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David A. Fischer

University of Missouri School of Law, fischerd@missouri.edu

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PRODUCTS LIABILITY—FUNCTIONALLY IMPOSED STRICT LIABILITY

DAVID A. FISCHER*

Introduction

Many manufacturers and insurance companies claim that a products liability crisis exists. This is evidenced by soaring products liability insurance rates. They express the fear that as insurance becomes unavailable or prohibitively expensive, useful products will be withheld from the market and some manufacturers may even be forced out of business. Such critics of the tort system are calling for modifications of the common law in order to give greater protection to manufacturers. A more drastic approach, vigorously championed by Professor Jeffrey O’Connell, calls for total or partial abolition of the tort system and substitution with various forms of no-fault insurance. In response, the federal government recently created an Interagency Task Force on Product Liability to study products liability and consider possible remedies to any problems that are found.

The task force found that while there was no products liability crisis, there were some serious problems. Specifically, certain targeted industries experienced average products liability insurance increases of from 150% to

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*B.A. 1965, J.D. 1968, Missouri-Columbia. Professor of Law, University of Missouri-Columbia.— Ed.


2 FINAL REPORT, supra note 1, at I-1; Johnson, supra note 1, at 678.


4 Johnson, supra note 1, at 678.
200% between 1974 and 1976. The task force found there were three basic causes for the problem: improper insurance rate-making practices, uncertainties in the law of products liability, and production of unsafe products.

The specific problem with the tort litigation system, according to the task force, is that the law is so unsettled in most jurisdictions that manufacturers and insurance companies have no way of estimating potential liability. This is a partial cause of the panicky rate-making decisions that have taken place in the insurance industry within the last few years. Actual decisions that have been manifestly unfair to defendants are very few in number. Therefore, a major need of the system is far greater predictability and assurance that manufacturers will not be held liable for excessive damages.

A study of the various approaches used by courts for determining whether to impose strict liability reveals the cause for the uncertainty in the law. Courts have developed a number of distinct approaches, all of which tend to be rather simplistic in that they focus on a limited range of factors. For example, whether the danger posed by the product is latent or patent might be determinative. The difficulty is that the law applies to such a diverse range of cases that the existence of a chosen factor in one case might have an entirely different significance than it would have if it were present in another case. Thus, obviousness of the danger might provide a reasonable basis for denying liability where precautions are available to minimize the danger; yet obviousness might be irrelevant if no such precautions are available. This illustrates that if any given approach were literally applied in every case, it would often yield results that are clearly undesirable when analyzed in light of the policy considerations underlying the imposition of strict liability. This has led some courts to switch from one approach to another in different cases in the hope of finding a rule that would satisfactorily resolve all cases. Other courts retain flexibility by

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7 Id. at 14613-14614, 14616.
8 Id. at 14514.
9 Id. at 14516.
failing to clarify exactly what test is being used. This has understandably created great confusion among potential defendants and insurance companies because neither can accurately predict what rules will be applied in future cases.

In light of the current pressure to reform or even abolish the tort law system, it is necessary to consider the possible changes that might be made. A system of strict liability is needed that will yield results which are reasonably predictable and which advance the policies underlying strict liability. Actually, these two goals are related because courts cannot be expected to forthrightly apply a rule that does not consistently reconcile those policies in a satisfactory fashion. Therefore, the framework for analysis that will be used in this article is to evaluate alternative approaches in light of the policy considerations. Enhanced predictability of result may be possible if a rule can be developed that will satisfactorily reconcile these policies underlying strict liability.

Two basic policies underlie the imposition of strict liability; first is the policy of risk spreading. It is desirable that manufacturers should spread losses inevitably resulting from the use of their products among all consumers by paying for those losses and then recouping the loss by raising the price of the product enough to either purchase insurance against the loss or to self-insure. The second policy is to provide a safety incentive. Competition provides manufacturers with an incentive to keep costs down, and because risk spreading increases costs, an incentive is provided to manufacture fewer defective products. A countervailing consideration is that the liability imposed on manufacturers must not be so onerous as to unduly burden industry. For example, the objectives of risk spreading and deterrence might be furthered by imposing liability on automobile manufacturers for all harm caused by automobiles. However, it is clearly not economically feasible to impose such liability because it would have a disastrous effect on the automobile industry and on the economy as a whole.

Rptr. 433 (1972) (rejecting unreasonably dangerous test of defect); Barker v. Lull Eng’r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (a product is defective in design if it is either unreasonably dangerous in retrospect or if it contains dangers that a reasonable buyer would not expect).


Holford, supra note 12; Wade, supra note 12.
Ideally, a scheme of strict liability should be devised which will further the policy objectives of risk spreading and deterrence in a predictable fashion without unduly burdening industry. This article will analyze the schemes of strict liability presently in force in light of these objectives. This analysis will reveal serious drawbacks in the present scheme of strict liability. An alternative approach that more fully accommodates the competing policy considerations will then be examined.

I. Common Law Strict Liability in Tort

Courts generally require that products be defective before those in the business of selling such products can be held strictly liable for the harm they produce. This requirement helps prevent manufacturers from becoming insurers for all the harm caused by their products. Courts have developed two basic tests for determining whether a product is defective.

One test is known as the consumer expectations test. It was derived from the law of warranty and is designed to protect consumers from hidden or unexpected dangers arising from the use of products. Recovery is precluded under this test, regardless of the magnitude of the danger involved, if the danger is obvious, generally known, or has been adequately warned against. This test grants a limited immunity to manufacturers. They are free to market dangerous products, even if the danger can be feasibly eliminated or reduced, as long as they make the danger known.

The second test of defect is that a product is defective if it is unreasonably dangerous. This test was also derived from the law of warranty. A product is defective under this test if a reasonable person would not market it because the utility of the product is outweighed by the gravity of harm threatened by the use of the product. Dean Wade has enumerated the following list of factors to be taken into account in making

16 RESTATEMENT (SECOND) OF TORTS, § 402A, comment i (1965) [hereinafter cited as RESTATEMENT].
17 Id., comment j.
19 Id. at 1561.
21 See text accompanying notes 46-49, infra.
the determination: the usefulness of the product; the likelihood it will cause injury and the seriousness of the injury; the availability of safer substitutes; the manufacturer's ability to eliminate the danger; the user's ability to avoid the danger; the user's knowledge of the danger; and the feasibility of risk spreading.\textsuperscript{22}

A court may use either test as the exclusive test for determining defectiveness, or it may use the two tests in combination. As will be seen later, the test used or the combination used can materially affect the results in given cases and the scope of liability in general.

Regardless of the test used or combination used, none of the tests of defect can consistently advance the policy considerations underlying strict liability. Cases will often arise where strict liability is imposed even though considerations of policy do not call for it. That is, risk spreading and deterrence cannot be meaningfully advanced by the imposition of liability or the manufacturer cannot feasibly bear the loss. On the other hand, cases will arise where strict liability is not imposed even though it is economically feasible to do so, and risk spreading and deterrence can be effectively advanced. From a policy perspective, the results yielded by any of these tests of defect will frequently be wrong.

In order to illustrate the inability of the present approach to consistently advance the policy considerations underlying strict liability, the various tests of defect currently employed by courts will be discussed in detail. First, the use of one test or the other as the exclusive test of defectiveness will be examined. Then, use of the two tests in various combinations will be examined.

\textit{Use of Either Consumer Expectations or Unreasonable Danger as Sole Test of Defect}

Either test can be used as the sole test of defect. Thus, the unreasonably dangerous test can be used to resolve all cases, whether they involve manufacturing defects, improper design, or a failure to warn.\textsuperscript{23} Obviousness of the danger would still be relevant insofar as it relates to reasonableness; however, it would not be controlling. Likewise, consumer expectations can be used as the sole criterion for resolving all such cases.\textsuperscript{24}

Selection of the test used can materially affect the result. Many cases arise where liability would be imposed under one test, but not the other.

\textsuperscript{22} Wade, \textit{supra} note 12, at 837-38.


For example, a punch press without a feasible safety device would be defective under the unreasonably dangerous test because the utility of omitting the device is greatly outweighed by the gravity of the harm threatened to the worker who must use the machine. However, such a machine would not be defective under the consumer expectations test because the danger of injury by inadvertently catching one’s hand in the mechanism is readily apparent to anyone who uses the machine. The opposite result also frequently happens. Suppose a new and apparently desirable drug is marketed containing an unknown but justified risk of a serious side effect. Such a product would not be defective under the unreasonably dangerous test because the utility of the drug outweighs the gravity of harm threatened by its use. However, such a product would be defective under the consumer expectations test because the ordinary consumer would have no way of knowing of the dangerous side effect.

Consumer Expectations Test

From a policy perspective, the consumer expectations test often works quite well in situations where the user’s knowledge of the risk enables him to protect himself by using the product in such a way as to minimize the risk, and where the risk cannot be feasibly eliminated or reduced. For example, suppose a plaintiff smashes his finger while using the defendant’s hammer. There would be no liability under the consumer expectations test because the danger is obvious. This result is desirable. The safety incentive policy underlying strict liability cannot be significantly advanced because it is unlikely that any alternative design could eliminate the danger without destroying the utility of the product. The policy of risk spreading could be advanced by imposing liability; however, the cost of imposing such liability on manufacturers for all such accidents would probably be too great to bear.

In other situations the consumer expectations test does not work well from the point of view of advancing the policy considerations underlying strict liability. This often results because consumers do not have the same information as manufacturers and therefore their expectations as to safety will not always be in line with reality. Inequities result when those expectations are either too high or too low, or when the consumer’s knowledge of the danger does not aid him in avoiding injury.


The consumer expectations test does not work well when expectations are unreasonably high, as they often are with the introduction of new products.\textsuperscript{27} Suppose a new antibiotic is introduced. Despite careful testing it contains an unknowable risk of a serious allergic reaction in a significant number of people. The first users to suffer the reaction would be able to recover under strict liability in tort since their expectations were frustrated.\textsuperscript{28} Liability advances the safety incentive rationale for strict liability. The manufacturer who knows that he is held to a standard of perfection has a greater incentive to eliminate hazards from his products than a manufacturer who is merely required to use reasonable care.\textsuperscript{29} The difficulty is that such liability may have too much of a deterrent effect. The potential liability in such industries is so great that it could well unduly discourage the development and introduction of new and useful products. Liability also advances the risk spreading rationale underlying strict liability, at least from the consumer’s perspective. However, this could create a hardship from the manufacturer’s point of view in certain cases because he cannot plan to spread an unknown risk.\textsuperscript{30} In such cases he would be required to spread the risk by use of subsequent price increases. This may not always be feasible, and even where it is, it might cause temporary disruptions harmful to the enterprise.

The consumer expectations test can impair achievement of the goals underlying strict liability in other situations as well. Suppose in the antibiotic example the danger of allergic reaction becomes known after a period of time. Since users are aware of the risk, the product is no longer defective.\textsuperscript{31} Users suffering allergic reactions from this time on will have no remedy. The policy of risk spreading is completely thwarted. Likewise, all incentive for the manufacturer to reduce or eliminate this hazard has been eliminated. In fact, literal application of the consumer expectations test would permit the manufacturer to continue to market the drug with the hazard even if he could feasibly eliminate the hazard.

The consumer expectations test may afford the consumer little protection in many other situations. In certain instances the consumer’s knowledge of the risk will not aid him in avoiding or minimizing the

\textsuperscript{27} Rheingold, \textit{What Are the Consumer’s "Reasonable Expectations"?}, 22 Bus. Law. 589, 595 (1967).
\textsuperscript{29} O’Connell, \textit{An Alternative to Abandoning Tort Liability: Elective No-fault Insurance for Many Kinds of Injuries}, 60 Minn. L. Rev. 501, 550 (1976).
danger. Suppose an accident victim is in desperate need of a blood transfusion. His knowledge that there is a one in a thousand chance that a given pint of blood will be infected with hepatitis virus affords him no protection. He has no real choice but to agree to the transfusion, and he has no way of detecting whether a given pint of blood is contaminated. In reality, he is no better off than a patient who agrees to a transfusion without knowledge that the risk exists.

An additional problem with the consumer expectations test is that it often affords inadequate protection to bystanders. The test originated during a period when only users or consumers of products were permitted to recover in strict liability. The test provides them with limited protection, as discussed previously. Liability has now generally been extended to cover bystanders. The test, however, affords them considerably less protection because the user's awareness of the hazard remains the criteria for determining defectiveness regardless of whether the bystander is aware of the hazard. Yet the user's knowledge of the hazard will not always provide sufficient protection for the bystander. First, the user does not have as great an incentive to protect a bystander from the danger posed by the product as he would to protect himself. Second, the hazard may be a condition of the product which impairs the user's ability to protect bystanders. For example, an earthmoving machine designed so that the operator's view is obstructed is dangerous to bystanders because of the operator's inability to see them.

The usefulness of the consumer expectations test in achieving the goals underlying strict liability is obviously limited. In some cases it works well, and in other cases it works poorly. This is because the rule does not take into account the different fact patterns which require that cases be dealt with differently.

In recent years a great many courts have rejected the consumer expectations test of defect. This has normally occurred in cases where the consumer expectations test is an especially inappropriate criterion for determining whether to impose strict liability in view of the policy considerations involved. This typically has occurred in cases where a bystander

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32 Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 274 (1969).
33 E.g., Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974).
is injured by a defective product,\textsuperscript{36} or where an employee is required to use an obviously dangerous machine under circumstances where he is likely to injure himself inadvertently.\textsuperscript{37} In many of these cases, both the safety incentive and risk spreading rationales are frustrated by the consumer expectations test. Risk spreading is economically feasible, and in many cases safety devices are currently available which would greatly reduce the hazard. Application of the consumer expectations test removes all incentive to make such products safer.

\emph{Unreasonably Dangerous Test}

Deans Wade and Keeton have long advocated that the unreasonably dangerous test be used as the sole test of defect.\textsuperscript{38} The consumer's knowledge of the danger would be one factor relevant to the question of reasonableness,\textsuperscript{39} but it would not be conclusive. They advocate that hindsight at the time of trial, rather than foresight at the time of manufacture, be used to determine if a product is "unreasonably dangerous."\textsuperscript{40} That is, the product is deemed unreasonably dangerous if a reasonable manufacturer with knowledge of the danger and feasible design alternatives that are known as of the date of trial would not have marketed the product in the same fashion as the defendant.\textsuperscript{41} Both adequacy of the design and of any warning that was or should have been given are determined by this method.

From the point of view of implementing the policies underlying strict liability, this test of defect is often unsatisfactory. It uses the single criterion of whether a reasonable manufacturer would sell the product to resolve all design, warning, and manufacturing defect cases. This is often the wrong question because even if a manufacturer would sell the product because its virtues outweigh its vices, it does not necessarily follow that risk spreading and deterrence cannot be accomplished in a given case. For example, strict liability may well be feasible and desirable in the case of a drug which contains a one in a million chance of serious side effect. The manufacturer would have to raise the price of each dose by only ten cents in order to pay damages of a hundred thousand dollars to each unfortunate victim. Liability would provide an incentive for him to eliminate the risk of

\textsuperscript{36} \textit{E.g.}, Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).


\textsuperscript{38} Keeton, \textit{Product Liability and the Automobile}, 9 FORUM-1 (1973) [hereinafter cited as Keeton]; Wade, \textit{supra} note 12, at 834-35.

\textsuperscript{39} Wade, \textit{supra} note 12, at 837.

\textsuperscript{40} Keeton, \textit{supra} note 38; Wade, \textit{supra} note 12.

the side effect if it appeared that the cost of doing so might be less than the
cost of paying for damages caused by the drug. In the case of a drug with a
one in a thousand chance of the same side effect, risk spreading probably
would not be feasible because the manufacturer would have to raise the
price of each dose by one hundred dollars in order to pay damages of one
hundred thousand dollars to each victim. Certainly, with regard to most
drugs such a price rise would be impractical. Strict liability in such a case
would normally result in removal of the drug from the market, a result that
is clearly undesirable if the drug has great utility. The unreasonably
dangerous test of defect would resolve both cases by determining whether a
reasonable person would market these drugs by comparing the utility of
the drug with the gravity of harm threatened by its use. Assuming both
drugs have sufficient utility to warrant their use and that a proper warning
has been given, both would be deemed nondefective. From a policy
perspective this result is wrong in the first case and right in the second.

The unreasonably dangerous test of defect can err in the other direc-
tion as well. That is, it can impose liability in cases where it is not feasible
and desirable from a policy point of view. In the examples discussed above,
assume that careful testing fails to reveal the risk of the side effect before
the drugs are marketed. After discovery it is determined that the risk is
unreasonable in retrospect. Here the manufacturer is held strictly liable
even in the case where he cannot feasibly spread the risk. The possibility of
such a result can have a harmful effect on the development of new pro-
ducts and on insurance rates. This is because the manufacturer of a new
product cannot know whether his product contains a scientifically
unknowable risk, and if so, whether the damages caused by the risk will
bankrupt him if he is held responsible.

The test does not yield consistently correct results because it considers
too narrow a range of factors, and it looks at them from the wrong point
of view. While the utility of the product and the gravity of harm threatened
are relevant, they are not the only factors that are relevant. Furthermore,
these factors should be used, along with other factors, to determine
whether risk spreading and deterrence are feasible and desirable instead of
using them alone to determine whether the product should be marketed. It
is error to assume that strict liability should never be imposed in the case of
products that reasonably may be marketed.

Use of the Consumer Expectations Test and the
Unreasonably Dangerous Test in Combination

Frequently courts use these two tests of defect in combination rather
than singly. Courts doing so may combine the tests in two different ways,
i.e., either in the conjunctive or in the disjunctive. That is, one court might require that a product both violate consumer expectations and be unreasonably dangerous in order for the defendant to be held liable. Other courts might hold the defendant liable if the product either violates consumer expectations or is unreasonably dangerous.

Using the two tests in combination is no more satisfactory from a policy perspective than use of the tests singly. This is illustrated in the following two sections by analyzing the results achieved in light of the pertinent policy considerations.

The Tests in the Conjunctive

The Restatement of Torts (Second) Section 402A uses the two tests of defect in the conjunctive. That is, in order for the product to be defective, it must both be in a condition not contemplated by the ordinary consumer, and be unreasonably dangerous. As a practical matter, the significance of adding the unreasonably dangerous requirement to the consumer expectations test varies, depending on whether the product is defective in manufacture or design.

The unreasonably dangerous requirement adds little in the case of manufacturing defects. A manufacturing defect exists when a product is in a condition other than that contemplated by the manufacturer, e.g., contains a physical flaw. As long as the flaw is hidden, such products are defective under the consumer expectations test. Such products would almost always be considered unreasonably dangerous as well. This is because the exercise of all possible care in attempting to discover the danger is no excuse. Therefore, the test boils down to the question of whether a reasonable person with knowledge of the defect would nevertheless market the flawed product. The answer would always be negative unless the flaw is one that appears to present no serious risk of harm to anyone. Because the Restatement approach differs so slightly from the consumer expectations test in the case of manufacturing defects, it has the same drawbacks as the consumer expectations test alone.

Sometimes inequities result because expectations are too low. Suppose a certain percentage of a manufacturer’s tires have unduly weak spots in the sidewalls. Eventually these weak spots develop into bulges which are

42 RESTATEMENT, supra note 16, § 402A.
43 Id. at comment g.
44 Id. at § 402A(2)(a).
readily apparent. Continued use of the tire after the bulge becomes apparent can result in a dangerous blowout. There would be no liability under the *Restatement* because the danger is obvious to the person who uses the tire after the bulges develop. This thwarts the policy of deterrence because the manufacturer has no incentive to improve his quality control program. The policy of risk spreading might also be thwarted, especially where the user's knowledge of the defect does not help him protect himself. For example, the user might be an employee who is required to use the vehicle equipped with the defective tires. Strict liability here is unlikely to have a ruinous effect on the manufacturer and ought to be imposed.

Inequities to the manufacturer can result when expectations are too high. Assume a control device used in nuclear power plants fails because of a hidden physical flaw, and a nuclear accident results. The *Restatement* would impose strict liability because expectations have been violated and the device is unreasonably dangerous because a reasonable person with knowledge of the defect would not have marketed the device. Although liability might be desirable from the point of view of risk spreading and deterrence, it is probably not economically feasible from the point of view of the manufacturer. The specter of liability provides a strong incentive for the manufacturer to withhold his product from the market. Because the development of nuclear energy is important to our economy, it is more appropriate to encourage this manufacturer to participate in the market as long as he takes all reasonable quality control measures.

Design defects differ from manufacturing defects in that in design cases the product is in the condition contemplated by the manufacturer. Thus, automobiles equipped with brakes which fade when overheated and automobiles equipped with regular glass rather than safety glass might be deemed defective in design. The *Restatement* provides that such products are not defective if certain conditions are met. First, the risk must be one that cannot be eliminated "in the present state of human knowledge." Second, marketing the product must appear justified because of its apparent utility. Third, a proper warning must be given. A product that meets these tests is denominated "unavoidably unsafe" and is not defective. A car not equipped with safety glass would fail these tests and be deemed defective because it presents a serious hazard to users which can feasibly be greatly reduced by use of safety glass. On the other hand, it may not be feasible to produce a car whose brakes will not fade when

46 *Restatement*, *supra* note 16, at comment *k*.
47 *Id.*
48 *Id.* at comments *j* and *k*.
49 *Id.* at comment *k*.
overheated. If so, a car equipped with brakes that may fade is not defective as long as a proper warning has been given because the utility of the product justifies its marketing. Such a product is deemed unavoidably unsafe and nondefective.

In cases involving design defects, the unreasonably dangerous requirement adds something to the consumer expectations test of defect because such a product can be nondefective even though the danger is unexpected. The comments to the *Restatement* make this apparent. If an unavoidably unsafe product is properly prepared and marketed, liability exists only for a failure to warn.\(^{50}\) Yet the comments defining when a warning must be given extend the duty to warn only to hazards which the manufacturer knew about or should have known about.\(^{51}\) It follows that there can be no liability for marketing apparently useful products containing unknown dangers arising from the product's design. Such products would normally violate consumer expectations because the consumer would seldom have more information than the manufacturer is required to have.

The *Restatement* comments discussed above make it clear that a product may not be deemed defective in design unless it violates both tests. Consumer expectations must be disappointed because the danger is unknown and has not been warned against. The product must also be unreasonably dangerous because it does not qualify as an unavoidably unsafe product that may be justifiably marketed. Thus, in design cases the *Restatement* imposes a bifurcated test of defect, requiring that the product contain both an unexpected danger and an unreasonable danger in order to be deemed defective.

Use of the two tests in the conjunctive represents a conservative approach because a product is defective only if it violates both tests. In the case of the punch press which is marketed without a feasible safety device, the product is not defective because there is no violation of consumer expectations. Note that if the unreasonably dangerous test alone were used, liability would be imposed. In the case of the new and apparently desirable drug containing an unknown but justified risk of a serious side effect, the product is nondefective because it is not unreasonably dangerous. If the consumer expectations test alone were used, this product would be deemed defective because the danger it possesses is unanticipated.

The results yielded by the bifurcated *Restatement* test will sometimes be inappropriate when viewed in light of the policies underlying the law of strict liability. Because the *Restatement* approach is conservative, most of

\(^{50}\) *Id.*

\(^{51}\) *Id.* at comments *j* and *h.*
the mistakes; that are made will favor the manufacturer. That is, the inappropriately decided cases will be ones where strict liability was not imposed even though it was feasible and desirable to do so. In the case of the punch press, strict liability is economically feasible, risk spreading is desirable, and such liability would provide a healthy incentive for the production of a safer punch press. Yet no liability would be imposed under the Restatement test. In the case of the experimental drug, the policies of deterrence and risk spreading can be advanced. The desirability of strict liability depends on whether risk spreading is feasible. This depends upon the magnitude of harm caused by the product. If the risk of harm is sufficiently small so that the manufacturer can spread the risk by price increases, strict liability is desirable. If the magnitude of harm caused by the drug is so great that this is not feasible, strict liability would be undesirable because it would drive the product off the market. The Restatement would not distinguish between these two cases and would resolve both cases in favor of the manufacturer by determining that the product is unavoidably unsafe. This illustrates that the Restatement will frequently exonerate the manufacturer in the cases where strict liability is feasible and desirable when considered in light of the appropriate policy considerations.

A difference of opinion exists as to whether foresight or hindsight is used to determine if a product is unreasonably dangerous because of the way it was designed or because of the failure to give an appropriate warning. This issue is frequently raised by asking whether compliance with the state of the art that existed at the time of manufacture will excuse the maker of the product, even though subsequent improvements in technology now permit the product to be made in a safer manner. Some authors and courts interpret the Restatement to require that foresight at the time of manufacture be used to determine whether a product is unreasonably dangerous. Under this interpretation strict liability is limited to dangerous manufacturing flaws that violate consumer expectations. In design cases the Restatement imposes liability only if the design creates an unexpected danger and the manufacturer either negligently adopted the

design or negligently failed to warn against the harm.\textsuperscript{53} Under the law of negligence a manufacturer is held to the standard of an expert in the field and is required to keep up with scientific advances.\textsuperscript{54} Therefore, ignorance of the risk would provide an excuse only in the case of a risk that was scientifically unknowable at the time of manufacture.\textsuperscript{55} This view is consistent with much of the law of products liability as of the date the \textit{Restatement} was adopted.\textsuperscript{56} It is also consistent with the language of the comments to the \textit{Restatement} discussed above, and with the view of Dean Prosser who was the reporter for the \textit{Restatement} at the time that Section 402A was adopted.\textsuperscript{57} This approach has been applied by courts both in cases involving drugs\textsuperscript{58} and in cases involving other products.\textsuperscript{59}

The other view of the \textit{Restatement} is to use the Wade/Keeton hindsight test to determine if a product is "unreasonably dangerous." A product is considered unreasonably dangerous if a reasonable manufacturer with knowledge of the danger and feasible design alternatives that are known as of the date of trial would not have marketed the product in the same fashion as the defendant. Both adequacy of the design and of any


\textit{Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966). \textit{But see} Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).}\textsuperscript{56}

\textit{Prosser, supra note 52, at 644-45, 646, 659 nn. 72-73, 661.}\textsuperscript{57}

\textit{Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Christofferson v. Kaiser Foundation Hospitals, 15 Cal. App. 3d 75, 92 Cal. Rptr. 825 (1971); Cunningham v. Charles Pfizer & Co., Inc., 532 P.2d 1377 (Okla. 1975); Twerski, From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 Marq. L. Rev. 297, 317 (1977); Comment, The Diminishing Role of Negligence in Manufacturers’ Liability for Unavoidably Unsafe Drugs and Cosmetics, 9 St. Mary’s L.J. 102 (1977).}\textsuperscript{58}


\textit{E.g., Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976).}\textsuperscript{60}
warning that was or should have been given are determined by this method.

A conceptual advantage results from incorporating the Wade/Keeton test into the Restatement approach. True strict liability would then be imposed in all cases because foreseeability is completely eliminated from the determination. A manufacturer can be held liable for harm resulting from a product that is considered defective in light of today's technology, even though it was produced at a time when the state of the art did not permit a safer product to be made. The other interpretation of the Restatement involves an awkward contradiction in terms. That is, a product is defective, and thus strict liability is imposed, in design or warning cases only if the manufacturer has been negligent in adopting the design or giving the warning. The Wade/Keeton test avoids this contradiction by truly imposing strict liability in all cases.

The Wade/Keeton test is becoming increasingly popular with other legal scholars61 and has been accepted by a number of courts.62 Most of these cases have not involved the scientifically unknown risk. As discussed above, it is only in cases involving such risks that there is a real difference between negligence liability and strict liability. The Final Report of the Interagency Task Force on Product Liability concluded that when actually faced with this question most courts have refused to impute knowledge of unknowable risks to manufacturers in either design63 or warning64 cases. It remains to be seen whether courts will actually do so in the future.

Use of hindsight in determining whether a product is unreasonably dangerous under the Restatement approach will result in virtually the same liability as if consumer expectations were used as the sole test of defect. Under the Restatement two-part test, a consumer injured by a product containing a known hazard could not recover because consumer expectations would not have been violated. Whenever a consumer is injured by a product containing an unknown hazard that has not been warned against, the manufacturer will be held liable because consumer expectations are violated and the product is also unreasonably dangerous in one of three ways. First, if the harm resulted from a dangerous manufacturing defect, the product would be unreasonably dangerous because a reasonable person with knowledge of the defect would not market the product. Second, if the hazard resulted from the design of the product it would be unreasonably dangerous.

63 FINAL REPORT, supra note 1, at II-8-9.
64 Id. at II-13-15.
STRICT LIABILITY

dangerous if the design were deemed unreasonable in retrospect. Third, in such a case, even if the design is reasonable, liability always would be imposed for failure to warn. A warning is always required unless it is unnecessary because the danger is known. Justifiable ignorance of the risk is no excuse for failure to warn when hindsight is used. The unreasonably dangerous test adds little to the consumer expectations test of defect when hindsight rather than foresight is used. It would make a difference only in the unusual case where a reasonable person would market the product notwithstanding the hidden defect because it poses no risk or a very slight risk that reasonably can be ignored.

When analyzed from a policy point of view, the results achieved by this approach are essentially the same as when the consumer expectations test is used as the sole test of defect. These results are described earlier in the section on the consumer expectations test.

The Tests in the Disjunctive

A number of courts define a product as being defective if it is either unreasonably dangerous under the Wade/Keeton test or if it possesses hidden or unexpected dangers. California's recent adoption of this approach will undoubtedly create an impetus for other jurisdictions to follow suit.

Use of the tests in the disjunctive rather than in the conjunctive substantially increase the likelihood of finding that a product is defective. This is because the victim can recover either if the danger was unexpected or if in retrospect the danger is unreasonable. In the case of the punch press marketed without a feasible safety guard, liability is imposed because the product presents an unreasonable danger. In the case of the new antibiotic drug which contains a scientifically unknowable risk of causing an allergic reaction, liability is imposed because the drug presents an unexpected danger. Once the danger becomes generally known or has been warned against, it still is defective if the danger is found to be unreasonable when the utility of the product is compared to the gravity of harm threatened. Only if the danger is a reasonable one in retrospect is the product nondefective.

While using the two tests in the disjunctive rather than in the conjunctive provides for recovery in a greater number of cases, this approach does not necessarily do a better job of fulfilling the policies underlying strict

65 RESTATEMENT, supra note 16, comment j.
66 E.g., General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Montgomery & Owen, supra note 61, at 843-45.
liability. The difference is that most of the policy mistakes will be made in favor of consumers and against manufacturers. Such mistakes occur when liability is imposed even though it is not economically feasible for the manufacturer to bear the loss, or when the policies of risk spreading and deterrence cannot be meaningfully advanced. In the case of the antibiotic which creates the risk of causing an allergic reaction, liability would be imposed for the initial injuries because consumer expectations were violated. This is true even though this unexpected loss might be too large for the manufacturer to bear. This is undesirable because it is unfair to the defendant and also because it tends to discourage other manufacturers from introducing new products which are apparently desirable. Many new products potentially possess serious unknowable risks, and manufacturers may sometimes be unwilling to take the gamble.

Some cases will arise where the policy mistake is made in favor of the manufacturer rather than the consumer. Referring once again to the antibiotic example, once the danger became known, the product would be nondefective if we assume that it was not unreasonably dangerous in retrospect. This is true even though risk spreading might be economically feasible and might provide an incentive for development of a safer product. The difficulty with this approach is that it is another attempt to develop a single word formula to resolve all cases mechanically.

II. Proposed Statutory Reforms

Many legislatures are considering modifications of the common law of products liability. The Department of Commerce has recommended that a products liability law be drafted either for implementation by the states or by the federal government. It recommends that the law deal with such issues as the basic standard of responsibility, statute of limitations, responsibility for unavoidably unsafe products and relevance of the state of the art evidence, relevance of compliance with legislative or administrative standards, various matters concerning damages recoverable, contribution and indemnity, and rules relating to conduct on the part of product users. This covers the full range of issues that are raised from time to time in various legislatures. According to the Commerce Department, the virtue of this approach is that it would lend greater predictability to the law of products liability.

The problem with this method of reforming the law is that it is an attempt to adopt rigid black letter rules to resolve all cases. One of the

68 Options Paper, supra note 6, at 14624.
69 Id. at 14627.
70 Id. at 14624.
schemes for determining defectiveness discussed previously would be frozen into the law and used to resolve all future cases. As has been demonstrated earlier, no single rule can consistently advance the policies underlying strict liability.

III. No-Fault Insurance

Professor Jeffrey O’Connell has advanced four no-fault insurance proposals as complete or partial substitutes for common law strict liability. The first is elective no-fault insurance. Under this proposal enterprises are permitted to elect to pay for product related injuries on a no-fault basis. The election can be as broad or narrow as desired with regard to the type of accidents covered and the benefits available. No-fault insurance provides the exclusive remedy for accidents coming within the scope of the election. The common law remedy remains available for other accidents.

His second proposal is to make worker’s compensation the sole remedy for workers injured by defective products. The employer paying benefits for an accident would have a negligence action against any third party who negligently caused harm to the employee. Employers would use the proceeds from such actions to help finance the system. A variant of this proposal is to expand coverage to include all off-the-job accidents involving workers and members of their families.

The third proposal is to use first party insurance for all accidents. This is a purely elective system whereby potential accident victims purchase accident insurance. Part of the consideration for guaranteed no-fault payments is assignment of the victim’s tort claim against potential product liability defendants.

The fourth proposal is called “enterprise liability.” Businesses would be liable on a no-fault basis for all risks systematically generated by their activities. This is Professor O’Connell’s most far-reaching proposal. He views his other proposals as interim measures which will ultimately lead to enterprise liability.

Although these no-fault schemes vary in scope and method of implementation, they share a number of common features. First, they make it easier to recover by requiring payment on a no-fault basis and by eliminating contributory negligence as a defense. Second, they use a

71 O’CONNELL (book), supra note 3, at 97.
72 O’Connell article, 1977 U. ILL. L. FORUM, supra note 3.
73 Id. at 775.
74 Id. at 790.
75 O’Connell article, 59 VA. L. REV, supra note 3.
76 O’CONNELL (book), supra note 3, at 80, 121 (elective no-fault); O’Connell article, 1977
number of methods that decrease the size of recoveries. Accident victims cannot recover damages for pain and suffering and damages that have been paid from collateral sources. These rules will effectively bar recovery for many small claims. In addition, most plans place upper limits on the amounts recoverable in the case of large claims. The intended effect of these features is to increase the number of people who can recover damages and to reduce the total amount of damages paid on behalf of defendants.

A major drawback of these plans is their inability to fulfill the policies underlying strict liability as well as the present system. Because the purpose of each proposal is to reduce the amount of compensation paid, it is obvious that risk spreading will be impaired because less of the risk will be spread than previously. Deterrence will also suffer under most of these plans. Because potential liability is smaller, manufacturers will have less incentive to develop safer products.

This is a particular problem under elective no-fault because it permits a potential defendant to choose in advance the types of cases where no-fault will apply. The premise of the system is that he will make a specified election only because he believes it to be in his financial self-interest. He is free to elect no-fault liability in cases where he would clearly be held liable at common law and retain the protection of the common law in cases where he would not be liable. If this occurs, accident victims will have no recovery in cases that are not actionable at common law and a reduced recovery in cases that are actionable.

Fundamental objections would remain even if the total amount of compensation remained the same as under the common law. The worker's compensation and first party insurance proposals extend the philosophy that all cases be treated alike even though they are not alike. The same

U. ILL. L. FORUM, supra note 3, at 778 (worker's compensation and first party insurance); O'Connell article, 59 VA. L. REV., supra note 3, at 772-73 (enterprise liability).

77 O'Connell (book), supra note 3, at 98 (elective no-fault); O'Connell article, 1977 U. ILL. L. FORUM, supra note 3, at 774, 778 (worker's compensation and first party insurance); O'Connell article, 59 VA. L. REV., supra note 3, at 772-73 (enterprise liability).

78 O'Connell (book), supra note 3, at 98.

79 O'Connell article, 59 VA. L. REV., supra note 3, at 772-74 (elective no-fault and enterprise liability); O'Connell article, 1977 ILL. L. FORUM, supra note 3, at 786 (worker's compensation and first party insurance).

80 O'Connell (book), supra note 3, at 98.

81 Id. at 98, 99, 144, 154, 155.

principles of liability are uniformly applied to all cases regardless of whether deterrence can be meaningfully advanced and regardless of whether risk spreading is feasible and desirable. By providing compensation in a large number of cases where it serves no useful purpose from a policy point of view, these systems necessarily pay inadequate compensation in cases where strict liability serves a useful purpose. Because the compensation paid in such cases is relatively low, its value as a risk distributor is greatly diminished. Under first party no-fault insurance, deterrence is not impaired because the insurance carrier can maintain the accident victim’s common law action against the product manufacturer. As discussed previously, the common law system advances deterrence only imperfectly. The worker compensation proposal would advance the policy of deterrence less effectively than the common law because the action against the product manufacturer is limited to negligence.\(^3\)

Enterprise liability is better than the other proposals in this regard. Professor O’Connell proposes a two-part test for determining whether to impose liability under this system. The harm must have resulted from a “typical risk” of the enterprise.\(^4\) In addition, liability must also further one of three goals: deterrence, improved resource allocation, or loss spreading.\(^5\) Fulfillment of the second part of this test guarantees that liability will at least serve some purpose underlying strict liability. Of course, it does not guarantee that the cost of fulfilling the objective is justified in light of the burden on the manufacturer. Nevertheless, it is a step in the right direction.

The other criteria for imposing liability under this proposal creates a significant problem. The requirement that the harm be caused by a “typical risk” of the enterprise is so nebulous that it is virtually devoid of meaning.\(^6\) Rather than being analytically useful, the terminology merely provides a vehicle for expressing a conclusion that has been intuitively reached. Professor O’Connell concedes as much.\(^7\) If anything, this scheme would make the law of products liability more uncertain than it is today. This is a serious drawback because the major criticism of the present system is uncertainty. What is needed is a systematic way of analyzing cases so that the policies underlying strict liability can be consistently

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85 Id. at 777.
advanced. A suggested method of doing this is discussed in the next section.

IV. Functionally Imposed Strict Liability

A preferred approach is for the judge to decide as a matter of law whether a given case is an appropriate one for strict liability. In making this decision, he should systematically analyze all factors bearing on the question of whether the policies of risk spreading and deterrence can be advanced by the imposition of liability without unduly inhibiting industry from continuing to supply useful products. This decision should be made as a matter of law because it is a question of vital social importance, and consistency from case to case is highly desirable. Thus, the court will decide as a matter of law whether a given case is an appropriate one for strict liability. Juries will be used to resolve disputed questions of fact such as causation and damages. Because trial judges will be acting under the ultimate supervision of a single appellate court, it will be possible over a period of time to develop a jurisprudence which will make predictability of result of future cases much easier than at present.\textsuperscript{88}

Courts presently use this approach to determine whether to impose strict liability for abnormally dangerous activities.\textsuperscript{89} This theory closely parallels strict liability in products cases because similar policy considerations form the basis for both actions. Consistency between the two areas is desirable, and the approach used in the case of abnormally dangerous activities is clearly the correct one. Judges rather than juries should decide these important questions of policy so that these policy determinations are consistently applied in similar cases.

An earlier article\textsuperscript{90} suggested that the following list of factors be considered in determining whether to impose strict liability.

I. Risk Spreading

A. From the point of view of consumer.

   1. Ability of consumer to bear loss.

\textsuperscript{88} Id. at 787.


   a. Knowledge of risk.
   b. Ability to control danger.
   c. Feasibility of deciding against use of product.

B. From point of view of manufacturer.
   1. Knowledge of risk.
   2. Accuracy of prediction of losses.
   3. Size of losses.
   4. Availability of insurance.
   5. Ability of manufacturer to self-insure.
   6. Effect of increased prices on industry.
   7. Public necessity for the product.
   8. Deterrent effect on the development of new products.

II. Safety Incentive
   A. Likelihood of future product improvement.
   B. Existence of additional precautions that can presently be taken.
   C. Availability of safer substitutes.

In a given case these factors would be taken into account to determine whether strict liability is desirable and feasible. If, on the whole, it is, the judge will decide in favor of strict liability. Not all factors will consistently point in the same direction, and the importance of a given factor may vary from case to case. Thus, whether the danger is obvious or hidden, and whether the risk is reasonable or unreasonable will often be relevant to the decision, but these factors will seldom be controlling. This system can be illustrated with a few examples.

Assume a consumer cuts himself with the sharp edge of a knife. The judge will decide against imposing liability. The danger is known to the consumer, and he can use the knife in such a way as to minimize the risk to himself. Also, because the injury in many such cases is likely to be relatively slight, the consumer is frequently able to bear the loss without undue hardship. On the other hand, risk spreading is not feasible from the point of view of the manufacturer. It is unlikely that he could afford to pay damages for every cut that is received from the blade of the knife. He clearly would be unable to purchase reasonably priced insurance against such injuries. Moreover, liability does not serve as a safety incentive because it is highly unlikely that technological advances could be made in the foreseeable future that would permit the production of a knife that could still be used as a knife and yet impose no danger of this sort of injury.

In the case of the punch press that was not equipped with a feasible safety guard, strict liability would be imposed. Risk spreading is desirable
because losses are likely to be too great for the victim to bear, and the employee who is required to use the machine can do little to protect himself from the danger of inadvertent injury. Operation of these machines typically involves constant hurried repetition of the same movements for hours at a time. The statistical likelihood of an inadvertent injury by activating the machine before the worker’s hand is clear is high. Strict liability would provide a strong incentive to install the safety device because this would be relatively inexpensive in comparison with potential liability. The cost of installing such devices is not so great as to have an adverse effect on the industry.

In the case of the newly developed antibiotic drug with the unknown risk of an adverse side effect, the decision to impose strict liability depends largely on the ability of the industry to spread the risk. If the damages are greater than the industry can bear, the drug would be removed from the market. This is undesirable if the product has high utility and there are no safer substitutes. On the other hand, potential liability that can feasibly be passed on in the form of higher prices will provide an incentive to produce a safer drug.

A great source of uncertainty in the present law of products liability is that decisions have a retroactive effect. Under the proposed scheme this would no longer be a problem. Courts could decide against retroactive application of a decision if this would have an adverse effect on industry. In the punch press example, it might be feasible to require future models to be equipped with a safety device, but it might not be feasible to require old models that are currently in use to be modified at the manufacturer’s expense. In this case the court could declare that the decision will have no retroactive effect. Strict liability will apply only to the plaintiff’s case and to future cases where the injury resulted from use of a punch press made without the safety device after the date of decision. Because the ability of industry to bear the loss is taken into account, manufacturers would no longer have reason to fear that they will unfairly be held liable for harm resulting from the design of an old product because of subsequent technological development.

This scheme would alleviate the concerns of manufacturers and products liability insurers. Predictability of result should be enhanced under the system. Litigated cases will constitute useful precedent for resolving similar future cases. Furthermore, because manufacturers know that their interests are explicitly being taken into account by courts in deciding the liability issue, justification for panic pricing of liability insurance is eliminated. This is because one factor in determining whether to impose liability will be the ability of the manufacturer to bear the loss.
Conclusion

The current approach for determining defectiveness cannot consistently advance the policies underlying strict liability in a satisfactory fashion in all cases. The factors underlying the feasibility and desirability of imposing strict liability differ drastically from case to case. In adopting various tests of defect, such as whether the product is unreasonably dangerous or violates consumer expectations, courts have attempted to resolve all such cases by use of a single, uniform criterion such as the reasonableness of the danger or the obviousness of the danger. These matters may often be relevant to the question of whether strict liability is both feasible and desirable. However, they are frequently not conclusive. In the case of the punch press which is not equipped with a feasible safety device, no valid policy is served by granting the manufacturer an immunity. Obviousness of the danger does not adequately protect the worker; strict liability is financially feasible, and it will provide an incentive to market safer products. In the case of the experimental drug with the unknowable side effects, strict liability would further both the policy of risk spreading and providing a safety incentive. The only reason for not imposing liability is that it might not be financially feasible from the point of view of the manufacturer. This consideration is unrelated to the question of whether the risk involved is a reasonable risk or an unreasonable risk.

Using the two tests in combination rather than singly does not solve this problem. This approach merely insures that most of the errors will be made either in favor of the manufacturer or the consumer, depending on which combination of the tests of defect is used. The conservative approach of combining the consumer expectations test and the unreasonable danger test in the conjunctive narrows the scope of liability of the manufacturer much more than either test alone would do. Thus, most of the errors from a policy point of view will involve cases where liability was not imposed even though it was feasible and desirable to do so. On the other hand, the liberal courts, which combine the tests in the disjunctive, have adopted a rule which imposes liability in many more cases than would either rule alone. Thus, most policy errors made by such courts will be on the side of the consumer. That is, strict liability was imposed even though it failed to serve either the policy of risk spreading or deterrence, or it was not economically feasible from the industry point of view to impose such liability.

The tort experience with proximate cause issues illustrates the futility of attempting to resolve very complex policy issues by the mechanical application of simplistic word formulas. Early in the history of the law of negligence, courts attempted to find a single test that could be used in all
cases. It soon became apparent that this was unworkable. For example, foreseeability is sometimes used as the test of proximate cause. However, it is clear that in some cases foreseeability carries liability too far, and in other cases it does not extend liability far enough. In order to resolve this difficulty, courts have had either to abandon the attempt to find a single rule, or to develop word formulas that are so ambiguous that they provide little guidance for resolving such cases, but are merely rationalizations for the end result.

The same fate awaits the law of strict liability. Principles should be forthrightly adopted for resolving cases in light of the policy considerations involved. Because these issues involve important questions of social policy, and because consistency from case to case is important, these principles should be applied by judges rather than juries. This approach is preferable to the alternative of adopting very flexible rules that can be easily manipulated to achieve desirable results. The latter scheme will create the same appearance of uncertainty that is the basis of criticism of the present law of products liability.

92 E.g., Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968).
93 E.g., Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964).
94 E.g., Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968).
95 E.g., Green v. Kahn, 391 S.W.2d 269 (Mo. 1965).