE), Products Liability and the Engineer (1994); John Vargo, What Every Engineer Should Know About Products Liability, Speech at the National Design Engineering Conference & Show, Chicago, Illinois (March 13-17, 1995) (transcript available form the American Society of Mechanical Engineers); see also The Personal Injury Attorney, Theory, Experts Evidence ch.13, section 13.03(2)(b) (1992). [↑](#footnote-ref-1081)
1081. 1080 See authorities cited supra note 1079; see also Howard Latin, "Good" Warnings, Bad Products and Cognitive Limitations, 41 UCLA L. Rev. 1193 (1994). [↑](#footnote-ref-1082)
1082. 1081 See authorities cited supra note 1079. [↑](#footnote-ref-1083)
1083. 1082 Latin, supra note 1080. [↑](#footnote-ref-1084)
1084. 1083 La. Rev. Stat. Ann. section 2800.59 (West 1988); see also Crawford & McDonald, supra note 1068, at 533-35. [↑](#footnote-ref-1085)
1085. 1084 Crawford & McDonald, supra note 1068, at 533-35. [↑](#footnote-ref-1086)
1086. 1085 910 F.2d 167 (5th Cir. 1990). [↑](#footnote-ref-1087)
1087. 1086 Id. at 172. [↑](#footnote-ref-1088)
1088. 1087 Id. [↑](#footnote-ref-1089)
1089. 1088 Id. at 181. [↑](#footnote-ref-1090)
1090. 1089 Id. at 183. [↑](#footnote-ref-1091)
1091. 1090 Id. [↑](#footnote-ref-1092)
1092. 1091 Id. [↑](#footnote-ref-1093)
1093. 1092 Id. [↑](#footnote-ref-1094)
1094. 1093 Id. [↑](#footnote-ref-1095)
1095. 1094 Id. [↑](#footnote-ref-1096)
1096. 1095 18 H. Alston Johnson, III, Louisiana Civil Law Treatise, Civil Jury Instructions sections 11.01-.14, at 168-84 (1994). [↑](#footnote-ref-1097)
1097. 1096 Me. Rev. Stat. Ann. tit. 14, section 221 (West 1993).

      One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

      Id. [↑](#footnote-ref-1098)
1098. 1097 Id.; see also St. Germain v. Husqvarna Corp., 544 A.2d 1283, 1287 n.3 (Me. 1988) (Glassman, J., dissenting) (pointing out in footnote that Maine's strict liability statute is an almost verbatim recitation of section 402A). [↑](#footnote-ref-1099)
1099. 1098 See Burke v. Hamilton Beach Div., 424 A.2d 145 (Me. 1981); Hurd v. Hurd, 423 A.2d 960 (Me. 1981). [↑](#footnote-ref-1100)
1100. 1099 See Burke, 424 A.2d at 145; Hurd, 423 A.2d at 960. [↑](#footnote-ref-1101)
1101. 1100 Both Burke and Hurd were overruled by Adams v. Buffalo Forge Co., 443 A.2d 932 (Me. 1982). See Me. Rev. Stat. Ann. tit. 14, section 161 (West 1993) (expressly providing that the lack of privity is no defense to an action against a manufacturer under section 221). [↑](#footnote-ref-1102)
1102. 1101 462 A.2d 1144 (Me. 1983). [↑](#footnote-ref-1103)
1103. 1102 Id. at 1148. [↑](#footnote-ref-1104)
1104. 1103 Id. [↑](#footnote-ref-1105)
1105. 1104 Id. at 1149. [↑](#footnote-ref-1106)
1106. 1105 544 A.2d 1283 (Me. 1988). [↑](#footnote-ref-1107)
1107. 1106 Id. at 1285. [↑](#footnote-ref-1108)
1108. 1107 Id. [↑](#footnote-ref-1109)
1109. 1108 Id.; see also Guiggey v. Bombardier, 615 A.2d 1169, 1172 (Me. 1992) (viewing the St. Germain test as balancing the "danger presented by the product against its utility"); Violette v. Smith & Nephew Dyonics, Inc., 62 F.3d 8, 12 (1st Cir. 1995) (same). [↑](#footnote-ref-1110)
1110. 1109 St. Germain, 544 A.2d at 1285-86. [↑](#footnote-ref-1111)
1111. 1110 Id. at 1286. [↑](#footnote-ref-1112)
1112. 1111 Id. at 1286-87 (Glassman, J., dissenting). The dissent stated:

      The danger utility test is not based on the presence or absence of due care of a defendant but on the danger-in-fact of a particular feature of the product as weighed against its utility. It is the product itself, and not the defendant's conduct, that is evaluated to determine whether the defendant will be held strictly liable for the injuries proximately caused by the reasonable use of the product. "Under this test, a product can be said to be defective in the kind of way that makes it unreasonably dangerous if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product." In the design utility test for strict liability it is irrelevant that a risk or hazard related to the use of the product as designed was not discoverable under existing technology and in the exercise of utmost care or that the defendant may have over-evaluated the benefits of the product as designed. "The benefits relevant to the utility of the product are those that are actually found to flow from the use of the product as designed rather than as perceived at the time the product was designed and marketed."

      . . . .

      With its focus on the product manufactured and sold and not on the conduct of the manufacturer and seller, to allow recovery by the plaintiff the factfinder must determine 1) if the product as it existed at the time of the accident was dangerous in fact, and 2) if so, did that danger outweigh the benefits that in fact flowed from the use of the product as designed?

      Id. at 1286-87 (footnotes omitted) (quoting W. Prosser & Keaton, The Law of Torts, section 99 at 699-700 (5th ed. 1984)). [↑](#footnote-ref-1113)
1113. 1112 Recent decisions still cite Stanley and St. Germain as the rule or standard for design defects under strict liability. E.g., Walker v. General Elec. Co., 968 F.2d 116 (1st Cir. 1992); Guiggey v. Bombardier, 615 A.2d 1169 (Me. 1992). [↑](#footnote-ref-1114)
1114. 1113 Maine Jury Instructions No. 136 Product Liability: Strict Liability, 7-50 to -51 (Issue 3, 1993) states in pertinent part:

      A machine is in a defective condition and is unreasonably dangerous because of its design where, at the time it leaves the seller's hands it is dangerous to an extent beyond that which would be contemplated by the purchaser who purchases it having the ordinary knowledge common to such a purchaser as to its characteristics.

      . . . .

      An unreasonably dangerous product may result from the manufacturer's failure to incorporate safety devices known to be technologically and financially feasible which reduce or eliminate unreasonable risk of injury from any foreseeable uses of the product. In order to determine whether the absence of a given safety device renders a product unreasonably dangerous, you should weigh the utility or advantages of such a device against any disadvantages it would create in the utility of the product. For example, a safety device which is very expensive may be required if it eliminates or reduces a significant risk of serious injury or death, but not if it is only of minimal value in improving safety. A safety device which reduces the efficiency of a product may reasonably be required if it also eliminates or reduces a significant risk of serious injury or death, but not if its benefits would be slight.

      It is for you, the jury, to determine whether the use of specific safety devices would have avoided plaintiff's injury and whether the benefits of such devices would have outweighed any disadvantages or vice versa.

      Id. The comments which contain citations of authority for Instruction No. 136 do not refer to either Stanley or St. Germain and, as such, lack authority for reference to any consumer contemplation test. It is clear that in a design defect situation the St. Germain case rejected the consumer expectation test. See St. Germain, 544 A.2d at 1285. [↑](#footnote-ref-1115)
1115. 1114 363 A.2d 955 (Md. 1976). [↑](#footnote-ref-1116)
1116. 1115 Id. at 956. [↑](#footnote-ref-1117)
1117. 1116 Id. at 957-61. [↑](#footnote-ref-1118)
1118. 1117 Id. at 958. [↑](#footnote-ref-1119)
1119. 1118 Id. at 962-63. [↑](#footnote-ref-1120)
1120. 1119 Id. at 959. [↑](#footnote-ref-1121)
1121. 1120 Id. [↑](#footnote-ref-1122)
1122. 1121 Id. [↑](#footnote-ref-1123)
1123. 1122 Id. at 959 n.4 (quoting Wade, supra note 123, at 17); see also text accompanying supra notes 83-84. [↑](#footnote-ref-1124)
1124. 1123 Id. at 959. [↑](#footnote-ref-1125)
1125. 1124 Id. [↑](#footnote-ref-1126)
1126. 1125 Id. [↑](#footnote-ref-1127)
1127. 1126 Id. [↑](#footnote-ref-1128)
1128. 1127 455 A.2d 434 (Md. 1983). [↑](#footnote-ref-1129)
1129. 1128 Id. at 435. [↑](#footnote-ref-1130)
1130. 1129 Id. [↑](#footnote-ref-1131)
1131. 1130 Id. at 436. [↑](#footnote-ref-1132)
1132. 1131 Id. [↑](#footnote-ref-1133)
1133. 1132 Id. at 441. [↑](#footnote-ref-1134)
1134. 1133 Id. [↑](#footnote-ref-1135)
1135. 1134 See Sheehan v. Anthony Pools, 440 A.2d 1085, 1089-92 (Md. Ct. Spec. App. 1982). [↑](#footnote-ref-1136)
1136. 1135 Anthony Pools, 455 A.2d at 441. The Anthony Pools court adopted the lower court's decision because it espoused a correct interpretation of the defense of contributory negligence in Phipps. However, immediately after making this statement the court says it adopted part III of the lower court's decision. Thus, the Maryland Court of Appeals could be stating it adopted all of part III which includes the lower court's discussion of design defect or it could be stating that it adopted part III in reference to the defense of contributory negligence only and not part III discussion of the design defect. It is the author's opinion that the later situation is the case, however, a discussion of the lower court's decision on design defect is made in the body of the text because of the apparent vagueness of the holding. [↑](#footnote-ref-1137)
1137. 1136 Anthony Pools, 440 A.2d at 1089. [↑](#footnote-ref-1138)
1138. 1137 Id. at 1089 n.6. [↑](#footnote-ref-1139)
1139. 1138 Id. [↑](#footnote-ref-1140)
1140. 1139 Id. at 1089-92. [↑](#footnote-ref-1141)
1141. 1140 Id. at 1089-90. [↑](#footnote-ref-1142)
1142. 1141 Id. at 1089-92. [↑](#footnote-ref-1143)
1143. 1142 Id. at 1092. [↑](#footnote-ref-1144)
1144. 1143 497 A.2d 1143 (Md. 1985). [↑](#footnote-ref-1145)
1145. 1144 Id. [↑](#footnote-ref-1146)
1146. 1145 Id. at 1159. But see Md. Crim. Law Code Ann. section 36I(h)(1) (1995) (overturning the holding in Kelley by statute). [↑](#footnote-ref-1147)
1147. 1146 Id. at 1148. [↑](#footnote-ref-1148)
1148. 1147 Id. [↑](#footnote-ref-1149)
1149. 1148 Id. [↑](#footnote-ref-1150)
1150. 1149 Id. [↑](#footnote-ref-1151)
1151. 1150 Id. [↑](#footnote-ref-1152)
1152. 1151 Id. [↑](#footnote-ref-1153)
1153. 1152 Id. [↑](#footnote-ref-1154)
1154. 1153 573 P.2d 443 (Cal. 1978). The Kelley court made specific reference to the Barker case and set forth its entire holding. Kelley, 497 A.2d at 1149. [↑](#footnote-ref-1155)
1155. 1154 Id. [↑](#footnote-ref-1156)
1156. 1155 Id. [↑](#footnote-ref-1157)
1157. 1156 Id. [↑](#footnote-ref-1158)
1158. 1157 Id. [↑](#footnote-ref-1159)
1159. 1158 Id. at 1150-51 (citations omitted). [↑](#footnote-ref-1160)
1160. 1159 Id. at 1153. [↑](#footnote-ref-1161)
1161. 1160 Id. at 1159. [↑](#footnote-ref-1162)
1162. 1161 Id. at 1149. [↑](#footnote-ref-1163)
1163. 1162 Id. [↑](#footnote-ref-1164)
1164. 1163 Id. [↑](#footnote-ref-1165)
1165. 1164 Id. [↑](#footnote-ref-1166)
1166. 1165 634 A.2d 1330 (Md. 1994). [↑](#footnote-ref-1167)
1167. 1166 Id. at 1337. [↑](#footnote-ref-1168)
1168. 1167 Id. at 1331. [↑](#footnote-ref-1169)
1169. 1168 Id. at 1334-35. [↑](#footnote-ref-1170)
1170. 1169 Id. at 1335. [↑](#footnote-ref-1171)
1171. 1170 Id. at 1336. [↑](#footnote-ref-1172)
1172. 1171 Id. at 1335 (citing Phipps, 363 A.2d at 955). [↑](#footnote-ref-1173)
1173. 1172 Id. [↑](#footnote-ref-1174)
1174. 1173 685 F.2d 112 (4th Cir. 1981). [↑](#footnote-ref-1175)
1175. 1174 Id. at 117. [↑](#footnote-ref-1176)
1176. 1175 Id. at 114. [↑](#footnote-ref-1177)
1177. 1176 Id. [↑](#footnote-ref-1178)
1178. 1177 Id. [↑](#footnote-ref-1179)
1179. 1178 Id. at 115. [↑](#footnote-ref-1180)
1180. 1179 Id. [↑](#footnote-ref-1181)
1181. 1180 Id. [↑](#footnote-ref-1182)
1182. 1181 Id. [↑](#footnote-ref-1183)
1183. 1182 Id. [↑](#footnote-ref-1184)
1184. 1183 Id. at 115-16. [↑](#footnote-ref-1185)
1185. 1184 488 A.2d 516 (Md. Ct. Spec. App. 1985). [↑](#footnote-ref-1186)
1186. 1185 Id. at 519-20. [↑](#footnote-ref-1187)
1187. 1186 See, e.g., Polansky v. Ryobi America Corp., 760 F. Supp. 85 (D. Md. 1991); Klein v. Sears, Roebuck & Co., 608 A.2d 1276 (Md. Ct. Spec. App. 1992); Nicholson v. Yamaha Motor Co., 566 A.2d 135 (Md. Ct. Spec. App. 1989); Lundgren v. FernoWashington Co., 565 A.2d 335 (Md. Ct. Spec. App. 1989); Ziegler v. Kawasaki Heavy Indus., 539 A.2d 701 (Md. Ct. Spec. App. 1988); C&K Lord v. Carter, 536 A.2d 699 (Md. Ct. Spec. App. 1988). [↑](#footnote-ref-1188)
1188. 1187 Md. Cts. & Jud. Proc. Code Ann. section 5-311 (1989). [↑](#footnote-ref-1189)
1189. 1188 Md. Cts. & Jud. Proc. Code Ann. section 5-115 (Supp. 1993). [↑](#footnote-ref-1190)
1190. 1189 Md. Cts. & Jud. Proc. Code Ann. sections 11-108 to -109 (1995). [↑](#footnote-ref-1191)
1191. 1190 Md. Crim. Law Code Ann. sections 36F-36I (1995). [↑](#footnote-ref-1192)
1192. 1191 Md. Health-General Code Ann. section 18-402 (1994). [↑](#footnote-ref-1193)
1193. 1192 Maryland Civil Pattern Jury Instructions MPJI 26:13 (3d ed. 1993). [↑](#footnote-ref-1194)
1194. 1193 Id. The citations which are cited in the commentary to Maryland Pattern Jury Instruction 26:13 also refer to both Singleton and Troja or cases which follow them. [↑](#footnote-ref-1195)
1195. 1194 See Note, The Future of "State-of-the-Art" Defenses in Massachusetts Products Liability Actions: Examining the Warranty of Merchantability Statute and its Application in Massachusetts, 25 New Eng. L. Rev. 653, 661-75 (1990); see also Swartz v. General Motors Corp., 378 N.E.2d 61 (Mass. 1978); Back v. Wickes Corp., 378 N.E.2d 964 (Mass. 1978). [↑](#footnote-ref-1196)
1196. 1195 See supra note 1194 and accompanying text. However, there are limitations for blood products. See Mass. Ann. Laws ch. 106, section 2-316(5) (Law. Co-op. 1990). [↑](#footnote-ref-1197)
1197. 1196 Back, 378 N.E.2d at 969. [↑](#footnote-ref-1198)
1198. 1197 378 N.E.2d 964 (Mass. 1978). [↑](#footnote-ref-1199)
1199. 1198 Id. at 969. [↑](#footnote-ref-1200)
1200. 1199 Id. at 970. [↑](#footnote-ref-1201)
1201. 1200 Id. (citations omitted). [↑](#footnote-ref-1202)
1202. 1201 Id.; see infra notes 1972-76 and accompanying text (discussing Phillips); supra notes 378-400 and accompanying text (discussing Barker). [↑](#footnote-ref-1203)
1203. 1202 Back, 378 N.E.2d at 970. [↑](#footnote-ref-1204)
1204. 1203 Id. [↑](#footnote-ref-1205)
1205. 1204 The clear language used--"the jury must weigh competing factors much as they would in determining the fault of the defendant in a negligence case"--could reasonably lead one to this conclusion. Id. [↑](#footnote-ref-1206)
1206. 1205 446 N.E.2d 1033 (Mass. 1983). [↑](#footnote-ref-1207)
1207. 1206 Id. at 1039-41. [↑](#footnote-ref-1208)
1208. 1207 Id. at 1040. [↑](#footnote-ref-1209)
1209. 1208 Id. at 1041. [↑](#footnote-ref-1210)
1210. 1209 Id. at 1040-41. [↑](#footnote-ref-1211)
1211. 1210 Id. at 1039-40 (citations omitted). [↑](#footnote-ref-1212)
1212. 1211 462 N.E.2d 273 (Mass. 1984). [↑](#footnote-ref-1213)
1213. 1212 Id. at 274. [↑](#footnote-ref-1214)
1214. 1213 Id. [↑](#footnote-ref-1215)
1215. 1214 Id. [↑](#footnote-ref-1216)
1216. 1215 Id. [↑](#footnote-ref-1217)
1217. 1216 Id. at 275. [↑](#footnote-ref-1218)
1218. 1217 Id. at 276. [↑](#footnote-ref-1219)
1219. 1218 Id. at 277-78 (citations omitted). [↑](#footnote-ref-1220)
1220. 1219 447 A.2d 539 (N.J. 1982). [↑](#footnote-ref-1221)
1221. 1220 Hayes, 462 N.E.2d at 278; see also infra notes 1972-76. [↑](#footnote-ref-1222)
1222. 1221 Hayes, 462 N.E.2d at 278. [↑](#footnote-ref-1223)
1223. 1222 See Wertheimer, supra note 127, at 1245-48. [↑](#footnote-ref-1224)
1224. 1223 See supra note 1210 and accompanying text; Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040-41 (Mass. 1983) ("The policies of negligence and warranty liability will best be served by keeping the spheres in which they operate separate . . . ."); see also Hayes v. Ariens Co., 462 N.E.2d 273 (Mass. 1984) (implicitly adhering to the Correia court's reasoning, while not addressing the issue). [↑](#footnote-ref-1225)
1225. 1224 It is quite clear that Beshada, Phillips, and Dean Wade all proposed an imputed knowledge rule as the distinguishing factor in a strict liability action. See generally Wertheimer, supra note 127. This interpretation could be based upon the language in Back where the court states that conscious design choices concerning the fitness of a product depends "largely, although not exclusively, on reasonable consumer expectations." Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978). However, the consumer expectation test as either an independent test or as part of a Barker-type bifurcated test is questionable because the Back court seems to qualify consumer expectations with a risk-utility balancing test. Id. Nevertheless, it does not appear to matter whether a bifurcated or single test is used in the risk-utility evaluation, as long as the knowledge of the danger or hazard is imputed to the defendant. [↑](#footnote-ref-1226)
1226. 1225 639 F. Supp. 1 (D. Mass. 1985). [↑](#footnote-ref-1227)
1227. 1226 Id. at 3-4. For an excellent examination of In re Massachusetts Asbestos Cases, see Wertheimer, supra note 127, at 1245-48. [↑](#footnote-ref-1228)
1228. 1227 Wertheimer, supra note 127, at 1247 (citing In re Massachusetts Asbestos Cases, 639 F. Supp. at 4). [↑](#footnote-ref-1229)
1229. 1228 In re Massachusetts Asbestos Cases, 639 F. Supp. at 3. [↑](#footnote-ref-1230)
1230. 1229 Wertheimer, supra note 127, at 1247 (citing In re Massachusetts Asbestos Cases, 639 F. Supp. at 4-5). [↑](#footnote-ref-1231)
1231. 1230 799 F.2d 1 (1st Cir. 1986). [↑](#footnote-ref-1232)
1232. 1231 See Wertheimer, supra note 127, at 1247-48 (citing Anderson, 799 F.2d at 35). [↑](#footnote-ref-1233)
1233. 1232 629 F. Supp. 540 (D. Mass. 1986), aff'd, 815 F.2d 691 (1st Cir. 1987). [↑](#footnote-ref-1234)
1234. 1233 926 F.2d 1217 (1st Cir. 1990). [↑](#footnote-ref-1235)
1235. 1234 See Wertheimer, supra note 127, at 1248 (citing Kotler, 926 F.2d at 1225). [↑](#footnote-ref-1236)
1236. 1235 596 N.E.2d 318 (Mass. 1992). [↑](#footnote-ref-1237)
1237. 1236 Id. at 319-20. [↑](#footnote-ref-1238)
1238. 1237 Id. at 320. [↑](#footnote-ref-1239)
1239. 1238 Id. at 320 & n.3. [↑](#footnote-ref-1240)
1240. 1239 Id. at 320 n.3. [↑](#footnote-ref-1241)
1241. 1240 Id. [↑](#footnote-ref-1242)
1242. 1241 Id. [↑](#footnote-ref-1243)
1243. 1242 In 1994, the Appeals Court of Massachusetts refused to decide "whether the Hayes dicta, repeated in a footnote in Simmons . . . means that, regardless of what an ordinarily prudent vendor-manufacturer actually knows, should have known, or could have reasonably foreseen, liability attaches for all risks associated with the product, whether undiscovered or undiscoverable." City of Boston v. United States Gypsum Co., 638 N.E.2d 1387, 1393 (Mass. App. Ct. 1994) (citations omitted). The court stated: "It may well be that consistent with that Supreme Judicial Court language . . . the adequacy of the warning is based on whether the dangers were scientifically discoverable, even though such discovery had not been made at the time the product was put on the market." Id. However, because the City did not argue that state of the art evidence was irrelevant at trial, the disputed jury instruction was appropriate under the circumstances. Id. [↑](#footnote-ref-1244)
1244. 1243 For an excellent case which applies the danger-utility balancing approach, see Colter v. Barber-Greene Co., 525 N.E.2d 1305 (Mass. 1988). [↑](#footnote-ref-1245)
1245. 1244 The Michigan Supreme Court made several references in both footnotes and in the body of its decision in Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 182 nn.12 & 14, 184 (Mich. 1984) (citing Sheila L. Birnbaum, Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence, 33 Vand. L. Rev. 593 (1980)).

      Sheila Birnbaum is presently a member of the law firm of Skadden, Arps, Slate, Meagher & Flom and heads its products liability department. She represents Dow Corning Corporation in breast implant litigation and also represents Honeywell Inc., AMP Inc., Slim-Fast Corporation, Pfizer Inc., First City Industries, Georgia-Pacific Corporation, Champion International Corporation, American Sterilizer, Home Insurance Company, American Motor Company, Olin Corporation, American Stores Company, and Bally Manufacturing Corporation. A former professor and associate dean, Sheila Birnbaum is presently a member of the Council of the American Law Institute. See The 1994 Power List: An Overview of the Outstanding Members of the Legal Profession, Nat'l L.J., Apr. 4, 1994, at C4.

      The Supreme Court of Michigan also relied to a great extent on Professors James Henderson and Aaron Twerski, the present co-reporters for the Restatement section on products liability. See Prentis, 365 N.W.2d at 181-82 nn.10 & 14; Glittenberg v. Doughboy Recreational Indus., 462 N.W.2d 348, 361 n.3 (Mich. 1990) (Boyle, J., dissenting). In addition, Professor Twerski has entered his appearance as counsel of record as amicus curiae for the Product Liability Advisory Council (PLAC), a nonprofit corporation, formed in 1983 under the sponsorship of the Motor Vehicle Manufacturer's Association of the United States, Inc. However, its membership includes all industries (and other council) with over 250 corporate members. The principal objective of PLAC is to make the views and problems of the business community known to those responsible for developing the common law of products liability (appellate court judges) in precedent setting cases. PLAC also sponsors articles in journals which support the corporate view. [↑](#footnote-ref-1246)
1246. 1245 Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873 (Mich. 1958). [↑](#footnote-ref-1247)
1247. 1246 133 N.W.2d 129 (Mich. 1965). [↑](#footnote-ref-1248)
1248. 1247 134 N.W.2d 730 (Mich. 1965). [↑](#footnote-ref-1249)
1249. 1248 326 N.W.2d 372 (Mich. 1982). [↑](#footnote-ref-1250)
1250. 1249 Id. at 373. [↑](#footnote-ref-1251)
1251. 1250 Id. at 372. [↑](#footnote-ref-1252)
1252. 1251 Id. at 377. [↑](#footnote-ref-1253)
1253. 1252 Id. [↑](#footnote-ref-1254)
1254. 1253 Id. at 378. [↑](#footnote-ref-1255)
1255. 1254 Id. [↑](#footnote-ref-1256)
1256. 1255 Id. at 378-79. [↑](#footnote-ref-1257)
1257. 1256 Id. at 379. [↑](#footnote-ref-1258)
1258. 1257 Id. at 378-79. [↑](#footnote-ref-1259)
1259. 1258 365 N.W.2d 176 (Mich. 1984). [↑](#footnote-ref-1260)
1260. 1259 Id. at 177. [↑](#footnote-ref-1261)
1261. 1260 Id. [↑](#footnote-ref-1262)
1262. 1261 Id. at 178. [↑](#footnote-ref-1263)
1263. 1262 Id. [↑](#footnote-ref-1264)
1264. 1263 Id. at 182-86. [↑](#footnote-ref-1265)
1265. 1264 Id. at 186. [↑](#footnote-ref-1266)
1266. 1265 Id. at 184. [↑](#footnote-ref-1267)
1267. 1266 Id. at 184-86. [↑](#footnote-ref-1268)
1268. 1267 Id. at 188-91 (Levin, J., dissenting). [↑](#footnote-ref-1269)
1269. 1268 Id. at 189 (Levin, J., dissenting). [↑](#footnote-ref-1270)
1270. 1269 Id. (Levin, J., dissenting). [↑](#footnote-ref-1271)
1271. 1270 Id. at 190 (Levin, J., dissenting). [↑](#footnote-ref-1272)
1272. 1271 Id. (Levin, J., dissenting). [↑](#footnote-ref-1273)
1273. 1272 Id. at 185. [↑](#footnote-ref-1274)
1274. 1273 Id. at 190 (Levin, J., dissenting) (footnotes omitted). [↑](#footnote-ref-1275)
1275. 1274 See, e.g., Bondie v. BIC Corp., 739 F. Supp. 346 (E.D. Mich. 1990); Hindelang v. R.D. Werner Co., 469 N.W.2d 2 (Mich. Ct. App. 1991). [↑](#footnote-ref-1276)
1276. 1275 Mich. Comp. Laws Ann. section 600:2946(1) (West 1986). [↑](#footnote-ref-1277)
1277. 1276 Mich. Comp. Laws Ann. section 600:2946(2) (West 1986). [↑](#footnote-ref-1278)
1278. 1277 Mich. Comp. Laws Ann. section 600:2946(3) (West 1986). [↑](#footnote-ref-1279)
1279. 1278 Mich. Comp. Laws Ann. section 600:2947 (West 1986). [↑](#footnote-ref-1280)
1280. 1279 Mich. Comp. Laws Ann. section 600:2948 (West 1986). [↑](#footnote-ref-1281)
1281. 1280 Mich. Comp. Laws Ann. section 333:9121 (West 1992). [↑](#footnote-ref-1282)
1282. 1281 Mich. Comp. Laws Ann. section 600:5805 (West 1987). [↑](#footnote-ref-1283)
1283. 1282 See Michigan Standard Jury Instructions--Civil SJI2d 25:31 (2d ed. Supp. 1994). [↑](#footnote-ref-1284)
1284. 1283 154 N.W.2d 488 (Minn. 1967). [↑](#footnote-ref-1285)
1285. 1284 Id. at 492. [↑](#footnote-ref-1286)
1286. 1285 Id. at 491-92. [↑](#footnote-ref-1287)
1287. 1286 Id. at 496-501. [↑](#footnote-ref-1288)
1288. 1287 Id. at 498-503. [↑](#footnote-ref-1289)
1289. 1288 Id. at 499. [↑](#footnote-ref-1290)
1290. 1289 Id. [↑](#footnote-ref-1291)
1291. 1290 Id. at 499-501. [↑](#footnote-ref-1292)
1292. 1291 Id. at 501. [↑](#footnote-ref-1293)
1293. 1292 Id. [↑](#footnote-ref-1294)
1294. 1293 Id. at 493-96. [↑](#footnote-ref-1295)
1295. 1294 Id. at 500. [↑](#footnote-ref-1296)
1296. 1295 240 N.W.2d 303 (Minn. 1976). [↑](#footnote-ref-1297)
1297. 1296 Id. at 307 (citations omitted). [↑](#footnote-ref-1298)
1298. 1297 Id. at 308 (citations omitted). [↑](#footnote-ref-1299)
1299. 1298 324 N.W.2d 207 (Minn. 1982). [↑](#footnote-ref-1300)
1300. 1299 Id. at 208-09. [↑](#footnote-ref-1301)
1301. 1300 Id. at 209. [↑](#footnote-ref-1302)
1302. 1301 Id. [↑](#footnote-ref-1303)
1303. 1302 Id. [↑](#footnote-ref-1304)
1304. 1303 Id. at 208. [↑](#footnote-ref-1305)
1305. 1304 Id. at 210. [↑](#footnote-ref-1306)
1306. 1305 Id. at 213. [↑](#footnote-ref-1307)
1307. 1306 Id. at 210-13. [↑](#footnote-ref-1308)
1308. 1307 95 N.E.2d 802 (N.Y. 1950). [↑](#footnote-ref-1309)
1309. 1308 Holm, 324 N.W.2d at 211-12. [↑](#footnote-ref-1310)
1310. 1309 Id. at 213. [↑](#footnote-ref-1311)
1311. 1310 Id. [↑](#footnote-ref-1312)
1312. 1311 Id. at 213-16. [↑](#footnote-ref-1313)
1313. 1312 Id. at 215. [↑](#footnote-ref-1314)
1314. 1313 Id. [↑](#footnote-ref-1315)
1315. 1314 Id. [↑](#footnote-ref-1316)
1316. 1315 Id. [↑](#footnote-ref-1317)
1317. 1316 Id. [↑](#footnote-ref-1318)
1318. 1317 Justice Simonett sets forth his view in a detailed footnote.

      Professor Wade does not recommend that the jury be given his seven-point test. Some commentators urge one tort action. Eventually, the various theories may coalesce into one tort, perhaps called "product fault liability," which will use the traditional concepts of negligence which have served so well and are understandable to jurors, while at the same time incorporating some of the notions of strict liability which stress the manufacturer's duty of care, the supplier's vicarious "breach of warranty" liability, and, in certain situations, a relaxation of the plaintiff's burden of proof as to the manufacturer's fault.

      Thus, in this case, along with the standard negligence instructions, the court might add that the jury is to consider, on the manufacturer's duty of care among all the facts and circumstances, the likelihood that the operator may be exposed to dangers from the environment in which the product is used, the seriousness of the dangers posed, and the mechanical and economic feasibility of additional safety devices for the product.

      Id. at 215 n.3 (citations omitted). [↑](#footnote-ref-1319)
1319. 1318 As Justice Simonett expresses in his concurrence in Kallio v. Ford Motor Co., 407 N.W.2d 92, 101 (Minn. 1987), a plaintiff may be confronted with proving details concerning many factors about statistics of accidents and feasibility of challenged and proposed designs. Much of this information will present burdens which are either impossible or too expensive to prove. Under a simple negligence test, it can be argued that even in design cases, the issue is one of reasonable or unreasonable conduct which a jury can evaluate without elaborate proofs of alternative designs and feasibility. See Oscar S. Gray, The Draft ALI Product Liability Proposals: Progress or Anachronism?, 61 Tenn. L. Rev. 1105 (1994). [↑](#footnote-ref-1320)
1320. 1319 346 N.W.2d 616 (Minn. 1984). [↑](#footnote-ref-1321)
1321. 1320 Id. at 621. [↑](#footnote-ref-1322)
1322. 1321 Id. [↑](#footnote-ref-1323)
1323. 1322 Id. at 622. [↑](#footnote-ref-1324)
1324. 1323 See Drager v. Aluminum Indus. Corp., 495 N.W.2d 879, 882 (Minn. Ct. App. 1993) (applying "reasonable care balancing test" in a defective design case). [↑](#footnote-ref-1325)
1325. 1324 Bilotta, 346 N.W.2d at 621 (quoting Holm v. Sponco, 324 N.W.2d 207, 212 (Minn. 1982) (quoting Micallef v. Miehle Co., 348 N.E.2d 571, 577-78 (1976) (citations omitted))). [↑](#footnote-ref-1326)
1326. 1325 Micallef, 348 N.E.2d at 574-79. [↑](#footnote-ref-1327)
1327. 1326 346 N.W.2d at 621. [↑](#footnote-ref-1328)
1328. 1327 Id. at 622. [↑](#footnote-ref-1329)
1329. 1328 Id. (citations omitted). [↑](#footnote-ref-1330)
1330. 1329 Id. at 623 (citing Holm v. Sponco, 324 N.W.2d 207, 214 (Minn. 1982) (Simonett, J., dissenting in part)). [↑](#footnote-ref-1331)
1331. 1330 However, Justice Simonett in a concurring opinion did recognize that one of the key differences between strict liability, the imputed knowledge rule, and the rule of negligence is the proof necessary to survive a directed verdict. Id. at 626. In other words, the imputed knowledge rule would allow the consumer to reach the jury; however, once the case reaches the jury the distinction between the two theories becomes non-existent. Id. Thus, a jury would not receive instructions about the imputed knowledge rule but would receive negligence instructions concerning balancing the risk and utility of the product. Holm, 346 N.W.2d at 626 n.2. [↑](#footnote-ref-1332)
1332. 1331 See generally Vargo, supra note 173; Wertheimer, supra note 127. [↑](#footnote-ref-1333)
1333. 1332 See supra notes 137-39 and accompanying text. [↑](#footnote-ref-1334)
1334. 1333 Wertheimer, supra note 127, at 1205. [↑](#footnote-ref-1335)
1335. 1334 Id. at 1193. [↑](#footnote-ref-1336)
1336. 1335 Id. at 1205-06. [↑](#footnote-ref-1337)
1337. 1336 Bilotta v. Kelly Co., 346 N.W.2d 616, 624 (Minn. 1984). [↑](#footnote-ref-1338)
1338. 1337 Id. (citing Wagner v. International Harvester Co., 611 F.2d 224, 231 (8th Cir. 1979)). [↑](#footnote-ref-1339)
1339. 1338 Id. [↑](#footnote-ref-1340)
1340. 1339 Id. [↑](#footnote-ref-1341)
1341. 1340 Id. at 624-25. [↑](#footnote-ref-1342)
1342. 1341 See Kallio v. Ford Motor Co., 407 N.W.2d 92, 94-95 (Minn. 1987). [↑](#footnote-ref-1343)
1343. 1342 407 N.W.2d 92 (Minn. 1987). [↑](#footnote-ref-1344)
1344. 1343 It is quite interesting that the defendant was represented by Hildy Bowbeer, a newly elected member of the ALI who also presented very pro defendant/manufacturers positions at the 1995 Annual Meeting of the Institute. See 72nd Annual Meeting, supra note 60. The same position presented in the Kallio case in 1987 by Ford Motor Company is the exact position taken by the co-reporters for the ALI in 1994. [↑](#footnote-ref-1345)
1345. 1344 Kallio, 407 N.W.2d at 94. [↑](#footnote-ref-1346)
1346. 1345 Id. at 95. [↑](#footnote-ref-1347)
1347. 1346 Id. [↑](#footnote-ref-1348)
1348. 1347 Id. at 95-96. [↑](#footnote-ref-1349)
1349. 1348 Id. [↑](#footnote-ref-1350)
1350. 1349 Id. at 96-97. [↑](#footnote-ref-1351)
1351. 1350 Id. at 97 n.8. [↑](#footnote-ref-1352)
1352. 1351 577 P.2d 1322, 1328 n.5 (Or. 1978). [↑](#footnote-ref-1353)
1353. 1352 Kallio, 407 N.W.2d at 97. [↑](#footnote-ref-1354)
1354. 1353 See, e.g., Westbrock v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. Ct. App. 1991). [↑](#footnote-ref-1355)
1355. 1354 See, e.g., Krein v. Raudabough, 406 N.W.2d 315 (Minn. Ct. App. 1987). [↑](#footnote-ref-1356)
1356. 1355 See, e.g., Hegna v. E.I. Du Pont De Nemours & Co., 825 F. Supp. 880 (D. Minn. 1993), aff'd sub nom. Abrams v. E.I. Du Pont De Nemours & Co., 27 F.3d 571 (1994). [↑](#footnote-ref-1357)
1357. 1356 Minn. St. Ann. section 604.03 (West Supp. 1994). [↑](#footnote-ref-1358)
1358. 1357 Minn. St. Ann. section 604.04 (West Supp. 1994). [↑](#footnote-ref-1359)
1359. 1358 Minn. St. Ann. section 544.41 (West 1988). [↑](#footnote-ref-1360)
1360. 1359 Minn. St. Ann. sections 549.191, 549.20 (West 1988). [↑](#footnote-ref-1361)
1361. 1360 See 4 Minnesota Practice, Minnesota Jury Instruction Guides--Civil JIG 117 (3d ed. 1986). [↑](#footnote-ref-1362)
1362. 1361 Id. at 84. [↑](#footnote-ref-1363)
1363. 1362 Id. at 86-87. [↑](#footnote-ref-1364)
1364. 1363 189 So. 2d 113 (Miss. 1966). [↑](#footnote-ref-1365)
1365. 1364 Id. at 121 (citations omitted). [↑](#footnote-ref-1366)
1366. 1365 Id. [↑](#footnote-ref-1367)
1367. 1366 Id. [↑](#footnote-ref-1368)
1368. 1367 482 So. 2d 213 (Miss. 1985). [↑](#footnote-ref-1369)
1369. 1368 Id. at 213-14. [↑](#footnote-ref-1370)
1370. 1369 Id. at 214. [↑](#footnote-ref-1371)
1371. 1370 Id. [↑](#footnote-ref-1372)
1372. 1371 Id. at 215 (citations omitted). [↑](#footnote-ref-1373)
1373. 1372 Id. at 216. [↑](#footnote-ref-1374)
1374. 1373 Id. [↑](#footnote-ref-1375)
1375. 1374 Id. at 217. [↑](#footnote-ref-1376)
1376. 1375 Id. [↑](#footnote-ref-1377)
1377. 1376 Id. at 218. [↑](#footnote-ref-1378)
1378. 1377 Id. (quoting Wade, supra note 109, at 837). [↑](#footnote-ref-1379)
1379. 1378 617 So. 2d 248 (Miss. 1993). [↑](#footnote-ref-1380)
1380. 1379 Id. at 250. [↑](#footnote-ref-1381)
1381. 1380 Id. [↑](#footnote-ref-1382)
1382. 1381 Id. at 254. [↑](#footnote-ref-1383)
1383. 1382 Id. at 255. [↑](#footnote-ref-1384)
1384. 1383 Id. at 254-55. [↑](#footnote-ref-1385)
1385. 1384 Id. at 256. [↑](#footnote-ref-1386)
1386. 1385 Id. [↑](#footnote-ref-1387)
1387. 1386 Id. at 256 n.3. See generally Wade, supra note 109. [↑](#footnote-ref-1388)
1388. 1387 Prestage, 617 So. 2d at 254 (citations omitted). [↑](#footnote-ref-1389)
1389. 1388 See Toliver v. General Motors Corp., 482 So. 2d 213, 219 (Miss. 1985). [↑](#footnote-ref-1390)
1390. 1389 Miss. Code Ann. section 11-1-63 (Supp. 1995). [↑](#footnote-ref-1391)
1391. 1390 Id. section 11-1-63(b), (d)-(f). [↑](#footnote-ref-1392)
1392. 1391 Id. section 11-1-63(f)(ii). [↑](#footnote-ref-1393)
1393. 1392 Id. section 11-1-65. Among the many restriction listed in the statute is the requirement that punitive damages be related to the compensatory damages and be proven by clear and convincing evidence. Id. [↑](#footnote-ref-1394)
1394. 1393 Miss. Code Ann. section 41-41-1 (1993). [↑](#footnote-ref-1395)
1395. 1394 See Mississippi Model Jury Instructions--Civil MJI 40.01 (1992). [↑](#footnote-ref-1396)
1396. 1395 445 S.W.2d 362 (Mo. 1969). [↑](#footnote-ref-1397)
1397. 1396 Id. at 364. [↑](#footnote-ref-1398)
1398. 1397 Id. [↑](#footnote-ref-1399)
1399. 1398 Id. at 366. [↑](#footnote-ref-1400)
1400. 1399 551 S.W.2d 602 (Mo. 1977). [↑](#footnote-ref-1401)
1401. 1400 Id. at 607 (citing Pike v. Frank G. Hough Co., 467 P.2d 229, 236 (Cal. 1970) (en banc)). [↑](#footnote-ref-1402)
1402. 1401 Id. at 607-08 (citations omitted). [↑](#footnote-ref-1403)
1403. 1402 673 S.W.2d 434 (Mo. 1984) (en banc). [↑](#footnote-ref-1404)
1404. 1403 Id. at 437. [↑](#footnote-ref-1405)
1405. 1404 Id. [↑](#footnote-ref-1406)
1406. 1405 Id. at 438. [↑](#footnote-ref-1407)
1407. 1406 707 S.W.2d 371 (Mo. 1986). [↑](#footnote-ref-1408)
1408. 1407 Id. at 376. [↑](#footnote-ref-1409)
1409. 1408 Id. at 376-77. [↑](#footnote-ref-1410)
1410. 1409 Id. at 378 (citations and footnotes omitted). The reference to Professor Leon Green is found in Leon Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185 (1976). [↑](#footnote-ref-1411)
1411. 1410 See Hagen v. Celotex Corp., 816 S.W.2d 667 (Mo. 1991) (refusing to adopt risk-benefit standard); Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) (recognizing Missouri Supreme Court's refusal to adopt external standards for design defects). [↑](#footnote-ref-1412)
1412. 1411 Mo. Ann. Stat. section 537.762 (Vernon 1988). [↑](#footnote-ref-1413)
1413. 1412 Id. section 537.764. [↑](#footnote-ref-1414)
1414. 1413 Mo. Ann. Stat. section 510.263 (Vernon 1996); Mo. Ann. Stat. section 537.675 (Vernon 1988). [↑](#footnote-ref-1415)
1415. 1414 Id. section 537.765. [↑](#footnote-ref-1416)
1416. 1415 Mo. Ann. Stat. section 431.069 (Vernon 1988). [↑](#footnote-ref-1417)
1417. 1416 Missouri Approved Jury Instructions MAI 25.09 (4th ed. 1991). [↑](#footnote-ref-1418)
1418. 1417 513 P.2d 268 (Mont. 1973). [↑](#footnote-ref-1419)
1419. 1418 Id. at 270. [↑](#footnote-ref-1420)
1420. 1419 Id. at 273. [↑](#footnote-ref-1421)
1421. 1420 Id. at 275 (quoting Lindsay v. McDonnell-Douglas Aircraft Corp., 460 F.2d 631, 639 (8th Cir. 1972)). [↑](#footnote-ref-1422)
1422. 1421 576 P.2d 711 (Mont. 1978). [↑](#footnote-ref-1423)
1423. 1422 Id. at 715. [↑](#footnote-ref-1424)
1424. 1423 Id. [↑](#footnote-ref-1425)
1425. 1424 Id. at 716. [↑](#footnote-ref-1426)
1426. 1425 Id. at 716-17 (quoting Brandenburger, 513 P.2d at 275). [↑](#footnote-ref-1427)
1427. 1426 95 N.E.2d 802 (N.Y. 1950). [↑](#footnote-ref-1428)
1428. 1427 Brown, 576 P.2d at 717. [↑](#footnote-ref-1429)
1429. 1428 Id. [↑](#footnote-ref-1430)
1430. 1429 348 N.E.2d 571 (N.Y. 1976). [↑](#footnote-ref-1431)
1431. 1430 Brown, 576 P.2d at 717. [↑](#footnote-ref-1432)
1432. 1431 576 P.2d 725 (Mont. 1978). [↑](#footnote-ref-1433)
1433. 1432 Id. at 726-27. [↑](#footnote-ref-1434)
1434. 1433 Id. at 729. [↑](#footnote-ref-1435)
1435. 1434 Id. at 730-31. [↑](#footnote-ref-1436)
1436. 1435 723 P.2d 195 (Mont. 1986). [↑](#footnote-ref-1437)
1437. 1436 Id. at 198. [↑](#footnote-ref-1438)
1438. 1437 Id. at 201. [↑](#footnote-ref-1439)
1439. 1438 Id. at 201-02. [↑](#footnote-ref-1440)
1440. 1439 Id. at 202. [↑](#footnote-ref-1441)
1441. 1440 748 P.2d 910 (Mont. 1987). [↑](#footnote-ref-1442)
1442. 1441 Id. at 917. [↑](#footnote-ref-1443)
1443. 1442 Id. at 918. [↑](#footnote-ref-1444)
1444. 1443 Mont. Code. Ann. sections 27-1-719 to -720 (1995). [↑](#footnote-ref-1445)
1445. 1444 Id. section 27-1-719(5)(a). [↑](#footnote-ref-1446)
1446. 1445 Id. section 27-1-719(5)(b). [↑](#footnote-ref-1447)
1447. 1446 Id. section 27-1-720. [↑](#footnote-ref-1448)
1448. 1447 Mont. Code. Ann. sections 27-1-220 to -221 (1995). [↑](#footnote-ref-1449)
1449. 1448 Mont. Code. Ann. sections 50-33-102 to -104 (1995). [↑](#footnote-ref-1450)
1450. 1449 Montana Supreme Court Commission on Civil Jury Instructions, Montana Pattern Jury Instructions--Civil MPI 7.00-.02 (1989). In a note, the commission stated that these instructions apply to actions arising before October 1, 1987. The commission expressed no opinion on whether these instructions apply to actions arising thereafter. Id. [↑](#footnote-ref-1451)
1451. 1450 191 N.W.2d 601 (Neb. 1971). [↑](#footnote-ref-1452)
1452. 1451 283 N.W.2d 25 (Neb. 1979). [↑](#footnote-ref-1453)
1453. 1452 Id. at 30. [↑](#footnote-ref-1454)
1454. 1453 Id. at 31. [↑](#footnote-ref-1455)
1455. 1454 Id. at 34-37. [↑](#footnote-ref-1456)
1456. 1455 Id. at 35. [↑](#footnote-ref-1457)
1457. 1456 Id. [↑](#footnote-ref-1458)
1458. 1457 Id. (citations omitted). [↑](#footnote-ref-1459)
1459. 1458 Id. [↑](#footnote-ref-1460)
1460. 1459 Id. at 36. [↑](#footnote-ref-1461)
1461. 1460 Id. at 36-37 (emphasis added). [↑](#footnote-ref-1462)
1462. 1461 340 N.W.2d 369 (Neb. 1983). [↑](#footnote-ref-1463)
1463. 1462 Id. at 375-76. [↑](#footnote-ref-1464)
1464. 1463 Id. at 375. [↑](#footnote-ref-1465)
1465. 1464 Id. [↑](#footnote-ref-1466)
1466. 1465 Id. [↑](#footnote-ref-1467)
1467. 1466 412 N.W.2d 56 (Neb. 1987). [↑](#footnote-ref-1468)
1468. 1467 Id. at 81-82. [↑](#footnote-ref-1469)
1469. 1468 Id. at 63. [↑](#footnote-ref-1470)
1470. 1469 Id. [↑](#footnote-ref-1471)
1471. 1470 Id. at 67-68. [↑](#footnote-ref-1472)
1472. 1471 Id. at 69. [↑](#footnote-ref-1473)
1473. 1472 Id. at 70. [↑](#footnote-ref-1474)
1474. 1473 Id. [↑](#footnote-ref-1475)
1475. 1474 Id. at 78. [↑](#footnote-ref-1476)
1476. 1475 Id. at 79 (citing Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978)). [↑](#footnote-ref-1477)
1477. 1476 Id. at 79-80 (citing Wilson, 577 P.2d at 1328 n.5 (emphasis added)). [↑](#footnote-ref-1478)
1478. 1477 Id. at 80-81. [↑](#footnote-ref-1479)
1479. 1478 Id. at 80 (emphasis omitted) (quoting O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1983)). [↑](#footnote-ref-1480)
1480. 1479 Id. at 81. [↑](#footnote-ref-1481)
1481. 1480 Id. at 70. The Supreme Court of Nebraska specifically reserved any ruling on whether the risk-utility test should be adopted:

      Regarding products liability cases, Nebraska has yet to adopt the riskutility test for strict liability in tort. Neither Rahmig nor Mosley suggests that such risk-utility test should be adopted to impose strict liability on a manufacturer of a defectively designed product. Whether Nebraska should or will adopt the risk-utility test for strict liability in tort is a matter for the future in an appropriate case brought to this court.

      Id. [↑](#footnote-ref-1482)
1482. 1481 Id. at 81-82. [↑](#footnote-ref-1483)
1483. 1482 See, e.g., Kudlacek v. Fiat S.P.A., 509 N.W.2d 603 (Neb. 1994); Adams v. American Cyanamid Co., 498 N.W.2d 577 (Neb. 1992). [↑](#footnote-ref-1484)
1484. 1483 Neb. Rev. St. sections 25-21, 182 (1989); see, e.g., Kudlacek, 509 N.W.2d at 603. [↑](#footnote-ref-1485)
1485. 1484 Neb. Rev. St. sections 25-21, 181 (1989); see, e.g., Kudlacek, 509 N.W.2d at 603. [↑](#footnote-ref-1486)
1486. 1485 Neb. Rev. St. sections 25-21, 185 (Supp. 1994). [↑](#footnote-ref-1487)
1487. 1486 Neb. Rev. St. section 71-4001 (1990). [↑](#footnote-ref-1488)
1488. 1487 Nebraska Jury Instructions 2d NJI 11.20 (1993). [↑](#footnote-ref-1489)
1489. 1488 420 P.2d 855 (Nev. 1966). [↑](#footnote-ref-1490)
1490. 1489 Id. at 857. [↑](#footnote-ref-1491)
1491. 1490 Id. at 858. [↑](#footnote-ref-1492)
1492. 1491 Id. [↑](#footnote-ref-1493)
1493. 1492 Id. [↑](#footnote-ref-1494)
1494. 1493 470 P.2d 135 (Nev. 1970). [↑](#footnote-ref-1495)
1495. 1494 Id. at 136-37. [↑](#footnote-ref-1496)
1496. 1495 Id. at 137. [↑](#footnote-ref-1497)
1497. 1496 Id. at 138. [↑](#footnote-ref-1498)
1498. 1497 657 P.2d 95 (Nev. 1983). [↑](#footnote-ref-1499)
1499. 1498 Id. at 96. [↑](#footnote-ref-1500)
1500. 1499 686 P.2d 925 (Nev. 1984). [↑](#footnote-ref-1501)
1501. 1500 Id. at 927. [↑](#footnote-ref-1502)
1502. 1501 Id. [↑](#footnote-ref-1503)
1503. 1502 Id. at 928. [↑](#footnote-ref-1504)
1504. 1503 The malfunction theory allows proof of a defect to be based upon the malfunction of the product and proof of the circumstances surrounding such malfunction. See Mismanufacture: The Malfuction Theory, 1 Prod. Liab. Practice Guide (MB) section 6.04[3], at 6-50. [↑](#footnote-ref-1505)
1505. 1504 734 P.2d 696 (Nev. 1987). [↑](#footnote-ref-1506)
1506. 1505 Id. at 697. [↑](#footnote-ref-1507)
1507. 1506 Id. at 697-98. [↑](#footnote-ref-1508)
1508. 1507 Id. [↑](#footnote-ref-1509)
1509. 1508 Id. at 698. [↑](#footnote-ref-1510)
1510. 1509 Id. (emphasis added) (citations omitted). [↑](#footnote-ref-1511)
1511. 1510 808 P.2d 522 (Nev. 1991). [↑](#footnote-ref-1512)
1512. 1511 Id. at 523. [↑](#footnote-ref-1513)
1513. 1512 Id. at 524. [↑](#footnote-ref-1514)
1514. 1513 Id. [↑](#footnote-ref-1515)
1515. 1514 Id. at 524-25. [↑](#footnote-ref-1516)
1516. 1515 826 P.2d 570 (Nev. 1992). [↑](#footnote-ref-1517)
1517. 1516 847 P.2d 1370 (Nev. 1993). [↑](#footnote-ref-1518)
1518. 1517 878 P.2d 948 (Nev. 1994). [↑](#footnote-ref-1519)
1519. 1518 Id. at 951. [↑](#footnote-ref-1520)
1520. 1519 Id. [↑](#footnote-ref-1521)
1521. 1520 Id. at 952-53. [↑](#footnote-ref-1522)
1522. 1521 Id. [↑](#footnote-ref-1523)
1523. 1522 Id. at 953-55 (footnotes omitted). [↑](#footnote-ref-1524)
1524. 1523 Id. at 956 n.11. [↑](#footnote-ref-1525)
1525. 1524 Nev. Rev. Stat. Ann. section 460.010 (Michie 1991). [↑](#footnote-ref-1526)
1526. 1525 Nev. Rev. Stat. Ann. section 48.095 (Michie 1986). [↑](#footnote-ref-1527)
1527. 1526 Nev. Rev. Stat. Ann. section 42.005 (Michie 1995). [↑](#footnote-ref-1528)
1528. 1527 Nev. Rev. Stat. Ann. section 41.131 (Michie 1986). [↑](#footnote-ref-1529)
1529. 1528 Nevada Pattern Jury Instructions--Civil Nev. J.I. 7.02 (1986). [↑](#footnote-ref-1530)
1530. 1529 Nevada Pattern Jury Instructions--Civil Nev. J.I. 7.03 (1986). [↑](#footnote-ref-1531)
1531. 1530 Nevada Pattern Jury Instructions--Civil Nev. J.I. 7.06 (1986). [↑](#footnote-ref-1532)
1532. 1531 Id. at 111. [↑](#footnote-ref-1533)
1533. 1532 256 A.2d 153 (N.H. 1969). [↑](#footnote-ref-1534)
1534. 1533 Id. at 154. [↑](#footnote-ref-1535)
1535. 1534 Id. at 156 (citing Patterson v. George H. Weyer Inc., 370 P.2d 116 (Kan. 1962)). [↑](#footnote-ref-1536)
1536. 1535 Id. (quoting Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 853 (5th Cir. 1967)). [↑](#footnote-ref-1537)
1537. 1536 260 A.2d 111 (N.H. 1969). [↑](#footnote-ref-1538)
1538. 1537 Id. at 113. [↑](#footnote-ref-1539)
1539. 1538 395 A.2d 843 (N.H. 1978). [↑](#footnote-ref-1540)
1540. 1539 Id. at 845. [↑](#footnote-ref-1541)
1541. 1540 Id. [↑](#footnote-ref-1542)
1542. 1541 Id. [↑](#footnote-ref-1543)
1543. 1542 Id. at 846-47. [↑](#footnote-ref-1544)
1544. 1543 Id. at 847. [↑](#footnote-ref-1545)
1545. 1544 Id. at 846 (citations omitted). [↑](#footnote-ref-1546)
1546. 1545 Id. at 847. [↑](#footnote-ref-1547)
1547. 1546 Id. at 847-48 (citations omitted). [↑](#footnote-ref-1548)
1548. 1547 Id. at 847 (citations omitted). [↑](#footnote-ref-1549)
1549. 1548 637 A.2d 148 (N.H. 1993). [↑](#footnote-ref-1550)
1550. 1549 Id. at 150. [↑](#footnote-ref-1551)
1551. 1550 Id. [↑](#footnote-ref-1552)
1552. 1551 Id. at 149. [↑](#footnote-ref-1553)
1553. 1552 Id. at 150. [↑](#footnote-ref-1554)
1554. 1553 Id. at 150-51. [↑](#footnote-ref-1555)
1555. 1554 Id. [↑](#footnote-ref-1556)
1556. 1555 N.H. Rev. Stat. Ann. section 507-D:1 to -D:5 (1983). [↑](#footnote-ref-1557)
1557. 1556 Among the more onerous provisions in the New Hampshire statute was a 12year statute of repose, a limitations on alterations and modifications of the product, and state-of-the-art. See Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983). [↑](#footnote-ref-1558)
1558. 1557 464 A.2d 288 (N.H. 1983). [↑](#footnote-ref-1559)
1559. 1558 N.H. Rev. Stat. Ann. section 507:8-g (Supp. 1995). [↑](#footnote-ref-1560)
1560. 1559 N.H. Rev. Stat. Ann. section 507:8-b (1983). [↑](#footnote-ref-1561)
1561. 1560 See New Hampshire Civil Jury Instructions sections 23.1-.2 (Rev. ed., Issue 0, 1994). [↑](#footnote-ref-1562)
1562. 1561 Id. [↑](#footnote-ref-1563)
1563. 1562 161 A.2d 69 (N.J. 1960). [↑](#footnote-ref-1564)
1564. 1563 Id. at 77-80. [↑](#footnote-ref-1565)
1565. 1564 290 A.2d 281 (N.J. 1972). [↑](#footnote-ref-1566)
1566. 1565 Id. at 284-85. [↑](#footnote-ref-1567)
1567. 1566 Id. at 285. [↑](#footnote-ref-1568)
1568. 1567 Id. [↑](#footnote-ref-1569)
1569. 1568 386 A.2d 816 (N.J. 1978). [↑](#footnote-ref-1570)
1570. 1569 Id. at 821 (citations omitted). [↑](#footnote-ref-1571)
1571. 1570 Id. at 825. [↑](#footnote-ref-1572)
1572. 1571 Id. (citations and footnotes omitted). [↑](#footnote-ref-1573)
1573. 1572 Id. at 821. [↑](#footnote-ref-1574)
1574. 1573 Id. at 826-27. [↑](#footnote-ref-1575)
1575. 1574 Id. at 827 (citations omitted). [↑](#footnote-ref-1576)
1576. 1575 406 A.2d 140 (N.J. 1979). [↑](#footnote-ref-1577)
1577. 1576 Id. at 145. [↑](#footnote-ref-1578)
1578. 1577 Id. at 153. [↑](#footnote-ref-1579)
1579. 1578 Id. [↑](#footnote-ref-1580)
1580. 1579 Id. at 148. [↑](#footnote-ref-1581)
1581. 1580 Id. at 149 (citations omitted). [↑](#footnote-ref-1582)
1582. 1581 Id. at 150 (citations omitted). [↑](#footnote-ref-1583)
1583. 1582 Id. at 150-51 (citations and footnotes omitted). [↑](#footnote-ref-1584)
1584. 1583 Id. at 151-52 (citations omitted). [↑](#footnote-ref-1585)
1585. 1584 Id. at 152-53 (citations and footnotes omitted). [↑](#footnote-ref-1586)
1586. 1585 432 A.2d 925 (N.J. 1981). [↑](#footnote-ref-1587)
1587. 1586 Id. at 928. [↑](#footnote-ref-1588)
1588. 1587 Id. [↑](#footnote-ref-1589)
1589. 1588 Id. at 929 (citations omitted). [↑](#footnote-ref-1590)
1590. 1589 Id. (quoting Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1039 (Or. 1974)). [↑](#footnote-ref-1591)
1591. 1590 525 P.2d 1033 (Or. 1974). [↑](#footnote-ref-1592)
1592. 1591 Freund, 432 A.2d at 929-30 (quoting Phillips, 525 P.2d at 1039). [↑](#footnote-ref-1593)
1593. 1592 Id. at 932 (citations omitted). [↑](#footnote-ref-1594)
1594. 1593 Id. [↑](#footnote-ref-1595)
1595. 1594 Id. at 933. [↑](#footnote-ref-1596)
1596. 1595 447 A.2d 539 (N.J. 1982). [↑](#footnote-ref-1597)
1597. 1596 Id. at 542. [↑](#footnote-ref-1598)
1598. 1597 Id. at 543. [↑](#footnote-ref-1599)
1599. 1598 Id. at 542-43. [↑](#footnote-ref-1600)
1600. 1599 Id. [↑](#footnote-ref-1601)
1601. 1600 Id. at 546. [↑](#footnote-ref-1602)
1602. 1601 Id. [↑](#footnote-ref-1603)
1603. 1602 Id. [↑](#footnote-ref-1604)
1604. 1603 Id. at 546-49. [↑](#footnote-ref-1605)
1605. 1604 Id. at 547-48. [↑](#footnote-ref-1606)
1606. 1605 Id. at 548. [↑](#footnote-ref-1607)
1607. 1606 Id. at 549. [↑](#footnote-ref-1608)
1608. 1607 For an excellent analysis of the Beshada decision and the commentaries that followed it, see Wertheimer, supra note 127, at 1213-27. [↑](#footnote-ref-1609)
1609. 1608 Beshada, 447 A.2d at 546. [↑](#footnote-ref-1610)
1610. 1609 463 A.2d 298 (N.J. 1983). [↑](#footnote-ref-1611)
1611. 1610 Id. at 301. [↑](#footnote-ref-1612)
1612. 1611 Id. at 302-03. [↑](#footnote-ref-1613)
1613. 1612 Id. at 305 (citations omitted). [↑](#footnote-ref-1614)
1614. 1613 Id. (citing Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982)). [↑](#footnote-ref-1615)
1615. 1614 Id. at 306. [↑](#footnote-ref-1616)
1616. 1615 Id. at 308-15 (Schreiber, J., dissenting). [↑](#footnote-ref-1617)
1617. 1616 Id. at 306. [↑](#footnote-ref-1618)
1618. 1617 479 A.2d 374 (N.J. 1984). [↑](#footnote-ref-1619)
1619. 1618 Id. at 383. [↑](#footnote-ref-1620)
1620. 1619 Id. [↑](#footnote-ref-1621)
1621. 1620 Id. at 386-87 (citations omitted). [↑](#footnote-ref-1622)
1622. 1621 Id. at 387-88 (citations omitted). [↑](#footnote-ref-1623)
1623. 1622 Id. at 388. [↑](#footnote-ref-1624)
1624. 1623 Id. at 388-89. [↑](#footnote-ref-1625)
1625. 1624 See Wertheimer, supra note 127. [↑](#footnote-ref-1626)
1626. 1625 Id. [↑](#footnote-ref-1627)
1627. 1626 Id. [↑](#footnote-ref-1628)
1628. 1627 Id. [↑](#footnote-ref-1629)
1629. 1628 Id. [↑](#footnote-ref-1630)
1630. 1629 Id. [↑](#footnote-ref-1631)
1631. 1630 Id. [↑](#footnote-ref-1632)
1632. 1631 Id. [↑](#footnote-ref-1633)
1633. 1632 Id.; see also Vargo, supra note 173. But see Becker v. Baron Bros., Inc., 649 A.2d 613 (N.J. 1994) (reinforcing the limitations of the Beshada holding). [↑](#footnote-ref-1634)
1634. 1633 See, e.g., Johansen v. Makita USA, Inc., 607 A.2d 637 (N.J. 1992); Landrigan v. Celotex Corp., 605 A.2d 1079 (N.J. 1992). [↑](#footnote-ref-1635)
1635. 1634 N.J. Stat. Ann. sections 2A:58C-1 to -7 (West 1987). [↑](#footnote-ref-1636)
1636. 1635 Even though it is called a tort reform statute, it is only a reform that places restrictions, not benefits, for the New Jersey consumer. See Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990); Roberts v. Cadec Sys., Inc., 654 A.2d 1365 (N.J. 1995). [↑](#footnote-ref-1637)
1637. 1636 See Dewey, 577 A.2d at 1251-55. [↑](#footnote-ref-1638)
1638. 1637 Id. [↑](#footnote-ref-1639)
1639. 1638 N.J. Stat. Ann. section 2A:59c-4 (West 1987). [↑](#footnote-ref-1640)
1640. 1639 Id. [↑](#footnote-ref-1641)
1641. 1640 The O'Brien decision allowed design liability even when there was no alternative design available. Such "generic design" liability appears negated by section 2A:58c-2. [↑](#footnote-ref-1642)
1642. 1641 N.J. Stat. Ann. section 2A:58c-5(c) (Supp. 1995). [↑](#footnote-ref-1643)
1643. 1642 N.J. Stat. Ann. section 2A:58c-2 (Supp. 1995). [↑](#footnote-ref-1644)
1644. 1643 N.J. Stat. Ann. sections 2A:15-5.9 to -5.17 (Supp. 1995). [↑](#footnote-ref-1645)
1645. 1644 N.J. Stat. Ann. section 2A:58c-11 (Supp. 1995). [↑](#footnote-ref-1646)
1646. 1645 New Jersey Institute for Continuing Legal Education, Model Jury Charges Civil section 5.34 (4th ed. 1992). [↑](#footnote-ref-1647)
1647. 1646 Id. [↑](#footnote-ref-1648)
1648. 1647 497 P.2d 732 (N.M. 1972). [↑](#footnote-ref-1649)
1649. 1648 Id. at 734-37. [↑](#footnote-ref-1650)
1650. 1649 497 P.2d at 735. [↑](#footnote-ref-1651)
1651. 1650 Id. at 733. [↑](#footnote-ref-1652)
1652. 1651 560 P.2d 934 (N.M. 1977). [↑](#footnote-ref-1653)
1653. 1652 Id. at 937-38. [↑](#footnote-ref-1654)
1654. 1653 Id. at 938. [↑](#footnote-ref-1655)
1655. 1654 Id. at 939. [↑](#footnote-ref-1656)
1656. 1655 Id. at 936. [↑](#footnote-ref-1657)
1657. 1656 Id. [↑](#footnote-ref-1658)
1658. 1657 Id. at 938 (citing Restatement (Second) of Torts section 402A cmt. i (1965)). [↑](#footnote-ref-1659)
1659. 1658 Id. at 939. [↑](#footnote-ref-1660)
1660. 1659 Id. (quoting Halvorson v. American Hoist & Derrick Co., 240 N.W.2d 303, 308 (Minn. 1976)). [↑](#footnote-ref-1661)
1661. 1660 592 P.2d 175 (N.M. 1979). [↑](#footnote-ref-1662)
1662. 1661 Id. at 177. [↑](#footnote-ref-1663)
1663. 1662 Id. (quoting Seattle First Nat'l Bank v. Tabert, 542 P.2d 774, 779 (Wash. 1975)). [↑](#footnote-ref-1664)
1664. 1663 Id. (quoting Casrell v. Altec Indus., 335 So. 2d 128, 133 (Ala. 1976)). [↑](#footnote-ref-1665)
1665. 1664 652 P.2d 734 (N.M. 1982). [↑](#footnote-ref-1666)
1666. 1665 Id. at 738. [↑](#footnote-ref-1667)
1667. 1666 824 P.2d 293 (N.M. 1992). [↑](#footnote-ref-1668)
1668. 1667 Id. at 297. [↑](#footnote-ref-1669)
1669. 1668 Id. [↑](#footnote-ref-1670)
1670. 1669 Id. [↑](#footnote-ref-1671)
1671. 1670 498 P.2d 1359 (N.M. 1972). [↑](#footnote-ref-1672)
1672. 1671 Klopp, 824 P.2d at 297. [↑](#footnote-ref-1673)
1673. 1672 902 P.2d 54 (N.M. 1995). [↑](#footnote-ref-1674)
1674. 1673 688 P.2d 779 (N.M. Ct. App. 1983). [↑](#footnote-ref-1675)
1675. 1674 Brooks, 902 P.2d at 55. [↑](#footnote-ref-1676)
1676. 1675 Id. at 55-56. [↑](#footnote-ref-1677)
1677. 1676 Id. at 56. [↑](#footnote-ref-1678)
1678. 1677 Both Beech and the corporately sponsored Product Liability Advisory Council, Inc. (PLAC) argued that

      in determining whether a product is defectively designed there is an inherent difficulty that does not arise when determining whether that same product contains a manufacturing flaw. In the case of a manufacturing flaw the product leaves the manufacturer's hands in a condition unintended by the manufacturer. Thus to ascertain whether the product contains a defect, the jury need only "compare the injury-producing product with the manufacturer's plans or with other units of the same product line." Barker v Lull Eng'g Co., 20 Cal.3d 413, 143 Cal.Rptr. 225, 236, 573 P.2d 443, 454 (1978). By contrast, in the case of a design defect, the product leaves the manufacturer's hands in the exact condition intended by the manufacturer. Thus, "while manufacturing flaws can be evaluated against the intended design of the product, no such objective standards exists in the design defect context." Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 880 (Alaska 1979).

      Beech contends that precisely because there is no objective standard of defectiveness in the design context, the concept of defect may be understood only by reference to the manufacturer's conduct; whether a design is "safe enough" depends on the reasonableness of the manufacturer's choice between safety and other imperatives such as price and product utility. Thus Beech contends that negligence is the appropriate standard by which to measure a supplier's liability for defective design.

      Beech also contends that negligence must be adopted as the sole standard of liability to avoid depriving the public of useful and beneficial products. In this regard Beech quotes the Michigan Supreme Court, reasoning:

      A verdict for the plaintiff in a design defect case is the equivalent of a determination that an entire product line is defective. It usually will involve a significant portion of the manufacturer's assets and the public may be deprived of a product. Thus, the plaintiff should be required to pass the higher threshold of a fault test in order to threaten an entire product line.

      Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176, 185 (1984).

      Finally, Beech contends that judging a manufacturer's product defective based on generational changes in attitudes about safety and generational advances in technology works an unfair hardship on manufacturers and does not serve the goals of strict products liability. In particular, Beech notes that "the average piston-engine aircraft is over 27 years old and one-third of the fleet is over 32 years old." See S.Rep. No. 202, 103d Cong., 1st Sess. 3 (1993). If this Court were to apply strict products liability in cases alleging defective design, Beech cautions, manufacturers would be "whipsawed . . . between the standards of different generations."

      Id. at 56-57. [↑](#footnote-ref-1679)
1679. 1678 Id. at 59. [↑](#footnote-ref-1680)
1680. 1679 Id. at 57-58. [↑](#footnote-ref-1681)
1681. 1680 Id. at 60. [↑](#footnote-ref-1682)
1682. 1681 Id. at 61. [↑](#footnote-ref-1683)
1683. 1682 Id. at 61-62 (footnotes omitted). [↑](#footnote-ref-1684)
1684. 1683 Id. at 62. [↑](#footnote-ref-1685)
1685. 1684 Id. at 62-63 (citations omitted). [↑](#footnote-ref-1686)
1686. 1685 Id. at 63. [↑](#footnote-ref-1687)
1687. 1686 Id. [↑](#footnote-ref-1688)
1688. 1687 Id. [↑](#footnote-ref-1689)
1689. 1688 Id. at 64. [↑](#footnote-ref-1690)
1690. 1689 N.M. Stat. Ann. section 24-10-5 (Michie 1994). [↑](#footnote-ref-1691)
1691. 1690 N.M. Stat. Ann. section 41-3A-1 (Michie 1989). [↑](#footnote-ref-1692)
1692. 1691 N.M. Supreme Court Rules 1986 Ann., Uniform Jury Instructions--Civil sections 13-1401 to -1424 (Michie 1991). [↑](#footnote-ref-1693)
1693. 1692 N.M. Supreme Court Rules 1986 Ann., Uniform Civil Jury Instructions--Civil section 13-1407 (Michie 1991). [↑](#footnote-ref-1694)
1694. 1693 181 N.E.2d 399 (N.Y. 1962). [↑](#footnote-ref-1695)
1695. 1694 Id. at 404. [↑](#footnote-ref-1696)
1696. 1695 Id. at 402. [↑](#footnote-ref-1697)
1697. 1696 298 N.E.2d 622 (N.Y. 1973). [↑](#footnote-ref-1698)
1698. 1697 Id. at 628-29. [↑](#footnote-ref-1699)
1699. 1698 See Restatement (Second) of Torts section 402A cmt. n (1965); William L. Prosser, Handbook of the Law of Torts section 102, at 670 (4th ed. 1971). [↑](#footnote-ref-1700)
1700. 1699 The contributory negligence of the owner/driver of the allegedly defective vehicle was separated from the issue of whether there was a defect in the vehicle. Codling, 298 N.E.2d at 629. [↑](#footnote-ref-1701)
1701. 1700 Id. at 627-28. [↑](#footnote-ref-1702)
1702. 1701 Two of the plaintiffs in the action were injured in a vehicle which was struck by a defective vehicle. Id. They were bystanders rather than users of the defective product. Id. at 624. [↑](#footnote-ref-1703)
1703. 1702 305 N.E.2d 769 (N.Y. 1973). [↑](#footnote-ref-1704)
1704. 1703 Id. at 770. [↑](#footnote-ref-1705)
1705. 1704 323 N.Y.S.2d 53 (App. Div.), appeal denied, 274 N.E.2d 312 (N.Y. 1971). [↑](#footnote-ref-1706)
1706. 1705 95 N.E.2d 802 (N.Y. 1950). [↑](#footnote-ref-1707)
1707. 1706 For an excellent examination of Campo, see 5 Fowler V. Harper & F. James, The Law of Torts section 28.5 (2d ed. 1986). [↑](#footnote-ref-1708)
1708. 1707 Bolm, 305 N.E.2d at 774. [↑](#footnote-ref-1709)
1709. 1708 Id. [↑](#footnote-ref-1710)
1710. 1709 391 F.2d 495 (8th Cir. 1968). [↑](#footnote-ref-1711)
1711. 1710 Bolm, 305 N.E.2d at 773 (citing Dix W. Noel, Manufacturers' Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816, 818 (1962)). [↑](#footnote-ref-1712)
1712. 1711 Id. [↑](#footnote-ref-1713)
1713. 1712 348 N.E.2d 571 (N.Y. 1976). [↑](#footnote-ref-1714)
1714. 1713 Id. at 573. [↑](#footnote-ref-1715)
1715. 1714 Id. [↑](#footnote-ref-1716)
1716. 1715 Id. at 574. [↑](#footnote-ref-1717)
1717. 1716 Id. at 577. [↑](#footnote-ref-1718)
1718. 1717 Id. [↑](#footnote-ref-1719)
1719. 1718 Id. at 578. [↑](#footnote-ref-1720)
1720. 1719 Id. at 577-78. [↑](#footnote-ref-1721)
1721. 1720 Id. (citations omitted). [↑](#footnote-ref-1722)
1722. 1721 Id. at 578 (citations omitted). [↑](#footnote-ref-1723)
1723. 1722 Id. [↑](#footnote-ref-1724)
1724. 1723 Id. (citations omitted). [↑](#footnote-ref-1725)
1725. 1724 Id.(citations omitted). [↑](#footnote-ref-1726)
1726. 1725 Id. at 578-79 (citations omitted). [↑](#footnote-ref-1727)
1727. 1726 403 N.E.2d 440 (N.Y. 1980). [↑](#footnote-ref-1728)
1728. 1727 Id. at 440. [↑](#footnote-ref-1729)
1729. 1728 Id. at 441. [↑](#footnote-ref-1730)
1730. 1729 Id. at 442. [↑](#footnote-ref-1731)
1731. 1730 Id. at 443 (citations omitted). [↑](#footnote-ref-1732)
1732. 1731 Id. (citations omitted). [↑](#footnote-ref-1733)
1733. 1732 Id. (citations omitted). [↑](#footnote-ref-1734)
1734. 1733 See id. at 445 (Fuchsberg, J., dissenting). [↑](#footnote-ref-1735)
1735. 1734 Id. (Fuchsberg, J., dissenting). [↑](#footnote-ref-1736)
1736. 1735 Id. (Fuchsberg, J., dissenting). [↑](#footnote-ref-1737)
1737. 1736 Id. at 445-48 (Fuchsberg, J., dissenting). [↑](#footnote-ref-1738)
1738. 1737 Id. at 443-44. [↑](#footnote-ref-1739)
1739. 1738 417 N.E.2d 545 (N.Y. 1981). [↑](#footnote-ref-1740)
1740. 1739 Id. at 552-58 (Jasen, Jones & Meyer, J.J., dissenting). [↑](#footnote-ref-1741)
1741. 1740 Id. at 546. [↑](#footnote-ref-1742)
1742. 1741 Id. [↑](#footnote-ref-1743)
1743. 1742 Id. [↑](#footnote-ref-1744)
1744. 1743 Id. at 547. [↑](#footnote-ref-1745)
1745. 1744 Id. [↑](#footnote-ref-1746)
1746. 1745 Id. [↑](#footnote-ref-1747)
1747. 1746 Id. [↑](#footnote-ref-1748)
1748. 1747 Id. [↑](#footnote-ref-1749)
1749. 1748 Id. [↑](#footnote-ref-1750)
1750. 1749 Id. [↑](#footnote-ref-1751)
1751. 1750 Id. [↑](#footnote-ref-1752)
1752. 1751 Id. [↑](#footnote-ref-1753)
1753. 1752 Id. at 547-48. [↑](#footnote-ref-1754)
1754. 1753 Id. at 548. [↑](#footnote-ref-1755)
1755. 1754 Id. [↑](#footnote-ref-1756)
1756. 1755 Id. at 546. [↑](#footnote-ref-1757)
1757. 1756 Id. [↑](#footnote-ref-1758)
1758. 1757 Id. at 549. [↑](#footnote-ref-1759)
1759. 1758 Id. [↑](#footnote-ref-1760)
1760. 1759 Id. (quoting Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973)). [↑](#footnote-ref-1761)
1761. 1760 Id. [↑](#footnote-ref-1762)
1762. 1761 Id. at 549-50 (citations omitted). [↑](#footnote-ref-1763)
1763. 1762 Id. at 550 (quoting John W. Wade, On Product "Design Defects" and Their Actionability, 33 Vand. L. Rev. 551, 567 (1980)). [↑](#footnote-ref-1764)
1764. 1763 Id. [↑](#footnote-ref-1765)
1765. 1764 Id. at 552-53 (Jasen, Jones, & Meyer, J.J., dissenting). [↑](#footnote-ref-1766)
1766. 1765 Id. at 552 (Jasen, Jones, & Meyer, J.J., dissenting). [↑](#footnote-ref-1767)
1767. 1766 Id. at 552-53 (Jasen, Jones, & Meyer, J.J., dissenting) (citations omitted). [↑](#footnote-ref-1768)
1768. 1767 Id. at 553 (Jasen, Jones, & Meyer, J.J., dissenting) (quoting Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976)). [↑](#footnote-ref-1769)
1769. 1768 Id. (Jasen, Jones, & Meyer, J.J., dissenting) (quoting Bolm v. Triumph Corp., 305 N.E.2d 769 (N.Y. 1973)). [↑](#footnote-ref-1770)
1770. 1769 Id. (Jasen, Jones, & Meyer, J.J., dissenting); see supra notes 1708-11 and accompanying text. [↑](#footnote-ref-1771)
1771. 1770 Id. (Jasen, Jones, & Meyer, J.J., dissenting). [↑](#footnote-ref-1772)
1772. 1771 436 N.Y.S.2d 480 (App. Div.), appeal denied, 426 N.E.2d 754 (N.Y. 1981). [↑](#footnote-ref-1773)
1773. 1772 Id. at 483-85. [↑](#footnote-ref-1774)
1774. 1773 Id. at 485. [↑](#footnote-ref-1775)
1775. 1774 450 N.E.2d 204 (N.Y. 1983). [↑](#footnote-ref-1776)
1776. 1775 Id. at 207. [↑](#footnote-ref-1777)
1777. 1776 Id. [↑](#footnote-ref-1778)
1778. 1777 Id. (quoting Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973)). [↑](#footnote-ref-1779)
1779. 1778 Id. [↑](#footnote-ref-1780)
1780. 1779 Id. (quoting Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440 (N.Y. 1980)). [↑](#footnote-ref-1781)
1781. 1780 Id. at 207-08 (citation omitted). [↑](#footnote-ref-1782)
1782. 1781 Id. at 208 (citation omitted). [↑](#footnote-ref-1783)
1783. 1782 Id. at 208-09. [↑](#footnote-ref-1784)
1784. 1783 See Wade, supra note 109. [↑](#footnote-ref-1785)
1785. 1784 Voss, 450 N.E.2d at 208 (citations omitted). [↑](#footnote-ref-1786)
1786. 1785 348 N.E.2d 571 (N.Y. 1976). [↑](#footnote-ref-1787)
1787. 1786 See supra text accompanying notes 1713-25. [↑](#footnote-ref-1788)
1788. 1787 Voss, 450 N.E.2d at 208. [↑](#footnote-ref-1789)
1789. 1788 497 N.Y.2d 382 (N.Y. App. Div. 1985). [↑](#footnote-ref-1790)
1790. 1789 No. USCOA, 2 No. 215, 1995 WL 72284 (N.Y. Dec. 5, 1995). [↑](#footnote-ref-1791)
1791. 1790 Id. at \*1. [↑](#footnote-ref-1792)
1792. 1791 Id. [↑](#footnote-ref-1793)
1793. 1792 Id. at \*2. [↑](#footnote-ref-1794)
1794. 1793 Id. [↑](#footnote-ref-1795)
1795. 1794 Id. at \*3. [↑](#footnote-ref-1796)
1796. 1795 Id. at \*9. [↑](#footnote-ref-1797)
1797. 1796 Id. at \*8. [↑](#footnote-ref-1798)
1798. 1797 Id. [↑](#footnote-ref-1799)
1799. 1798 Id. at \*2. [↑](#footnote-ref-1800)
1800. 1799 Id. [↑](#footnote-ref-1801)
1801. 1800 Id. [↑](#footnote-ref-1802)
1802. 1801 Id. [↑](#footnote-ref-1803)
1803. 1802 Id. at \*9. [↑](#footnote-ref-1804)
1804. 1803 Id. at \*5 (citations omitted). [↑](#footnote-ref-1805)
1805. 1804 Id. at \*6. [↑](#footnote-ref-1806)
1806. 1805 Id. at \*10. [↑](#footnote-ref-1807)
1807. 1806 Id. [↑](#footnote-ref-1808)
1808. 1807 Id. at \*9 (citations omitted). [↑](#footnote-ref-1809)
1809. 1808 Id. at \*2. [↑](#footnote-ref-1810)
1810. 1809 Id. at \*8. [↑](#footnote-ref-1811)
1811. 1810 Id. at \*7, \*12. [↑](#footnote-ref-1812)
1812. 1811 N.Y. Civ. Prac. L. & R. 214-c (McKinney 1990). [↑](#footnote-ref-1813)
1813. 1812 N.Y. Civ. Prac. L. & R. 1600-1602 (McKinney 1996). [↑](#footnote-ref-1814)
1814. 1813 N.Y. Civ. Prac. L. & R. 5041 (McKinney 1992). [↑](#footnote-ref-1815)
1815. 1814 N.Y. Civ. Prac. L. & R. 8701-8704 (McKinney 1996). [↑](#footnote-ref-1816)
1816. 1815 N.Y. Pub. Health Law section 580 (McKinney Supp. 1996); see also Simone v. Long Island Jewish Hillside Medical Ctr., 364 N.Y.S.2d 714 (N.Y. Sup. Ct. 1975). [↑](#footnote-ref-1817)
1817. 1816 See 2 New York Pattern Jury Instructions--Civil 2:141-:141.2 (Law. Co-op. Supp. 1993) (addressing strict liability, circumstantial evidence as proof of defect, and the fact that the product must be defective when it leaves sellers hands, respectively). [↑](#footnote-ref-1818)
1818. 1817 Smith v. Fiber Controls Corp., 268 S.E.2d 504 (N.C. 1980). [↑](#footnote-ref-1819)
1819. 1818 See Crews v. W.A. Brown & Son, Inc., 416 S.E.2d 924 (N.C. Ct. App. 1992). [↑](#footnote-ref-1820)
1820. 1819 1995 N.C. Sess. Laws 522; see also Driver v. Burlington Aviation, Inc., 430 S.E.2d 476 (N.C. Ct. App. 1993). In addition to rejecting strict liability, the Act places further restrictions for consumer recovery concerning alterations and modifications, N.C. Gen. Stat. section 99B-3 (1995); instructions and warnings, N.C. Gen. Stat. sections 99B4(1), 99B-5 (1995); assumption of risk, N.C. Gen. Stat. section 99B-4(2) (1995); design defects, N.C. Gen. Stat. section 99B-6 (1995); donated food, N.C. Gen. Stat. section 99B-10 (1995); firearms and ammunition, N.C. Gen. Stat. section 99B-11 (1995); statute of repose, N.C. Gen. Stat. section 1-50 (1983 & Supp. 1995); punitive damages, N.C. Gen. Stat. sections 1D-1 to -50 (1995); and blood products, N.C. Gen. Stat. section 130A-410 (1995). [↑](#footnote-ref-1821)
1821. 1820 225 N.W.2d 57 (N.D. 1974). [↑](#footnote-ref-1822)
1822. 1821 256 N.W.2d 530 (N.D. 1977). [↑](#footnote-ref-1823)
1823. 1822 Id. at 534-35. [↑](#footnote-ref-1824)
1824. 1823 Id. at 535-37. [↑](#footnote-ref-1825)
1825. 1824 Id. [↑](#footnote-ref-1826)
1826. 1825 Id. at 540 (citations omitted). [↑](#footnote-ref-1827)
1827. 1826 345 N.W.2d 349 (N.D. 1984). [↑](#footnote-ref-1828)
1828. 1827 345 N.W.2d 338 (N.D. 1984). [↑](#footnote-ref-1829)
1829. 1828 Day, 345 N.W.2d at 347-48; Mauch, 345 N.W.2d at 344-45. [↑](#footnote-ref-1830)
1830. 1829 Day, 345 N.W.2d at 347-48; Mauch, 345 N.W.2d at 357. [↑](#footnote-ref-1831)
1831. 1830 Day, 345 N.W.2d at 357; Mauch, 345 N.W.2d at 346-48. [↑](#footnote-ref-1832)
1832. 1831 Mauch, 345 N.W.2d at 345. [↑](#footnote-ref-1833)
1833. 1832 Id. (citations omitted). [↑](#footnote-ref-1834)
1834. 1833 Id. at 345. [↑](#footnote-ref-1835)
1835. 1834 337 A.2d 893, 898 (Pa. 1975). [↑](#footnote-ref-1836)
1836. 1835 Mauch, 345 N.W.2d at 345. [↑](#footnote-ref-1837)
1837. 1836 Louis R. Frumer & Melvin I. Friedman, Products Liability section 16A[4]f, at 3B-156 (1983). [↑](#footnote-ref-1838)
1838. 1837 Mauch, 345 N.W.2d at 346 (citations omitted). [↑](#footnote-ref-1839)
1839. 1838 353 N.W.2d 297 (N.D. 1984). [↑](#footnote-ref-1840)
1840. 1839 Id. at 300. [↑](#footnote-ref-1841)
1841. 1840 Id. at 301. [↑](#footnote-ref-1842)
1842. 1841 436 N.W.2d 221 (N.D. 1989). [↑](#footnote-ref-1843)
1843. 1842 Id. at 224-26; see also Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401 (N.D. 1994). [↑](#footnote-ref-1844)
1844. 1843 476 N.W.2d 248 (N.D. 1991). [↑](#footnote-ref-1845)
1845. 1844 The specific section of the Act involved alteration and modification under N.D. Cent. Code section 28-01.1-04 (1991). [↑](#footnote-ref-1846)
1846. 1845 Oanes, 476 N.W.2d at 253 (citations omitted). [↑](#footnote-ref-1847)
1847. 1846 Id. (emphasis omitted). [↑](#footnote-ref-1848)
1848. 1847 N.D. Cent. Code sections 28-01.1-01 to -07 (1991). [↑](#footnote-ref-1849)
1849. 1848 Id. section 28-01.1-02. [↑](#footnote-ref-1850)
1850. 1849 Id. section 28-01.1-04. [↑](#footnote-ref-1851)
1851. 1850 Id. section 28-01.1-05(3). [↑](#footnote-ref-1852)
1852. 1851 Id. section 28-01.1-06.1. [↑](#footnote-ref-1853)
1853. 1852 Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986). [↑](#footnote-ref-1854)
1854. 1853 Oanes v. Westgo, Inc., 476 N.W.2d 248, 252 (N.D. 1991). [↑](#footnote-ref-1855)
1855. 1854 N.D. Cent. Code section 28-01.1-05(2) (1991). [↑](#footnote-ref-1856)
1856. 1855 Morrison v. Grand Forks Housing Auth., 436 N.W.2d 221, 223-26 (N.D. 1989). [↑](#footnote-ref-1857)
1857. 1856 See Oanes, 476 N.W.2d at 254-55. [↑](#footnote-ref-1858)
1858. 1857 N.D. Cent. Code section 28-01.3-08 (Supp. 1995). [↑](#footnote-ref-1859)
1859. 1858 N.D. Cent. Code section 28-01.3-09 (Supp. 1995). [↑](#footnote-ref-1860)
1860. 1859 N.D. Cent. Code section 28-01.3-04 (Supp. 1995). [↑](#footnote-ref-1861)
1861. 1860 N.D. Cent. Code sections 32-03.2-04 to -05 (Supp. 1995). [↑](#footnote-ref-1862)
1862. 1861 N.D. Cent. Code sections 32-03.2-06, -10 (Supp. 1995). [↑](#footnote-ref-1863)
1863. 1862 N.D. Cent. Code section 32-03.2-11 (Supp. 1995). [↑](#footnote-ref-1864)
1864. 1863 N.D. Cent. Code section 41-02-33(3)(d) (1981); N.D. Cent. Code section 43-17-40 (1993). [↑](#footnote-ref-1865)
1865. 1864 N.D. Cent. Code sections 28-01.4-01 to -04 (Supp. 1995). [↑](#footnote-ref-1866)
1866. 1865 North Dakota Pattern Jury Instructions--Civil NDJI-Civil 620, 625 (1986). [↑](#footnote-ref-1867)
1867. 1866 Id. [↑](#footnote-ref-1868)
1868. 1867 An excellent survey of such history is accumulated and examined in Bowling v. Heil Co., 511 N.E.2d 373 (Ohio 1987). [↑](#footnote-ref-1869)
1869. 1868 147 N.E.2d 612 (Ohio 1958). [↑](#footnote-ref-1870)
1870. 1869 Id. at 614. [↑](#footnote-ref-1871)
1871. 1870 Id. at 615-16. [↑](#footnote-ref-1872)
1872. 1871 218 N.E.2d 185 (Ohio 1966). [↑](#footnote-ref-1873)
1873. 1872 Id. at 192-93. [↑](#footnote-ref-1874)
1874. 1873 364 N.E.2d 267 (Ohio 1977). [↑](#footnote-ref-1875)
1875. 1874 Id. at 271. [↑](#footnote-ref-1876)
1876. 1875 424 N.E.2d 568 (Ohio 1981). [↑](#footnote-ref-1877)
1877. 1876 Id. at 574. [↑](#footnote-ref-1878)
1878. 1877 Id. at 575 (citation omitted). [↑](#footnote-ref-1879)
1879. 1878 Id. at 576. [↑](#footnote-ref-1880)
1880. 1879 Id. at 577 (citations omitted). [↑](#footnote-ref-1881)
1881. 1880 Id. at 582-85 (Holmes, J., dissenting). [↑](#footnote-ref-1882)
1882. 1881 Id. at 585 (Holmes, J., dissenting). [↑](#footnote-ref-1883)
1883. 1882 432 N.E.2d 814 (Ohio 1982). [↑](#footnote-ref-1884)
1884. 1883 Id. at 818 n.3. [↑](#footnote-ref-1885)
1885. 1884 Id. at 818 (citations omitted). [↑](#footnote-ref-1886)
1886. 1885 Id. (citations and footnotes omitted). [↑](#footnote-ref-1887)
1887. 1886 452 N.E.2d 1281 (Ohio 1983). [↑](#footnote-ref-1888)
1888. 1887 Id. at 1283-84. [↑](#footnote-ref-1889)
1889. 1888 Id. at 1284. [↑](#footnote-ref-1890)
1890. 1889 Id. [↑](#footnote-ref-1891)
1891. 1890 511 N.E.2d 373 (Ohio 1987). [↑](#footnote-ref-1892)
1892. 1891 Id. at 375. [↑](#footnote-ref-1893)
1893. 1892 Id. [↑](#footnote-ref-1894)
1894. 1893 Id. at 375-77. [↑](#footnote-ref-1895)
1895. 1894 Id. at 380 (quoting Daly v. General Motors Corp., 575 P.2d 1162, 1183-84 (Cal. 1978)). [↑](#footnote-ref-1896)
1896. 1895 653 N.E.2d 661 (Ohio 1995). [↑](#footnote-ref-1897)
1897. 1896 See id. at 672 (citing Leichtamer v. American Motors Corp., 424 N.E.2d 568, 575 (Ohio 1981)). [↑](#footnote-ref-1898)
1898. 1897 Id. at 671. [↑](#footnote-ref-1899)
1899. 1898 Id. at 672 (quoting Leichtamer, 424 N.E.2d at 575). [↑](#footnote-ref-1900)
1900. 1899 Id. (quoting Restatement (Second) of Torts section 402A cmt. c (1965)). [↑](#footnote-ref-1901)
1901. 1900 Id. [↑](#footnote-ref-1902)
1902. 1901 Ohio Rev. Code Ann. sections 2307.71-.80 (Anderson 1991). [↑](#footnote-ref-1903)
1903. 1902 See James A. Lowe, Products Liability in Ohio After Tort Reform section 1.2, at 3 (1988). Governor Celeste vetoed a bill which preceded Ohio's Product Liability on the basis it was unduly restrictive and anti-consumer. [↑](#footnote-ref-1904)
1904. 1903 For an excellent survey and analysis of the Act, see Lowe, supra note 1902. [↑](#footnote-ref-1905)
1905. 1904 Id. at 2-3. [↑](#footnote-ref-1906)
1906. 1905 Id. at xi. [↑](#footnote-ref-1907)
1907. 1906 Id. [↑](#footnote-ref-1908)
1908. 1907 Id. at 1. [↑](#footnote-ref-1909)
1909. 1908 Ohio Rev. Code Ann. section 2307.75(E) (Anderson 1991). [↑](#footnote-ref-1910)
1910. 1909 Id. section 2307.75(F). [↑](#footnote-ref-1911)
1911. 1910 Id. section 2307.80. [↑](#footnote-ref-1912)
1912. 1911 Id. section 2307.78. [↑](#footnote-ref-1913)
1913. 1912 Id. section 2307.76(B). [↑](#footnote-ref-1914)
1914. 1913 Ohio Rev. Code Ann. section 2108.11 (Anderson 1994). [↑](#footnote-ref-1915)
1915. 1914 3 Ohio Jury Instructions OJI 351.01 (1995). [↑](#footnote-ref-1916)
1916. 1915 Id. at OJI 351.09. [↑](#footnote-ref-1917)
1917. 1916 521 P.2d 1353 (Okla. 1974). [↑](#footnote-ref-1918)
1918. 1917 Id. at 1364-65. [↑](#footnote-ref-1919)
1919. 1918 Id. at 1363. [↑](#footnote-ref-1920)
1920. 1919 Id. at 1362-63. [↑](#footnote-ref-1921)
1921. 1920 Id. at 1363-64. [↑](#footnote-ref-1922)
1922. 1921 Id. at 1365 (citations omitted). [↑](#footnote-ref-1923)
1923. 1922 Id. at 1367. [↑](#footnote-ref-1924)
1924. 1923 Id. at 1366-67. [↑](#footnote-ref-1925)
1925. 1924 612 P.2d 251 (Okla. 1980). [↑](#footnote-ref-1926)
1926. 1925 Id. at 253. [↑](#footnote-ref-1927)
1927. 1926 Id. at 252-53. [↑](#footnote-ref-1928)
1928. 1927 Id. at 253. [↑](#footnote-ref-1929)
1929. 1928 Id. at 254. [↑](#footnote-ref-1930)
1930. 1929 Id. at 252. [↑](#footnote-ref-1931)
1931. 1930 Id. at 252-53. [↑](#footnote-ref-1932)
1932. 1931 Id. at 253. [↑](#footnote-ref-1933)
1933. 1932 Id. [↑](#footnote-ref-1934)
1934. 1933 Id. [↑](#footnote-ref-1935)
1935. 1934 Id. However, as the trial court's instruction indicates, warnings were probably a part of the design defect. Id. at 255. [↑](#footnote-ref-1936)
1936. 1935 Id. at 253-54. [↑](#footnote-ref-1937)
1937. 1936 Id. at 254 (citation omitted). [↑](#footnote-ref-1938)
1938. 1937 Id. at 256. [↑](#footnote-ref-1939)
1939. 1938 Council Draft No. 2, supra note 3, section 2(c), at 22-26. [↑](#footnote-ref-1940)
1940. 1939 Council Draft No. 2, supra note 3. [↑](#footnote-ref-1941)
1941. 1940 Id. [↑](#footnote-ref-1942)
1942. 1941 688 P.2d 1283 (Okla. 1984). [↑](#footnote-ref-1943)
1943. 1942 Id. at 1286. [↑](#footnote-ref-1944)
1944. 1943 Id. [↑](#footnote-ref-1945)
1945. 1944 Id. at 1286-87. [↑](#footnote-ref-1946)
1946. 1945 Id. [↑](#footnote-ref-1947)
1947. 1946 537 F.2d 726 (3d Cir. 1976). [↑](#footnote-ref-1948)
1948. 1947 Lee, 688 P.2d at 1287-88. [↑](#footnote-ref-1949)
1949. 1948 Id. at 1289. [↑](#footnote-ref-1950)
1950. 1949 Id. [↑](#footnote-ref-1951)
1951. 1950 817 F.2d 1452 (10th Cir. 1987). [↑](#footnote-ref-1952)
1952. 1951 Id. at 1457. The Karns court accurately portrayed the alternative design requirement as essentially a state-of-the-art requirement:

      Defendant argues that plaintiff failed to establish the feasibility of safer, alternative designs, or that the danger of the XR-90 as designed outweighs its utility. While evidence bearing upon design alternatives and the "state of the art" in the industry may be relevant to determining whether a product is unreasonably dangerous, such evidence is not an essential element of the plaintiff's case. Moreover, Block did testify that the force of the kickback could be substantially reduced by reducing the speed or mass of the blade. Although such modifications would, not doubt, reduce the XR90's effectiveness as a cutting tool, we cannot say, as a matter of law, that the utility of the machine as designed justifies the risk associated with its use.

      Id. (citations omitted). [↑](#footnote-ref-1953)
1953. 1952 Id. [↑](#footnote-ref-1954)
1954. 1953 890 P.2d 881 (Okla. 1994). [↑](#footnote-ref-1955)
1955. 1954 Id. at 886 (finding that a penile implant was protected under comment k). [↑](#footnote-ref-1956)
1956. 1955 Id. [↑](#footnote-ref-1957)
1957. 1956 Id. at 892-94. [↑](#footnote-ref-1958)
1958. 1957 Okla. Stat. Ann. tit. 63, section 2151 (West 1984). [↑](#footnote-ref-1959)
1959. 1958 Okla. Stat. Ann. tit. 23, sections 9-9.1 (West 1987 & Supp. 1996). [↑](#footnote-ref-1960)
1960. 1959 Oklahoma Uniform Jury Instructions--Civil No. 12.2 (2d ed. 1993). [↑](#footnote-ref-1961)
1961. 1960 Id. at No. 12.3 (defining unreasonably dangerous). [↑](#footnote-ref-1962)
1962. 1961 See Dutsch v. Sea Ray Boats, 845 P.2d 187 (Okla. 1992), for an excellent examination of several pattern instructions. [↑](#footnote-ref-1963)
1963. 1962 435 P.2d 806 (Or. 1967). [↑](#footnote-ref-1964)
1964. 1963 Id. at 808-09. [↑](#footnote-ref-1965)
1965. 1964 Id. [↑](#footnote-ref-1966)
1966. 1965 525 P.2d 125 (Or. 1974). [↑](#footnote-ref-1967)
1967. 1966 Id. at 126. [↑](#footnote-ref-1968)
1968. 1967 Id. at 127. [↑](#footnote-ref-1969)
1969. 1968 Id. [↑](#footnote-ref-1970)
1970. 1969 Id. at 128. [↑](#footnote-ref-1971)
1971. 1970 Id. at 128-29. [↑](#footnote-ref-1972)
1972. 1971 Id. at 129. [↑](#footnote-ref-1973)
1973. 1972 525 P.2d 1033 (Or. 1974). [↑](#footnote-ref-1974)
1974. 1973 Id. at 1036 (footnote omitted). [↑](#footnote-ref-1975)
1975. 1974 Id. at 1036-37 (footnotes omitted). [↑](#footnote-ref-1976)
1976. 1975 Id. at 1038. [↑](#footnote-ref-1977)
1977. 1976 Id. at 1039-40. [↑](#footnote-ref-1978)
1978. 1977 L.R. 3 H.L. 330 (1868). [↑](#footnote-ref-1979)
1979. 1978 Phillips, 525 P.2d at 1040. [↑](#footnote-ref-1980)
1980. 1979 Id. at 1040-41 n.16. [↑](#footnote-ref-1981)
1981. 1980 Id. at 1039. [↑](#footnote-ref-1982)
1982. 1981 554 P.2d 1000 (Or. 1976). [↑](#footnote-ref-1983)
1983. 1982 Id. at 1005-06. [↑](#footnote-ref-1984)
1984. 1983 Id. at 1006. [↑](#footnote-ref-1985)
1985. 1984 577 P.2d 1322 (Or. 1978). [↑](#footnote-ref-1986)
1986. 1985 Id. at 1327-28. [↑](#footnote-ref-1987)
1987. 1986 Id. at 1324. [↑](#footnote-ref-1988)
1988. 1987 Id. [↑](#footnote-ref-1989)
1989. 1988 Id. [↑](#footnote-ref-1990)
1990. 1989 Id. [↑](#footnote-ref-1991)
1991. 1990 Id. at 1327-28. [↑](#footnote-ref-1992)
1992. 1991 Id. at 1327. [↑](#footnote-ref-1993)
1993. 1992 Id. at 1328 (footnotes omitted). [↑](#footnote-ref-1994)
1994. 1993 Id. at 1328 n.5. [↑](#footnote-ref-1995)
1995. 1994 454 F.2d 1270 (8th Cir. 1972). [↑](#footnote-ref-1996)
1996. 1995 Wilson, 577 P.2d at 1326-27. [↑](#footnote-ref-1997)
1997. 1996 Id. at 1327. [↑](#footnote-ref-1998)
1998. 1997 See Glover v. BIC Corp., 6 F.3d 1318 (9th Cir. 1993); Wood v. Ford Motor Co., 691 P.2d 495 (Or. Ct. App. 1984). [↑](#footnote-ref-1999)
1999. 1998 706 P.2d 929 (Or. 1985). [↑](#footnote-ref-2000)
2000. 1999 Id. at 931. [↑](#footnote-ref-2001)
2001. 2000 The Ewen court held that a jury instruction on consumer expectations, absent reference to pedestrians, was appropriate in a design defect situation. The analysis of Ewen in reaching this conclusion indicated the court found no difference between the consumer oriented test under comment i and the seller-oriented risk-utility test with imputed knowledge as expressed in Phillips. Id. at 932-34. [↑](#footnote-ref-2002)
2002. 2001 The Oregon Products Liability Act is found at Or. Rev. Stat. sections 30.900-.920 (1988). The Act originated in 1977 and was enlarged over the years. An excellent legislative history of section 30.920, enacted in 1979, is reviewed in Dominick Vetri, Legislative Codification of Strict Products Liability Law in Oregon, 59 Or. L. Rev. 363 (1981) and is cited in Ewen v. McLean Trucking Co., 706 P.2d 929 (Or. 1985). [↑](#footnote-ref-2003)
2003. 2002 Or. Rev. Stat. section 30.905(1) (1988). [↑](#footnote-ref-2004)
2004. 2003 Or. Rev. Stat. section 30.910 (1988). [↑](#footnote-ref-2005)
2005. 2004 Or. Rev. Stat. section 30.915 (1) (1988). [↑](#footnote-ref-2006)
2006. 2005 Or. Rev. Stat. sections 30.925, .927 (1988). [↑](#footnote-ref-2007)
2007. 2006 Or. Rev. Stat. section 30.920 (1988). [↑](#footnote-ref-2008)
2008. 2007 Id. [↑](#footnote-ref-2009)
2009. 2008 706 P.2d 929 (Or. 1985). [↑](#footnote-ref-2010)
2010. 2009 Or. Rev. Stat. section 18.485 (1988). [↑](#footnote-ref-2011)
2011. 2010 Or. Rev. Stat. sections 18.540, 41.315 (1988). [↑](#footnote-ref-2012)
2012. 2011 Or. Rev. Stat. section 97.300 (1990). [↑](#footnote-ref-2013)
2013. 2012 Oregon Jury Instructions for Civil Cases UCJI 48.02 (1993). [↑](#footnote-ref-2014)
2014. 2013 Id. at UCJI 48.02-.04. [↑](#footnote-ref-2015)
2015. 2014 In UCJI 48.03, defining the consumer expectation test the comment cites Ewen v. McLean Trucking Co., 706 P.2d 927 (Or. 1985). In UCJI 48.04, defining unreasonably dangerous as the imputed knowledge has the following caveat: "The committee is uncertain as to the appropriateness of the manufacturer's test in light of the discussion in Ewen." [↑](#footnote-ref-2016)
2016. 2015 220 A.2d 853 (Pa. 1966). [↑](#footnote-ref-2017)
2017. 2016 319 A.2d 903 (Pa. 1974). [↑](#footnote-ref-2018)
2018. 2017 Id. at 904. [↑](#footnote-ref-2019)
2019. 2018 Id. at 907 (citations omitted). [↑](#footnote-ref-2020)
2020. 2019 337 A.2d 893 (Pa. 1975). [↑](#footnote-ref-2021)
2021. 2020 The plaintiff also relied upon a warning defect. Id. at 902-03. [↑](#footnote-ref-2022)
2022. 2021 Id. at 897. [↑](#footnote-ref-2023)
2023. 2022 Id. at 898 (citations omitted). [↑](#footnote-ref-2024)
2024. 2023 Id. [↑](#footnote-ref-2025)
2025. 2024 Id. at 899. [↑](#footnote-ref-2026)
2026. 2025 Id. [↑](#footnote-ref-2027)
2027. 2026 Id. There was little doubt about the rejection of both comment i and Dean Wade's imputed knowledge test for defects as the court explained in footnote six:

      The Restatement commentary suggests an objective test looking to the reasonable expectations of the "ordinary consumer . . . with the ordinary knowledge common to the community as to [the product's] characteristics." Restatement (Second) of Torts, section 402A, comment i. Others suggest an objective test looking instead to the reasonable seller, submitting as the issue whether he, if he had known of the condition of the product, "would . . . then have been acting reasonably on placing it on the market."

      Id. at 899 n.6 (quoting Wade, supra note 123, at 15). [↑](#footnote-ref-2028)
2028. 2027 Id. at 900 (citations omitted). [↑](#footnote-ref-2029)
2029. 2028 Id. [↑](#footnote-ref-2030)
2030. 2029 Id. at 901. [↑](#footnote-ref-2031)
2031. 2030 391 A.2d 1020 (Pa. 1978). [↑](#footnote-ref-2032)
2032. 2031 Id. at 1027. [↑](#footnote-ref-2033)
2033. 2032 Id. at 1024. [↑](#footnote-ref-2034)
2034. 2033 Id. [↑](#footnote-ref-2035)
2035. 2034 Id. at 1024-25. [↑](#footnote-ref-2036)
2036. 2035 Id. at 1026 (citations omitted). [↑](#footnote-ref-2037)
2037. 2036 Id. [↑](#footnote-ref-2038)
2038. 2037 Id. at 1027 (footnotes omitted). [↑](#footnote-ref-2039)
2039. 2038 Id. at 1027 n.12 (quoting Pennsylvania Standard Jury Instruction (Civil) 8.02, Subcommittee Draft (June 6, 1976)). [↑](#footnote-ref-2040)
2040. 2039 See Walton v. AVCO Corp., 610 A.2d 454 (Pa. 1992); Lewis v. Coffing Hoist Div., Duff-Norton, 528 A.2d 590 (Pa. 1987). [↑](#footnote-ref-2041)
2041. 2040 Ellen Wertheimer, Azzarello Agonisties: Bucking the Strict Products Liability Tide, 66 Temple L. Rev. 419 (1993). [↑](#footnote-ref-2042)
2042. 2041 Id. at 424-29. [↑](#footnote-ref-2043)
2043. 2042 Id. [↑](#footnote-ref-2044)
2044. 2043 Id. at 428-30. The primary critics of Azzarello are Professors Henderson and Birnbaum. Professor Henderson is a co-reporter on the Restatement for Products Liability while Birnbaum is on the ALI council. Both are opposed to strict liability. Id. [↑](#footnote-ref-2045)
2045. 2044 Pa. Stat. Ann. tit. 42, section 8333 (1982). [↑](#footnote-ref-2046)
2046. 2045 See Pennsylvania Standard Jury Instruction (Civil) 8.02 (1981). [↑](#footnote-ref-2047)
2047. 2046 283 A.2d 255 (R.I. 1971). [↑](#footnote-ref-2048)
2048. 2047 Id. at 263. [↑](#footnote-ref-2049)
2049. 2048 Id. [↑](#footnote-ref-2050)
2050. 2049 Id. at 262 (citing Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963)). [↑](#footnote-ref-2051)
2051. 2050 538 A.2d 666 (R.I. 1988). [↑](#footnote-ref-2052)
2052. 2051 546 A.2d 775 (R.I. 1988). [↑](#footnote-ref-2053)
2053. 2052 Id. at 781. [↑](#footnote-ref-2054)
2054. 2053 Id. at 779 (citations omitted). [↑](#footnote-ref-2055)
2055. 2054 Id. at 781. [↑](#footnote-ref-2056)
2056. 2055 Id. at 782 (citations omitted). [↑](#footnote-ref-2057)
2057. 2056 Id. [↑](#footnote-ref-2058)
2058. 2057 R.I. Gen. Laws section 9-1-32 (1985). [↑](#footnote-ref-2059)
2059. 2058 R.I. Gen. Laws section 9-1-13(b) (1985). [↑](#footnote-ref-2060)
2060. 2059 R.I. Gen. Laws section 23-17-30 (1989). [↑](#footnote-ref-2061)
2061. 2060 471 A.2d 195 (R.I. 1984). [↑](#footnote-ref-2062)
2062. 2061 Barnwell v. Barber-Colman Co., 393 S.E.2d 162 (S.C. 1989); Schall v. Sturm Ruger Co., 300 S.E.2d 735 (S.C. 1983); Hatfield v. Atlas Enters., 262 S.E.2d 900 (S.C. 1980). [↑](#footnote-ref-2063)
2063. 2062 S.C. Code Ann. sections 15-73-10, -20, -30 (Law. Co-op. 1976). Although adoption of strict liability would be beneficial to the consumer, other legislation has limited consumer recovery in actions involving blood products, S.C. Code Ann. section 44-43-10 (Law. Co-op. 1985), and punitive damages, S.C. Code Ann. section 15-33-135 (Law. Co-op. Supp. 1995), [↑](#footnote-ref-2064)
2064. 2063 240 S.E.2d 511 (S.C. 1977). [↑](#footnote-ref-2065)
2065. 2064 Id. at 512. [↑](#footnote-ref-2066)
2066. 2065 Id. at 513. [↑](#footnote-ref-2067)
2067. 2066 Id. (quoting Skyhook v. Jasper, 560 P.2d 934, 938 (N.M. 1977)). [↑](#footnote-ref-2068)
2068. 2067 Id. at 514. [↑](#footnote-ref-2069)
2069. 2068 242 S.E.2d 671 (S.C. 1978). [↑](#footnote-ref-2070)
2070. 2069 Id. at 673. [↑](#footnote-ref-2071)
2071. 2070 Id. at 679. [↑](#footnote-ref-2072)
2072. 2071 Id. [↑](#footnote-ref-2073)
2073. 2072 560 P.2d 934 (N.M. 1977). [↑](#footnote-ref-2074)
2074. 2073 Young, 242 S.E.2d at 680. [↑](#footnote-ref-2075)
2075. 2074 286 S.E.2d 129 (S.C. 1982). [↑](#footnote-ref-2076)
2076. 2075 Id. at 132. [↑](#footnote-ref-2077)
2077. 2076 Id. [↑](#footnote-ref-2078)
2078. 2077 The plaintiff alleged the lug bolts on the wheels of a vehicle were defective because they were not of sufficient size to withstand overtorqueing or excessive tightening. Id. at 130-31. Such overtorqueing was done at a local dealership. Id. at 131. The overtorqueing caused cracks in the lug bolts causing them to fail which in turn caused the wheel to separate from the vehicle. Id. The Claytor court believed the defective condition was the cracks; thus, the product was not defective when it left the factory. Id. at 132. [↑](#footnote-ref-2079)
2079. 2078 697 F.2d 1192 (4th Cir. 1982). [↑](#footnote-ref-2080)
2080. 2079 Id. at 1196-97. [↑](#footnote-ref-2081)
2081. 2080 Id. at 1196-98. [↑](#footnote-ref-2082)
2082. 2081 300 S.E.2d 735 (S.C. 1983). [↑](#footnote-ref-2083)
2083. 2082 Id. at 735. [↑](#footnote-ref-2084)
2084. 2083 Id. at 737. [↑](#footnote-ref-2085)
2085. 2084 393 S.E.2d 162 (S.C. 1989). However, punitive damages are recoverable in actions where the plaintiff alleges negligence. Scott by McClure v. Fruehauf Corp., 396 S.E.2d 354 (S.C. 1990). [↑](#footnote-ref-2086)
2086. 2085 450 S.E.2d 589 (S.C. 1994). [↑](#footnote-ref-2087)
2087. 2086 Id. at 592-93. [↑](#footnote-ref-2088)
2088. 2087 Id. at 593. [↑](#footnote-ref-2089)
2089. 2088 205 N.W.2d 104 (S.D. 1973). [↑](#footnote-ref-2090)
2090. 2089 Id. at 105-06. [↑](#footnote-ref-2091)
2091. 2090 Id. at 107 (citations omitted). [↑](#footnote-ref-2092)
2092. 2091 249 N.W.2d 251 (S.D. 1976). [↑](#footnote-ref-2093)
2093. 2092 The plaintiff also used expert testimony. Id. at 257. [↑](#footnote-ref-2094)
2094. 2093 Id. at 253-55. [↑](#footnote-ref-2095)
2095. 2094 Id. at 256 (citations omitted). [↑](#footnote-ref-2096)
2096. 2095 278 N.W.2d 155 (S.D. 1979). [↑](#footnote-ref-2097)
2097. 2096 Id. at 160-61 (citation omitted). [↑](#footnote-ref-2098)
2098. 2097 283 N.W.2d 557 (S.D. 1979). [↑](#footnote-ref-2099)
2099. 2098 Id. at 561. [↑](#footnote-ref-2100)
2100. 2099 355 N.W.2d 833 (S.D. 1984). [↑](#footnote-ref-2101)
2101. 2100 Id. at 835. [↑](#footnote-ref-2102)
2102. 2101 Id. [↑](#footnote-ref-2103)
2103. 2102 396 N.W.2d 122 (S.D. 1986). [↑](#footnote-ref-2104)
2104. 2103 Id. at 135. [↑](#footnote-ref-2105)
2105. 2104 Id. at 133. [↑](#footnote-ref-2106)
2106. 2105 400 N.W.2d 909 (S.D. 1987). [↑](#footnote-ref-2107)
2107. 2106 Plaintiff waived the negligence and warranty issues; thus, the court decided the case solely on strict liability. Id. at 911. [↑](#footnote-ref-2108)
2108. 2107 Id. at 912 (quoting Jahnig v. Coisman, 283 N.W.2d 557, 560 (S.D. 1979)) (citations omitted). [↑](#footnote-ref-2109)
2109. 2108 Id. (quoting R. Dugan, Reflections on South Dakota's Trifurcated Law of Products Liability, 28 S.D. L. Rev. 259 (1983)). [↑](#footnote-ref-2110)
2110. 2109 Id. at 913 (quoting R. Dugan, Reflections on South Dakota's Trifurcated Law of Products Liability, 28 S.D. L. Rev. 259 (1983)) (citations omitted). [↑](#footnote-ref-2111)
2111. 2110 Id. (citations omitted). [↑](#footnote-ref-2112)
2112. 2111 S.D. Codified Laws Ann. section 15-2-12.1 (1984), repealed by 1985 S.D. Laws 157, section 2 (Supp. 1994). [↑](#footnote-ref-2113)
2113. 2112 S.D. Codified Laws Ann. section 20-9-9 (1987). [↑](#footnote-ref-2114)
2114. 2113 S.D. Codified Laws Ann. section 20-9-10 (1987). [↑](#footnote-ref-2115)
2115. 2114 S.D. Codified Laws Ann. section 20-9-10.1 (1995). [↑](#footnote-ref-2116)
2116. 2115 349 N.W.2d 419 (S.D. 1984). [↑](#footnote-ref-2117)
2117. 2116 Peterson v. Safeway Steel Scaffold Co., 400 N.W.2d 909, 915 (S.D. 1987). [↑](#footnote-ref-2118)
2118. 2117 Id. at 914. [↑](#footnote-ref-2119)
2119. 2118 Id. [↑](#footnote-ref-2120)
2120. 2119 S.D. Codified Laws section 20-9-10 (1995). [↑](#footnote-ref-2121)
2121. 2120 S.D. Codified Laws section 20-9-10.1 (1995). [↑](#footnote-ref-2122)
2122. 2121 S.D. Codified Laws sections 15-8-15.1 to -15.2 (1995). [↑](#footnote-ref-2123)
2123. 2122 S.D. Codified Laws section 21-1-4.1 (1987). [↑](#footnote-ref-2124)
2124. 2123 South Dakota Civil Pattern Jury Instructions Nos. 150-29 to -30 (1989). [↑](#footnote-ref-2125)
2125. 2124 418 S.W.2d 430 (Tenn. 1967). [↑](#footnote-ref-2126)
2126. 2125 Id. at 431 (citing Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966)). [↑](#footnote-ref-2127)
2127. 2126 503 S.W.2d 516 (Tenn. 1973). [↑](#footnote-ref-2128)
2128. 2127 541 S.W.2d 402 (Tenn. 1976). [↑](#footnote-ref-2129)
2129. 2128 Id. at 404-06. [↑](#footnote-ref-2130)
2130. 2129 Id. at 404 (citations omitted). [↑](#footnote-ref-2131)
2131. 2130 Id. at 405-06 (quoting Scanlon v. General Motors Corp., 326 A.2d 673 (N.J. 1974)). [↑](#footnote-ref-2132)
2132. 2131 712 S.W.2d 100 (Tenn. 1986). [↑](#footnote-ref-2133)
2133. 2132 Id. at 103. The Tennessee Products Liability Act of 1978 had no application to Gann because the accident occurred prior to its enactment. Id. at 103 n.1. [↑](#footnote-ref-2134)
2134. 2133 Id. at 101. [↑](#footnote-ref-2135)
2135. 2134 Id. at 104-05 (citations omitted). [↑](#footnote-ref-2136)
2136. 2135 Id. at 105. [↑](#footnote-ref-2137)
2137. 2136 Id. [↑](#footnote-ref-2138)
2138. 2137 Id. [↑](#footnote-ref-2139)
2139. 2138 Id. at 106. [↑](#footnote-ref-2140)
2140. 2139 897 S.W.2d 684 (Tenn. 1995). [↑](#footnote-ref-2141)
2141. 2140 Id. at 685. [↑](#footnote-ref-2142)
2142. 2141 Id. at 686-88 (citing McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992) (adopting modified comparative fault in Tennessee)). [↑](#footnote-ref-2143)
2143. 2142 Id. at 688-91 (citing Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973), Olney v. Beaman Bottling Co., 418 S.W.2d 430 (Tenn. 1967), and the Tennessee Products Liability Act of 1978). [↑](#footnote-ref-2144)
2144. 2143 Id. at 693. [↑](#footnote-ref-2145)
2145. 2144 Id. at 694. [↑](#footnote-ref-2146)
2146. 2145 Tenn. Code Ann. sections 29-28-101 to -108 (1980 & Supp. 1995). [↑](#footnote-ref-2147)
2147. 2146 Id. section 29-28-103. [↑](#footnote-ref-2148)
2148. 2147 Id. section 29-28-105(b). [↑](#footnote-ref-2149)
2149. 2148 Id. [↑](#footnote-ref-2150)
2150. 2149 Id. section 29-28-104. [↑](#footnote-ref-2151)
2151. 2150 Id. section 29-28-105(d). [↑](#footnote-ref-2152)
2152. 2151 Id. section 29-28-106(a). [↑](#footnote-ref-2153)
2153. 2152 Id. section 29-28-106(b). [↑](#footnote-ref-2154)
2154. 2153 Id. section 29-28-108. [↑](#footnote-ref-2155)
2155. 2154 Id. section 29-28-103(a). [↑](#footnote-ref-2156)
2156. 2155 Id. section 29-28-102(8); see Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (applying several sections of the Act). [↑](#footnote-ref-2157)
2157. 2156 Tenn. Code Ann. section 29-28-105(a) (1980). [↑](#footnote-ref-2158)
2158. 2157 See Roysden v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235-36 (6th Cir. 1988); Smith v. Detroit Marine Eng'g Corp., 712 S.W.2d 472, 474-75 (Tenn. Ct. App. 1985). [↑](#footnote-ref-2159)
2159. 2158 Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984) (discussing the Products Liability Act, yet deciding only a failure to warn issue). [↑](#footnote-ref-2160)
2160. 2159 Tenn. Code Ann. section 47-2-316(5) (1992). [↑](#footnote-ref-2161)
2161. 2160 Tenn. Code Ann. section 47-2-315 (1992). [↑](#footnote-ref-2162)
2162. 2161 8 Tennessee Practice, Pattern Jury Instructions--Civil T.P.I. 10.01 (1988). [↑](#footnote-ref-2163)
2163. 2162 416 S.W.2d 787 (Tex. 1967). A companion case, Shamrock Fuel & ***Oil*** Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967), decided the same day as McKisson, discussed the appropriate defenses to section 402A assuming the application of strict liability. [↑](#footnote-ref-2164)
2164. 2163 McKisson, 416 S.W.2d at 790. [↑](#footnote-ref-2165)
2165. 2164 519 S.W.2d 87 (Tex. 1974). [↑](#footnote-ref-2166)
2166. 2165 Id. at 92. [↑](#footnote-ref-2167)
2167. 2166 548 S.W.2d 344 (Tex. 1977). [↑](#footnote-ref-2168)
2168. 2167 Id. at 346. [↑](#footnote-ref-2169)
2169. 2168 Id. at 352. [↑](#footnote-ref-2170)
2170. 2169 Id. at 347 n.1 (citing Paige Keeton, Products Liability: The Meaning of "Defect" and the Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 568 (1969); Wade, supra note 123, at 15). [↑](#footnote-ref-2171)
2171. 2170 Id. at 351. [↑](#footnote-ref-2172)
2172. 2171 571 S.W.2d 867 (Tex. 1978). [↑](#footnote-ref-2173)
2173. 2172 Id. at 872. [↑](#footnote-ref-2174)
2174. 2173 Id. at 869. [↑](#footnote-ref-2175)
2175. 2174 Id. at 869 n.2. [↑](#footnote-ref-2176)
2176. 2175 584 S.W.2d 844 (Tex. 1979). [↑](#footnote-ref-2177)
2177. 2176 Id. at 847. [↑](#footnote-ref-2178)
2178. 2177 Id. [↑](#footnote-ref-2179)
2179. 2178 Id. at 846. [↑](#footnote-ref-2180)
2180. 2179 Id. [↑](#footnote-ref-2181)
2181. 2180 Id. at 849. [↑](#footnote-ref-2182)
2182. 2181 Id. at 849-50. [↑](#footnote-ref-2183)
2183. 2182 Id. at 851 (emphasis added) (citation omitted). [↑](#footnote-ref-2184)
2184. 2183 Turner v. General Motors Corp., 8400 Prod. Liab. Rep. (CCH) paragraph 17,981 (Tex. 1979). [↑](#footnote-ref-2185)
2185. 2184 Although the elimination of the consumer expectation test from jury instructions was clear in the majority opinion, the majority did not express a clear opinion as to its remaining vitality as evidence at trial. Turner, 584 S.W.2d at 847. However, Justice Campbell, in his concurring opinion, believed consumer expectations had been completely discarded in design defect cases. Id. at 853. [↑](#footnote-ref-2186)
2186. 2185 Id. at 847. [↑](#footnote-ref-2187)
2187. 2186 Id. at 847 n.1. [↑](#footnote-ref-2188)
2188. 2187 Id. at 847. [↑](#footnote-ref-2189)
2189. 2188 609 S.W.2d 743 (Tex. 1980). [↑](#footnote-ref-2190)
2190. 2189 Id. at 746. [↑](#footnote-ref-2191)
2191. 2190 Id. at 745. [↑](#footnote-ref-2192)
2192. 2191 Id. [↑](#footnote-ref-2193)
2193. 2192 Id. at 746-47. [↑](#footnote-ref-2194)
2194. 2193 Id. at 747. [↑](#footnote-ref-2195)
2195. 2194 Id. at 747-48. [↑](#footnote-ref-2196)
2196. 2195 Id. at 748 (citing 2 L. Frumer & M. Friedman, Products Liability section 16A[4]i (1980)). [↑](#footnote-ref-2197)
2197. 2196 Id. [↑](#footnote-ref-2198)
2198. 2197 Id. at 749. [↑](#footnote-ref-2199)
2199. 2198 Id. at 749 n.3. [↑](#footnote-ref-2200)
2200. 2199 Id. at 745-46 (emphasis added) (citations omitted). [↑](#footnote-ref-2201)
2201. 2200 Id. at 746 n.2 (citing Turner v. General Motors Corp., 584 S.W.2d 844, 849 (Tex. 1979)). [↑](#footnote-ref-2202)
2202. 2201 Id. at 746. [↑](#footnote-ref-2203)
2203. 2202 650 S.W.2d 61 (Tex. 1983). [↑](#footnote-ref-2204)
2204. 2203 Id. at 61-62. [↑](#footnote-ref-2205)
2205. 2204 Id. at 62-63. [↑](#footnote-ref-2206)
2206. 2205 Id. at 63. [↑](#footnote-ref-2207)
2207. 2206 673 S.W.2d 569 (Tex. 1984). [↑](#footnote-ref-2208)
2208. 2207 Id. at 572. [↑](#footnote-ref-2209)
2209. 2208 Id. at 573. [↑](#footnote-ref-2210)
2210. 2209 Id. at 576. [↑](#footnote-ref-2211)
2211. 2210 Id. at 573 (emphasis added). [↑](#footnote-ref-2212)
2212. 2211 Id. [↑](#footnote-ref-2213)
2213. 2212 848 S.W.2d 724 (Tex. Ct. App. 1992). [↑](#footnote-ref-2214)
2214. 2213 Id. at 729. [↑](#footnote-ref-2215)
2215. 2214 Id. at 731. [↑](#footnote-ref-2216)
2216. 2215 Id. at 732-33. [↑](#footnote-ref-2217)
2217. 2216 Id. at 732 (citing Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980)). [↑](#footnote-ref-2218)
2218. 2217 Id. (citing Turner v. General Motors Corp., 584 S.W.2d 844, 846-47 (Tex. 1979); Texas Torts & Remedies section 41.03[3]a)). [↑](#footnote-ref-2219)
2219. 2218 Id. (citations omitted). [↑](#footnote-ref-2220)
2220. 2219 Tex. Civ. Prac. & Rem. Code Ann. sections 82.001-.006 (West Supp. 1996). [↑](#footnote-ref-2221)
2221. 2220 Id. section 82.005. [↑](#footnote-ref-2222)
2222. 2221 Id. [↑](#footnote-ref-2223)
2223. 2222 Id. section 82.006. [↑](#footnote-ref-2224)
2224. 2223 Tex. Civ. Prac. & Rem. Code Ann. sections 33.011-.017 (West 1986 & Supp. 1996). [↑](#footnote-ref-2225)
2225. 2224 Tex. Civ. Prac. & Rem. Code Ann. sections 41.001-.013 (West Supp. 1996). [↑](#footnote-ref-2226)
2226. 2225 Tex. Civ. Prac. & Rem. Code Ann. section 77.003 (West Supp. 1996). [↑](#footnote-ref-2227)
2227. 2226 Tex. Civ. Prac. & Rem. Code Ann. section 16.012 (West Supp. 1996). [↑](#footnote-ref-2228)
2228. 2227 3 Texas Pattern Jury Charges 71.05 (2d ed. 1990). [↑](#footnote-ref-2229)
2229. 2228 601 P.2d 152 (Utah 1979). [↑](#footnote-ref-2230)
2230. 2229 Id. at 153-54. [↑](#footnote-ref-2231)
2231. 2230 Id. at 158-59. [↑](#footnote-ref-2232)
2232. 2231 See Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) (design case); Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991) (comment k issue). [↑](#footnote-ref-2233)
2233. 2232 642 P.2d 380 (Utah 1982). [↑](#footnote-ref-2234)
2234. 2233 Id. at 381 n.2. [↑](#footnote-ref-2235)
2235. 2234 886 P.2d 542 (Utah Ct. App. 1994). [↑](#footnote-ref-2236)
2236. 2235 Id. at 548. [↑](#footnote-ref-2237)
2237. 2236 8 F.3d 1470 (10th Cir. 1993). [↑](#footnote-ref-2238)
2238. 2237 Id. at 1479. [↑](#footnote-ref-2239)
2239. 2238 Utah Code Ann. sections 78-15-1 to -6 (1992). [↑](#footnote-ref-2240)
2240. 2239 717 P.2d 670 (Utah 1985). [↑](#footnote-ref-2241)
2241. 2240 Id. at 686. [↑](#footnote-ref-2242)
2242. 2241 Utah Code Ann. section 78-15-5 (1992). [↑](#footnote-ref-2243)
2243. 2242 Id. section 78-15-6. [↑](#footnote-ref-2244)
2244. 2243 Id. But see Grundberg v. Upjohn Co., 813 P.2d 89, 90 (Utah 1991) (holding that a drug approved by the United States Food and Drug Administration (FDA) which was "properly prepared, compounded, packaged, and distributed" could not be defective as a "matter of law" unless there was proof of "inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with FDA approval"). [↑](#footnote-ref-2245)
2245. 2244 Utah Code Ann. sections 78-18-1 to -2 (1992). [↑](#footnote-ref-2246)
2246. 2245 Utah Code Ann. section 26-31-1 (1995). [↑](#footnote-ref-2247)
2247. 2246 Utah Code Ann. sections 78-27-37 to -43 (1992 & Supp. 1995). [↑](#footnote-ref-2248)
2248. 2247 Model Utah Jury Instructions--Civil MUJI 12.4 (1993 ed.). [↑](#footnote-ref-2249)
2249. 2248 Id. at MUJI 12.5. [↑](#footnote-ref-2250)
2250. 2249 333 A.2d 110 (Vt. 1975). [↑](#footnote-ref-2251)
2251. 2250 Id. at 111. [↑](#footnote-ref-2252)
2252. 2251 Id. at 115. [↑](#footnote-ref-2253)
2253. 2252 373 A.2d 505 (Vt. 1977). [↑](#footnote-ref-2254)
2254. 2253 Id. at 507. [↑](#footnote-ref-2255)
2255. 2254 Id.; see also McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995) (involving a failure to warn claim). [↑](#footnote-ref-2256)
2256. 2255 See Ostrowski v. Hydra-Tool Corp., 479 A.2d 126 (Vt. 1984) (repeating consumer expectation test for warning defects). [↑](#footnote-ref-2257)
2257. 2256 John M. Dinse et al., Vermont Jury Instructions section 7.24 (1994). [↑](#footnote-ref-2258)
2258. 2257 See Lust v. Clark Equip. Co., 792 F.2d 436 (4th Cir. 1986); St. Jane v. Heidelberger Druckmaschinen A.G., 816 F. Supp. 424 (E.D. Va. 1993). [↑](#footnote-ref-2259)
2259. 2258 Va. Code Ann. section 8.01-38.1 (Michie 1992). [↑](#footnote-ref-2260)
2260. 2259 Va. Code Ann. section 8.01-418.1 (Michie 1992). [↑](#footnote-ref-2261)
2261. 2260 Va. Code Ann. section 32.1-297 (Michie 1992). [↑](#footnote-ref-2262)
2262. 2261 452 P.2d 729 (Wash. 1969). [↑](#footnote-ref-2263)
2263. 2262 Id. at 730. [↑](#footnote-ref-2264)
2264. 2263 542 P.2d 774 (Wash. 1975). [↑](#footnote-ref-2265)
2265. 2264 Id. at 776. [↑](#footnote-ref-2266)
2266. 2265 Id. at 777-79. [↑](#footnote-ref-2267)
2267. 2266 Id. at 779. [↑](#footnote-ref-2268)
2268. 2267 See Keeton et al., supra note 109. [↑](#footnote-ref-2269)
2269. 2268 Id. [↑](#footnote-ref-2270)
2270. 2269 Tabert, 542 P.2d at 779. [↑](#footnote-ref-2271)
2271. 2270 Id. (quoting Brown v. Quick Mix Co., 454 P.2d 205, 208 (Wash. 1969)). [↑](#footnote-ref-2272)
2272. 2271 664 P.2d 1208 (Wash. 1983). [↑](#footnote-ref-2273)
2273. 2272 Id. at 1211. [↑](#footnote-ref-2274)
2274. 2273 Id. at 1212. [↑](#footnote-ref-2275)
2275. 2274 Id. [↑](#footnote-ref-2276)
2276. 2275 Id. [↑](#footnote-ref-2277)
2277. 2276 See infra notes 2289-95 and accompanying text. [↑](#footnote-ref-2278)
2278. 2277 683 P.2d 1097 (Wash. 1984). [↑](#footnote-ref-2279)
2279. 2278 Id. at 1098. [↑](#footnote-ref-2280)
2280. 2279 Id. [↑](#footnote-ref-2281)
2281. 2280 Id. at 1099 (citations omitted). [↑](#footnote-ref-2282)
2282. 2281 Id. at 1099-1100 (citations omitted). [↑](#footnote-ref-2283)
2283. 2282 Id. at 1100 (quoting Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969)). [↑](#footnote-ref-2284)
2284. 2283 Id. (quoting Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 835 (Iowa 1978)) (citations omitted). [↑](#footnote-ref-2285)
2285. 2284 Id. (citations omitted). [↑](#footnote-ref-2286)
2286. 2285 Id. at 1100-01 (citation omitted). [↑](#footnote-ref-2287)
2287. 2286 See infra notes 2289-95 and accompanying text. [↑](#footnote-ref-2288)
2288. 2287 728 P.2d 585 (Wash. 1986). [↑](#footnote-ref-2289)
2289. 2288 Id. at 588-89. [↑](#footnote-ref-2290)
2290. 2289 1981 Wash. Laws ch. 27 section 1. [↑](#footnote-ref-2291)
2291. 2290 Wash. Rev. Code Ann. sections 7.72.010-.060 (West 1992). [↑](#footnote-ref-2292)
2292. 2291 Id. section 7.72.030(1). [↑](#footnote-ref-2293)
2293. 2292 Id. section 7.72.030(1)(a). [↑](#footnote-ref-2294)
2294. 2293 Id. section 7.72.040. [↑](#footnote-ref-2295)
2295. 2294 Id. section 7.72.050. [↑](#footnote-ref-2296)
2296. 2295 Id. section 7.72.060. [↑](#footnote-ref-2297)
2297. 2296 728 P.2d 585 (Wash. 1986). [↑](#footnote-ref-2298)
2298. 2297 Id. at 586. [↑](#footnote-ref-2299)
2299. 2298 Id. [↑](#footnote-ref-2300)
2300. 2299 Id. [↑](#footnote-ref-2301)
2301. 2300 Id. at 589 (citing Phillip A. Talmadge, Washington's Product Liability Act, 5 U. Puget Sound L. Rev. 1 (1981)). [↑](#footnote-ref-2302)
2302. 2301 Id. [↑](#footnote-ref-2303)
2303. 2302 Id. at 589 n.5. [↑](#footnote-ref-2304)
2304. 2303 Id. [↑](#footnote-ref-2305)
2305. 2304 Id. at 587 (emphasis added). [↑](#footnote-ref-2306)
2306. 2305 Id. [↑](#footnote-ref-2307)
2307. 2306 Id. at 589-90. [↑](#footnote-ref-2308)
2308. 2307 Id. at 590. [↑](#footnote-ref-2309)
2309. 2308 Id. [↑](#footnote-ref-2310)
2310. 2309 Id. [↑](#footnote-ref-2311)
2311. 2310 782 P.2d 974 (Wash. 1989). [↑](#footnote-ref-2312)
2312. 2311 Id. at 975. [↑](#footnote-ref-2313)
2313. 2312 Id. at 976. [↑](#footnote-ref-2314)
2314. 2313 Id. [↑](#footnote-ref-2315)
2315. 2314 Id. at 975. [↑](#footnote-ref-2316)
2316. 2315 Id. at 980. [↑](#footnote-ref-2317)
2317. 2316 Id. at 981 n.4 (quoting Washington Pattern Jury Instructions--Civil 110.02 (3d ed. 1989)). [↑](#footnote-ref-2318)
2318. 2317 In his concurring opinion, Justice Anderson summarized the court's holding in this manner. Id. at 983. [↑](#footnote-ref-2319)
2319. 2318 818 P.2d 1337 (Wash. 1991). [↑](#footnote-ref-2320)
2320. 2319 Id. at 1339. [↑](#footnote-ref-2321)
2321. 2320 Id. [↑](#footnote-ref-2322)
2322. 2321 Id. [↑](#footnote-ref-2323)
2323. 2322 Id. [↑](#footnote-ref-2324)
2324. 2323 Id. [↑](#footnote-ref-2325)
2325. 2324 Id. at 1344-45. [↑](#footnote-ref-2326)
2326. 2325 Id. [↑](#footnote-ref-2327)
2327. 2326 Id. at 1343 (quoting Wash. Rev. Code Ann. section 7.72.030(1)(b)). [↑](#footnote-ref-2328)
2328. 2327 Id. (quoting Wash. Rev. Code Ann. section 7.72.030(3)). [↑](#footnote-ref-2329)
2329. 2328 Id. at 1340. [↑](#footnote-ref-2330)
2330. 2329 Id. at 1340-41. [↑](#footnote-ref-2331)
2331. 2330 Id. at 1341. [↑](#footnote-ref-2332)
2332. 2331 Id. [↑](#footnote-ref-2333)
2333. 2332 Id. at 1341-42. [↑](#footnote-ref-2334)
2334. 2333 Id. at 1342. [↑](#footnote-ref-2335)
2335. 2334 Id. [↑](#footnote-ref-2336)
2336. 2335 Id. [↑](#footnote-ref-2337)
2337. 2336 Id. at 1342-43. [↑](#footnote-ref-2338)
2338. 2337 Id. at 1344-45. [↑](#footnote-ref-2339)
2339. 2338 Id. at 1345 (citations omitted). [↑](#footnote-ref-2340)
2340. 2339 Id. at 1346. [↑](#footnote-ref-2341)
2341. 2340 The Court of Appeals of Washington has held that a plaintiff may use either the risk-utility analysis or the consumer expectation standard to show that a product is unreasonably designed. Bruns v. Paccar, Inc., 890 P.2d 469 (Wash. Ct. App. 1995). [↑](#footnote-ref-2342)
2342. 2341 Ayers, 818 P.2d at 1345. [↑](#footnote-ref-2343)
2343. 2342 See supra notes 2265-67 and accompanying text. [↑](#footnote-ref-2344)
2344. 2343 See supra notes 2265-70 and accompanying text. [↑](#footnote-ref-2345)
2345. 2344 See supra notes 2267-68 and accompanying text. [↑](#footnote-ref-2346)
2346. 2345 See supra note 2266 and accompanying text. The Tabert court says "a number of factors must be considered" and later says "in other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue." Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774 (Wash. 1975). [↑](#footnote-ref-2347)
2347. 2346 Wash. Rev. Code Ann. sections 4.22.005-.070 (West 1988 & Supp. 1996). [↑](#footnote-ref-2348)
2348. 2347 Section 4.56.250 which limited noneconomic damages was declared unconstitutional in Sophie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989). See Wash. Rev. Code Ann. section 4.56.250 (West Supp. 1996). Section 4.56.260 which provides for periodic payments for future economic damages exceeding $ 100,000 remains in effect. Wash. Rev. Code Ann. section 4.56.260 (West 1988). [↑](#footnote-ref-2349)
2349. 2348 Wash. Rev. Code Ann. section 70.54.120 (West 1992). [↑](#footnote-ref-2350)
2350. 2349 Washington Pattern Jury Instructions--Civil WPI 110.02 (3d ed. 1994). [↑](#footnote-ref-2351)
2351. 2350 253 S.E.2d 666 (W. Va. 1979). [↑](#footnote-ref-2352)
2352. 2351 Id. at 668. [↑](#footnote-ref-2353)
2353. 2352 Id. at 684. [↑](#footnote-ref-2354)
2354. 2353 Id. at 677. [↑](#footnote-ref-2355)
2355. 2354 Id. at 680. [↑](#footnote-ref-2356)
2356. 2355 Id. at 682. [↑](#footnote-ref-2357)
2357. 2356 Id. [↑](#footnote-ref-2358)
2358. 2357 Id. at 682-83. [↑](#footnote-ref-2359)
2359. 2358 Id. at 684. [↑](#footnote-ref-2360)
2360. 2359 385 S.E.2d 393 (W. Va. 1989). [↑](#footnote-ref-2361)
2361. 2360 Id. at 394. [↑](#footnote-ref-2362)
2362. 2361 Id. at 396 (quoting Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979)). [↑](#footnote-ref-2363)
2363. 2362 Id. (quoting Chase v. General Motors Corp., 856 F.2d 17, 20 (4th Cir. 1988)). [↑](#footnote-ref-2364)
2364. 2363 406 S.E.2d 781 (W. Va. 1991). [↑](#footnote-ref-2365)
2365. 2364 438 S.E.2d 28 (W. Va. 1993). [↑](#footnote-ref-2366)
2366. 2365 Id. at 336-40. [↑](#footnote-ref-2367)
2367. 2366 Id. at 37. [↑](#footnote-ref-2368)
2368. 2367 Id. at 37 n.5. [↑](#footnote-ref-2369)
2369. 2368 See generally Morningstar v. Black Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979). [↑](#footnote-ref-2370)
2370. 2369 W. Va. Code section 16-23-1 (1995). [↑](#footnote-ref-2371)
2371. 2370 155 N.W.2d 55 (Wis. 1967). [↑](#footnote-ref-2372)
2372. 2371 Id. at 63. [↑](#footnote-ref-2373)
2373. 2372 Id. at 64. [↑](#footnote-ref-2374)
2374. 2373 Id. at 63. This standard for the establishment of strict liability was reaffirmed by the Supreme Court of Wisconsin in Bittner v. American Honda Motor Co., 533 N.W.2d 476 (Wis. 1995), where the plaintiff's product liability action was based on both a negligence theory, for which the relevant test is whether the conduct foreseeably creates an unreasonable risk to others, and a strict liability theory. Bittner, 533 N.W.2d at 486. [↑](#footnote-ref-2375)
2375. 2374 225 N.W.2d 431 (Wis. 1975). [↑](#footnote-ref-2376)
2376. 2375 Id. at 435. [↑](#footnote-ref-2377)
2377. 2376 360 N.W.2d 2 (Wis. 1984). [↑](#footnote-ref-2378)
2378. 2377 Id. at 15. [↑](#footnote-ref-2379)
2379. 2378 Id. (quoting Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 797-98 (1975)). [↑](#footnote-ref-2380)
2380. 2379 Id. [↑](#footnote-ref-2381)
2381. 2380 Id. at 15-16 (citations omitted). [↑](#footnote-ref-2382)
2382. 2381 Id. at 16 (emphasis omitted). [↑](#footnote-ref-2383)
2383. 2382 Id. [↑](#footnote-ref-2384)
2384. 2383 Id. (quoting Huddell v. Levin, 537 F.2d 726, 737 (3d Cir. 1976)). [↑](#footnote-ref-2385)
2385. 2384 Id. at 16-17 (quoting Collins v. Rodge Tool Co., 520 F.2d 591, 594 (7th Cir. 1975)). [↑](#footnote-ref-2386)
2386. 2385 466 N.W.2d 897 (Wis. 1991). [↑](#footnote-ref-2387)
2387. 2386 Id. at 902. [↑](#footnote-ref-2388)
2388. 2387 Wis. Stat. Ann. section 146.31 (West 1989). [↑](#footnote-ref-2389)
2389. 2388 Wis. Stat. Ann. section 895.045 (West Supp. 1995). [↑](#footnote-ref-2390)
2390. 2389 Wis. Stat. Ann. section 895.85 (West Supp. 1995). [↑](#footnote-ref-2391)
2391. 2390 3 Wisconsin Jury Instructions--Civil 3260 (1995). [↑](#footnote-ref-2392)
2392. 2391 716 P.2d 334 (Wyo. 1986). [↑](#footnote-ref-2393)
2393. 2392 Id. at 344 (citing Restatement (Second) of Torts section 402A (1965)). [↑](#footnote-ref-2394)
2394. 2393 751 P.2d 357 (Wyo. 1988). [↑](#footnote-ref-2395)
2395. 2394 Id. at 359. [↑](#footnote-ref-2396)
2396. 2395 Id. at 365. [↑](#footnote-ref-2397)
2397. 2396 Id. [↑](#footnote-ref-2398)
2398. 2397 Id. [↑](#footnote-ref-2399)
2399. 2398 Id. [↑](#footnote-ref-2400)
2400. 2399 It was argued in 1991 that the legislative change in Wyoming statute section 1-1109, which deals with allocation and apportionment of the word "fault" to "negligence" was intended to extend the statute into warranty and strict liability; however, the Supreme Court of Wisconsin held that the statute could not be "extended from its express and intended arena of negligence" by either statutory interpretation or common law extension. Phillips v. Duro-Last Roofing, 806 P.2d 834 (Wyo. 1991). [↑](#footnote-ref-2401)
2401. 2400 Wyo. Stat. section 35-5-110 (1994); Wyo. Stat. section 34.1-2-316 (1991). [↑](#footnote-ref-2402)
2402. 2401 Id. section 34.1-2-316. [↑](#footnote-ref-2403)
2403. 2402 Wyo. Stat. section 1-1-109 (Supp. 1995). [↑](#footnote-ref-2404)
2404. 2403 Wyoming Civil Pattern Jury Instructions No. 11.07 cmt. at 83 (1994) remains blank because the Committee is "so sharply divided on a proper form of instruction on design defect that no instruction was submitted." [↑](#footnote-ref-2405)