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Recommended Citation
11 Hofstra L. Rev. 861 (1983)

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FROM RISK-UTILITY TO CONSUMER EXPECTATIONS: ENHANCING THE ROLE OF JUDICIAL SCREENING IN PRODUCT LIABILITY LITIGATION

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INTRODUCTION

The law of torts has been twice blessed over the past decade. The law and economics theorists have enriched and elevated the level of discourse concerning the policy of tort compensation rules.[1] Simplistic discussion of such notions as risk-spreading, compensation, and deterrence has been replaced by sophisticated literature that takes into account subtleties and interactions that were simply not considered a short while ago.[2] Although not totally unrelated to the law-economics discipline,[3] tort law has been subjected to searching

1. *See generally* G. CALABRESI, THE COST OF ACCIDENTS (1970); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980); Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981).

2. *See, e.g.*, R. POSNER, *supra* note 1, §§ 6.11, 6.12; Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).

3. The law-economics literature has not disregarded process. *See generally* R. POSNER, *supra* note 1, §§ 19.1-23.4; Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

examination by scholars who, for want of a better term, I shall label as "process" or "justiciability" theorists.[4] Dialogue that a short time ago was limited to the rather sterile question of who should do it—the legislature or the courts[5]—has now focused on the rather significant limitations that attend the judicial process. It is no secret that since the *anschauung* of Professor Henderson's classic article, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*,[6] I have been preoccupied with the unsettling questions which he propounded. In fact, a good case can be made for the proposition that I have become more Hendersonian than Henderson.[7] Although differences remain between us, the common ground

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It is certainly possible to explain the multifactor duty analysis set forth in this paper in efficiency terms. Judicial intervention, utilizing the reasonableness standard in cases where the judicial error factor is high, may lead to less than optimal resource allocation. Nonetheless, I am persuaded that pushing the entirety of duty analysis into efficiency theory may be the equivalent of slamming the door on an overfull closet. Many of the factors have an independent moral base and would stand alone whether or not they met efficiency norms. *Cf.* Schwartz, *Economics, Wealth Distribution and Justice*, 1979 WIS. L. REV. 799, 804-11 (inadequacy of efficiency theory to explain rape, defamation, and burglary rules). *See infra* note 112.

4. The realization that process concerns play a role in shaping substantive tort law can be found in the work of the late Dean Leon Green. *See* Green, *The Duty Problem in Negligence Cases* (pts. 1 & 2), 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929). However, the argument that the judicial process is inherently unsuited for the litigation of polycentric tort cases moved the dialogue to a much more radical posture, since it challenged the justiciability of the reasonableness norm that is central to most tort litigation. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereinafter cited as Henderson, *Judicial Review of Design Choices*]; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) [hereinafter cited as Henderson, *Expanding the Negligence Concept*]; Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982). Others have expressed similar concerns with the ability of the present tort litigation system to deliver just results. *See* Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347 (1980) [hereinafter cited as Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability*]; Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

5. *See, e.g.*, Green, *The Thrust of Tort Law, Part II—Judicial Law Making*, 64 W. VA. L. REV. 115, 121-22 (1962); James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 333-37 (1959). This controversy is exemplified by the debate concerning the adoption of comparative fault. *See* Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. REV. 295 (1980); *Comments on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

6. Henderson, *Judicial Review of Design Choices*, *supra* note 4.

7. *See infra* text accompanying notes 11-31, 123-25. Professor Henderson supports national products liability legislation that seeks to codify the negligence standard. *See Hearings*

upon which we tread is the deeply held belief that the tort litigation system cannot stand the strain of a totally unstructured standard of reasonableness. In a recent publication, I examined this thesis at considerable length and suggested a structured middle ground between rigid rules and the open-ended reasonableness standard, which I believe to be analytically sound and politically feasible.[8] In fact, I suggest that the middle ground has already been occupied by sensitive and responsible courts. The middle-ground approach operates as a screening mechanism for cases which must be filtered out of the tort litigation system unless the system is to take on the complexion of a Rube Goldberg cartoon.

Mine is not the only proposal extant for reducing the intolerable strains that exist on the tort litigation system. The product liability crisis has, for the first time, created a real possibility that major substantive tort law reform will take place at the federal level.[9] The contributions of highly respected academicians to the legislative de-

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on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation, 97th Cong., 2d Sess. (1982) (statements of Prof. James A. Henderson) [hereinafter cited as *1982 Senate Hearings*]; Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978). I believe that the multifactor duty analysis set forth in this article corresponds more closely to the solutions to the justiciability problems propounded by Henderson in his earlier writings, *see, e.g.*, Henderson, *Expanding the Negligence Concept*, *supra* note 4, than to his more recent endorsement of legislation that seeks to control the administration of risk-utility analysis.

8. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

9. The focus is currently on the Kasten bill, Product Liability Act, S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S284 (daily ed. Jan. 26, 1983) [hereinafter cited as Senate Bill], and on the Shumway bill, Product Liability Act of 1983, H.R. 2729, 98th Cong., 1st Sess., 129 CONG. REC. H2328 (daily ed. Apr. 25, 1983) [hereinafter cited as House Bill]. S. 44 is identical to S. 2631, which was reported by a unanimous Senate Committee on Commerce, Science, and Transportation on December 1 (legislative day November 30), 1982. S. REP. NO. 670, 97th Cong., 2d Sess. (1982) [hereinafter cited as 1982 SENATE REPORT]. Federal legislative activity began with the promulgation of the MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979) [hereinafter cited as MUPLA], by the United States Department of Commerce. Legislative hearings have generated intense interest from both consumer and industry groups. *See 1982 Senate Hearings*, *supra* note 7; *Product Liability: Legislative Hearings on H.R. 5571, H.R. 5258, H.R. 1061, H.R. 2891, H.R. 4204, H.R. 1675, H.R. 1676, H.R. 2964, H.R. 5626 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *1979 House Hearings*]. For an analysis of an early version of S. 2631, see Twerski, *National Product Liability Legislation: In Search for the Best of All Possible Worlds*, 18 IDAHO L. REV. 411 (1982).

State legislative activity has also been considerable. For a comprehensive list of the various state statutes and their major provisions, see *id.* at 412 n.7.

liberations have been significant.[10] Their suggestions appear to me well-intentioned and, at first glance, capable of limiting the unwarranted extension of liability into areas that are within the legitimate discretionary ambit of manufacturers. But initial appearances are deceiving. The proposals focusing on limiting the range and scope of the various factors that comprise risk-utility analysis fail to account for important policy concerns that have traditionally operated as a significant brake on the unbridled reasonableness doctrine. If the middle-ground approach is descriptive of the behavior of courts, and if courts are, in fact, motivated to limit liability for reasons that cannot be expressed by formulation and reformulation of the negligence formula, then legislative marching orders are not likely to be meaningful. Courts have a nasty habit of imposing their will on legislatures that ask them to act irrationally. Policy decisions of significant moment can be masked in language that smacks of pedestrian fact-finding. In short, lawmaking and high policy can be driven underground. The proposals that seek to curb the abuses of risk-utility analysis by fragmenting the fact-finding process invite such subterfuge.

To make my case, I shall briefly restate some of the basic tenets of the process theorists with some emphasis on my most recent work. Drawing on other examples from the law of torts, I hope to demonstrate that justiciability concerns have long been recognized as germane to the fundamental duty issue. The public law nature of tort law also invites comparison to some of the classic constitutional justiciability cases. The reader will not be surprised to learn that the factors that are considered by courts in deciding the justiciability issue cut across specific subject matter lines. Admittedly, the leap

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10. The MUPLA, *supra* note 9, was authored by the United States Department of Commerce Task Force on Product Liability and Accident Compensation. The Task Force was chaired by Professor Victor E. Schwartz of the University of Cincinnati School of Law. *See* Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579 (1980); *Hearing Before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 1st Sess. (1979) (testimony of Prof. Victor E. Schwartz). Professor James A. Henderson, Jr. of the Boston University School of Law had a significant role in drafting major provisions that were ultimately incorporated into S. 44, Senate Bill, *supra* note 9. *See 1979 House Hearings*, *supra* note 9 (statement of Prof. James A. Henderson, Jr.). Professor David Owen of the University of South Carolina School of Law was instrumental in drafting the Product Liability Act of 1982, H.R. 5214, 97th Cong., 1st Sess., 127 CONG. REC. H9529 (daily ed. Dec. 14, 1981). *See 1982 Senate Hearings*, *supra* note 7 (statement of Prof. David G. Owen). H.R. 5214 was reintroduced this year, with some variations, as H.R. 2729, House Bill, *supra* note 9. 129 CONG. REC. E1821 (daily ed. Apr. 25, 1983) (statement of Rep. Shumway). The contributions of these outstanding scholars to the legislative effort demand that their work product be given careful attention.

from highly visible constitutional cases to seemingly more mundane tort law is considerable, but the chasm is not as wide as one might suppose. I shall then turn to alternative proposals for ameliorating the "standards" crisis in product liability law and demonstrate that for a host of reasons such proposals will exacerbate, rather than alleviate, the crisis. There is no alternative to judicial lawmaking to accomplish realistic screening of cases that should be regulated by the tort litigation system. Having firmly established the policymaking role of the judiciary in products litigation, I shall reexamine the embattled consumer expectation test and suggest that, with proper advance judicial screening, the test may play a significant role in products litigation.

I. JUSTICIABILITY AND THE LAW OF TORTS

A decade ago Professor Henderson set forth a thesis that, for the first time, forced hard attention to be focused upon the justiciability of design defect claims.[11] He argued that for a case to be justiciable, the issues that comprise the claim must be separable and resolvable in a sequential fashion.[12] Yet, the basic standard in design defect litigation is the reasonableness or societal acceptability of a given design. To resolve the reasonableness question, a court must balance such factors as cost, esthetics, safety, and utility against harm potential. The interdependence of these various elements is apparent. For example, if one changes the design of a product to enhance its safety, it may be necessary to alter other aspects of the product that affect its esthetics, utility, and cost. Once the proposed changes are made in formulating a new hypothetical design, it then may be necessary to reexamine the safety decision. Changing the nonsafety aspects of the design may be of such significance that the initial safety decision, which led to these changes, will have to be reconsidered in toto or scaled down to more modest proportions. This will again cause the reexamination of the impact on safety on each and every aspect of the product—setting us once again into a never-ending cycle.[13] This process is all the more complex because one cannot merely weigh the safety considerations against the nonsafety aspects of the product. Each element of the negligence formula is a variable that is subject to change depending on what is decided in

11. Henderson, *Judicial Review of Design Choices*, *supra* note 4.
12. *Id.* at 1534-39.
13. *See id.* at 1539-42.

regard to each of the other variables. Such a process, which speaks to what is good for society or, as Henderson puts it, "How much safety is enough?" raises serious justiciability problems that cannot be easily dismissed.[14] Henderson concluded that where courts are called upon to establish safety standards without reliance on existing industry standards or statutory safety rules, the polycentric nature of the litigation demands that the courts stay their hand and permit the manufacturer's managerial safety decision to govern.

Over the years, in a series of articles that I coauthored, my colleagues and I sought to come to grips with the rather substantial arguments that Henderson posed.[15] This past year, after considerable reflection and soul-searching, I concluded that Henderson's basic thesis was correct.[16] The open-ended reasonableness doctrine should not be the sole test for deciding whether a manufacturer has violated its duty to those injured as a result of a design-related product injury. My reasons for reaching this conclusion, however, were not limited to the polycentric nature of design defect litigation. It became clear to me that in design defect cases, courts have identified a host of policy reasons on which they relied in deciding to direct verdicts

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14. Many courts have given serious consideration to the Henderson thesis. *See, e.g.*, Knippen v. Ford Motor Co., 546 F.2d 993, 999 (D.C. Cir. 1976); Bowman v. General Motors Corp., 427 F. Supp. 234, 241 & n.12 (E.D.Pa. 1977); Korli v. Ford Motor Co., 69 Cal. App. 3d 115, 122, 137 Cal. Rptr. 828, 833 (1977), *reconsidered*, [1978-1979 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 8340, at 17,717 (Sept. 18, 1978) (opinion withdrawn from publication, 149 Cal. Rptr. 98 (1978)); Rucker v. Norfolk & W. Ry., 64 Ill. App. 3d 770, 795-96, 381 N.E.2d 715, 734-35 (1978) (Jones, J., dissenting); Guilyot v. Del-Gulf Supply, Inc., 362 So. 2d 816, 819 n.1 (La. Ct. App. 1978); Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 326, 364 N.E.2d 267, 273 (1977).

It has been my position that design cases run the gamut from those that are highly polycentric to those that hardly raise the polycentricity problem. Thus, the degree of polycentricity should be one of a number of factors that a court should consider. *See* Twerski, *supra* note 8, at 551-53. In Owens v. Allis-Chalmers Corp., 414 Mich. 413, 326 N.W.2d 372 (1982), the Michigan court took a position consistent with the one that I advocated. The intermediate appellate court, utilizing the Henderson polycentricity thesis, found the case, which dealt with the design of a forklift, highly polycentric and thus nonadjudicable. In reversing, the Michigan Supreme Court expressed general agreement with the Henderson thesis, but found that the design implicated in this particular case was not so polycentric as to make it nonadjudicable. Professor Henderson himself has recognized that polycentricity concerns may not be of the same magnitude in every case. *See* Henderson, *Judicial Review of Design Choices*, *supra* note 4, at 1539, 1540 n.29.

15. Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) [hereinafter cited as Twerski, Weinstein, Donaher & Piehler, *Use and Abuse of Warnings*]; Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability*, *supra* note 4.

16. Twerski, *supra* note 8.

for defendants. I argued that significant policy choices were often masked in the rather pedestrian holdings that a directed verdict was in order because reasonable persons could not differ on the evidence. In reality, however, if one carefully examined the cases, one could identify the factors that were actually at work.[17] Although courts often highlight one factor or another as the major reason for directing a verdict, it is usually possible to identify a cluster of factors that lie behind a court's determination that the defendant owed no duty to the plaintiff. The factors that I suggested governed directed verdict decisions in design defect cases are the following:

> (1) Polycentricity: Aspects of the product design may be related in such a way that any design change would substantially affect the cost, utility, safety, or esthetics of the product.
>
> (2) Close risk-utility proof: The task of weighing and balancing the product's potential for harm against its utility may be difficult or impossible.
>
> (3) State of the art: The alternative design may not be practically feasible in light of the state of the art.
>
> (4) Tenuous causation: The case for causation-in-fact may be tenuous.
>
> (5) Shifting duty: Independent and responsible decisionmakers may have played a significant role in assessing and utilizing the allegedly hazardous product.
>
> (6) Consumer choice: Consumers may have the option to purchase a similar product without the alleged safety hazard.
>
> (7) Obviousness of danger: The hazard may be open and obvious to the ordinary consumer.
>
> (8) Cost: An alternative design could substantially raise the cost of the product to the consumer.
>
> (9) Design safety review process: The safety review process that led to the formulation of the product's design may have been extensive.
>
> (10) Legislation: The government may have played a role in regulating the product's design.[18]

The suggested factors break down into two major categories: (1) institutional limitations preventing courts from fairly litigating design defect cases,[19] and (2) the existence of alternative decisionmaking

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17. *Id.* at 578-95.

18. *Id.* at 527, 550-78.

19. Factors falling within the category of institutional limitations include polycentricity, close risk-utility proof, state of the art, and tenuous causation. These factors are discussed in Twerski, *supra* note 8, at 551-64.

mechanisms for determining the appropriate level of product safety.[20] In deciding whether a verdict should be directed for the defendant, a court would examine the potential difficulties it would encounter if it should undertake to resolve a given design question. It might discover that the design changes that must be considered to establish that standard which renders the challenged design unsafe would raise serious polycentricity problems.[21] A review of the evidence might reveal that, at very best, the court was dealing with a very close-call question as to whether the suggested safety device would add to or detract from the overall safety of the product. This becomes particularly serious because the plaintiff need only pinpoint an alternative design that would have avoided the particular injury to this plaintiff, whereas the defendant is forced to defend the general acceptability of the design.[22] A court might also reflect on the fairness of litigating the adequacy of a design that was instituted many years before the injury took place.[23] Where liability is based on negligence, there is a very real question as to whether juries can place themselves in that frame of mind which correctly reflects societal values of yesteryear.[24] A jury incapable of turning back the clock will not be judging a negligence case, but one based in quasi-strict liability. Finally, a court should assess whether the case confronts it with causation problems that will allow for nothing better than an educated guess.[25]

If a court's initial assessment is that it faces serious institutional

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20. Factors included in the category of alternative decisionmaking mechanisms are shifting duty, consumer choice, obviousness of danger, cost, the design safety review process, and legislation. These factors are discussed in *id.* at 564-78.

21. *See id.* at 551-53.

22. *See id.* at 553-56.

23. *See id.* at 560-61; Henderson, *Coping With the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919 (1981).

24. Although some courts have indicated that strict liability will be the governing standard in design defect and failure to warn cases, *see, e.g.*, Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Beshada v. Johns-Manville Corp., 90 N.J. 191, 447 A.2d 539 (1982); Phillips v. Kimwood Mach. Co., 269 Or. 581, 525 P.2d 1033 (1974), the majority view predicates liability in design and warning cases on basic negligence principles. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973); Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974); *see also* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980). The negligence standard for design defect and failure to warn has been adopted by MUPLA, *supra* note 9, § 104 and analysis, and by the Senate Bill, *supra* note 9, § 5(b).

25. *See* Twerski, *supra* note 8, at 562-64.

limitations in litigating the appropriateness of the particular design, then the court should further examine whether alternative decision-making mechanisms may have adequately accounted for safety concerns. A court might discover that the market in which the questioned product competed was vigorous—one that offered consumers a broad choice of options.[26] Or it might find that the defendant manufacturer's safety review process was extensive and thorough.[27] The court might also find that the product was subject to extensive safety regulation by state or federal safety agencies.[28] Finally, the court might find that to extend the protection of the safer design alternative would require the court to be excessively paternalistic by imposing its will on society when, in fact, the burden of decisionmaking should be shifted to responsible persons who can intelligently decide for themselves the desired level of product safety.[29]

If a court were to determine that its institutional limitations are considerable—that is, it has little confidence that its own decision processes are likely to reach a result clearly preferable to that reached by the manufacturer—and, in addition, it has good reason to believe that other forces existed in society that could have effectively influenced the choice of whether additional safety should have been added to the product, it would then direct a verdict for the defendant. With the margin for error being significant, and with some assurance that society had already scrutinized the design for safety, a court would simply call it quits.

The analogy to the Rube Goldberg cartoon is apt. If these determinations can be made at the pleading or pretrial stage, there is little reason to crank up the judicial system when it is destined to produce questionable results. However, even if the determinations cannot be made until the plaintiff and/or defendant have completed their respective cases, the directed verdict would operate to set precedent for future litigation, instructing claimants and manufacturers as to the kinds of cases that will not be permitted to reach juries. The process will thus allow the parties to self-screen the unworthy cases from litigation. By expressing their holdings through directing

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26. *See id.* at 566-67.

27. *See id.* at 574-75. *See also* Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability*, *supra* note 4.

28. The suggestion is not that compliance with a statute becomes an automatic ground for a directed verdict, but rather that the legislative presence is one factor to be considered in directing a verdict. *See* Twerski, *supra* note 8, at 576-78.

29. *See id.* at 571-73.

verdicts in favor of defendants in clear policy language, rather than masking their findings in fact-sensitive evidentiary terms, courts would facilitate this weeding-out process. High policy would emerge from its subterranean existence and provide guidance to the business community and the courts. Admittedly, this multifactor duty approach does not provide the certainty of such old standbys as the patent danger rule, the intended purpose rule, or the bystander rule. Nonetheless, it would make available a body of precedent that could give form and substance to design litigation. Cases that pass the multifactor screening mechanism would reflect a composite judgment that the alternative decisionmaking mechanisms for assuring that safety is adequately considered were not sufficient, when regarded together with the error potential inherent in the litigation process, to justify denial of the claim.[30]

The argument that courts have always been attentive to justiciability considerations has been recently made by Professor Henderson.[31] He has demonstrated that a broad range of process concerns have played a major role in the formulation of substantive tort doctrine. I believe that a brief review of classical doctrine will reveal that single-factor duty rules are best explained by a multifactor analysis not unlike that suggested for design litigation. This, of course, does not ipso facto make it correct. But in proposing that courts utilize this mode of judicial screening, it is helpful to suggest to them that they should feel relatively comfortable in doing so. More importantly, before we go rushing headlong into the screening process suggested by recent legislative proposals for ridding the product liability system of unworthy cases, it is imperative that we have a sense of a screening process that allows for both predictability and flexibility.

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30. Professor Henderson has suggested that, in reality, I have focused not only on the two categories I have outlined (i.e., institutional limitations and alternative decisionmaking mechanisms), but also on an evaluation of the substantive merits of the cases. He suggests that if an analysis of the first two categories leads to the conclusion that a directed verdict is proper, then a presumption of nondefectiveness arises, rebuttable only by clear evidence on the side of the plaintiff in support of defect. Henderson, *Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845, 854-55 (1983). Although I do not conceive of my proposal as creating presumptions of any sort, I believe that Professor Henderson has accurately characterized my position that close-call design defect cases should not be litigated in the teeth of demonstrable judicial limitations in avoiding both factual and doctrinal error, when there is strong evidence of extrajudicial mechanisms for control of product safety.

31. Henderson, *Process Constraints in Tort*, *supra* note 4.

II. SOMETHING OLD—A LOOK AT GOVERNMENTAL IMMUNITY

One of the oldest single factor no-duty rules is governmental immunity from tort liability.[32] Although that hoary rule, the subject of significant legislative and judicial scorn, has been substantially undermined,[33] courts have stood fast in their support of the immunity doctrine in those cases where the essence of the "special relationship between the government and its citizens" is implicated.[34] It is interesting, however, to note that a wide range of policy concerns support the broadside conclusion that cases involving this special relationship should not be subject to the reasonableness standard of tort law.

Weiss v. Fote[35] is illustrative. In that case, the plaintiff was struck by a car that was involved in an intersection collision. The collision propelled the car across the intersection, over the curb, crushing the plaintiff. At trial, the plaintiff sought to establish that the traffic signal at the intersection was negligently designed in that the four-second clearance interval between the changes in the traffic light was too short. As a result, the east-west traffic light turned green before all of the north-south traffic had cleared the intersection.[36] The New York Court of Appeals, reversing a jury verdict against the city of Buffalo, held that no duty had been violated by the city.[37] The court was not prepared to go behind the planning functions of Buffalo's traffic safety officials.

Utilizing the multifactor analysis discussed earlier, it is evident that the court in *Weiss* had ample reason to refuse to expose the governmental decision to a review of its substantive reasonableness. The decision of whether to utilize a four- or five-second interval is one that could involve the courts in a never-ending cycle of decision-making. The decision as to proper time for clearance does not affect

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32. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971); Borchard, *Government Liability in Tort* (pts. I, II & III), 34 YALE L.J. 1 (1924), 34 YALE L.J. 129 (1924), 34 YALE L.J. 221 (1925); Borchard, *Governmental Responsibility in Tort* (pts. IV, V, VI), 36 YALE L.J. 1 (1926), 36 YALE L.J. 757 (1927), 36 YALE L.J. 1039 (1927).

33. *See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-2680 (1976); N.Y. CT. CL. ACT § 8 (McKinney 1963). *See also* Feres v. United States, 340 U.S. 135, 139-40 (1950) (noting that major reason behind abolition of governmental immunity in Federal Tort Claims Act was inequity of leaving injured parties remediless solely because wrongdoer was government employee).

34. Henderson, *Expanding the Negligence Concept*, *supra* note 4, at 507.

35. 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

36. *Id.* at 583, 167 N.E.2d at 64, 200 N.Y.S.2d at 411.

37. *Id.* at 588, 167 N.E.2d at 67, 200 N.Y.S.2d at 415.

this intersection alone. Traffic lights must be staggered to account for the flow of traffic from numerous other arteries. The availability of police to monitor traffic at other intersections is also implicated. Two or three seconds more clearance time at any given intersection may not be significant; multiplying that integer throughout the entire city of Buffalo may well raise substantial questions of cost and efficiency.

Complex design cases involve proof problems that raise serious questions as to the fairness of the judicial process. The plaintiff alleges that the design of a system is faulty by pointing to a very specific setting in which the design did not provide adequate safety. He can often successfully demonstrate that another design would have avoided this particular accident. To defend the allegedly negligent design, the defendant must argue that the alternative design would not be as effective or safe in other instances. Thus, the defendant is faced with an alternative design that would have avoided the particular injury which occurred, but might have caused other problems of equal magnitude. It takes a particularly perceptive jury to be willing to look away from the case at hand and to focus on those hypothetical instances in which the alternative design would have created other safety problems.[38] It is little wonder that courts have proceeded with caution in this setting.

In appraising its own capabilities of fairly litigating the case, a court may seriously doubt whether its risk-utility assessment could accurately gauge whether the choice of the plaintiff's alternative design is superior to the one that caused the accident. This is exactly what the court concluded in *Weiss*.[39] In addition, the court there considered the fact that the traffic safety design was implemented by an administrative agency with delegated legislative powers. To be sure, legislative standards are not binding,[40] but they should not be disregarded by courts faced with complex choices among closely matched alternatives.[41] It is also clear in *Weiss* that the court as-

38. *See* Twerski, *supra* note 8, at 553-56.

39. The court in Weiss stated: "Indeed, as we read the lengthy and involved body of testimony before the jury, there is ample basis for doubting that body's capacity to arrive at a conclusion as to the 'clearance interval's' reasonableness." 7 N.Y.2d at 586, 167 N.E.2d at 66, 200 N.Y.S.2d at 413-14.

40. It is hornbook law that compliance with a statutory standard may be some evidence, but is not conclusive, on the issue of non-negligence. *See, e.g.*, Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965); Berkebile v. Brantly Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971); W. PROSSER, *supra* note 32, § 36, at 203-04.

41. Thus, the mere fact that a legislative standard exists should be a significant factor in

sessed the process of decisionmaking utilized by the traffic control agency. The court discovered a process that had thoroughly assessed the alternatives and had engaged in extensive fact-finding before reaching a decision. When a court is confronted with a decisionmaking process that is well structured and designed to bring sensible alternatives to the fore, there is good reason to expect such an extensive and thorough process to result in reasonable standards.[42] The court further noted that the agency entrusted with the decision, in opting for a clearance interval of four seconds, had decided the very case that was now before the court, utilizing the substantive risk-utility standard that is the essence of negligence litigation. The court stated:

> We are of the opinion that the traditional reliance on a jury verdict to assess fault and general tort liability is misplaced where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury. Although a jury verdict is to be highly regarded, it is neither sacrosanct nor preferable to the judgment of an expert public planning body.[43]

Thus, the seemingly blunderbuss governmental immunity rules, in truth, reflect the sensitive balancing of several factors. When courts are convinced that their own capabilities for decisionmaking may be seriously compromised and that the decisionmaking process to which the questioned decision had been delegated sensitively engaged in rigorous and reasoned deliberations, the no-duty decision is not only defensible, it is eminently correct.

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deciding whether to permit a case to be tried on the reasonableness issue. *See* Twerski, *supra* note 8, at 578; *id.* at 587-89 (discussion of Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978)).

42. For an assessment of the role that a thorough process should have on design defect litigation, see Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability*, *supra* note 4.

43. 7 N.Y.2d at 588-89, 167 N.E.2d at 67-68, 200 N.Y.S.2d at 415-16. Thus, the court in *Weiss* not only recognized the presence of a regulatory standard, but also assessed the process that led to the establishment of the standard and evaluated the competence of the alternative decisionmaker.

In cases where courts are called on to evaluate the standards set by an administrative agency, and the agency, as in *Weiss*, is not the party defendant, a court may evaluate the integrity and independence of the agency as an additional factor in deciding whether to give the agency standard credence. Thus, it may consider whether the agency has a reputation for freedom from industry pressure, or whether it has developed a substantial industry orientation toward regulation. *See* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

III. SOMETHING NEW—FROM THE CLASSROOM TO THE STADIUM

The suggested form of duty analysis set forth above[44] has found expression in several recent cases. Although the courts have yet to articulate their analytical processes with sufficient vigor, it does not require a quantum leap to conclude that the rudiments of multifactor analysis are well in place.

A particularly interesting analysis of limited judicial competence in complex tort litigation is found in *Hackbart v. Cincinnati Bengals, Inc.*[45] The incident which gave rise to the lawsuit occurred near the end of the first half of a football game between the Denver Broncos and the Cincinnati Bengals. The Denver team was ahead by a score of 21 to 3. Cincinnati had the ball on offense and attempted a forward pass. Charles Clark was playing fullback for the Bengals and was a prospective receiver on the play. Hackbart was playing free safety for the Denver Broncos, defending against the pass. As fate would have it, the forward pass was intercepted near the goal line by a Denver linebacker, who began to run the ball upfield. Hackbart attempted to block Clark in the end zone to keep him out of the play. When he did so, Hackbart fell, but raised himself on one knee to watch the play as it continued upfield. Clark, acting out of anger and frustration, but without a specific intent to injure, stepped forward and struck Hackbart on his back. Weeks later, it was discovered that as a result of this blow, Hackbart suffered a neck injury that caused the premature termination of his football career.

The federal district court found that the defendant had violated no duty to the plaintiff.[46] That decision was ultimately reversed by the Court of Appeals for the Tenth Circuit in an opinion that did little to grapple with the rather formidable analysis of the district court.[47] In deciding that civil courts could not be expected to control

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44. *See supra* text accompanying notes 17-31.

45. 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

46. *Id.* at 356.

47. 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). The court of appeals believed that both federal and state jurisdictional principles militated against judicial restraint in refusing to provide a forum for the litigation of this case. *Id.* at 521-24. The court's argument, however, appears contrived. The extensive body of law dealing with limited-duty or no-duty rules provides a rich source of substantive doctrine from which the courts are free to analogize without contravening jurisdictional principles. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 415-535 (7th ed. 1982). State courts continue their redefinition of duty rules. *See, e.g.*, Antcliff v. State Employees Credit Union, 414 Mich. 624, 327 N.W.2d 814 (1982); Robinson v. Reed-Prentice, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

the level of violence in commercial football when there was no specific intent to injure,[48] the district court made several observations about the sport: Football is a game characterized by significant physical violence;[49] the sanctions for inappropriate behavior on the football field are set forth by a highly legalistic set of rules calibrated to sanctions ranging from yardage penalties to suspension or expulsion;[50] disabling injuries are commonplace in football;[51] flare-ups and fighting are not uncommon in the heat of passion during a game;[52] the violence of football is carefully orchestrated. The court noted that the coaches made a guided effort to build the emotional level of players to " 'controlled rage.' "[53] One coach testified that the pregame psychological preparation should generate an emotion

> equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.[54]

The court went on to analyze whether behavior on the playing field in the business of professional football should become a subject for the business of the courts. The court noted:

> The [National Football League's] rules of play are so legalistic in their statement and so difficult of application because of the speed and violence of the play that the differences between violations which could fairly be called deliberate, reckless or outrageous and those which are "fair play" would be so small and subjective as to be incapable of articulation.[55]

The court further noted that it would be extremely difficult to resolve causation questions since the number of collisions between players are so frequent and forceful.[56]

The district court's analysis touches on many of the considera-

48. 435 F. Supp. at 358.
49. *Id.* at 354.
50. *Id.*
51. *Id.* at 355.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 358.
56. *Id.*

tions that have been suggested for a multifactor duty analysis. The court first examined its ability to penetrate deeply into the fine points of football rules so that it could divine an appropriate standard of care for an alien world in which violence was the norm.[57] The analogy to the dilemma of a court in a complex design defect case seeking to establish a design standard against the background of technological concepts that are foreign to the court is not strained. In *Hackbart*, the problem is even more extreme. The court noted that the written rules of football are not only difficult to understand, but difficult to apply because of the speed and violence of the game.[58] Their application, the court said, "is often a matter of subjective evaluation of the circumstances."[59] Thus, to be fair, a court would have to freeze a moment in time and bring to bear the subjective evaluation of a referee to the issue. The Henderson argument that this calls for managerial decisionmaking rather than judicial decisionmaking[60] seems particularly apt. When one adds the complex causation problem to the football case, the justiciability of the claim is put further in doubt. What would have happened to Hackbart had Clark not battered him? A football player past age 35 is prone to disabling injuries. The blow that was delivered out of anger or frustration could have just as easily been delivered in the very next play on a legitimate tackle. Thus, the relationship between the standard of care and causation is implicated in this type of case.[61] To make the case for causation with clarity, the standard of legitimate player contact would have to be defined and determined to be such that it would have avoided injury.

Finally, the harsh reality is that the players subjected themselves to the authority of another decisionmaking process—that of the National Football League.[62] The alternative decisionmaker was a well respected body that had set standards and imposed sanctions for their violation. I do not mean to imply that the NFL has the delegated legislative authority of a governmental regulatory agency. However, as a result of television and the media, football has become a high visibility sport, and continued national approval of its general

57. *Id.* at 354-55.
58. *Id.* at 354.
59. *Id.*
60. Henderson, *Expanding the Negligence Concept*, *supra* note 4, at 469-77.
61. For a discussion of the relationship between standard of care and causation, see Twerski, *supra* note 8, at 564.
62. 435 F. Supp. at 358.

operation is certainly significant. The decision to forego judicial examination of individual conduct in a football game seems quite correct.

In a similar vein, the refusal of courts to allow a cause of action for educational malpractice is buttressed by a multiplicity of factors. In these cases, plaintiffs have brought suit for the failure of school systems to act reasonably in the discharge of their duty to educate the student.[63] Allegations have included improper testing, evaluation, grading, and promotion. The politically charged nature of these cases has clearly been a factor in the denial of a cause of action.[64] Nonetheless, the elements that have been discussed by the courts indicate that they have recognized their own limitations and are prepared to entrust educational decisions to responsible and responsive governmental agencies.

In denying recovery, courts have expressed deep concern about their ability to set standards that could meet with widespread societal approval. Thus, in *Peter W. v. San Francisco Unified School District*,[65] the court said:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not

63. *E.g.*, Smith v. Alameda County Social Servs. Agency, 90 Cal. App. 3d 929, 941-42, 153 Cal. Rptr. 712, 718-19 (1979); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Tubell v. Dade County Pub. Schools, 419 So. 2d 388 (Fla. Dist. Ct. App. 1982); Doe v. Board of Educ., 295 Md. 67, 453 A.2d 814 (1982); Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

64. *See, e.g.*, Hunter v. Board of Educ., 292 Md. 481, 439 A.2d 582 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

65. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

perceived, recognized but not identified.[66]

This problem truly involves the court in polycentric decisionmaking. If the problem is that Johnny can't read, then spending more time on reading could lead to less time on mathematics or current events. Should physical education be sacrificed for remedial reading or should the funds be equally divided? A decision to increase educational intensity could meet with resistance at home because it would adversely affect the child's ability to help care for siblings or earn part-time money, which could in turn cause emotional stress, which could in turn result in diminished academic performance.[67] The cycle is never ending. To this must be added the intractable problem of establishing causation. If the standard is so difficult to evaluate, then establishing what would have happened if the hypothetical standard had been met is equally difficult.[68]

The courts also have emphasized the decisionmaking authority of the boards of education and their high political visibility as a significant reason for nonintervention in an educational malpractice case.[69] These boards, locally based and responsible to political pressure, are not only delegated by law with the responsibility for education, but also constitute a market of sorts for various educational theories. The work product is, in a sense, open and obvious to parents and guardians. Long range educational problems do not surface overnight and there is an opportunity for parental involvement, as well as very often an appeals process of sorts for decisions that are unpalatable.

If courts are to be encouraged to perform the screening necessary to prevent the law of torts from drowning in the reasonableness standard, then there will be a continuing need in each area to articulate the special concerns that justify judicial abstinence. It will re-

66. *Id.* at 824, 131 Cal. Rptr. at 860-61 (footnote omitted).

67. Although the courts have not identified this problem as involving polycentric decisionmaking, they have given voice to this concern in more traditional verbiage—they have noted that the multitudinous factors that affect the learning process make it impossible to establish causation. *See* cases cited *infra* note 68.

68. *See* D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 556 (Alaska 1981); Hunter v. Board of Educ., 292 Md. 481, 487, 439 A.2d 582, 585 (1982); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 445-46, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 379 (1979) (Wachtler, J., concurring).

69. *See* D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 557 (Alaska 1981); Hunter v. Board of Educ., 292 Md. 481, 487-88, 439 A.2d 582, 585-86 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 125-27, 400 N.E.2d 317, 319-20, 424 N.Y.S.2d 376, 378-80 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 444-45, 391 N.E.2d 1352, 1354-55, 418 N.Y.S.2d 375, 378 (1979).

quire more then the broadside statement that declares that courts ought to leave the area alone. Finely honed policy arguments, tied specifically to the facts of the particular case, can make the difference in bringing about aggressive judicial control of tort law.

IV. SOMETHING BORROWED—POLITICAL QUESTION DOCTRINE

Questions of judicial competence have also played a role in cases that the United States Supreme Court has identified as presenting nonjusticiable political questions.[70] In the seminal case of *Baker v. Carr*,[71] the Court set forth several factors that, if present, would weigh in favor of an issue being held nonjusticiable.[72] Two of these considerations—"a lack of judicially discoverable and manageable standards for resolving [the question]"[73] and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"[74]—reflect the Supreme Court's recognition of its own institutional limitations.[75]

The cases of *Coleman v. Miller*,[76] *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*[77] and *Gilligan v. Morgan*[78] present perhaps the clearest examples of instances in which the Court has stressed a lack of institutional capacity.[79] In *Coleman*, the

70. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 8, 10 (1973) (court would lack competence to formulate standards for composition and training of military units); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (foreign policy determinations by President involve factors beyond judicial competence to evaluate or review); Coleman v. Miller, 307 U.S. 433, 453-54 (1939) (court should not undertake to appraise political, social, and economic conditions bearing on constitutional amendment process).

71. 369 U.S. 186 (1962).

72. *See id.* at 217.

73. *Id.*

74. *Id.*

75. The precise role that functional or prudential factors play in the political question doctrine has not been clearly defined by the Court, and has been the subject of considerable debate among commentators. It is beyond the scope of this article to expound upon or critique the many positions that have been taken. For a review of the most prominent approaches in this area, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16 (1978).

76. 307 U.S. 433 (1939).

77. 333 U.S. 103 (1948).

78. 413 U.S. 1 (1973).

79. This article does not purport to undertake a comprehensive analysis of the political question doctrine. Certainly constitutional scholars will recognize that numerous other concerns and constitutional nuances are implicated in the cases discussed here. However, the presence of institutional concerns has not escaped recognition by the leading commentators. For example, Professor Scharpf relied on *Coleman* and *Waterman S.S.* in support of his functional theory of the political question doctrine. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567-73 (1966). In essence, Scharpf argued that the Court was justified in deferring to an alternative decisionmaker when it was called

State of Kansas, which had rejected a proposed constitutional amendment in 1924, ratified the same amendment in 1937.[80] The petitioners, members of the Kansas legislature who had opposed ratification, argued that the amendment could not have been legitimately enacted because it had not been passed within a "reasonable time."[81] Chief Justice Hughes, writing the opinion of the Court in which two other Justices joined, stated that a determination as to how much time an amendment should be afforded for ratification required a consideration of factors that were not properly within the purview of the judiciary.[82] He wrote:

> Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute . . . . [There are numerous matters which must be] examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified.[83]

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upon to assess or evaluate factual matters as to which another branch had "superior institutional capacity." *Id.* at 570. Professor Henkin, in evaluating *Gilligan*, suggested that the Court's recognition of judicial incompetence to supervise and evaluate military procedures may have implicitly led it to conclude that the cause should be dismissed for "want of equity." Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 619-22 (1976). Henkin would favor the employment of this doctrine when the nature of the remedy requested rendered the Court unable to fashion adequate relief. *See id.* at 606-07, 619-20.

80. 307 U.S. at 435-36. The amendment at issue was the proposed Child Labor Amendment, 46 Stat. 670 (1924).

81. 307 U.S. at 451-52.

82. *Id.* at 453-54. In Dillon v. Gloss, 256 U.S. 368, 375-76 (1921), the Court had decided that Congress had the power to designate the mode of ratification of amendments. The Court also held that the Constitution required that ratification "reflect the will of the people in all sections [of the country] at relatively the same period." *Id.* at 375. The time set, said the Court, should be "some reasonable time after the proposal." *Id.*

83. 307 U.S. at 453-54.

The Court went on to say that while such matters were inappropriate for judicial consideration, an alternative mechanism did exist for their evaluation and solution:

> [T]hese conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.[84]

Thus, the Court was particularly ill-at-ease when asked to delve into matters that are, by their nature, amorphous and unquantifiable. This discomfort was accentuated because of the existence of an alternative decisionmaker that was better suited to the task.

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[85] the Court faced another judicial no man's land. The respondent, a domestic air carrier, asked that a Civil Aeronautics Board (CAB) decision not to grant it authorization to provide foreign air transportation be overturned.[86] The denial of the grant had received express presidential approval as was required by statute.[87] Although review of CAB decisions was provided for in the Civil Aeronautics Act,[88] the Court declined to review such decisions when, as in this instance, the President had approved the CAB's decision.[89]

The Court pointed to the fact that the presidential decision not only hinged on foreign policy considerations, but required knowledge of specialized information only the Chief Executive could reasonably be expected to assay adequately.[90] In addition, the Court indicated that even if it could obtain and assess the requisite information, the nature of the decision to be made required a degree of discretion and an analysis of factors that were inappropriate to the judiciary. Mr. Justice Jackson wrote:

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84. *Id.* at 454.

85. 333 U.S. 103 (1948).

86. *Id.* at 105.

87. *Id.* at 104-05. Another section of the Civil Aeronautics Act provided that all orders of the CAB were reviewable in federal court. *See* Civil Aeronautics Act, ch. 601, § 1006, 52 Stat. 1024 (1938) (repealed 1958). The current version of this statute removes from review all orders that are subject to presidential approval. 49 U.S.C. § 1486 (1976).

88. Ch. 601, § 1006, 52 Stat. 1024 (1938) (current version at 49 U.S.C. § 1486 (1976)). *See supra* note 87.

89. 333 U.S. at 110-11.

90. *Id.* at 111.

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[91]

Coleman illustrates the problems the judiciary faces when it realizes an informational deficit. The difficulty stems not from the volume of information to be considered, but from the nature of that information. Political, social, and economic factors are fundamentally amorphous and unquantifiable. *Coleman* suggests that when courts stray into these fields they run a substantial risk of factual error; any decision reached would of necessity be flawed because it would rest on an unsteady base.

Like *Coleman*, *Waterman Steamship* focuses initially on informational difficulties.[92] Unlike *Coleman*, however, the information at issue was not difficult to assess, but was inaccessible because of its confidential nature.[93] In addition, the Court noted that even if the informational problems were resolved, the matter would still be nonjusticiable because of the nature of the decision involved, not the nature of the facts upon which the decision would be based.[94] The decision of the President on such matters was inherently one that was grounded in an exercise of discretion. On such a question, the Court, even if considering the same facts available to the President, could claim no better expertise than the Chief Executive in such matters. In short, the Court may have felt that it could apply no principle for guiding the Chief Executive to a better decision and could set down no framework for the resolution of such an issue in the future.

While *Coleman* focused on the bases of decision and *Waterman Steamship* on the character of the decision itself, these factors both

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91. *Id.* (citations omitted).
92. *See id.*
93. *See id.*
94. *See id.*

seem to be present in *Gilligan v. Morgan.*[95] *Gilligan* presents an interesting political question analogue to questions sometimes found in design defect litigation. The respondents, students at Kent State University in 1970, claimed that the Ohio National Guard violated the students' rights of speech and assembly and otherwise acted without legal justification during a violent campus disturbance in May, 1970.[96] The students asked that the Court undertake a "judicial evaluation of the appropriateness of the 'training, weaponry and orders' of the Ohio National Guard . . . [and] that the District Court establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard."[97] Further, the Court was asked to provide "[c]ontinued judicial surveillance to assure compliance with the changed standards."[98]

The Court held that it was beyond the capabilities of the judiciary to grant the relief sought. First, the Court said that information relative to the design of a military unit was highly technical and inconclusive, and thus beyond the judicial grasp:

> [The respondents' request] would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited [by respondents] may represent only a fragment of the accumulated data and experience in the various States, in the Armed Services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed quite technical competence.[99]

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95. 413 U.S. 1 (1973).

96. *Id.* at 3.

97. *Id.* at 5-6.

98. *Id.* at 6.

99. *Id.* at 8. The majority based its decision, in part, on a constitutional delegation to a coequal branch. Justice Blackmun, however, in a concurrence joined by Justice Powell, indicated that he would hold the issue nonjusticiable solely on the ground of judicial incapacity. He wrote:

> This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and command. As such, it presents an "[inappropriate] . . . subject matter for judicial consideration," for

In essence, the *Gilligan* Court was asked to correct a defect in the design of the Ohio National Guard. The Court's difficulty in fulfilling this request stemmed from a number of factors. First, the relevant information was of a highly technical nature; the Court could not assure itself that it would not commit factual error in evaluating the evidence. Second, the Court acknowledged that even a party able to assess the pertinent data would find it in large part subjective, often contradictory, and hopelessly inconclusive. No expert could state unequivocally that he had derived the appropriate standard from such material. This being the case, the Court could not suggest any definitive standards by which to adjudge the decisionmaker's choices as erroneous. The best the Court could hope to do was to replace the judgment of the professional planner with its own—to exchange one unprincipled decision with another.

In sum, the Court in the political question area has identified the following warning signals of nonjusticiability: (1) The information needed for a decision is highly technical, elusive, or in some other way inaccessible; (2) An evaluation of the requisite information, even by a party that has the capability of making such an evaluation, does not yield substantive standards; (3) An alternative mechanism exists that is in a better position to evaluate or resolve the issue in question.[100]

It is clear that when the stakes are sufficiently high, courts are capable of mustering the necessary introspection to assess their institutional infirmities and to evaluate the efficacy of other decisionmaking modes. The selfsame political realities that have been of sufficient intensity to trigger federal legislative proposals have brought to the attention of the judiciary the severity of the problems encountered by the business community with products liability. Courts that have had their justiciability consciousness raised could thus draw on well-developed concepts in limiting the reasonableness standard. That this is the preferred direction to be taken can only be seen by comparing the judicial screening process with the proposals for legis-

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respondents are asking the District Court, in fashioning that prospective relief, "to enter upon policy determinations for which judicially manageable standards are lacking." Baker v. Carr, 369 U.S. 186, 198, 226 (1962).

Id. at 14 (Blackmun, J., concurring).

100. It is not germane here whether the Court employed these factors in determining whether reference to an alternative decisionmaker was constitutionally mandated or whether prudence so required. These cases have been highlighted merely to illustrate the types of institutional limitations by which courts, including the Supreme Court, feel they are or should be bound.

lative screening.

V. SOMETHING BLUE—LEGISLATIVE SCREENING

The product liability crisis has spawned legislative activity at both the state and federal level.[101] In another forum, I undertook a detailed analysis of the proposed federal legislation.[102] I shall not repeat my critique at this time except to note that the federal legislation would, in my opinion, so complicate the law of products liability that not only consumers but manufacturers will rue the day it was passed. There is a place for sharply focused federal legislation that addresses the most serious problems besetting the product liability litigation system.[103] But a complex product liability code that seeks to legislate every aspect of the common law cause of action is beyond anyone's drafting capabilities.[104] The ambiguities will plague us for decades to come.

The focus of my present concern is on the sections that seek to provide a screening mechanism that will prevent unworthy risk-utility cases from reaching juries. As noted earlier, I do not disagree that screening must be accomplished.[105] My suggested multifactor duty analysis is directed toward that very goal.[106] I do believe, however, that the screening that the proposed federal legislation seeks to accomplish will drive significant policy analysis underground and Balkanize risk-utility analysis.

Two sections of the most recent version of the Kasten bill[107] address the risk-utility standard. Section 5(b) of Senate Bill 44 provides:

> A product is unreasonably dangerous in design or formulation if, at the earlier of the time of manufacture or Government certification of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation that the manufacturer used. A product is not unrea-

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101. *See supra* note 9.

102. Twerski, *supra* note 9.

103. For my suggestion for sensible product liability reform that would resolve some of the most vexing issues facing the litigation system, see *id.* at 469-76.

104. It is interesting that the drafters of S. 44, Senate Bill, *supra* note 9, have sought to accomplish in twenty-nine triple-spaced pages what it took the RESTATEMENT (SECOND) OF TORTS (1965), in dealing with negligence liability, an entire volume to accomplish. That the drafters did not succeed is not surprising. They simply attempted the impossible.

105. *See supra* text accompanying notes 7-9.

106. Twerski, *supra* note 8.

107. Senate Bill, *supra* note 9.

sonably dangerous in design or formulation unless—

> (1) the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and
>
> (2) a means to eliminate the danger that caused the harm was within practical technological feasibility.[108]

It is the burden of the plaintiff under section 5(b)(2) to establish that a means of eliminating the harm was technologically feasible.[109] Section 5(e) delimits the evidence that will be found accceptable to establish the alternative design. It provides:

> An alternative design or formulation is evidence that a product was unreasonably dangerous in design or formulation only if the claimant establishes that, at the time of the manufacture of the product—
>
> (1) the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community for the existence of the alternative design, should have known about the alternative design; and
>
> (2) the alternative design or formulation would have—
>
> (A) utilized only science and technology which was reasonably accepted in the scientific, technical, or medical community and which was within practical technological feasibility;
>
> (B) prevented the claimant's harm and provided equivalent or better overall safety than the chosen design or formula. The overall safety of the alternative design or formula is better than the chosen design or formula if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses; and
>
> (C) been desirable, functionally, economically, and otherwise, to the person who uses or consumes it.[110]

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108. *Id.* § 5(b).
109. *Id.* § 5(b)(2).
110. *Id.* § 5(e).

A. *Driving Policy Analysis Underground*

The statutory sections set forth above specify provisions that must be met by the plaintiff in order to establish a prima facie case for defect. These provisions essentially codify risk-utility analysis but require that the plaintiff prove each of the elements separately (more about this later). What is important for this portion of the discussion is that the proposed federal standards seek to control the abuse of risk-utility analysis by looking to the risk-utility formula itself to screen the unworthy cases out of the litigation system. This presupposes that the difficulties that have been encountered in product liability litigation can be attributed to the runaway use of risk-utility analysis. My belief, however, is that the difficulty with products litigation stems not from unbridled risk-utility analysis, but from the occasional inappropriateness of utilizing the balancing process at all.[111] In cases where readily identifiable policy concerns militate against utilization of the negligence formula, defendants should be exonerated from liability. This is how I have always understood the function of tort no-duty rules.[112] Thus, to look to the Learned Hand formula[113] to accomplish the screening sets the entire process on its head. These are not mere theoretical musings. Consider the following.

1. *Technological Feasibility.*—Section 5(e)(2)(A) provides that for an alternative design to be considered it must have "utilized only science and technology which was reasonably accepted in the scientific, technical, or medical community and which was within practical technological feasibility."[114] In discussing the state of the

111. Under my proposed analysis, the close-call risk-utility case would be diverted from litigation if there were demonstrable institutional infirmities that would place in question the ability of the court to fairly litigate the design, and alternative mechanisms existed that addressed the safety concerns. Although this necessarily calls for some understanding of the risk-utility evidence, the cutting edge for screening is the non-risk-utility considerations.

112. Thus, no-duty rules have been rationalized as diverting from risk-utility litigation those cases that for sound policy reasons should not be subjected to the negligence test. *See, e.g.*, W. PROSSER, *supra* note 32, §§ 56, 58; Green, *The Duty Problem in Negligence Cases* (pts. 1 & 2), 28 COLUM. L. REV. 1014, 1033-45 (1928), 29 COLUM. L. REV. 255, 255-56, 270-75 (1929).

Some scholars rationalize no-duty rules based on risk-utility considerations. According to their view, a no-duty rule does not operate to remove cases from the risk-utility arena, but rather is a conclusion that is itself based on risk-utility principles. *See, e.g.*, R. POSNER, *supra* note 1, §§ 6.7, 6.9; Landes & Posner, *supra* note 2, at 872-73; Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 119-27 (1978).

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

114. Senate Bill, *supra* note 9, § 5(e)(2)(A).

art question as one of the factors to be utilized by the courts in a multifactor duty analysis, I have noted that the question of whether to apply negligence or strict liability in a particular case was only one of the questions that courts must decide.[115] Indeed, it is the easiest one at that. If legislatures wish to eliminate strict liability they need only mandate that for design and failure to warn cases, the manufacturer's conduct is to be judged as of the time of manufacture or sale.[116]

Much more difficult to control, however, are two other questions that pass under the state of the art label. The first is the problem of changing societal attitudes with regard to safety. There are real fairness problems in litigating cases involving a design of ten or twenty year vintage. The problem is not that technology has changed drastically. Most of the design changes for which plaintiffs clamor were technologically feasible ten, twenty, and most probably, fifty years ago. If they were not instituted, it was due to the fact that society did not consider safety to be the burning issue that it has become today.[117] The proposed section does not address this real problem of unfairness to manufacturers. It may be that courts, faced with cases of antiquated designs, will utilize section 5(e)(2)(A) or that juries instructed with regard to this section will bring in defense verdicts. But it is unlikely that courts will grapple with the question honestly. With Congress having spoken to the issue of technological feasibility, the matter will come to rest. It is not likely that courts will utilize their creative lawmaking powers to clarify the policy that they seek to apply. Thus, either the real problem will remain with us or the courts seeking to take into consideration the policy of not litigating cases past the time that societal values have changed will end up making their decisions in the jargon of technological feasibility.

A second problem that plagues the courts and often masquerades under the state of the art-technogical feasibility label concerns the weight to be given to uncorroborated expert testimony.[118] It is one of the world's worst kept secrets that expert testimony is often the product of guesswork that bears little relation to the real world.

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115. Twerski, *supra* note 8, at 556-61.

116. Senate Bill, *supra* note 9, § 5(b) adopts a negligence standard that pinpoints the time of manufacture as the time period for the exercise of risk-utility judgments. This aspect of the legislation is, I believe, desirable. *See* Twerski, *supra* note 9, at 470-72.

117. *See* Henderson, *supra* note 23; Twerski, *supra* note 8, at 560.

118. *See* O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627 (1978); Twerski, *supra* note 8, at 556-57.

An expert testifying about an alternative design may have done little to support that testimony as to its practical feasibility. I have suggested that in assessing the directed verdict potential, courts should evaluate the strength of the expert testimony as one factor in its decisionmaking process.[119] Thus, expert testimony of a somewhat questionable nature that might be sufficient to support a jury verdict in a rather simple design case, should not be sufficient if the case involved a complex polycentered design change.

Legislative attempts have offered little hope for the resolution of this problem. An early version of the federal legislation contained a section that sought to deal directly with expert testimony.[120] That section limited the rights of claimants so sharply[121] that it was dropped from the most recent version of the bill.[122] The current bill limits the court's focus to the issue of whether the plaintiff has proven the practical technological feasibility of the design. By ignoring any consideration of expert testimony, the proposed legislation overlooks the fact that the issue often should not be whether the alternative design is practical, but rather, whether such a decision can be based on flimsy expert testimony.

The difficulty with legislating this topic is that the moment we formulate the expert testimony issue as a make-or-break test for the viability of a design defect case, we engage in massive overkill. The alternative embodied in the proposed federal legislation will either not address the problem at all, or will compel courts to mask their policymaking with regard to expert testimony in the guise of determinations of practical technological feasibility. Thus, decisionmaking that otherwise would lead to well-articulated decisions with high precedential value will be driven underground.

2. *Polycentricity.*—Perhaps the most potent argument for screening design defect cases from the litigation system is the inability of courts to replicate the design process undertaken by manufac-

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119. *See* Twerski, *supra* note 8, at 556-58; Twerski, *supra* note 9, at 441-43.

120. In the original version of S. 2361, Product Liability Act, 97th Cong., 2d Sess., 128 CONG. REC. S6847-51 (daily ed. June 16, 1982), § 4(b) provided: "The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence." *Id.* at S6847.

121. *See* Twerski, *supra* note 9, at 441-43; 1982 SENATE REPORT, *supra* note 9, at 14.

122. S. 2631 was reported to the Senate with amendments in the nature of a substitute. 128 CONG. REC. S13,674 (daily ed. Dec. 1, 1982). The amended S. 2631 is identical to S. 44. 129 CONG. REC. S283 (daily ed. Jan. 26, 1983) (statement of Sen. Kasten).

turers.[123] The contention that this multifaceted and interconnected process is not fit for judicial determination is most persuasive when an alternative design suggested by the plaintiff would significantly alter the design of the product.[124] The court would then become enmeshed in managerial decisionmaking of a high order.

The standards that the federal legislation establishes for the admissibility of evidence of an alternative design addresses this problem only tangentially. Admittedly, the rule-oriented approach of section 5(e) will have some tendency to prevent polycentric cases from reaching juries. It is, however, quite possible for even highly polycentric cases to meet the standards set forth in the statute. The problem with the statute is that it does not directly address the polycentricity issue. It could not do so. The proposition that courts ought to be wary of indulging in managerial decisionmaking is not a fit topic for legislation. It is a matter to be directed to a court in its lawmaking role.

Even if one were to grant that the most extreme polycentric cases would be screened out by the legislative standard, a court could not weigh polycentricity together with other factors in deciding to direct a verdict for the defendant in cases where polycentricity is present but not in its most extreme form.[125] The legislative scheme does not provide for considering a broad range of policies in directed verdict practice. Instead, it proceeds on the assumption that sharply focused and limited findings on the isolated factors of risk-utility analysis will do the job. For those who have argued so valiantly over the years that courts should face up to their institutional limitations, the federal legislation sacrifices far too much. One can only expect that the policy grounds for decisions will be driven underground. Courts will, from time to time, note that the plaintiff has not made out one or another of the various elements of the federal cause of action. It will have little relation, however, to the real reason for the decision. This masking of the true issue will prevent courts from confronting the polycentricity issue in all but perhaps the most extreme case.

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123. Henderson, *Judicial Review of Design Choices*, *supra* note 4; Henderson, *Expanding the Negligence Concept*, *supra* note 4.

124. *See, e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974); Twerski, *supra* note 8, at 580, 594; Note, *Judicial Participation in the Establishment of Vehicle Safety Standards: A System in Need of Reform*, 54 TEMP. L.Q. 902 (1981).

125. *See supra* note 14.

3. *Market Factors.*—Among the considerations that I have contended a court should evaluate in deciding to direct a verdict is the extent to which the market was competitive and provided real choices to consumers.[126] In a free market economy, the market can provide substantial guidance as to the desired standard of product safety. The factors test embodied in federal legislation touches upon some of these market factors.[127] However, it focuses on them narrowly as part of risk-utility analysis. There is no attempt to assess the factors in a broader perspective, which I believe is necessary in order to give them the force of significant public policy. Once again, the legislation will cause important policy decisions to be masked in the garb of relatively insignificant fact-finding.

B. *The Balkanization of Risk-Utility Analysis*

The essence of risk-utility analysis is the balancing and weighing of various considerations so that a composite judgment can be made as to whether the product as designed embodied "excessive preventable danger."[128] The federal legislation that sets standards for design litigation seeks to control the judgmental process by fractionalizing risk-utility analysis. For example, section 5(b),[129] at first blush, appears to be nothing more than a reformulation of the negligence formula. But, there is a vast difference between the negligence calculus and the legislative prescription. To make out the prima facie legislative case, a plaintiff must establish each element of the

126. The scope of consumer choice and the open and obvious nature of the danger relate to market concerns. *See* Twerski, *supra* note 8, at 556-74. Professor Henderson has expressed concern that the market choice factor is difficult to deal with at the trial level. He asks whether evidence on consumer choice would be presented to the jury as relevant to the reasonableness issue or whether the jury would be excused from hearing such evidence. Henderson, *supra* note 30, at 856-57. I do not, however, propose radical restructuring of design defect litigation. Much of the evidence of competition will be relevant to the reasonableness issue. Some of it will be judicially noticed by the court. It does not, for example, take a particularly astute observer to note the wide range of choices available to consumers in the automotive market. There is no need for a judge to close his eyes to realities. The judge, prior to a motion for a directed verdict, may also invite the presentation of available published literature to help inform the court on this matter.

127. Senate Bill, *supra* note 9, § 5(e)(2)(A) addresses "practical technological feasibility," which demands under § 2(8) that economic feasibility of the alternative design be established. The market choices are, of course, relevant to the issue of economic feasibility.

128. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885 (Alaska 1979); Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Cryts v. Ford Motor Co., 571 S.W.2d 683, 690 (Mo. Ct. App. 1978); Knitz v. Minister Mach. Co., 69 Ohio St. 2d 460, 466, 432 N.E.2d 814, 818 (1982).

129. Senate Bill, *supra* note 9, § 5(b).

formula *on its own.*[130] What does this mean in practical terms? Consider the amount of knowledge to be charged to a defendant. A defendant is not to be held liable unless "the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community . . . , should have known about the danger . . . ."[131] The issue given to a jury is not whether the defendant acted reasonably given the knowledge that he had or should have had, but whether the knowledge was reasonably accepted in the scientific, technical, or medical community. It is clear, however, that the state of knowledge in the technological community is only one factor in deciding the reasonableness of the defendant's conduct. A risk may be remote and not well established scientifically. If, however, there are good alternatives to the product that avoid the risk entirely, there is no good reason to submit the plaintiff to even a relatively small risk.[132] Furthermore, the risk may be remote, but if it should occur, the gravity of the harm may be great. Under risk-utility balancing, such a product could be declared unreasonably dangerous. The statutory definition eviscerates the trade-off process and substitutes a "layered analysis" that asks questions that do not squarely face the negligence issue.[133] Admittedly, scientific accepta-

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130. *Id.*

131. *Id.* § 5(b)(1).

132. *See* RESTATEMENT (SECOND) OF TORTS § 293 comments b & c (1965).

133. The wonderfully descriptive term "layered analysis" is taken from Henderson, *Expanding the Negligence Concept*, *supra* note 4, at 521 n.203. He utilizes it to describe the numerous exceptions to the rigid no-duty rules. These exceptions create a liability posture if, *but only if*, each of a set of formal requisites is established. Thus, for example, the RESTATEMENT (SECOND) OF TORTS § 339 (1965), dealing with child trespassers, creates such a layered analysis. It provides:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Only if a claimant makes out each of the provisions (a)-(e) would the exception to the no-trespasser recovery rule be established. *See, e.g.*, Goll v. Muscara, 211 Pa. Super. 93, 235 A.2d 443 (1967).

bility is one element to be considered in determining negligence, but it cannot be the sole determinant. By splitting the negligence formula asunder, the legislation screens indiscriminately; it takes no account of the overall balance.

Similarly, section 5(e)(2)[134] improperly requires that each of its elements be made out separately. Thus, for example, the requirement in 5(e)(2)(C) that the alternative design must have "been desirable, functionally, economically, and otherwise, to the person who uses or consumes it,"[135] makes no sense unless it is part of a balancing process. To speak of the alternative design being functionally and economically desirable has little meaning unless we are to take into account the counterweight of safety. It will be the rare instance that some trade-off in favor of safety will not require some sacrifice with regard to function or cost.[136]

In short, to utilize the risk-utility test to screen against the risk-utility test sacrifices both high policy and the innate good sense behind the risk-utility balancing formula. Furthermore, there remains a real question as to what value there is in throwing these very specific questions to the jury. It would seem that the reason for sending a negligence case to the jury is to tap the jury's sense of what is reasonable. It is a holistic judgment that is sought. There is considerable controversy about even informing the jury about risk-utility balancing. Some argue that these factors are best considered by a judge in making his directed verdict decision.[137] However, even those who believe that the jury should be given the factors and told that they are to weigh and balance them, submit the final decision to the jury's discretion.[138] Under the layered analysis, the jury is given a set of discrete questions, each of which has meaning only when considered together with the others, and is told to vote yea or nay. One may wonder, why bother with the jury at all? Perhaps I am mistaken and the discrete questions posed by the legislation are not for the jury,

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This form of analysis prevents the total judgment from being made in a holistic fashion. It is this model that the federal legislation emulates.

134. Senate Bill, *supra* note 9, § 5(e)(2).

135. *Id.* § 5(e)(2)(C).

136. For a full discussion of this aspect of the legislation, see Twerski, *supra* note 9, at 431-37.

137. *See, e.g.*, Azzarello v. Black Bros. Co., 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978); Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1308 n.29 (1974); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 840 (1973).

138. Bowman v. General Motors Corp., 427 F. Supp. 234 (E.D. Pa. 1977); Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal Rptr. 225 (1978).

but for the judge alone to utilize for the purposes of screening out unworthy design defect cases. If this is so, and we are addressing the trial judge, then I submit that the issues that should be considered in directing a verdict need not be limited to the risk-utility factors. Judges can make policy that transcends the negligence formula. And they should not be encouraged to focus on a factors test which Balkanizes the balancing process and robs it of meaning.

VI. THE IMPORTANCE OF SCREENING—THE CONSUMER EXPECTATION TEST

The consumer expectation test is the stepchild of modern product liability law. The rich literature, which otherwise has so ably blanketed the field, has paid it scant attention.[139] With some notable exceptions,[140] scholars have not paid much heed to the continued insistence of numerous courts to predicate liability, in whole or in part, on the failure of a product to meet consumer expectations.[141]

There is a broad-based consensus among courts that in most cases risk-utility analysis must be utilized to establish the standard of product quality.[142] In balancing risk-utility factors, some consider-

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139. The major thrust of the recent literature on products liability has been directed toward risk-utility analysis. For a list of such literature, see Twerski, *supra* note 8, at 521 n.1.

140. *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 69-71 (1980); Bernacchi, *A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration*, 47 U. CIN. L. REV. 43 (1978); Hubbard, *Reasonable* Human *Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 812-24 (1976); Rheingold, *What are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589 (1967); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

141. The following cases illustrate the diversity of jurisdictions that have expressed their liability standard, either in whole or in part, in consumer expectation terms: Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976); Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Vineyard v. Empire Mach. Co., 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978); Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); Aller v. Rodgers Mach. Co., 268 N.W.2d 830 (Iowa 1978); Lester v. Magic Chef, Inc., 230 Kan. 643, 641 P.2d 353 (1982); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); Menard v. Newhall, 135 Vt. 53, 373 A.2d 505 (1977); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

142. *See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd mem. sub nom.* Yoder Co. v. General Cooper & Brass Co., 474 F.2d 1339 (3d Cir. 1973); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); Micallef v. Miehle Co., 39

ation must be given to the likelihood of injury.[143] What a consumer will expect in product performance is certainly an important element in determining whether the product is likely to cause harm. If a product portrays itself as safer than it really is, the consumer may be tempted to put it to uses that may be beyond its performance capacity, triggering a serious injury. There is no way to escape the consumer expectation perspective in establishing a standard for defect.[144]

The more significant question is not whether consumer expectations must be factored into the risk-utility equation that sets the product safety standard, but rather whether consumer expectations alone create a standard for establishing defect. Is it ever possible to bypass risk-utility analysis entirely and establish defect on the grounds that a product failed to meet certain minimum expectations? If so, how are these expectations to be identified so that they can serve as a guide for the court and jury?

These questions must be addressed without equivocation if the consumer expectation test is to achieve independent status as a test for defect. I shall argue that, with proper definition and appropriate limitation, there is a role for a consumer expectation test that operates independently from risk-utility analysis. It is possible to construct a test that will screen out illegitimate and ill-founded consumer expectation cases—thus eliminating the fear that the test is so subjective that it is, in a sense, lawless. The task of weeding out the unworthy consumer expectation cases must fall to the court. Only a court, capable of evaluating the underlying purposes behind the consumer expectation test and the alternative modes of decision available should the test be deemed inappropriate, can judge whether a given fact pattern warrants its application.

There can be no doubt that a test that operates independently from risk-utility balancing smacks of true strict liability.[145] One can readily understand the reluctance of some to embrace such an apparently harsh standard for liability.[146] I shall demonstrate, however,

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N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Wilson v. Piper Aircraft Corp., 382 Or. 61, 577 P.2d 1322 (1978); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

143. RESTATEMENT (SECOND) OF TORTS § 293 comment b (1965).

144. A product that sits dormant in a corner can do no harm. It is only when one considers its uses by consumers that risk levels can be intelligently addressed.

145. *See* Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 301 (1979).

146. *See* Keeton, *supra* note 145, at 302-03.

that, properly understood, the consumer expectation test is neither frightening nor harsh. It is, instead, a sophisticated and delicate tool that can focus attention on the impact of marketing on product safety.

A. *Consumer Expectations—The Madison Avenue Tort*

Many reasons have been set forth for the creation of a test for defect based on consumer expectations. Some have expressed dissatisfaction with the high level of subjectivity of risk-utility balancing and its use by opponents of product and environmental safety to legitimize ultraconservative positions.[147] Others have been disturbed by the use of a formula for liability that elevates economic efficiency over such important human values as protecting the justified expectations of consumers.[148] Case law, however, seems more concerned with developing a test that responds to product image as the standard for liability.[149] I have long believed that product liability problems stem, in large part, from the inability of American technology to keep pace with Madison Avenue. The need for the consumer expectation test arose because no clearly defined tort or contract concept was readily available to address the reality that consumer behavior is significantly influenced by product image.

At first blush, one might expect that the express warranty theory might adequately address product image and the consumer expectations that such image creates. Under the Uniform Commercial Code, a seller is liable when it expressly warrants its product.[150]

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147. *See, e.g.*, Zimmerman, *Risk-Benefit Analysis: The Cop-Out of Government Regulation*, 14 TRIAL, Feb. 1978, at 43. *Cf.* Green, *Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective*, 45 GEO. WASH. L. REV. 901 (1977) (risk-utility balancing may also be inappropriate in context of public policy decisionmaking).

148. *See, e.g.*, Hubbard, *supra* note 140.

149. *See* cases cited *supra* note 141.

150. U.C.C. § 2-313 (1978) provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a state-

There is considerable controversy as to how definite the statement must be to constitute an express warranty. The question of which kinds of statements are puffing and constitute only "the seller's opinion or commendation of the goods" and which statements cross over the line and constitute a warranty has baffled courts for decades.[151] It is clear, though, that the language of most advertisements is not definite enough to constitute an express warranty.[152]

The consumer expectation test focuses less on the quality of the seller's representation and more on the sense impressions that flow to the consumer as to how the product will perform. These impressions may be created by the aura of the product as portrayed by advertisements, the product's self-image, the uses to which consumers have put the product in the past, and many similar intangible factors, which altogether create product image.[153] Under traditional contract

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ment purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

151. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-3 (2d ed. 1980); Shapo, *supra* note 139, at 1186-91.

152. *See* Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Keating v. DeArment, 193 So. 2d 694 (Fla. Dist. Ct. App. 1967); Jakubowski v. Minnesota Mining & Mfg., 80 N.J. Super. 184, 193 A.2d 275 (1963); Denna v. Chrysler Corp., 1 Ohio App. 2d 582, 206 N.E.2d 221 (1964). *But see* Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

153. For a full development of the thesis demonstrating how the various forms of consumer expectations relate to the concept of product defect, see Shapo, *supra* note 140, at 1334-68. Shapo has stated his thesis as follows:

> Judgments of liability for consumer product disappointment should center initially and principally on the portrayal of the product which is made, caused to be made or permitted by the seller. This portrayal should be viewed in the context of the impression reasonably received by the consumer from representations or other communications made to him about the product by various means: through advertising, by the appearance of the product, and by the other ways in which the product projects an image on the mind of the consumer, including impressions created by widespread social agreement about the product's function. This judgment should take into consideration the result objectively determinable to have been sought by the seller, and the seller's apparent motivation in making or permitting the representation or communication.
>
> These determinations of liability should consider, generally, the integrated image of the product against the background of the public communications that relate to it; and should refer, specifically, to those communications concerning the characteristics or features of the product principally related to the element of disappointment, and to the question of whether these characteristics or features reasonably might have aroused conflict with respect to the decision to buy or otherwise to encounter the product.

Id. at 1370. He suggests that the following factors are relevant in establishing a consumer tort:

> 1. The nature of the product as a vehicle for creation of persuasive advertising images, and the relationship of this factor to the ability of sellers to generate product representations in mass media;

law, such soft product expectations would not support a finding of express warranty.[154] They are, however, the stuff that gives content

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2. The specificity of representations and other communications related to the product;

3. The intelligence and knowledge of consumers generally and of the disappointed consumer in particular;

4. The use of sales appeals based on specific consumer characteristics;

5. The consumer's actions during his encounter with the product, evaluated in the context of his general knowledge and intelligence and of his actual knowledge about the product or that which reasonably could be ascribed to him;

6. The implications of the proposed decision for public health and safety generally, and especially for social programs that provide coverage for accidental injury and personal disability;

7. The incentives that the proposed decision would provide to make the product safer;

8. The cost to the producer and other sellers of acquiring the relevant information about the crucial product characteristic and the cost of supplying it to persons in the position of the disappointed party;

9. The availability of the relevant information about the crucial product characteristic to persons in the position of the disappointed party and the cost to them of acquiring it;

10. The effects of the proposed decision on the availability of data that bear on consumer choice of goods and services;

11. Generally, the likely effects on prices and quantities of goods sold;

12. The costs and benefits attendant to determination of the legal issues involved, either by private litigation or by collective social judgment;

13. The effects of the proposed decision on wealth distribution, both between sellers and consumers and among sellers.

Id. at 1370-71. Although courts have taken notice of the Shapo thesis, *see, e.g.*, Conder v. Hull Lift Truck, Inc., 76 Ind. App. 381, 405 N.E.2d 538 (1980), *vacated*, _ Ind. _, 435 N.E.2d 10 (1982); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979), it has yet to be adopted as a unifying theme for the entirety of products liability law.

The thesis of this paper is much narrower. For better or for worse, courts continue to utilize consumer expectations as an independent basis of liability. They have not integrated it into their overall theoretical framework as Shapo has suggested they do in his landmark work. If there is to be a consumer expectation liability test, it must be narrowly focused and judicially circumscribed or it will be hopelessly subjective and lacking in credibility.

154. *See* cases cited *supra* note 152. As noted earlier, Professor Shapo is willing to take soft consumer expectations into account in formulating his consumer test. *See supra* note 153. It is clear that Professor Gary Schwartz would take issue with the attempt to find a consumer expectation cause of action that fell short of express warranty. In Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435 (1979), he disagrees with the Shapo thesis. He notes that

> [t]he thesis works well if the "portrayal" is concrete enough to entail a U.C.C. express warranty or a Restatement product representation. Absent this concreteness, the thesis does not easily test out. Consider, for example, the advertisements of Datsun automobiles, advertisements that have always praised the car for both economy and quality, but with varying emphases. For several years, this advertising stressed economy through the slogan, "Datsun Saves." After a well-publicized change of advertising agencies, in 1977-78 Datsun's message became "We Are Driven," suggesting quality and performance. With inventories swelling in dealers' lots in fall

to the consumer expectation test.

It is questionable whether it is proper to give legal standing to a consumer expectation test that would clearly be inadequate to support a finding of express warranty. If the drafters of the U.C.C., after careful deliberation, decided that only consumer expectations created by express representations of the seller should be actionable, it seems incorrect to create and give legal cognizance to a test based on soft consumer expectations.

There are, however, two justifications for such an approach. The first is that the entire law of strict products liability in torts has developed independently of the Uniform Commercial Code.[155] Although some courts continue to cling to the Code as the source of authority for strict products liability,[156] the vast majority have abandoned the Code and have substituted a clear tort perspective.[157] Admittedly, this approach may be more difficult with regard to the consumer expectation test because it is so heavily based on the rubric of warranty law. Nonetheless, courts have demonstrated a willingness to create tort concepts for products liability law and to abandon the excess baggage of the U.C.C.

The second justification for the independent development of the consumer expectation test is based on a realistic analysis of how consumer expectations are to be defined. The most pronounced criticism

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1978, its advertising shifted to "We Are Dealing," pointing to temporary low prices. To my mind, these changes in advertising themes, conspicuous though they are, do not justify a legal rule that measures Datsun's personal injury liability to its 1976 purchasers by standards less demanding than those applicable to its 1977-78 purchasers. Nor should Datsun's liability differ in any material respect from Toyota's ("If You Can Find a Better-Built Small Car, Buy It").

Id. at 476 n.241. A more difficult case in which to test the Schwartz approach would be Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981). *See infra* text accompanying notes 207-13.

155. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965). The vast majority of courts have bypassed the U.C.C. for the tort cause of action. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). Whether the section 402A development impermissibily invaded an area legislatively covered by the U.C.C. has been the subject of acrimonious debate. *See* Dickerson, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469 (1974); Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697 (1978); Wade, *Is Section 402A of the Second Restatement of Tort Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

156. *See, e.g.*, Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968 (Del. 1980); Swartz v. General Motors Corp., 375 Mass. 588, 378 N.E.2d 61 (1978).

157. *See* authorities cited *supra* note 155.

of the consumer expectation test is that it is difficult to pinpoint just what those expectations are with regard to any given product.[158] In the following sections, a more precise method for defining consumer expectations will be set forth.[159] Utilizing this more precise definition, it will be evident that when properly applied, the consumer expectation test should not be deemed in conflict with the principles of the law of express warranty. The common law has by its creativity filled a void not addressed at all by the Code, rather than set itself in opposition to a clear legislative mandate.

Furthermore, if classic representational theories are inadequate to deal with soft representations, it must be understood that risk-utility theory cannot adequately address the problem either. As noted earlier, risk-utility analysis permits consideration of product image within the overall balancing process;[160] consumer expectations are relevant to the foreseeable risk level inherent in product use. But product image swallowed into the overall risk-utility formula blunts the sharp edge of the argument that manufacturers should not escape liability for failing to meet consumer expectations.

B. *Defining the Consumer Expectation Test*

The consumer expectation test of defect has been phrased in terms of what ordinary consumers actually expect in terms of product performance.[161] This definition of the test has created a straw man of sorts, since it is clear that it provides no standard for determining just what a consumer's legitimate expectations are. Thus, the drafters of the *Model Uniform Product Liability Act*[162] refused to include the consumer expectation test in their definition of defect. They stated: "The consumer expectation test takes subjectivity to its most extreme end. Each trier of fact is likely to have a different understanding of abstract consumer expectations. Moreover, most consumers are not familiar with the details of the manufacturing process and cannot abstractly evaluate conscious design

158. *See* MUPLA, *supra* note 9, §104(B) analysis; Montgomery & Owen, *supra* note 140, at 823; Schwartz, *supra* note 154, at 475-81; Wade, *supra* note 137, at 829.

159. *See infra* text accompanying notes 161-84.

160. *See supra* text accompanying notes 142-44.

161. *E.g.*, Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975); UTAH CODE ANN. § 78-15-6(2) (1977); RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). *But see* Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1203-06 (1976).

162. MUPLA, *supra* note 9.

alternatives."[163]

This perceived weakness with the consumer expectation test led the Texas Supreme Court to reject its earlier position that partially defined defect in terms of consumer expectations. In *Turner v. General Motors Corp.*,[164] the court eliminated the consumer expectation test from its definition of defect, stating: "We are persuaded to this conclusion by the inconclusiveness 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."[165]

There is considerable merit to the argument that such an open-ended test for defect is an invitation to jury lawlessness. If defect were measured by each jury's subjective assessment of what consumers expect, there would be no rational way to limit design defect litigation. How could a court ever direct a verdict for a defendant? To do so would require a judgment that no jury could find that consumers would expect the product to cause injury in a particular use context. It would be a rare case indeed that would qualify for a directed verdict if the standard were based on the assumed expectations of the ordinary consumer.[166]

There is, however, a more reasonable and pragmatic interpretation of the consumer expectation test. Every product has core uses that define the essence of the product. When a product is employed

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163. *Id.* § 104 analysis.

164. 584 S.W.2d 844 (Tex. 1979).

165. *Id.* at 851. *See also* Lester v. Magic Chef, Inc., 230 Kan. 643, 657, 641 P.2d 353, 363 (1982) (Prager, J., dissenting).

166. At first glance, this appears to be a case of the pot calling the kettle black. The criticisms hurled between the risk-utility theorists and the consumer expectation proponents may lead one to wonder which school of thought is entitled to cast the first stone. The reader will recall that one justification proferred for employing a consumer expectation test was the subjective nature of risk-utility analysis. *See supra* note 147 and accompanying text. However, the implications of the subjectivity inherent in the two tests may differ. Risk-utility analysis is subjective in that the weight afforded the variables in the overall equation may differ from jury to jury. The variables themselves, though, remain constant. The consumer expectation approach turns on a finding of a specific consumer expectation, which may vary according to the subjective perceptions of each trier of fact. Thus, risk-utility has an element of subjectivity in its balancing process; in consumer expectations, the very facts on which the process relies are tainted with subjectivity.

It is not so clear that risk-utility has the better argument. After all, if the problem with subjectivity is that it impairs the consistency and predictability of outcomes in products cases, its existence in the process stage can be as damaging as in the data stage. In addition, I have pointed out that any risk-utility balancing must also factor consumer expectations into the equation. *See supra* text accompanying notes 142-44. Even risk-utility, then, suffers from some subjectivity in the data stage.

in a core use, and causes injury, there is an element of shock or surprise attendant to the event, i.e., disappointed consumer expectations. For example, if a new tire blows out while being driven on the highway at fifty miles per hour or if the steering mechanism fails on a car that had never been tampered with, the plaintiff should be able to establish a cause of action without having to counter an argument that either the production or the design of the car was reasonable under risk-utility analysis.[167]

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167. There appears to be widespread agreement among commentators that a product that causes injury when put to its core uses should be the subject of liability without the necessity of establishing fault. Professor Henderson agrees that these cases, which he denominates "inadvertent design errors," do not call for the utilization of a risk-utility test to establish a design standard. Henderson, *Judicial Review of Design Choices, supra* note 4, at 1550-52. It is not clear, though, that Henderson would totally embrace the views espoused in this article. In discussing inadvertent design errors, he notes:

> The feature of paramount importance shared by all these cases is the degree to which they allow or, in fact, require the courts to delegate the task of establishing applicable safety standards to the collective managerial authority of the engineering community. If the plaintiff can prove that conformance by the defendant manufacturer to customary engineering practices would have prevented the product failure, the defendant is liable for the harm caused. From the self-defeating nature of the design defect in such a case, there is no further evaluative task required of the court beyond a determination that the design itself caused the product to fail during its intended use. In effect, the intended design serves as a standard with which to assess (and almost automatically condemn) the actual design.

Id. at 1551-52 (footnote omitted). It would appear that Henderson would require proof that the product failed to conform with customary engineering practices, though he does note that the intended use standard "almost automatically" condemns the actual design. Under my proposal, the failure of a product to meet core-use norms would impose liability. I am also uncertain as to whether Henderson would agree with my position that firm consumer expectations should be brought under the intended use umbrella. The question of whether the manufacturer's intentions should govern is an important one. Under the thesis suggested herein, firm consumer expectations, whatever their source, would set the performance standard for the product. *Cf.* R. EPSTEIN, *supra* note 140, at 81 n.24 (drawing similar distinction between Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) and Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978)).

Professor Richard Epstein supports a representational theory that would impose strict liability for products that fail to meet clear performance standards. *See id.* at 69-71. What Epstein calls the "strong design defect" case is very similar to the core-use concept suggested herein. Epstein would apparently include cases that rest upon the "defendant's express or implicit representation about his product's design and performance." *Id.* at 69. He suggests that in the fuzzy no man's land in which express warranty has not been made out, there is room for jury decisionmaking as to the meaning of the representation. *Id.* at 70-71. For an incisive analysis of the Epstein thesis, see Britain, Book Review, 17 NEW ENG. L. REV. 627 (1982). Britain suggests that once one leaves the domain of the explicit or express warranty, the litigation management problems are every bit as complex as they are with risk-utility theory, which Epstein deprecates. *See id.* at 629-30 & n.38. If Britain is correct in characterizing Epstein's representational theory as extending to consumer impressions from advertising or product appearance, then Epstein's position would be very close to that which I am espousing.

Professor Gary Schwartz grudgingly admits that in what he calls the "easy case," the

If the consumer expectation test is, in truth, a strict liability test for product failure in normal use, the question arises whether this is any different than applying the doctrine of *res ipsa loquitor* to a products liability claim.[168] The *res ipsa* doctrine permits the plaintiff to establish a cause of action when the inference can be drawn that the product would not have failed in the absence of defect.[169] Many cases that adopt the consumer expectation test seem to discuss its utility in terms of proof of defect. In *Phipps v. General Motors Corp.*,[170] the Maryland Court of Appeals discussed the prevailing view that design defect litigation requires risk-utility analysis. The court noted:

> The reasoning of these authorities is that in a design defect case the standard of defectiveness under § 402A, involving as it does the element of unreasonable danger, still requires a weighing of the utility of risk inherent in the design against the magnitude of the risk. However, there are those kinds of conditions which, whether caused by design or manufacture, can never be said to involve a reasonable risk. For example, the steering mechanism of a new automobile should not cause the car to swerve off the road; the drive shaft of a new automobile should not separate from the vehicle when it is driven in a normal manner; the brakes of a new automobile should not suddenly fail; and the accelerator of a new automobile should not stick without warning, causing the vehicle suddenly to accelerate. Conditions like these, even if resulting from the design of the products, are defective and unreasonably dangerous without the necessity of weighing and balancing the various factors involved.[171]

The California Supreme Court, in *Barker v. Lull Engineering*

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consumer expectation test makes sense. *See* Schwartz, *supra* note 154, at 481. He contends, however, that when consumer expectations have not been met, the case is fundamentally based on failure to warn grounds. It is thus not necessary to resort to a consumer expectation standard—more traditional theory will serve the purpose. For a rebuttal to this argument, see *infra* text accompanying notes 231-32. One should also consider that Schwartz differs from my position in that he would give no weight to expectations that do not stem from the manufacturer or that are less explicit than express warranty.

168. *See, e.g.*, Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971).

169. *Res ipsa*, in the products liability context, differs from the classic *res ipsa* application in negligence cases, in that the defect concept replaces that of negligence. Instead of drawing the inference that negligence was responsible for the harm, one draws the inference that defect was responsible. This eliminates the need to draw the additional conclusion that the defect was caused by negligent behavior.

170. 278 Md. 337, 363 A.2d 955 (1976).

171. *Id.* at 345-46, 363 A.2d 959 (footnote omitted) (citations omitted).

Co., Inc.,[172] was even more explicit in drawing the connection between the consumer expectation test and proof of defect. The California court first established that the consumer expectation test was based, in part, on implied warranty grounds.[173] It then stated:

> As we noted in *Greenman*, "implicit in [a product's] presence on the market . . . [is] a representation that it [will] safely do the jobs for which it was built." When a product fails to satisfy such ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation, a manufacturer is strictly liable for resulting injuries. Under this standard, an injured plaintiff will frequently be able to demonstrate the defectiveness of a product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault.[174]

A similar view was espoused by the Oregon court in *Heaton v. Ford Motor Co.*,[175] when the court noted:

> In the type of case in which there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user.[176]

If the issue is *proof* of defect, as these cases imply, there would appear to be no reason to create a separate test for liability. Under such an approach, we could continue with risk-utility analysis as the *liability* standard, but use the *res ipsa* theory to make out a prima facie case for the plaintiff. Although, in many instances, it would make little difference if we approach the case from a proof vantage point rather than employ a new strict liability theory, it is important to appreciate the tactical difference between a *res ipsa* approach and a normal use-strict liability theory. Under *res ipsa*, the plaintiff makes out a prima facie case by setting forth the facts of the incident and alleging the inference that such an accident would not occur in the absence of defect.[177] The defendant is then permitted to

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172. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

173. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236.

174. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236 (brackets in original) (citations omitted).

175. 248 Or. 467, 435 P.2d 806 (1967).

176. *Id.* at 471-72, 435 P.2d at 808 (footnotes omitted).

177. *See* Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971).

rebut the inference of defect using any relevant evidence. This is often done by suggesting alternative causes for the accident.[178] However, the defendant would certainly be permitted to introduce risk-utility evidence to demonstrate that there was no design defect that could have been responsible for the harm. To bolster his case, the plaintiff would be required to rebut by introducing contrary expert evidence to support his general inference of defect. It is clear that such an approach involves the plaintiff in expensive and lengthy litigation.

If, instead, the plaintiff could recover on a strict liability theory grounded on the doctrine that when a product fails in normal use, liability attaches because it disappoints consumer expectations, there would be no rebuttal on the basis of risk-utility evidence. Liability would be fully established by demonstrating that the product failed in normal use and that neither the plaintiff nor a third party was responsible for tampering that could have introduced the defect into the product. Any attempt by the defendant to introduce risk-utility evidence would be rejected since the operative theory is the failure of the product to meet consumer expectations when the product fails in a normal use context.[179]

Recasting the consumer expectation test into a test of strict liability for products that fail in normal use answers many of the criticisms leveled at the consumer expectation test. A perceived fault with the consumer expectation test is that it appears to depend on gauging the expectations of consumers. This was considered to be so subjective a formula as to render it unworkable. If, however, the test is whether the product failed in normal use, liability does not depend on the hypothetical expectations of consumers, but rather on a deter-

178. This is the most effective method of rebutting a *res ipsa* case. *See generally* James, *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitor)*, 37 VA. L. REV. 179, 225-28 (1951).

179. The implications of utilizing consumer expectation theory may transcend the prima facie case. To the extent that products liability law is representational, there is an excellent argument to be made for limiting or negating contributory negligence and comparative fault. Thus, contributory negligence has not been considered a legitimate affirmative defense against an express warranty action when the plaintiff did little more than "test the warranty." *See* Bahlman v. Hudson Motor Co., 290 Mich. 683, 288 N.W. 309 (1939). The drafters of the Uniform Comparative Fault Act take the position that actions that are fully contractual are not covered by the Act. UNIF. COMPARATIVE FAULT ACT § 1 (a) comment, 12 U.L.A. 37 (Supp. 1983). Admittedly, an action brought under a consumer expectation theory may be less than fully contractual, but the fairness of penalizing a plaintiff for using a product as it has been portrayed, either overtly or more subtly by clever advertising, may be questioned. *See* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 802-04 (1977).

mination as to whether the use was in the core of uses that are indigenous to the product.

Another alleged problem with the consumer expectation test is that it tends to be unworkable for third parties and bystanders who have no expectations whatsoever with regard to product performance.[180] A normal use-strict liability test, however, applies equally to purchasers and bystanders.

One may question whether the concept of normal use is so broad as to make it undefinable. Furthermore, why should liability be limited to normal use injuries? Shouldn't there be liability for foreseeable misuse as well? The answers to these questions can only be understood by appreciating the relationship between a narrowly focused expectation test and a more broadly-based risk-utility test.

The consumer expectation test cannot be the only test for defect, since it would not cover many cases in which clear consumer expectations do not exist. As Professor Wade has noted: "In many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made."[181]

The inability of the consumer expectation test to cover all cases does not mean it is worthless. It simply must be limited to those cases in which consumer use patterns are so clear that the product can be said to have failed in its normal use. In defining normal use patterns, courts will take into account the impact of product image on use patterns. This may cause some concern to defendants in that it may broaden the base of the standard. However, a test that fixes liability for normal use patterns, even if it includes a product image component, can hardly be viewed as unfair.

What will happen to those cases that do not fall into the normal use category? The answer is that those cases should be litigated using a risk-utility analysis. This is, indeed, the thrust of *Barker v. Lull Engineering Co., Inc.*,[182] in which the court held:

> Numerous California decisions have implicitly recognized this fact and have made clear, through varying linguistic formulations, 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

180. *See* Schwartz, *supra* note 154, at 472-75.
181. Wade, *supra* note 137, at 829.
182. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

inherent in the challenged design outweighs the benefits of such design.[183]

Once it is understood that the consumer expectation test is not the sole test for defect, but provides a method for resolving a hard core of product defect cases, many of the problems disappear. It would be the function of the court in the first instance to determine whether the injury took place when the product was being put to a normal use. If a court had any substantial doubt that it was, the court would then require that the case be litigated utilizing risk-utility principles.[184] Similarly, the problem of how to resolve the foreseeable misuse cases evaporates; only hardcore normal uses would be governed by the consumer expectation test. All other cases would be subject to the imposition of liability only if the plaintiff were able to establish that the product failed to meet societal acceptability under risk-utility analysis.

C. *The Two-Prong Test for Defect—Consumer Expectations and Risk-Utility Analysis—Some Leading Examples*

Several courts have adopted a two-prong test for defect. Under this approach, a plaintiff can establish defect if he proves *either* that the product failed to meet consumer expectations *or* that the product was unreasonably dangerous under a risk-utility analysis.

1. *Heaton v. Ford Motor Co.*—The two-prong text was first adopted in the much cited case of *Heaton v. Ford Motor Co.*[185] In *Heaton*, the plaintiff purchased a new Ford four-wheel drive pickup truck to use for hunting and other cross country purposes. On the day of the accident, the plaintiff was driving along a blacktop highway at a normal speed. The truck hit a rock about five or six inches in diameter. The truck continued on for about thirty-five miles when it suddenly left the road and tipped over. After the accident, the rim of the wheel was found to have separated from the "spider" (the interior portion of the wheel which is attached to the vehicle by lug nuts).

The court began its analysis by setting forth that unreasonable danger would be established if the product was more dangerous than

183. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.

184. The screening function of the court is to set the minimum level at which the representational theory is credible. The availability of the fall-back risk-utility test allows the court the discretion to set the threshold at a rather substantial level. For examples of implementation of the test, see *infra* text accompanying notes 185-213.

185. 248 Or. 467, 435 P.2d 806 (1967).

"would be contemplated by the ordinary purchaser."[186] This is, of course, the consumer expectation test. The standard for establishing this strict liability test was expressed by the court as follows:

> When it is shown that a product failed to meet the reasonable expectations of the user the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product *could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the existence of a defect.* The case at bar, however, is not such a case.[187]

The court's emphasis on definite expectations is much in line with the normal use concept developed earlier.[188]

The court then applied the standard to the facts. The problem in this case was that there was no way to gauge what consumer expectations were with regard to the ability of a pick-up truck to survive a collision at high speed with a five or six inch rock. To send such a case to a jury on a consumer expectation test would have invited speculation:

> Where the performance failure occurs under conditions with which the average person has experience, the facts of the accident alone may constitute a sufficient basis for the jury to decide whether the expectations of an ordinary consumer of the product were met. High-speed collisions with large rocks are not so common, however, that the average person would know from personal experience what to expect under the circumstances. Nor does anything in the record cast any light upon this issue. The jury would therefore be unequipped, either by general background or by facts supplied in the record, to decide whether this wheel failed to perform as safely as an ordinary consumer would have expected. To allow the jury to decide purely on its own intuition how strong a truck wheel should be would convert the concept of strict liability into the absolute liability of an insurer.[189]

The court then addressed the alternative test for liability—whether the product was reasonably safe. This is the risk-utility test. It noted that the plaintiff had failed to introduce expert testimony and risk-utility data that would have provided a basis for a

186. *Id.* at 471, 435 P.2d at 808.
187. *Id.* at 472, 435 P.2d at 808 (emphasis added) (footnote omitted).
188. *See supra* text accompanying notes 166-84.
189. *Id.* at 473, 435 P.2d at 809.

decision on the issue of whether the product was reasonably safe. The court stated:

> Where the jury has no experiential basis for knowing this, the record must supply such a basis. In the absence of either common experience or evidence, any verdict would, in effect, be the jury's opinion of how strong the product *should* be. Such an opinion by the jury would be formed without the benefit of data concerning the cost or feasibility of designing and building stronger products. Without reference to relevant factual data, the jury has no special qualifications for deciding what is reasonable.[190]

The process of the court's decision is worthy of note. The court went through the following steps:
(1) It set forth the consumer expectation test as a first test for liability.
(2) It defined consumer expectations within the context of normal use and definite expectations of performance.
(3) It found that under the facts of the case, there were no means to gauge consumer expectations.
(4) It set forth the alternative test based on risk-utility reasonableness principles.
(5) It found that there was no evidence introduced to support a finding for the plaintiff on risk-utility analysis.
(6) It directed a verdict for the defendant.

2. *Barker v. Lull Engineering Co., Inc.*—The case that most clearly articulated the two-prong test, providing the plaintiff the alternative of proceeding on either consumer expectations or risk-utility grounds, is *Barker v. Lull Engineering Co., Inc.*[191] In *Barker*, the plaintiff was injured at a construction site while operating a high-lift loader manufactured by the defendant, Lull Engineering Co. The loader was utilized to lift a load of lumber on terrain that sloped sharply in several directions. The injury occurred when the load was lifted approximately twenty feet above ground. Due to the sharp slope, the load of lumber shifted and the plaintiff was forced to jump from the loader. He was struck by a piece of falling lumber and was seriously injured. The plaintiff contended that the design of the loader was inadequate: (1) It did not have outriggers to lend stability to the loader and prevent its tipping on difficult terrain; (2) it was not equipped with roll bars or seat belts to protect the operator in

190. *Id.* at 474, 435 P.2d at 809 (emphasis in original).
191. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

the event the machine rolled over; and (3) it lacked an automatic locking device on the leveling lever to prevent inadvertent bumping by the operator.

The *Barker* court found that a consumer expectation approach to defect was based, in part, on warranty law and, thus, was an appropriate first-level test for defect.[192] The court noted, however, that if consumer expectation was the only test for defect, then all products having patent dangers would be absolved of liability, since such products tend to meet consumer expectations.[193] This would encourage the design of patently dangerous, rather than safe, products. To counter this, the *Barker* court held that

> a product may be found defective in design under *either* of two alternative tests. First, a product may be found defective in design if . . . the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if . . . the benefits of the challenged design [do not] outweigh the risk of danger inherent in such design.[194]

The two-prong test for defect is set forth with great clarity. What is less clear is whether the use of the loader on the sharply sloped terrain in *Barker* would qualify for the consumer expectation test. If, as I have suggested, the consumer expectation formula ought only to be used for core product uses (normal use), this case should have been sent to the jury using only the risk-utility test. The defendant's argument that the high-lift loader was being misused as a crane would seem to raise the issue of foreseeable misuse. In such situations there would appear to be no alternative to risk-utility analysis. The departure from normal-core uses makes the consumer expectation test impractical. The court's articulation of the two-prong test was excellent. Its failure, however, to screen out an inappropriate fact pattern from the consumer expectation test left it vulnerable to the attack that this test is overly subjective and standardless.

A similar ambiguity exists in *Caterpillar Tractor Co. v.*

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192. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236.

193. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. *See infra* text accompanying notes 254-64.

194. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38 (emphasis added). The *Barker* test also addressed the burdens of proof. In the first prong of the test, the plaintiff is required to establish that the product failed to meet consumer expectations. In the second prong, the plaintiff must initially demonstrate that the product was the proximate cause of the injury; the burden then shifts to the defendant to show that the benefits of the product's design outweigh its inherent risks.

Beck,[195] an Alaska case that followed *Barker* in adopting the two-prong test for defect. In *Caterpillar*, the plaintiff's decedent was killed when a Caterpillar 944 front-end loader that he was operating rolled over an embankment. The plaintiff contended that Caterpillar's failure to equip the loader with a roll-over protective shield constituted a design defect and was the cause of death.

Although the Alaska court adopted verbatim the *Barker* two-prong test for defect,[196] the court did not indicate whether, on the facts, there was a jury issue under the consumer expectation aspect of the case. It would seem that the capacity of the loader to protect the operator in a roll-over accident is not a matter of clear consumer expectations and is certainly not within the core uses of the product. Such a case should go to the jury only under risk-utility analysis. There is some general language in *Caterpillar* indicating that the case should be given to the jury, instructing them as to both the consumer expectation and risk-utility tests.[197] If the court is prepared to do so, they would be straining the consumer expectation or normal use test beyond its rational limits. In a case of such complexity, there is really no alternative to submitting the case to the jury with the full panoply of risk-utility data and expert testimony that would focus on the feasibility, cost, and utility of the suggested safety mechanisms.

3. *Suter v. San Angelo Foundry & Machine Co.*—A recent adoption of the two-step test for defect by the New Jersey Supreme Court is of particular importance. In *Suter v. San Angelo Foundry & Machine Co.*,[198] the court departed from an earlier decision in which it had defined defect *solely* in terms of the risk-utility formula.[199] The case is important because the court did not expressly adopt the two-prong formula for defect. Yet, when one reads *Suter* carefully, one is led inexorably to the conclusion that the court has adopted a test in which consumer expectations and risk-utility balancing are to be applied in the alternative.

In *Suter*, the plaintiff was hurt when his hand was caught in the cylinders of an industrial sheet metal rolling machine. The machine forms straight sheet metal into cylinders. The accident occurred in the process of rerolling a metal cylinder. The plaintiff was standing

195. 593 P.2d 871 (Alaska 1979).
196. *Id.* at 884.
197. *Id.* at 886.
198. 81 N.J. 150, 406 A.2d 140 (1979).
199. Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978).

on the left side of the machine and saw a piece of slag lying in the metal cylinder. As he reached over to pull the slag out, he pushed a gear lever into the forward position and activated the rollers. The fingers of his right hand were caught and pulled into the rollers. The plaintiff managed to yank his hand free only after it had been severely injured. The design defect alleged in this case was that a rotary guard should have been inserted around the lever to protect it from inadvertant contact or, in the alternative, the lever should have been placed higher above the floor.

The *Suter* court first determined that the threshold test for liability ought to be based on consumer expectations:

> We perceive that the only additional question to be put to the jury in a case involving a design defect, *vis-a-vis* 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, that manufacturer's responsibility would be clear without more. The product would not satisfy the reasonable expectations of the purchaser.[200]

The court then noted that in cases where there were no clear expectations, it would apply a reasonableness test:

> 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."[201]

In the final paragraph of the majority opinion, the court summarized how the issue of defect should be determined:

> When submitting the case to a jury, the court should charge generally that a manufacturer has an obligation 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

200. 81 N.J. at 170-71, 406 A.2d at 150 (citation omitted).
201. *Id.* at 171, 406 A.2d at 150 (citations omitted).

> ensuing damages. Design defect cases are covered as well within that context. In those design defect situations in which the defect is not self-evident, the trial court should also charge the jury on whether the manufacturer, it being deemed to have known of the harmful propensity of the product, acted as a reasonably prudent one. Depending on the proofs, the trial court should explain pertinent factors related to the determination of reasonable prudence.[202]

It is clear that the New Jersey court is, in truth, espousing a two-prong test for defect. The first category of defect is those clear cases where the product is not "reasonably fit, suitable and safe for their intended or foreseeable purposes."[203] This is the consumer expectation test. The second prong is the test of negligence (risk-utility), with the caveat that the manufacturer is "deemed to have known of the harmful propensity of the product."[204]

The lesson is clear. Cases must be carefully scrutinized to determine whether they permit the submission of the defect issue to the jury on a consumer expectations count alone. The New Jersey Supreme Court has accomplished this, although it has not flagged this approach with the clarity of the California and Alaska courts in, respectively, *Barker v. Lull Engineering Co., Inc.*[205] and *Caterpillar Tractor Co. v. Beck.*[206]

4. *Leichtamer v. American Motors Corp.*—The most recent judicial contribution giving form to the consumer expectation test is *Leichtamer v. American Motors Corp.*[207] In that case, the Ohio Supreme Court emphasized the importance of advertising to consumer

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202. *Id.* at 177, 406 A.2d at 153.

203. *Id.*

204. *Id. Suter* has been criticized as being a poorly worded opinion. *See* Birnbaum, *supra* note 24, at 624 ("a rather muddled variation of the *Barker* test").

Strict adherence to the language in *Suter* yields a curious result. It appears to require that a jury be instructed on risk-utility only when the court believes that the product in fact met consumer expectations. If the court believes that the product will fail to meet consumer expectations, *Suter* indicates that no risk-utility instruction is to be given. In such a case, a negative jury determination on the consumer expectation issue will compel a finding of no liability, since the risk-utility instruction would not have been given.

The imprecise wording of the opinion has led one notewriter to suggest that *Suter* imposes the consumer expectation test as a maximum determinant of liability. *See* Note, *The Design Defect Case in New Jersey: An Unworkable Standard*, 10 HOFSTRA L. REV. 1297, 1313 n.111 (1982). The court's language should have included a jury instruction to the effect that if they do not find the defect to be self-evident, then they are to decide the case on risk-utility grounds.

205. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

206. 593 P.2d 871 (Alaska 1979).

207. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

expectations. The plaintiffs sued for injuries enhanced by the defective design of a Jeep in which they were passengers during a rollover accident. The accident occurred when the Jeep was traveling downhill on rough terrain. The Jeep pitched over and landed upside-down on its roll-bar. The roll-bar collapsed, resulting in severe injuries to the plaintiffs. The plaintiffs premised their case on the failure of the Jeep to meet consumer expectations. They contended that the Jeep was advertised as a vehicle capable of being driven downhill over rugged terrain.

The television advertising campaign was aimed at encouraging people to buy a Jeep. Consider the following messages: " 'Ever discover the rough, exciting world of mountains, forest, rugged terrain? The original Jeep can get you there, and Jeep guts will bring you back.' "[208] One Jeep television advertisement challenges a young man accompanied by his girl friend: " '[Y]ou guys aren't yellow, are you? Is it a steep hill? Yeah, little lady, you could say it is a steep hill. Let's try it. The King of the Hill, is about to discover the new Jeep CJ-7.' "[209]

The plaintiffs testified that they had seen the commercials and that they thought the roll-bar would protect them if the vehicle landed on its top. The court, in approving a test for defect based on disappointed consumer expectations, held:

> The commercial advertising of a product will be the guiding force upon the expectations of consumers with regard to the safety of a product, and is highly relevant to a formulation of what those expectations might be. The particular manner in which a product is advertised as being used is also relevant to a determination of the intended and reasonably foreseeable uses of the product. Therefore, it was not error to admit the commercial advertising in evidence to establish consumer expectation of safety and intended use.[210]

There are two significant aspects to the court's decision. First, the court was willing to predicate liability for disappointed consumer expectations based on the advertisements and the general product image. The court did so in the face of an argument by the defendant that " 'a jury may not base its verdict upon such television commercials in the absence of a specific representation contained in the commercials as to the quality or merit of the product in question

208. *Id.* at 459, 424 N.E.2d at 572.
209. *Id.* at 460, 424 N.E.2d at 573.
210. *Id.* at 469, 424 N.E.2d at 578.

. . . .' "[211] The case makes no mention of express warranty. The consumer expectation test is thus set free from the constraints of specificity imposed by the more staid express warranty doctrine.

Second, the court was willing to impose liability without establishing that the roll-bar failed to meet risk-utility standards. Indeed, the dissent attacked the *Leichtamer* majority on this very ground.[212] The dissent argued that it was improper to permit recovery when the plaintiff had failed to establish a practicable, safer alternative design. For the majority this was irrelevant since the Jeep failed to meet consumer expectations. The independence of the consumer expectation test from risk-utility, thus, was firmly established in Ohio.[213]

D. *Consumer Expectations and Foreseeable Use*

Several of the consumer expectation decisions take the position that a manufacturer should be liable if the product fails to perform as safely as an ordinary consumer would expect when used in an "intended or reasonably foreseeable manner."[214] Care must be taken that the "reasonably foreseeable" aspect of the definition does not destroy the basic validity of the test. "Reasonable foreseeability" is a concept that is so elastic that it could be stretched to encompass some very remote risk.[215] Even uses that are quite abnormal and not within the suggested normal use parameters could squeak by a foreseeability test. As noted earlier, the fact patterns in such cases as *Barker v. Lull Engineering Co., Inc.*[216] and *Caterpillar Tractor Co. v. Beck*,[217] though arguably foreseeable, should not qualify for the consumer expectation test. *Leichtamer v. American Motors Corp.*[218] is a much more difficult case since the advertisement suggested very rugged use over hilly terrain. Thus, even though the case involved an

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211. *Id.*

212. *Id.* at 477-82, 424 N.E.2d at 583-85 (Holmes, J., dissenting).

213. *See also* Knitz v. Minster Mach. Co., 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982).

214. *See, e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885 (Alaska 1979); Barker v. Lull Eng'g Co., Inc., 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 469, 424 N.E.2d 568, 576 (1981).

215. *See, e.g., In re* Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964); Kewanee Mach. & Conveyor Co., 59 Ill. App. 3d 578, 375 N.E.2d 885 (1978); Jonescue v. Jewel Home Shopping Serv., 16 Ill. App. 3d 339, 306 N.E.2d 312 (1973); Koski v. Automatic Heating Serv., 75 Mich. App. 180, 254 N.W.2d 836 (1977).

216. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

217. 593 P.2d 871 (Alaska 1979).

218. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

injury occasioned by a car rollover, there was a legitimate jury question as to the scope of consumer expectations.

There is simply no substitute for tight judicial control of the consumer expectation test. Courts will have to monitor carefully the cases in which it may legitimately operate. If they do not, the consumer expectation test has the potential of devouring all design litigation. The risk-utility test would then rarely be engaged and defendants would be stripped of their only real line of defense in design litigation.

The failure to realize that such judicial control is crucial to the operation of the consumer expectation test well may have led the Texas Supreme Court to overturn an earlier decision that adopted the two-prong defect test and return to a risk-utility standard as the only viable standard for design cases. In *Turner v. General Motors Corp.*,[219] the plaintiff suffered serious injuries when his 1969 Chevrolet Impala sedan overturned as he swerved to avoid a collision with a truck. The car rolled over once and the roof caved in at the driver's corner when it hit the ground. Although his seat belt was buckled, the plaintiff was struck on his head and suffered a crushed vertebra, resulting in paralysis. The alleged design defect was that the roof structure of the car was inadequately designed to withstand a rollover collision.

The court used the occasion of *Turner* to indicate its dissatisfaction with the consumer expectation test that was part of a bifurcated test for defect. It reiterated the criticism that consumer expectations would hardly be anything more than the personal experiences of the jurors.[220] In an earlier opinion that was later withdrawn, the court set forth the argument of General Motors that it was unfair to predicate liability on the basis of consumer expectations because "the ordinary consumer does not have any realistic expectations concerning the forces generated in a rollover of an automobile."[221] It was further argued that "[t]he design of an automobile roof involves technical considerations and that actual consumer expectations provide no rational basis for determining whether a design is unreasonably dangerous. The consumer may expect too much or too little, or have no expectations at all."[222]

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219. 584 S.W.2d 844 (Tex. 1979).

220. *Id.* at 851.

221. Turner v. General Motors Corp., [1978-1979 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 8400, at 17,980 (Mar. 21, 1979), *withdrawn*, 584 S.W.2d 844, 845 (Tex. 1979).

222. *Id.*

There may be valid grounds for not using the consumer expectation test. But the inappropriateness of the test to the facts of *Turner*[223] does not mean that the test is invalid. It simply means that, in many cases, the consumer expectation test should not be utilized. Indeed, the two-prong test is predicated on the belief that there exist design defect cases for which the consumer expectation test will not work. In those instances risk-utility analysis becomes the test for defect.

To summarize: A major objection to the consumer expectation test is that it is too open-ended and subjective. It is easy to point to fact patterns for which it would be highly inappropriate to utilize the consumer expectation test. That does not mean, however, that there does not exist a core of consumer uses well within the normal use range for which it is an appropriate and useful test for defect.

E. *Rejection of Consumer Expectation Test Because of Strict Liability*

The most significant and telling objection to the consumer expectation test is that it imposes true strict liability. The risk-utility test permits the defendant to interpose a defense that his product meets the level of societal acceptability by demonstrating that, given the benefits of the product to society, its usefulness outweighs its risks. In contrast, the consumer expectation test permits no such defense. When the product is in normal use, the product should cause no injury; if it does, the defendant is liable. That this is the thrust of the consumer expectation test is evident from the two-prong process. Only if a product meets the consumer expectation test is it necessary for the plaintiff to establish that the product does *not* meet risk-utility standards; if the product fails the consumer expectation test, *defect is made out without a determination of risk-utility standards.* Therefore, even if it could be shown that the product was reasonably safe given risk-utility balancing, the plaintiff recovers nonetheless upon showing that the product failed to meet consumer expectations. This expression of the strict liability principle has caused serious concern in both judicial and academic quarters.[224] It deserves careful

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223. Thus, Professor Epstein, an advocate of the consumer expectation test, recognizes that it would have been inappropriate as applied to the facts of *Turner*. *See* R. EPSTEIN, *supra* note 140, at 82 n.27.

224. *See, e.g.*, Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 477-82, 424 N.E.2d 568, 582-85 (1981) (Holmes, J., dissenting); Keeton, *supra* note 145; Schwartz, *supra* note 154.

exploration.

A leading critic of the two-prong test for defect, Professor Page Keeton, argues that if the consumer's expectations are unrealistic with regard to product performance, he may have grounds for a cause of action for failure to warn.[225] This is a theory that fits into risk-utility analysis.[226] Professor Keeton illustrates this concern with the following hypothetical:

> If a product such as a drug produces a harmful side effect which was unknowable by either the seller or the user, then it is of course *ipso facto* more dangerous than the ordinary purchaser would have contemplated it to be, but if, (1) there was no breach of duty to disclose a risk or danger that should have been discoverable in the exercise of ordinary care, and (2) the benefits far outweighed its dangers, then the maker or seller has served society well. It can be argued that cost of mishaps due to side effects of this kind should be borne by the maker but surely not on the theory that the product is defective.[227]

Professor Gary Schwartz has set forth a similar concern.[228] In analyzing the two-prong test articulated in *Barker v. Lull Engineering Co., Inc.*,[229] he notes that the consumer expectation test does not permit rebuttal evidence on the issue of risk-utility analysis:

> A jury considers the consumer expectations question subsequent to the accident in which the product has performed in a cer-

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225. Keeton, *supra* note 145.

226. Thus, Professor Keeton notes:

> It is quite clear that to the extent that a maker knows, or in the exercise of ordinary care should know, of a risk or hazard that users may not discover or appreciate, liability results for breach of the duty to disclose what a reasonable person would disclose. This ground of liability protects users and consumers to a considerable extent from harm resulting from unappreciated dangers. It is submitted, however, that an inquiry as to whether the danger in fact of the design outweighed the benefits of the design would better protect users and consumers, without placing an undue burden on manufacturers and suppliers. The court's primary justification for the retention of the contemplation test is the ease with which the plaintiff can establish a design defect under this test by circumstantial evidence. If a claimant proves that a product fails under circumstances the ordinary purchaser or user would not have expected, a case has been made. That is clearly so, but the question is, should it be so? I think not. If the court would permit the defendant to show under a risk-utility analysis by way of rebuttal that it would not be feasible, then the position would be supportable.

Id. at 310 (footnotes omitted).

227. *Id.* at 303 (footnote omitted).

228. *See* Schwartz, *supra* note 154.

229. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

> tain way. Perhaps a jury will find "consumer" expectations denied if it—the jury—feels that a properly designed product would have performed better. So utilized, the consumer expectations prong amounts to the risk-benefit prong looked at from a res ipsa loquitor point of view. Res ipsa can claim a significant role in the proof of products cases. But to suggest that a res ipsa analysis is appropriate in every product design case would be plainly wrong. And even if res ipsa "applies" on the risk-benefit issue, the manufacturer is entitled to rebut with trade-off evidence. Yet, under *Barker*'s consumer expectations prong, the manufacturer has no such opportunity—a finding that consumer expectations have been denied is conclusive of liability. Given the finality under *Barker* of a negative consumer expectation finding, and given that *Barker* expressly advances the consumer expectations standard as an alternative to the risk-benefit standard, it is clear that *Barker*'s consumer expectations test cannot be regarded as merely a res ipsa approach to risk-benefit.[230]

Professor Schwartz also contends that, in most instances, a plaintiff should be able to establish a case based on consumer expectations by setting forth a failure to warn theory.[231]

The battle lines are thus drawn between those courts that will insist on an instruction based on unreasonable danger (risk-utility) and those that will permit an instruction on a true strict liability theory based on consumer expectations. Those courts that insist on retaining the consumer expectation test are apparently unwilling to rely solely on failure to warn theory to establish liability where consumer expectations have not been met. Their position is readily explainable. There are products that cannot be made safe for normal use even with a warning.[232] Consumer expectations would remain higher than product capability with or without a warning. To be sure, this would still permit a case to be made out on the basis of failure to warn. But the true issue would be avoided. Since the warning would not solve the problem with the product, the only rational way to address the question would be to redesign the product. This would, however, bring us full circle back to risk-utility analysis—the very approach we were seeking to avoid by use of the consumer expectation test. Furthermore, the plaintiff would be burdened to demonstrate affirmatively the inadequacy of the warning. It is hard

230. Schwartz, *supra* note 154, at 472 n.217 (citation omitted).

231. *Id.* at 476-78, 481.

232. *See* Twerski, Weinstein, Donaher & Piehler, *Use and Abuse of Warnings*, *supra* note 15, at 506-07.

to set aside the common notion that a consumer who is injured while using a product in its normal fashion ought not to bear the responsibility of showing what went wrong.

F. *Defining Consumer Expectations in Risk-Utility Terms—The Ultimate in Confusion*

Several courts have managed to create a test for defect that utilizes both the consumer expectation concept and risk-utility theory without engaging in a two-step analysis. Instead, they have managed to confuse and intermingle both tests to such a degree that there is no single coherent definition of defect available.

Seattle-First National Bank v. Tabert[233] is illustrative of this approach. In this case, a husband and wife, the driver and passenger, respectively, in a Volkswagen microbus, were killed when the vehicle collided with the rear of a flatbed truck. The contention of the plaintiff-administrator of their estates was that the microbus was defectively designed because it permitted the invasion of the passenger compartment when the vehicle collided at relatively low speeds. The court said:

> [W]e 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.
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> 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.[234]

Note that liability is predicated on consumer expectations, which are defined in terms of risk-utility analysis. This seems to be a tortuous route to the implementation of risk-utility analysis. The two-prong

233. 86 Wash. 2d 145, 542 P.2d 774 (1975).
234. *Id.* at 154, 542 P.2d at 779.

test of *Barker* had the virtue of focusing on consumer expectations as an independent test for defect. One can agree or disagree with *Barker*, but at least one is sure of what the court sought to accomplish. To fashion a consumer expectation test with a risk-utility base serves only to confuse the issue.

In *Aller v. Rodgers Machine Co.*,[235] the Iowa court also appears to have confused the two standards. The court, setting forth the unreasonable danger standard, indicated that the product must be dangerous to an extent beyond that which would be expected by the ordinary consumer who purchases it.[236] The court, however, then went on to say:

> In order to prove that a product is unreasonably dangerous, the injured plaintiff must prove the product is dangerous and that it was unreasonable for such a danger to exist. *Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.*[237]

Several courts have phrased their consumer expectation test to say that the product must be so dangerous that it would not meet the *reasonable expectations* of the ordinary consumer as to safety.[238] This approach again leads to a risk-utility analysis since the focus is on what a consumer has a right to expect rather than what he or she actually expects in fact.

All of the above stated formulations confuse the consumer expectation standard with risk-utility analysis. When jurors are fed this confusion in a set of complex jury instructions, they can only be adrift at sea as to how they are to define defect.[239] If the consumer expectation test is to be utilized, it will have to be used as an independent test for defect. If not, it should be abandoned.

G. *The Intended Use Test—A Variation on the Consumer Expectation Test*

There is one additional variation on the theme of consumer ex-

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235. 268 N.W.2d 830 (Iowa 1978).

236. *Id.* at 834.

237. *Id.* at 835 (emphasis added).

238. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 170-71, 176, 406 A.2d 140, 140, 153 (1979); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 322, 326, 230 N.W.2d 794, 798 (1975).

239. For a discussion of the confusing nature of jury instructions in products liability cases, see O'Donnell, *Design Litigation and Strict Liability: The Problem of Jury Instructions Which Do Not Instruct*, 56 U. DET. J. URB. L. 1051 (1979).

pectations that has caused considerable consternation. This variation posits that the product manufacturer is the guarantor of the product's safety. In *Azzarello v. Black Brothers Co.*,[240] the Pennsylvania Supreme Court approved the following jury instruction, which embodies the guarantor concept:

> "The [supplier] of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make if 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."[241]

At first glance, the Pennsylvania guarantor rule appears to be unworkable. Professor Henderson's sharp attack on the rule[242] would seem to be on target:

> Taken literally, the test is absurd and unworkable. No sensible person would insist that a product designer must include *every* precaution, however costly. At bottom, the design alternatives to which plaintiffs point in these cases must be shown somehow to have been feasible, or sensible, regardless of whether one speaks in terms of "unreasonable danger." For the Pennsylvania Supreme Court to suggest otherwise is nonsensical.[243]

Note, however, that the Pennsylvania court limited the imposition of liability to cases in which the product failed to have a safety feature that would make it safe only for its intended use. Once we limit recovery to core-intended uses, then there is nothing draconian about imposing liability for the failure of the product without requiring risk-utility analysis. This is no different than the basic thrust of *Barker v. Lull Engineering Co., Inc.*,[244] *Suter v. San Angelo Foundry & Machine Co.*,[245] and the other opinions that have applied a

240. 480 Pa. 547, 391 A.2d 1020 (1978).

241. *Id.* at 559-60 n.12, 391 A.2d at 1027 n.12 (citation omitted) (brackets in original).

242. Henderson, *Products Liability: Controversial New Decision on Design Defects*, 2 CORP. L. REV. 246 (1979).

243. *Id.* at 248. *See also* Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 800-01 (1979).

244. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

245. 81 N.J. 150, 406 A.2d 140 (1979).

two-prong defect analysis.[246] As I have noted, a consumer expectation test must focus on core uses to be workable. The proposed *Azzarello* test would be no different in this aspect of the defect definition.

The most interesting and novel twist in the *Azzarello* case comes not from its requirement that the manufacturer is the guarantor of the product, but from its redefinition of the role of the judge and jury in a design defect case. An understanding of this aspect of the case is crucial to an appreciation of its guarantor rule. At the outset, the court was asked to decide whether an instruction that imposed a requirement that the product be unreasonably dangerous was consistent with strict liability.[247] The fact pattern raised the issue of design defect. The plaintiff's right hand was pinched between two hard rubber rollers in a coating machine manufactured by the defendant. The lower court had imposed a requirement of unreasonable danger as a predicate to liability.[248] The Pennsylvania Supreme Court overruled, opting instead for the guarantor standard.

Before it set forth its new standard, the Pennsylvania court examined the role of risk-utility analysis in a design defect case. It admitted that an examination of risk-utility considerations was crucial and should be undertaken. In its view, however, this was a function for the court in its policymaking role; it was not a question for the jury at all:

> [t]he 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

246. Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967).

247. 480 Pa. at 549-50, 391 A.2d at 1021-22.

248. *Id.* at 550-51, 391 A.2d at 1022.

> 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 article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions.[249]

The position of the *Azzarello* court that risk-utility analysis should be for the court alone, as a matter of public policy cannot be dismissed out of hand. The policy implications of design defect litigation are of great moment. When a court declares a design defective it affects not only the entire product-line of that manufacturer, but sometimes the design of products throughout the industry.[250] The decision by the Pennsylvania court to place the responsibility solely on the court on the issue of risk-utility analysis gives evidence of a rather strong desire on the part of the court to control the flow of cases to the jury. Thus, unlike the analysis of Professor Henderson and other academic critics,[251] I would conclude that the *Azzarello* case contracts the scope of liability rather than expands it.

It would appear that the following methodology is dictated by *Azzarello*: (1) The parties will introduce risk-utility evidence. They will also introduce evidence as to the safety of the product for its intended use. (2) The court will determine whether the evidence would support an alternative design under risk-utility analysis. The court will consider the policy implications that would result if it were to find the design defective. (3) If the court decides that the policy considerations arising from risk-utility analysis are too weighty to require a design change or a warning, the court will declare the design nondefective and direct a verdict for the defendant. (4) If the court finds that an alternative design would not impose disproportionate costs to society, it will submit the question of defect to the jury with the instruction that the manufacturer is the guarantor of the safety of the product when it fails in its intended use. The court having decided that an alternative design is within the realm of possibility, it now gives to the jury the decision as to whether it should

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249. *Id.* at 558, 391 A.2d at 1026.

250. *See* Twerski, *supra* note 8, at 545-47; Wade, *supra* note 137, at 838.

251. *See* Birnbaum, *supra* note 24, at 636-39; Note, *Restatement (Second) of Torts—Section 402A—Uncertain Standards of Responsibility in Design Defect Cases—After* Azzarello, *Will Manufacturers be Absolutely Liable in Pennsylvania?*, 24 VILL. L. REV. 1035, 1050 (1979).

have been implemented in this case.

The aforementioned structure does remove the issue of reasonableness from the jury. Traditionally, this has been an issue that has been within the jury's domain.[252] However, the fear that design defect litigation may cause devastating consequences to industry may justify this unorthodox approach. In a sense, *Azzarello* gives us the two-prong *Barker* test in reverse. First, the court decides whether an alternative design is feasible under risk-utility analysis. Then a jury decides whether failure to implement the feasible design has sufficiently disappointed consumer expectations when the product has been put to its intended use.

This novel approach to design defect litigation raises three serious problems. First, it removes from jury consideration those risk-utility cases in which the evidence is closely balanced. That the role of the jury is to be so sharply limited on the issue of product reasonableness is a matter of concern since the jury has traditionally played an important role in the expansion of the law of products liability. Second, defendants would not be liable for injuries caused through an intended use if the product met risk-utility standards. Third, the limitation of liability to the intended use seems to remove the foreseeable misuse cases from the liability picture. As noted earlier, the consumer expectation test should not include foreseeable misuse cases;[253] they should be covered by risk-utility analysis.

H. *Consumer Expectation Test as the Only Test for Defect*

Earlier discussion has focused on whether it is possible to define defect solely on the basis of consumer expectations without adverting to risk-utility analysis. In this section the focus will be on whether a jurisdiction can successfully operate with consumer expectations as the *only* test for defect.

Although some jurisdictions have defined defect on the basis of consumer expectations alone, a moment's reflection will demonstrate the problem with this approach. A rule that would hold a product defective only if it fails to meet consumer expectations would reinstate the patent danger rule to its prior position of primacy in product liability law.[254] A product that is patently dangerous almost in-

252. W. PROSSER, *supra* note 32, § 37, at 207-08.

253. *See supra* text accompanying notes 182-85.

254. *See* Darling, *The Patent Danger Rule: An Analysis and a Survey of its Vitality*, 29 MERCER L. REV. 583, 598-99 (1979); Donaher, Piehler, Twerski & Weinstein, *supra* note 137, at 1304.

variably meets consumer expectations and is thus absolved of liability. This would mean that an obviously dangerous product that could be made safer well within the constraints of risk-utility guidelines would be declared nondefective. Given the widespread dissatisfaction with the patent danger rule,[255] it would make little sense to make the consumer expectation test the only test for defect.

The tendency to utilize the consumer expectation test to reach a decision that a product is not defective without examining the risk-utility factors is great. It hangs on with all the tenacity of original sin. *Vineyard v. Empire Machine Co.*[256] illustrates the problem. In that case, a construction worker brought an action against the manufacturer and seller of a huge earth moving machine for injuries sustained when the machine overturned. On the day of the accident, the plaintiff had deposited a load of fill dirt while proceeding down a steep slope. As he pulled the trailer portion of the scraper over the fill he had just deposited, the rear trailer portion of the scraper started to slip down an incline, which in turn pulled over the tractor. The plaintiff either jumped or was thrown from the scraper, resulting in serious injuries, including a crushed leg, which was subsequently amputated. The plaintiff alleged that the design of the machine was defective since the absence of protective roll-bars was responsible for the increased severity of his injury.

The court acknowledged that the patent danger rule was not the governing rule in Arizona.[257] Nevertheless, the court continued to define the "unreasonable danger" standard within the confines of the consumer expectation test. It held the *Restatement*'s definition applicable: " '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.' "[258]

Applying this standard, the court found that the sole defect al-

255. *See, e.g.*, Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd mem. sub nom.* Yoder Co. v. General Copper & Brass Co., 474 F.2d 1339 (3d Cir. 1973); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 (1956); Darling, *supra* note 254, at 588-89.

256. 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978).

257. *See id.* at 504-05, 581 P.2d at 1154-55.

258. *Id.* at 505, 581 P.2d at 1155 (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965)).

leged was the lack of roll-over bars. This danger was readily apparent to the user:

> The only danger presented by the lack of roll-over bars is if this 20-ton piece of heavy equipment should turn over. There was no evidence that this particular piece of equipment had such a propensity. The danger presented by the slight chance that this scraper would turn over and that roll-over bars would not be present to protect the driver, is not a danger "to an extent beyond that which would be contemplated by the ordinary consumer."[259]

Note the fallacy that follows from declaring the consumer expectation test the sole test for defect. The court did not inquire as to the possible risk-utility trade-offs and the feasibility of roll-over bars but decided that the product met consumer expectations and, thus, liability would not be imposed. Although the court said that it was not slavishly following the patent danger rule, in reality, the court applied it in the guise of the consumer expectation test.

A similar fallacy is found in the reasoning of the court in *Hartman v. Miller Hydro Co.*[260] In that case, the plaintiff was injured when his trousers were caught in an unguarded drive shaft of a bottle washing machine. The design defect alleged was the failure to install a guard over a revolving shaft and to provide an emergency stop switch for the shaft near the operator's station.

There was conflicting testimony as to whether the manufacturer had installed a safety guard that had been removed at a later time. However, the court found that in any event, the absence of the safety guard would not have fulfilled the requirement that the machine be unreasonably dangerous to impose liability. The court said:

> A product is unreasonably dangerous only if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics.
>
> Hartman testified he was never warned that a guard should be placed over the shaft, and that he did not know leaning against the exposed shaft was dangerous. As assistant production manager responsible for plant safety, however, he must be accredited with sufficient intelligence to realize that an exposed revolving shaft is dangerous. This conclusion is supported by the fact that another employee had previously become caught in the same shaft. Thus, it

259. *Id.*
260. 449 F.2d 191 (10th Cir. 1974).

> cannot be said that a danger existed which was beyond contemplation of an ordinary user. The danger was obvious.[261]

The Montana Supreme Court, in *Stenberg v. Beatrice Foods Co.*,[262] indicated that it would not be lulled by the *Restatement* language into adopting the patent danger rule *sub silentio*. In *Stenberg*, the plaintiff lost his arm when it got caught in the intake end of a grain auger. The design defect alleged was the failure of the machine to be equipped with proper shields and guards. The jury, at one point, was instructed that to find the product unreasonably dangerous, it must find the product " 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it . . . .' "[263] The court found this instruction erroneous. It stated:

> 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. Plaintiff did not dispute that he saw the unshielded intake end of the grain auger, and he also recognized it as being dangerous. Surely, if he could see the danger, he could contemplate the danger. Under the court's instruction therefore, it was a simple matter for the jury to conclude that the unshielded intake end of the grain auger was not unreasonably dangerous, because plaintiff saw it and could contemplate what he had seen.
>
> . . . .
>
> . . . Under this type of instruction it would be virtually impossible for an open and obvious condition to be unreasonably dangerous. For all practical purposes recovery would be limited to latent conditions.[264]

I. *Applying the Consumer Expectation Test to the Various Forms of Defect*

In earlier sections, the usefulness of a sharply focused consumer expectation test as one prong of the defect definition was set forth. It now must be determined whether the consumer expectation test will

261. *Id.* at 194 (footnote omitted).
262. 176 Mont. 123, 576 P.2d 725 (1978).
263. *Id.* at 130, 576 P.2d at 729.
264. *Id.* at 131-32, 576 P.2d at 730-31.

be applied equally to production defects, design defects, and failure to warn cases. Logic demands that the consumer expectation test be applied to all types of defect. Indeed, the very strength of the test is that is can easily be utilized without regard to the type of defect under consideration.

The essence of the consumer expectation test, as outlined herein, is that the law permits recovery for the failure of a product within the core of normal uses. When this type of failure occurs, the defendant should not be allowed to argue that the product meets risk-utility guidelines. If the product is not up to performance expectations within normal use parameters, there should be no defense of reasonableness allowed. Nor should plaintiff have to bear the burden of showing that this particular unit failed to meet the defendant's own manufacturing standards. The consumer expectation test is a product performance test that wipes away from the liability picture the defendant's excuses for product failure. If a plaintiff can establish liability on the basis of the product's failure to meet consumer expectations, he need not allege, nor prove, either production defect, design defect, or failure to warn. As noted earlier, the consumer expectation test becomes a sort or irrebutable *res ipsa* test.[265] If this is so, it is of no concern to the plaintiff what specifically went wrong with the product while in normal use, only that something indeed went wrong and that it caused injury. Although there is an inference to be drawn from some of the cases that the consumer expectation test is to be utilized only for design defect cases,[266] this position seems illogical and inconsistent with the basic thrust of the theory.

J. *Application of the Consumer Expectation Test to Food Products*

The consumer expectation test has been of special importance in resolving the question of whether foreign objects in food preparations are defective. Is a chicken bone found in a chicken pie a defect? Is a walnut shell found in maple walnut ice cream a defect? Or a pearl in oyster stew? The courts have had great difficulty with these cases and seem to have found an acceptable answer to their dilemma in the consumer expectation test.

For many years, the test used for deciding the issue of what was or was not a contaminant in food preparations was the foreign-natu-

265. *See supra* text accompanying notes 176-79.
266. *See* Schwartz, *supra* note 154, at 479 n.252.

ral substance test. This test was first expressed in *Mix v. Ingersoll Candy Co.*[267] There, the plaintiff brought suit for injuries caused by a fragment of chicken bone found in a chicken pie. The California court held that the chicken pie was not unfit for human consumption as a matter of law:

> [W]e are of the opinion that despite the fact that a chicken bone may occasionally be encountered in a chicken pie, such chicken pie, in the absence of some further defect, is reasonably fit for human consumption. *Bones which are natural to the type of meat served cannot legitimately be called a foreign substance*, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. At least he cannot hold the restaurant keeper whose representation implied by law is that the meat dish is reasonably fit for human consumption, liable for any injury occurring as a result of the presence of a chicken bone in such chicken pie.[268]

The foreign-natural test for determining whether a substance is a contaminant has been subject to considerable ridicule. In *Zabner v. Howard Johnson's Inc.*,[269] the Florida court noted that natural substances could often be as dangerous to the consumer as foreign objects. The court said: "Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served."[270]

Similarly, the Wisconsin Supreme Court, in *Betehia v. Cape Cod Corp.*,[271] rejected the foreign-natural test. In that case, the plaintiff suffered an injury from a chicken bone that was present in a chicken sandwich. The court held:

> The "foreign-natural" test applied as a matter of law does not recommend itself to us as being logical or desirable. It is true one can expect a T-bone in T-bone steak, chicken bones in roast chicken, pork bone in a pork chop, pork bone in spare ribs, a rib bone in short ribs of beef, and fish bones in a whole baked or fried fish, but the expectation is based not on the naturalness of the particular bone to the meat, fowl, or fish, but on the type of dish served containing the meat, fowl, or fish. There is a distinction between what

267. 6 Cal. 2d 674, 59 P.2d 144 (1936).
268. *Id.* at 682, 59 P.2d at 148 (emphasis added).
269. 201 So. 2d 824 (Fla. Dist. Ct. App. 1967).
270. *Id.* at 826.
271. 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

> a consumer expects to find in a fish stick and in a baked or fried fish, or in a chicken sandwich made from sliced white meat and in roast chicken. The test should be what is reasonably expected by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation. What is to be reasonably expected by the consumer is a jury question in most cases; at least, we cannot say as a matter of law that a patron of a restaurant must expect a bone in a chicken sandwich either because chicken bones are occasionally found there or are natural to chicken.[272]

The courts are apparently satisfied that applying the consumer expectation test is the proper way to resolve the defect question in these types of cases. Throughout this section, it has been argued that the consumer expectation test is an acceptable first-level test for defect that establishes a minimum below which no product should fall. However, even if a product meets consumer expectations, it can still be declared defective if it fails to meet the standard of reasonableness utilizing risk-utility analysis. This would lead to the observation that, even in the food product cases, the consumer expectation test should not be the sole test for defect. If it is economically feasible to remove the chicken bones from the sandwich spread without negatively affecting the taste, why should the defendant be exculpated merely because consumers expect some chicken bones to be present? The food cases should logically follow the two-step process of *Barker v. Lull Engineering Co., Inc.*[273] and be placed under the scrutiny of risk-utility analysis, even if the product meets consumer expectations.

VII. Screening the Failure to Warn Cases

Manufacturers who seek to defend their products against failure to warn allegations face extraordinary difficulties. If the warning case gets beyond the judge and into the hands of the jury, it is difficult to sustain the contention that on risk-utility grounds, the warning need not have been given. Unlike the design defect case, where the plaintiff seeks to convince the court that the alternative design should have been substituted, the failure to warn case does not attack the product at all. The design case usually requires expert testimony to establish the practicality and efficacy of the alternative de-

272. *Id.* at 331-32, 103 N.W.2d at 68-69.
273. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

sign. It is subject to attack in that the costs of the alternative design may be too great or the overall utility of the product lessened by the suggested change. The failure to warn case is the poor man's design defect case. The plaintiff need not suggest complex design changes; he need only claim that words of caution were called for. Warnings are not inherently expensive. A few additional words on a label are hardly the stuff that can be defended against risk-utility attack. If frivolous cases are to be defensible, the protection must come from the courts who must take upon themselves the responsibility of screening such cases from juries through directed verdict practice.

Two recent Michigan appellate cases demonstrate that such judicial screening can be accomplished by the courts. In *Dunn v. Lederle Laboratories*,[274] the plaintiff used the manufacturer of Sabin vaccine after she was infected with polio as a result of diapering her daughter who had been vaccinated with the live-type Sabin vaccine. In upholding a jury verdict for the defendant, the court found that the commonly held belief that warnings are inexpensive is not supportable. The court held that "sensory overload" was a problem to be reckoned with.[275] The court professed agreement with my position that

> "[w]arnings, in order to be effective, must be selective. They must call the consumer's attention to a danger that has a real probability of occurring and whose impact will be significant. One must warn with discrimination since the consumer is being asked to discriminate and to react accordingly. The story of the boy who cried wolf is an analogy worth contemplating when considering the imposition of a warning in a case of rather marginal risk. . . . Those who argue for warning as *the* judicial solution to latent defect cases labor under a naive belief that one can warn against all significant risks. The truth is that such a marketing scheme is not feasible. The warning process, in order to have impact, will have to select carefully the items which are to become part of the consumer's mental apparatus while using the product. Making the consumer account mentally for trivia or guard against risks that are not likely to occur imposes a very real societal cost. . . .
>
> "In short, when calculating the burden of precaution which is part of the risk-utility calculus, it will be necessary to focus on costs other than the cost of label printing. The efficacy of warning is a societal cost of substantial importance."[276]

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274. 121 Mich. App. 73, 328 N.W.2d 576 (1982).

275. *Id.* at 81, 328 N.W.2d at 580.

276. *Id.* at 81-82, 328 N.W.2d at 581 (quoting Twerski, Weinstein, Donaher & Piehler,

The court concluded that considering the slight risk of contracting polio, the variability of the risks of harm, and other policy reasons, it would not broaden the requirement of warning to this fact situation.

The willingness of the court to examine the social costs of warnings bodes well for those advocating active judicial review of product design and warning standards. It gives evidence that courts are able to remove from the judicial theater those cases that significant public policy dictates are ill-starred.

A recent Michigan Supreme Court case gives further evidence of such judicial capability. In *Antcliff v. State Employees Credit Union*,[277] the plaintiff sued a manufacturer of scaffolding for failing to instruct or provide directions for the safe rigging of a scaffold. In upholding the lower court's refusal to consider the failure to warn theory, the court said:

> The scaffold was not found by the jury to be defective. The most that can be said of the accident is that the load-bearing capacity of the rigging system designed by plaintiff Howard Antcliff and his co-worker was insufficient to support the powered scaffold. This led to the system's collapse. We are unable to conclude that the scaffold's weight was a dangerous propensity which necessitates vindication of the policy. In addition, plaintiff Howard Antcliff and his co-worker were both journeyman painters. In view of their knowledge and experience as riggers, we feel constrained to charge them with full appreciation of the danger of inadequately supporting the scaffold on which they worked. As a result, the circumstances here (a non-defective product lacking in dangerous propensities and a known or obvious product-connected danger) do not support application of the policy which would require Spider to provide instructions for the safe rigging of its product.
>
> Moreover, the contrary conclusion would lead to demonstrably unfair and unintended results. There are countless skilled operations such as the rigging of scaffolding, which involve otherwise non-dangerous products in potentially dangerous situations. A manufacturer of such a product should be able to presume mastery of the basic operation. The more so when, as here, the manufacturer affirmatively and successfully limits the market of its product to professionals. In such a case, the manufacturer should not be burdened with the often difficult task of providing instructions on how to properly perform the basic operation.[278]

Use and Abuse of Warnings, *supra* note 15, at 514-17).

277. 414 Mich. 624, 327 N.W.2d 814 (1982).

278. *Id.* at 639-41, 327 N.W.2d at 820-21 (footnotes omitted).

It is not necessary to agree with the court's conclusion in order to applaud its technique. The court was concerned that the warning syndrome was being overdone. Sophisticated and skilled workers rarely pay attention to boiler plate instructions but instead rely on their own substantial expertise. The court carefully limited its decision to the specific fact pattern before it. Nonetheless, it is clear that judicial screening was carefully at work.

CONCLUSION

The law of torts is entering a new era. The days of unbridled jury discretion are numbered. I have attempted to demonstrate that significant judicial screening is already taking place. The question of the day is whether courts will have the wisdom to accelerate the process and save the tort system from collapse. If they do not take immediate action, we can expect regressive legislation at the federal level. Those who believe that tort law has served the country well, must realize that the time for creative constraint has arrived. I believe that to accomplish this restraint, courts have no alternative but to focus their attention on fundamental duty concepts.