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The Third Restatement, and the
Reinstatement of Liability Without Fault

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**The Biter Bit: Unknowable Dangers, The Third Restatement, and
the Reinstatement of Liability Without Fault¹**

by Ellen Wertheimer²

Introduction

Strict products liability developed out of a perceived need to protect consumers from the costs engendered by defective products. The basic idea was that manufacturers should be liable for the injuries caused by their defective products even—maybe especially—in the absence of manufacturer negligence. Indeed, if it were sufficient for liability to result only for negligent design, failure to warn, or mismanufacture, there would have been no need for a new theory of liability, because negligence-based liability would have provided adequate consumer protection. It was widely recognized, however, that negligence based liability was not enough, and that manufacturers should be responsible for injuries caused by the products they designed, labeled, marketed, and sold, even if their conduct had been reasonable. The costs of such injuries had to fall somewhere, and, as between an innocent plaintiff and an innocent manufacturer, the courts chose that the costs fall on the manufacturer. In order to accomplish this, the courts needed a new

¹“The Biter Bit” is the name of an ironic short story by Wilkie Collins. In this story, a young police officer (the Biter of the title), is himself bitten by his wish to show up the old guard police force. The analogy here, of course, is that those who would have eradicated strict products liability in the Third Restatement may well have caused its rejuvenation, as this article discusses. “The Biter Bit” appears in WILKIE COLLINS, *TALES OF TERROR AND THE SUPERNATURAL*, Dover Publications, Inc. (1972), at pages 268-294.

²Professor of Law, Villanova University School of Law. I want to thank Christine Andreoli and Joseph Larkin, my research assistants, and Nazareth Pantoloni, librarian extraordinaire, for their help in writing this article. I am also grateful to Mark Rahdert for

theory of liability, one that went beyond negligence. When the new theory was codified in the form of Section 402A of the Second Restatement of Torts,³ the courts enthusiastically and almost uniformly adopted it as the law of their jurisdictions.⁴ Under strict products liability theory, and under Section 402A, manufacturers would be liable for their defective products even if the manufacturers had exercised all due care in the design and manufacturing process.

There were three types of defect. Products could be defective in design, defective in having inadequate warnings, or defective because

his suggestions.

³ RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

- (1) One who sells any property in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer...
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product...

⁴ *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1356 (D.C. 1978) (“Subsequent to the decision in *Greenman v. Yuba Power Products, Inc.*, and the promulgation of § 402A of the RESTATEMENT, the concept of strict liability in tort spread rapidly. At the date of this writing, the CCH Products Liability Reporter lists 45 states as having adopted the concept. One other state and the District of Columbia are cautiously placed on this list with a footnote reading ‘inferred by court decision.’”) (footnotes omitted); *Brandenburger v. Toyota Motor Sales, U.S.A.*, 513 P.2d 268, 272 (Mont. 1973) (“The trend seems to be to adopt the theory of strict liability as it has now been adopted by a majority of the states...We adopt the definition, as other jurisdictions have, set forth in 2 Restatement of Torts 2d § 402A...”); *Turner v. Hudson*, 1986 Me. Super. LEXIS 278, 282 (Me. 1986) (“In almost every other jurisdiction, strict liability is common law doctrine. The highest courts of other states have simply “adopted” 402A of the Restatement (Second) of Torts.”); *Phipps v. General Motors Corp.*, 363 A.2d 955, 963 (Md. 1976) (“Almost all of the courts of our sister states have adopted the strict liability principles set forth in § 402A of the Restatement (Second) of Torts. Several reasons for adopting strict liability are summarized ... We find the above reasons persuasive. . . . Therefore, we adopt the theory of strict liability as expressed in § 402A of the Restatement (Second) of Torts.”); *Greeno v. Clark Equip. Co.*, 237 F.Supp. 427, 432-33 (N.D.Ind. 1965) (“The direction of the law is clear. Again drawing on the language of and authorities cited by Judge Wisdom in *Putman*, we find that ‘Part of the impetus has come from an almost unanimous call from the authorities in the field of torts.’ If the Restatement correctly states the conditions of recovery now in practice, let those elements have a fresh name...The question is now squarely before this court and must be decided. It is perhaps fortuitous that the Indiana Supreme Court has not yet passed on this issue, but doubtlessly that forward-looking court would embrace the Restatement (Second), Torts § 402A, and the many recent cases and authors who have done likewise, as eminently just and as the law of Indiana today.”)(internal citations omitted).

mismanufactured. All three types of defect were covered under section 402A by a single rule of strict liability. Of the three, the last, mismanufactured products, need not detain us here: manufacturers have for many decades been liable for mismanufactured products under a theory of *res ipsa loquitur*.⁵ This basis for liability seamlessly became the mismanufacture doctrine of 402A, and has never caused either courts or manufacturers any qualms.

Design defects and failure to warn, however, began causing problems as soon as Section 402A was adopted. Courts had never imposed liability without fault in such a broad spectrum of cases, although liability without fault was not unknown, even in tort cases, where *res ipsa loquitur* had come to function as a form of liability without fault. That *res ipsa* was liability without fault is clear from an examination of the cases. In *Escola v. Coca Cola Bottling Co.*, for example, the defendant manufacturer could present infinite and irrefutable evidence that it had acted as a reasonable manufacturer in the bottle-filling and inspection processes, and no one would have been interested because the bottle exploded.⁶ It is more than possible that

⁵ *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (exploding soda bottle).

⁶ *Escola*, 150 P.2d at 439, 440 (“... the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extrinsic force after delivery to the restaurant by Defendant. It follows, therefore, that the bottle was in some matter defective at the time Defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled “Under the general rules pertaining to the doctrine ... it must appear that bottles of carbonated liquid are not ordinarily defective without negligence by the bottling company. . . . Although it is not clear in this case whether the explosion was caused by an excessive charge or a defect in the glass, there is a sufficient showing that neither cause would ordinarily have been present if due care had been used.”). *See also*, *Rizzo v. Corning*,

Coca-Cola was not, in fact, negligent, but no one cared.⁷ In fact, the plaintiff in *Escola* admitted that she *could not* prove negligence on the part of the defendant.⁸

Unlike mismanufacture cases, however, failure to warn and design defect cases presented problems for courts accustomed to negligence-based liability. In design and failure to warn cases, courts found it difficult to develop standards that would differentiate strict liability from negligence, simplify the plaintiff's burden of proof, yet stop short of imposing absolute liability on manufacturers for all product-related injuries. Negligence had proven inadequate to provide the level of consumer protection that courts felt was necessary in the modern era., and plaintiffs' resources were viewed as inadequate to compete with those available to manufacturers. But no one felt that all injuries should be compensated.

Two types of defect--in design and warning--are the focus of this

Inc., 105 F.3d 338, 343 (7th Cir. 1997) ("A carafe designed to be used for years, not months, breaks in half without being dropped or banged or cleaned with abrasive cleaners or damaged in a flood or fire. In these unusual circumstances the accident itself is sufficient evidence of a defect to permit, though of course not compel, the jury to infer a defect."); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 733 (9th Cir. 1986), *cert. denied*, 479 U.S. 918 (1987) ("Under Hawaii law, application of *res ipsa loquitur* raises no presumption of negligence. The doctrine merely establishes a *prima facie* case of negligence; it allows the case to go to the jury."); *Higgins v. General Motors Corp.*, 699 S.W.2d 741, 743 (Ark. 1986) ("Strictly speaking, since proof of negligence is not in issue, *res ipsa loquitur* has no application to strict liability; but the inferences which are the core of the doctrine remain, and are no less applicable.").

⁷ *Escola*, 150 P.2d at 440 ("It is true that defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process. It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled.").

⁸ *Escola*, 150 P.2d at 438 ("Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the

article. The thesis of this article is that courts, initially enthusiastic about strict products liability, gradually backtracked from their own standards for imposing liability until, in many jurisdictions, strict products liability ceased to exist. The Third Restatement of Products Liability, ostensibly codifying this incremental process into black-letter law, eliminated any strictness from products liability and transformed it back into a negligence-based doctrine. At least some courts, forced to confront the Third Restatement's clear formulations, suddenly remembered why they had adopted strict products liability in the first place and returned to that doctrine. The very codification of what had been an incremental process forced courts to confront fully the implications of the incremental process itself, and they did not like what they saw.

This article first turns to the definitions of defect, in which the seeds of the retreat from strict products liability were planted. The definitions of defect have been discussed on numerous occasions, both in cases⁹ and in the legal literature.¹⁰ The focus in this brief discussion will be on the three problem points of unknowable dangers, consumer

doctrine of *res ipsa loquitur*.”).

⁹ See generally *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991); *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988); *Barker v. Lull Engineering*, 573 P.2d 443 (Cal. 1978); *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).

¹⁰ See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981); Frank J. Vandall, *“Design Defect” in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61 (1982).

expectation and reasonable alternative designs.

I. The Early Days of Defining Defect: Easy Cases Make Problematic Law

Once courts decided that strict products liability was a good idea, they set about defining its scope. Everyone agreed that manufacturers should not be liable for all injuries caused by their dangerous products; they should only be liable for injuries caused by their *defective* products.¹¹ Thus, dangerous products fell into two piles: dangerous and defective products, and dangerous and nondefective ones. Into the latter pile would fall reasonably dangerous products like knives, ladders, automobiles, and certain prescription pharmaceuticals like vaccines. Into the former pile would fall those unreasonably dangerous products that were found to be defective.

The first step, of course, was to define defect. Not all dangerous products would be defective; strict liability was never intended to be absolute.¹² Unlike defectiveness, dangerousness is a factual attribute.

¹¹ *Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 144 (4th Cir. 1992) (discussing definitions of defect with regard to the doctrine of strict liability in tort, the court states, "What is common to all these definitions is the idea that "defect" in the strict liability context is not synonymous with ineffectiveness or "ordinary" malfunction; the "defect" must be one that is unreasonably unsafe for the intended use of the product. It is the safety and dangerousness of the defect that is the essential element of the doctrine."); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 677 (W. Va. 1979) (quoting *Dippel v. Sciano*, 37 Wis. 2d 443 in which the court held that strict liability does not mean that the manufacturer has become the insurer of its product nor does it result in absolute liability.); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978); *Baughn v. Honda Motor Co.*, 727 P.2d 655, 659 (Wash. 1986) ("Most jurisdictions that employ the risk-utility approach require that there be something wrong with the product before a risk-utility analysis is permitted."); *McCarthy v. Olin Corp.*, 119 F.3d 148, 171 (2d Cir. 1997) ("In order for strict products liability to apply, there must be a defect, i.e., something wrong with the product ...").

¹² *Phipps v. General Motors Corp.*, 363 A.2d 955, 963 (Md. 1976) ("Thus, the theory of

Defectiveness, on the other hand, is a legal one. The difference between dangerous products and defective products resembles the difference between factual causation and proximate causation. Factual causation is, as its name suggests, a factual finding that the defendant caused the plaintiff's injury. Proximate causation represents a legal conclusion that the defendant should be liable for the injury, and is a very different matter from factual causation. Causation may be factual without being proximate: the defendant may have caused the plaintiff's injury but not be legally responsible for it.¹³ Similarly, a dangerous product may or may not be defective. All injury-causing products are dangerous, but manufacturers are only liable for defective ones. Defective products are those factually dangerous products for which manufacturers are legally responsible. Dangerousness is a factual attribute: the product caused injury. Defectiveness is a legal conclusion that the manufacturer is responsible for the injury.

In need of a way to decide for which dangerous products manufacturers would be liable,¹⁴ courts set about defining defect, and

strict liability is not a radical departure from the traditional tort concepts. Despite the use of the term "strict liability" the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product. Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product.").

¹³ In the famous case of *Overseas Tankship (U.K.) Ltd. V. Morts Dock & Engineering Co.*, 1961 A.C. 388 (Privy Council 1961), it was indisputable that the defendant had caused the fire by spilling oil on the surface of the water: without the oil, there would have been no material for the plaintiff's workers to ignite. The defendant was not liable to the plaintiff in this case, however, because the oil was not the proximate cause of the damage.

¹⁴ The court in *Barker v. Lull Engineering*, 573 P.2d 443, 446-47 (Cal. 1978), reflected on the necessity for defining defect.

reached various conclusions as to what should constitute a defective product. The definitions uniformly focused on the product and not on the manufacturer's conduct; the latter focus belongs to negligence, the former to strict products liability. As one court observed:

A negligence action focuses on conduct, specifically the quality of the act causing the injury; a strict products liability action focuses on the product itself. . . . The rise of strict liability in products liability actions results from the perception that the manufacturing enterprise can best carry the cost of injuries occasioned by defective products as an element of product cost.¹⁵

As the Supreme Court of Wisconsin succinctly stated, “[s]trict products liability focuses not on the defendant’s conduct but on the nature of the defendant’s product.”¹⁶

But courts still needed to specify what characteristics of a dangerous product made it defective. The major tests for defect that emerged from this need included the imputation of knowledge¹⁷, the risk-utility test,¹⁸ and the consumer expectation test.¹⁹ Sometimes the courts used one of these tests exclusively; sometimes they used them in combination.²⁰

¹⁵ *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1434 (5th Cir. 1983).

¹⁶ *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 745 (Wisc. 2001).

¹⁷ *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974).

¹⁸ *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 254-55 (Miss. 1993), *superseded by* *Wolf v. Stanley Works*, 757 So. 2d 316 (Miss. Ct. App. 2000).

¹⁹ *Barker v. Lull Eng'g Co., Inc.*, 573 P.2d 443 (Cal. 1978).

²⁰ The Supreme Court of Oregon tied together consumer expectation and manufacturer reasonableness in *Phillips*, 525 P.2d at 1036-37 (“A product is defective and

Under the imputation of knowledge test, a manufacturer would be liable for the injuries caused by a product if a reasonable manufacturer, irrebutably presumed to know of the product's danger, would have changed the product in some way (design or warning) before selling it.²¹ Thus, the courts would not ask what a reasonable manufacturer should have known about the product, and unknowability of the danger could not constitute a defense. Under this definition of defect, various factors such as the utility of the product, the feasibility of altering its design to eliminate or reduce the danger without sacrificing its utility, and the level of danger would come into play in the course of examining the manufacturer's decision-making process.²² The feasibility of an alternative design would be highly relevant as a factor in the decision on whether the manufacturer should have changed the design or whether the

unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.")

²¹ *Phillips*, 525 P.2d at 1036 ("A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product.") (internal footnotes omitted).

²² The seven Wade-Keeton factors for evaluating the risks and utility of a product are:

- (1) The usefulness and desirability of the product, its utility to the user and to the public as a whole;
- (2) The safety aspects of the product, the likelihood that it will cause injury and the probable seriousness of the injury;
- (3) The availability of a substitute product which would meet the same need and not be as unsafe;
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- (5) The user's ability to avoid danger by the exercise of care in the use of the product;
- (6) The user's anticipated awareness of the danger's inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Morningstar v. Black and Decker Mfg. Co., 253 S.E.2d 666, 681 (W. Va. 1979)

product was non-defective as designed and sold. If a design change were feasible, it would make it more likely that the court would find the product defective, because a reasonable manufacturer would have changed the design before allowing the product out of its control. As can be seen here, this test is quite close to a pure risk/utility test, because a reasonable manufacturer performs a risk/utility balancing process in the design phase of every product it makes.

Under the risk-utility test, a product would be defective if its risks outweighed its utility. Under this test, knowledge of the danger was also not an issue: the product was examined as it was and as it actually performed, including its dangers, whether they were known to the manufacturer or not. This test is close to the imputed knowledge test, both because a reasonable manufacturer performs a risk/utility analysis on its products before selling them, and also because under neither test was the court interested in whether the manufacturer had known of the danger, this being tantamount to an imputation of knowledge. As with the imputed knowledge test, the feasibility of an alternative design would be highly relevant as part of balancing the risks and utility of the product in the form in which it was sold.

Under the consumer expectation test, the court would ask whether the product was more dangerous than a reasonable consumer would expect. This test, like the other two, effectively imputes knowledge of the danger to the manufacturer, because the question is not what the

manufacturer should have known about the product, but rather whether the product was more dangerous than a reasonable consumer would expect. The consumer expectation test requires an understanding of consumer expectations, but “no understanding about the product itself.”²³ Alternative designs are perhaps less relevant here, as the focus is on what the consumer expected of the particular product at issue.

The three types of definition applied to all defects, whether of design or warning.²⁴ The types of defect were not treated differently from each other: either a product was defective, or it was not.

In practice, the imputed knowledge and consumer expectation tests tended to merge into the risk/utility test. A reasonable manufacturer (under the imputed knowledge test) performs a risk/utility test on all its products before selling them. A reasonable consumer expects the product that a reasonable manufacturer would sell.²⁵ Many courts simply held that the consumer expectation test included the risk/utility test, or abandoned the consumer expectation test altogether.²⁶ Whether courts

²³ *Green v. Smith & Nephew AHP, Inc.*, 629 N.W. 2d 727, 742 (Wisc. 2001).

²⁴ It is worth noting that a mismanufactured product is defective under all of these tests: if a reasonable manufacturer had known of the flaw, that manufacturer would have fixed it before selling the product; a flawed product fails any risk/utility test; and a reasonable consumer does not, as a matter of law, expect a flawed product unit. *Res ipsa loquitur* is basically a shortcut to these conclusions.

²⁵ *Phillips*, 525 P.2d at 1037 (“... because a seller acting reasonably would be selling the same product which a reasonable consumer believes he is purchasing. That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it.”).

²⁶ See discussion *infra*.

applied a risk/utility test, one of the other tests, or a combination, however, the results proved to be controversial in design and warning cases, particularly in situations where the product involved an unknowable danger or could not be made safer by a change in design.

II. The Epic Battles with Strict Products Liability: Before the Third Restatement

A. The Demise of Liability for Unknowable Dangers in Failure to Warn Cases

The original tests for defect did not deal explicitly with the problem presented by liability for dangers that were unknowable at the time the product was manufactured.²⁷ By the time the issue arose, the courts had set up their tests for defective products. The cases in which the tests for defect were adopted did not involve unknowable dangers. For example, *Phillips v. Kimwood*, the lead case expounding the imputed knowledge test, involved an industrial sanding machine that embodied the risk of regurgitating sheets of plywood back at the person using the machine.²⁸ A set of rear-facing teeth, an easy and straightforward design change, would have eliminated this danger. While the court used the case as a vehicle for adopting the imputed knowledge test for defect, the

²⁷ For the purposes of this article, there is no difference among the time of design, manufacture, or sale. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981). What is important is that the manufacturer did not know of the danger before it materialized.

²⁸ *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1035 (Or. 1974) (“The pressure exerted by the pinch rolls in the top half of the machine was insufficient to counteract the pressure which the sanding belts were exerting upon the thin sheet of fiberboard and, as a result, the machine regurgitated the piece of fiberboard back at the plaintiff, hitting him in

plaintiff could, in all likelihood, have proved negligence in design had the plaintiff needed to do so.²⁹ The danger was clearly knowable, and the manufacturer arguably unreasonable for failing to protect against it. Similarly, *Barker v. Lull Engineering*,³⁰ a lead case adopting a combination of consumer expectation and risk/utility tests, involved a piece of construction equipment that lacked a roll over protective shield that would help the operator of the equipment in the event of an accident. As with *Phillips*, such a design change was both readily available and straightforward, and the manufacturer was arguably negligent in designing the product. The plaintiff could have won a negligent design case and did not need strict products liability in order to prevail.

Thus, courts were unprepared for the problem that would be presented by lawsuits claiming that a product was defective because the manufacturer had failed to warn of a danger about which the manufacturer could not have known. As *Phillips* and *Barker* demonstrate, the early Section 402A cases involved eminently knowable dangers, and also dangers that could be eliminated or reduced. The tests for defect adopted in these decisions did not differentiate between types of defect or knowable or unknowable dangers. This cannot have been

the abdomen and causing him the injuries for which he now seeks compensation.”)

²⁹ *Phillips*, 525 P.2d at 1038-39 (“It is our opinion that the evidence was sufficient for the jury to find that a reasonably prudent manufacturer knowing that the machine would be feed manually and having the constructive knowledge of its propensity to regurgitate thin sheets when it is set to thick ones, which the courts via strict liability have imposed upon it, would have warned Plaintiff’s employer ... and that, in the absence of such a warning, the machine was dangerously defective.”)

accidental: knowability of the danger was completely irrelevant to the policy that mandated recovery for innocent plaintiffs even from innocent defendants. Indeed, strict products liability was designed specifically to deal with cases where the manufacturer had not been negligent. When actually confronted with unknowable dangers, however, the courts showed a regrettable tendency to back down from the principles and law of strict products liability. "In recent years, while an occasional court still clings to the notion that strict liability for defective design and warnings should not depend upon the foreseeability of the risk, most courts squarely confronting the issue have shielded manufacturers from liability for harm caused by unforeseeable product risks."³¹

The issue that caused the massive retreat³² from strict products liability centered around whether manufacturers should be liable for injuries caused by dangers that had been unknowable at the time of manufacture. While in theory there are design dangers that could have been unknowable at the time of manufacture,³³ the cases tended to be

³⁰ *Barker v. Lull Engineering*, 573 P.2d 443, 447 (Cal. 1978).

³¹ David Owen, *Products Liability Law Restated*, 49 S.C. L. Rev. 273, 287 (1998).

³² Professor Frank Vandall thoroughly documented this retreat in his article, *Constricting Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843 (2003); see also Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992).

³³ It is difficult to imagine a design defect that would have been unknowable in the face of expert testing. In most design cases, the plaintiff could prevail even if required to prove negligence, because the failure to uncover the design problem might itself prove inadequate product testing. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439 (Cal. 1944) ("If the explosion resulted from a defective bottle containing a safe pressure, the defendant would be liable if it negligently failed to discover such a flaw. If the defect were visible, an inference of negligence would arise from the failure to discover it. Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a

about failure to warn, and inevitably focused on whether a manufacturer should be liable for failing to warn of a danger about which the manufacturer could not have known.³⁴ With one notable exception, *Beshada v. Johns-Manville Prods. Corp.*,³⁵ which involved asbestos, most of the initial cases dealt with prescription pharmaceuticals.³⁶ In response to what was perceived as the unfairness of holding manufacturers liable for failing to warn of dangers about which they could not have known, courts almost uniformly, and sometimes with unseemly haste,³⁷ backed down from all of the tests for defect that they had carefully developed over the preceding years, and imposed a knowability requirement. While courts gave various reasons for their actions, such as the need to encourage the development of prescription pharmaceuticals and the inhibiting effect that strict liability would have on manufacturers of

reasonable inspection is made, and if such a defect is overlooked an inference arises that a proper inspection was not made.”)

³⁴ Clearly, if the danger were knowable, or if the manufacturer failed adequately to test the product, the manufacturer would be liable in negligence.

³⁵ *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982).

³⁶ Because they involved prescription pharmaceuticals, many of these cases extensively discussed comment k of section 402A, which addressed application of products liability principles to pharmaceutical products. See e.g. *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988); *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah, 1991) (upheld a blanket exemption for prescription drugs but refused to rely exclusively on the plain language of comment k, calling it “strained.”); *Young v. Key Pharms., Inc.*, 922 P.2d 59 (Wash. 1996) (holding that comment k extends a blanket exemption to pharmaceutical drug manufacturers); *Wolfgruber v. Upjohn*, 423 N.Y.S.2d 95, 97 (N.Y. App. Div. 1979) *aff’d*, 417 N.E.2d 1002 (N.Y. 1980) (stating that the scope of the warning is the key factor in a drug products liability suit because prescription drugs are “[unavoidably] unsafe products.”); *Stone v. Smith, Kline & French Labs.*, 447 So. 2d 1301, 1303 (Ala. 1984) (Stating that comment k “provides for drugs and vaccines an exception to the strict liability defined in 402A.”). For further discussion of comment k, see *infra*.

³⁷ See *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984). In *Feldman*, the New Jersey Supreme Court, a scant 23 months after deciding *Beshada*, ruled that imputed knowledge would be restricted to “knowledge at the time the manufacturer distributed the

societally necessary drugs, these reasons cannot fully explain the judicial haste in retreating nor the breadth of the decisions, which went well beyond pharmaceutical cases.³⁸

The process of this decline—although more like a rout—can be readily documented.³⁹ In *Beshada*, an asbestos case, the court reacted almost with surprise to the suggestion from the defendants that unknowability should constitute a defense in a lawsuit based on failure to warn of the dangers of asbestos.⁴⁰ The court pointed out that strict products liability differed from negligence based liability precisely because it imputed knowledge of the danger to the manufacturer. If the defendant could use lack of knowability as a defense, it would undercut the imputation of knowledge and replace it with the negligence standard that section 402A was designed to eliminate. This would render strict products liability meaningless. Perhaps unfortunately, the court reflected in *Beshada* that it was not asking manufacturers to do the impossible in holding them liable for failing to warn of all dangers about which

product.”

³⁸ See *Brown v. Superior Court*, 751 P.2d. 470 (Cal 1988) (strict products liability not applicable to prescription pharmaceuticals because of special concerns related to that industry); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal 1991) (*Brown* not intended only to apply to prescription pharmaceuticals).

³⁹ See Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992) (documenting abandonment of imputation of unknowable dangers) (hereinafter *Empire*).

⁴⁰ *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 547 (N.J. 1982) (“If we accepted defendants’ argument, we would create a distinction among fact situations that defies common sense.”).

warnings should be given, whether knowable or not.⁴¹ It is of course impossible to warn of an unknowable danger. Impossibility is not the issue: responsibility for the product, and for the injuries it has caused, is.⁴² The basis for liability is not negligence, under which doctrine a manufacturer would only be liable for dangers about which the manufacturer should have known, but rather strict liability, under which doctrine the basis for liability is whether the product was defective. Under strict products liability, liability for a product follows from responsibility for that product, and not from negligence in producing it. The manufacturer may not have known of the danger, but the manufacturer designed, packaged, and sold the product, and should accept responsibility for the injuries it causes provided the product fails the applicable test for defect. The manufacturer may not have known of the danger, but the plaintiff did not know of it either.⁴³ Under strict products liability, as a matter of policy the costs of defective products move to the manufacturer, and should not be left on the plaintiff. “[P]ublic policy demands that the burden of accidental injuries caused by products. . . be placed on those who market them, and be treated as a cost of production

⁴¹ *Id.* at 546 (“When the defendants argue that it is unreasonable to impose a duty on them to warn of the unknowable, they misconstrue both the purpose and effect of strict liability. By imposing strict liability, we are not requiring defendant to have done something that is impossible.”).

⁴² See *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1434 n. 3 (5th Cir. 1983) (“As a policy matter, strict liability in products cases deals with enterprise responsibility.”).

⁴³ See *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 754-55 (Wis. 2001) (manufacturer liable for unknowable danger; consumer did not know of the danger, and the consumer expectation test applied).

against which liability insurance can be obtained.”⁴⁴

The fact that *Beshada* was an asbestos case perhaps made it easier for the court to rule in favor of the plaintiffs, because the public interest arguments that would later emerge in prescription pharmaceutical cases were absent. Less than two years later, in *Feldman v. Lederle Labs.*, the Supreme Court of New Jersey backed down from this doctrinally pure position and allowed unknowability as a defense in a case involving a prescription pharmaceutical.⁴⁵ One might argue that *Beshada* itself was a product of the “easy cases make problematic law” proposition, and it is clear that the court was much more comfortable holding asbestos manufacturers liable for failing to warn of unknowable dangers than it was holding drug manufacturers liable in the same kind of case. Be that as it may, the court in *Feldman* seemed horrified at the idea that a manufacturer could be liable for failing to warn of an unknowable danger. Although the court denied that it was overruling *Beshada*,⁴⁶ it is clear that *Feldman* did exactly that, stating that “If *Beshada* were were deemed to hold generally or in all cases. . . that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree.⁴⁷ This clearly allowed manufacturers to

⁴⁴ *Id.*, quoting Restatement (Second) of Torts, section 402A comment l.

⁴⁵ *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984).

⁴⁶ *Id.* at 388 (“We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding.”)

⁴⁷ *Id.* at 387.

argue that they should not be liable for failing to warn of an unknowable danger.⁴⁸ As one court pointed out:

Section 402A of the Restatement of Torts 2d does not require that the plaintiff prove the manufacturer knew or should have known that the product was unreasonably dangerous. However, courts have refused to hold defendants strictly liable in the absence of such knowledge or reason to know. The New Jersey Supreme Court held in *Beshada v. Johns-Manville Products Corp.* (1982), 90 N.J. 191; 447 A. 2d 539, that a manufacturer could be strictly liable for harm caused by a product even when it could not have known of the danger at the time of manufacture. This case has not generally been followed. Courts instead include foreseeability in their analysis of strict liability.⁴⁹

Instead of pursuing a case-by-case approach to the risk/utility test, courts discarded the imputation of knowledge altogether in that one group of cases in which the imputation of knowledge would determine the result: those cases in which the plaintiff could not prove that the manufacturer knew or should have known of the danger, those cases in which the danger was unknowable. As one commentator put it: “[D]espite their bold rhetoric, courts are seldom willing to apply the imputed knowledge approach in those rare cases where it actually makes a difference. Rather, the tendency is to emphasize that imputed knowledge differentiates strict liability from negligence only in those cases in which the defendant likely knew or should have known of the

⁴⁸ All that was left of strict products liability for failure to warn after *Feldman* got through with it was the placement of the burden of showing unknowability on the defendant. The plaintiff did not have to prove that the manufacturer knew or should have known of the danger; rather, the defendant had to prove that the danger was unknowable.

⁴⁹ *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1183 n.1 (Ohio, 1990)

risk even without imputed knowledge.”⁵⁰

Courts used several techniques in the incremental process of eliminating strict liability for unknowable dangers. The first was simply to do so outright, the route taken by the *Feldman* court. Another was the foot in the door technique. The Supreme Court of California used this technique. In *Brown v. Superior Court*,⁵¹ the court ruled that manufacturers of prescription pharmaceuticals should not be liable for failing to warn of unknowable dangers because of the damage the threat of such liability would do to the public interest in the development of new prescription drugs. The opinion was carefully crafted to focus on the prescription drug industry. In *Anderson v. Owens-Corning Fiberglas Corp.*,⁵² the court, ignoring the difference between asbestos and prescription pharmaceuticals, ruled that asbestos manufacturers should not be liable for failing to warn of unknowable dangers on the highly dubious ground that *Brown* did not apply only to prescription pharmaceuticals.⁵³ Other courts followed suit.⁵⁴

⁵⁰ Richard L. Cupp, Jr., and Danielle Polage, *The Rhetoric of Strict Products Liability versus Negligence: An Empirical Analysis*, 77 N.Y.U.L. REV. 874, 896 (2002).

⁵¹ *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

⁵² A prescription pharmaceutical might pass a risk/utility test, even without a warning. Asbestos certainly does not.

⁵³ *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991).

⁵⁴ Other courts have extended protection from liability for unknowable dangers beyond the field of prescription drugs. *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795 (Wash. 2000) (blanket protection for all medical products, including breast implants, but protection will be extended on a case-by-case basis for pesticides); *Hufft v. Horowitz*, 5 Cal. Rptr. 2d 377, 381 (Cal. Ct. App. 1992) (extending *Brown* to implanted medical devices); *Terhune v.*

Yet another technique involved the fox versus foxhound approach.⁵⁵ This technique involved reliance on comment j to section 402A, which many courts, quoting an edited version of this comment from other opinions in other jurisdictions, misinterpreted to allow liability only for failing to warn of unknowable dangers. In this technique, a court would quote comment j to Section 402A in support of the position that manufacturers should not be liable for failing to warn of unknowable dangers. As quoted by the courts,⁵⁶ comment j provides:

A.H. Robins Co., 90 Wn. 2d 9 (Wash. 1978) (extending comment k protection to include the Dalkon Shield, an internal contraceptive device.); *Transue v. Aesthetech Corp.*, 341 F.3d 911 (9th Cir. 2003) (breast implants); *Brooks v. Meditronic, Inc.*, 750 F.2d 1227, 1232 (4th Cir. 1984) (holding that a pace maker can fall under comment k protection.); *Rogers v. Miles Lab.*, 116 Wn.2d 195, 197, 204 (extending comment k immunity to all blood and blood product cases.); *Brody v. Overlook Hosp.*, 127 N.J. Super. 331, 339-40 (holding that hepatitis-infected blood should be considered an “unavoidably unsafe product” as defined in comment k.) *aff’d* 66 N.J. 448; *see Hines v. St. Joseph’s Hosp.*, 86 N.M. 763, 765 (Although not expressly stated, extending comment k protection to blood and, more specifically, blood infected with hepatitis.).

⁵⁵ This label is based on an essay by Stephen Jay Gould called “The Case of the Creeping Fox Terrier Clone,” in which he discussed the problem presented when sequential sources simply quote from the preceding source, errors and all. The essay deals with an error about the size of eohippus that appeared in an early biology text; the error reappears through decades of texts because the subsequent authors all quote, in sequence, the error as quoted in the preceding text. Comment j to section 402A has been treated much as the evolutionary history of horses was treated in these texts. See “The Case of the Creeping Fox Terrier Clone,” pages 155-167 in STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY, W.W. Norton and Co., New York, 1991.

⁵⁶ Numerous courts have quoted comment j in this manner. These include *Anderson v. Owens-Illinois, Inc.*, 799 F.2d 1, 4 (1st Cir. 1986); *Vermeulen v. Armstrong World Indus.*, 204 Cal. App. 3d 1192, 1204; *Malin v. Union Carbide Corp.*, 219 N.J. Super. 428, 436; *Chrysler Corp. v. Batten*, 264 Ga. 723, 725 (utilizing quotation marks, the judge in this seatbelt failure case quotes comment j in a way so that he eliminates the ellipses and takes comment j completely out of the allergy context). Other courts picked up this version of comment j in their own opinions, citing preceding opinions as the source. This process may be traced as one follows an identical version from *Zeigler v. CloWhite Co.*, 234 Ga. App. 627, 629 and *Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 274 (stating “see also Restatement (2d) of Torts, § 402A, Comment j (seller is required to give warning “if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge” of the danger...)”) into subsequent opinions, in which the identical quotation appeared. See *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 33; *Hickman v. Thomas C. Thompson Co.*, 644 F. Supp. 1531, 1537 (D. Colo. 1986) (this case involved the inhalation of enamel dust and the quote concerning comment j read “This argument is supported by comment j to § 402A of the Restatement (Second) of Torts (1965), which states,

Where, however, the product * * * is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the * * * danger.

Unfortunately for the intellectual integrity of this analysis, however, this is not what comment j in fact says.⁵⁷ Comment j, without the careful ellipses, provides:

Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.

The seller is required by comment j to warn against ingredients that might provoke allergic reactions; the antecedent of the word "it" in the fourth line of the above quotation is "ingredient," and not "danger," and the risk involved is the risk of an allergic reaction, not a general danger

in applicable part, that "the seller is required to give warning . . . if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger."); *McElhaney v. Eli Lilly & Co.*, 575 F. Supp. 228, 231 (D.S.D. 1983) (quoting comment j as "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . as to its use The seller is required to give warning . . . if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of . . . the danger."); *Feldman v. Lederle Labs.*, 479 A.2d 374, 451 (N.J. 1984); *Vassallo v. Baxter Healthcare Corporation*, 696 N.E.2d 909 (Mass. 1998).

⁵⁷ *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1142 (Mont. 1997) ("Furthermore, the Chemical Companies rely on only one part of the third sentence of Comment j which, when considered in its entirety, indicated that this sentence is not applicable to the question certified to the Court..The certified question before us involves an alleged cancer-causing ingredient, not one to which the decedent is alleged to have been allergic. Therefore, the third sentence of Comment j is not applicable to the certified question.").

attached to use of the product⁵⁸. I am convinced that the courts simply quoted comment j from each other, without reading the actual text of the comment. When one reads the text of the comment, one discovers that the comment is about allergic reactions, and not about knowability at all. Quite simply, the comment does not support the use to which the courts have put it.⁵⁹

A similar technique may be found in court use of comment k to justify exempting pharmaceutical manufacturers from Section 402A. Courts happily held that comment k provided for an exemption from section 402A for all prescription drugs because such drugs are unavoidably dangerous. Again unfortunately for the intellectual integrity of this analysis, comment k does not say this. Comment k, which is almost never quoted in its entirety, provides:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not

⁵⁸ *In re: Hawaii Federal Asbestos Cases*, 665 F.Supp. 1454, 1458-59 (D. Haw. 1986) (“Defendants believe that Hawaii will follow comment j, and that comment j allows the defense. I do not believe that the Court will follow comment j with the result that it overrides the consumer expectation test when the defendants could not have known of the products defects.... But the largest flaw in defendants’ argument is that comment j applies to products that cause allergic reactions. Comment j applies to common products, such as strawberries, eggs, and possibly cosmetics, that are otherwise safe yet cause allergic reactions. Obviously no one would consider asbestos, lung cancer, or mesothelioma resulting from asbestos exposure an allergic reaction.”).

⁵⁹ Even when they quote comment j in its entirety, however, some courts persist in citing Comment j as proof that the manufacturer is only liable for knowable dangers. This knowability requirement, along with Comment j, was then applied to cases that had nothing to do with allergies or even pharmaceuticals. *See Crislip v. TCH Liquidating Co.*, 556 N.E. 2d 1177, 1180 (Ohio, 1990) (wood-burning furnace). In *Crislip*, while discussing failure to warn issues, the court cited Comment j as supporting the general proposition that a manufacturer can only be held liable for failing to warn if the danger was knowable. Although the court includes virtually all of the language of Comment j, it italicizes the warning language for emphasis and completely ignores the language regarding allergies.

uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

This language does not include an exemption from section 402A for prescription pharmaceuticals. Far from it. Comment k provides no immunities at all. Rather, comment k by its own terms provides that manufacturers of prescription pharmaceuticals are not liable for damages provided their drug passes a risk/utility test. The example for the comment is the Pasteur vaccine, which is dangerous, but which is not defective because the disease it is designed to prevent is always and hideously fatal. The Pasteur vaccine is dangerous, but not unreasonably so. Indeed, Comment k invites the application of the risk/utility test to drugs; if the drug passes it, the drug is dangerous but not defective; if not, the drug is defective. It is also worth pointing out that a drug like the

Pasteur vaccine would be nondefective even in the absence of any warning, because no consumer would reject the vaccine even were there warnings on it.⁶⁰ Comment k recognizes the existence of reasonably dangerous products. In order to be so classified, however, the product must pass a risk/utility test.

Some courts simply ruled that there was no difference between failure to warn in negligence and under Section 402A.⁶¹ These courts simply and explicitly abolished strict liability for failure to warn altogether. Manufacturers would only be liable for failing to warn under negligence doctrine. One court remarked: “After reviewing the authorities and comments on the failure to warn question, we believe any posited distinction between strict liability and negligence principles is illusory. We fail to see any distinction between negligence and strict liability in the analysis of those jurisdictions injecting a knowledge

⁶⁰ See *Reyes v. Wyeth Labs*, 498 F.2d 1264, 1273-74 (5th Cir. 1974) (risk of contracting polio from vaccine compared with risk of contracting polio without it).

⁶¹ Some jurisdictions required that manufacturers prove lack of knowability, while others simply divided failure to warn law from strict products liability and put it back into negligence.

The following are cases require proof of lack of knowability: *Oglesby v. General Motors Corp.*, 190 F.3d 244 (4th Cir. 1990); *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194 (Ill. 1980); *Mauch v. Manufacturers Sales and Serv., Inc.*, 345 N.W.2d 338, 346 (N.D. 1984); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 538-40.

The following cases stand for the concept that the standard in strict liability is a negligence standard: *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1183 (Ohio, 1990) (“Thus, the standard imposed upon the defendant in a strict liability claim grounded upon inadequate warnings is the same as that imposed in a negligence claim based upon inadequate warning.”); *Flaminico v. Honda Motor Co.*, 733 F.2d 463, 476 (7th Cir., 1984); *Standhardt v. Flitkote Co.*, 84 N.M. 796, 508 P.2d 1283, 1290-1 (N.M. 1973); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 782 (R.I. 1988).

requirement into their strict liability/ failure to warn equation.”⁶²

B. The Consumer Expectation Test

Like the imputed knowledge test, the consumer expectation test has nothing to do with manufacturer knowledge of the danger. The test is whether the product behaved as safely (or as unsafely) as a reasonable consumer would expect.

As has often been documented,⁶³ the consumer expectation test ran into problems from the beginning. It is undeniable that the consumer expectation test posed problems when it was first used. There may be no ascertainable consumer expectation for a particular product.⁶⁴ Consumer expectation for a product may be too low, as is the case for products with obvious dangers.⁶⁵ Consumer expectation for a product may be too high, as might be the case for prescription pharmaceuticals.⁶⁶

⁶² *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa, 1994). Not all courts abandoned the imputation of knowledge in such cases. Hawaii and Massachusetts, for example, continued to impute knowledge irrespective of its knowability. See *Johnson v. Raybestos-Manhattan*, 740 P.2d 548 (Haw. 1987). Massachusetts, which initially adhered to the imputation of knowledge, only abandoned its commitment to strict products liability in 1998, in *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998), after other courts were returning to the Second Restatement.

⁶³ See, e.g., Wertheimer, *Empire*, 60 U. CIN. L. REV. at 1198.

⁶⁴ *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967); See also *GMC v. Farnsworth*, 965 P.2d 1209, 1221 n.16 (Alaska 1998) (the Supreme Court of Alaska, discussing the possible shortcomings of the consumer expectations test and citing *Soule v. GMC*, 882 P.2d 298 (Cal. 1994), stated “*Soule* did recognize, however, that some products may be so unfamiliar to the average consumer that it would be difficult to form any intelligent expectations about how they should perform.”)

⁶⁵ If the consumer expectation test governed, no product with an obvious danger could be defective. Courts uniformly rejected this argument, holding that products with obvious dangers, while they passed a consumer expectation test, might still fail a risk/utility test. See, e.g., *Knitz v. Minster Machine Co.*, 1987 WL 6486 (Ohio Ct. App. 1987) (punch press).

⁶⁶ A reasonable consumer might expect a vaccine to be without risks when it cannot be so and should not be ruled defective simply because it is dangerous. Such a product might pass a risk/utility test. See Restatement (Second) of Torts § 402A cmt. k (1965); see also

Many courts dodged this three-tiered problem by abolishing the consumer expectation test or by reconstruing it as a risk/utility test.⁶⁷ Thus, as the *Phillips* court declared,⁶⁸ the reasonable consumer would be held to expect the product that a reasonable manufacturer would produce, or the reasonable consumer would perform a increasingly hypothetical risk/utility balancing test on the product, the same test the manufacturer would perform. The pure reasonable consumer test fell into desuetude in the same case-by-case process that led to the abolition of liability for unknowable dangers.

The shift away from the consumer expectation test was initially motivated by the need for a standard that would protect consumers from

Reyes v. Wyeth Labs., 498 F.2d 1264, 1273-74 (5th Cir. 1974) ("Although the living virus in the vaccine does not make the vaccine defective, it does make it what the Restatement calls an "unavoidably unsafe product", one which cannot be made "safe" no matter how carefully it is manufactured. Such products are not necessarily "unreasonably dangerous", for as this Court has long recognized in wrestling with product liability questions, many goods possess both utility and danger. . . .Applying this standard here, the scales must tip in favor of availability. The evil to be prevented -- poliomyelitis and its accompanying paralysis -- is great. Although the danger that vaccines may contract polio is qualitatively devastating, it is statistically minuscule. On balance then, marketing the vaccine is justified despite the danger.") (internal citations omitted)

⁶⁷ *Flemister v. GMC*, 723 So. 2d 25, 27 (Ala. 1998) (concluding that the appropriate standard in a crashworthiness case was a test that, although referred to as a consumer expectation test, was a hybrid test including risk-utility factors and the requirement of proof of a reasonable alternative design. The Justices stated that "[c]onsumer expectation,' considered in the context of the entire text of the relevant jury instruction, is not the exclusive test by which a jury evaluates an alleged design defect. Rather, the term 'consumer expectation' states only one factor of a standard that acknowledges a consumer's reasonable expectations as to the intended purpose of the automobile; applicable law also requires proof of the attendant risk and utility of the automobile's design and of any available design alternatives, from which proof a jury could reasonably conclude that the automobile's design was defective."); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 10 (N.Y. App. Div. 2003) ("While the dissent herein suggests in New York applies a consumer expectations test to design defect causes of action, the Court of Appeals made clear in *Denny v. Ford Motor Co.* (87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250), that the determination of whether a design defect is actionable requires a balancing of risks and utilities of the product, with the consumer's degree of awareness of the product's potential danger but one factor to consider in that analysis.").

⁶⁸ *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-37 (Or. 1974).

products that passed the consumer expectation test because they were obviously dangerous. This is clear in *Barker v. Lull Engineering* and in many of the ensuing cases: courts perceived a need for a standard of defectiveness that would leave room for a design to be defective even if the product were no more dangerous than a reasonable consumer would expect.⁶⁹

Numerous California decisions have implicitly recognized this fact and have made clear, through varying linguistic formulations, that a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.⁷⁰

In other cases, consumer expectation tests were either rejected or transformed into a risk/utility test in order to allow complex products, as to which consumers could have no reasonable expectation, to be ruled defective.⁷¹ Thus, the necessary refinements in the consumer expectation

⁶⁹ *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978) ("... a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design."); *Collazo-Santiago v. Toyota Motor Corp.*, 937 F. Supp. 134, 137 (D.P.R. 1996) (holding that Puerto Rico would adopt the two-prong Barker test which would allow a jury to find a product defective even if the product meets an ordinary consumer's expectations.); *Caterpillar Tractor v. Beck*, 593 P.2d 871, 884 (Alaska 1979) (Adopting the Barker two-prong test, the Supreme Court of Alaska stated "[i]n view of the diversity of product deficiencies which could fall within the notion of defect, we are persuaded that the *Barker* two-prong test provides the most comprehensive guidelines for instructing juries, without compromising any of the goals of strict liability."); *Ontai v. Straub Clinic & Hosp.*, 659 P.2d 734 (Haw. 1983) (holding that the *Barker* test would be applied in the jurisdiction of Hawaii).

⁷⁰ *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 71-72 (1st Cir. 2002).

⁷¹ *Dart v. WIEBE Mfg., Inc.*, 709 P.2d 876, 879 (Ariz. 1985) (consumer expectation test applies to be applied in cases where the consumer could have formed an expectation).

test were made in order to allow liability in a broader group of cases than that test, literally applied, would have permitted.⁷² In cases where reasonable consumers could legitimately have no expectations, such as cases involving highly complex products, and in cases involving obvious dangers, plaintiffs could use a risk/utility test to prove defectiveness.⁷³

All of this led to the consumer expectation test becoming increasingly disfavored. Some courts abandoned it altogether in favor of a risk/utility test.⁷⁴ This, of course, does not in itself eliminate liability for unknowable dangers because the risk/utility test, like imputed knowledge and consumer expectation, has nothing to do with knowability. Rather, the risk/utility test involves weighing the product as it was, and no one's knowledge of the danger—whether plaintiff or defendant—is relevant to this process.

"Where the consumer expectation test is inappropriate [because the consumer has none], the question of defective and unreasonably dangerous condition may be determined by applying Wade's risk/benefit factors. . . ."). *But see Clay v. Ford Motor Co.*, 215 F.3d 663, 669 (6th Cir. 2000) (noting that although Ohio statute previously provided for both the risk-utility test and the consumer expectation test, an amendment to the statute in 1998 eliminated the consumer expectation test from consideration in products designed after January 27, 1997.).

⁷² That group of cases in which consumer expectations were unrealistically high did not play a major role in the changing of the test for defectiveness. Most of those cases involved prescription pharmaceuticals, and courts tended to deal with drug manufacturers under warning, not design, law.

⁷³ See *Dart*, *supra*.

⁷⁴ See *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 215 (3d Cir. 1991) (stating that fact finder can only determine whether design was defective after hearing evidence of what designs were feasible at time of manufacture and whether they were in fact safer); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885-86 (Alaska 1979) (stating that once plaintiff has shown injury was proximately caused by product defendant can avoid liability by proving benefits outweighed risk of danger); *Barker v. Lull Engineering Co.*, 573 P.2d 443, 457-58 (Cal. 1978) (defining defect through a combination of consumer expectation test and risk/utility balancing analysis).

C. Reasonable Alternative Designs

Section 402A does not require that the plaintiff prove the existence of a reasonable alternative design as an element of defectiveness. Many courts were reluctant to rule that a design could be defective unless it could be made safer,⁷⁵ but some courts refused to hold that a reasonable alternative design was a sine qua non of design defect under Section 402A.⁷⁶ Some commentators took the position that liability in the absence of an alternative feasible design, which they called “product category liability,” was tantamount to liability without defect.⁷⁷ This characterization is both inflammatory and inaccurate. Liability in the absence of an alternative feasible design is liability without defect only if and only if defect is defined as requiring an alternative feasible design. If defect is defined in terms of a risk/utility test, the existence of an alternative feasible design may be a factor in weighing the product’s usefulness and dangers, but is not a requirement for such a weighing

⁷⁵ *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (“It is illogical to say that a product is defective . . . when ‘defect’ has historically been measured in reference to the availability, or at least the feasibility of safer alternatives. . . . [T]he existence of a safer alternative design is a sine que non for the imposition of liability.”), *aff’d*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 112 S.Ct. 3019 (1992) (for further consideration in light of *Cipollone*), *aff’d on reh’g*, 981 F.2d 7 (1st Cir. 1992); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485 (E.D. Pa. 1988) (holding no alternative feasible design for cigarettes), *aff’d without op.*, 856 F.2d 184 (3d Cir. 1988); *Kelley v. R.G. Indus.*, 497 A.2d 1143 (Md. 1985) (holding no alternative feasible design for handgun).

⁷⁶ *Couch v. Mine Safety Appliances Co.*, 728 P.2d 585, 586 (Wash. 1986)(the availability of a reasonable alternative design is “not a necessary element of a Plaintiff’s burden” in a design defect action.)

⁷⁷ These commentators included Professors Henderson and Twerski, who were the Reporters for the Third Restatement. See James A Henderson, Jr., and Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L.REV. 1263 (1991).

process.⁷⁸ A product must pass a risk/utility test in order to be nondefective; it can pass (or fail) such a test whether there is an alternative feasible design or not. An unavoidably unsafe product can still be tested under a risk/utility standard, even with a warning on it.⁷⁹ Holding such a product nondefective because it is unavoidably unsafe makes no sense whatsoever. Useful, unavoidably unsafe products may well be nondefective; useless ones should not be exempt from defective status simply because they cannot be made safer.⁸⁰ Be this as it may, however, courts tended to allow themselves to be persuaded that liability in the absence of an alternative feasible design was liability without defect, even though this meant exempting manufacturers of highly dangerous/low utility products from liability.⁸¹

⁷⁸ *Leichtamer v. Am. Motors Corp.*, 1980 Ohio App. LEXIS 13923, 36 (Ohio Ct. App. 1980) (citing *Anderson, Admr. v. Volks-wagenwerk and Traverse Motors, Inc.*, Case No. 31230 which stated "Defendants argue that in order to recover, Plaintiffs should have been required to prove there was a safer alternative design; there is no such requirement under Michigan law. The existence of, or lack of a safer alternative design, may have been relevant, but it is not dispositive in the sense that such proof is necessary to make out a prima facie case or in the sense that the court should have decided the issue as a matter of law. The trial court correctly instructed that there may be more than one proximate cause and that defendants' conduct need only be a proximate cause in order for plaintiffs to recover."); *Timmons v. Ford Motor Co.*, 982 F. Supp. 1475, 1479 (S.D.Ga. 1997) (although the Georgia Supreme Court refers to proof of the existence of an alternative design in design defect cases as the "heart of a design defect analysis," alternative designs are only one factor in the analysis.); *Pease v. Am. Cyanamid* 795 F. Supp. 755, 759 (D.MD. 1992) (proof of an alternative design is one of seven factors to be weighed in the balancing test to determine if a product can be considered unreasonably dangerous); *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 152-53 (Mo. 1998) (rejecting the Third Restatement's requirement of a reasonable alternative design.)

⁷⁹ Some products are unavoidably unsafe, and can be rendered non-defective by the addition of a warning. The mere presence of a warning, however, should not automatically mean that the product passes a risk/utility test, particularly where the warning provides information that does not render the product safe, but which rather informs the consumer about dangers that inhere in the normal use of the product. See *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841 (D.C. Circuit 1998).

⁸⁰ Ellen Wertheimer, *The Smoke Gets In Their Eyes, Product Category Liability And Alternative Feasible Designs In The Third Restatement*, 61 TENN. L. REV. 1429 (1994).

⁸¹ See *Miller v. Brown & Williamson Tobacco Corp.*, 679 F.Supp. 485 (E.D. Pa. 1988), *aff'd without op.*, 856 F.2d 184 (3d Cir. 1988) (no alternative design for cigarettes); *Kelley v.*

As is the case with unknowable dangers, the idea of a reasonable alternative design links up with the consumer expectation test for defect. If the consumer expectation test is used, the court simply asks whether the product was as safe as a reasonable consumer would expect. This question has nothing to do either with knowability of the danger or with the availability of an alternative feasible design: the question is simply whether the product was as safe as expected by the consumer. Thus, neither unknowability nor lack of a reasonable alternative design should constitute a defense for the manufacturer under the consumer expectation test. It should come as no surprise, then, that the Third Restatement does not include a consumer expectation test for defect.⁸²

R.G. Indus., 497 A.2d 1143 (Md. 1985) (no feasible alternative design for handguns). For more recent cases, see *Lederman v. Pacific Indus.*, 119 F. 3d 551, 555 n.5 (7th Cir. 1997); *Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 144 (4th Cir. 1992); *Bravman v. Baxter Healthcare Corp.*, 794 F. Supp. 96, 101 (S.D.N.Y. 1992) *aff'd in part and rev'd in part* 984 F.2d 71 (2d Cir. 1993); *Becker v. Baron Bros.*, 649 A.2d 613, 619 (N.J. 1994); *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 63, 71 (1st Cir. 2002).

But see, Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1428 (1994) ("The centerpiece of the proposed Restatement (Third) of Torts: Products Liability is the requirement that the plaintiff present evidence of a reasonable alternative design as part of her prima facie case. This requirement is not supported by the majority of the jurisdictions that have considered the question.")

Efforts to foreclose liability in the absence of an alternative feasible design have not been restricted to the courts. Legislatures have enacted statutes defining products liability to exclude liability in the absence of such a design. See *Brown v. Philip Morris, Inc.*, 228 F.Supp.2d 506, 520-524 (D. N.J. 2002) for a discussion of one such statute as applied to cigarettes. The New Jersey Product Liability Act foreclosed liability both in the absence of an alternative feasible design and in the presence of consumer expectation of the danger. Other jurisdictions have adopted statutes to protect manufacturers of guns and ammunition, as well as of cigarettes. See, e.g., Chapter 99B-11 of the North Carolina General Statutes. Significantly, this chapter was enacted in 1987, the period when strict products liability was being curtailed nationally. N.G.S.A. section 99B-11 (1987).

⁸² Mismanufactured products almost by definition fail a consumer expectation test, and the Third Restatement has left the law applicable to such products alone. *Res ipsa loquitur* applies to mismanufactured products, and not to any other type of defect. This leads to the fascinating problem of classifying products as defective by reason of manufacture or design; as Professor Twerski himself has said, one cannot always tell from what type of defect a product suffers. The implications of the classification are potentially vast, however: the plaintiff must prove an alternative feasible design if the claim is one of design defect, but need only prove that the product caused the injury and that it should not have done so if the claim is one of manufacture. See eg James A. Henderson, Jr.

This article now sets the stage for the Third Restatement of Products Liability. First, it turns to the eve of the Third Restatement, and analyzes where the legal transmogrifications discussed above had landed the law as the Third Restatement drafting process began.

D. The Eve of the Third Restatement

The decimation of strict products liability was greeted with enthusiasm by many scholars, including Professors Henderson and Twerski, the Reporters for the Third Restatement, who had been opposed to liability without fault from the start.⁸³ Fatefully, these eminent scholars were appointed to be the reporters for the Third Restatement of Torts, and they enthusiastically embraced what they viewed as a judicial trend towards reshaping strict products liability into negligence based liability.⁸⁴

It is worth noting that the courts that abolished the imputation of knowledge in cases involving unknowable dangers focused exclusively on the perceived unfairness to the defendants of holding them liable for failing to do something they could not, by definition, have done. In their

& Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 870 (1998) (“...both legal commentators and the practicing bar muddied the waters by confusing the issue of the standard for design defect with other issues that have little or nothing directly to do with the standard, such as the issue of whether the producer should be liable when a design conforms with the best technology available at the time of sale.”)

⁸³ For an extensive listing off all of the articles written by Henderson and Twerski see Jerry J. Phillips, *Achilles’ Heel*, 61 TENN. L. REV. 1265, 1265 n. 3 (1994).

⁸⁴ Not everyone agreed that there was any such trend. John Vargo presented strong evidence arguing to the contrary in his monumental article. John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns A “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996). If this article is correct, it convicts the reporters of the Third Restatement of overstating the strength of the precedents on which they allegedly relied.

zeal to protect manufacturing endeavors, the courts ignored or glossed over the unfairness to the plaintiffs in leaving them with costs they could not, also by definition, have avoided.⁸⁵ Strict products liability stands for the idea that the party that designed, sold, marketed and profited from the product should pay for the injuries it causes as a cost of doing business.⁸⁶ However unfair it may appear to hold a manufacturer liable for failing to warn of an unknowable danger, it is surely even more unfair to leave the costs of the injury on the plaintiff. Indeed, allowing manufacturers to escape liability imposes a subsidy of their manufacturing efforts on whatever entity gets left with the costs. This result is indefensible both morally and economically. The Third Restatement, by codifying this subsidy, also brought judicial attention to bear on it. As the following analysis will demonstrate, those proponents of eliminating strict products liability would probably have been better off leaving their views uncodified.

As has been discussed above, the basis for the fairly wholesale retreat from imposing liability for unknowable dangers lay in the idea that liability for failing to warn of unknowable dangers would be absolute. If the test is a reasonable manufacturer knowing of the danger, defenses are

⁸⁵ One of the original policy reasons driving the imposition of strict liability was that it “insure[d] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Ca.1 1963).

⁸⁶ MARK. C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 73-74 (1995).

few and far between, because what fact finder would conclude that a reasonable manufacturer, knowing of the danger, would fail to warn about it? The courts could see no defenses that would protect the manufacturer from liability in such a scenario, and thus began the retreat from strict products liability.

The New Jersey Supreme Court's highly disingenuous opinion in *Feldman* exemplifies the cowardice of the courts when confronted with the fruition of their adoption of strict products liability. In design cases, the manufacturer can argue with at least a chance of success that the product, even with its dangers, passes a risk/utility test. This is the case when a product has a high utility and cannot be made safe. The idea that there are reasonably dangerous products comes as a corollary to the idea that some products are unreasonably dangerous. Any product that is dangerous, but whose utility outweighs its dangers, is nondefective. Such products include knives, automobiles (with available safety technology), and ladders (ditto). A product whose dangers cause it to fail a risk/utility test, like a sander without teeth, is defective.

The problem in warning cases is that the risk/utility calculus is different than in design cases. A challenged design may pass a risk/utility test because its design cannot be altered in such a way as to reduce or eliminate the danger. Warnings, however, are both inexpensive and easy to include with or on a product, at least in theory. A product with a

warning will inevitably be safer than a product without one,⁸⁷ and it seems easy, at least with hindsight, to conclude that the product should have contained a warning. Courts, egged on by defendants, concluded that factfinders would reason as follows:

1. The product was dangerous, even though the manufacturer did not know of the danger.

2. Knowledge of the danger is imputed to the manufacturer.

3. Any reasonable person knowing of the danger would have put a warning of the danger onto the product.

4. There was no warning on the product.

5. Therefore, the product was defective and the manufacturer is liable.

Thus, courts decided that imputing knowledge of the danger to the manufacturer was inappropriate, because the imputation would lead automatically to liability in failure to warn cases.

In design defect cases, manufacturers can defend themselves by arguing that the danger (knowledge of which is imputed) was not curable, at least not without destroying the product or rendering it useless or prohibitively expensive, and thus that there is no feasible alternative design. The product may pass a risk/utility test in the absence of an ability to eliminate or reduce the dangers, meaning that the product,

⁸⁷ At the very least, a warning will inform the consumer about dangers in the product, and, if these dangers are unavoidable, permit an informed choice as to use of that product.

although dangerous, was reasonably so, and therefore was not defective.⁸⁸ This is the state of the art defense in design cases. No truly analogous defense is immediately apparent in warning cases: there is nothing uninventable about a warning, and it is almost always possible to convey one. The *Feldman* court viewed unknowability in warning cases as analogous to the lack of ability to make a safer product in design cases, concluding that unknowability should be a defense in failure to warn cases.⁸⁹ Courts were all too eager to adopt in warning cases what superficially appeared to be an analogous defense to the absence of a feasible alternative design in design cases: the state of the art defense in its warning cases guise, pursuant to which the defendant would be allowed to argue that it was not feasible to warn of the danger because the danger was unknowable. The *Feldman* court reached this result, as did many others. This, of course, eliminated the aspect that set strict products liability apart from negligence based liability in the first place.

The courts who leaped to this analogy—that feasible alternative design is to design defect as knowability of danger defense is to failure to warn cases—missed the point of strict products liability completely. Not only did this result leave plaintiffs paying for injuries caused by manufacturers, it also created an analogy that does not work. Courts

⁸⁸ This is not the same as requiring an alternative feasible design for the product. The product is still tested under a risk/utility standard, but it must pass or fail that test as it is, in the absence of an alternative feasible design.

⁸⁹ This is what the court must have meant when it said “similarly, as to warning cases.” *Feldman v. Lederle Laboratories*, 479 A. 2d 374, 386 (N.J. 1984).

forgot the most important part of strict products liability: the risk/utility test. A dangerous product is not necessarily defective: it is only defective if it fails a risk/utility test. Many of the products that courts ruled defective in the absence of warnings might not have been ruled defective at all, because their utility might well have outweighed their dangers, even without a warning. The dangerous aspect of the product must also have caused injury, another aspect of strict products liability neglected by the courts, at least in this context. If the presence of a warning on a product would not have affected the use to which the consumer put that product, then it is not defective for failure to warn.

An analogous group of cases appears in the realm of informed consent. The question in informed consent is: would a reasonable patient, knowing of the undisclosed risk, have elected the procedure anyway? The answer to this question is often “yes.” A set of such cases deals with polio vaccine and informed consent. The plaintiff sues when he or she develops polio after being vaccinated or after being exposed to someone who was. The risk of developing polio from the vaccine was not disclosed to the patient. Would a reasonable person, knowing of the risk, have undergone the vaccination anyway? It is perfectly possible that the answer to this is yes, and may even be “yes” as a matter of law.⁹⁰ In fact, many informed consent cases founder on precisely this causation shoal.⁹¹

⁹⁰ *Reyes v. Wyeth Laboratories*, 498 F. 2d 1264 (5th Cir. 1974).

⁹¹ See *Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355 (Iowa 1987), in which the court ruled that informing the patient about a remote risk of death would not

Analogously, a court can decide that a product is not defective as a matter of law, if there is a risk that a jury will impose liability for a reasonably dangerous product.⁹²

This set of cases generates two arguments in strict products liability cases. The first is the argument that the product, even without a warning, was not defective. Of course, having a warning would have been better, but its absence might not make the product defective because the product, even without a warning, might be of such high utility that the failure to warn pales into insignificance. The second is the argument that the plaintiff's decision to use the product did not depend on the warning. Even if the plaintiff had been warned, he or she would have used the product anyway. The absence of the warning does not make the product defective unless the product without the warning fails a risk/utility test **and** unless the absence of the warning affected the plaintiff's decision about using the product in the first place.

The irony of the demise of strict products liability, then, is that all this retreating was so unnecessary. It centered around a fundamental mistake, an idea that defendants and many scholars were able to sell to the courts. This idea was that holding manufacturers strictly liable for failing to warn of unknowable dangers was tantamount to absolute liability and liability without defect. Manufacturers persuaded the courts

have affected her decision on whether to undergo the procedure. Thus, the failure to inform the patient of the risk was not causally linked to her death.

⁹² See *Jordan v. K-Mart*, 611 A.2d 1328 (Pa. Super. Ct. 1992) (sled is dangerous but

that liability for unknowable dangers would irretrievably damage them and have an unfair impact upon them. It is, after all, impossible to warn of a danger about which one could not have known.

Thus, the courts were frightened into believing that liability for unknowable dangers was absolute liability, liability without defect. They were encouraged in this belief by legions of articles, many authored by extremely distinguished law professors, many of whom had, from the start, opposed liability without fault,⁹³ and who successfully persuaded the courts that liability for unknowable dangers was absolute, and unfair, liability. The syllogism worked like this:

1. Strict products liability had never been intended to impose absolute liability.
2. Liability for unknowable dangers was liability without defect, and therefore absolute.
3. Strict products liability should not impose liability for unknowable dangers.

Thus, the vast majority of courts, when confronted by the issue, ruled that manufacturers could not be liable for unknowable dangers. This process was perhaps assisted by the fact that the opinions in which the

not defective).

⁹³ See, e.g., James A Henderson, Jr., and Aaron D. Twerski, *Doctrinal Collapse in Product Liability: The Empty Shell of Failure to Warn*, N.Y.U. L. REV. 265 (1990); James A Henderson, Jr., and Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L.REV. 1263; John W. Wade, *On the Effect in Products Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983); John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529 (1983). For a more complete listing off all of the articles written by Henderson and Twerski see n. 3 from Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265).

original tests for defect had been developed all involved products with eminently knowable dangers. Thus, the courts could use lack of knowability as a means of distinguishing the case before them from their prior cases under Section 402A.

The flaw in this analysis is that liability for failing to warn requires that the product be defective in order for the manufacturer to be held liable, an aspect ignored by those who argue that liability for failing to warn of unknowable dangers is absolute. Liability for unknowable dangers is liability without defect, if and only if defect is defined as including foreseeable (knowable) dangers. The original tests for defect, of course, included no such requirement. All of the tests required that the product have a defect, defined in what came to be viewed as risk/utility terms. In other words, a product is defective if it fails a risk/utility test, no matter who knew what, when, about the product. A manufacturer will not be liable for dangerous products, only for defective ones. Liability is only absolute if the manufacturer is held liable for all injuries caused by a dangerous product; it is not absolute if the manufacturer is held liable only for all injuries caused by a defective product.

Confusion between the concepts of dangerousness and defectiveness fed the terror of absolute liability.⁹⁴ But whether the

⁹⁴ See Ellen Wertheimer, *The Smoke Gets in their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1441 (1994) (“... ‘[D]angerousness’ represents a factual characteristic of a product, while

danger was knowable or not, no manufacturer should be liable unless that danger made the product defective—unless the product failed a risk/utility test. Many of the products at issue in the cases in which the courts retreated from strict products liability—prescription pharmaceuticals—probably were not defective at all, because they would have passed a risk/utility test with or without a warning. But the courts were muddled about the difference between dangerous and defective products, and never performed any kind of risk/utility test on these products, preferring instead to dismiss the cases involved on the ground that manufacturers could not be found liable for failing to warn of unknowable dangers. It is perhaps worth reiterating that no court in the process of the retreat pointed out that the danger had been unknown to the consumer as well, and that their refusal to impose liability left the costs on the consumer. Refusing to hold manufacturers liable does not make the costs go away; it simply imposes them on someone else. Emphasizing the need for an uninhibited pharmaceutical industry allowed courts to sacrifice individual plaintiffs for the greater good, without analyzing whether liability was appropriate in the first place.⁹⁵ In many cases, the drug would probably have passed a risk/utility test, perhaps as a matter of law; alternatively, the plaintiff might have been unable to

'defectiveness' is a legal conclusion about that product."); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1187 (concluding defectiveness liability is about responsibility rather than blame).

⁹⁵ There was also no empirical evidence that pharmaceutical companies were in fact inhibited by strict products liability.

show that the presence of a warning would have had an impact on the plaintiff's conduct.

Thus, in order to avoid imposing liability for dangerous, but non-defective products, courts, encouraged by various academics and economic recessions,⁹⁶ discarded strict products liability altogether. As I have said in earlier articles, adding the requirement that the danger be foreseeable basically eliminates liability without negligence: if the danger were foreseeable, the manufacturer who fails adequately to perform a risk/utility test on the product was negligent in its design and/or marketing. In other words, under this theory of foreseeability a product is defective when the manufacturer has acted unreasonably in the face of a known danger. This is negligence, not strict products liability.

It also follows that if, as many courts state, imputing knowledge of the danger is the hallmark of strict products liability, reinstating the requirement that the danger be foreseeable eliminates the imputation of knowledge in all cases in which the imputation is result determinative. This includes all cases where the danger was unknowable at the time of manufacturer. Under this approach, plaintiffs will lose all cases involving unknowable dangers. They can win all others under a negligence theory, and the availability of a strict liability theory will not determine the result.

II. The Third Restatement and the Response

⁹⁶ See RAHDERT, *supra*, at 159-61.

The Third Restatement codified the abolition of the imputation of knowledge by defining defects in terms of foreseeable risks.⁹⁷ This, of course, does away with liability for unknowable dangers in all circumstances. The Third Restatement also established a risk/utility test as the sole criterion for defect, eliminating any consumer expectation test from the definition of defect, and it added the requirement that the plaintiff prove a reasonable alternative design as a “centerpiece.”⁹⁸ As Professor Owen observed:

The requirements of “foreseeability” and “reasonableness” in subsections 2(b) and 2(c) effectively reconvert the products liability standard for these types of cases to one of negligence—a rather remarkable retreat from section 402A’s explicitly “strict” standard of liability of the Second Restatement that most courts boldly purported to apply to design and warnings cases for thirty years. Thus, . . . subsections 2(b) and 2(c) of the Third Restatement abandon the strict liability concept and employ negligence principles in design and warnings cases.⁹⁹

⁹⁷ RESTATEMENT (THIRD) OF TORTS § 2 (1998). This section provides, in relevant part:

Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instruction or warnings. A product:

* * *

(b) is defective in design when the foreseeable risks of the harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

⁹⁸ Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1428 (1994).

⁹⁹ David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 285 (1998).

The use of the word “purported” by Professor Owen is particularly relevant, given that courts had whittled away at the imputation of knowledge and the consumer expectation test over the years. The Third Restatement, however, made it impossible for courts to ignore what they had done.

The Third Restatement forced courts to confront what had previously been an incremental process of curtailing strict products liability, and many courts did not like what they saw.¹⁰⁰

In one of the supreme ironies of modern tort jurisprudence, many courts upon meeting the Third Restatement took a step back from what they had cavalierly done in the past in abolishing the imputation of knowledge of unknowable risks, and realized that there was no necessity to rule out liability for such dangers. As this portion of this article will show, many decisions rejecting the Third Restatement and reinstating strict products liability might not have existed had there been no Third Restatement. It was in confronting the fact that manufacturers were avoiding having to pay for injuries they had caused that the courts realized the implications of requiring that dangers be foreseeable, of eliminating the consumer expectation element and of demanding a reasonable alternative design in order for liability to result. Courts seem

¹⁰⁰ Some courts, of course, followed the Third Restatement, even in the face of their own prior precedent that would have required its rejection. See *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998) (rejecting earlier Massachusetts law to follow Third Restatement).

to have rediscovered that letting manufacturers off the hook does not make the costs go away. It simply leaves them on the plaintiff, and perhaps on the public, instead of placing them on the party that caused them. The manufacturer may not have been at fault. The plaintiff was not at fault either. The Third Restatement sent courts back to the roots of strict products liability, to the idea that, as between two faultless entities, the party who caused the injury, who designed the product, who sold it, who profited from its availability, should pay for the injuries it caused. This would not have happened if the opponents of strict products liability had not pushed too far too fast.

There are three respects relevant to this article in which the Third Restatement tried to transform strict products liability into negligence based liability. These are unknowable dangers, consumer expectation, and reasonable alternative design. The first, liability for unknowable dangers, was eliminated by requiring foreseeability of danger as an element of defect. The second, consumer expectation, was obliterated by the adoption of an exclusive risk/utility test for defect. The third, liability in the absence of a reasonable alternative design, was eliminated by the requirement that the plaintiff prove that the product could have been made safer.

This article now turns to these three subjects and their treatment under the Third Restatement and court opinions dealing with the Third Restatement.

A. Unknowable Dangers

The Third Restatement requires that dangers be “foreseeable” in both design and warning contexts before the product can be found defective. By including foreseeability in the definition of defect, the Third Restatement foreclosed any liability for unknowable dangers in either the design or warning context. The pronouncement that strict products liability for unknowable dangers is dead may have been premature, however. Judging from many of the opinions that have been handed down since the Third Restatement appeared on the scene, the Third Restatement seems to have constituted some sort of a wake up call, although not the call its Reporters intended.

The Supreme Court of Wisconsin, in refusing to exempt manufacturers from liability for unknowable dangers, implicitly rejected the Third Restatement’s call for just such an exemption. The court in *Green v. Smith & Nephew AHP, Inc.*, pointed out that “[f]oreseeability of harm is an element of negligence. . . . In other words, strict products liability imposes liability without regard to negligence and its attendant factors of duty of care and foreseeability [of danger].”¹⁰¹ Nor does liability for unknowable dangers constitute absolute liability: the plaintiff must prove the product defective as well as dangerous.¹⁰²

It is perfectly correct to argue that the products liability goal of enhancing product safety is not particularly well served (if at all) by

¹⁰¹ *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 745-46 (Wisc. 2001). The use by the plaintiff must be foreseeable, but the danger need not be. *Id.* at 747.

¹⁰² *Green*, 629 N.W. 2d at 746.

imposing liability for unknowable dangers. But the conclusion that this lack of congruence justifies eliminating liability for unknowable dangers altogether only follows if enhancing product safety is the only, or even the most important, goal of imposing liability in the first place. The *Green* court rejected this contention:

[the argument that product safety is not encouraged by liability for unknowable dangers] focuses on one public policy underlying strict products liability while ignoring a second, more important policy consideration. Although products liability law is intended in part to make products safer for consumers, the primary “rationale underlying the imposition of strict liability on manufacturers and sellers is that the risk of the loss associated with the use of defective products should be borne by those who have created the risk and who have reaped the profit by placing a defective product in the stream of commerce.”¹⁰³

The court in *Green* refused to allow a knowability defense, adhering instead to a pure consumer expectation test which does not involve examination of what the manufacturer knew and when the manufacturer knew it.

The *Green* opinion is particularly noteworthy for its detailed analysis and rejection of the defendant’s contention that Wisconsin law prior to *Green* had evolved into a standard that required that the danger be foreseeable in order for the manufacturer to be liable for injuries caused by that danger. The defendant, with some justice, argued that earlier opinions had settled Wisconsin law as establishing that strict

¹⁰³ *Green*, 629 N.W.2d at 750, quoting *Kemp v. Miller*, 154 Wis. 2d 538, 556 (Wis. 1990).

product liability would not apply in cases where “a manufacturer does not and cannot foresee the risk of harm presented by its product.”¹⁰⁴ The court painstakingly analyzed away the earlier opinions cited by the defendant in reaching its conclusion that Wisconsin law did not embody a knowability requirement.¹⁰⁵ The court then refused to adopt the Third Restatement as a change what it viewed as its law, saying that the Third Restatement not only failed to serve “the policies underlying strict products liability law,” but that it also added both the requirement that the plaintiff prove negligence and a reasonable alternative design to the burden on the consumer. The court refused to “impose such a burden on injured persons.”¹⁰⁶

The Supreme Court of Montana also refused to adopt a knowability requirement in *Sternhagen v. Dow Co.*¹⁰⁷ The court adhered to its imputed knowledge test, stating that “[u]nder the imputation of knowledge doctrine, which is based on strict liability’s focus on the product and not the manufacturer’s conduct, knowledge of a product’s undiscovered or undiscoverable dangers shall be imputed to the manufacturer. Our adoption of the imputation of knowledge doctrine [brings with it a] concomitant rejection of the state-of-the-art defense.”¹⁰⁸

¹⁰⁴ *Green*, 629 N.W.2d at 745.

¹⁰⁵ *Green*, 629 N.W.2d at 745-751.

¹⁰⁶ *Green*, 629 N.W.2d at 751-52.

¹⁰⁷ *Sternhagen v. Dow Co.*, 935 P.2d 1139 (Mont. 1997).

¹⁰⁸ *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1143 (Mont. 1997).

Sternhagen and *Green* differ from *Beshada* in one important respect. Like *Beshada*, they impose liability for unknowable dangers. Like *Beshada*, they are true to their original formulations of the appropriate tests for defect, the imputation of knowledge test and the consumer expectation test respectively. But they differ from *Beshada* in one important respect: timing. They come at the end of the process of dismantling strict products liability, and not at the beginning, and represent a return to the first principles behind that doctrine. The *Beshada* court, writing at the beginning of strict products liability, simply followed its own definition of defect in imputing knowledge to the manufacturer, refusing to create an exception for unknowable dangers. *Sternhagen* and *Green*, on the other hand, have come at the end, and were written after an exception for unknowable dangers had been created. They postdate the Third Restatement, and are all the stronger for confronting the arguments that led to the development of the Third Restatement and then rejecting them. *Sternhagen* and *Green* should prove of greater durability than *Beshada*, if only because they answer the years of backtracking and come back to the beginning again: given a choice between leaving the costs of a defective product on an innocent consumer and placing them on the manufacturer, the choice is clear. The manufacturer should pay.

B. Consumer Expectation Test

The Third Restatement eliminated any consumer expectation tests

from its concept of products liability, adopting an exclusive risk/utility test instead.¹⁰⁹ This cleverly removed another means by which manufacturers might be liable for unknowable dangers, because such knowability is irrelevant to what the consumer might or might not have expected from the product at issue.¹¹⁰ Removing the consumer from the products liability equation is highly significant and symbolic of the orientation of the Third Restatement towards protecting manufacturers.¹¹¹ As has been discussed above, courts that fled from liability for unknowable dangers focused exclusively on the impact of such liability on the manufacturers of the products at issue, and never on the impact of non-liability on the injured consumer. It seems appropriate that the Third Restatement, which eliminated any liability for unknowable dangers, would, like the courts that went before it, remove the consumer from the determination of defectiveness altogether.

Confronted by this newly imposed consumer invisibility, and feeling a renewed need to respond to it, courts and some legislatures have rejected this removal of the consumer from the equation. Faced with this

¹⁰⁹ *Vautour v. Body Masters Sports Indus., Inc.*, 784 A.2d 1178 (N.H. 2001)(stating that section 2(b) of the Restatement (Third) of Torts requires proof of a reasonable alternative design in design cases, and pointing out that, under New Hampshire law, proof of a reasonable alternative design is only one possible factor to be considered under a risk-utility analysis.)

¹¹⁰ *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 742 (Wisc. 2001).

¹¹¹ One commentator has pointed out that various sources characterize section 2(b) of the Restatement (Third) as “a wish list from manufacturing America.” Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700-1726-27 (2003) (quoting *Green v. Smith & Nephew, Inc.*, 629 N.W.2d at 751 n. 16 (Wisc. 2001) (quoting Frank J. Vandall, *Constructing a Roof before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability section 2(b) Design Defect*, 30 MICH. J.L. REFORM 261, 261-65 (1997))).

removal, the court in *Green v. Smith & Nephew AHP, Inc.*, not only reaffirmed its commitment to the consumer expectation test, but also reaffirmed its commitment to the consumer expectation test as the **sole** test of defectiveness, even in cases involving open and obvious dangers and complex products, two areas where the consumer expectation had proved problematic to courts in other cases. When the danger is open and obvious, the *Green* court pointed out, the product will pass a consumer expectation test, but suit may be brought for “negligence, breach of implied warranty, or breach of express warranty.”¹¹² Complexity of the product was simply irrelevant, in the court’s view, because the issue was whether “the product falls below . . . minimum consumer expectations,” and not the “scientific understanding of the product itselfThis court frequently has upheld use of the consumer-contemplation test in cases involving complex products.”¹¹³ In vigorously reaffirming its commitment to the consumer expectation test, the *Green* court renewed its dedication to section 402A of the Restatement (Second) of Torts and firmly rejected the Third Restatement’s formulations.

The Supreme Court of Kansas agreed, and in *Delaney v. Deere & Co.*, renewed its commitment to the consumer expectation test by rejecting both an exclusive risk/utility approach and the requirement of a reasonable alternative design:

¹¹² *Green*, 629 N.W.2d at 743.

¹¹³ *Green*, 629 N.W.2d at 742.

[W]e agree that as the foreword to the Third Restatement makes clear, the new Restatement “goes beyond the law.” Hazard, Foreword to Restatement (Third) of Torts, xv, xvi (1997). Rather than simply taking a photograph of the law of the field, the Third Restatement goes beyond this to create a framework for products liability. We have examined Comment 1 and find it wanting. The adoption of Comment 1 necessarily involves the adoption of the reasonable alternative design standard and an exclusive risk/utility analysis of that reasonable alternative design to determine whether the subject product is defective. This is contrary to the law in Kansas. To summarize the law in Kansas, whether a design defect in a products exists is determined using the consumer expectations test.¹¹⁴

Other courts have come to the same conclusion as the Supreme Court of Kansas. As was the case in *Delaney*, a number of courts have rejected the Third Restatement’s reliance on a risk/utility test and its requirement of a reasonable alternative design because these tests rejected the consumer expectation standard altogether. As the court stated in *Potter v. Chicago Pneumatic Tool Co.*, in the course of rejecting the Third Restatement: “The defendants propose that it is time for this court to abandon the consumer expectation standard and adopt the requirement that the plaintiff must prove the existence of a reasonable alternative design in order to prevail on a design defect claim. We decline to accept the defendants’ invitation.”¹¹⁵ Unlike the court in *Green*, however, the

¹¹⁴ *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000).

¹¹⁵ *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997). See also, *Couch v. Mine Safety Appliances Co.*, 728 P.2d 585, 586 (Wash 1986) (holding that the availability of an reasonable alternative design is “not a necessary element of a Plaintiff’s burden” in a defective design action.); *Delaney v. Deere & Co.*, 999 P.2d 930, 945 (Kan 2000) (The Kansas Supreme Court Justices stated “However, Kansas has consistently held that evidence of a reasonable alternative design may but is not required to be introduced in a design defect action. Kansas has not used the concept of reasonable alternative design to

Potter court did not view consumer expectation as the sole test of defectiveness:

Although today we adopt a modified formulation of the consumer expectation test, we emphasize that we do not require a plaintiff to present evidence relating to the product's risks and utility in every case. . . . [T]he ordinary consumer expectation test is appropriate when the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations. Conversely, the jury should engage in the risk-utility balancing required by our modified consumer expectation test when the particular facts do not reasonably permit the inference that the product did not meet the safety expectations of the ordinary consumer.¹¹⁶

Refusing to adopt section 6(c) of the Third Restatement, and salvaging consumer expectation as an important part of products liability, another court remarked:

Next, defendant asks us to adopt section 6(c) of the Restatement (Third) of Torts: Product liability. That section provides:

A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic

become the standard by which the questioned product is measured.") (internal citation omitted).

In all fairness, it must be said that the *Potter* court did not include liability for unknowable dangers within the scope of strict products liability, ruling that manufacturers could only be liable for knowable dangers. *Potter*, 694 A.2d at 1329. The dangers in that case, however, were not unknowable. *Potter* also indicated that there might be cases involving complex products in which consumer expectation would not be an appropriate test because "an ordinary consumer might not be able to form expectations of safety." *Potter*, 694 A.2d at 1333.

¹¹⁶ *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1335 (Conn. 1997) (citations omitted).

benefits, would not prescribe the drug or medical device for any class of patients.

This section completely eliminates appraisal of the consumer's expectations from determination of whether a medical device is unreasonably dangerous. Thus, the section conflicts with Illinois law.

Moreover, the section provides manufacturers with virtual immunity from liability for all medical products. Even when doctors discover unexpected injuries due to a medical device, they may find the device useful in some extreme cases. . . . Under section 6(c), the fact that the device remains useful for some patients would immunize the manufacturer from liability.

Commentators have noted that section 6(c) represents a substantial departure from established common law throughout the country. . . . Most courts that have considered related provisions of the Restatement (Third) have refused to adopt them.¹¹⁷

This quotation is highly significant in terms of the subject matter of this article. The Third Restatement forced courts to take another look at where strict products liability had been and where it was going. The necessity for this reexamination was generated by Third Restatement itself.¹¹⁸ Faced with the total exclusion of consumers from products liability law, courts rejected the Third Restatement and adhered to the law

¹¹⁷ *Mele v. Howmedica, Inc.*, 808 N.E.2d 1026, 1038-39 (Ill. App. 2004).

¹¹⁸ For other courts and opinions rejecting the Third Restatement and approving the consumer expectation test, see *Jackson v. GMC*, 60 S.W.3d 800, 802 (Tenn. 2001) (reaffirming that, under Tennessee law, the consumer expectation test "...is applicable to any products liability claim where the plaintiff intends to show that a manufacturer is liable for plaintiff's injuries as a result of an unreasonably dangerous product."); *Hiner v. Deere & Co.*, 340 F.3d 1190, 1198 (10th Cir. 2003) (affirming that the Kansas courts will continue to use the consumer expectation test as laid out in 402A of the Restatement (Second) of Torts in defective design claims.); *Accord McCoy v. Whirlpool Corp.*, 2003 US Dist. LEXIS 11712 (D. Kan. 2003) (reiterating this point); *Haddix v. Playtex Family Prods. Corp.*, 138 F.3d 681, 684 (7th Cir. 1998). In *Haddix*, the court cited with approval the holding in *Papike v. Tambrands, Inc.*, 107 F.3d 737 (9th Cir. 1997), and held that the risk of contracting Toxic Shock Syndrome was within an ordinary consumer's knowledge and so, even though the jurisdiction allows for use of either the consumer expectation test or the risk-utility test, in defective design cases where you have "a simple product which poses an obvious danger" the risk-utility test is inapplicable and the consumer expectation test must be applied.); *Murphy v. Playtex Family Prods. Corp.*, 176 F. Supp. 2d 473, 487 (D. Md. 2001) (adopting the reasoning of the Seventh and Ninth circuits in *Haddix* and *Papike*).

they had developed under the Second. Incidentally, this leads one to the corollary conclusion that the Third Restatement, as many of its critics have said, does not codify the law as it was when the Third Restatement was written, but rather represented an effort to change the law to what the Reporters thought it should be. If it were truly a restatement, the courts who reaffirmed their commitment to preexisting consumer expectation standards would not have rejected it as inconsistent with the law in their jurisdictions.

C. Reasonable Alternative Design

The Third Restatement defines design defect in terms of the availability of an alternative feasible design. In other words, the plaintiff must prove the existence of reasonable alternative design in order to show that the product's design was defective.

Ironically, the trend toward incorporating a risk/utility test into a consumer expectation test with the goal of broader consumer protection in cases where the danger of the product was obvious metamorphosed into the Third Restatement abolition of the consumer expectation test with its goal of shrinking consumer protection. "Substitution of a risk-utility analysis, however, especially as formulated in the Restatement Third, has attracted considerable criticism and has been viewed as a retrogression, as returning to negligence concepts and placing a very difficult burden on plaintiffs."¹¹⁹ The Supreme Court of Kansas reacted

¹¹⁹ *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1154-55 (Md. 2001). The court further pointed out that, despite efforts by the Reporters of the Third Restatement to

with horror to the Third Restatement's requirement of a reasonable alternative design:

The Third Restatement's requirement that a plaintiff produce a reasonable alternative design has been harshly criticized. See Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects--A Survey of the States Reveals a Different Weave*, 26 U. Mem. L. Rev. 493 (1996); Frank Vandall, *State Judges Should Reject the Reasonable Alternative Design Standard of the Restatement (Third), Products Liability, Section 2(b)*, 8 Kan. J.L. & Pub. Pol'y 62 (1998); Westerbeke, *The Reasonable Alternative Design Requirement*, 8 Kan. J.L. & Pub. Pol'y 66 (1998). Vandall states that the reasonable alternative design requirement is not supported by public policy or economic analysis because the cost of processing a case will make it economically impossible to produce a reasonable alternative design in a small products liability case. 8 Kan. J.L. & Pub. Pol'y at 63. Further, contrary to the view of the authors of the Third Restatement that the majority of states require a reasonable alternative design to establish a design defect, research by John F. Vargo indicates that very few states in fact have this requirement. See 26 U. MEM. L. REV. AT 550-553. Vargo, in his exhaustive review, examines the Restatement (Third) of Torts' claim that "reasonable alternative design" is the majority rule in this country and concludes that, far from a majority rule, only three states require a reasonable alternative design and five do so by statute. See Appendix IV and related textual support for author's conclusions, 26 U. MEM. L. REV. AT 951, 501-951.¹²⁰

The goal of requiring a reasonable alternative design was clearly retrogressive. Under this standard, manufacturers would never be liable unless the product could have been made safer. In other words, there

portray this as the majority view, it was unclear that most courts would agree with this position, and, "to the extent that it is shared, it has been criticized as representing an unwanted ascendency of corporate interests under the guise of tort reform."

¹²⁰ *Delaney v. Deere & Co.*, 999 P.2d 930, 945-46 (Kan 2000).

would be no such thing as a product that was unavoidably dangerous and defective. Under the Third Restatement, manufacturers would only be liable for products with curable dangers, and never for products whose designs could not be changed to reduce or eliminate their hazards.

This shift in focus to protecting manufacturers is all the more pernicious because strict products liability was developed to protect consumers.¹²¹ The focus should be on the injured consumer and the product that caused the injury, and not on the manufacturer's conduct. Focus on the manufacturer's conduct amply appears in negligence based doctrine, but strict products liability was supposed to be something else.

Faced with the Third Restatement, however, courts have realized that products liability doctrine is at risk of losing the attributes that led to its development in the first place. In few contexts is this clearer than in that of prescription drugs. Section 6(c) of the Third Restatement pronounces that a prescription pharmaceutical is only defective if no doctor would ever prescribe it to any "class of patients" for any condition. It is highly unlikely that any plaintiff could ever meet this burden of proof, as it is hard to imagine a drug that has passed through the FDA processes and is not useful to any patient whatsoever. As one court pointed out:

¹²¹ See Andrew F. Popper, *Traditional Restatement of Harbinger of Policy Changes?: Tort Reform Policy More Than State Law Dominates Section 2 of the Third Restatement*, 8 KAN. J.L. & PUB. POL'Y 38, 40 (1998) ("Controversy happens when you deal with a product that is made by a company that is not negligent and the product ends up killing people, and there is no readily available alternative, or the cost of producing an available alternative is prohibitive. In that area, the Restatement fails you, as judges, and, more importantly, fails the public.")

The Third Restatement was intended as ‘a complete overhaul’ of the Second Restatement. These changes have garnered substantial criticism. In particular, § 6(c) has been criticized for its failure to reflect existing case law, its lack of flexibility with regard to drugs involving differing benefits and risks, its unprecedented application of a reasonable physician standard, and the fact that a consumer’s claim could easily be defeated by expert opinion that the drug had some use for someone, despite potentially harmful effects on a large class of individuals. To date, no court has adopted the Third Restatement’s strict liability test for prescription drugs, and one court has explicitly refused to adopt the test.¹²²

The Third Restatement thus brought into the codified open what courts had been comfortable doing on a case by case basis. Eliminating the consumer expectation test in favor of a risk utility test is one thing when its dilution is designed to further the goal of consumer protection, as was the case when it was changed to avoid precluding liability for open and obvious hazards. It is quite another when the goal of its abolition is to protect manufacturers, a goal that becomes patently clear when the risk/utility test is coupled with the requirement of a reasonable alternative design. The court in *Vautour v. Body Masters Sports Industries* pointed out that even adopting a risk/utility test did not automatically mean that the plaintiff had to prove a reasonable alternative design: “The plaintiffs’ burden was to present evidence regarding the risk-utility factors; they did not have the duty of proving a safer, alternative design.”¹²³ Risk/utility tests can exist in the absence of a reasonable

¹²² *Bryant v. Hoffman-La Roche, Inc.*, 585 S.E.2d 723, 727 (Ga. App. 2003)

¹²³ *Vautour v. Body Masters Sports Indus.*, 784 A.2d 1178, 1184 (N.H. 2001).

alternative design requirement, and “the rigid pre-requisite of a reasonable alternative design places too much emphasis on one of many possible factors that could potentially affect the risk-utility analysis.”¹²⁴ Requiring a reasonable alternative design simply brought the goal of deterring lawsuits into the open. The court in *Vautour* decided that “the risk-utility test as currently applied protects the interests of both consumers and manufacturers in design defect cases, and we decline to adopt section 2(b) of the Third Restatement.”¹²⁵

There has been considerable controversy surrounding the adoption of Restatement (Third) of Torts § 2(b). Most of the controversy stems from the concern that a reasonable alternative design requirement would impose an undue burden on plaintiffs Commentators have noted that for suits against manufacturers who produce highly complex products, the reasonable alternative design requirement will deter the complainant from filing suit because of the enormous costs involved in obtaining expert testimony. Thus, because of the increased costs to plaintiffs of bringing actions based on defective product design, commentators fear that an alternative design requirement presents the possibility that substantial litigation expenses may effectively eliminate recourse, especially in cases in which the plaintiff has suffered little damage.¹²⁶

The court in *Sternhagen* likewise refused to adopt the Third Restatement’s requirement of a reasonable alternative design, comprehensively rejecting the Third Restatement on several grounds simultaneously:

¹²⁴ *Vautour*, 784 A.2d at 1184.

¹²⁵ *Id.*

¹²⁶ *Vautour*, 784 A.2d at 1184 (N.H. 2001).

We decline to extend th[e requirement of a reasonable alternative design] to cases where alternative designs did not exist and a product's dangers were undiscovered or undiscoverable at the time of manufacture. If we were to do so, we would inject negligence concepts into Montana's strict products liability law and eviscerate the public policy underlying strict products liability law in this State.¹²⁷

Injecting negligence concepts into strict products liability law was, of course, precisely the goal of the Third Restatement. Indeed, as the courts point out, there is nothing left of strict products liability under the Third Restatement.

IV. Conclusion: The Biter Bit

The openness of the Third Restatement forced courts to confront both what they had done in eliminating protections for injured plaintiffs and what the Third Restatement was doing in the same respect. It is this very openness and the resultant need to confront it that has caused courts—maybe even forced them—to return to strict products liability. Once the changes that had gradually been made to section 402A were brought out in to the open in the Third Restatement, courts recognized how far strict products liability had strayed from its origins and goals, and realized that the Third Restatement was at risk of abolishing it altogether. For the same reasons that strict products liability was originally adopted, the courts are now in the process of reaffirming their

¹²⁷ *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997).

commitment to retaining—or in some cases reinstating—the doctrine.¹²⁸

Society generally has a history of tacit decision-making that, when opened up to inspection, causes consternation. It is one thing to argue that automobiles should not have airbags, even though such an omission will kill a substantial number of faceless people. It is another to argue that someone who sets out to row across the Atlantic should be left to his or her own devices when lost to radio contact. In this latter situation, huge search and rescue operations are likely to be launched, with no expense spared, and with only one life at stake.¹²⁹ It is my contention that the unfairness of this tacit process of curtailing liability became impossible to ignore when the Third Restatement attempted to codify it. The Third Restatement did one of two things in every jurisdiction in which it was invoked. The first of these was indeed to codify the law of a jurisdiction as it had developed over the years, with rejection of liability for unknowable dangers, elimination of the consumer expectation test, or requirement of a reasonable alternative design. This forced courts to confront the fact that strict products liability had been incrementally eroded almost to the point where it had ceased to exist in their jurisdictions. The second of these was to provide courts with a contrasting view of strict products liability to the view in place in their

¹²⁸ *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan 2000).

¹²⁹ See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES IN LIBERTY AND JUSTICE: ESSAYS IN POLITICAL THEORY 2 (Brian Barry ed., 1991). It is one thing to condemn a known person with a known face to certain death in the icy waters of the Atlantic, and a very different matter to cause the deaths by product of numerous faceless, future people whose identity is in no way predictable.

jurisdictions. This led courts to reexamine their prior law, developed under the Second Restatement, and at least in some cases to reaffirm their commitment to that prior law. That this led to some of the opinions discussed in this article seems likely: the Third Restatement provided a mirror for examination of strict products liability law. In many cases, the Third Restatement stood up poorly to the challenge of the Second, leading courts to take positions contrary to those expressed in the Third Restatement. Those advocating abandoning strict products liability might have done better to leave it alone, allowing the incremental process to continue its work.

In short, the Third Restatement made explicit what courts had implicitly been doing in ruling that manufacturers would not be liable for failing to warn of unknowable dangers, for design defects in the absence of an alternative feasible design, or for products that failed consumer expectation tests. In this very explicitness lay the seeds of a renewal for strict products liability. Courts, more comfortable with exempting manufacturers from liability for products that failed a risk/utility test on a case by case basis, had to confront the blanket nature of manufacturer exemption from liability for injuries to consumers who (like the manufacturers) could not avoid injury but who (unlike the manufacturers) were not responsible for and did not profit from the availability of the product. Faced with an uncompromising rule, courts, like the *Sternhagen* court, have come to recognize the fundamental unfairness of exempting manufacturers from paying for the injuries their products caused. Strict

products liability has returned, and we ironically owe this return to the Third Restatement.

What the Third Restatement did was prove too much. The pro-defendant trend, which the Third Restatement attempted to codify and encourage, had occurred, assuming that it existed, without courts being required closely to scrutinize what they were doing. It happened gradually, and in small incremental steps that meant that courts could avoid confronting the plight into which consumers were being cast by their rulings. But turning this incremental phenomenon into a rule, as the Third Restatement did, pushed the courts too far and too hard down the slippery slope. It meant that the courts could no longer ignore what their own rulings had so subtly accomplished. It has also caused the re-examination of the ALI as an appropriate policy-making entity, leading to questions about whether the ALI is any more qualified to make policy than the courts.¹³⁰

It is, of course, true that in the process of ruling in individual cases the courts were making bad law. A prime example is the rule that manufacturers could not be liable for failing to warn of unknowable dangers. The thoughtless breadth of these rulings is itself breathtaking. But the route to liability through later distinctions between cases remained open. In a distinction going the other way, *Feldman* at least

¹³⁰ See Marshall S. Shapo, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of the Law: Products Liability: the Next Act*, 26 HOFSTRA L. REV. 761, 766 (1998) ("the processes of the ALI may have no comparative advantage with political institutions in making choices among political arguments.")

pretended that it was not overruling *Beshada*, and *Brown* could pretend it was limited to prescription pharmaceuticals, leaving its extension to all products to the later decision in *Anderson*. In a common law area, distinguishing earlier precedent to achieve a different result is itself an art form. But when the rule is codified, such distinctions are no longer so easy to draw and one cannot as easily ignore or rationalize what one is doing.

When the courts were faced with the Third Restatement, they were taken back in time to the days before strict products liability, when all agreed that consumers needed protection from dangerous and defective products, protection that negligence standards could not supply. The whole rationale behind strict products liability was that manufacturers should be liable, even in the absence of negligence, because it was appropriate that manufacturers compensate equally innocent plaintiffs for their injuries caused by defective products. Instead of adopting the Third Restatement, many courts have returned to the idea that gave birth to strict products liability in the first place: as between innocent plaintiffs and innocent manufacturers, the manufacturers should pay for the injuries caused by their defective products.

The causal link between the Third Restatement and the renewal of strict products liability cannot be directly proven. Rather, circumstantial evidence leads to the conclusion that the Third Restatement, far from promoting the retreat from strict products liability, has caused its revival. First, opinions like *Sternhagen* carefully analyze the Third Restatement,

making explicit exemptions that had earlier been implicit or disguised in opinions that rejected liability for unknowable dangers. Giving the rule a face forced courts to confront the unfairness of what they had done in leaving certain costs on consumers. Second, it is more than odd that the revival of strict products liability should occur in today's world, where conservatism is rampant and corporations more powerful than ever. The recessions of the 1980's allowed corporations to cry poverty and persuade courts to rule in their favor, cutting back on laws that would have led to liability. The market failures of this decade should, at least in theory, produce the same results. This is not happening. One is at a loss to explain this. The factor that differentiates this era from the 1980's is the very presence of the Third Restatement itself. Third, I cannot think of any other reason that would explain *Sternhagen* and its progeny other than the Third Restatement. This leaves me with a *res ipsa loquitur* of causation argument: *post hoc, ergo propter hoc*, at least in the absence of a better explanation.

Faced with the Third Restatement, courts have realized that products liability doctrine is at risk of losing the attributes that led to its development in the first place. The Third Restatement brought into the codified open what courts had been comfortable doing on a case by case basis. It is this very openness that forced courts to confront what they had done in eliminating protections for injured plaintiffs, and it is this very openness that has caused courts—maybe even forced them—to return to strict products liability. products liability has returned, and we owe

this return to the Third Restatement.