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Torts--Products Liability--Strict Liability for Defect in Design--Blevins v. Cushman Motors

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TORTS—PRODUCTS LIABILITY—STRICT LIABILITY FOR DEFECT IN DESIGN

Blevins v. Cushman Motors[1]

Albert Blevins and his golfing partner were using a golf cart manufactured by the defendant Cushman Motors. While being turned in a shady area of the golf course where a light dew was present, the golf cart "skidded, tipped, and turned over." Blevins fell to the ground and was pinned beneath the cart. Blevins sued Cushman Motors for personal injuries on the theory of strict liability in tort for design defect. Judgment was entered for the plaintiff. The Kansas City District of the Missouri Court of Appeals affirmed. The Supreme Court of Missouri heard the case as if on original appeal and affirmed the judgment for Blevins.

The *Blevins* decision is significant for three reasons: the Missouri Supreme Court adopted strict liability for design defects; the opinion articulates the conceptual differences between strict liability and negligence; and although it adopts strict liability for design defects, the opinion fails to express clearly the standard to be used in determining whether a product is defective.

Missouri first accepted the strict liability theory for defective products in *Keener v. Dayton Electric Manufacturing Co.*,[2] following section 402A of the *Restatement (Second) of Torts*.[3] *Keener* established that an action for strict liability in tort will lie to recover for injuries caused by a product which is unreasonably dangerous as manufactured. The court in *Keener* held that a product-based injury is actionable under section 402A when the product is found to be defective and dangerous when put to a use reasonably anticipated by the manufacturer.[4]

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1. 551 S.W.2d 602 (Mo. En Banc 1977).
2. 445 S.W.2d 362 (Mo. 1969).
3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
4. 445 S.W.2d at 366. It is interesting to note that in proposing the jury instruction for use in Missouri products liability cases, the court departed from a

It is important to distinguish between two types of product defects: manufacturing defects and design defects. A manufacturing defect involves one particular product in which, through some malfunction of the manufacturing process, there exists a defect. A design defect involves the whole line of products and is the result of the manufacturer's choice to adopt a particular design. Although *Keener* involved a design defect, the court in that case did not distinguish between design defects and manufacturing defects.

Relying on *Keener,* both the Missouri Court of Appeals[5] and the federal Eighth Circuit[6] had applied the strict liability theory to design defect cases prior to *Blevins.* These courts cited a leading California case[7] which concluded that there is no rational distinction between design and manufacturing defects, as a product with a design defect may be just as defective and dangerous as one with a manufacturing defect.[8] In *Blevins* the Missouri Supreme Court approved this extension of *Keener.*

By recognizing a cause of action based on strict liability for design defects, the court held that one need not prove negligence in such cases. The distinction between strict liability and negligence was set out in *Blevins*:[9] strict liability deals with the dangerous condition of an article which is designed in a particular way; negligence is concerned with the reasonableness of the manufacturer's actions in designing and selling the product.[10] Therefore, a product can have a degree of dangerousness not tolerated under a strict liability theory even though the actions of the designer were entirely reasonable and consequently not negligent, in view of what he knew at the time he designed and sold the manufactured product.[11] The imposition of liability in negligence cases is based on the foreseeability or reasonable anticipation that harm or injury is a

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strict interpretation of the *Restatement* language. MO. APPROVED INSTR. No. 25.04 (1975 ed.) requires the jury to find only that a product was defective and therefore dangerous when put to a reasonably anticipated use. The court left out the requirement that the product be unreasonably dangerous but did require that it was put to a use reasonably anticipated. Maryland Cas. Co. v. Dodlinger, 420 F.2d 1368 (8th Cir. 1970) (applying Missouri law).

5. Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (St. L. Mo. App. 1970).

6. Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973) (applying Missouri law).

7. Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

8. *Id.* at 475, 467 P.2d at 236, 85 Cal. Rptr. at 635-36.

9. 551 S.W.2d at 608, (citing Phillips v. Kimwood Machine Co., 269 Ore. 485, 525 P.2d 1033 (1974)); Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974).

10. Phillips v. Kimwood Machine Co., 269 Ore. 485, 493, 525 P.2d 1033, 1037 (1974); Roach v. Kononen, 269 Ore. 457, 465, 525 P.2d 125, 129 (1974).

11. Cases cited note 10 *supra.*

likely result of acts or omissions,[12] whereas strict liability is based, in part, on the foreseeable or reasonably anticipated use of a defective product.[13]

The difference between negligence and strict liability has been the subject of much discussion.[14] Most writers seem to agree that the *results* are usually the same under either theory.[15] Both involve a risk-utility analysis;[16] the ultimate question is whether the manufacturer was

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12. Taylor v. Hitt, 342 S.W.2d 489, 494 (St. L. Mo. App. 1961); Hull v. Gillioz, 344 Mo. 1227, 1236, 130 S.W.2d 623, 628 (1939).

13. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 366 (Mo. 1969).

14. *See* Fischer, *Products Liability–The Meaning of Defect,* 39 Mo. L. REV. 339 (1974); Keeton, *Products Liability and the Meaning of Defect,* 5 ST. MARY'S L.J. 30 (1973); Keeton, *Manufacturers Liability: The Meaning of "Defect" in the Manufacture and Design of Products,* 20 SYRACUSE L. REV. 559 (1969); Keeton, *Products Liability–Liability Without Fault and the Requirement of a Defect,* 41 TEX. L. REV. 855 (1963); Pope & Pope, *Design Defect Cases: The Present State of Illinois Products Liability Law,* 8 J. MAR. J. PRAC. & PROC. 351 (1975); Rheingold, *What Are the Consumer's "Reasonable Expectation"?,* 22 BUS. LAW 589 (1967); Rheingold, *Proof of Defect in Products Liability Cases,* 38 TENN. L. REV. 325 (1971); Vetri, *Products Liability: The Developing Framework for Analysis,* 54 ORE. L. REV. 293 (1975); Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5 (1965); Whitford, *Strict Products Liability and the Automotive Industry: Much Ado About Nothing,* 1968 WIS. L. REV. 83; Comment, *Products Liability in Missouri: The Keener Complex,* 42 U.M.K.C.L. REV. 187 (1973); Note, *Products Liability–Defectiveness Standard of Section 402A of Restatement (Second) of Torts Questioned,* 80 DICK. L. REV. 633 (1975); Note, *Manufacturer's Liability for Design Defects,* 56 NEB. L. REV. 422 (1977).

15. Wade, *supra* note 14, 44 MISS. L.J. at 836-37 stated:

> In the case of improper design which makes the product dangerous, whatever is enough to show that it is so dangerous that strict liability should apply (that it has a defective design, to use the *Cronin* approach), will also be enough to show negligence on the part of the manufacturer. Even if the manufacturer is not aware of the danger created by a bad design, he is negligent in not learning of it.... The proof necessary to establish strict liability will certainly be sufficient to establish negligence liability as well.... There are thus innate similarities between the actions in negligence and in strict liability, and changing the terminology does not alter this.

Keeton, *supra* note 14, 5 ST. MARY'S L.J. 30, is in accord.

16. Negligence principles require a balancing of the likelihood and gravity of harm against the utility of the conduct and the burden imposed by precautions which would be effective to avoid the harm. Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See* United States. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (classic negligence risk-utility balancing formula); RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965) (risk-utility analysis); Note, *supra* note 14, 56 NEB. L. REV. at 426. Wade, *supra* note 14, 44 MISS. L.J. at 837, offered factors to be considered in the risk-utility analysis under strict liability theory to determine defect:

> (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 probable seriousness of the injury.

reasonable in marketing the product as designed. *Blevins* seems to follow a distinction recognized by Dean Keeton, namely, that the adoption of strict liability principles eliminates the need to prove "that the manufacturer realized or should have realized in the exercise of ordinary care the dangers involved in the product's use."[17] The focus is shifted from the acts of the designer to the product itself, creating a "reasonable product standard."[18] Keeton further theorized that under strict liability the type of dangerous conduct required to subject the manufacturer to liability is the same as is required for recovery on a negligence theory. However, the fact that the manufacturer was excusably unaware of the extent of the danger and had not committed any negligent act or omission would be entirely irrelevant.[19] Consequently, although the design-defect plaintiff still must meet the burden of producing detailed technical evidence of design plans, specifications, and procedures[20] to make a submissible case under a strict liability theory, he may prevail more readily than under a negligence theory.

Another difference between the two theories relates to availability of the contributory negligence defense.[21] This distinction often arises in the so-called "second collision" cases, in which it is conceded that the plaintiff's own negligence caused the accident, but it is argued that the

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(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
(7) The feasibility ... of spreading the loss by setting the price of the product or carrying liability insurance.

The difference in analysis is that under a negligence theory the focus is on the reasonableness of the manufacturer's actions, whereas under a strict liability analysis, the focus is on the condition of the product. *See* Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation,* 54 TEX. L. REV. 1185, 1210 (1976). *See also* Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation,* 52 TEX. L. REV. 1303, 1307 n.20 (1974).

17. Keeton, *supra* note 14, 20 SYRACUSE L. REV. at 565.

18. Note, *supra* note 14, 80 DICK. L. REV. at 636.

19. This, Keeton reasoned, would eliminate a number of difficult decision points (presumably those involved in determining whether the plaintiff made a submissible case), greatly simplify trials, and enhance the likelihood of settlements. Keeton, *Products Liability–Inadequacy of Information,* 48 TEX. L. REV. 398, 407 (1970).

20. Powell & Hill, *Proof of Defect and Defectiveness,* 5 U. BALT. L. REV. 77 (1975).

21. Whitford, *supra* note 14, at 124.

defect aggravated the injuries.[22] Contributory negligence is a complete bar to the defendant's negligence liability in Missouri,[23] but it is not a complete defense to strict liability actions.[24] Thus under a strict liability theory, the defense of contributory negligence would not be available to the manufacturer to provide insulation from liability in this type of case.

The imposition of strict liability in design defect cases will expand the liability of manufacturers, yet this expanded liability does not place the manufacturer in the position of an "insurer" of his products. It has been held that the manufacturer has no duty to market a "foolproof" product.[25] The primary limitation on the manufacturer's liability is the requirement that there be a *defect* in the product at the time it leaves the manufacturer.[26] Missouri limits the manufacturer's liability by requiring that the design be "defective and dangerous when put to a use reasonably anticipated" by the manufacturer.[27] The crucial term is "defective." Because this standard determines liability, the court should make clear its meaning. Unfortunately, *Blevins* failed to clarify the law on this point. It is instructive to examine the possible interpretations of the standard for defect and the ramifications of each.

As previously noted, the court in *Blevins* reaffirmed its earlier adoption of *Restatement (Second) of Torts* section 402A.[28] It could be argued that in doing so the court also adopted the *Restatement* test for determining the defectiveness of a product. The standard for defectiveness set forth in the comments to the *Restatement*[29] is the "consumer expecta-

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22. Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir.), *cert. denied,* 425 U.S. 507 (1976); Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

23. Henell v. St. Louis-S.F. Ry., 324 Mo. 38, 23 S.W.2d 102 (1929).

24. Williams v. Ford Motor Co., 454 S.W.2d 611 (St. L. Mo. App. 1970).

25. Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968) (applying Missouri law).

26. Keeton, *supra* note 14, 41 TEX. L. REV. at 858-59, *cited in* Markle v. Mulholland's, Inc., 265 Ore. 259, 509 P.2d 529 (1973).

27. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 366 (Mo. 1969).

28. 551 S.W.2d at 607.

29. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in part:

Comment *g. Defective condition.*

> The rule stated in this section applies only where the product is at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.... The seller is not liable when he delivers the product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed....

Comment *h.*

> A product is not in a defective condition when it is safe for normal handling, and consumption.... If the injury results from abnormal handling as where a bottled beverage is knocked against a radiator to remove a cap, ... the seller is not liable....

Comment *i. Unreasonably dangerous.*

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the

tions" test. Under this test, which evolved from principles of warranty,[30] a product is defective if, at the time it leaves the seller's hands, it is in a condition not contemplated by the ultimate consumer, and that condition is unreasonably dangerous to the consumer.[31] Recovery is precluded if the dangerous aspect of the product is generally known,[32] has been adequately warned against,[33] or is obvious.[34] It is difficult to argue

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> user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. . . .
> Comment *k. Unavoidably unsafe products.*
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> 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 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 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 consequence 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.

30. Warranty cases in Missouri prior to the acceptance of strict liability in tort incorporated a consumer expectations test as to fitness. Paton v. Buick Motor Div., 401 S.W.2d 446 (Mo. 1966); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. En Banc 1963). The Missouri court in *Morrow* first accepted an implied warranty theory without the need to show privity to establish strict liability of the manufacturer, *i.e.,* it extended the food cases to nonfood manufactured products. This case was the forerunner to strict tort liability in Missouri. Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (K.C. Mo. App. 1961); Cohagan v. Laclede Steel Co., 317 S.W.2d 452 (Mo. 1958); Zesch v. Abrasive Co., 354 Mo. 1147, 193 S.W.2d 581 (1946); La Plant v. E.I. Dupont de Nemours & Co., 346 S.W.2d 231 (Spr. Mo. App. 1961); Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1057, 253 S.W.2d, 532 (St. L. Ct. App. 1952); Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Spr. Mo. App. 1944). *See* Krauskopf, *Products Liability,* 33 Mo. L. REV. 24 (1968); Rheingold, *supra* note 14, 22 BUS. LAW. at 593 n.15.

The language in the warranty cases use the term "manufacturer's intended use," but the Missouri courts have used normally expected or foreseeable use as synonymous with intended use, *i.e.,* consumer expectations as to normal use. Krauskopf, *supra,* at 33.

31. RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).

32. *Id.*, comment *i.*

33. *Id.*, comments *h* & *g.*

34. Fischer, *supra* note 14, at 342 n.30 stated: "The Restatement does not address itself to this question, but it is commonly held that under the Restate-

that the consumer's expectations as to safety could be frustrated if the consumer knew of the danger.[35]

Liability would be foreclosed under the consumer expectations test if the consumer "misused" or "abnormally used"[36] the product. This concept is explained in the *Restatement*:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottle of beverage is knocked against a radiator to remove the cap. . . . The seller is not liable.[37]

Given this defense of misuse, the question becomes what sort of action constitutes abnormal handling. In *Blevins* the court cited cases containing the following language: "The statement to the effect defendants are not liable for injuries resulting from abnormal use is only true if such abnormal use was not reasonably foreseeable. The issue is one of foreseeability, and misuse may be foreseeable."[38] Accordingly, misuse would be an abnormal use that was not reasonably foreseeable by the manufacturer.[39] A product's foreseeable uses may be very different from its intended use and would include any particular use which should be known to a reasonably prudent manufacturer. If it is determined that the use was abnormal, the "defect" requirement would not be met and the plaintiff would be denied recovery. Thus misuse negates characterization of the product as defective for purposes of imposing liability on the manufacturer.

The *Restatement* test also requires that the product be "unreasonably dangerous" to the user or consumer,[40] *i.e.*, it must be "dangerous to an extent beyond that which would be contemplated by the ordinary customer who purchases it with ordinary knowledge common to the com-

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ment a warning is not required if the danger is obvious." *E.g.*, Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 291 (1970); Denton v. Bachtold Bros., 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972). *See* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 274 (1969).

35. Fischer, *supra* note 14, at 349.

36. RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* (1965).

37. *Id.* Missouri has included this normal use concept in the strict liability instruction of the *Missouri Approved Jury Instructions* (MAI). MO. APPROVED INSTR. No. 25.04 (1969 ed.)

38. 551 S.W.2d at 607 (citing Hoppe v. Midwest Conveyor Co., 485 F.2d 1196, 1200 (8th Cir. 1973) (applying Missouri law)); Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943, 948 (St. L. Mo. App. 1970). *See* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15.01 (1960).

39. Dunham v. Vaugham & Bushnell Mfg. Co., 86 Ill. App. 2d, 315, 229 N.E.2d 684 (1967). *Accord,* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962).

40. *See* note 29 *supra*.

munity as to its characteristics."[41] This consideration relates directly to the underlying justification for imposing strict liability. Under mass marketing conditions, the consumer is induced to rely upon the suitability of the chosen product for normal use. To the extent that the consumer *expects* the danger, the product is "safe" for normal use[42] and therefore not unreasonably dangerous. Use of the "unreasonably dangerous" requirement in this context is a reiteration of the consumer expectations test.

The "unreasonably dangerous" requirement takes on a different meaning when dealing with a product which is "unavoidably unsafe."[43] This type of product is one which, due to the present state of human knowledge, is not capable of being made completely safe for its intended use.[44] The *Restatement* excepts such products from the application of strict liability; "such products are not 'defective' or 'unreasonably dangerous' if marketing them is justified because their utility outweighs the risk their use involves."[45] However, proper warning must be given regarding the unsafe nature of the product,[46] and failure to do so would render the product "reasonably dangerous." The *Restatement* provides that a proper warning must be given if the manufacturer "has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the present of . . . the danger."[47]

In discussing the unavoidably unsafe product, the *Restatement* uses the "new drug" as an example, but this characterization could apply to any product wherein the design is the cause of its unsafe nature. If the design were as safe as the present state of human knowledge permitted, the product were properly made, and a proper warning were given, the product would not be defective. However, if the manufacturer were negligent either in the propriety of the product's design or in the failure to give a proper warning based on the knowledge available at the time of

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41. However, Green, *supra* note 16, at 1210 stated:
> The ordinary consumer, if there be such, or any other consumer expects the product he buys to be as represented. So the question in any litigated case is not what was expected, but what the consumer received and consumed. Thus, the litigated issue is limited to the specific product and its condition when sold and when consumed. There is no common denominator, either in consumer's or manufacturer's expectations that will serve as a standard for the determination of the quality of the product in a particular case.

42. "Safe" as used here does not necessarily mean safe per se but that the product is to be deemed "safe" for purposes of imposing strict liability.
43. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965).
44. *Id.* comment *i.*
45. Fischer, note 14 *supra*, at 343.
46. RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* (1965).
47. *Id.* comment *i.*

manufacture, liability would attach.[48] This aspect of the *Restatement* test, involving the "unavoidably unsafe" product, introduces a requirement of culpability on the part of the manufacturer as a condition precedent to imposing strict liability. This requirement in effect reproduces the culpability requirement found in negligence theory.

The consumer expectations test has been criticized by the commentators.[49] It has been argued that expectations as to safety will not always be in line with what the reasonable manufacturer can achieve, because the average consumer will not have the same information as experts in the field. It is also stated that the modern trend is to extend the cause of action to bystanders,[50] and that the rationale of the consumer expectations test does not apply in bystander cases.[51]

In *Blevins* the Missouri court cited Oregon cases which have adopted a different seller-oriented test of defectiveness, known as the Wade-Keeton test.[52] This standard, as expressed by Dean Keeton, is that a product is defective if it is unreasonably dangerous as marketed. The product is unreasonably dangerous if a reasonable seller knowing of the risk of danger of the product and utilizing the scientific knowledge available at the time of trial would not have marketed the product so designed.[53] Under this test constructive knowledge of the defect is imputed to the manufacturer. The issue then becomes whether with this knowledge a reasonable manufacturer would have marketed the product. This determination of reasonableness involves a risk-utility analysis offered by Dean Wade.[54] The analysis involves weighing factors which include the product's utility (the product's usefulness and the availability of substitutes) against the product's risk (the product's safety, the manufacturer's ability to make the product safer, the user's ability to avoid the danger resulting from use of the product, and the user's anticipated awareness of the dangers involved).

Under the Wade-Keeton test, liability is also limited through the use of the concept of "misuse." The concept is identical to that discussed in

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48. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) (failure to warn); Balido v. Improved Mach. Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973)(propriety of product's design).

49. Fischer, *supra* note 14 at 349; Green, *supra* note 16, at 1204; Keeton, *supra* note 14, 5 ST. MARY'S L.J. at 35; Wade, *supra* note 14, 44 MISS. L.J. at 833.

50. *E.g.,* Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974).

51. Fischer, *supra* note 14, at 349-51.

52. 551 S.W.2d at 608 (citing Phillips v. Kimwood Machine Co., 269 Ore. 485, 525 P.2d 1033 (1974)); Roach v. Kononen, 269 Ore. 457, 525 P.2d 125 (1974).

53. Keeton, *supra* note 14, 5 ST. MARY'S L.J. at 37. *See* Ross v. Up Right, Inc., 402 F.2d 943, 946 (5th Cir. 1968); Helene Curtis Ind., Inc. v. Pruitt, 385 F.2d 841, 850 (5th Cir.), *cert. denied,* 391 U.S. 913 (1967). *See also* Wade, *supra* note 14, 19 Sw. L.J. at 15.

54. *See* note 16 *supra.*

the consumer expectations test above, except that it is an affirmative defense and must be pleaded and proved by the manufacturer defendant.[55] This test is attractive, in light of the trend toward expanded manufacturer liability, because the plaintiff is relieved of the burden of proving the absence of misuse as an element of his case.

The difference between the consumer expectations test and the Wade-Keeton test is that the focus in the latter is on the manufacturer who has imputed knowledge of the defect, whereas the consumer expectations test focuses on the consumer and his expectations, except in those cases involving an unavoidably unsafe product.

A recent Oregon decision[56] indicates that the state now uses the Wade-Keeton test and the consumer expectations test in the conjunctive, that is, both tests must be satisfied for a finding of defectiveness. The Oregon court defined "defective" using the Wade-Keeton standard, but in discussing "misuse" defined it as "a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for."[57] This test incorporates both standards—the article is defective only if a reasonable manufacturer with constructive knowledge of the defect would not have marketed the product *and* the plaintiff did not use the product in such a way that the average consumer could not reasonably expect the product to be safe. Adoption of this standard unnecessarily constricts the liability of the manufacturer as the plaintiff must satisfy a double burden. This would be inconsistent with the general trend in the products liability field and with Missouri decisions expanding manufacturers' liability exposure.

The courts first adopting the Wade-Keeton test in Texas[58] have recently adopted that test and the consumer expectations test in the disjunctive. In *General Motors Corp. v. Hopkins*[59] the jury was instructed that "defective" meant an "unreasonable risk of harm." "Unreasonable risk of harm" meant either that the product as designed threatened harm to persons using the product to an extent that any product so designed would not be placed in the channels of commerce by a prudent manufacturer aware of the risks involed in its use, *or* that a product so manufactured would not meet the reasonable expectations of the ordinary consumer as to its safety.[60] If Missouri courts accepted this test, strict

55. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).
56. Findlay v. Copeland Lumber Co., 509 P.2d 28 (Ore. 1973).
57. *Id.* at 31.
58. Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert. denied,* 419 U.S. 1096 (1974) (applying Texas law); Gravis v. Parke-Davis & Co., 502 S.W.2d 863 (Tex. Ct. App. 1973).
59. 548 S.W.2d 344 (Tex. 1977).
60. *Id.* at 347 n.1.

liability would be expanded to include those cases which would satisfy either the consumer expectations test or the Wade-Keeton test. With either test, the manufacturer would still retain the benefits of the limits on liability noted earlier, *i.e.*, the requirements of defectiveness and absence of "misuse."

By not clearly expressing one standard or the other, the *Blevins* court could be said to have followed the California approach to "defectiveness." Two leading California cases[61] cited in *Blevins* reject the consumer expectations test because it "rings of negligence."[62] The California courts hold simply that a manufacturer is subject to strict liability in tort if the plaintiff can prove that the article was defective and caused the injury.[63] The California Supreme Court has concluded that the question of defectiveness is a question for the jury, and that the jury is to decide the question without a more detailed standard on which to base its analysis and ultimate determination.[64] This approach has been criticized repeatedly.[65] By allowing the jury to determine "defectiveness" without judicial guidance, the policy considerations which lie behind the imposition of strict tort liability in the products area may be ignored by the lay body without an understanding of their importance.[66] The expansive responsiblities and ramifications involved in im-

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61. Cronin v. JBE Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

62. Cronin v. JBE Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 441 (1972); Donaher, Piehler, Twerski & Weinstein, *supra* note 16, at 1305.

63. Cronin v. JBE Olson Corp., 8 Cal. 3d 121, 135, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 443 (1972); Luque v. McLeon, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

64. The jurors are called upon to determine "defectiveness" by drawing on their own common experiences as consumers and by using good sense.

65. Keeton, *supra* note 14, 5 ST. MARY'S L.J. at 33 stated:

> Seemingly the Supreme Court of California does not suggest that those victimized by nondefective products would have a recovery, even when the product was used appropriately. It simply rejects the notion that the product must be "unreasonably dangerous" to be defective, and then substitutes nothing in the place of that notion to give content to the term defective.

See Fischer, *supra* note 14, at 346; Wade, *supra* note 14, 44 MISS. L.J. at 830.

66. Fischer, *supra* note 14, at 359 listed policy considerations and factors which are involved in the imposition of strict liability:

I. Risk Spreading
  A. From the point of view of consumer
    1. Ability of consumer to bear loss
    2. Feasibility and effectiveness of self-protection measures
      a. Knowledge of risk
      b. Ability to control danger
      c. Feasibility of deciding against use of product

posing strict liability on the manufacturer demand that some objective and rational basis for determining that liability be developed.

The Missouri Supreme Court has permitted via *Blevins* the submission of design defect cases under a theory of strict liability in tort. This decision is in accord with the trend in other jurisdictions[67] and has been supported by many of the commentators.[68] The effect for the practitioner is uniformity in theories of liability in the products liability area; cases may be submitted under one theory as opposed to pleading in the alternative. In completing an effective transition to strict liability theory in the design defect cases, the Missouri courts must make definitive the standard of "defectiveness" to be used to make possible the utilization of this theory of recovery without the confusion existing under the present standard.

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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 products

67. *See, e.g.,* Passwaters v. General Motors Corp. 454 F.2d 1270 (8th Cir. 1972); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Juenger v. Bucyrus-Erie Co., 286 F. Supp. 286 (E.D. Ill. 1968); LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972). *See also* Blevins v. Cushman Motors, 551 S.W.2d at 607.

68. *See generally* authorities cited note 14 *supra*.