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# FROM DEFECT TO CAUSE TO COMPARATIVE FAULT—RETHINKING SOME PRODUCT LIABILITY CONCEPTS

AARON D. TWERSKI\*

## INTRODUCTION

More than a decade has passed since the onset of the products liability revolution.<sup>1</sup> In this period of time literally thousands of judicial opinions have sought to identify and clarify the ramifications of the shift from the doctrine of negligence to that of strict liability as the judicial standard to govern actions arising from injuries caused by defective and dangerous products.<sup>2</sup> At first blush it would appear that there is general agree-

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1. The onset of the products liability era can be variously marked by *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 1161 A.2d 69 (1960) or *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). The adoption by the American Law Institute of RESTATEMENT (SECOND) OF TORTS § 402A (1965) triggered a revolution in American tort law establishing strict liability. In 1972 Professor Dix Noel had noted that some 36 jurisdictions had expressed their general approval of the strict liability doctrine. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of the Risk*, 25 VAND. L. REV. 93 n. 4 (1972). See PROD. LIAB. REP. (CCH) § 4050 for a listing of the states accepting strict liability doctrines. The most recent adoptions of strict liability doctrine have been by the Alabama and Florida courts. See *Atkins v. American Motors Corp.*, 295 Ala. \_\_\_, 335 So. 2d 134 (1976); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

2. The volume of litigation can be somewhat gauged by the number of reported products liability decisions. The PRODUCTS LIABILITY REPORTER published by Commerce Clearing House has reported approximately 144,000 decisions since 1970 alone. The National Commission on Product Safety estimated that in 1969 approximately 300,000 products suits were filed. NATIONAL COMMISSION ON PRODUCT SAFETY FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY (June, 1970).

ment throughout the country as to the meaning and import of strict liability. The courts do indeed seem to be speaking in one tongue. If the results appear inconsistent it is seemingly to be attributed to the reaction of courts to differing fact patterns—no judicial system can nor should immunize itself from the compelling impact of the case at bar. Such, I believe, is the orthodox view of the present litigation situation.<sup>3</sup> It is, in my considered opinion, seriously in error. We have permitted the cosmetic sameness of the legal jargon to hide fundamental differences of opinion as to the meaning of the strict liability doctrine. This triumph of language over analysis has not only masked and debased the judicial dialogue between courts of different jurisdictions; it has also managed to confuse the internal logic of some of the most perceptive courts in the country. It is to a careful delineation of these issues that I now turn.

### I. HOW STRICT IS STRICT LIABILITY?

The starting point for any discussion of the developments in products liability is the law of negligence. The hallmark of negligence theory is the requirement that plaintiff establish that the defendant *fails to act* as a “reasonable man” would under the circumstances.<sup>4</sup> It should be noted that negligence theory provides no guarantee nor promise that the product is

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One can only guess at the volume of litigation brought on by increased consumer awareness in more recent years.

3. This proposition is difficult to support by direct authority, yet the treatment of products liability material by the leading case-books supports this thesis. *See, e.g.,* C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* (2d ed. 1969); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON THE LAW OF TORTS* (26th ed. 1976). These texts present the materials in such a manner as to indicate fundamental agreement with the basic principles involved. J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* (1975) undertakes a rather novel approach to the product liability action which mainly reflects their view that the litigation process treats certain categories of products cases in a very different manner. For a full development of their thesis, see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 153 (1973). For a sharp rebuttal to Henderson, see Twerski, Weinstein, Donaher, & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) [hereinafter cited as Twerski, *The Use and Abuse of Warnings*], and finally the counter to the rebuttal, see Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976).

4. W. PROSSER, *LAW OF TORTS* § 32 at 149 (4th ed. 1971); Green, *The Negligence Action*, 1974 ARIZ. ST. L. J. 369; RESTATEMENT (SECOND) OF TORTS § 291 (1965). When I use the term “reasonable man,” it is only because that is the traditional verbiage. I do not mean, for a moment, to imply that women are excluded. In fact I prefer “reasonable person” and will use that terminology throughout.

not defective. The law does not assure a buyer or user that the product will meet a certain standard of quality—only that the defendant, through *negligent conduct*, will not bring about a defective product.<sup>5</sup> In assessing the buyer's expectations under negligence law and his possible responses through his conduct to the product, the very best that a buyer or user can anticipate is a product that is nonnegligently produced.

The shift to strict liability theory, as expressed in *Restatement (Second) of Torts*, section 402A and adopted by the large majority of states, accomplished a major doctrinal shift—the focus of attention is no longer the conduct of the defendant but rather the product in its use environment.<sup>6</sup> If the product is defective it no longer matters *how* it came to be defective. All the care in the world will not absolve a defendant who has sold a defective product which causes injury to a plaintiff.<sup>7</sup> The tort is no longer the conduct of the defendant which gave birth to the defect; the tort is selling a defective product.

#### A. Defective Product—Competing Theories

The concept of “defect” in product liability law has been the cause of enormous confusion in the profession. Everyone agrees that for a product to be a likely subject for a products suit it must have a defect; but there is considerable disagreement as to just what attributes of a product will, when added together, make one out.<sup>8</sup> The confusion reigns so supreme that several major courts have eschewed giving content to the concept of defect.<sup>9</sup> And the Wisconsin Supreme Court after first

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5. *Id.*; RESTATEMENT (SECOND) OF TORTS § 388 (1965).

6. RESTATEMENT (SECOND) OF TORTS § 402A, comment a (1965).

7. *Id.*

8. This confusion is not unlike that engendered by the common-law concept of domicile where there was seemingly complete agreement among the courts that every human being had one and only one domicile. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11-23 (1971). Because of the differing interpretations of domiciliary facts more than one court could conclude that it was in fact the one domicile. See *In Re Dorrances's Estate*, 309 Pa. 151, 163 A. 303 (1932); 115 N.J. Eq. 268, 170 A. 601 (1934), and the constitutional acceptance of this doctrine, *Riley v. New York Trust Co.*, 315 U.S. 343 (1941); *Williams v. North Carolina [I]*, 317 U.S. 287 (1942); *Williams v. North Carolina [II]*, 325 U.S. 226, *reh. denied* 325 U.S. 895 (1945).

9. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209 (Alaska 1975); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973); *Berkebile v. Brantley Helicopter Corp.*, 219 Pa. Super. 479, 337 A.2d 893 (1975). But see *Greiner v. Volkswagenwerk Aktiengesellschaft*, 540 F.2d 85 (3d Cir. 1976); *Bair v. American Motors Corp.*, 535 F.2d 249 (3d Cir. 1976); *Beron v. Kramer-Trenton Co.*, 402 F. Supp.

solemnly proclaiming that a plaintiff may be able to establish a cause of action for negligence even when unable to establish an action for strict liability<sup>10</sup> later split sharply as to whether in a *negligence* action the plaintiff had to establish that the defect in a product had to be "unreasonably dangerous".<sup>11</sup> Such illogic emanating from one of the most respected courts in the country gives evidence of fundamental misunderstanding as to the nature and source of strict liability law.

The illusiveness of the "defect" concept is, in this author's opinion, attributable to the failure to clearly delineate the differences between: (1) "production" or "manufacturing" defect and "design" defect cases and (2) representational theories and "unreasonable risk" theories, as the basis for product liability law. The confusion born from the failure to indicate what theory is being advocated in any particular case when added to some holdover semantic problems from the yesteryear of product liability law has precluded the establishment of an understandable definition of defect.

### B. *Production Defect—Design Defect*

The doctrine of strict tort liability for products was first recognized in the context of production defect cases. The typical case was that of the exploding soda bottle.<sup>12</sup> An injured plaintiff who sought to sue the glass manufacturer or bottler<sup>13</sup>

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1268 (E.D. Pa. 1975), refusing to follow *Berkebile* as an illogical plurality opinion in which the majority of the court did not join. See also the excellent discussion in Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety*, 14 Duq. L. Rev. 25 (1975).

10. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

11. *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1975); *Greiten v. La Dow*, 70 Wis. 2d 589, 235 N.W.2d 677 (1975). It should be noted that in a strict liability action the Wisconsin court has taken the position that a plaintiff must establish that the product is unreasonably dangerous. *Heldt v. Nicholson Mfg. Co.*, 72 Wis. 2d 110, 240 N.W.2d 154 (1976).

12. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1954).

13. In the case of multiple defendants, it was the plaintiffs' responsibility to point the accusing finger at the particular defendant. If negligence was established, but it was not clear which defendant was responsible for the negligence, plaintiff would not prevail. This remains a problem even under a theory of strict liability where the plaintiff is freed only from proving negligence but not from proving that the defect existed in the hands of the manufacturer. See *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), setting forth the following requisites in order to make out a prima facie case. Plaintiff must establish (1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of

for negligence was faced with the defense that the defendant had acted reasonably in its manufacturing process. The quality control system of the defendant became the battle ground for the law suit. If the defendant had in fact acted reasonably the fact that a defective bottle had slipped through quality control would not be sufficient grounds for imposing liability. To be sure the doctrine of *res ipsa loquitur* was of immeasurable assistance to plaintiffs for it permitted an inference of negligence even in the absence of proof of the specific negligence of the defendant.<sup>14</sup> Yet, strange as it may seem, the effective use of the *res ipsa* doctrine was probably the tipping point for strict liability. In those instances in which plaintiffs were prevailing on the basis of *res ipsa*, even when confronted with a strong defendant showing of nonnegligence, strict liability was in fact the doctrine being applied.<sup>15</sup> And in those instances where the defendant did prevail the fact that plaintiff had been unable to successfully counter the defendant was attributed to the defendant's control of the evidence (*i.e.*, the manufacturing process).<sup>16</sup> Thus, win or lose, there was a strong feeling that

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the plaintiff's injury or damages, (4) that the seller engaged in the business of selling such a product and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.

Thus, even under strict liability, to prove item number (1), that the defect existed in the hands of the seller, the plaintiff must identify at what point along the distributive chain the defect came into being. This is not unlike establishing which defendant was negligent. In certain instances courts have been willing to lighten the plaintiff's burden on this question. *See, e.g.*, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1945); *Nicholas v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953); *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953). *See also* James, *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179 (1951).

The startling new case on this subject is *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 221 (1975), where the appellate court held that the trial judge must under such circumstances require a jury to bring a verdict against at least one of the defendants. A full discussion of the implication of these cases is well beyond the scope of this paper.

14. *See Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1954).

15. *See* Justice Traynor's now famous dissent in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d at \_\_\_\_, 150 P.2d at 441, where this thesis is developed. Justice Traynor contends:

An injured person, however is not ordinarily in a position to refute such evidence [of negligence] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.

16. *See, e.g.*, the strong argument for strict liability in *Codling v. Paglia*, 32 N.Y.2d 330, 340-41, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973), in which the court stated:

negligence should not be the governing theory.

In a production defect case it is not difficult to identify the defect in the product. Generally, one need only compare the product against the "good" product made by the defendant which rolls off the assembly line.<sup>17</sup> The standard of reference is internal—it is the manufacturer's own quality standard. If the defendant's product fails to measure up to that standard it can, with relative safety, be identified as a defect.<sup>18</sup> If that defect

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Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. By way of direct illustration, how many automobile purchasers or users have any idea how a power steering mechanism operates or is intended to operate, with its "circulating worm and piston assembly and its cross shaft splined to the Pitman arm"? Further, as has been noted, in all this the bystander, the nonuser, is even worse off than the user—to the point of total exclusion from any opportunity either to choose manufacturers or retailers or to detect defects. We are accordingly persuaded that from the standpoint of justice as regards the operating aspect of today's products, responsibility should be laid on the manufacturer, subject to the limitations we set forth.

17. See Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969) [hereinafter cited as Keeton, *Manufacturer's Liability*]. Many of the early strict liability cases were of this genre. *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

18. Theoretically, the statement in the text is overbroad. The test for unreasonable danger is, in reality, the same for both production and design defect cases. The practical effect of administering the test may result in a finding that in production defect cases that the product is unreasonably dangerous in most instances. For example, the burden of precaution in a production defect case may be for the manufacturer not to market the flawed product which comes off the assembly line while the burden of precaution in a design defect case may be to effect a substantial alteration in the entire design of a product. To be sure, the defendant may not know which of the products of the assembly line is flawed and thus may not be negligent. But if strict liability focuses on whether the product is defective, then the question of defendant's ability to know is irrelevant. Thus a product with a manufacturing defect can be termed defective since the defendant, if he had the knowledge, would have decided against marketing

caused the plaintiff's harm, a prima facie case has been established. Thus, it rarely makes a difference in a production defect case whether the standard given to the jury for deciding whether a defect exists is that the product is "defective" or "unreasonably dangerous" or "defective and unreasonably dangerous to the user or consumer." The decisional process remains the same. The internal manufacturing standard is the bench mark for assessing the presence of defect.

In a design defect (or failure to warn)<sup>19</sup> case the situation is far different for there is no claim that the unit which caused injury to the plaintiff is any different from any other unit of the same model produced by the manufacturer. The claim, instead, is that an entire model line or a particular feature of an entire model line is defective. Since there is nothing "wrong" with the product per se, the term "defective" has no meaning without reference to some external standard. It is here that the battle lines are formed.

### 1. The Defect Test

Several courts have taken the position that there is no intrinsic difference between a strict liability case based on defective design and one based on defective manufacture. If defect is an acceptable term of art for the one, it is acceptable for the

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the flawed product. On the other hand, a design defect case may involve serious evaluation of risk-utility considerations. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965); Weinstein, Twerski, Piehler and Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duq. L. Rev. 425, 433 n. 14 (1974). A problem may arise if the manufacturing standards of a given company give rise to a flaw which still meets acceptable standards of the entire industry and which do not fall below risk-utility standards as assessed by the judiciary. In such an instance, in the absence of express warranty, it would be improper to hold a particular manufacturer liable for a flaw that is predicated upon a higher standard than that imposed on the industry as a whole. Thus, for example, an automobile part which is flawed if judged on Rolls-Royce standards is not necessarily unreasonably dangerous if such a standard is acceptable when applied to other automobile manufacturers. The only recourse for the plaintiff who suffered injury due to a failure of a Rolls-Royce part if it meets general industry standards would be an action for express warranty.

19. Failure-to-warn cases are analogous to design defect cases in that the issue is whether an entire product line should have been marketed with a warning. The individual product which caused the injury is not singled out because it differs from all others marketed by the manufacturer. See W. PROSSER, *LAW OF TORTS* § 96, at 644-47 (4th ed. 1971); Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398 (1970). For a full discussion of the interplay between warning and design parameters, see Twerski, *The Use and Abuse of Warnings*, *supra* note 3.



other. The judicial statement of this view in *Cronin v. J. B. E. Olson Corp.*<sup>20</sup> is direct and forthright.

We can see no difficulty in applying the *Greenman* [strict liability] formulation to the full range of products liability situations, including those involving "design defects." A defect may emerge from the mind of a designer as well as from the hand of the workman.

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The most obvious problem we perceive in creating any such distinction is that thereafter it would be advantageous to characterize a defect in one rather than the other category. It is difficult to prove that a product ultimately caused injury because a widget was poorly welded—a defect in manufacturer—rather than because it was made of inexpensive metal difficult to weld, chosen by a designer concerned with economy—a defect in design. The proof problem would, of course, be magnified when the article in question was either old or unique, with no easily available basis for comparison. We wish to avoid providing such a battleground for clever counsel. Furthermore, we find no reason why a different standard, and one harder to meet, should apply to defects which plague entire product lines. *We recognize that it is more damaging to a manufacturer to have an entire line condemned, so to speak, for a defect in design, than a single product for a defect in manufacture.* But the potential economic loss to a manufacturer should not be reflected in a different standard of proof for an injured consumer.<sup>21</sup>

The court concluded that any reference to an external standard requiring that the product be "unreasonably dangerous" should not be permitted. When faced with the problem that the word "defect" had no clearly defined meaning in a design defect case the court passed the problem off in a footnote by expressing its faith that eventually there would emerge an acceptable definition of the defect concept.<sup>22</sup> After discussion of the more successful attempts to define defect we shall reflect again on the inadequacies of the *Cronin* formulation. Suffice it to say that it has established a concept of defect without meaningful content. It may now be true that defect, like obscenity

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20. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

21. *Id.* at 134, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43 (1972) (emphasis added). See also *Casrell v. Altec Indus., Inc.*, 295 Ala. \_\_\_, 335 So. 2d 128 (1976).

22. 8 Cal. 3d at 135 n. 16, 501 P.2d at 1162 n. 16, 104 Cal. Rptr. at 442 n. 16. A similar position has been espoused by courts both in Pennsylvania and New Jersey. See note 9 *supra*.

in Justice Stewart's definition, will be discovered by sense impression.<sup>23</sup> Unfortunately, "I know it when I see it" will not suffice as a judicial standard for products liability.

## 2. The Consumer Expectation Test

A more meaningful standard is found in the *Restatement (Second) of Torts*, which predicates liability upon a finding that a product is "in a defective condition unreasonably dangerous to the user or consumer."<sup>24</sup> The comments to the *Restatement* seem to emphasize that the consumer expectation test is the essence of strict tort liability. A product is considered defective when "it is . . . in a condition not contemplated by the ultimate consumer."<sup>25</sup> And a product is to be found unreasonably dangerous when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product, with the ordinary knowledge common to the community as to its characteristics."<sup>26</sup>

In a joint article arising from a National Science Foundation study my colleagues and I sharply attacked the consumer expectation test as the operative test for strict liability. The virtue of the consumer expectation test is that it does focus on the product as a functioning entity in the hands of the consumer and eliminates negligence considerations (which focus on the conduct of the defendant) from a design defect case. We then noted:

The *Restatement* standard is, however, a mixed blessing. Although it forces an examination of the actual environment of product use, it suffers from the fact that this examination is undertaken from the viewpoint of the ordinary consumer. The test suggests that if the ordinary consumer "contemplates" the danger, then the product is not unreasonably dangerous. Indeed, there is a strong argument that the *Restatement* language is but an updated version of the patent danger rule. This rule, which has come under heavy attack from both academic and judicial quarters, provides that a manufacturer has fulfilled all his duties to the consumer if

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23. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). See Donaher, Piehler, Twerski, and Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEXAS L. REV. 1303 (1974) [hereinafter cited as Donaher].

24. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

25. *Id.* comment g.

26. *Id.* comment i.

the product's dangers are open and obvious. In many instances manufacturers have been absolved from liability when an obvious danger caused serious injury, even though that injury could have been averted by a design modification that would not have added significantly to the cost of the product or impaired its usefulness. For courts seeking to rid themselves of every vestige of the patent danger rule, the adoption of the § 402A comments was fraught with risks. The language could too easily be misunderstood.<sup>27</sup>

Subsequent developments have proven that our prophecies of doom were well founded. In *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*,<sup>28</sup> the Wisconsin court illustrated that plaintiffs have good reason to fear a test which establishes liability solely on the basis of consumer expectations. In that case plaintiff, a two-year-old child, suffered injury when he fell into a swimming pool in the backyard of the home of his grandfather, whom he was visiting. The complaint alleged that a retractable ladder to the above-ground pool had been left in the down position, that the pool was unsupervised and that the plaintiff climbed the ladder, fell into the water and remained there for an extended period of time, resulting in severe brain damage. The plaintiff contended that the swimming pool was defectively designed because the defendant had failed to take the *reasonable and low cost* precaution of building the swimming pool so that the fencing extended across the deck at the top of the ladder opening, with a self-closing, self-latching gate on the deck of the swimming pool. This suggested design would have prevented access to the swimming pool area by children of the plaintiff's tender age even when the ladder from the deck to the ground was in the down position.

The Wisconsin court dismissed the plaintiff's complaint holding that, as a matter of law, the swimming pool was not defectively designed. Its reason for so holding was that the *Restatement*—consumer expectation test demanded such a result. The court said:

[T]he test in Wisconsin of whether a product contains an unreasonably dangerous defect depends upon the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product. If the average consumer

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27. Donaher, *supra* note 23 at 1304.

28. 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer.

Based upon the principles discussed above, we conclude that the swimming pool described in plaintiff's complaint does not contain an unreasonably dangerous defect. *The lack of a self-latching gate certainly falls within the category of an obvious rather than a latent condition.*<sup>29</sup>

It is strange that after the rejection of the patent danger rule by the most respected courts in the country<sup>30</sup> and after its discreditation by leading academic critics<sup>31</sup> that the doctrine has received new acceptance<sup>32</sup> clothed in the respectable language of the *Restatement*. Indeed the fountainhead of the patent danger rule, the New York Court of Appeals, has recently seen fit to reject the doctrine outright. The rule that a manufacturer was not responsible for dangers in a product which were open and obvious had its origin in the landmark case of *Campo v. Scofield*.<sup>33</sup> In that case plaintiff was engaged in feeding onions into an "onion topping" machine when his hands became caught in its revolving steel rollers and were badly injured. Plaintiff alleged that the onion topping machine was negli-

29. *Id.* at 332-33, 230 N.W.2d at 799 (emphasis added).

30. *Orfield v. International Harvester*, 535 F.2d 959 (6th Cir. 1976); *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd sub. nom. Yoder Co. v. General Copper & Brass Co.*, 474 F.2d 1339 (3rd Cir. 1973); *Byrns v. Riddell Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Pike v. Frank G. Hough Co.*, 2 Cal. 2d 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); *Casey v. Gifford Wood Co.*, 61 Mich. App. 208, 232 N.W.2d 360 (1975); *Coger v. Mackinaw Products Co.*, 48 Mich. App. 113, 210 N.W.2d 124 (1973); *Byrnes v. Economic Mach. Co.*, 41 Mich. App. 192, 200 N.W.2d 104 (1972); *Palmer v. Massey Ferguson, Inc.*, 3 Wash. App. 508, 476 P.2d 713 (1970).

31. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5 (1956); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973); Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398 (1970); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974) [hereinafter referred to as Twerski, *Old Wine in a New Flask*].

32. In addition to the *Vincer* case in Wisconsin, the following courts have, by their adoption of section 402A, comment i, given tacit approval to the patent danger doctrine: *Sherrill v. Royal Industries, Inc.*, 526 F.2d 507 (8th Cir. 1975); *Hartman v. Miller Hydro Co.*, 499 F.2d 191 (10th Cir. 1974).

33. 301 N.Y. 468, 95 N.E.2d 802 (1950).

gently designed because the manufacturer had failed to provide safety guards that would prevent the user from getting his hands caught in the machine. The court held that no liability would attach:

The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a *duty merely to make it free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to the plaintiff or other users.*<sup>34</sup>

After a long and disappointing relationship with the patent danger rule<sup>35</sup> the New York Court of Appeals rejected the doctrine in *Micallef v. Miehle Co.*<sup>36</sup> Plaintiff, Paul Micallef was employed as an operator on a huge photo-offset printing press. One day while working on the press plaintiff discovered that a foreign object had made its way onto the plate of the unit. Such a substance, known to the printing trade as a "hickie," causes a blemish or imperfection on the printing page. In order to correct this situation plaintiff informed his superior that it was his intention to "chase the hickie." The process of "chasing hickies" consists of applying, very lightly, a piece of plastic about eight inches wide to the printing plate, which is wrapped around a circular plate cylinder that spins at high speed. The revolving action of the plate against the plastic removes the "hickie." While plaintiff was engaged in this maneuver the plastic was drawn into the nip point grabbing his hand between the plate cylinder and an ink-form roller. The photo-offset

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34. *Id.* at 471, 95 N.E.2d at 803 (emphasis added).

35. See *Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); *Meyer v. Gehl Co.*, 36 N.Y.2d 760, 761, 329 N.E.2d 666, 368 N.Y.S.2d 834 (1975) in which a biting dissenting opinion by Justice Fuchsberg appears. In that case the patent danger rule barred recovery to a five-year-old plaintiff who got his hand caught in the exposed gears of a hay unloading machine. The plaintiff, to no avail, argued that what was patent to an adult might be latent to a child; and further, that plaintiff should not be barred from establishing the hay unloading machine could have been made reasonably safe for only a slight additional cost. See Brief of Appellant pp. 9-13. Thus, plaintiff sought the privilege of establishing his case using risk-utility principles. This was identical to the quest of the plaintiff in *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

36. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

machine had no safety guards to prevent such an occurrence and plaintiff was unable to quickly stop the machine because the shut-off button was distant from the point of operation of the machine.

The plaintiff, Micallef, was fully aware of the danger of getting his hand caught in the press while "chasing hickies." It was, however, the custom of the industry to "chase hickies on the run," because once the machine was stopped, it required at least three hours to resume printing. An expert witness testified that good engineering practice would dictate that a safety guard be placed near the rollers since the danger of human contact at the point of operation was well known. The court realized that even though this design modification was both reasonable and feasible, the *Campo*-patent danger rule demanded that recovery be denied. In rejecting its long held position that the obviousness of the danger is to be the only criterion for judging the safety of a product the court relied on the astute observations of Professors Harper and James. They contend:

[T]he bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition; and since it was so readily avoidable they might find the maker negligent.<sup>37</sup>

Returning to the *Vincer v. Esther Williams* swimming pool case it is clear that by adopting the patent danger rule the Wisconsin court short-circuited the analytical process. The court removed from both the court's and jury's consideration an examination of the safety of the design of the swimming pool. If, for example, for a very slight additional cost it would be possible to virtually eliminate the danger of accidental

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37. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5 at 1543 (1966). For a further expansion of this thesis see James, *Assumption of Risk: Unhappy Reincarnation*, 78 *YALE L.J.* 185 (1968); Twerski, *Old Wine in a New Flask*, *supra* note 31.

drownings then such a design modification should be given serious consideration through the medium of a design defect case.<sup>38</sup>

At this stage of the discussion, I am forced to confess error. In my earlier writings on this subject I joined Harper and James in the analytical framework they had suggested for dealing with the open danger problem.<sup>39</sup> The argument proceeds along the following lines: The mere fact that a court abolishes the patent danger rule does not necessarily mean that the obviousness of the danger is irrelevant to the determination of whether a product is "unreasonably dangerous." Since the concept of reasonable danger depends on a consideration of risk-utility principles it must be recognized that the obviousness of the danger often reduces the frequency of risk exposure. The

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38. The late Chief Justice Wilke, in his dissent, argued that the jury should not be deprived of the opportunity of evaluating the case on risk-utility principles. He was unprepared to permit the case to be short-circuited by an inflexible no-duty rule. Justice Wilke's position is consistent with that offered in the text. Unfortunately, neither the majority nor the dissent alerted the court to the fact that in both *Vincer* and *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431 (1975), the court was adopting the ill-fated patent danger rule.

Justice Wilke then argued that the plaintiff's ability to appreciate the danger should not be a factor in deciding whether the product is unreasonably dangerous, but should rather become a matter of affirmative defense. Realizing that in the context of *Vincer* this would mean that defendant would bear the entire loss because the plaintiff was two years old and could thus not be deemed contributorily negligent, Justice Wilke made the astounding suggestion that the parents' negligence be imputed to the infant.

As indicated in the text, the abolition of the patent danger rule does not mean that the obviousness of the danger is not an important fact in determining whether the product is unreasonably dangerous. It becomes part of the risk-utility calculus. Thus, if the Wisconsin court had been so inclined, it could have decided that it would not pay allegiance to the patent danger rule, but still find as a matter of law that the swimming pool was not unreasonably dangerous. Only by deciding that the product is unreasonably dangerous by use of risk-utility criterion, should the court face the question of plaintiff's contributory negligence. Thus, in this case if the jury had indeed found that the swimming pool should have been constructed to protect children from accidental drowning, and that it was in fact unreasonably dangerous, it would have been ludicrous to permit contributory negligence to defeat or diminish plaintiff's recovery. See text accompanying footnotes 105 to 114.

This penchant for missing the crucial middle step, and thus moving from the abolition of the patent danger rule to the position that the obviousness of the danger is only to affect the affirmative defenses of contributory negligence and assumption of the risk was recently demonstrated by the New York Court of Appeals in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976), in which the court appeared to take the position that the obviousness of the danger will go only to the affirmative defense. *Id.* at 387, 384 N.Y.S.2d at 122.

39. Twerski, *From Colding to Bolm to Velez, A Tryptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974); Donaher, *supra* note 23.

more obvious the risk, the less chance there is that people will encounter it. Thus, by including the obviousness of the risk into overall risk-utility considerations it may well be that a product will be considered reasonably safe. This may especially be true if the cost of eliminating the hazard is high or if the utility of a product can be seriously impaired by a design modification. Under this analysis, consumer expectations become a part (albeit *only* a part) of the overall determination of whether a product is or is not "unreasonably dangerous."<sup>40</sup> In instances where the risk-utility analysis as a result of the obviousness of the danger is so clear that reasonable men cannot differ a court may still, on a case by case basis, direct a verdict for the defendant. Where the issue is less clear the issue would be for the jury. The virtue of this approach is that instead of a categorical determination that *all* patent danger cases are to be dismissed a court can decide when the balancing of risk-utility considerations demands that a verdict be given for defendant. This permits the judge to consider in his overall assessment the probability of the risk, the gravity of the harm and the burden or costs of preventing the obvious danger which is under attack.

The overall good sense of this "consider the obviousness together with everything else" approach has caused some courts to reject the "consumer expectation" test.<sup>41</sup> And yet, we

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40. Authorities cited *supra* note 39; *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd sub nom. Yoder v. General Copper & Brass Co.*, 474 F.2d 1339 (3d Cir. 1973); *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976).

41. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974). In *Roach* the court begins its analysis of a design defect case by citing *Heaton v. Ford Motor Co.*, 248 Ore. 467, 435 P.2d 806 (1967). *Heaton* is discussed in the text accompanying footnotes 45 to 47. The court in *Roach* characterizes its own decision in *Heaton* as adopting the consumer expectation test. The court then goes on to adopt a risk-utility test for design defect cases eliminating scienter as a requirement of plaintiffs' prima facie case. It is not clear whether in adopting the risk-utility formulation the court abandoned the consumer expectation test. There is some evidence that the court has confused the two tests. In discussing the court's view that strict liability is negligence absent scienter the court states:

As Professor Wade points out, a way of determining whether the condition of the article is of the requisite degree of dangerousness to be defective (*unreasonably dangerous; greater degree of danger than a consumer has a right to expect; not duly safe*) is to assume that the manufacturer knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, something should have been done about the danger before it was sold.

525 P.2d at 129. The italicized portion of the above quote indicates considerable confusion as to whether the operative test for liability is the consumer expectation test



find a dogged determination on the part of other courts to focus on that test as the operative rule for products liability determination.<sup>42</sup> I suggest that there is a good bit of right on both sides and that a fundamental restructuring of the order in which these tests are presented to a court or jury for determination will indicate that both tests can and should be utilized in assessing liability in a products liability case.

Courts and commentators have perceived that there really are two separate questions in any products liability action: (1) Does the product meet consumer expectations and (2) Does the product meet the standards of safety which society demands from products by evaluating risk-utility considerations? The shortcoming of the consumer expectation test is not that it is irrelevant; it is that it is not ambitious enough. A product may well meet consumer expectations when the danger is obvious and/or well warned against. Nevertheless, the judgment of society may be that for a slight additional cost (in some instances at no cost) design modifications could eliminate obvious dangers which are both substantial and hazardous. This would then seem to force us back into a general risk-utility evaluation of the product. On the other hand, there seems to be a strongly held opinion that plaintiffs should not be forced, in a strict liability action, to make out a risk-utility case when the product has failed to meet the common expectations of society for product performance.<sup>43</sup>

The answer to this dilemma is that a two-tiered test should be utilized. The consumer expectation test is an excellent *standard below which no product should be permitted to fall*.<sup>44</sup>

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or one based on risk-utility considerations. As pointed out in the text *infra* the two tests are not synonymous. In previous decisions Oregon had cast its lot with the consumer expectation test. *Markle v. Mulholland's, Inc.*, 265 Or. 259, 509 P.2d 529 (1973). See also *Phillips v. Kimwood Mach. Co.*, 269 Or. 489, 525 P.2d 1033 (1974), where the risk-utility test seems to prevail. For a reconciliation of these two tests see text accompanying notes 44-48 *infra*.

42. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969); *Markle v. Mulholland's, Inc.*, 265 Or. 259, 509 P.2d 529 (1973); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

43. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 2d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972), and authorities cited *supra* note 42.

44. A full development of representational theory can be found in the brilliant analysis of the problem by Professor Marshall Shapo in his article entitled *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109-1388 (1974) [hereinafter cited as

Shapo]. In Professor Shapo's own words, his thesis is that:

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.

It would not be appropriate to deal with a fully developed and masterful 270-page thesis within the context of a footnote. One must read the article in its entirety to appreciate the almost majestic scope of the theory presented and the very impressive array of authority which is brought in support of Professor Shapo's representational theory. There are many areas of convergence between the Shapo thesis and my own. See Twerski, *Cases On Products Liability* (1974) (on file in Hofstra University Law Library) and Twerski, *Old Wine in a New Flask*, *supra* note 31. Nevertheless, I find myself in significant disagreement with the broad sweep of the Shapo thesis. It appears that Shapo believes that risk-utility considerations would be merged into a representational model. See Shapo *supra* at 1370. At various points in the development of his thesis, he strains to resolve problems such as those raised by industrial machinery, the patent-latent danger problem and the bystander problem into his representational model. Shapo, at various points in his article, recoils from defining his representational theory as the exclusive method for resolving products problems. Nevertheless, he feels compelled to work out problems which, in this author's view, are best analyzed under risk-utility principles within his representational model.

This author has some explaining to do in fashioning the two-tiered test for defect. In an earlier article written in conjunction with my colleagues for a National Science Foundation Study, we argued that there is a sensitive interplay between design and warning (representational) parameters. Since the amount of information a consumer can carry as part of his mental baggage is limited, it is necessary to decide which dangers are to be designed out of the product and which are to be warned against. See Twerski, *The Use and Abuse of Warnings*, *supra* note 3.

The present suggestion is that if a product fails to meet consumer expectations it will be held to be defective. If our previous thesis was correct, then even warnings (representations) must be judged in a risk-utility framework. The answer to this predicament is made of the same cloth as this author's objection to the sweeping nature of the Shapo thesis. Shapo would include into representational theory all the subtleties that affect consumer expectations. Although there is much to be said for straightforward representational approach, I believe that, in order for the representation theory to be workable and understandable by a jury, it must be at a fairly gross level if we are to declare the product defective because it disappoints consumer expectations. The fine tuning of the representational theory, in which the jury is permitted to assess the subtleties of the product, belongs in the overall visceral reaction which a jury brings to bear in its overall risk analysis. I would thus limit the representational

If plaintiff establishes that realistic consumer expectations with regard to the product have not been met then the product is defective—without further considering risk-utility principles. If society's views, as gauged through the eyes of the average consumer, are unrealistic then it is the function of the marketing system to bring them back into line. To hold a manufacturer to a standard which reflects normal expectations appears eminently fair. Thus, a plaintiff should be free to make out a case of defect based on the failure of the product to meet consumer expectations. If the finder of fact determines that the product has failed the consumer expectation test, a defect has been established. If that defect was causal of the plaintiff's harm a *prima facie* case has been established.

The converse, however, is not true. A finding that the defendant has met the consumer expectation test will not necessarily absolve him of liability. It may still be possible that utilizing the second-tier test, that of "unreasonable risk" based on risk-utility considerations, a court may find that a product which meets consumer expectations as to what the product *is* does not meet society's expectations as to what the product *should be*. To be sure, we ought not be prepared to go off the deep end and impose liability cavalierly on products that conform with consumer expectations.<sup>45</sup> But, the underlying question is whether society will, through its judicial system, ever demand more than an *honest product* and will require a *safe product* as well. Although honesty and safety in a product often coincide, they are not matching ends of a bookcase. The safety standard may be more demanding than the honesty standard. The cases overruling the patent danger rule can be read in no other way.

An interesting example of the application of the two-tiered test can be found in a much cited Oregon case, *Heaton v. Ford Motor Co.*<sup>46</sup> In that case plaintiff had purchased a new truck

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problem to clearly disappointed expectations and deal with the design-warning interplay within the context of the unreasonable danger problem in which the jury is faced with design and warning alternatives. See also Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEXAS L. REV. 1185 (1976).

45. It should be noted that the patent danger rule did not survive for a quarter of a century on totally irrational grounds. Whenever we are faced with a patent danger situation, we should be aware that we are entering into an area in which the consumer's right to make a knowing choice may be affected, and that we are about to act in a paternalistic fashion. But see Keeton, *Products Liability*, *supra* note 19. Professor Shapo suggests that even in patent danger cases there may be lurking representational problems. See Shapo, *supra* note 44, at 1210-11 and 1351.

46. 248 Or. 467, 435 P.2d 806 (1967).

to use for hunting and other cross-country purposes. He had driven the truck some seven thousand miles without noticing anything unusual about its performance. On the day of the accident, however, the truck while moving on a "black-top" highway at normal speed, hit a rock which plaintiff described as about five or six inches in diameter. The truck continued on uneventfully for approximately thirty-five miles, when it left the road and tipped over. The court held that the evidence presented in the case did not permit a finding that the defendant had breached the "consumer expectation" standard.

Where the performance failure occurs under conditions with which the average consumer 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. . . . 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.<sup>47</sup>

The court then considered whether the jury *should* have been permitted to decide how strong the product should *be*. The court recognized that in order for a jury to attempt this kind of evaluation it would have to be presented with the kind of data necessary to make a risk-utility evaluation. The court stated:

Such an opinion by the jury would be formed [in this case] 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.<sup>48</sup>

Given the suggested analytical framework for deciding the defect issue in a products case it is not necessary for courts to choose between the "consumer expectation" test and the "unreasonably dangerous" standard. A products case would be

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47. *Id.* at 474, 435 P.2d at 809.

48. *Id.* It may be that Justice O'Connell had the better of the argument in this case when, in his dissenting opinion, he argued that a jury could find that this product did in fact not meet consumer expectations. But, that does not at all detract from the wisdom of the two-tiered approach. This may have been a case which was resolvable on the basis of clear disappointment of consumer expectation.

submitted to the jury to determine first, whether the product met with average consumer expectations; if the answer is negative, defect is established. If the answer is in the affirmative then plaintiff bears the burden to establish, by utilizing relevant risk-utility criteria, that the product does not meet societal standards of safety.<sup>48.1</sup> Having established a two-step standard for determining defect a further explication of what risk-utility balancing means in the context of a strict liability case is in order.

### 3. The Unreasonably Dangerous Product—Risk—Utility Balancing

The distinction between negligence and strict products liability, as pointed out earlier, is that negligence focuses on the conduct of the defendant and strict liability focuses directly on the product in the environment of its use. Since there is general agreement that the manufacturer is not the insurer of the product but is liable only when a product is defective,<sup>49</sup> it becomes clear that some external standard must be used in order to give content to the defect concept in a design defect case. The second step of the two-tiered test suggested above requires that a plaintiff establish that a product is "unreasonably dangerous." Since a product is a thing rather than a person the term "unreasonably dangerous" needs some explanation. Products are not capable of reasoning—only persons are. What we mean when we speak of the "unreasonably dangerous" product is that we recognize that all products present risks to the consuming public. Some risks, when balanced against the important functions that the product performs and the cost of providing for greater safety, are deemed "reasonable." This means that a reasonable person who had actual knowledge of the product's harmful character would conclude that it was proper to market the product in that condition.<sup>50</sup>

How does this differ from negligence? In products liability,

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48.1. See Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. Rev. 803, 843-44 (1976).

49. Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 21, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Markle v. Mulholland's, Inc., 265 Or. 259, 509 P.2d 529 (1973); Howes v. Deere & Co., 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

50. See Keeton, *Product Liability*, *supra* note 19; Keeton, *Manufacturer's Liability*, *supra* note 17; Atkins v. American Motors, Inc., 295 Ala. —, 335 So. 2d 134 (1976); Harding v. Kimwood Corp., — Or. —, 551 P.2d 107 (1976); Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1974).

unlike negligence, we do not concern ourselves with the conduct of the defendant which brought about the unreasonably dangerous condition. Thus, for example, if in the testing of a product the defendant manufacturer has acted reasonably and has performed adequate testing and after the product is in actual use in the marketplace it then turns out that the testing and design process failed to account for certain dangers and the design is deemed inadequate it will *not* be a defense that the defendant acted reasonably. If we can proclaim that the product is *in fact* not reasonably safe—in that a reasonable person who had that knowledge would have decided against marketing without the design alteration or additional warning—then the product is unreasonably dangerous.<sup>51</sup>

It must be understood that applying a strict liability rationale to a design defect case is a fairly radical idea. What, in fact, happens is that the defendant is held accountable for knowledge and technology that may not have been available at the time the product was manufactured. In certain areas of product liability law where the interests of society are particularly high in assuring product availability, the courts have refused to adopt strict liability. Thus, the vast majority of drug cases continue to follow the negligence theory.<sup>52</sup> The *Restatement*

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51. Authorities cited *supra* note 50.

52. The text lumps together for discussion what the cognescenti of product liability law know to be rather different kinds of problems. In the standard strict liability case, it is rare for the defendant to contend that it was beyond the capability of technology to discover the defect or to test against a certain aspect of faulty design. If the product is, in fact, defective the plaintiff can clearly recover. He is freed from having to prove negligence and can prevail on proof of defect alone. Yet, if strict liability means that negligence is not relevant, then the plaintiff should be able to prevail even when the defendant can establish that he was not negligent. See Keeton, *Products Liability*, *supra* note 19. As theoretically sound as this argument is, it has not carried the day in the drug cases. *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968); *Cochran v. Brooke*, 243 Or. 89, 409 P.2d 904 (1966). And though there are cases holding that the state of the art is not a defense, *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970), there are cases which hold that a court will not hold a manufacturer to a standard which was not part of the safety ethic at the time the product was manufactured. *Ward v. Hobart*, 450 F.2d 1176 (5th Cir. 1971). See Shapo, *supra* note 44, at 1356-61; Byrne, *Strict Liability and the Scientifically Unknowable Risk*, 57 MARQ. L. REV. 660 (1974). Thus, in essence, there is evidence that strict liability may be less a rule of liability than an aid to the plaintiff in proving his *prima facie* case. Where defendant is truly able to establish that he was not negligent, perhaps liability will not attach. For all the criticism that this author heaps on the Wisconsin court for its decision in *Powers v. Hunt-Wesson Foods, Inc.*, 64 Wis. 2d 532, 219 N.W.2d 393 (1974), it may be that its view (that strict liability shifts the burden of proof) remains essentially correct in those cases in which the defendant contends that

(*Second*) of Torts, section 402A, comment k eschewed the application of strict liability for new and experimental drugs. There is a lively debate still waging between the commentators and the courts as to whether design defect cases are really to be handled under strict liability guidelines.<sup>53</sup> My own observations are that even those courts that are willing to apply strict liability theory in design defect cases have yet to face the tough issue—what is to be done when the defendant claims and is able to establish that with the use of due care he was unable to discover the problem or, had he discovered it, would under the then available technology have been unable to solve it. The willingness of courts to apply strict liability when the facts of the case indicate that negligence could have been established demands a note of caution as to the scope and breadth of strict liability law.

Nonetheless, courts have held that the state of the art is not a defense to a strict liability case.<sup>54</sup> The Oregon Supreme Court has given clear expression to the strict liability doctrine in design defect cases. In *Roach v. Kononen* they said:

[I]t is generally recognized that the basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. *The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured product.* As Professor

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there was no means possible for defendant to prevent the defect had he acted reasonably under the circumstances. See text accompanying notes 62 to 84 *infra* for a full discussion of *Powers*.

53. See *Jackson v. Coast Paint and Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); *Thompson v. Package Mach. Co.*, 22 Cal. App. 3d 188, 99 Cal. Rptr. 281 (1972); *Roach v. Kononen*, 269 Or. 457 525 P.2d 125 (1974); W. PROSSER, *LAW OF TORTS* §94, at 644-48 (4th ed. 1971); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 Sw. U.L. REV. 109 (1976).

54. *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); *Sutkowski v. Universal Marion Corp.*, 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972); *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

Wade points out, a way of determining whether the condition of the article is of the requisite degree of dangerousness to be defective (unreasonably dangerous) . . . is to assume that the manufacturer knew of the product's propensity to injure as it did, and then to ask whether, with such knowledge, something should have been done about the danger before the product was sold.<sup>55</sup>

#### 4. The Tail Wags the Dog: Negligence Per Se—The Strange Wisconsin Doctrine

Among the states that have adopted strict liability Wisconsin stands in the minority in its peculiar reading of the strict liability doctrine. When Wisconsin first adopted strict liability in *Dippel v. Sciano*<sup>56</sup> the court sought to analogize the new doctrine to the already familiar doctrine of negligence per se. One can readily see the alluring nature of the analogy. Negligence per se permits a court to adopt a criminal statute or to effect a court made rule as to the minimum standard of care.<sup>57</sup> Once it is adopted by the court the question is no longer what the standard of conduct for the defendant shall be; it is not permissible for the defendant to claim that he had acted reasonably under the circumstances. If the defendant's conduct comes within the purview of the statute or the court adopted standard of conduct, he is negligent. The case will not be given to the jury except to decide whether or not the per se rule was violated. The standard of care remains inviolate and beyond question. Similarly, if the product is defective, the defendant, by selling the product, is deemed to be negligent per se and will not be heard to say that he acted reasonably.

The consequences for Wisconsin jurisprudence in adopting the negligence per se rule have been extreme. The analogy is not apt and was destined to play havoc with the reasonable development of product liability law. And although there has recently been some clarification, the court is apparently determined to define strict liability in negligence per se terminology.<sup>58</sup> When a court declares that a certain standard of conduct

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55. *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125 (1974) (emphasis added).

56. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

57. W. PROSSER, *LAW OF TORTS* § 36 (4th ed. 1971); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21 (1949) reprinted in C. MORRIS, *STUDIES IN THE LAW OF TORTS* (1952).

58. Thus, even in the more recent opinions when the court states that strict liability



is negligent *per se* it is not abolishing reasonableness as the governing standard of conduct. It merely declares that for reasons of policy the defendant is expected to *meet* either the statutory or court made standard—which is now deemed to be the minimum standard of conduct. If we wish to know how a reasonable person under the circumstances is to act, the *per se* rule tells us what is reasonable. This is not a play on words but rather a recognition that in the allocation of the proper function between judge and jury in a negligence case there remains a class of cases for which the court has the responsibility to set the minimum *standard of conduct*.<sup>59</sup> Thus when it becomes

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really means strict liability and not merely the shifting of the burden of proof on the negligence issue, the court remains committed to the negligence *per se* analogy. See *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1976); *Greiten v. La Dow*, 70 Wis. 2d 589, 235 N.W.2d 677 (1975). Several recent decisions have adopted strict liability using the negligence *per se* parlance. *Atkins v. American Motors Corp.*, 295 Ala. \_\_\_, 335 So. 2d 134 (1976); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). The negligence *per se* analogy was a matter of considerable importance to the Alabama court in adopting strict liability. It immediately was the cause of considerable confusion. The court has apparently contradicted itself as to whether this form of strict liability will subject a retailer to liability without fault. In the *Atkins* case the court says that liability will not attach. However, in a case decided the same day, *Casrell v. Altec Indus., Inc.*, 295 Ala. \_\_\_, 335 So. 2d 128 (1976), the court apparently extends strict liability to suppliers and sellers.

59. See authorities cited *supra* note 57. It is important to note that the Wisconsin court's position in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), and *Howes v. Hansen*, 56 Wis. 2d 247, 201 N.W.2d 825 (1972), that foreseeability plays no role in a negligence *per se* case does not mean that a *per se* case is not based on basic negligence principles. The confusion appears to stem from the now famous quotation of the court in *Osborne v. Montgomery*, 203 Wis. 223, 240 N.W. 372 (1931), in which the court said:

We come now to a consideration of that class of cases where foreseeability is not an element of negligence—a more accurate statement would be to that class of cases where the defendant is foreclosed or concluded upon the question of foreseeability. In all those cases where it is said that the performance of the wrongful act being admitted the defendant is guilty of negligence as a matter of law or that the act is negligent *per se*, the case is one which admits of no question as to reasonable anticipation or foreseeability. These cases are those in the main where the act amounts to a violation of a standard of care fixed by statute (ordinance) or previous decision. The employment of a minor child in violation of the statute is an instance of the first kind, and the failure to stop, look, and listen is the most common illustration of the second type. It is apparent that there must always be a causal relation between the act complained of and the injury sustained; otherwise liability does not follow.

*Id.* at 240, 234 N.W. at 378-79 (footnote omitted).

This statement does not mean that foreseeability is not relevant in a negligence *per se* case. It only means that foreseeability has already been accounted for in the establishment of the statutory standard and will not be re-examined in the individual case at bar. It is thus incumbent on the judge to direct a verdict on the standard of care issue

clear that it would be impossible for the defendant to have met the statutory standard there exists a defense of excused violation in a per se case.<sup>60</sup> More important, however, is the simple fact that a per se rule addresses itself to the question of how the defendant should act. He must be able to meet the standard by conforming his actions to the rule of law. Thus, it is not negligence per se for a retailer to sell a product with a microscopic metallurgical defect. To say that selling a defective product is negligence per se is nonsense when there is no way that the defendant will be able to meet the standard. Negligence per se is a sensible doctrine because it reflects a standard of care to which a defendant, if he gives heed, can conform his conduct. When the courts demand perfection from a defendant, strict liability is being imposed and any attempt to label it negligence per se is sophistry.<sup>61</sup>

Following *Dippel v. Sciano* there remained substantial doubt as to whether the negligence per se analogy in Wisconsin was merely an effort to cast new doctrine in more familiar language or whether the court truly meant that the governing rule in products liability was in reality negligence per se. Whatever doubt that remained seemed to be washed away in *Powers v. Hunt-Wesson Foods, Inc.*<sup>62</sup> *Powers* was a rather standard production defect case in which plaintiff was injured when a ketchup bottle broke while he was gently tapping the bottom of the bottle to loosen the tight cap. In this decision the late Chief Justice Hallows, writing for the majority, expanded on a theme which he had mentioned in his concurring opinion to

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since it has already been decided that a reasonable person should have foreseen the risk and acted to prevent its occurrence.

60. *Maloney v. Rath*, 69 Cal. 2d 442, 445 P.2d 513, 71 Cal. Rptr. 897 (1968); *Ainsworth v. Deutschman*, 251 Or. 596, 446 P.2d 187 (1968); RESTATEMENT (SECOND) OF TORTS § 288A (1965).

61. It appears that even Professor Wade has been lulled into this false analogy. See Wade, *Strict Tort Liability of Manufacturers*, *supra* note 18, at 14, wherein he draws the analogy to the adulterated food cases, such as *Doherty v. S.S. Kresge Co.*, 227 Wis. 661, 278 N.W. 437 (1938). Those cases are in truth not negligence per se cases since there is no way that defendant can defend on the basis of excused violation. Those cases are, in fact, the original strict liability cases. Indeed, Professor Wade acknowledges this in his casebook, W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIAL ON TORTS 246 n. 4 (6th ed. 1976). What leads Professor Wade to draw the negligence per se analogy in his much cited article remains a mystery to this author. The erroneous analogy was relied on in *Atkins v. American Motors Corp.*, 295 Ala. \_\_\_, 335 So. 2d 134 (1976).

62. 64 Wis. 2d 532, 219 N.W.2d 393 (1974).

63. 37 Wis. 2d 443, 463-64, 155 N.W.2d 55, 65-66 (1967).

*Dippel*.<sup>63</sup> Concerned that strict liability might be misconstrued as absolute liability he took pains to assure the bar that this was not so in Wisconsin.

Absolute liability is imposed for public policy reasons and admits of no exceptions or defenses. Strict liability in this state at least means negligence as a matter of law or negligence per se, and the effect of the adoption of the rule of strict liability based on this negligence in effect shifts the burden of proof from the plaintiff of proving specific acts of negligence to the defendant to prove he was not negligent in any respect. In this respect, the rule in Wisconsin impliedly qualifies the Restatement of *Torts* 2d in Sec. 402A, which states the rule of sub. (1) "applies although (a) the seller has exercised all possible care in the preparation and sale of his product." One must read this section as meaning the Restatement rule in sec. 402A(1) is the starting point and is prima facie liability based on negligence but does not foreclose the defendant from proving he was not negligent.<sup>64</sup>

The rather unequivocal statement has now been cast aside in *Greiten v. La Dow*<sup>65</sup> where the court in a meaningful footnote held that strict liability indeed means strict liability—not negligence. The court has reiterated this position in *Howes v. Deere & Co.*<sup>66</sup>

The reasons for moving to a clear straightforward adoption of strict liability are many. First, it will be recalled that one of the major reasons Wisconsin adopted strict liability in *Dippel* was to remove the nefarious discrimination against nonprivity plaintiffs.<sup>67</sup> Prior to the adoption of strict liability in tort a plaintiff had a cause of action for breach of the implied warranty of merchantability under the Uniform Commercial Code.<sup>68</sup> The warranty action was, however, conditioned on a plaintiff's fulfilling the Code requirements regarding privity, notice and disclaimers. The essence of the tort action was to strip the defendant of these defenses.<sup>69</sup> If, however, the essence

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64. 64 Wis. 2d at 536, 219 N.W.2d at 395.

65. 70 Wis. 2d 589, 235 N.W.2d 677 (1975). For those mystified by the fact that the concurring opinion is written by four members of the court and the majority by three members, the court clarified this matter in *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1976). In fact, the court tells us that the majority in *Greiten* is really the concurring opinion and the concurring opinion is really the majority. For those looking for case authority that four is more than three, *Howes v. Deere & Co.* clearly stands for that proposition.

66. 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

67. 37 Wis. 2d at 449-60, 155 N.W.2d at 57-63.

68. U.C.C. § 2-314.

69. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); RESTATE-

of the tort action is negligence with a mere shift in the burden of proof to the defendant, a cause of action which does not depend on fault can be based only on warranty and will only be available against a privity defendant.<sup>70</sup> For example, a re-

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MENT (SECOND) OF TORTS § 402A, comment m. (1965). Whether the role of the judiciary in accomplishing this sweeping change was proper remains a matter of substantial debate. See, e.g., Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974); 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); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966). See also the excellent concurring opinion by Judge Fuchsberg in *Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 404, 335 N.E. 2d 275, 280, 373 N.Y.S.2d 39, 45 (1975). It is quite clear that the disclaimer problem has not evaporated into thin air merely because comment m has suggested that disclaimers are invalid. See, e.g., *Velez v. Craine and Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 617, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973).

70. The danger that a court in limiting the scope of its strict liability doctrine may slip back into the privity problem is not peculiar to Wisconsin jurisprudence. In *Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), the New York Court of Appeals may have accomplished a similar result. The question in *Victorson* was whether a plaintiff bringing an action for strict products liability was to be bound by the contract or Uniform Commercial Code statute of limitations which begins to run from tender of delivery, U.C.C. § 2-725, or whether the tort statute of limitations which runs from time of injury was to govern. In the cases before the court the contract (implied warranty of merchantability) statute had already run and would have barred the cause of action. Overruling its previous decision in *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), the court found that the tort statute of limitations would govern. In the course of its decision the court emphasized that in the case at bar the plaintiff had no prior association with the manufacturer prior to being injured. The plaintiffs in the cases before the court were patrons at a commercial laundromat that got their hands caught in a centrifuge extractor when the lid on the extractors popped up prematurely while the extractors were still spinning. There is a very strong inference that had a privity relationship existed between the plaintiff and the defendant the court could have limited the plaintiff to the statute of limitations under the Uniform Commercial Code which would have run from tender of delivery. The concurring opinion by Judge Fuchsberg takes note of this possibility and argues that the majority opinion should not be so read.

It is strange that so long into the product liability era a court would revive the privity doctrine and provide a right to a nonprivity plaintiff that it would deny to a privity plaintiff. In one significant case, an intermediate appellate court has already had occasion to apply this doctrine. In *DeCosta, Jr. v. A. Reynolds Construction and Supply Corp.*, 49 App. Div.2d 476, 375 N.Y.S.2d 655 (1975), the court held that a plaintiff in privity with the defendant was not entitled to the tort statute of limitations which runs from the time of injury and was barred by the U.C.C. statute of limitations which ran from tender of delivery. The plaintiff had proceeded originally on a negligence and breach of warranty theory. Defendant has moved for summary judgment on the grounds that the actions were time-barred. The product in this case was an in-ground swimming pool which was installed in October 1969. The swimming pool collapsed and caused injury to plaintiff's property in March 1974. Plaintiff commenced his action in January 1975. No appeal was taken from the original dismissal; thus there was no review of what was almost certainly an erroneous holding with regard to the negligence claim. In June 1975 plaintiff commenced a cause of action based on

tailer who sells a coffee pot with faulty electrical wiring can only realistically be sued for breach of warranty. To bring an action under the Hallows version of strict liability would be doomed to failure. No retailer has a duty to inspect the internal wiring of a prepackaged item. This will only bring us back full circle to where we were prior to *Dippel* where the multiplicity of actions up through the distributive chain was the only method of bringing a no-fault products liability case against a manufacturer. Second, it is hard to believe that in the standard production defect case Wisconsin would be willing to put the plaintiff through the expense of litigating the merits of the defendant's quality control system. To be sure, plaintiff, under *Dippel* and *Powers* could make out a prima facie case if able to establish a defect, but then the defendant has the option of coming forward with rebuttal testimony. If plaintiff is to be assured of victory he will be forced to counter the defendant's case with respect to quality control, otherwise the defendant may well carry his burden of proof on the question of negligence. Both *Greiten*<sup>71</sup> and *Howes*<sup>72</sup> appreciate that it is too late in the development of product liability law to allow the very charade which the courts found so odious in the first instance.

It is apparent that the Wisconsin court does not seek to turn the clock back a dozen years. The court has in effect told us why it was that they adopted a strict liability theory modeled along the lines of negligence per se. There was a very strong feeling in the court that the adoption of strict liability might absolve the plaintiff of his responsibility for his own conduct. If contributory fault (be it contributory negligence or assump-

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strict liability. This time the action was barred on collateral estoppel grounds. Upholding the lower court's finding, the appellate division decided that, since plaintiff was in privity with the defendant-manufacturer, no cause of action existed in strict tort liability. The immediate purchaser who stands in privity is bound to the U.C.C. cause of action and has no separate tort action based on strict liability. The dissent argued that granting rights to a nonprivity plaintiff greater than to those which inure to a privity plaintiff was irrational.

The lesson is clear. In developing case law with regard to various aspects of product liability law, it is important to keep in mind that slight changes in liability rules may bring us full circle to where we were prior to the revolution. If indeed the Wisconsin court would have retained the view it had advocated in *Powers*, there is little question that the privity plaintiff would have been advantaged by having a strict liability action based on the implied warranty of merchantability and the nonprivity plaintiff would have been relegated to the negligence action.

71. 70 Wis. 2d 598, 235 N.W.2d 677 (1975).

72. 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

tion of the risk) is to be a factor in a strict liability action then the mechanism of the Wisconsin comparative negligence statute had to be the vehicle. The court simply could not conceive of adopting an all or nothing contributory negligence formula after decades of experience with comparative negligence. It then became concerned as to how the comparative negligence doctrine would work when the theory of the plaintiff's case was strict liability. The court said:

It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se.<sup>73</sup>

The court then went on to explain that it could accomplish a comparison of fault by structuring strict liability on a negligence per se principle.

The short response to the court's approach is that it is the clearest case of the tail wagging the dog that one can imagine. The metaphor seems particularly appropriate when one notes that the court's authority to accomplish this maneuver arose from the strict liability dog bite cases. In those cases the court stated that the contributory negligence of the plaintiff could be measured against the strict liability of the owner of a dog because strict liability was really not strict liability but merely negligence per se.<sup>74</sup> In a later section of this paper the appropriate role of the affirmative defenses of contributory negligence and assumption of the risk within the context of product liability law will be examined. It is this author's view that these defenses, be they in the form of an absolute bar or as a reduction of the plaintiff's verdict based on the percentage of his fault, have been given altogether too much play under the product liability theory. However, if there are appropriate circumstances where the plaintiff's verdict is to be reduced by the percentage of fault, why must that be accomplished under the doctrine of comparative *negligence*?

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73. *Dippel v. Sciano*, 37 Wis. 2d 443, 461, 155 N.W.2d 55, 64 (1967). This is confirmed by the court's recent statement in *Howes v. Deere & Co.*, 71 Wis. 2d 268, 273-74, 238 N.W.2d 76, 80 (1976).

74. *Wurtzler v. Miller*, 31 Wis. 2d 310, 143 N.W.2d 27 (1966); *Nelson v. Hansen*, 10 Wis. 2d 107, 102 N.W.2d 251 (1960).

In a products liability case in which plaintiff's fault is operative it is clear that there are two factors at work that cause the plaintiff's injury: (1) the defective product and (2) the plaintiff's conduct in using, misusing, or abusing the product. There appear to be two ways to reduce plaintiff's verdict based on the percentage of his fault.

The first is to frankly acknowledge that what is involved in comparative negligence is not so much a comparative process in evaluating fault but rather a decision based on equity and justice; that is, that a plaintiff ought not to recover the entirety of his damages when he himself has been at fault. What is done is rather to focus on the plaintiff's behavior and to ask by what percentage should the plaintiff's recovery be reduced. A cynic might suggest that, in fact, this is how comparative negligence operates in most instances. The jury views the totality of events leading up to an injury and decides that in assessing total blame for the injury it believes plaintiff has contributed a certain amount.

There is evidence that comparative negligence is less a strict comparison of fault than it is a kind of homespun judgment that plaintiff should have his verdict reduced by what the jury considers to be an amount reflecting his participation in the injury. The last several years have seen a great deal of controversy concerning whether a plaintiff should have his verdict reduced due to his failure to wear a seat belt.<sup>75</sup> Many courts have not credited the defense since the plaintiff was not the cause of the accident but only the cause of the aggravation of his own injuries. It is interesting to compare the approach that the Wisconsin and New York courts have taken to this rather complex question.

In *Spier v. Barker*<sup>76</sup> the New York Court of Appeals, prior to the time that the legislature adopted a comparative fault statute,<sup>77</sup> took the position that plaintiff should have his recov-

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75. Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172 (1970). See Note, 3 HOFSTRA L. REV. 883 (1975).

76. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). See also Note, 3 HOFSTRA L. REV. 883 (1975).

77. New York adopted the "pure" form of comparative negligence for causes of action accruing on or after September 1, 1975. N.Y. CIV. PRAC. LAW § 1413 (McKinney Supp. 1975). It is possible that New York might have opted for the comparative negligence approach to the seat belt question rather than the avoidable consequences approach if New York would have had a comparative negligence doctrine at the time the court was faced with *Spier v. Barker*. There is an intimation to that effect in the

ery reduced by the amount that the injury would have been reduced had the plaintiff been wearing a seat belt. For example, if defendant were traveling thirty miles per hour over the speed limit and he lost control of his car and collided with the plaintiff who, because he was not wearing his seat belt, was thrown from the car, the defendant would only be liable for the damages caused by the first collision. The defendant would not be liable for the add-on injuries which resulted because the plaintiff failed to wear his seat belt.<sup>78</sup>

The Wisconsin court faced the same question in *Bentzler v. Braun*<sup>79</sup> and took the position that the principle of comparative negligence was appropriate and a jury should award damages based on the overall assessment of fault. If we are to seek analytical purity it is clear that one of two different techniques must be utilized: (1) plaintiff should be 100 percent at fault for his add-on injuries and zero percent at fault for his first collision injuries<sup>80</sup> or (2) the second collision injuries are an amal-

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Appellate Division decision. *Spier v. Barker*, 42 App. Div. 428, 431, 348 N.Y.S.2d 581, 583 (1973).

78. The court in the *Spier* case made it clear that the burden of pleading and proving that nonuse of the seat belt by the plaintiff resulted in increasing the extent of his injuries rests on the defendant. *Spier v. Barker*, 35 N.Y.2d at 450, 453, 323 N.E.2d at 167, 169, 363 N.Y.S.2d at 920, 922. It may be that the court chose the analogy to avoidable consequences rather than contributory negligence so that it could shift the burden of proof to the defendant on the issue of injury aggravation. Under New York law at the time, plaintiff bore the burden of proving freedom from contributory negligence. See discussion on this point in Note, 3 HOFSTRA L. REV. 883, 895 (1975).

79. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

80. This would be the exact result reached by applying the avoidable consequences doctrine. This was, of course, the holding in *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974). The court in *Bentzler* opted instead for applying the comparative negligence doctrine. It did not require that the comparative negligence doctrine operate only on the add-on injuries. It will be recalled that the New York court in *Spier* thought that the second collision injuries were severable and could be determined by expert testimony. In cases where the injuries are clearly severable the Wisconsin court has indicated that alternative (2) mentioned in the text be adopted, i.e., that the comparison of negligence is to be performed on the second collision injuries. See *Johnson v. Heintz*, 61 Wis. 2d 585, 213 N.W.2d 85 (1973), and *Johnson v. Heintz*, 73 Wis. 2d 286, 243 N.W.2d 815 (1976). That the Wisconsin court saw fit to treat the first and second collision injuries as a unitary whole is a matter of some significance. The court had available to it the *Spier* alternative or the alternative (2) set forth in the text. By rejecting these alternatives and opting to treat the injuries as nonseverable, the court must have realized that it was opting for a common-sense apportionment of fault rather than a strict damage apportionment or a combination of fault-damage apportionment. It is this observation that led the author to the conclusion in the text that the court was not dealing with a clear comparison of negligence. The defendant's negligence in causing the collision and the plaintiff's negligence in aggravating his injuries by failing to "buckle-up" are not truly comparable.



gam of the defendant's fault in causing the collision and the plaintiff's fault in failing to wear his seat belt. To permit the comparative negligence question to operate on the entire injury event would simply seem incorrect. Nevertheless, the Wisconsin court did not see fit to bifurcate the first collision damages and the second collision damages which resulted from the failure to wear the seat belt and opted instead for a general homespun evaluation of fault for the entire injury. The point to be made here is not that the Wisconsin court erred in its analysis of the seat belt defense for it seems to me that in a common sense way the court dealt intelligently with what is a most complex problem. The court took the position that plaintiffs should bear responsibility for some safety and that it

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It is interesting to speculate as to the reason the Wisconsin court opted for the comparative fault approach to this problem. This author's guess is that the court felt that the complexity of the trial process where one would have to establish the exact amount of the injuries caused by the first and second collision led the court to fear an approach based on damage apportionment. To be sure, even under *Bentzler v. Braun*, there must be evidence that there was a causal relationship between the failure to wear the seat belt and the aggravated injuries, but this is far different from requiring an exact damage apportionment. The attempt to analogize these cases to the passive negligence situation where plaintiff's activities cause his injury but not the collision is not altogether successful. See, e.g., *Dutcher v. Phoenix Ins. Co.*, 37 Wis. 2d 591, 155 N.W.2d 609 (1968), and *Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140 (1963). In those cases the activity of the plaintiff must reduce the plaintiff's recovery vis-a-vis the entirety of his damages. There are no damages strictly attributable to the plaintiff's conduct alone. This is not the situation in the seat belt cases where the court had the option to apportion damages but instead chose to apportion fault.

It should be noted, however, that in *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431 (1975), the court adopted the rule that an automobile manufacturer is liable for the aggravation of injuries caused by the failure of the manufacturer to design the auto so that it will respond with reasonable safety to a collision. In the text of the opinion the court cites with approval *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), and specifically cites the following passage from *Larson*:

Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

*Id.* at 503, *quoted at* 66 Wis. 2d at 561, 225 N.W.2d at 437. The court thus seems to concur with *Larson* that second collision damages are severable. This raises the question as to why the court did not so hold in the seat belt case and adopt the view of *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 323 N.Y.S.2d 916 (1974). It may be that in the auto design-second collision cases there was no other analytical scheme to accomplish the apportionment of damages. Faced with a better alternative in the seat belt case (*i.e.* apportionment of fault), the court took what it considered to be the better solution to the problem. Consistency apparently gave way to pragmatism in this instance.

would leave to the good sense of the jury just how to evaluate plaintiff's share in the overall injury setting.<sup>81</sup> If one were to compare the negligence of the defendant and the negligence of the plaintiff, one would be doomed to failure since the negligence of the two parties took place at different times and played different roles in the accident. Instead the court opted not for a *comparison* of the negligence but rather for a reduction of plaintiff's verdict based on a visceral assessment of the role that plaintiff played in the injury.

A second method of looking at the comparative fault problem in strict products liability is to assess the percentage of fault of the defendant based on the seriousness of the product defect and the causal role the defect played in the injury. To be sure, this would be a partial admission that strict liability is based on fault principles and that it is assumed that the more serious the defect the more culpable is the defendant. Admittedly, under a pure strict liability theory there need be no necessary correlation between the seriousness of the defect and the conduct of the defendant. Innocent or slightly negligent conduct might lead to a very serious defect in a product. But we must remember we do not live in the best of all possible worlds. It is a compensation system that we are administering not a closed philosophical system. In this imperfect world it is not an outrageous inference that a bad defect most probably stems from serious fault—even if the fault need not nor cannot be established.

There remains one final question to confront. Given the

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81. The Wisconsin approach which utilizes the comparative fault methodology for reducing damages seems far superior to the approach of the New York court in *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 323 N.Y.S.2d 916 (1974), which is based on the doctrine of avoidable consequences. Consider the following hypothetical. Defendant speeding 30 m.p.h. over the limit crosses the median strip and collides with a plaintiff who has failed to fasten his seat belt. Plaintiff is thrown from the car and suffers serious injuries amounting to \$100,000. There is evidence presented that had the plaintiff been wearing his seat belt, his injuries would have been minor and his damages would only be \$10,000. Under the New York apportionment of damages—avoidable consequences theory—the plaintiff would only be entitled to recover \$10,000 from the defendant. The \$90,000 add-on injuries which were due to his failure to buckle-up would fall on the plaintiff. Under the Wisconsin comparative fault approach a jury would be entitled to reduce plaintiff's recovery by their assessment of the plaintiff's fault in the overall injury situation. The fairness of the Wisconsin result over that of New York in this instance seems obvious. This is, of course, the result of favoring a comparison of fault rather than an apportionment of damages based on causation.

tenor of the Wisconsin comparative negligence statute,<sup>82</sup> which specifically speaks of comparing the negligence of the plaintiff against that of the defendant, are the Wisconsin court and other courts that face similar statutory language free to carve out a doctrine of comparative fault along the lines suggested above? Although one can appreciate the reluctance of courts to so interpret their statutes, the problem hardly is worth the agonizing in which the courts have indulged.<sup>83</sup> On this point I am in complete agreement with Professor Victor Schwartz who is puzzled by the judicial timidity of courts that fear adopting comparative negligence in a strict liability situation.<sup>84</sup> Admittedly, some courts have shown reluctance to adopt comparative negligence without legislative direction.<sup>85</sup> Scholars have debated the wisdom of the reluctance of courts to overturn by common law rule the doctrine of contributory negligence—a common law rule itself.<sup>86</sup> A major stumbling block for many courts has been the broad choice of competing negligence doctrines from which to choose. When placed against the background of an ingrained rule of contributory negligence it is understandable that some courts have felt that a legislative solution was necessary. However, for a state with a long history of comparative negligence in which the various and sundry intricacies of the doctrine have been worked out to refuse to

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82. WIS. STAT. § 895.045 (1973) reads as follows:

**Contributory negligence.** Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

For a full compilation of the various forms of comparative negligence, see V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 43-81 (1974) [hereinafter cited as *COMPARATIVE NEGLIGENCE*]. Some statutes are free of the comparative "negligence" problem since they do not contain words limiting the principle to cases of negligence. *Id.* at 196.

83. Note 56 *supra* and accompanying text. See also *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1361 (Okla. 1974); *Wurtzler v. Miller*, 31 Wis. 2d 310, 143 N.W.2d 27 (1966); *Nelson v. Hansen*, 10 Wis. 2d 107, 102 N.W.2d 251 (1960).

84. See *COMPARATIVE NEGLIGENCE supra* note 82 at 196. This author's disagreement with Professor Schwartz is chronicled in the third section of this paper. See notes 109 to 123 *infra* and accompanying text.

85. *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); *Parsonson v. Construction Equip. Co.*, 386 Mich. 61, 191 N.W.2d 465 (1971).

86. *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968). See also *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

adopt comparative fault when faced with strict liability is almost ludicrous. The legislative will is clear. The implementation mechanism for the reduction of plaintiff's verdict is well established. If ever a court had the right to extend by analogy without waiting for further legislation on the subject, this would appear the appropriate occasion.

Wisconsin and other states seeking to work out strict liability theory need not recoil from the doctrine of strict liability nor need they impose the doctrine of contributory negligence as a complete bar. The doctrine of comparative fault, when viewed as a tool of justice, is readily available without either distorting the law of products liability or returning us to the neanderthal doctrine of contributory negligence as a complete bar.

##### 5. Negligence and the Unreasonably Dangerous Product— The Riddle of *Greiten v. La Dow*

Where a plaintiff proves negligence—in this case, the lack of ordinary care in the design of a product—there is no doubt that there may be recovery in the event the defective design results in an unreasonably dangerous product, *but there may be recovery for the negligent design of a product even though it is not unreasonably dangerous in the 402A sense.*<sup>87</sup>

The occasion for the utterance of this strange statement was *Greiten v. La Dow*, a design defect case. Plaintiff, an employee of a lithographing company, brought an action against the designer and installer of a retractable board holder. The board holder was located at the delivery end of a printing press; its function was to collect printed material as it came off the press. The board holder was supported by angle irons which extended and remained extended as long as electrical current flowed to the press. Should the power be turned off, or fail, the angle irons would retract—the plywood board and any paper on it would drop a minimal distance onto the wooden skid of the press. The plaintiff was injured when a crew working on the press was changing a loaded skid. A hand truck had been pushed under the skid and had become stuck there. When the plaintiff reached under the skid to shake the hand truck loose, a circuit breaker opened and cut off the electricity causing the

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87. 70 Wis. 2d 589, 603, 235 N.W.2d 677, 685 (1975) (emphasis added). As noted earlier, this statement is found in what the court later acknowledged is the majority opinion. See note 65 *supra*.

angle irons to retract and the plywood board with paper to fall on the plaintiff's head.

The defect alleged by the plaintiff was that the press should have been produced with a different design—one which would have permitted the angle irons to remain extended, even in the event of a power failure.<sup>88</sup>

The plaintiff proceeded in this case under a theory of negligence, rather than strict tort liability, claiming that the defendant was careless in the design and manufacture of the machine and that such negligence was the proximate cause of the accident and his injuries. The court decided that, as a matter of law, plaintiff did not establish that the design actually utilized was a result of the defendant's negligence. Although plaintiff had suggested alternative designs, his suggestions were so speculative and fraught with their own dangers that negligence could not be established in this case. If this alone had been its holding, *Greiten* would have soon passed into oblivion as merely a factual affirmance of a directed verdict based on evidence that was insufficient to make out a prima facie case. Instead, the court took the occasion to set forth an exposition on the concept of negligence. It questioned whether it was necessary to find that a product was defective and/or unreasonably dangerous when the plaintiff proceeded on a negligence theory.

The court in *Greiten* held that in a negligence case it was not necessary to establish that the product was defective or unreasonably dangerous. I admit to being mystified by this holding. It seems quite clear that unless the court is using strict liability language in a very special way, it is clearly wrong. There is some evidence, however, that the terminology problems are substantial. Unless it is clarified in the near future, serious confusion is likely to continue.

In explaining its position that a cause of action for negligence does not require plaintiff to establish an unreasonably dangerous defect, the court stated:

All that it is necessary to prove is that the product is designed with a lack of ordinary care and that lack of care resulted in injury. No test of negligence has been called to the attention of this writer that requires that the product be unreasonably dangerous in order to predicate liability.<sup>89</sup>

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88. 70 Wis. 2d at 594 n.1, 235 N.W.2d at 681 n.1.

89. *Id.* at 603, 235 N.W.2d at 685. See note 65 *supra*.

Remembering that we are herein concerned with a design defect case, this statement above quoted is simply incomprehensible. If we assume that the defendant failed to act reasonably in the design process, we are obliged to inquire as to what resulted from the negligent behavior of the defendant. The answer must be that there was some design aspect of the product that was inadequate. If the negligence had resulted in nothing at all, then we could indeed label the defendant's conduct sloppy or careless—but certainly not negligent. Negligence is, after all, the creation of unreasonable risks to the world at large. Thus, we must focus on the design parameters of the product that are inadequate. But, we return now to the basic question by what standards are we to judge the inadequacy of the design. As indicated earlier, this standard, in a design defect case, must be an external one since there is nothing inherently wrong with the product. The two standards suggested previously<sup>90</sup> in the two-tier test for product defect are: (1) the consumer expectation test, and if that test is met, then the more demanding (2) "unreasonable danger" test, based on risk-utility considerations. It simply will not do to state that the negligence which causes harm is grounds for liability in a products case. The crucial middle step cannot be eliminated in that negligence has to result in a finding that some aspect of the product is below acceptable quality, otherwise the negligence has simply washed out into nothingness.

I believe, however, that there is a clue in *Greiten v. La Dow*, that the Wisconsin court is not advocating such a farfetched view. In referring to its desire to abolish the term "unreasonably dangerous" from products actions based on negligence the court states:

The use of that and similar terms was laid to rest in *Smith v. Atco Co.* when we discarded the term, "inherently dangerous." We said therein:

"If a manufacturer or supplier is hereafter to be relieved from liability as a matter of law by the courts, such result should be reached on the basis there was no causal negligence established against the defendant *rather than that the product was not inherently dangerous.*"<sup>91</sup>

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90. See text accompanying notes 24 to 55.

91. 70 Wis. 2d at 604, 235 N.W.2d at 686 (emphasis added).

Focusing on this language, it is likely that the court is concerned with the connotation or the tenor of the term "unreasonably dangerous." The term sounds as if the requisite proof for a product defect is some form of "extraordinary" danger. This is a legitimate concern. A leading scholar has suggested that the selfsame concern motivated the California court in the *Cronin*<sup>92</sup> case to abandon the concept of unreasonable danger as an element of the jury instruction on the defect issue.<sup>93</sup> I rather disagree that this was the concern of the California court in *Cronin*.<sup>94</sup> But, it does appear that this is the concern of the Wisconsin court in *Greiten*. Some doubt is cast on this analysis, however, by the court's discussion in *Howes v. Deere & Co.*,<sup>95</sup> in which the court again attempted to draw the distinction between strict liability and negligence. This time the court saw fit to withdraw a statement it had made in *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.* The court in *Howes* proclaimed:

It may be that some of the difficulty in distinguishing between the elements encompassed in the common-law negligence rule and the negligence per se doctrine are attributable to the opinions of this court. The opinion in *Vincer v. Esther Wms. All-Alum. S. Pool Co.* (1975), 69 Wis. 2d 326, 230 N.W.2d 794, contains the following statement at page 330:

" . . . However, even under negligence law the plaintiff still must prove that the product causing the injury was *dangerous and defective*."

The statement is not relevant to the ultimate decision in the case and is herewith withdrawn.<sup>96</sup>

The court is apparently maintaining that it is not necessary to prove a defect in a negligence case. The question remains: if there is no defect, what was the result of the negligent act? Perhaps, here too, the court is concerned that the language "dangerous and defective" connotes a sense of special danger.

The short answer to all of the above is that neither in negligence nor in strict liability litigation need the plaintiff prove

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92. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

93. Wade, *On the Nature of Strict Tort Liability For Products*, 44 Miss. L.J. 825, 839 (1973).

94. See Donaher, *supra* note 23, at 1304.

95. 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

96. *Id.* at 274, 238 N.W.2d at 80 (emphasis added).

anything other than that the product is below the standard which society has a right to expect—reasonable safety. If the phraseology of a jury instruction is a problem, I suggest that the recent Pattern Jury Instruction adopted for use by trial judges in New York would resolve the problem. It provides that a product is defective

if it is not reasonably safe—that is if the product is so likely to be harmful to persons or property that a reasonably prudent person who had actual knowledge of its harmful character would conclude that it should not have been marketed in that condition.<sup>97</sup>

The instruction then emphasizes the strict liability aspect by referring directly to the elimination of “scienter” as an element of a strict liability case:

It is not necessary to find that the seller had or should have had knowledge of the harmful character of the product in order to determine that it is not reasonably safe. It is sufficient that a reasonably prudent person who did in fact know of its harmful character would have concluded that the product should not have been marketed in that condition.<sup>98</sup>

It thus becomes clear that the only distinction between negligence and strict liability is the scienter element of the case. Both negligence and strict liability require a defective or “not reasonably safe” product. In negligence, one must prove that the defendant’s conduct which brought about the defect was below the standard of the “reasonable person.” In strict liability, one may judge the defectiveness out of the fact that the product is not reasonably safe, without accounting for the conduct of the defendant.

## II. ALLOCATION OF PROOF PROBLEMS—THE MIDDLE-AGED PRODUCT

In the course of its experience with products liability cases, the Wisconsin Supreme Court has explored some of the difficult problems which arise when plaintiff seeks to establish that the defect which caused his injury was present in the product when it left the hands of the manufacturer. In *Jagmin v. Simonds Abrasive Co.*,<sup>99</sup> the court, in a sensitive and highly

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97. NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL No. 2:141 (Supp. 1976).

98. *Id.*

99. 61 Wis. 2d 60, 211 N.W.2d 810 (1973).



perceptive opinion, sought to establish guidelines for the resolution of the "middle-aged" product problem.

In every products liability case, the plaintiff must establish not only a defect, but that the product was in a defective condition when it left the possession or control of the seller.<sup>100</sup> This is not a problem in many instances. When the plaintiff is able to establish the exact nature of the specific defect through expert testimony or where the circumstantial evidence is such that an expert can conclude that a defect existed at the time of manufacture, this element of the case can be made out. In a large number of cases, however, this mode of proof is not possible. There are several reasons for this. First, products liability cases are frequently violent events. The evidence oftentimes "self-destructs," and we are left with little more than the "say-so" of the plaintiff as to how the accident occurred. Second, and more important, prior to the accident the product may have been through substantial use. Thus, even if at the time of injury there was in fact a defect in the product, it may become very difficult to establish that the defect existed at the time of manufacture. In these instances, plaintiff must resort to some form of *res ipsa loquitur*.<sup>101</sup> In a strict liability case, the inference that one must make is that, more probably than not, the accident would not have occurred in the absence of a *defect* and that the defect existed when the product left the hands of the manufacturer.<sup>102</sup> For this inference to be a rational one the courts have demanded that the plaintiff establish the "chain of control" with regard to the product so that the plaintiff can negate other probable causes which could have introduced the defect in the product or which were themselves the cause of the accident.<sup>103</sup>

In *Jagmin*, the court was faced with just such a problem. Plaintiff was injured when a grinding wheel attached to a portable cup grinder which he was operating broke and struck him in the face. The grinding wheel, when new, was two inches in thickness and could be used until it was ground down to one-half inch in thickness. Plaintiff testified that he had put a new

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100. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

101. See the excellent discussion on this point in *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 211 N.W.2d 810 (1973).

102. *Id.*

103. *Id.*

wheel on the night before the accident and had used it not more than three-quarters of an hour before quitting. He then used the new wheel for about half an hour the morning of the accident. He testified that the wheel was about one and one-half inches thick and had at least four or five hours of grinding on it. On these facts alone the *res ipsa* type inference would have been fully warranted. There was, however, a real question as to whether the grinding wheel in question had been used by someone on the night shift who might have misused it and thus have introduced a defect into the product.<sup>104</sup> This was further complicated by the inability of establishing whether the wheel which was involved in the accident was the one which the experts examined or whether another wheel had been substituted instead.

The Wisconsin court resolved the problem by concluding that there was sufficient evidence in this case to go to the jury. It found that there was a legitimate fact question presented as to whether the wheel had been used by the night shift and that question was appropriately for the jury. It is hard to disagree with the court, in that the court dealt carefully and sensitively with fact issues which it believed should not have been resolved by directed verdict. However, it is time that this problem be placed in a far broader perspective.

In cases where defect cannot be definitively established by expert testimony, the proof problems appear in what, for want of better terminology, shall be referred to as the young, the middle-aged and the old product. The cases at either extreme can be disposed of easily. The "young" product is best represented by the brand new car in use for only several hundred miles. After plaintiff loses control of the car for unexplained reasons, the question will arise as to whether the car was defective. Since the car is so new, plaintiff is able to account for almost every movement of the car. If plaintiff is able to negate the possibility of his own negligent conduct as a cause of the accident, the inference of defect is compelling. This was the scenario in some of the most celebrated products cases in the literature. *Henningsfield v. Bloomfield Motors*<sup>105</sup> and *Codling v. Paglia*<sup>106</sup> both involved new cars in which the steering mecha-

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104. *Id.* at 75-77, 211 N.W.2d at 818-19.

105. 32 N.J. 358, 161 A.2d 69 (1960).

106. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

nisms unexplainedly failed. Although the plaintiffs were not able to establish the defect with specificity, the inference of defect was so compelling that negating misuse was simply not a major problem. At the other end of the spectrum, it is clear that when a product has been in use for a very long period of time, unless the plaintiff is able to isolate the defect and convincingly prove that the defect was in the product when it left the hands of the manufacturer, he is destined to lose his case. No court is prepared to hypothesize as to the multitudinous causes which might have impaired the quality of an automobile that was driven some fifty thousand miles.

The problem arises, as the Wisconsin court correctly perceived, in the middle range or what I call the "middle-aged" product. The question is not only how long is a product supposed to last, but also how much abuse is a product expected to take; and finally, how much abuse did this particular product take in fact. The tendency of courts has been to treat this problem as an evidentiary one. Verdicts are either affirmed or reversed on the basis of whether plaintiff has done enough to negate the possible other causes of the defect. It becomes necessary then, for the plaintiff to go through his period of product ownership and convince a court that nothing untoward or irresponsible was done to the product. We give witness daily, in the exploding bottle cases, to the charade of parties solemnly testifying that they did nothing to the bottle which could have brought about the explosion. The evidence in this whole class of cases takes on an "Alice in Wonderland" kind of quality with people testifying as to their lifelong experience with the product and trying to account for that which no human memory can account. Or, we place the fortunes of a case in the hands of third parties such as auto mechanics who have had the opportunity to affect the defect. The question then becomes one of credibility, and as the number of intervening causes mount the less credible the plaintiff's case becomes. The sheer waste of judicial effort in trying to discover the undiscoverable through the presentation of evidence is staggering.

The first step in resolving this problem is to recognize that we have been permitting marketing problems to masquerade as basic liability questions. It is strange that the question of how long is a product supposed to last is viewed to be within the

purview of the jury in the standard product liability case.<sup>107</sup> If a car, for example, becomes a dangerous instrumentality after six years, and a hair dryer subject to serious failure after three years, those facts are well within the possession of manufacturers. Repair data and product life information are calculated by major industry and figure into the determination of output. To be sure, this data is not able to pinpoint product failure with exactitude.<sup>108</sup> But product deterioration information is available in the sense that there is knowledge of when the troublesome period tends to set in. Yet, for some reason this information is kept a deep dark secret from the consuming public. It is only when plaintiffs bring a product claim that product life becomes a focal question. It does seem ludicrous to send the issue of how long should a product last to a jury when industry knows the answer to that question—and could affect consumer behavior by sharing it with the public.

The realization that product life is determinable by the manufacturer not only affects the question of how long a product should last, but could also help in resolving the question of intervening causes which could have contributed to the defect. To be sure, that problem cannot be totally eliminated, but if realistic guides as to product life became part of the marketing scheme, there would be a ready method for resolving the alternate cause question. Since products are meant to last for a certain period of time and take normal abuse within that period, a *prima facie* case of product failure should be made out when the product fails within that period of time. The burden should then shift to the defendant to establish that the defect came into being through some cause that was abnormal in character and not a consequence of normal consumer use. This would free us from the process of speculating over the lists of horrors that could, or might have happened within the normal life span of the product.

### III. PLAINTIFF'S RESPONSE TO THE PRODUCT—THE NEED FOR A JUDICIOUS USE OF COMPARATIVE NEGLIGENCE

In an earlier section our discussion focused on whether the

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107. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E. 2d 401 (1969).

108. Admittedly this information is not equally available for all products. In many instances the variables with regard to the extent of use may make a marketing approach to this problem difficult.

comparative negligence doctrine could be woven into the fabric of strict liability law.<sup>109</sup> Although we concluded that there were no theoretical difficulties in applying the doctrine to a strict liability case, we left open the question as to whether it is appropriate to apply the comparative negligence doctrine in every case where plaintiff's fault has contributed to the injury in a strict liability situation. The *Restatement (Second) of Torts*, section 402A, comment n provides:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Although this comment has been endorsed by a large number of courts,<sup>110</sup> there is substantial question whether the substance of the comment will withstand the onslaught of the comparative negligence doctrine. Professor Schwartz has argued that the *Restatement* position was justified only so long as contributory negligence or assumption of the risk were a complete bar to plaintiff's recovery.<sup>111</sup> However, now that courts have available to them the doctrine of comparative negligence in which both contributory negligence and assumption of the risk go only to reduce the plaintiff's recovery, it is unfair to saddle the

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109. See text accompanying footnotes 73 to 86 *supra*.

110. See, e.g., *Bachner v. Pearson*, 479 P.2d 319 (Alaska 1970); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 251 A.2d 278 (1969); *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966). See also Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); Twerski, *Old Wine in a New Flask*, *supra* note 31.

Note that the Wisconsin court did not adopt the *Restatement* comments in *Dippel v. Sciano*, 37 Wis. 2d 443, 459, 155 N.W.2d 55, 63 (1967).

111. Schwartz, *supra* note 82 at 203-07. Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 177 (1974).

defendant manufacturer with the entire loss. It is only fair to make the plaintiff bear that portion of the loss which represents his contribution to the injury event.

The argument is not unpersuasive. It is clearly the operating principle in Wisconsin,<sup>112</sup> and several other jurisdictions.<sup>113</sup> In my opinion, the principle presumes far too much and requires sharp delimitation before it can be utilized as an operating principle in product liability law. The following hypotheticals will provide a medium for further discussion: (1) Plaintiff was driving on the highway in his 1976 XYZ model car. He was speeding at twenty miles per hour over the limit. He lost control of the auto and collided with the median strip retainer. Due to a defectively designed door latch plaintiff was thrown from the car and suffered serious injuries. His injuries would have been minor had the door latch held.<sup>114</sup> (2) Plaintiff was injured when a poorly beaded tire on his car blew out. At the time of the accident plaintiff was speeding twenty miles per hour over the limit. The evidence is such that had plaintiff been driving at the appropriate speed limit he would have been able to bring his car under control and could have avoided impact with another car. (3) Plaintiff was an experienced factory worker who at the time of the accident was helping operate a machine designed to break glass and stack glass strips. He was working on the west side of the machine while his supervisor operated the controls on the east side of the machine. As

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112. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

113. *Edwards v. Sears & Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1975); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972). See also *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) and *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976), in which it is clear that the New York court is willing to entertain contributory negligence as a defense to a strict liability action. The *Micallef* case is particularly revealing since the court overruled the patent danger rule, yet continued to permit contributory negligence to operate as a defense. It is unlikely that the New York court would have taken this step if contributory negligence would be a total bar since there would be few cases where the affirmative defense would not bar the plaintiff. It is likely that the court, fully cognizant that the state finally had a comparative fault statute, *supra* note 77, felt that plaintiffs would now truly benefit from the abolition of the patent danger rule. There is no question that the legislative intent in New York was to have the comparative negligence statute apply in strict liability actions. 1975 N.Y. (McKINNEY'S) LEG. REP. 1485-86. The court could have by judicial interpretation limited the statute to cases which meet the standards set forth in RESTATEMENT (SECOND) OF TORTS § 402A, comment n. It chose not to do so in *Micallef*.

114. This hypothetical is a spin-off from *Marshall v. Ford Motor Co.*, 446 F.2d 712 (10th Cir. 1971).

he continued to operate the machine plaintiff noticed that glass appeared to be jamming the machine, and he became concerned that the machine was being damaged. To thwart this possibility plaintiff attempted to remove a piece of glass with his hand, but his glove caught in the machinery and he was injured. There was evidence presented in the case that the glass cutting machine was defective in that it did not contain adequate safety features such as off-on switches on both sides of the machine, or a barrier or guard to keep individuals from putting their extremities into the machine.<sup>115</sup>

In attempting to delineate the appropriate role for the affirmative defenses which arise from plaintiff's interaction with the product, it is first necessary to focus on the defendant's duty in manufacturing a reasonably safe product. The duty of producing a nondefective product under strict liability has been placed on the manufacturer. The harm that has befallen the plaintiff is directly within the risk of the defect against which the manufacturer has a duty to guard. Thus, in the above hypotheticals the defendant has a clear duty to manufacture a car with a latch that will withstand collision, a tire which will not blow out at 65 miles per hour and a glass cutting machine that will protect users from getting their hands caught at the point of operation. By recognizing the contributory negligence defense in any form (either as a complete bar or as comparative negligence), we are reducing the defendant's liability exposure to users who are clearly within the orbit of defendant's responsibility.

The question then arises: is this not common to contributory negligence whenever it is utilized as a defense to a tort action? Negligent defendants, after all, do have a duty to protect even contributorily negligent plaintiffs. If plaintiffs are barred from recovering or have their recoveries reduced, it is because the law censures their activity, not because it condones the conduct of the defendant. There is, however, an important distinction between the product liability picture and general negligence litigation. Consider for a moment a standard automobile accident in which the defendant is involved in negligent activity (*i.e.*, speeding) and plaintiff is involved in contributo-

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115. This case is similar to *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968). It is fully discussed in Twerski, *Old Wine in a New Flask*, *supra* note 31 at 32 (1974).

rily negligent activity (e.g., negligent lookout). An accident takes place and both participants are the proximate cause of the harm. Although each could reasonably foresee the possibility of the other's act, *the defendant did not provide the matrix for the plaintiff's action*. In products liability cases the opposite is true. How a consumer will interact with a product is a function of both design and marketing. If plaintiff is involved in negligent activity while either using or misusing the product, it may be that we ought to demand that the product be designed and marketed so that the particular offensive use will either be precluded or mitigated by some design parameter of the product. If this is the desideratum of the law, then it becomes very questionable whether plaintiffs should have their verdicts reduced *when the very aspect which made the product dangerous and defective in the first instance has resulted in the very harm which one could expect from the defective design*.

It is evident that in certain instances courts will be unwilling to consider the contributory negligence defense whether it be clothed as a complete bar or as comparative negligence. Hypothetical (1) places the question in very sharp focus. In that case a speeding plaintiff was thrown from a car which was designed with a defective door latch when the car collided with a median strip retainer. Query, should a court consider the fact that plaintiff was contributorily negligent in bringing about the collision through his speeding? There is, to this author's knowledge, no clear judicial authority on the matter. No one seems to have directly considered the matter.<sup>116</sup> It is quite clear that

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116. In *Horn v. General Motors Corp.*, 17 Cal. 3rd 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976), the problem discussed in the text surfaced in an indirect fashion. Plaintiff while driving her car was forced to swerve to avoid a car which had suddenly swung into her lane of traffic. As she steered to the right, plaintiff brought her left hand across the horn cap in the center of the steering wheel. The horn cap was defectively designed in that it was too easily removable. Below the horn cap were three sharp prongs that held the horn cap in place. Plaintiff's chin collided with the sharp prongs and she suffered serious injury. Plaintiff sought to hold General Motors liable for the aggravation of her injuries which were due to the defective design of the horn cap and the sharp prongs which would, upon collision, cause serious injuries to the driver. In affirming a jury verdict for the plaintiff, the court was faced with the contention that plaintiff failed to wear her seat belt, and that had she been wearing her seat belt, her injuries would have been much reduced. The court, citing its previous decision in *Luque v. McLean*, 8 Cal. 3rd 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), held that the only defense to a strict liability action was voluntary and unreasonable assumption of a known risk. The court found that there was no evidence that plaintiff was aware that the car had an easily removable horn cap which masked sharp prongs. Thus, the defense was not allowed.



in those jurisdictions where contributory negligence is a complete bar no court would dare to suggest that the plaintiff's conduct in bringing about the accident should bar him from recovering for second collision damages. The entire theory of second collision recovery is based on the premise that accidents are foreseeable and that manufacturers should design their cars to take this into account. One might, however, consider the possibility of using the comparative negligence doctrine to reduce plaintiff's recovery for second collision damages since both plaintiff and defendant are responsible for bringing them about. This would not be unlike the seat belt cases where the Wisconsin court has permitted the reduction of plaintiff's recovery based on plaintiff's failure to wear the seat belt.<sup>117</sup> The use of the comparative negligence doctrine would go toward reducing the plaintiff's recovery for his *entire* injury rather than bifurcating the first and second collision injuries.

Having set forth the theoretical possibility, I suggest that it should be categorically rejected. In a second collision case where plaintiff seeks to recover for injuries which were aggravated by the defendant's failure to properly design the vehicle

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The dissent by Justice Clark raises the issue of comparative negligence. He argues that California's judicial adoption of comparative negligence in *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), should govern in this instance. He contends that the equitable principles of comparative negligence should operate in a strict liability situation as well. As set forth in the text accompanying notes 74-86 *supra* the author is in substantial agreement with the dissenting position as to the applicability of the comparative fault doctrine in a strict liability case.

What is troubling in this instance is the uncritical readiness to apply comparative negligence to the fact situation before the court. If second collision liability is to be imposed on General Motors, it is because there is a need to protect plaintiffs be they negligent or contributorily negligent from needless injury when cars collide. The fault of General Motors is in not designing its car so that when a driver is involved in a collision his injuries will not be aggravated. The foreseeability and liability of General Motors should, thus, logically attach even to a nonbelted plaintiff.

Perhaps an argument can, however, be made that in this particular case, plaintiff's verdict ought to be reduced by a percentage of her fault. A court might take the position that, in the hypothetical dealt with in the text where the plaintiff's negligence is in the driving of the car, the car manufacturer's liability goes to protect the negligent and non-negligent alike. In the *Horn* case the negligence of the plaintiff was in a sense identical with that of the defendant. If the defendant failed to take precautions to protect the plaintiff in the event of collision (from second collision injuries), it must be admitted that the plaintiff failed to take precautions to prevent second collision injuries as well. These issues are difficult and will require careful attention by the courts. The position of the majority declining to consider comparative negligence in a strict liability situation and that of the dissent in uncritically accepting the doctrine both seem wrong.

117. *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

it should be unthinkable to reduce plaintiff's recovery by the percentage of his fault for the original collision. If the judgment is made that the design of the vehicle was in fact unreasonable, it is because the defendant has a duty to design against the possible effects of collisions. This takes into account the possibility of collisions which are brought about through the plaintiff's fault and those in which he has been faultless. It is simply not reasonable to conclude that defendant's design modifications to make the auto crashworthy are for the benefit of only faultless plaintiffs. We know otherwise. To either exculpate the defendant or to permit the reduction of total damages based on the fact that plaintiff had also been at fault is to demean the very process in which we determined that defendant's design was substandard.

Hypothetical (2) should, in my opinion, be analyzed in a similar vein. Admittedly, in this case plaintiff's speeding has contributed to the harm. Had plaintiff been traveling at the appropriate speed limit, he would have been able to bring his car under control. The car did, however, go out of control due to a defect in the tire. If, for example, plaintiff was traveling 65 miles per hour in a 45 mile per hour zone, should his recovery be reduced in an action brought *against the tire manufacturer*? The defendant had a clear duty to make a tire that was beaded properly and that could operate under normal driving conditions. While plaintiff's conduct is negligent vis-a-vis the world at large, it is not negligent to the defendant tire manufacturer. If plaintiff contributed to his own injury, the beneficiary ought not to be the tire manufacturer. Indeed, if one is speeding at twenty miles per hour over the limit, he is truly in need of a good tire with proper beading. If this was guaranteed to him by the law of products liability, he should not be deprived of the guarantee merely because he has decided to test the warranty.<sup>118</sup> Yet, an across the board application of the comparative negligence doctrine may reduce the plaintiff's recovery substantially.

One might argue that in the above circumstances the plaintiff was involved in foreseeable misuses of the product in conduct which is not product directed, *i.e.*, the contributory negli-

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118. *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971). See also 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16.01[3] (1976).

gence is of a general nature in which the product only played a secondary role, and thus the plaintiff should not be affected by comparative negligence. However, there are instances when the plaintiff's conduct is directed toward a deficiency in the product where it also seems that it is inappropriate to reduce plaintiff's verdict by the percentage of his fault. Hypothetical (3) where plaintiff has his hand cut off by the unguarded cutting edge of a glass cutting machine exemplifies the problem. Here it is clear that plaintiff is in a sense pitting his wits against the machine. He hopes to release the jamming of the machine and to prevent further damage to the machinery. The real question is: should a guard at the point of operation have been introduced to reduce the chance that a dedicated employee afraid that an expensive piece of equipment will be damaged will be protected against risk of injury to himself? If the answer to that question is in the affirmative, it is difficult to justify reducing plaintiff's verdict when he is injured by absence of the very mechanism which should have protected him in the first place.

The problem with comparative negligence is that it is the great compromiser. It permits a court the luxury of evading fundamental policy questions, and once it is introduced it has a life of its own which blinds courts to the policy questions which they might otherwise be required to face. There is already evidence that this has happened in Wisconsin. In *Schuh v. Fox River Tractor Co.*,<sup>119</sup> the court faced the problem of whether the contributory negligence of the plaintiff was equal to or greater than that of the defendant. The defect alleged in this case was that a corn blower had a lever which was positioned so that it could mislead a user to believe that he was shutting off power to the entire machine. The plaintiff testified that he believed that when he pulled the clutch lever of the tractor it turned off the entire crop blower, both the auger and the fan. In reality the pulling of the clutch lever did not shut off the power take-off from the tractor to the crop blower. Thus, while the auger of the crop blower stopped, the fan continued to operate. Plaintiff, believing that the power was off, stood on the edge of the hopper of the crop blower in order to place a chain that had come loose onto the sprocket of the conveyer.

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119. 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

He slipped from his position and his left leg became entangled in the fan and was ultimately amputated.

The jury came in with a verdict finding the plaintiff forty percent negligent and the defendant sixty percent at fault. The court on appeal found the jury was entitled to credit the plaintiff's story that he believed that, due to the deceptive location of the clutch lever, he was in fact turning off the power to the entire blower machine. And then in a strange turnabout the court found that, because of his previous experience with the machine both on the day of the accident and a year prior thereto, *plaintiff should have known* that the fan continued to operate. As a matter of law the plaintiff's negligence was equal to or greater than that of the defendant.

The result is extraordinary to say the least. If the product defect was that it could mislead employees who because of their lack of experience, lack of intelligence, or simple forgetfulness would believe that the clutch lever cut off power to the entire blower, then that defect was operative in this very case. If we believe plaintiff, as the court says we have a right to do, then he was the very kind of person for whom a nondeceptive lever was necessary. To then turn around and to hold that as a matter of law his negligence exceeds that of the defendant is not understandable. It is to march up the hill in order to march right down.

This does not mean that there may not be appropriate circumstances where the plaintiff's fault ought to reduce the recovery based on the percentage of his fault.<sup>120</sup> Where plaintiff

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120. The recent decision of the Pennsylvania Supreme Court in *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975) illustrates the kinds of policy decisions that courts must face before deciding whether to allow comparative negligence as a defense. The case did not deal with the comparative negligence question but the facts present the problem in a sharp fashion. The plaintiff was killed when a helicopter he was flying failed to go into autorotation causing the aircraft to crash. Plaintiff took off that day with a close-to-empty gasoline tank. When the helicopter apparently went out of fuel, he attempted to put it into autorotation; however, the pitch stick was designed such that autorotation had to be accomplished within one second. The design defect alleged in this case was that one second was too short a period for a pilot to put this life-saving mechanism into operation. There were two kinds of plaintiff fault alleged in this case (both under the guise of "abnormal use"): (1) plaintiff failed to engage the autorotation mechanism quickly enough (within one second) and (2) plaintiff took off in the helicopter with a close-to-empty gasoline tank.

The court held that the two kinds of plaintiff behavior described above should not bar the plaintiff. The plaintiff's failure to engage the pitch stick quickly enough could not be grounds for barring the plaintiff. As the court pointed out, the plaintiff's entire

voluntarily and unreasonably encounters a known risk, it may be that his recovery should be reduced. I have discussed this problem at length in another forum.<sup>121</sup> We must, however, be extremely careful that contributory fault does not negate or lessen the plaintiff's recovery when the very harm which should have been protected against materializes. It could be argued that since the defect must be the proximate cause of the harm, every form of plaintiff's conduct which is covered within the ambit of proximate cause would under the above argument be precluded from comparative negligence. The above argument stops far short of reaching that conclusion. It is, however, my contention that before a court decides to recognize the doctrine of comparative fault in a products case it give careful consideration to whether it is negating the very reason for deciding that defendant's product is defective. The words of the New Jersey Supreme Court in *Bexiga v. Havir Manufacturing Corp.*<sup>122</sup> on this question are most persuasive:

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case rested on the issue of the time necessary for autorotation. As to the plaintiff's taking off with an empty gas tank, the court said, "The autorotation system is a safety device existing for the sole purpose of preventing a crash in the event of engine failure for any reason. The reason the engine failed is irrelevant." *Id.* at 98, 337 A.2d at 901.

Although my argument in the text would tend to support the court's reasoning, it should be clear that two very different kinds of policy decisions were made by the court. As to the first form of plaintiff's negligent conduct in failing to quickly engage the autorotation system, even if we can agree that a reasonable plaintiff would have acted more quickly, one can easily sympathize with the court's opinion that the defendant's negligence went to the heart of the plaintiff's contention of defect in this case. If there should be a pitch stick which engages the autorotation system that takes two seconds, then plaintiff should not have his recovery affected by the fact that he may have been negligent as well. The defendant's design was defective because it failed to account for that very eventuality. I would thus take the position that plaintiff's recovery should not be affected by comparative negligence.

The second form of plaintiff's negligence (taking off with an empty gas tank) is a much closer question. My own personal opinion is that the court is quite correct insofar as the defendant should have designed the autorotation system so that it would work properly in case of engine failure—any kind of failure. Yet, I would not consider outrageous a holding by a court that this was a proper case for the imposition of comparative fault. There is something relatively foolhardy about taking off in a helicopter with an empty gasoline tank that commends the case for a consideration of plaintiff's fault.

The point to be made is that serious policy decisions will have to be made before engaging the comparative fault mechanism. It will have to reflect the judgment of the court as to the proper allocation of burdens given the nature of the product, the kinds of plaintiffs that tend to use the product, etc. The over-simplistic categories created for the discussion of plaintiff's fault simply will not do.

121. Twerski, *Old Wine In A New Flask*, *supra* note 31.

122. 60 N.J. 402, 290 A.2d 281 (1972).

The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.<sup>123</sup>

### CONCLUSION

Fifteen years into the modern era of products liability law there is as yet no clear recognition that the litigation problems created by this new class of cases require a new set of perspectives. We have instead borrowed from our past experience with negligence with little appreciation that the problems we now face, whether they be in establishing the definition of defect, allocating burdens of proof or evaluating the affirmative defenses, require direct confrontation of the sensitive problem of the interaction of user and product. This interaction must now come to the surface in the development of legal doctrine. The issue is not how the problems will be resolved when and if they are confronted. Reasonable men can differ as to the right and wrong of the matter. Failure to confront the problems can lead to nothing else but a highly confusing and inconsistent body of law.

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123. *Id.* at \_\_\_\_, 290 A.2d at 286.

