Elimination of "Unreasonably Dangerous" from § 402A - The Price of Consumer Safety?

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Comments

Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?

I hope that in some way [absolute liability] can be limited to food, on the theory . . . that food is a special kind of animal . . .

However, when you extend that to cases involving machinery and appliances and cook stoves, where there are both property and personal damage . . . . I hope we are not going to get something in the Restatement that will permit the court to instruct the jury that all the plaintiff needs to prove is that the product was defective, and that contributory negligence on his part is no defense because this is absolute liability.¹

A typical plaintiff who has been injured from the use of a "defective" product will bring his action under the alternative theories of negligence, breach of express and implied warranty, and strict liability. This shotgun approach comes at a time when courts, once seemingly content with Restatement (Second) of Torts § 402A's version of strict tort liability, are groping toward a more consumer-oriented standard. One result of this judicial consumerism has been a change in the plaintiff's initial burden of proof: in some states the requirement that a plaintiff prove injury from the use of a product in a "defective condition unreasonably dangerous," has been pared down to proof of injury from the use of a "defective" product. Elimination of "unreasonably dangerous," a change at first glance both innocuous and purely academic, has caused and will cause further confusion in design defect and failure to warn cases. Without the "unreasonably dangerous" qualification to provide a standard for what is "defective," courts explore the thin line between strict and absolute liability.

In the foreground of this substantive change are the policy bases for imposition of strict liability. These bases, while giving courts the freedom to discard the doctrine of caveat emptor, are also reflective

¹. 38 ALI PROCEEDINGS 80 (1961) (Mr. Alan Loth).
of a paternalism that may ultimately work to the disadvantage of the consumer. It is to the problems posed by the elimination of the "unreasonably dangerous" concept that this comment is addressed.

I. BACKGROUND TO § 402A

A. Early History

In the mid-eighteen hundreds, a person injured by a product was without a remedy in either contract or tort unless he could show one of the following: (a) privity of contract;² (b) fraudulent misrepresentations on the part of the defendant;³ or (c) negligence in the manufacture of an "inherently dangerous product." A wide variety of objects were soon characterized as "inherently dangerous,"⁵ until MacPherson v. Buick Motor Co.⁶ paved the way for negligence liability without proof of privity between manufacturer and remote vendee.⁷ To replace the necessity for showing vertical privity, MacPherson proposed two requirements for imposition of tort liability: (1) the nature of the article must be such as to threaten "probable" physical injury to the user if negligently made; and (2) there must be knowledge that the article will be used without inspection by persons other than the purchaser.⁸ The major factor influencing the decision was the invitation to public use by the product's presence on the open market; foresight that persons other than the immediate purchaser would use the product imposed a duty of reasonable care towards them.⁹

Even after MacPherson had eliminated the vertical privity requirement, the burden of proving defendant's negligence remained. Sustaining this burden was often impossible since the ordinary consumer is not well versed in manufacturing techniques, and lacks

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4. Thomas v. Winchester, 6 N.Y. 397 (1852).
6. 217 N.Y. 382, 111 N.E. 1050 (1916) (automobile manufacturer found liable to purchaser of automobile who was injured by the collapse of a wheel manufactured by another).
7. For an analysis of this development, see E. Levi, An Introduction to Legal Reasoning 8-127 (1949).
access to defendant's premises and records. The doctrine of *res ipsa loquitur* alleviated this burden somewhat, but it was of no use in a suit against a wholesaler or retailer.\textsuperscript{10} Furthermore, the plaintiff's assertions could be countered by evidence of defendant's due care, or of plaintiff's contributory negligence.

Of particular public concern at this time were cases involving injury from adulterated food. To circumvent the burden of showing negligence, courts began to experiment with fictions that would impose liability without regard to either privity of contract or fault of the defendant. These included:\textsuperscript{11} the intermediate dealer as agent for either consumer or seller; the consumer as assignee of the seller's warranty to the dealer; the consumer as third party beneficiary of the contract between seller and dealer; and the article's presence in the market as creating an implied warranty of fitness for human consumption. These fictions were ultimately replaced by a concept of warranty running with the goods similar to a covenant running with the land.\textsuperscript{12} After discarding the requirements of showing privity and negligence when dealing with adulterated food, the courts proceeded along the same lines when dealing with articles for intimate bodily use.\textsuperscript{13} Finally, in the 1950's, courts began to extend the implied warranty rationale to impose liability for injury from any product.\textsuperscript{14}

**B. Escola v. Coca Cola Bottling Co.**

It was thus in principles that have become primarily associated with contract and sales law that strict tort liability had its origin. Yet, the substitution of contract language for that of negligence brought problems of its own. These problems were both substantive and procedural, involving notions of reliance, expectations, notice, and disclaimer.\textsuperscript{15}

\textsuperscript{10} See generally Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462-63, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960) [hereinafter cited as *The Assault*].

\textsuperscript{11} These legal fictions are recounted in *Restatement (Second) of Torts* § 402A (1965) [hereinafter cited as § 402A]; id. comment b.


\textsuperscript{13} See note 28 infra.

\textsuperscript{14} The principal case during this time was Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (wife of automobile purchaser allowed to recover from the manufacturer and dealer for injuries sustained while driving the car).

\textsuperscript{15} *The Assault*, supra note 10, at 1127-33.
Justice Traynor, in his concurring opinion in *Escola v. Coca Cola Bottling Co.*,\(^{16}\) attempted to rid the courts of these concepts associated with contract law by placing strict liability solely in tort.\(^{17}\) Expanding on the expression of policy in *MacPherson*,\(^{18}\) Traynor's analysis presumed the manufacturer to be the guarantor of its product's safety:\(^{19}\) not only is there an implied representation of safety when the defendant invites another to use a product,\(^{20}\) but the plaintiff is at the mercy of the manufacturer and unprepared to meet the consequences of injury.\(^{21}\) Underlying this reasoning were two assumptions: (1) the manufacturer can more easily absorb a loss than can the injured plaintiff; and (2) the imposition of strict liability will effectively deter production of dangerous products.\(^{22}\)


It was not until eighteen years later that the California Supreme Court's majority decision in *Greenman v. Yuba Power Products, Inc.*,\(^{23}\) pronounced an independent strict liability in tort, thereby paving the way for the Restatement (Second) of Torts § 402A. The *Greenman rule*, as it has since been labeled,\(^{24}\) was stated by Justice Traynor:


\(^{18}\) See text accompanying note 6 supra.

\(^{19}\) *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944):

Judge Cardozo's reasoning [in the *MacPherson* case] recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.

*Id.* at 465, 150 P.2d at 442 (Traynor, J., concurring). See *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975) (manufacturer is the guarantor of its product's safety); but cf. *id.* at 900 (requiring a finding of defectiveness meant to prevent the manufacturer from becoming an insurer).


\(^{21}\) *Id.* at 467, 150 P.2d at 443.

\(^{22}\) *Id.* at 461-62, 150 P.2d at 440-41.

\(^{23}\) *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (plaintiff, who received a defectively designed power tool as a gift, allowed to recover from retailer and manufacturer for injuries resulting from its use).

\(^{24}\) *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 130, 501 P.2d 1153, 1160, 104 Cal. Rptr. 433, 440 (1972).
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.\textsuperscript{25}

Although the \textit{Greenman rule} rests on two arguments raised by Justice Traynor in \textit{Escola}—implied representation of safety and the manufacturer as a better risk spreader than plaintiff\textsuperscript{26}—it may be significant in terms of scope of liability that no mention of the deterrent effect of strict liability was made.\textsuperscript{27}

The current version of \textsection 402A was adopted in 1965,\textsuperscript{28} and until recently it had been assumed that the \textit{Greenman rule} and \textsection 402A were identical.\textsuperscript{29} But in 1972, the California Supreme Court declared that the "unreasonably dangerous" requirement of \textsection 402A had never had a place in California's strict product liability.\textsuperscript{30} Other courts followed suit.\textsuperscript{31} In these states, the requirement of proving

\begin{footnotesize}
26. Id. at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
27. See text accompanying note 58 \textit{infra}.
\begin{quote}
\textsection 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
\end{quote}
product defectiveness and proximate causation are arguably the only elements that prevent the imposition of absolute liability.

II. CONTRASTING APPROACHES OF COMMERCIAL AND TORT LAW

A. Differing Policies

A discussion of the importance of the "unreasonably dangerous" requirement is not limited to a consideration of the Greenman rule and § 402A, for the warranty background of product liability also brings into consideration the Uniform Commercial Code (UCC). While one of the purposes of § 402A was to circumvent the procedural limitations of sales law where physical injuries were treated as "consequential damages," once both the statutory commercial rule and the common law tort rule were in existence, they were construed as representing identical standards. In actions for breach of implied warranty, the existence of § 402A was first used to justify elimination of vertical privity, and then of horizontal privity. The elimination of these privity requirements was then used to buttress the argument for discarding the "unreasonably dangerous" requirement of § 402A. Thus, although the need for a strict liability in tort initially justified § 402A, the similarity of tort and sales law resulted in the convergence and dilution of the standards enunciated in § 402A and the UCC.

There is, however, a clear need for both contract and tort concepts to temper the inclination now present towards absolute liability. Initially, it is important to recognize the different policies underlying § 402A and the UCC, since these differences will ultimately define the scope of liability which a court will be willing to impose.

the defect rendered the product unreasonably dangerous, he must show the existence of privity of contract to maintain a breach of warranty claim).

32. See text accompanying note 25 supra.
33. See note 28 supra.
39. See Boshkoff, Some Thoughts About Physical Harm, Disclaimers and Warranties, 4
In the commercial setting, the concern is for the protection of the reasonable expectations of the ignorant consumer by preventing oppression and unfair surprise. The UCC comments expressly reject the rationale of "risk allocation" premised on the consumer's inferior bargaining position. The UCC's stated purpose of preventing oppression and unfair surprise involves the consideration of the quality of the product and the minimum standards to which the manufacturer is held.

In contrast, § 402A is largely premised on the theory that the manufacturer who marketed the defective product can treat strict liability as a cost of doing business. This policy of placing the risk on the one best able to absorb the cost is an economic justification, dealing only tangentially with the quality of the product. Without implied standards of consumer expectations to guide product quality, the policy of risk allocation can result in the imposition of liability without regard to either fault or defectiveness.

The different expectations which each theory of liability was intended to protect may account for their diverging policy bases. While the UCC had its origins in commercial transactions where a consumer might accept the risk of receiving a lower quality product, § 402A had its origin in cases involving adulterated foods where a consumer would not expect to take such a risk.

B. Production and Design Defects

Product liability has gone far beyond the cases of faulty manufac-


40. UNIFORM COMMERCIAL CODE § 2-313, Comment 4; id. § 2-316, Comment 1. See also Jones v. Bright, 130 Eng. Rep. 1167, 1169-70 (1829).

41. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

42. Section 402A, supra note 11, comment c. In 1941, the Commissioners for the Uniform Sales Act, the precursor of the UCC, experimented with a draft that was similar to § 402A, and that had much the same policy rationale. REvised UNIFORM SALES ACT § 16-B at 125 (2d draft 1941). The rejection of this section by the Commissioners indicates not only an awareness of the problems presented by approaching product liability through uniform legislation, see Titus, supra note 34, at 757; it also indicates the recognition that risk allocation is an inappropriate theory with which to deal with problems of the marketplace.


44. See Seely v. White Motor Co., 63 Cal. 2d 9, 15, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965); Boshkoff, supra note 39, at 293-94.
turing, an area where an absolute liability standard may be justifiably applied. However, when a product causes injury because of a design problem, considerations other than consumer safety must come into play. The reason for this lies in the distinction between manufacturing and design "defects."

The result of a manufacturing defect is a flawed product, something other than that intended by the manufacturer. Such a defect is peculiar to but a few individual products, and can often be remedied by replacing the product with one without flaws. In contrast, a design choice, whether deliberate or inadvertent, is exactly what was intended by the manufacturer. The term "defect," since it implies a deviation from the norm, is inappropriate for design cases in which the defective design is the norm. Correction of such a defect involves more than merely replacing it with another product of the same make. Correction requires cancellation of a model's production or the complete replacement of one model with another of a different design. Included in this replacement are additional costs such as those for redesigning, advertising, and purchasing of new equipment and different materials, with a strong temptation to reduce quality of workmanship and materials in order to minimize lost profits.

It is in the design area that the policy basis underlying commercial transactions—protection of the consumer's expectations through prevention of unfair surprise—must be used to temper the

45. In many cases involving production defects, something approaching an absolute liability has been imposed through application of the negligence principle of res ipsa loquitur. See Rheingold, Proof of Defect in Product Liability Cases, 38 Tenn. L. Rev. 325, 326 n.5 (1971).

46. Professor Henderson argues that review of a manufacturer's conscious design choice lies beyond the scope of adjudication. Any attempt to set safety standards in this area would expose the courts to the confusion that comes in juggling both technological and social tradeoffs. Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531 (1973) [hereinafter cited as Henderson]. It has also been argued that the plaintiff's technological disadvantage makes adjudication of conscious design choices impractical. Donaher, Piehler, Twerski, Weinstein, The Technological Expert in Products Liability Litigation, 52 Texas L. Rev. 1303, 1316 n.40 (1974) [hereinafter cited as Donaher]. It would seem, however, that there is a role for consumer input via adjudication into conscious design choices, if it be only to determine whether, given the dangers posed by the design, the product should be manufactured and marketed at all.


recent inclination of courts towards the adoption of absolute liability premised on risk allocation. If strict liability in tort is not to become absolute liability, the policy must focus on the consumer's interaction with the total product, rather than on consumer safety in a vacuum.

Those courts which do not distinguish between manufacturing and design defects fail to recognize the role of the underlying policies in limiting liability. Risk allocation may be appropriate when injury is caused by a production defect; but when the question involves the safety of a product's design, both risk allocation and consumer expectations must be considered. The word "defect" cannot serve as a substitute for the needed policy considerations. This is especially true when the only standard for defectiveness is drawn from "useful precedents." By producing an "I know it when I see it" approach to what is defective, this "standard" leads to the tempting but circuitous argument "if it caused injury, it must be defective."

Product liability involves a censuring of the product rather than of the manufacturer's actions. Although the requirement of defectiveness in strict tort liability was meant to replace fault as a means of limiting a defendant's liability, both terms interact; the concept of fault cannot be abolished without subjecting the manufacturer to unlimited liability. Implicit in the impugning of the product is a

49. See, e.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) ("[a] defect may emerge from the mind of the designer as well as from the hand of the workman").

50. Id. at 134 n.16, 501 P.2d at 1162 n.16, 104 Cal. Rptr. at 442 n.16, quoting Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 373 (1965) [hereinafter cited as Traynor].

51. Donaher, supra note 46, at 1306.

52. See Newmark v. Gimbel's, Inc., 54 N.J. 585, 595, 258 A.2d 697, 702 (1969) (a product which is defective and causes physical harm is by definition unreasonably dangerous). This development can be compared to that of the "inherently dangerous product." See text accompanying note 7 supra.


censuring of its maker. But neither product nor producer should be impugned unless a better product was both technologically feasible and marketable. What is needed is a policy that focuses on both human safety and the product's place in the market. Neither § 402A's "risk allocation" nor the UCC's "commercial expectations" can accomplish this individually. However, both policies seem to be combined in the context of tort law in the deterrent theory of strict liability, mentioned by Justice Traynor in *Escola*. Although the deterrent theory does not answer the question of whether the product is in fact defective, it does suggest that the manufacturer should bear the risk because he occupies the better position of foreseeing and guarding against harm. Inherent in this rationale is the assurance that liability will not be imposed unless: (a) a better product was feasible at the time of production, or (b) the risk is so great that the product, if it cannot be altered, should not have been marketed at all.

The growth of strict tort liability was influenced by a desire to circumvent the ideas of privity, notice, and disclaimer associated with sales law, and to ground strict liability in tort. But ironically, the only term with a tort flavor has been eliminated from § 402A, leaving a term grounded in contract law to define the scope of liability.

57. See Garst v. General Motors Corp., 207 Kan. 2, 21, 484 P.2d 47, 61 (1971) (in determining whether there was negligence in design, the jury must consider "whether others in the field are using the same design, or a safer design . . . [and] whether a safer design not yet in use is known to be feasible"); McCormack v. Hanksraft Co., 278 Minn. 322, 331, 154 N.W.2d 488, 495-96 (1967).
60. Boshkoff, *supra* note 39, at 298; *The Assault*, *supra* note 10, at 1134; § 402A, *supra* note 11, comment m.
61. The case of Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), decided the same day as Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), replaced the contract term "awareness" which was contained in the *Greenman rule* (see text accompanying note 25 supra), with tort language of assumption of risk. In contrast, the court in *Cronin* did not even acknowledge the difficulties of limiting strict tort liability with a contract term. Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 *Hofstra L. Rev.* 455, 464 (1974) [hereinafter cited as Wade, *Justice Traynor*]. Now, particularly in the area of design problems, the issue has become one of
C. Breach of Implied Warranty as a Guide to Defectiveness

As shown above, defining "design defect" as a deviation from the norm is unsatisfactory, since the design is the norm. In an attempt to delimit "defect," courts are again relying on warranty. And despite protestations that it is "a very different kind of warranty from those usually found in the sale of goods," the differences are not readily apparent. Many courts have turned to the UCC which offers two guidelines: one of implied warranty of merchantability which sets a minimum standard, i.e., the article must be "fit for the ordinary purposes for which such goods are used," and one of fitness for a particular purpose, a more subjective standard, i.e., the article must be fit for its intended use. Some courts and commentators have agreed that "defective" under § 402A is the converse of "merchantable" under UCC § 2-314. But other courts, whether intentionally or inadvertently, have characterized defective as "unfit for intended use."
The importance of which warranty, if either, should be used as a model for product liability, is best illustrated in the case of Seely v. White Motor Co. A truck purchased for use in plaintiff’s business of heavy-duty hauling was found to have a condition known as “galloping,” a condition which can result in a loss of control during braking. Eleven months after purchase, and after several unsuccessful repair attempts, the brakes failed and the truck overturned. The owner-operator was not physically injured. An action was brought under theories of breach of express warranty and strict liability to recover (1) repair loss caused by the accident, (2) money advanced toward the purchase price of the truck, and (3) lost profits caused by inability to make further use of the truck. The trial court awarded plaintiff his lost profits and money paid on the purchase price under breach of express warranty, but due to plaintiff’s inability to prove that the defect that had caused the galloping was responsible for the accident, he did not recover the repair expenses.

On appeal, Chief Justice Traynor went out of his way to explain why the Greenman rule would be inappropriate for recovering repair expenses even if causation could be proved: warranty is limited to commercial transactions while strict tort liability is meant to cover physical injuries. Underlying this distinction are notions of the meaning of “defective,” and of the function of the marketplace. Traynor’s analysis assumed that the presence of a defect is synonymous with lack of fitness for intended use. His concern was that application of strict tort liability to a commercial setting would impose liability for the product’s failure to meet plaintiff’s specific business needs and economic expectations. Liability for failure to
meet plaintiff's economic expectations is appropriate when dis-
claimers are allowed and where expectations are more clearly deter-
mined by consensus. But strict tort liability's elimination of dis-
claimers was meant to prohibit the manufacturer from limiting the
scope of his liability. To impose liability for failure to meet plain-
tiff's subjective economic expectations while not allowing the defen-
dant an active role in limiting those expectations, could expose the
defendant to unlimited liability.76

There is an indication that the more liberal definition of defective
as "unmerchantable" would not have influenced Traynor's distinc-
tion. Santor v. A & M Karagheusian, Inc.,77 which the California
court expressly disapproved,78 applied this standard and found for
the plaintiff in strict liability.79 In Santor, the plaintiff bought a
carpet, sold as "Grade #1," which was defective due to faulty manu-
facturing. The trial court awarded plaintiff the difference between
the purchase price and the actual value of the carpet at the time
he knew of or should have discovered the defect. Although the trial
court's finding was for breach of implied warranty of merchantabil-
ity, the supreme court found for plaintiff in tort. More importantly,
the court in Santor defined "defect" merely in terms of breach of
implied warranty of merchantability.80 No attempt was made to
limit the scope of either "defect" or "merchantable" in the context
of tort law.81 Instead, "defect" was left to be defined solely with
reference to the open-ended rationale of enterprise liability.82

The Santor case perhaps best illustrates that limitation of liabil-
ity is not a matter of semantics. Without a limiting policy, both
fitness for ordinary use and fitness for intended use are easily
twisted to focus entirely on the plaintiff's economic expectations
rather than on the condition of the product. This is not meant to

76. Id. at 16-18, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23. See also Boshkoff, supra note 39, at 299.
77. 44 N.J. 52, 207 A.2d 305 (1965).
rejected the "unreasonably dangerous" standard of § 402A, it is interesting to note that this
standard played no role eight years before in the case of Santor v. A & M Karagheusian, Inc.,
81. Id.
82. Id. at 63-67, 207 A.2d 305, 311-13.
deny the importance of contract terms in the field of strict tort liability. Rather, it is meant to illustrate the importance of recognizing that principles from both tort and contract figure into the concept of product liability.

Greenman was meant primarily as a rejection of the defenses available under sales law, not as a rejection of its substantive aspects. Accordingly, the statement that the defect render the product "unsafe for its intended use" was added to place the warranty more firmly in tort. It is clear from the Seely case that Chief Justice Traynor was reluctant to abandon sales law warranties. Traynor's objection to Santor was in its imposition of strict liability in the absence of both physical harm and a condition making the product "unsafe for use." In Traynor's view, strict liability in tort is somewhat of a hybrid; to sales law's implied warranties of merchantability and fitness for intended use he added the element of physical danger. This addition qualifies plaintiff's ability to recover for mere economic disappointment in the marketplace.

Although Traynor's language of implied warranty of safety reflects the grounding of product liability in contract and tort, it fails to suggest the balancing process that is peculiar to this area of strict liability. The standards of fitness for intended use and fitness for ordinary use, when taken out of the context of sales law and bargained-for-exchange, become no more than reflections of policy decisions.

83. See generally Franklin, supra note 63, at 986-90.
87. See Snider v. Bob Thibodeau Ford, Inc., 42 Mich. App. 708, 715-17, 202 N.W.2d 727, 731-32 (1972). Compare Larsen v. General Motors Corp., 391 F.2d 495, 502-03 (8th Cir. 1968) (foreseeability of automobile collision imposes a duty on the manufacturer to design the automobile so that the user is not subjected to unreasonable harm in the event of a collision), with Evans v. General Motors Corp., 359 F.2d 822, 824-25 (7th Cir.), cert. denied, 385 U.S. 836 (1966) (manufacturer's duty does not extend beyond designing an automobile that is safe for its intended use; collisions are not an intended use).

Adler suggests that an implied warranty of absolute safety be applied where injury occurs during intended use of the product, and that an implied warranty of reasonable safety be applied when injury occurs during foreseeable but unintended use. Adler, Strict Products Liability: The Implied Warranty of Safety, and Negligence With Hindsight, as Tests of Defect (A Conceptual Framework for the Practicing Lawyer), 2 Hofstra L. Rev. 581, 588-92
III. CAUSES OF CONFUSION

A. Problems in Application of the "Unreasonably Dangerous" Standard

Section 402A reflects the Reporter's awareness of the dual nature of product liability law as well as the need for a balancing process. The comments to § 402A define "defect" and "unreasonable danger" in terms of one another; yet they also suggest that both of these elements must be proved by the plaintiff. Although this may seem contradictory at first glance, it emphasizes the need for both terms. Courts that have eliminated the need to prove "unreasonable danger," first to establish plaintiff's prima facie case, and then as a standard of product defectiveness, insist that the term sounds too much in negligence, and that the finding of a defect and proximate cause is sufficient to prevent the defendant from becoming an insurer.

It is suggested here that these courts are more concerned with the abuses of the "unreasonably dangerous" standard than with the standard of product safety that it connotes. The "unreasonably dangerous" standard requires a balancing of risk-utility similar to negligence. However, unlike negligence, no inquiry is made directly into defendant's due care, nor is the plaintiff's contributory negligence a defense. Foreseeability of harm, gravity of harm, and burden of

(1974) [hereinafter cited as Adler]. However, his application of the test appears inconsistent. Referring to the Cronin decision, Adler states: "Because the failure was in the function for which the hasp was intended and designed, the breach was of the warranty of absolute safety." Id. at 591. The intended use of the "defective" hasp was to prevent the bread trays from coming into the driver's compartment during ordinary highway driving. The California court made it clear that the manufacturer must anticipate collisions as a foreseeable aspect of use, and design the automobile accordingly. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972). Thus, according to Adler's own test, the defectiveness of the hasp should have been judged by the standard of reasonable safety.

"Intended use," and "anticipated" or "ordinary use" are often used interchangeably. The result should not depend on which phrase is used, but rather on considerations of what is reasonably foreseeable use. The doctrine of intended use more nearly allows the manufacturer to set his own standards of safety, which was what strict liability was intended to prevent. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). In contrast, the doctrine of anticipated use suggests an objective standard imposed by law. Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 638 (Mo. Ct. App. 1975).


precaution are inquiries made to determine whether the product should remain on the market. Only indirectly does this involve an inquiry into plaintiff's or defendant's exercise of due care. However, some courts, by focusing only on the probability of harm, have diverted attention from the product as a whole, to either the plaintiff's or the defendant's due care. Obviousness of the danger posed, one factor in determining unreasonable danger, has been twisted to resemble the defense of contributory negligence. Foreseeability of harm, another factor in determining unreasonable danger, has been confused with the wholly separate inquiry into proximate cause.

1. Contributory Negligence

Cronin v. J.B.E. Olson Corp. was the first case in which the "unreasonably dangerous" standard was eliminated from product liability. It is suggested here that this was done out of concern for the failure of courts to focus on the product and not their injection of negligence principles. However, because the Cronin court did not attempt to articulate the meaning of "unreasonable danger" within the context of product liability, its elimination has been interpreted as a rejection of all standards associated with negligence.

The purpose of strict liability was correctly stated in Cronin as relieving "the plaintiff from problems of proof inherent in pursuing

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90. See text accompanying note 158 infra.
91. See text accompanying note 93 infra.
92. See text accompanying note 107 infra.
93. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). Plaintiff sustained personal injuries when the aluminum safety hasp which was designed to hold his bread trays in place broke upon the collision of plaintiff's truck with another truck. As a result of the safety hasp's failure, the bread trays came forward, struck plaintiff in the back, and hurled him through the truck windshield. At the trial, plaintiff's expert testified to the flaws in the aluminum, alleging the hasp broke "because [the aluminum] was extremely porous and had a significantly lower tolerance to force than a non-flawed aluminum hasp would have had." Id. at 124, 501 P.2d at 1156, 104 Cal. Rptr. at 436.

The defendant in Cronin argued:

[Without this element [of unreasonably dangerous] ... a seller would incur absolute liability for any injury proximately caused by an intended use of a product, regardless of the insignificance of the risk posed by the defect or the fortuity of the resulting harm.

Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 128, 501 P.2d 1153, 1158, 104 Cal. Rptr. 433, 438 (1972). Had the court addressed this contention, which posits a defective condition in its definition of absolute liability, it would have been obliged to clarify the "unreasonably dangerous" standard.
negligence and warranty remedies." Section 402A fulfills the stated purpose since notions of defendant's fault are replaced by plaintiff's reasonable expectations in relation to the product. However, plaintiff's "reasonable expectations" does ring of the reasonable man standard of negligence, and on this basis "unreasonable danger" was eliminated by the Cronin court.

In a design defect case brought in strict tort liability, plaintiff's burden of proof is satisfied by showing injury during normal use of the product, provided no secondary causes are evidenced. Defendant must then attempt to show that plaintiff was subjectively aware of the defective condition, but voluntarily proceeded to encounter it. If defendant could successfully plead that an ordinary consumer would have expected the defective condition, then this is tantamount to allowing a defense of plaintiff's contributory negligence in not discovering the defect, or in encountering its dangers.

The Cronin court should have made it clear that defining defectiveness in terms of unreasonable danger and ordinary consumer expectations need not frustrate the wholly subjective defense of assumption of risk. However, the court itself confused the initial burden of showing defectiveness with the defense of contributory negligence in stating that the "unreasonably dangerous" limitation has burdened the injured plaintiff with proof of an element which rings of negligence. As a result, if, in the view of the trier of fact, the "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.

This presumes the existence of a defective condition, but precludes liability because of the ordinary consumer's expectations. However, under § 402A the ordinary consumer's expectations are only consid-

ered in establishing the existence of a defective condition in the first place. Once a defective condition is established, the injured plaintiff's own expectations are considered in relation to the defense of assumption of risk.\textsuperscript{100}

2. \textit{Latent-Patent}

The \textit{Cronin} court appears to have been attempting to bring plaintiff's initial burden of proof in line with defendant's defense of assumption of risk. This would eliminate any reference to the latency or patency of the defect, a test which has been said to bring the defense of contributory negligence in through the backdoor.\textsuperscript{101}

Liability under the latent-patent test is determined by the manner in which the ordinary consumer would have interacted with a product were the danger of use obvious. Those courts which have accepted this test,\textsuperscript{102} by allowing the obviousness of the harm to offset the danger of the product, have focused not on product standards, but on plaintiff's conduct. This is essentially the defense of contributory negligence. However, the only defenses allowed by § 402A are subjective contributory negligence (or assumption of risk)\textsuperscript{103} and product misuse,\textsuperscript{104} and these defenses are not addressed until the product has been characterized as "unreasonably dangerous."\textsuperscript{105} Thus, it would seem that the ease with which "reasonable consumer expectations" can be twisted into the defense of contributory negligence\textsuperscript{106} was at the heart of the \textit{Cronin} court's elimination of the "unreasonably dangerous" requirement.

\textsuperscript{100} Obviousness of the danger is a consideration to be made in determining assumption of risk, as well as in determining the reasonableness of the danger posed by the product. However, in assumption of risk, obviousness of danger is balanced against the plaintiff's age and experience rather than against the product's other features. See \textit{Scott v. Dreis & Krump Mfg. Co.}, 26 Ill. App. 3d 971, 989-91, 326 N.E.2d 74, 87 (1975).

\textsuperscript{101} \textit{Donaher, supra} note 46, at 1304.


\textsuperscript{103} Section 402A, \textit{supra} note 11, comment n.

\textsuperscript{104} \textit{Id.} comment h.

\textsuperscript{105} \textit{Wade, Strict Tort Liability, supra} note 17, at 843.

\textsuperscript{106} See \textit{Williams v. Brasea, Inc.}, 497 F.2d 67, 78 (5th Cir. 1974) (court denied plaintiff recovery for injury when the power winch on a shrimp boat was activated while plaintiff's hands were entangled in the line, reasoning that such tangling was not beyond the expectation of experienced seamen); \textit{Royal v. Black & Decker Mfg. Co.}, 205 So. 2d 307 (Dist. Ct. App.
3. **Proximate Cause**

The problem of balancing risk-utility is in the definition and application of terms. Courts which have allowed plaintiff's recovery to be frustrated by one element of unreasonable danger, such as obviousness of defect, or intended use, view product design from the vantage of the injury-producing event rather than from that of consumer expectations of the total product. In fact, these courts are often addressing the issue of proximate causation, not that of product defectiveness. To the extent that the "unreasonably dangerous" requirement is a limitation of defendant's liability, it is similar to proximate cause. However, each is a distinct element that must be proven by the plaintiff.

The initial determination of product defectiveness must be made independently of the injury that occurred. A product should be characterized as defective if its utility is outweighed by an unreasonably high likelihood of serious harm during anticipated use. Foreseeability of harm is but one of the elements to be considered in determining the reasonableness of the danger. Once it is determined that the product is unreasonably dangerous and therefore defective, the question is then asked whether the injury resulted from a danger that was posed by the defective condition—a question of proximate cause. Foreseeability of the injury that occurred is the *sine qua non* in the determination of proximate cause. Often

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Fla. 1967) (electrocution while attempting to connect plug of power drill into extension cord not an unexpected danger).


112. Taken here to mean occurring in the natural sequence of events. Prosser, * supra* note 29, § 98, at 657.

113. *But see* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 900 (Pa. 1975) ("[f]oreseeability is not a test of proximate cause; it is a test of negligence").

Leap-frogging from product defectiveness to proximate cause has led to the belief that the "unreasonably dangerous" requirement is superfluous. See 49 WASH. L. REV. 231, 235 (1973)
the determination of defectiveness and legal causation are difficult to separate since the injury that actually occurred may be one of the dangers attendant on the product's use. If this is the case, the approach to the problem of determining defectiveness is "negligence with hindsight": assuming that the manufacturer knew the danger of injury that actually occurred, the issue to be decided is (1) whether this danger was so great in terms of probability and gravity, that the product was unmarketable, or (2) could the danger have been reduced without forcing the product outside acceptable limits of price and utility.114

It is particularly in the area of design defects that separation of defectiveness and proximate causation becomes complicated. To establish a production defect, it is often only necessary to compare the allegedly defective product with others of the same model. If, because of the flaws in question, the product cannot function as it will foreseeably be used, then it can be judged defective. In contrast, design defects are more often unspecified. Since an inference of defectiveness can arise on proof of injury during normal use of the product (absent secondary causes),115 the defendant is in the position of having to negate the inference by assigning the injury to other causes. In defending against this res ipsa loquitur type presumption, the defendant is attempting to prove two things: (1) that no defect existed, and (2) if there were a defect, it was not the proximate cause of plaintiff's injuries. Inference of design defect is difficult to rebut without a constant reference to the injury that gave rise to the litigation. The problem for the defense is compounded by the lack of objective standards of design safety which might be used as a fulcrum for rebuttal.116

Foreseeability of the harm that occurred is a question of proximate cause, and may or may not be considered in determining whether the design is unreasonably dangerous. Every product presents some danger to its user. The initial question in determining if the manufacturer has fulfilled its duty to the consuming public is

whether, considering the probability and gravity of foreseeable harm, the product should have been marketed. If the answer is affirmative, a second question must be asked: is the danger posed by the product design acceptable in view of the product's function and price? Only when this is answered in the negative should a court address the question of the foreseeability of the harm that occurred. It must be made clear that the question of defendant's duty in product design relates to societal needs; its duty to this particular plaintiff can be no greater than its duty to society.

B. ALI Proceedings

One of the reasons for the confusion surrounding the purpose of the "unreasonably dangerous" standard can be seen in § 402A, comment i. In 1961, while § 402A applied to food, the decision was made to use both "defective condition" and "unreasonably dangerous," as means of limiting liability. Both elements of proof were retained without discussion as the section's application was expanded first to products for intimate bodily use, and then to all products. Courts have used Dean Prosser, the Reporter of the Restatement throughout these three drafts, as authority in their elimination of the "unreasonably dangerous" standard. Citing one of his articles, they explain the "unreasonably dangerous" clause as having been added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey and automobiles) would become "automatically responsible for all the harm that such things do in the world." The problem here is one of convenient omission, for the clause to which Prosser was referring in his article was "defective condition unreasonably dangerous." Such an omission on the part of the courts misleads by negating the history of the term "unreasonable danger."

118. See note 28 supra.
120. Prosser, Strict Liability, supra note 84, at 23.
It is interesting to note that disagreement during the 1961 American Law Institute (ALI) Proceedings centered around inclusion of the word "defect," not "unreasonably dangerous." The discussion reveals that it was the term "defect" that was added to foreclose absolute liability. During the discussion, Professor Dickerson moved to omit "defective," the addition of which he referred to as "gilding the lily." To his mind, liability could be controlled entirely by the word "unreasonably," since he could think of no product which was unreasonably dangerous but not defective. Prosser's explanation reveals that these too were his sentiments, but that he saw no problems that could result from the addition of "defective." The term was added to ensure that a jury's finding an unsafe product to be unreasonably dangerous would not be sufficient:

[T]here something must be [sic] wrong with the product itself, and hence the word "defective" was put in . . . . "Defective" was put in to head off liability on the part of the seller of whiskey, on the part of the man who consumes it and gets delirium tremens, even though the jury might find that all whiskey is unreasonably dangerous to the consumer.

Thus, although the word "unreasonably" served to limit liability for unsafe products, the word "defective" was included to give the defendant added protection. It may be difficult to imagine an example of a food that causes physical injury which is not at the same time defective and unreasonably dangerous; but "defective" in this context means unwholesome and adulterated. Once § 402A's application was expanded to include all products, the distinction between "defective" and "unreasonably dangerous" emerged. Unfortunately no examples were given to illustrate this, which may in part account for the confusion surrounding the purpose of "unreasonable danger."

C. Comments to § 402A

Section 402A, comment g defines a defective condition as one "not contemplated by the ultimate consumer, which will be unrea-

121. 38 ALI PROCEEDINGS 87 (1961).
122. Id. at 87-88.
123. Id.
124. Id. at 55.
125. Wade, Strict Tort Liability, supra note 17, at 830-31.
reasonably dangerous to him." Standing alone, this phrase focuses on the vulnerability of the consumer and the unexpected nature of the danger, both reminiscent of the UCC's concern with oppression and unfair surprise. Referring as it does to "the ultimate consumer," who is invariably the plaintiff, it offers an extremely subjective, injury-oriented test. Without reference to comment i's definition of "unreasonable danger," comment g lends itself to the reasoning that since no injury-causing condition is contemplated (absent assumption of risk), the injury is evidence of product defectiveness. If this is the case, "defect" becomes a descriptive term, "a fiction . . . [meaning] nothing more than a condition causing physical injury."129

While comment g suggests that an article which is defective is also unreasonably dangerous, comment i suggests that although the article may be defective, it may not be unreasonably dangerous. However, comment i cites examples of articles that are unreasonably dangerous only because they are defective. The analysis

126. Section 402A, supra note 11, comment g.
127. Traynor, supra note 50, at 370.
128. In Brown v. Western Farmers Ass'n, 268 Ore. 470, 521 P.2d 537 (1974), it was unclear whether plaintiff's complaint was alleging product defectiveness or unreasonable danger: The obvious inference from these allegations is that the feed was defective and in damaging the chicks to which it was fed it obviously was not fulfilling the reasonable expectations of the plaintiffs, because chicken feed is not expected to damage one's chickens so that their eggs taste bad and they quit laying eggs . . . . Id. at 473, 521 P.2d at 538. By positing this injured consumer as a reasonable consumer, the complaint removed any semblance of objectivity. Where product defectiveness is not specified, the plaintiff asks that inferences be drawn from the fact of the injury itself.
129. Traynor, supra note 50, at 372.
130. Section 402A, supra note 11, comment g provides: 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.
131. Id. comment i provides: Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.
132. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

Id.
provided in these comments has led courts to conclude that the purpose of the “unreasonable danger” qualification in limiting liability is adequately served by the requirement of “defect.” It is suggested here that the examples given in comment i are relevant to an understanding not only of “unreasonable danger,” but also to the origin of “defect.”

Comment i contains examples of products that are unsafe by nature. It demonstrates two reasons why they are, or are not, unreasonably dangerous. “Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . .” It is not unreasonably dangerous, not because it is not defective, but because alcohol’s effects are known to the “ordinary consumer who purchases it.” A product that is unsafe but not defective is judged by the ordinary consumer’s knowledge of its propensities. If the product is unsafe when put to use, but its qualities are known to the ordinary consumer, this knowledge prevents it from being unreasonably unsafe. A warning is required to prevent a product whose dangers are not commonly known from being considered unreasonably dangerous. If the required warning is given, comment j implies that the product is not unreasonably dangerous, and hence not defective. Consolidating

134. Section 402A, supra note 11, comment i.
135. Id.
136. Section 402A, supra note 11, comment j. The distinction between a direction or warning under § 402A and a disclaimer under the Uniform Commercial Code, lies in its effect on the user-consumer. The primary purpose of a warning is to educate the consumer as to the product’s dangers; only in this way can the manufacturer of an unavoidably unsafe product avoid liability. Dickerson, How Good a Product, supra note 53, at 310-11. The examples given in § 402A, comment j, are of products to which some people may be allergic, but which are not defective in the sense of deviation from the norm. The utility of a non-defective, but unavoidably unsafe product must first be found to outweigh its foreseeable dangers. Only then will a warning add to the product’s safety and justify its marketing. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). A mere warning is not an acceptable substitute for product improvement.

In contrast, the primary purpose of a disclaimer is to shield the manufacturer from liability no matter what the condition of the product. But see Uniform Commercial Code § 2-719 (limitation of liability for physical injuries is prima facie unconscionable). The Uniform-Commercial Code concerns itself primarily with the form rather than the substance of the writing, making unnecessary any attempt to educate the user-consumer of the product. See Uniform Commercial Code § 2-316.

137. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . . .
comments $i$ and $j$, products with no assignable defect are judged by the "unreasonably dangerous" standard which emphasizes consumer knowledge. It is in this area of failure to warn that product defectiveness and unreasonable danger merge, for unreasonable danger is the only standard by which to judge defectiveness.

Although comment $i$ suggests that there are defective conditions which do not render the product unreasonably dangerous, no examples of such products are given. The examples comment $i$ does give are the same as those used during the 1961 ALI Proceedings where the decision was made to use "defective" and "unreasonably dangerous" in conjunction. "Defect" was added to ensure that the defendant would not be held responsible for products with inherent possibilities for harm. Comment $i$ makes it clear that whiskey is not unreasonably dangerous because it is intoxicating; "but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous."\(^\text{138}\) In short, "bad whiskey" is unreasonably dangerous only because it is defective, i.e., there is something wrong with the product. No examples of a defective product not unreasonably dangerous were given because at the time both terms were included, they were used with reference to adulterated foodstuffs and flawed products. Indeed, it is in the area of adulterated food that "defective" is most clearly synonymous with "unreasonably dangerous," and in this context "unreasonably dangerous" would be a superfluous term.

IV. ROLE OF "UNREASONABLY DANGEROUS" IN DESIGN CONTEXT

A. Conceptual Problems

"Defect" when applied to products other than food can be anything from a failure to meet specifications to an unsafe design.\(^\text{139}\) While the term gives the same illusion of certainty as is present when dealing with adulterated food, it provides no standard of product safety. In fact, defectiveness, as understood by the public to mean that there is something wrong with the product,\(^\text{140}\) is to some

\(\ldots\) [A] product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous.

Section 402A, supra note 11, comment $j$.

\(^{138}\) Id., comment $i$.

\(^{139}\) Weinstein, supra note 53, at 430.

\(^{140}\) 38 ALI PROCEEDINGS 88 (1961).
degree a characteristic of all products.\textsuperscript{141} The term when applied to products other than food is little more than a value-laden description. Some courts have attempted to qualify “defective” with the word “dangerously.”\textsuperscript{142} While this gives defectiveness a tort flavor, it does not reflect the balancing process needed when considering design problems, and could result in the characterization of any injury-producing condition as a defect.\textsuperscript{143} It is suggested that the term “unreasonable” must provide the standard by which both concepts of danger and defect are measured.\textsuperscript{144}

The function of the “unreasonably dangerous” requirement is best illustrated in the trial of a design problem. Here the temptation is greatest to judge the product solely with reference to its injury-producing capacity, and to conclude that since the product could have been designed differently, it is defective.\textsuperscript{145} Although this conclusion may be relevant to the issue of causation, it contributes nothing to the concept of defectiveness. In the area of design defects, the product is generically unsafe, but not adulterated; the key phrase is “unreasonably dangerous.” Only if a product is unreasonably dangerous should it be judged defective.\textsuperscript{146}

\textsuperscript{141} Weinstein, \textit{supra} note 53, at 430.

Professor Wade’s concern is that the term “defective” will mislead the jury, since it both implies an absolute standard, and is associated with sales law’s loss on a bargain. He suggests that “harmfully” be added to “defective” to ground the term in tort, and to ensure that a weighing of factors will be made. Wade, \textit{Strict Tort Liability}, \textit{supra} note 17, at 832.


\textsuperscript{143} \textit{See} Newmark v. Gimbel’s Inc., 54 N.J. 585, 595, 258 A.2d 697, 702 (1969); text accompanying note 126 \textit{supra}.

\textsuperscript{144} Weinstein, \textit{supra} note 53, at 430-31.

\textsuperscript{145} The initial decision whether to try a case on the basis of a design or production defect will affect the type of inquiry into defect, i.e., whether the inquiry will focus on technological irregularities which have resulted in a product other than that intended, or whether it will focus on a design which was exactly as intended. For a discussion of the production-design dichotomy, \textit{see} Weinstein, \textit{supra} note 53. The focus of this comment is on the so-called design defect cases where the concept of defectiveness is obscure and where the censuring of a product will have the more severe impact on the manufacturer.

Both of these factors—the initial problems of defining defect, and the effect of judging a product design to be defective—demonstrate the need for the balancing approach of negligence, absent negligence’s considerations of defendant’s knowledge and due care. \textit{See} generally Wade, \textit{Strict Tort Liability}, \textit{supra} note 17.

Those courts that have eliminated "unreasonably dangerous" on the grounds that a bifurcated standard of proof is unnecessary and burdensome for the plaintiff, have discarded the only element of § 402A relevant to design problems. Without "unreasonably dangerous," the courts are left with two alternatives: (1) conclude a defect existed since a different design would have prevented injury,147 or (2) conclude there was no defect since the product was exactly as intended.148 The "unreasonably dangerous" standard, on the other hand, suggests an intermediate approach. By focusing on the consumer's interaction with the product, there is a recognition "that many products . . . have both utility and danger."149 Under this standard, the issue is whether the utility of the product outweighs the danger, an inquiry redolent of negligence.150

At this point, it must be made clear that negligence and strict liability are not "antithetical."151 If they were, then strict liability would quickly become absolute liability. Neither Greenman nor § 402A was meant to impose liability without regard to defendant's fault; rather, they were intended to impose liability without regard to plaintiff's ability to prove that fault.152 Section 402A was placed

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147. This approach was specifically rejected in Garst v. General Motors Corp., 207 Kan. 2, 9-10, 20-21, 484 P.2d 47, 53, 61 (1971) (negligent design).
148. This concern was voiced during the ALI discussion concerning omission of the word "defective." Dean Lockhart was concerned that a manufacturer of a product causing idiosyncratic reactions need only show the product was not defective since it was made as intended. 38 ALI PROCEEDINGS 89 (1961).
150. This balancing process is particularly important in the decision whether or not to market an "unavoidably unsafe" product. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088-89 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); § 402A, supra note 11, comment k.
152. See Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968):
Where my brethren go astray is in equating the entirely separate concept of strict liability without fault with strict liability without regard to a product's reasonable fitness for consumption or use by the general public.

... [Liability is imposed for defective products regardless of whether the defect could have been discovered by the manufacturer. This is a common use of terminology to distinguish between the negligence concept of fault as opposed to the implied warranty concept of liability regardless of fault. Id. at 108-09 (Simpson, J., dissenting) (citations omitted). This dissent was adopted per curiam, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970). See also Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 24 (5th Cir.), cert. denied, 375 U.S. 865 (1963).
in the Restatement section dealing with negligence liability to facili-
tate comparison with other negligence sections.\textsuperscript{153} It was merely the defenses of lack of privity, defendant's due care, and plaintiff's con-
tributory negligence that were eliminated with strict liability.\textsuperscript{154} In other respects, the proof needed for imposition of strict liability
remained similar to that needed for purposes of negligence.\textsuperscript{155}

Unlike negligence, the primary focus of product liability is on the
product rather than on notions of plaintiff's or defendant's fault. However, the product cannot be viewed in isolation. Any inquiry into product design must be made with reference to defendant's design process and plaintiff's own interaction with the product.\textsuperscript{156} This implies a balancing process, rather than an absolute standard of liability. The reasonable seller or consumer provides the standard against which this balancing is made.\textsuperscript{157} So long as one remembers that it is the \textit{product} that is being judged, notions of reasonableness and foreseeability associated with negligence are not antithetical to
strict liability.

\section*{B. Factors to Consider in Evaluating "Unreasonable Danger"}

Dean Wade has proposed a set of criteria by which the reasonableness of product danger can be measured. These factors reflect a realization that all products involve some degree of danger; and that what is being censured is the manufacturer's failure to strike a proper balance between design safety and social desire for utility and aesthetics. They include:

\begin{enumerate}
\item The usefulness and desirability of the product—its util-
ity to the user and to the public as a whole.
\item The safety aspects of the product—the likelihood that
\end{enumerate}

\begin{footnotes}
\item[153.] Section 402A, supra note 11, comment a.
\item[154.] See Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 851 (5th Cir. 1967) ("[t]he
document of strict liability only removes the requirement of privity of contract; it does not
prove Appellee's case"), cert. denied, 391 U.S. 913 (1968); Mather v. Caterpillar Tractor
Corp., 23 Ariz. App. 409, 533 P.2d 717, 719 (1975); § 402A, supra note 11, comment n; note
28 supra.
Kononen, 525 F.2d 125, 129 (Ore. 1974); Prosser, \textit{Strict Liability}, supra note 84, at 50-51.
\item[156.] Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr.
433, 437 (1972) (design and manufacture of products must be carried out "with recognition of
the realities of their everyday use").
\item[157.] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), cert.
\end{footnotes}
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.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.\(^5\)

Wade then suggests the following jury instructions on the issue of "unreasonable danger":

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.\(^5\)

These instructions accomplish the purpose of strict liability, \textit{i.e.}, to relieve plaintiff of proving defendant's negligence, by presuming defendant's scienter. However, it has been criticized as being overly defense-oriented and as not putting the focus on the product as it relates to societal expectations.\(^8\) Therefore another instruction has

\(^158\) Wade, \textit{Strict Tort Liability}, supra note 17, at 837-38. These factors are not meant to be included in the jury instructions, but are to be made by the court in determining whether the case should be submitted to the jury or decided as a matter of law. \textit{Id.} at 838-40.


This test of unreasonable danger, presuming knowledge on the part of the defendant of the dangers that emerged at trial, was originally suggested in Keeton, \textit{Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products}, 20 \textit{SYRACUSE L. REV.} 559, 565-69 (1969). See Holford, \textit{supra} note 48, at 93-94 (criticizing this test as both furnishing little incentive for product improvement, and allowing consumers too broad an economic choice in the area of design safety, a choice which they are not equipped to handle).

\(^160\) Donaher, \textit{supra} note 46, at 1306-07 (commenting on similar instructions given the
been suggested: "[T]he question is whether the product is a reasonable one given the reality of its use in contemporary society."161

Either test by itself suffers from vagueness or possible jury misinterpretation. Perhaps the solution is that these tests be combined in recognition of the interaction of product design, societal expectations, and reasonableness of seller/manufacturer's actions. The goal is to have the jury instructions reflect the type of evidence that was presented during the trial. While the court has the responsibility of focusing the expert testimony on those factors suggested by Dean Wade,162 the jury should be left to synthesize these considerations in their evaluation of the reasonableness of the danger posed by the product.

The Cronin court made it clear that it did not intend to make the manufacturer/seller an insurer of its products.163 This, it felt, could be accomplished by requiring a finding of defect and causation.164 Although no definition of "defect" was attempted,165 the court must have assumed an objective standard of reasonableness to which the defendant would be held.166 Yet it removed the only requirement that connotes objectivity, and retained the language associated with contract law and plaintiff's subjective expectations. What the court did was to eliminate the term "unreasonably dangerous" because, as defined in comment i, it could be used to subvert the defense of assumption of risk. While this is a valid concern, the Cronin ap-
approach seems to leave no room for the balancing process suggested by Dean Wade.

In order to prevent the manufacturer from becoming an insurer, the court must redefine "defect" so as to restore the objective standard that had been provided by the phrase requiring unreasonable danger. This raises two problems: (1) such a redefinition of the term "defect" may confuse the fact-finder; and (2) there may be no attempt to redefine "defect" within the design area. In the context of a design case, a failure to redefine "defect" would allow the plaintiff to establish a prima facie case by showing injury during ordinary use, without specifying the defective condition, and would leave the defendant with the often difficult task of countering this with the defense of assumption of risk. Any attempted definition of "defect" should incorporate notions of safety and risk. The Cronin court appears to have precluded this by eliminating the "unreasonably dangerous" concept, both as a separate standard of proof, and as a means of defining defect. Without the objective standards of danger and risk, the term "defect" offers no guidance in a design defect case. However, redefining "defect" in terms of tort law's standards of risk could be confusing since the term is rooted in consumer's commercial expectations. Viewed particularly within the context of design problems, the Cronin court's elimination of "unreasonably dangerous" can be seen as erroneous. Although it was done with the correct objective, i.e., to focus on the product rather than on the consumer, it was done without recognizing the two major differences between production and design cases: there is not a bifurcated standard in the area of design problems, since "defective" means "unreasonably dangerous"; and product design is more clearly a function of reasonable consumer (or societal) expectations.

167. Wade, Justice Traynor, supra note 61, at 465 n.48. This negligence approach appears to be the only means of preventing the manufacturer from becoming an insurer when injury results from a product design. See Garst v. General Motors Corp., 207 Kan. 2, 19-20, 484 P.2d 47, 60-61 (1971).

168. A bifurcated standard is of necessity more difficult to prove than a unitary one. But merely proclaiming that the phrase "defective condition unreasonably dangerous" requires only a single finding would not purge that phrase of its negligence complexion.


170. Donaher, supra note 46, at 1303-09.
C. Consumer Expectations

The consumer does not participate in the manufacturer's design decision except indirectly—through regulations or through the manufacturer's desire to sell his product. "Reasonable consumer expectations" is often distorted by the injury which gave rise to the trial, since litigation provides the only opportunity for direct consumer input into design. However, "reasonable consumer expectations" relates not only to the issue of how a defect is defined, but also to the policy considerations underlying strict liability. A discussion of the role of consumer expectations is meant to illustrate that the Cronin court was concerned with the abuses occasioned by the application of the "unreasonably dangerous" standard, but that it did not intend to reject the factors underlying this standard.

The "reasonable consumer's expectations" of how a product should function is the only standard the manufacturer can use in designing his product. To this extent consumer expectations are coextensive with the manufacturer's duty. Realistically, neither consumer expectations nor product design focuses solely on product safety. Some degree of product safety must be sacrificed in order for the product to compete in the marketplace; but this sacrifice is only acceptable in the area of foreseeable use because it is here that the trade-offs of safety, utility, and price are made.

The public is not only the ultimate beneficiary of safety regulations; it is also the ultimate cost-bearer. A limit exists as to how much it is willing to pay for safety at the expense of non-safety features. The rationale of risk allocation is that industry should absorb the cost of harm caused by its products. To the extent that it refers to industry's being competitive in the market, the rationale is probably accurate. However, it is the consumer who pays, both in the sense of increased cost and decreased non-safety features, as well as decreased design and economic choice. Reasonable consumer expectations relate directly to the amount the public is willing to absorb and sacrifice for safety. Once a product has exceeded limi-
tations of safety dictated by reasonable consumer expectations, the product can be labeled "defective." If a consumer chooses to confront that defect, it is he who has "assumed the risk" of harm, and not the buying public who has assumed it for him.176 What is needed is a standard that gives the public a choice of product design while ensuring that safety considerations are not unduly sacrificed. The real issue does not concern the amount of product safety that is needed, but rather the amount of product safety that society is willing to pay for.177 Thus, to some extent, the risk allocation model is misleading since it fails to provide for such an inquiry into society's willingness to bear the ultimate cost. The deterrent rationale, however would compel such an inquiry, for it would be incumbent on the court to ask whether safety could have been achieved without sacrificing other aspects of socially desirable product design.178

Product design is a function of a number of factors, all relating to consumer expectations. To discard the term "unreasonably dangerous" because it may be abused is to deny the reality of the design process. It is suggested here that § 402A's inclusion of "ordinary consumers' expectations," refers to all aspects of consumer-product interaction; this includes not only his expectations during use of the product, but those expectations and considerations that went into the purchase of the product as well.179 What is needed is a recognition that concepts of sales and tort law are material to the determination of a design defect. It is irrelevant whether the term used be "not duly safe,"180 or "unreasonably dangerous"181 so long as it reflects the balancing of risks and utility that the dual nature of design cases requires. The word "defect" is rooted too deeply in sales law and notions of bargained-for-exchange to reflect these trade-offs. The very considerations which recommended the term to the Cronin court, i.e., clarity and simplicity,182 make it an unworkable standard.

176. Id. at 89-90.
177. Henderson, supra note 46, at 1540.
180. Wade, Strict Tort Liability, supra note 17, at 833; § 402A, supra note 11, comment j (unduly dangerous).
181. Section 402A, supra note 11.
V. Conclusion

A balancing of society's safety and commercial needs is particularly desirable in the area of design defects. Unlike the determination of a production defect, where the only alternative to be considered is an "unflawed" product, the design defect case involves consideration of a number of alternative designs. In design cases, the utility of the product as designed may so outweigh the foreseeable injury, that its manufacture is justified despite its having caused injury, and despite technologically feasible alternatives.\footnote{183}

A case involving automotive design will illustrate this point. In 
\textit{Dreisonstok v. Volkswagenwerk, A.G.},\footnote{184} the plaintiff's injuries during a one-car crash were aggravated by the lack of sufficient "crash-room" between the driver's compartment and the front of the vehicle. Although the court acknowledged that collisions are a foreseeable aspect of automobile use,\footnote{185} foreseeability alone was not sufficient to impose liability for harm. Likelihood of harm, considering both foreseeability and obviousness of danger, was weighed against the overall utility and intended use of the product. Design safety, the court determined, is a function of the inherent limitations of different models, and of the price at which such models are offered.\footnote{186} The Volkswagen minibus offered inexpensive transportation for large numbers of people. In the absence of evidence of a practical design alternative that could offer the same advantages while decreasing the danger posed, the minibus was unreasonably dangerous.\footnote{188} By speaking of the manufacturer's duty in terms of safety, utility, and marketability, the court significantly enlarged the concept of "intended use" to include both practical and aesthetic considerations. This in turn enlarged the scope of judicial inquiry into consumer interaction with the product.

The flexibility of the course taken by the \textit{Dreisonstok} court has attracted those courts that have experienced the frustrations of the \textit{Cronin} approach. New Jersey courts seem to be reconsidering the

\begin{itemize}
  \item 489 F.2d 1066 (4th Cir. 1974).
  \item \textit{Id.} at 1069-70; \textit{accord}, \textit{Cronin v. J.B.E. Olson Corp.}, 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972).
  \item \textit{Dreisonstok v. Volkswagenwerk, A.G.}, 489 F.2d 1066, 1070 (4th Cir. 1974).
  \item \textit{Id.} at 1072-73. \textit{See generally} Henderson, supra note 46, at 1540.
\end{itemize}
purpose of the "unreasonably dangerous" requirement. Its purpose, it has been learned, was not merely to preclude liability if the reasonable consumer would have expected the danger; it also connotes an objective standard by which the product can be measured, while allowing an inquiry into the user's and seller's expectations. The California courts are also reviewing product safety standards in terms of probability and gravity of harm and burden of precaution. These developments reflect the balancing of risk-utility of the Wade analysis that is absent when the word "defect" is used alone. However, concurrent with this balancing process, the policy of enterprise liability must be revised to include the role of the reasonable consumer expectations of product design.

Despite these indications of discontent with Cronin, Pennsylvania has not only adopted its approach, but appears to have gone one step beyond. In Berkebile v. Brantly Helicopter Corp., the Penn-

190. Id. at ----, 336 A.2d at 70-72.
    The determination of whether the presence of the water heater in the garage location constituted a defective design, and the foreseeability of harm resulting therefrom, should have been left to the jury. It was for the jury to balance the likelihood of harm and the gravity of the harm as opposed to the burden of precautions which would effectively have avoided it.
    Id. at 773, 111 Cal. Rptr. at 265 (citations omitted). But see Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973) (accepting Dean Wade's analysis of strict liability, and characterizing strict liability as similar to negligence, absent the element of scienter).

The California courts have also recognized that there must be a standard to use in determining when the lack of warnings renders the product defective. The standard adopted was that of unreasonable danger:
    We do not understand that Cronin . . . overrules the principle . . . [that] a product although faultlessly made, may be defective, if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning.
Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 80, 119 Cal. Rptr. 135, 138 (1975). The manufacturer's failure to warn of dangers in the use of its product is often characterized as a design defect. Wade, Strict Tort Liability, supra note 17, at 842. The court insisted, without explanation, that "[t]he inclusion of the element of 'unreasonably dangerous' when applied to a duty to warn is entirely different than when applied to a defect in design or manufacture." Dosier v. Wilcox & Crittendon Co., 45 Cal. App. 3d 74, 80 n.3, 119 Cal. Rptr. 135, 138-39 n.3 (1975).

194. The trend of product liability law in Pennsylvania has mirrored that of product liability generally. In Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966), overruled by Kassab
sylvania Supreme Court eliminated the “unreasonably dangerous” qualification of § 402A in accordance with its presumption of the manufacturer as “guarantor [sic] of his product’s safety.” Considerations of the “reasonable man” standard no longer have a place in jury instructions; and “unreasonable danger” is now a question of proximate causation with which it has so often been confused. Plaintiff’s burden is satisfied by a showing of defect and cause in fact: once these have been established, plaintiff will have shown proximate cause, since “as to him the product was unreasonably dangerous.”

One explanation for this oversimplistic view of plaintiff’s burden is the court’s failure to appreciate the function of the “unreasonably dangerous” standard within the context of a design defect case. In the design area, “defect” is not self-defining, but represents a

v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968), the Pennsylvania Supreme Court denied plaintiff relief for breach of implied warranty of merchantability when a defective vaporizer-humidifier shot boiling water on him. Relief was denied for want of vertical privity. On the same day, in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), the same court adopted § 402A. Although Webb v. Zern, supra, did not purport to overrule Miller v. Preitz, supra, it was an obvious attempt to circumvent the privity requirement of the UCC. See Uniform Commercial Code § 2-318, Comment 3 (beyond protection to family, household, and guests of the purchaser, the Code is neutral).

337 A.2d 893 (Pa. 1975). Decedent was killed in a crash of the helicopter he was piloting. In a wrongful death and survival action brought against the manufacturer, decedent’s executrix claimed the helicopter was defective because: (1) the design allowed the average pilot insufficient time to go into autorotation in an emergency power failure during climbing; (2) there were inadequate warnings concerning the risks and limitations of the autorotation system; (3) the rotor blade which separated during flight was defectively manufactured and designed. There were also allegations of misrepresentations concerning the safety of the helicopter. Id. at 897.

Any discussion of the Berkebile decision, however, must be made noting that only one justice concurred in the opinion of Chief Justice Jones; the remaining five justices concurred in result only.


Id. at 899.

Id. at 900.

But see id. at 900. “The salutory purpose of the ‘unreasonably dangerous’ qualification is to preclude the seller’s liability where it cannot be said that the product is defective . . . .” Again, this statement reflects a basic misunderstanding of the function of the terms “defective” and “unreasonably dangerous.” See text accompanying note 121 supra. Where all products of one design are alike defect has no meaning except in relation to the degree of danger that design poses. The purpose of the “unreasonably dangerous” qualification in the design area can best be viewed as limiting, rather than precluding, the seller’s liability where the product is not “defective” in the sense of deviation from the norm.
composite of the factors underlying the "unreasonably dangerous" standard. Cronin involved a manufacturing defect, where deviation from the norm could provide the test for defectiveness. The Berkebile decision arose in the context of an alleged design defect and failure to warn. Unlike Cronin, Berkebile not only eliminated the clause "unreasonable danger," but by condemning both "reasonableness" and "foreseeability," it has purported to make impossible a consideration of the factors that enter into the "unreasonably dangerous" evaluation.

The Pennsylvania court made no attempt to define "defect" in the design context. It did, however, define "defect" in the context of failure to warn; and in doing so spoke, albeit indirectly, of reasonableness, foreseeability, and plaintiff's expectations. The court stated the issue as whether there were sufficient warnings accompanying the product to make it safe. Safe for whom—the "average pilot," or for the decedent plaintiff? Since the court acknowledged that the degree of protection required was dependent upon the degree of danger posed, the jury's evaluation had to take into account foreseeability, gravity of harm, and burden of precaution.

The Pennsylvania court and other courts which have adopted the Cronin approach have two options: either struggle with a definition of "defect" that must incorporate concepts of risk-utility; or make the determination of "defect" subordinate to a policy decision which makes the manufacturer the guarantor of product safety. Meanwhile, elimination of the "unreasonably dangerous" standard has posed a difficult dilemma for the trial courts which must apply the rule.

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201. See note 93 supra.
202. See note 197 supra.
204. Id.
205. Id. at 902.
206. Id. at 901.
207. Id. at 902.
208. Id.