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DISTINGUISHING THE CONCEPT OF STRICT LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES FROM STRICT PRODUCTS LIABILITY UNDER SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS: TWO PARALLEL LINES OF REASONING THAT SHOULD NEVER MEET¹

Charles E. Cantú*

I. INTRODUCTION

The cornerstone of tort law in our Anglo-American system of jurisprudence is based upon three generally accepted principles.² The first is that by awarding any individual monetary damages after their injury, we can make them whole,³ and the second is the concept of the reasonable

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1. Referring to the Euclidian definition of parallel lines as "two lines, if extended into infinity, would never meet." Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 WASH. L. REV. 51, 92-95 (1996) (providing an in-depth discussion of Euclid's fifth postulate and the parallel postulate).

2. JOHN W. WADE ET AL., PROSSER, WADE AND SCWATRTZ'S TORTS CASES AND MATERIALS 1-3 (9th ed. 1994) (including the ability to make a party whole through compensation as one of the major purposes of tort law based on a finding of fault through the application of a reasonable prudent person standard).

3. See *City of Dallas v. Cox*, 793 S.W.2d 701, 733 (Tex. App. 1990) (stating "In awarding compensatory damages, it is the purpose of the law to repair the wrong that has been done."); *McInroy v. Dyer*, 47 Pa. 118, 121 (Pa. 1864) (arguing that awarding money damages in the amount of loss is the way to do "complete justice, and is supported by authority"); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953); Robert E. Keeton & Jeffery O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims*, 78 HARV. L. REV. 329, 330-31 (1964) (allowing that the underlying principles of Anglo-American tort law is to compensate an injured plaintiff when the injury results from the action of the defendant);

prudent person.⁴ The third, and the focal point of this article, is that liability is imposed, and the corresponding right to recovery is created, not because of the fact that the plaintiff is injured, but because the injury is the result of the defendant's fault.⁵

Fault, as each first year law student is quick to learn, is either based upon the fact that the defendant was negligent in bringing about injury, or in the alternative, that the defendant intended or was substantially certain that the harm would result as the natural consequence of their behavior.⁶ The largest percentage of our tort litigation is involved with these issues. A smaller number however, are concerned with scenarios where culpability is not an issue. The defendant's liability will result in these cases because our system of jurisprudence has dictated that blame is not an element of recovery.⁷ Instead, liability is imposed simply because of the relationship between the parties, or due to the fact that the defendant has undertaken the activity which resulted in injury.⁸ This is

Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 71-72 (1993) (allowing that it is well-known that "money can provide solace for the victim").

4. *Mo.-Kan.-Tex. R. Co. v. McFerrin*, 291 S.W.2d 931, 936 (Tex. 1956) (applying the standard of a reasonably prudent person to a wrongful death case); see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 31, 32, 33 (5th ed. 1984) (imposing liability when an individual fails to act as a reasonably prudent person); Heidi Li Feldman, *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1448 (1995) (reporting that jury instructions throughout American jurisdictions require the jury to find negligence when the defendant fails to act as a reasonable prudent person).

5. See *Zurich Gen. Acc. & Liab. Ins. Co. v. Fort Worth Laundry Co.*, 63 S.W.2d 236, 236 (Tex. Civ. App. 1933) (noting that under common law, an injured workman's right to damages is based on the fault of the employer); Susanah M. Meade, *Evolution of the Species of Tort Liability Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 39-40 (1986) (providing that a defendant is liable, directly or vicariously, if the defendant is deemed responsible for the plaintiff's injury).

6. *Cont'l Ins. Co. v. Sabine Towing Co.*, 117 F.2d 694, 697 (5th Cir. 1941) (providing the well-settled rule that fault and negligence are equivalent); *Keetch v. Kroger*, 845 S.W.2d 262, 271 (Tex. 1992) (Mauzy, J., dissenting) (defining negligence to mean "fail[ing] to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances"); JOHN W. WADE ET AL., PROSSER, WADE, AND SCWATRZ'S TORTS CASES AND MATERIALS 1-3 (1994) (describing the practice of "other textwriters [sic] and courts to group [strict liability cases] under the rubric 'liability without fault'"); Lee A. Wright, *Utah's Comparative Apportionment: What Happened to the Comparison?*, 1998 UTAH L. REV. 543, 559 (1998) (stating that the majority of courts have found that fault includes both negligent and intentional conduct).

7. See *McKinnie v. Lundell Mfg. Co., Inc.*, 825 F. Supp. 834, 838 (W.D. Tenn. 1993) (providing that strict liability does not require the plaintiff to prove negligence on behalf of the manufacturer); see also WADE, *supra* note 2, at 664 (quoting Dean Prosser for the proposition that strict liability is determined "apart from wrongful intent or negligence").

8. See *DeCrosta v. A. Reynolds Const. & Supply Corp.*, 375 N.Y.S.2d 655, 658 (N.Y. App. Div. 1975) (stating that liability "arises out of the relationship between the parties"); WADE, *supra*

of course, liability without fault, or as it is more commonly known, strict liability.⁹

II. BACKGROUND

As a rule, this concept of strict liability has been very limited.¹⁰ The most common situations involve animals, some nuisance cases, libel, misrepresentation, vicarious liability, workman's compensation, and ultra-hazardous activities.¹¹ In the case of animals, the courts refuse to extend strict liability beyond situations involving a defendant who keeps a wild animal (one where its natural habitat exists in the wild),¹² or a domesticated animal with known vicious tendencies.¹³ Nuisance cases as well as those involving misrepresentations will impose liability when

note 2, at 664 (stating that Chapter 14 focuses on cases where courts have found liability based lack of fault).

9. See *C. A. Hoover & Son v. O. M. Franklin Serum Co.*, 444 S.W.2d 596, 598 (Tex. 1969) (noting that with respect to a serum manufacturer, whether the company acted as a reasonably prudent manufacturer is not an issue since the case falls under strict liability, and liability is not determined by the producer's knowledge regarding the quality of the product); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 757 (1996) (describing strict liability as no-fault liability); Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1, 29 (1993) (defining strict liability as fault based solely on the resulting injury).

10. See *Davis v. Gibson Prod. Co.*, 505 S.W.2d 682, 691 (Tex. Civ. App. 1973) (noting that we do not impose liability upon a defendant to make it an insurer; the scope of defendant's responsibility under Section 402A is limited by the 'intended use' doctrine); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1289 (2001) (stating that strict liability is likely to be applied more narrowly than other theories of tort liability); Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 346 (1996) (discussing the early application of strict liability to a narrow set of facts).

11. See *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974) (stating that "suits for damages caused by vicious animals should be governed by principles of strict liability"); *Harvey v. Buchanan*, 49 S.E. 281, 282 (Ga. 1904) (quoting GA. CIV. CODE § 3821 "A person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury."); Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 989 (1996) (stating that strict liability is applied to cases involving wild animals and ultra-hazardous activities); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 49 n.63 (1983) (highlighting cases in which strict liability is applied to finding of nuisance and libel).

12. See *DeHart v. Austin, Ind.*, 39 F.3d 718, 720 n.1 (7th Cir. 1994) (defining wild animal as "any animal which is now or historically has been found in the wild, or in the wild state").

13. *Trager v. Thor*, 516 N.W.2d 69, 75 (Mich. 1994) (failing to find a temporary caregiver of a dog is strictly liable because the temporary caregiver did not have knowledge); see also RESTATEMENT (SECOND) OF TORTS § 518 (1977) (requiring that liability for domestic animals arises only when a person has knowledge of the animals propensity for the behavior).

one of three generally accepted bases of liability is present: negligence, intentional conduct, or strict liability.¹⁴ Libel, on the other hand, has historically imposed liability without fault.¹⁵ If what was made known injured another's good name or reputation in the community, the defendant will be held responsible regardless of their intent or failure to inquire as to the truth of the matter published.¹⁶ Vicarious liability has always placed blame upon the employer or principal where the employee or agent has acted negligently. State legislatures have statutorily provided for recovery from the employer's insurance carrier when a person is injured on the job.¹⁷ It is with ultra-hazardous activities however, that we are concerned with. In these situations, common law dictates that the relationship between the defendant and the plaintiff is unimportant. Instead, the scenario is one where having undertaken an activity which is deemed dangerous or ultra-hazardous, the defendant should be held liable for any resulting injury even though there was a total absence of fault.

A. *Strict Liability*

Historically, this concept began with the decision rendered in *Rylands v. Fletcher*.¹⁸ In this case, the defendant undertook to erect reservoirs so that he could supply his mills with a source of energy.¹⁹ After careful consultation with an engineer and a competent contractor, the pools were constructed.²⁰ The weight of these pools however, caused

14. *Cox v. City of Dallas*, 256 F.3d 281, 289-90 (5th Cir. 2001) (expounding the three theories under which a nuisance claim can be asserted); *United States v. Neustadt*, 366 U.S. 696, 706 n.16 (1961) (relying on several learned authorities for the elements commonly used to support a finding that an individual is guilty of misrepresentation).

15. Paul Gaffney, Comment, *First Amendment Analysis of the Annenberg Libel Reform Proposal*, 1990 U. CHI. LEGAL F. 601, 601-23 (1990) (reporting that early libel cases were relatively simple because the defendant was held strictly liable for publication); see also James A. Hemphill, Note, *Libel—Proof Plaintiffs and the Question of Injury*, 71 TEX. L. REV. 401, 404 n.30 (1992) (explaining that prior to 1974 the courts were more likely to find that a defendant was strictly liable for libel).

16. Hemphill, *supra* note 15, at 403-04 (allowing that when a libelous statement injures the reputation of the defendant the courts would hold the plaintiff strictly liable absent a privilege).

17. *Blanchard v. Ogima*, 215 So. 2d 902, 906 (La. 1968) (stating “[a] master or employer is liable for the tortious conduct of a Servant or Employee which is within the scope of authority or employment, but a principal is not liable for the physical torts of a Non-servant agent.”); Thomas C. Galligan, Jr., *A Primer on the Patterns of Louisiana Workplace Torts*, 55 LA. L. REV. 71, 73 (1994) (reporting that under a vicarious liability theory, employers are strictly liable for the negligence of the employee).

18. First reported in L.R. 3 H.L. 330 (1868).

19. *Id.* at 331.

20. *Id.* at 331-32.

the tanks to collapse into an underground coal mine belonging to the plaintiff.²¹ When the suit was heard, the English court held that even in the absence of fault, the defendant should be held responsible.²² The decision goes to great length in drawing a distinction between natural and unnatural uses of land. At the same time, *Rylands* is clear that by bringing water onto the premises, the defendant should be held responsible when it escapes and inflicts injury.²³ Subsequent English cases continue to follow this “natural” versus “non-natural” criteria.²⁴ In doing so, these courts have looked at not only the character of the activity at issue, but at the activity’s appropriateness to the area and the surroundings to determine whether the defendant should be held strictly liable.²⁵

Although a majority of the jurisdictions in the United States have adopted the *Rylands* rule, we remain reluctant to impose strict liability as a blanket concept.²⁶ Our American judiciary seems much more inclined to find an individual responsible only when we can establish culpability.²⁷ When the principle has been applied to so-called dangerous or ultra-hazardous activities, the application has been limited. It has been limited to instances where the defendant has, for his own purpose, created an abnormal risk of harm to those surrounding him, and therefore should pay for any resulting injury.²⁸ This reasoning has been invoked

21. *Id.* at 332.

22. *Id.* at 334-35.

23. *Id.* at 335-36.

24. See *Cambridge Water Co. Ltd. v. Eastern Counties Leather Plc.*, 2 A.C. 264, 302-03 (1994) (reasoning that a defendant is liable only when the defendant has knowledge that the item placed on the land is likely to escape); *Read v. J. Lyons & Co. Ltd.*, A.C. 156 (H.L. 1947) (applying the rule of *Rylands v. Fletcher* to a munitions case).

25. *Cambridge Water Co. Ltd.* 2 A.C. at 308-09 (continuing to apply the *Rylands* rule in determining if an activity is ultra-hazardous); *Read*, A.C. at 181-82 (relating the history of the *Rylands* rule as a means of finding a defendant strictly liable for making inappropriate use of property).

26. *Porter v. Rosenberg*, 650 So. 2d 79, 81 (Fla. Dist. Ct. App. 1995) (noting that courts have been reluctant to extend strict liability to health providers who use a product incidental to the primary function); Lisa Peck Lindelef, *California Farmworkers: Legal Remedies for Pesticide Exposure*, 7 STAN. ENVTL. L.J. 72, 105 (1988) (providing that courts are loathe to impose strict liability in pesticide cases); Phillip L. McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Product Liability, Part I*, 16 MISS. C. L. REV. 393, 400 n.57 (1996) (stating that courts were not quick to find defendants strictly liable in real estate transactions).

27. Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 63-64 (1999) (stating that courts are more inclined to require a culpable mental state before awarding damages); see Lindelef, *supra* note 26, at 105 (reporting that the California courts have required parties to present evidence to the jury, presumably in an effort to find fault based on the elements set out in RESTATEMENT (SECOND) OF TORTS § 520); see also Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 160 (1995) (providing that attorneys assist the jury to assign blame).

28. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability*

in a variety of cases, primarily those involving the transportation of toxic chemicals and flammable liquids,²⁹ pile driving which has created excessive vibrations,³⁰ crop dusting which has contaminated adjoining lands,³¹ the use of poisonous gases,³² deploying rockets,³³ fireworks displays,³⁴ hazardous waste disposals,³⁵ drilling for oil,³⁶ and, coming full circle, cases involving escaping water.³⁷ In each of these scenarios, it is the appropriateness of the activity to the surrounding environs that is the controlling issue.³⁸ Once the court determines that the act was one that

Frontier: The Rejection of Liability without Defect, 66 N.Y.U. L. REV. 1263, 1276 n.54 (1991) (noting the court's reluctance to impose strict liability on non-merchants for defective products); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 294-97 (1987) (discussing the courts general reluctance to a broad application of strict liability); see also Brian J. Beck, Note, *Liability of Marine Surveyors for Loss of Surveyed Vessels: When Someone Other than the Captain Goes Down with the Ship*, 64 NOTRE DAME L. REV. 246, 268 (1989) (relating that the courts are reluctant to apply strict liability to ship surveyors).

29. *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1214 (E.D. Cal. 1976) (finding that the transport of bombs in a railroad car subjected the transporter to strict liability for injuries). *But see* *Indiana Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1174, 1183 (7th Cir. 1990) (failing to find the transporter strictly liable for spilling deadly chemicals).

30. *Vern J. Oja & Ass'n v. Wash. Park Towers, Inc.*, 569 P.2d 1141, 1143 (Wash. 1977) (applying strict liability in an effort to determine whether the defendant should be held liable for damage arising from the vibration). The court found Oja & Associates strictly liable for the damaged building because the activity they undertook was abnormally dangerous. *Id.* at 1143-44.

31. *Langan v. Valicopters, Inc.*, 567 P.2d 218, 220-21 (Wash. 1977) (finding that crop dusting is an abnormally dangerous activity and, thus, subject to strict liability when injuries occur).

32. *Luthringer v. Moore*, 190 P.2d 1, 7 (Cal. 1948) (stating that where a defendant uses poison to fumigate, the defendant is liable without fault).

33. See generally *Smith v. Lockheed Propulsion Co.*, 56 Cal. Rptr. 128, 135-142 (Cal. Ct. App. 1967) (applying a strict liability theory to rockets). For a multitude of reasons, the court found that the defendant could be held strictly liable for testing rocket engines. *Id.* at 793.

34. *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 920 (Wash. 1991), *amended by*, 817 P.2d 1359 (Wash. 1991) (concluding that, based on factors laid out in Section 520 of the Second Restatement, a fireworks displays "are abnormally dangerous activities justifying the imposition of strict liability").

35. *State Dep't of Env'tl. Prot. v. Ventron*, 468 A.2d 150, 159-60 (N.J. 1983) (exploring the application of strict liability to a case involving the disposal of toxic chemicals).

36. *Green v. Gen. Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928) (finding "absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of producing oil").

37. *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982) (concluding that the rule of strict liability governs cases where oil contaminates neighboring water wells); *Clark-Aiken Co. v. Cromwell-Wright Co., Inc.*, 323 N.E.2d 876, 887-88 (Mass. 1975) (reversing the lower court's decision by concluding that strict liability applies to escaping water in accordance with the long-standing Massachusetts law and *Rylands* rule).

38. *Miller v. Civil Constructors*, 651 N.E.2d 239, 244 (Ill. App. Ct. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 520: "The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability even though the activity is carried on with all reasonable care."); WADE, *supra* note 3, at 684 n.2 (noting that toxic chemicals, pile driving, crop dusting, the use of

should not have been performed in a particular area, strict liability is imposed.

B. Restatement (Second) of Torts Section 520

The American Law Institute has been sympathetic to this position. In the current Section 520 of the Restatement (Second) of Torts, which incidentally refers to these scenarios as those which are abnormally dangerous,³⁹ it lists six factors which should be considered by the courts when determining whether strict liability is the appropriate basis of liability.⁴⁰ From the comments, it is clear that not all elements are required, and that some, depending on the case in point, carry more weight than others.⁴¹ This should be interpreted to mean that Section 520 should be considered in its entirety.⁴² As such, each individual segment is a variable unto itself, and is given different emphasis depending on the facts presented in each individual case.

According to the first requirement, it must be established that the activity involves a high degree of risk to the person, land or chattels of others.⁴³ The initial question therefore, is whether we have an operation which carries an exceptional risk. By definition, this would eliminate those activities that the court would agree are not ultra-dangerous, and, by virtue of other sections, this would depend upon the location involved.⁴⁴ Next, Section 520 seeks to determine whether the gravity of the potential harm is likely to be great.⁴⁵ At this point, we apparently utilize the risk-benefit analysis that has been the hallmark of actionable

poisonous gases, deploying rockets and fireworks, hazardous wastes disposal, drilling for oil, and escaping water "involve the use of property").

39. RESTATEMENT (SECOND) OF TORTS § 520 (rep. note 1981) (reporting several items that are considered ultra-hazardous activities).

40. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

41. *Id.* cmt. f (stating that any one of these variables are "not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability" based on the circumstances surrounding the case at hand).

42. *Id.* ("In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance.").

43. RESTATEMENT (SECOND) OF TORTS § 520(a) (1977) (focusing on the "existence of a high degree of risk of some harm to the person, land or chattels of others").

44. *Id.* cmt. g ("In determining whether there is such a major risk, it may therefore be necessary to take into account the place where the activity is conducted. . ."); *see also* *Cmmw. v. Gen. Pub. Util. Corp.*, 710 F.2d 117, 121 n.3 (3d Cir. 1983) (suggesting RESTATEMENT (SECOND) OF TORTS § 520 cmt. g applies to a case involving nuclear energy, however, the court failed to determine whether Three Mile Island posed an ultra-hazardous activity under this section).

45. RESTATEMENT (SECOND) OF TORTS § 520(b) (1977) (questioning whether the "likelihood that the harm that results from it will be great").

negligence: $PL (G) > B = N$.⁴⁶ Under this formula, we take PL, the probability of loss, and multiply the product by G, the gravity of the foreseeable harm.⁴⁷ This total is weighed against B, the burden of eliminating or reducing the risk.⁴⁸ The end result is a negligent defendant when the burden is less than the total of the first three variables.⁴⁹ It should be noted that, while we are applying strict liability, the first half of Section 520 rings of negligence.⁵⁰ This concern is amplified by the third factor, which asks whether the risk can be eliminated by exercising reasonable care.⁵¹

Up to this point, the terms are not indicative of imposing liability without regard to the issue of fault. It is, however, at this juncture that Section 520 resurrects the principles of *Rylands v. Fletcher*. Lord Chancellor's reasoning is echoed by the fourth factor which asks whether the activity in question is a matter of common usage.⁵² This position is further strengthened by the fifth factor, which seeks to determine whether the activity is appropriate to the location in which it is conducted.⁵³ The

46. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1974) (providing Judge Learned Hand's formula for negligence as the general rule for actionable negligence); DAVID G. OWEN ET AL., *PRODUCTS LIABILITY AND SAFETY* 55-56 n.7 (3d ed. 1996) (discussing the risk-benefit analysis as it applies to actionable negligence).

47. *Carroll Towing*, 159 F.2d at 173 (using two factors to "calculate" the injury); Gina M. DeDominicis, Note, *No Duty at Any Speed?: Determining the Responsibility of the Automobile Manufacturer in Speed-Related Accidents*, 14 HOFSTRA L. REV. 403, 405 n.11 (1986) (relating that a finding of negligence starts with multiplying the probability of the harm by the gravity of the injury).

48. *Carroll Towing Co.*, 159 F.2d at 173 (providing a formula for determining negligence); DeDominicis, *supra* note 47, at 405 n.11 ("If the product of the first two factors exceeds the burden of adequate precautions, the failure to take those precautions constitutes negligence.").

49. DeDominicis, *supra* note 47, at 405 n.11.

50. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) (providing that § 520 makes allowances for both a negligence approach and a strict liability approach to ultra-hazardous activities); see also *Indiana Harbor Belt R. Co. v. Am. Cyanamid Co.*, 662 F. Supp. 635, 644 (N.D. Ill. 1987) (finding no liability for American Cyanamid under the first half of Section 520 while being strictly liable for conducting an ultra-hazardous activity in accordance with comment f).

51. RESTATEMENT (SECOND) OF TORTS § 520(c) (1977) (requiring that the defendant must be "[u]nab[le] to eliminate the risk by the exercise of reasonable care").

52. Compare *Rylands v. Fletcher*, L.R. 3 H.L. 330, 339 (1868) (providing that landowners may use their land for its natural purpose, but will be liable for the effects of the non-natural usage), with RESTATEMENT (SECOND) OF TORTS § 520(d) (1977) (stating the fourth factor to be the "extent to which the activity is not a matter of common usage"). In fact, the drafters seem to have considered Lord Chancellor's comments while drafting Section 520. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977) (discussing, among other activities, the collection of water in reservoirs in coal mining country).

53. See *Sprinkle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 416 (5th Cir. 1987) (concluding that under Section 520, the storage and use of ammonia at a manufacturing plant is not unusual nor abnormally dangerous); RESTATEMENT (SECOND) OF TORTS § 520(e) (1977) (requiring the consideration of "inappropriateness of the activity to the place where it is carried on").

Restatement therefore makes it clear that we render judgment on the behavior of the defendant in light of two factors: behavior which is appropriate to the surroundings and which is also a matter of common acceptance.⁵⁴ This will be considered on a case by case basis. If both elements are present, strict liability is likely to be given.⁵⁵ Finally, section six weighs the value of the activity to the community.⁵⁶ This balancing is conducted from either the standpoint of pure economics or as a matter of public policy.⁵⁷ The ultimate question we seek to answer is whether there is any resulting benefit to the community.⁵⁸ When the surrounding area receives no economic benefit, or the activity is against public policy, it is likely that strict liability will be applied.⁵⁹

54. See *Sprinkle*, 824 F.2d at 409 (applying § 520 to conclude that the activity was not ultra-hazardous and, therefore, did not result in strict liability); RESTATEMENT (SECOND) OF TORTS § 520(d), (e) (1977).

55. See *Crosby v. Cox Aircraft Co. of Washington*, 746 P.2d 1198, 1201 (Wash. 1987) (noting that aviation is an activity of common usage, and is appropriately conducted over populated areas); William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1157 nn.258, 260 (1989) (providing that when subsections (d) and (e) are present a finding of strict liability is appropriate); see also Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 397 (1987) (opining that the location of the activity considered in its totality may allow a particular activity to be subjected to the rule).

56. RESTATEMENT (SECOND) OF TORTS § 520(f) (quoting the final factor as the “extent to which its value to the community is outweighed by its dangerous attributes”).

57. Stephen Kelly Lewis, Comment, “*Attack of the Killer Tomatoes?*” *Corporate Liability for the International Propagation of Genetically Altered Agricultural Products*, 10 TRANSNAT’L LAW. 153, 187-88 (1997) (relating that the findings of strict liability for an ultra-hazardous activity is grounded both in economics as well as public policy); Donald E. Santarelli & Nicholas E. Calio, *The Gun on Tort Law: Aiming at Courts to Take Product Liability to the Limit*, 14 ST. MARY’S L.J. 471, 499-500 (1983) (arguing that hand gun manufacturers should not be held strictly liable for distributing hand guns because their action provides both an economic benefit and a socially useful purpose, thus, not an abnormally dangerous activity).

58. *Albig v. Mun. Auth. of Westmoreland County*, 502 A.2d 658, 668 (Pa. 1985) (stating “Section 520 of the RESTATEMENT (SECOND) OF TORTS should result in a determination that the activity is not abnormally dangerous only when the individuals imperiled by the activity are also the individuals benefited by the activity”); Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 623-24 (1999) (noting that if the activity provided some benefit to the community then strict liability can be avoided); see also RESTATEMENT (SECOND) OF TORTS § 520 cmt. k (1977) (providing that, even in situations where the activity is not common to the area, the value might be sufficient to support a finding that the activity was not ultra-hazardous, thus no strict liability applies).

59. See *Albig*, 502 A.2d at 668 (asserting that only when the portion of the community receiving the benefit of the activity is also placed at risk then should subsection 520(f) produce a finding that the activity is not abnormally dangerous); Keith N. Hylton, *The Theory of Tort Doctrine and The Restatement (Third) of Torts*, 54 VAND. L. REV. 1413, 1424 (2001) (providing that when the last three factors of Section 520 of the Second Restatement are established, strict liability arises); Elizabeth C. Price, *Toward a Unified Theory of Product Liability: Reviving the Causative Concept of Legal Fault*, 61 TENN. L. REV. 1277, 1304 (1994) (relating Professor Keeton’s concern that finding a value to the community would prevent a finding of strict liability).

If we take Section 520 to be a representation of the American position on the issue of strict liability, it becomes clear, regardless of those latent ambiguities resulting from a choice of terms, that strict liability will result when the defendant undertakes an ultra-hazardous activity.⁶⁰ It would appear to be one that is inappropriate to the locale and which, by its nature, poses great risk of harm to others and has no particular redeeming value to the community. In essence, we are weighing the risk of harm emanating from the activity against its appropriateness to its surroundings. As we shall see, this is not how we determine the applicability of strict liability in the area of defective products under Section 402A of the Restatement (Second) of Torts.

C. History of Section 402A of the Restatement (Second) of Torts

The idea of strict liability in the area of defective products did not appear unexpectedly.⁶¹ It may have caused a surprising and dramatic increase in the number of law suits involving defective products. However, before the concept was published as part of the Restatement, it had, in true compliance with the tradition of the American Law Institute, been espoused for many years.⁶² As far back as the 1940's, concurring opinions had called for the imposition of strict liability whenever a manufacturer undertook to introduce a defective product into the stream of commerce. This position was actively supported by legal scholars.⁶³ In 1963 however, Judge Roger Traynor of the Supreme Court of California wrote his decision in *Greenman v. Yuba Power Products, Inc.*,⁶⁴ and gave the idea new impetus.⁶⁵

60. *Miller v. Civil Constructors*, 651 N.E.2d 239, 245 (Ill. App. Ct. 1995) (stating that "The doctrine of strict or absolute liability is ordinarily reserved for abnormally dangerous activities for which no degree of care can truly provide safety."); John Whitney Pesnell, Note, *Contributing Negligence—When Should it be a Defense in a Strict Liability Action?*, 43 LA. L. REV. 801, 812 (stating that the issue of strict liability for ultra-hazardous activities "has been treated by the courts as one of allocating inevitable losses"); see also Nolan & Ursin, *supra* note 28, at 273 (providing that strict liability will not be instituted where the community receives a benefit, however, once this hurdle is cleared, strict liability can be imposed).

61. Charles E. Cantú, *Twenty-five Years of Strict Product Liability Law: The Transformation and Present Meaning of Section 402A*, 25 ST. MARY'S L.J. 327, 329 (1993).

62. *Id.*

63. See *id.* (relating that scholars long supported the idea of strict products liability prior to the publication of Section 520 of the RESTATEMENT (SECOND) OF TORTS).

64. 377 P.2d 897 (Cal. 1963).

65. DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 157 (1996) (noting that the Traynor decision led the American Law Institute to adopt *Greenman v. Yuba* as Section 402A); Andrew T. Bayman, Note, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557, 577 (1989) (relating that Section 402A built on the idea set forth in *Greenman*).

In this case, the defendant manufacturer sold a power tool that could be used as a saw, drill press, and wood lathe.⁶⁶ The plaintiff was injured when as a result of a defect in the design, a large piece of wood flew off and struck the plaintiff in the head.⁶⁷ Judge Traynor's decision reasoned that, strict liability in the area of defective products had originally been recognized in the area of unwholesome foods, and had recently been extended to such products as a grinding wheel, bottles, a vaccine, an insect spray, a surgical pin, a skirt, a tire, a home permanent, a hair dye, and automobiles.⁶⁸ Traynor further reasoned that although these cases had been decided on the basis of implied or expressed warranties running from the manufacturer to the injured plaintiff, recent changes in the law abandoned the principle of privity, and refused to allow a manufacturer to disclaim expressed and implied warranties.⁶⁹ This made it clear that we were really deciding these cases upon the principles of strict liability.⁷⁰ Accordingly, judgment was rendered for the plaintiff based on this rationale.⁷¹ Importantly, this was the first time a majority opinion had bypassed legal fiction and imposed strict liability for injuries resulting from a defective product.⁷² As we shall see, this decision was an impressive beginning. The final outcome was codified as Section 402A of the Restatement (Second) of Torts which provides:

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.

66. *Greenman*, 377 P.2d at 898.

67. *Id.*

68. *Id.* at 901.

69. *Id.*

70. *Id.*

71. *Id.* at 901. ("To establish the manufacturer's liability it was sufficient that the plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture. . .").

72. Scott J. Mueller, Note, *Product Liability for Smokeless Tobacco: Should Tobacco Companies be Liable for a Failure to Warn*, 21 SUFFOLK U. L. REV. 769, 778 (1987) (recognizing that "the Supreme Court of California totally bypassed the negligence and warranty concepts and applied a tort theory of strict liability in *Greenman v. Yuba Power Products, Inc.*"); see Gerard M. Mackarevich, Note, *Manufacturers' Strict Liability for Injuries From a Well-Made Handgun*, 24 WM. & MARY L. REV. 467, 479 (1983) (indicating that strict products liability under Section 402A grew out of the California Supreme Court's decision in *Greenman v. Yuba Power Prod, Inc.*).

The rule stated in Subsection (1) applies although (a) a 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.⁷³

Before discussing the subsequent development and expansion of this Section, it should be noted that Judge Traynor was a member of the American Law Institute's group which had drafted the original version of Section 402A two years earlier, limiting its application to food products.⁷⁴ The following year, Section 402A was extended to include all products intended for intimate bodily use.⁷⁵ Thus in 1963, Traynor must have been elated when *Greenman v. Yuba Power Products, Inc.* rose through the appellate process to appear in his court, giving him an opportunity to express an idea he had supported for over two decades. In 1964, his decision was used as the basis for Section 402A.⁷⁶ This was the first time in the history of the Institute that a section was drafted on the authority of one decision. Section 402A did not represent either a majority or minority position; it was based upon one case. Nevertheless, it was not long before this principle became the almost unanimous position in the United States.⁷⁷

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

74. RESTATEMENT (SECOND) OF TORTS § 402A (Draft Search Term End No. 6, 1961) (discussing the limited scope of products the American Law Institute sought to cover under early drafts of Section 402A); Oscar S. Gray, *Reflections on the Historical Context of Section 402A*, 10 TOURO L. REV. 75, 85 n.37 (1993) (reporting that Judge Traynor was a member of the American Law Institute's Advisory Committee that drafted Section 402A).

75. RESTATEMENT (SECOND) OF TORTS § 402A (Draft Search Term End No. 7, 1962); see also Gray, *supra* note 74, at 85 n.40 (relating that the Traynor decision was used to expand the scope of defective products ultimately covered by Section 402A).

76. Gray, *supra* note 74, at 85 (allowing that the final draft on Section 402A reflected Traynor's earlier decision); Victor E. Schwartz, *The Restatement (Third) of Torts: Product Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 747 (1998) (stating that Dean Prosser and Judge Traynor "now had 'the case' to apply section 402A to all products" after the decision in *Greenman v. Yuba Power Products, Inc.*); Michael J. Tdoke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why The Comment D Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1196 (1996) (relating that Dean Prosser drafted Section 402A solely on the basis of Judge Traynor's reasoning).

77. Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1160 (Cal. 1972) (stating that "numerous cases" have adopted Restatement (Second) Section 402A); Scott Gordon Night, Comment, *Product Liability: Component Part Manufacturer's Liability for Design and Warning Defects*, 54 J. AIR L. & COM. 215, 218 (1988) (relaying that the majority of jurisdictions have adopted Section 402A); Mark R. Sullivan, Note, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.: Abuses of Pennsylvania's Products Liability Symmetry*, 43 U. PITT. L. REV. 1181, 1186 (1982) (stating that Section 402A became popular with a majority of courts shortly after its publication by the American Law Institute).

D. Subsequent Interpretation of Section 402A

It soon became clear that Section 402A was going to be liberally interpreted and eventually mean more than what had been originally expressed. Much has been written on this phenomenon,⁷⁸ and it need not be explored here. What will be emphasized, however, is the concept of applying strict liability upon one who has introduced a defective product into the stream of commerce.

From the beginning, the courts were adamant that the Restatement did not call for absolute liability.⁷⁹ The idea was not to make sellers of goods insurers. It was not the idea that the plaintiff had been injured that called for the imposition of damages, but instead, the fact that the plaintiff's injuries were caused by the defendant's defective product.⁸⁰ Section 402A's one phrase: "in a defective condition," was extremely important, and one of the most difficult for the courts to interpret.⁸¹

78. See, e.g., Myron J. Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526, 540 (1987) (providing that the liberal interpretation of Section 402A has "led to illogical and sometimes bizarre results"); Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1242 (1994) (asserting that Section 402A expanded the ability to recover based on each jurisdiction's interpretation of what the drafters failed to say); William E. Westerbeke, *The Source of Controversy in the New Restatement of Products Liability: Strict Liability Versus Products Liability*, 8 KAN J.L. & PUB. POL'Y 1, 6 (1998) (providing that Section 402A originally was intended to deal with traditional barriers to recovery, but soon grew to become "an all-purpose and all-encompassing cause of action to deal with the whole field of products liability").

79. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (relating that the consumer contemplation test found in Section 402A prevents the imposition of absolute liability); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986) (relying on Judge Traynor's 1965 article for the proposition that Section 402A was never meant to envelope absolute liability as a theory of recovery); *Kysor Indus. Corp. v. Frazier*, 642 P.2d 908, 911 (Colo. 1982) (limiting the scope of liability under section 402A to strict liability on a limited basis, rather than absolute liability).

80. *Commw. v. Johnson Insulation*, 682 N.E.2d 1323, 1326 (Mass. 1997) (quoting the RESTATEMENT (SECOND) OF TORTS in stating "The Restatement of Torts, *supra*, takes the position that the seller of '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,' even though 'the seller has exercised all possible care in the preparation and sale of his product.'"); RESTATEMENT (SECOND) OF TORTS § 402A (1) (subjecting merchants to liability when their product injures a user or consumer); see Wertheimer, *supra* note 78, at 1241 nn.24, 27 (likening liability under Section 402A to the doctrine of *res ipsa loquitur* because to is the defendant's action, the introduction of the defective product to the stream of commerce, that caused injury to the plaintiff); *Night, supra* note 77, at 219 (stating that Section 402A claims require that a product has caused injury to the plaintiff).

81. RESTATEMENT (SECOND) OF TORTS § 402A (1) (requiring that a product be in a defective condition before a plaintiff can assert a claim); see *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 740 (N.Y. 1995) (Simons, J., dissenting) ("But the Search Term Begin word 'defect' has no clear legal meaning"); *Burchill v. Kearney-National Corp. Inc.*, 468 F.2d 384, 387, 389 (3d Cir. 1972) (Van Dusen J., dissenting) (drawing different conclusions based on the same facts in both the majority opinion and the dissenting opinion regarding the defectiveness of a fitting).

Distinguishing between goods that are legally “defective” and those that were simply shoddy or fulfilled the requirement of the classic lemon was difficult.⁸² When we consider that any product is capable of inflicting injury and that no product is technologically perfect, the scope of the problem becomes clear.⁸³ When we add to this dilemma the court’s initial uncertainty of the fact that a product may be in a defective condition because it was misdesigned, and/or misassembled, and/or mismarketed, the problem increases.⁸⁴ And if we include the fact that there was no one accepted test for determining a defective condition, the difficulty increases further yet.⁸⁵ It is perhaps for these reasons that early decisions interpreting Section 402A were confusing. The courts were feeling their way. However, once the concept of defectiveness became clear, well-established standards evolved.

III. UNCOVERING THE MYSTERIES OF SECTION 402A

A. *Mismanufactured Products*

When speaking in terms of defectiveness, the first concept to be recognized was that of a mismanufactured or misassembled product.⁸⁶ This condition is the result of either substandard raw material used in the construction of the goods, and/or the fact that the product has been con-

82. See James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1260-61 (1993) (commenting that Section 402A provided a tremendous amount of flexibility for courts when asked to define “defective condition unreasonably dangerous”).

83. OWEN, *supra* note 65, at 262 n.3 (stating that “all products are flawed at some level”).

84. See Lisa L. Havens-Cortes, Comment, *Melody Home, DTPA and the Medical Profession*, 45 BAYLOR L. REV. 985, 999 (1993) (relating that section 402A recognizes three means by which a product can be defective); J. David Tate, Comment, *The American Law Institute Study on Enterprise Liability for Personal Injury: How Does Texas Tort Law Compare?*, 45 BAYLOR L. REV. 103, 110 (1993) (providing that there are three recognized theories for determining whether a product is defective). See generally OWEN, *supra* note 65, (providing a discussion on the three types of defects recognized by both legal scholars and the courts).

85. Henderson & Twerski, *supra* note 82, at 1260-61 (discussing that courts could apply any test “[l]ike the Oracles at Delphi” when determining whether a product was defective); Keith Miller, *Design Defect Litigation in Iowa: Myths of Strict Liability*, 40 DRAKE L. REV. 465, 469-70 (1991) (stating that, while the comments to Section 402A offered some guidance, little support was provided to courts attempting to determine whether a product was defective); Rebecca Tustin Rutherford, Comment, *Changes in the Landscape of Products Liability Law: An Analysis of the Restatement (Third) of Torts*, 63 J. AIR L. & COM. 209, 210-11 (1997) (declaring that courts and scholars have expressed concern over the confusing standard of liability created by section 402A).

86. See Wertheimer, *supra* note 78, at 1241 n.27 (declaring that, early in the history of Section 402A, some scholars argued that the section was intended only to apply to mismanufacture cases).

structed in a manner not intended by the manufacturer.⁸⁷ Hypothetically speaking, the present state of the good may be attributable to a latent condition or something as simple as a missing screw, a misplaced safety device, or a bolt that has not been securely fastened; a mishap that occurred at some point in the manufacturing process.⁸⁸ It is obvious that this product stands alone. It is different from all other products manufactured at that time.⁸⁹ As a result, the best method which evolved to determine whether the product was defective is the reasonable expectations test.⁹⁰ This is an objective test and easy to apply.⁹¹ Since reasonable minds may differ, the question is one for the jury: did the product meet the reasonable expectations of the ordinary user or consumer?

The most common method for determining this issue is to look at three criteria: product usage, product characteristics, and the manufacturer's advertisements.⁹² Under the first, we are concerned with the pur-

87. *Ford Motor Co. v. Massey*, 855 S.W.2d 897 (Ark. 1993) (holding that a stiff throttle cable used in the repair of an automobile gave rise to a question of fact regarding mismanufacture); *C. L. Pouncey v. Ford Motor Co.*, 464 F.2d 957, 961-62 (5th Cir. 1972) (finding that the plaintiff had offered sufficient evidence that the material used in manufacturing a fan blade could cause the product to be defective).

88. *Titus v. Bethlehem Steel Corp.*, 154 Cal. Rptr. 122, 128 (Cal. Ct. App. 1979) (noting that a product may be defective because it lacks a safety device).

89. John Cirace, *A Theory of Negligence and Products Liability*, 66 ST. JOHN'S L. REV. 1, 62 (1992) (asserting that a mismanufactured product differs from the other units produced by a manufacturer); Thomas C. Galligan, Jr., *Product Liability—Cigarettes and Cipollone: What's Left? What's Gone?*, 53 LA. L. REV. 713, 727 (1993) (affirming that a mismanufactured product "deviates from otherwise identical products made by the same manufacturer").

90. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 798 (Wis. 1975) (concluding that comments g and i of the Second Restatement require that a defective product which has been mismanufactured shall be determined based on "the reasonable expectations of the ordinary consumer"); see David A. Fischer, *Product Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 348 (1974) (relating that the consumer expectations test is a natural fit when determining defectiveness).

91. Fischer, *supra* note 90, at 351; Rutherford, *supra* note 85, at 224 (categorizing the consumer expectations test as "reliable and easy to administer" and is determined from the perspective of the ordinary consumer).

92. See *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 806 (Wash. 2000) (stating that "a product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."); see also *Mattingly v. Anthony Indus., Inc.*, 167 Cal. Rptr. 292, 294 (Cal. Ct. App. 1980) (citing *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 894 (9th Cir. 1977) for the statement that "the court found that the jury was properly instructed that a product was defective when it has a propensity for causing physical harm" . . . 'beyond that which would be contemplated by the ordinary (user or) consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.');

Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283, 315 n.105 (1995) (discussing that a product is defective under the consumer expectations test because the products' defective condition arises from the characteristics or common usage); see Lisa L. Locke, Note, *Products Liability and Home-Exercise Equipment: A Failure to Warn and Instruct May Be*

pose for which the product is ordinarily employed.⁹³ This measure is reminiscent of the implied warranty of merchantability under the Uniform Commercial Code, in that, we are concerned with the purpose for which the product is ordinarily used.⁹⁴ A manufacturer should foresee some misuse of their product, but they are not insurers, and if individuals engage in unforeseeable uses, the manufacturer should not be held responsible.⁹⁵ The converse however, is also true. The goods in question should be suitable for the purposes for which they are ordinarily used.⁹⁶ Consumers are entitled to this expectation, and have come to rely upon it.⁹⁷ The second criterion concerns itself with the appearance of the product.⁹⁸ Under normal conditions, we expect more from heavy ma-

Hazardous to Your Health, 22 SUFFOLK U. L. REV. 779, 807-08 (1988) (relaying that a product may be defective based on advertising); Douglas E. Schmidt et al., *A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability*, 21 WM. MITCHELL L. REV. 411, 414 (1995) (relating that defectively manufactured product can arise due to the product's construction); Marshall Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370 (1974) (hypothesizing that defects may be rightfully based on advertising).

93. RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965) (providing that a product is not defective "when it is safe for normal handling and consumption"); James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Product Liability Restatement*, 26 HOFSTRA L. REV. 667, 677 (1998) ("A product that fails its manifestly intended function is blatantly defective.").

94. Compare U.C.C. § 2-314(2)(c) (1995) (requiring that a good be "fit for the ordinary purpose for which such goods are used"), with RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965) (commenting that a product is not in a defective state "when it is safe for normal handling and consumption").

95. Featherall v. Firestone Tire & Rubber Co., 252 S.E.2d 358, 367 (Va. 1979) (holding that no award shall be granted for the unforeseen misuse of a product); see also David S. Goldberg, Comment, *Manufacturers' Post-Sale Duties in Texas—Do They or Should They Exist*, 17 ST. MARY'S L.J. 965, 983 (1986) (arguing that a manufacturer should not be liable for the unforeseen misuse of their product).

96. See Cook v. Downing, 891 P.2d 611, 613 n.1 (Okla. Ct. App. 1994) (noting that the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question); Wertheimer, *supra* note 78, at 1239 n.19 (quoting William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799 (1966) for the idea that "[b]y placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising and otherwise they do everything they can to induce that belief"). Wertheimer also cites comment c of Section 402A for the general proposal that consumers expect manufactures to market safe products or bear the burden associated with a defective product. *Id.*

97. See Navarro v. Fuji Heavy Indus., Ltd., 117 F.3d 1027, 1029 (7th Cir. 1997) (stating that consumers expect the products they purchase not to be defective).

98. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (basing defect on the ordinary community's knowledge regarding a products characteristics); see Jankowski, *supra* note 92, at 315 n.103 (relating that the plaintiff in *Lester v. Magic Chef, Inc.*, 641 P.2d 353 (Kan. 1982) objected to a jury instruction that called for a finding of a defective product based on characteristics). Stating that much had been written about Comment i, thus the court held that the instruction was not unreasonable. *Lester* 641 P.2d at 359, 361.

chinery than delicate, fine precision tools, and this would apply to the expectations of those who are engaged in using the product.

Finally, the third element deals with the representations or allegations made in advertisements.⁹⁹ This issue concerns the projected image that has been cast upon the consuming public.¹⁰⁰ If the manufacturer has created an image calling for strong, durable goods, we should hold them to their word. These concepts work hand-in-hand when determining what a reasonable person would expect when using a product and, if this confidence is breached, we should hold the responsible party liable for having violated this standard.

The reasonable expectations test is not universal. For example, in the area of foodstuff, some jurisdictions adhere to what is generally referred to as the foreign/natural test when attempting to distinguish between food that is merely unwholesome and that which is in a defective condition.¹⁰¹ Under this test, the jury is asked whether the alleged adulterated food contains a substance which is natural, such as a kernel of corn in a package of corn flakes, or whether the substance is foreign such as a decomposed mouse in a soft drink.¹⁰² The downside to this criteria is that the more outrageous the matter in question and the more unpalatable to the average person, the more likely it is that the jury will determine that the product is defective. It is for this reason, that since

99. See Ralph D. Davis, *Different Treatment of Marketing and Design Defects in Pure Risk-Utility Balancing: Who's the Villain?*, 27 AM. BUS. L.J. 41, 50 (1989) (relating that marketing contributes to an overall feeling of confidence in the product due to a familiarity with the product); Shapo, *supra* note 92, at 1370 (allowing that a product's marketing can lead to a defective product).

100. Davis, *supra* note 99, at 50 ("Advertising, especially advertising portraying product use, creates representational attributes, and does so by design. Even if the advertising is only for the purpose of product name awareness or image with no product portrayal, such advertising contributes to overall familiarity with, and hence confidence in, a particular product."); Note, *Harnessing Madison Avenue: Advertising and Product Liability Theory*, 107 HARV. L. REV. 895, 904-06 (1994) (relaying that courts have used advertising as a means of establishing that a product is defective due to the advertisement's ability to reduce the risk in the eyes of the consumer).

101. See Mitchell v. T.G.I. Friday's, 748 N.E.2d 89, 93-94 (Ohio Ct. App. 2000) (noting that some Ohio appellate courts have recognized the Ohio Supreme Court as having adopted the Foreign-Natural Test); Leigh A. Aughenbaugh, Note, *The Demise of the Foreign-Natural Test in North Carolina—Goodman v. Wenco Foods*, 16 CAMPBELL L. REV. 275, 289 (1994) (reporting that some states continue to use the foreign/natural test as a means of determining whether a food product is defective).

102. Hickman v. Wm. Wrigley, Jr. Co., Inc., 768 So. 2d 812, 816 (La. Ct. App. 2000) (stating that "under the 'foreign-natural test', if the harmful substance is foreign, the defendant is strictly liable, and the analysis stops. If the substance is natural to the food, then the negligence of the defendant must be determined."); Aughenbaugh, *supra* note 101, at 277 (describing the jury's role in determining whether a food product is defective under the foreign/natural test); see also Gail Kachadurian McCallion, Note, *From the Source to the Mouth: What Can you Reasonably Expect to Find in Your Food?*, 5 FORDHAM ENVTL. L.J. 189, 211-12 (1993) (illustrating the foreign/natural test).

1965, the reasonable expectations test has emerged as the most widely used when attempting to determine whether this or any other type of product has been mismanufactured.¹⁰³

B. *Misdesigned Products*

From the above discussion, we see that a finding of mismanufacture isolates the product in question as one which is defective, and as a result there is no question that it stands apart from the rest of the defendant's goods. A decision finding that a product has been misdesigned, however, condemns the defendant manufacturer's entire line of production.¹⁰⁴ It is for this reason that the courts have exercised more diligence and spent more time deriving a standard for defectiveness. As a result, different norms have been advanced by legal scholars at one time or another. With differing combinations and with varying enthusiasm, the various tests have been: 1) whether the product met the reasonable expectations of the user or consumer (the same test employed when determining whether goods have been mismanufactured, which added to the confusion discussed above); 2) whether a reasonably prudent manufacturer would have placed their product into the stream of commerce had they been aware of the risk in question; 3) whether the product was in a condition considered to be unreasonably dangerous; and 4) whether the risk created by the product in its design outweighed its utility or benefit to society.¹⁰⁵

All of the above have been employed, but it is the last test, designated as the risk-benefit analysis, which is an almost identical formula to

103. Cantu, *supra* note 61, at 334 (contending that the reasonable expectations test has gained acceptance as the favored test used to determine whether a product has been mismanufactured); Aughenbaugh, *supra* note 101, at 289 (providing that the national trend is to employ the reasonable expectations test when determining whether a product has been mismanufactured).

104. John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 704 n.122 (1988) (concluding that a defective design results in a defective product line); Michelle Capezza, Comment, *Controlling Guns: A Call for Consistency in Judicial Review of Challenges to Gun Control*, 25 SETON HALL L. REV. 1467, 1485 n.65 (1995) (asserting that when a product is found to be misdesigned "every one of the products represents a potential lawsuit against the manufacturer").

105. Robert P. Murrian, *Products Liability—Tennessee's Prudent Manufacturer Test*, 67 TENN. L. REV. 307, 308 (2000) (reporting that the prudent manufacturer test has been a long standing measure of whether a product is defective); William R. Pilat, Comment, *Strict Liability and Design Defects: Do Texas Courts Provide Jury Instructions that Instruct?*, 29 HOUS. L. REV. 633, 636-37 (1992) (providing the two views taken by the courts in determining whether a defective product is considered defective by design); Michael J. Toke, Note, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 257 (1996) (criticizing the application of the reasonable expectations test to misdesign cases).

PL (G)>B = N that is used as the hallmark for determining actionable negligence. This test has emerged as the prevailing standard for determining misdesign.¹⁰⁶ Under this test, however, we are concerned with the issue of product defectiveness, not negligence. As a consequence, the formula is stated as PL (G)>B = D,¹⁰⁷ and as we did in the area of negligence, we multiply PL (the probability of foreseeable loss) against the G (the gravity of the resulting harm).¹⁰⁸ This total is then balanced against B (the burden of eliminating or reducing the injury).¹⁰⁹ Again, we have a defective product in those cases where the burden is less than the product of the first three variables.¹¹⁰ In this instance however, the burden is not concerned with the behavior of the defendant, but with the issue of a feasible alternative to the present design of the product.¹¹¹

It is in the area of a feasible alternative that the finders of fact will consider various factors. For example, they will investigate cost.¹¹² After all, we do not expect the defendant to spend themselves into oblivion in order to introduce a different product into the stream of commerce.¹¹³

106. *Brown v. Link Belt Div. of FMC Corp.*, 666 F.2d 110, 115 (5th Cir. 1982) (stating "In defining unreasonably dangerous, a balancing test is mandated: if the likelihood and gravity of harm outweigh the benefits and utility of the product, the product is unreasonably dangerous."); Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1636 (1997) (commenting that the risk-benefit analysis for determining defectiveness "employ[s] a more Hand-like risk-benefit test"); David A. Urban, Comment, *Custom's Proper Role in Strict Products Liability Actions Based on Design Defect*, 38 UCLA L. REV. 439, 471 (1990) (recognizing the similarities between the negligence formula espoused by Judge Learned Hand and the risk-benefit test for a defectively designed product).

107. *Knitz v. Minster Mach. Co.*, 1987 WL 6486, at *17 (Ohio Ct. App. Feb. 9, 1987) (listing the five factors that give rise to the risk-benefit formula for defective design); *Baker v. Lull Engineering Co.*, 573 P.2d 443, 455 (Cal. 1978) (asserting the five factors for determining whether a product is defective under what was to become known as the risk-benefit test and relied on by the *Knitz* court).

108. DeDominicis, *supra* note 47, at 419 (relating the formula utilized in determining whether a product is defective based on design).

109. *Id.*

110. *Id.* (concluding that a product is defective when the burden to the manufacturer is outweighed by the gravity of the harm multiplied by the probability that the loss will occur).

111. *Id.*

112. *Knitz*, 1987 WL 6486, at *17 (identifying the five factors that the jury reviews when answering the issue of defective product design); *Baker*, 573 P.2d at 455 (asserting a non-exhaustive list of factors the jury should consider when determining whether a product is defective). The list of five factors from *Baker* provides that:

[A] jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Id.

113. See *Delaney v. Deere & Co.*, 999 P.2d 930, 945 (Kan. 2000) (quoting RESTATEMENT (THIRD) OF TORTS § 2, Comment d: "the test is whether a reasonable alternative design would, at

In addition, the jury will consider the marketability of the proposed redesign.¹¹⁴ Manufacturers are in business to make a profit; therefore, it would be foolish to require a redesign that would not sell.¹¹⁵ Moreover, state of the art, also known as technological feasibility, is another factor for the jury to consider.¹¹⁶ We will not require a manufacturer to design their goods in a manner that is impossible to create.¹¹⁷ Utility is also considered: What good is a product that does not fulfill the needs of the consuming public?¹¹⁸ And finally, the issue of safety is of the utmost importance.¹¹⁹ Our ultimate concern is a safer product and whether the

reasonable cost, have reduced the foreseeable risks of harm posed by the product, and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe.”); James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 274 (1990) (stating that a court that subjects manufacturers to retroactive liability for defective products “is asking the impossible of manufacturers”); James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY’S L.J. 351, 381 (1983) (questioning “[w]here will these essential products come from when the business is punished into oblivion?”); See Wertheimer, *supra* note 78, at 1244 n.36 (relating that some scholars argue that the manufacturer should not be required to constantly introduce new and safer products into the marketplace at the risk of going out of business).

114. DeDominicis, *supra* note 47, at 419 (relating that the jury usually determines whether the product is defective under the risk-benefit analysis); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 838-41 (1973) (contrasting the jury’s role in determining products liability compared to court’s role in determining negligence).

115. See Mead, *supra* note 5, at 853 (asserting that a finding of defectiveness is correct when the court concludes that a redesign of the product is possible); John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 750 (1983) (arguing that when the price of the redesign removes the product from the marketplace, the redesign is not feasible).

116. *Baker*, 573 P.2d at 455 (listing the possibility of a feasible alternative as a factor the jury should consider when determining the defectiveness of a product); Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U. L. REV. 1, 28-29 (1982) (asserting that the jury answers the question of feasible alternative as part of the ultimate issue of defectiveness).

117. *Baker*, 573 P.2d at 455 (requiring that a safer alternative design must be, among other things, mechanically feasible); Daniel C. Pope, Case Note, *Maryland Holds Manufacturer of ‘Saturday Night Specials’ Strictly Liable for Injuries Suffered by Innocent Victims of Criminal Handgun Violence: Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 497 A.2d 1143 (1985), 20 SUFFOLK U. L. REV. 1147, 1154-55 (1986) (applying the risk-benefit analysis to a handgun case only to conclude that in those instances where a safer design is not possible the product cannot be defective).

118. *Baker*, 573 P.2d at 455 (expressing that the jury should consider “the adverse consequences to the product and the consumer that would result from an alternative design”); Jerry Phillips, *The Proposed Products Liability Restatement: A Misguided Reversion*, 10 TOURO L. REV. 151, 179-80 (1993) (asserting that the issue of utility is rightfully placed upon the jury when determining whether a substitute product should be placed on the market for consumption).

119. *Baker*, 573 P.2d at 455-56 (noting the over-arching theme risk-utility test is to introduce a design that is safer for the user or consumer); Kathryn Dix Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz’s Model and the Cost-Minimization Alternative*, 46 U. MIAMI L. REV. 1, 64 n.248 (1991) (stating the purpose of the risk-benefit analysis is to provide an incentive to

alternative design meets this goal must be considered by the jury.

While this test appears to be the same as that used in the area of actionable negligence, there are some important differences. First, under 402A, we are concerned with whether the product is defective and not with whether the defendant was negligent. In addition, the focus is on the condition of the product and not on the conduct of the defendant. Finally, under this test the defendant is charged with knowledge of the defective condition, whereas in the area of actionable negligence the defendant is held to the standard of the reasonable prudent expert. After some trial and error, the risk-benefit analysis emerged as the prevailing test for determining misdesign. It is easy for the jury to apply and appears to be best suited for situations where an addition, modification, or deletion in the existing product will result in a safer more efficient product.

C. *Mismarketed Products*

The third and final perspective of defectiveness involves marketing. Here, we are concerned with the safe and effective use of the product, which has a direct correlation to the adequacy of both the warnings and instructions accompanying the goods.¹²⁰ Oddly, and this may have contributed to some of the confusion mentioned earlier, we encounter two similarities that arose in the area of misdesign. The first is that the manufacturer intended to place its product into the stream of commerce in its present condition. Again, this means that a finding of defectiveness will condemn the defendant's entire product line.¹²¹ Second, the

manufacturers to create a safer product).

120. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (commenting that a "seller may be required to give directions or warnings, on the container [of a product] as to its use"); OWEN, *supra* note 65, at 329-31 (explaining that defective marketing occurs when the manufacturer fails to provide "'adequate' warnings and instruction"); see also Robert G. Pinco, *Implications of FDA's Proposal to Include Foreign Marketing Experience in the Over-the-Counter Drug Review Process*, 53 FOOD & DRUG L.J. 105, 106 (1998) (asserting that many agencies allow a manufacturer to market a product only after showing the product is safe and effective to use).

121. See *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 163 (Ill. 1979) (quoting *Liberty Mutual Ins. Co. v. Williams Mach. & Tool Co.*, 338 N.E.2d 857, 860 (1975) "The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the 'negligence' of the manufacturer."); James A. Henderson, Jr., *Restatement (Third) Torts: Product Liability: What Hath the ALI Wrought?*, 64 DEF. COUNS. J. 501, 506 (1997) (relating that the similarities in finding a product defective due to misdesign or mismarketing results in an attack on the manufacturer's entire product line); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1515 (1992) (describing that the effect of finding a product defective due to mismarketing is to render the entire product line defective).

predominant test that finally emerged for determining whether the information accompanying the product is suitable or lacking is the risk-benefit analysis.¹²²

When applying the test, we once again measure the probability of loss (PL) times the gravity of the foreseeable harm (G), and weigh the product of these variables against the burden of eliminating or reducing the risk (B).¹²³ In this instance, however, the burden is not to present an alternative design. Instead, the concern, in light of the intended use of the commodity, is whether the warnings and instructions accompanying the product are adequate.¹²⁴ This is a delicate issue. Consider, once injured, the plaintiff brings suit alleging defective marketing; if our goal is a safer product, it would appear that public policy or the resulting benefit to the community would always require the additional warning or instruction, the omission of which has allegedly caused the plaintiff's injury.¹²⁵ After all, how much greater is the burden of issuing one more warning or instruction? This dilemma would appear to invalidate the risk-benefit analysis as an effective test. Since the burden in all cases — an extra warning or instruction — would appear to be less costly than the foreseeable risk of harm, it would seem apparent that under this test,

122. See *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 807 (Wash. 2000) (stating “[m]ost courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution.”). Marc Z. Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 SETON HALL L. REV. 623, 641 (1987) (establishing that the risk-benefit analysis is used to determine whether a product should be marketed at all).

123. See *Baker*, 573 P.2d at 455 (asserting the five factors for determining whether a product is defective under what was to become known as the risk-benefit test); A.D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514 (1976) (describing the balancing test for defectiveness based on design as the weighing of probability and gravity of the harm versus the cost of warning the user of the harm).

124. *First Nat'l Bank in Albuquerque v. Nor-Am Agric. Prod. Inc.*, 537 P.2d 682, 691 (N.M. Ct. App. 1975) (stating that a product's marketing material “must adequately indicate the scope of the danger”); see also D. Brit Nelson, Comment, *Is Privity Still Required in a Breach of Express Warranty Cause of Action for Personal Injury Damages?*, 43 BAYLOR L. REV. 551, 552 n.7 (1991) (“In this particular scenario, a § 402A claim for mislabeling would seem appropriate. The product must be proven to be unreasonably dangerous or defective upon a “mismarketing” theory, namely, failure to adequately warn of dangers or failure to adequately instruct on proper usage.”).

125. George W. Flynn & John J. Laravuso, *The Existence of a Duty to Warn: A Question for the Court of the Jury?*, 27 WM. MITCHELL L. REV. 633, 639 (2000) (reporting that most jurisdictions require that the failure to warn or instruct could have prevented the injury); George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 407-08 (1995) (exploring the need to find that the failure to warn or instruct caused the injury to the plaintiff); Tate, *supra* note 84, at 112 (stating that the lack of warning must be the cause of the plaintiff's injury).

the marketing of all products would ultimately be defective.¹²⁶

It is at this point, however, that we must consider the rule of diminishing returns. Manufacturers cannot be expected to warn and instruct a user or consumer regarding all possible risks.¹²⁷ The result of such an expectation would be a voluminous amount of information, which in all probability would be ignored by our potential user or consumer.¹²⁸ The solution and the reasoning, admittedly circuitous, is to include an amount of information that is considered to be adequate. "Adequate information" is defined as an amount that would satisfy the reasonable and prudent person.¹²⁹ Since reasonable minds will differ, this is by necessity a question of fact. Therefore, if the jury subsequently determines the information was not adequate, the product will be considered defective from a marketing perspective, and vice versa.¹³⁰

126. *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1995) (observing that the failure to warn "will almost always weigh in favor of an obligation to warn of latent dangers"); Vicki Lawrence MacDougall, *Products Liability Law in the Nineties: Will Federal or State Law Control?*, 49 CONSUMER FIN. L.Q. REP. 327, 335-36 (1995) (criticizing the risk-benefit analysis because the test focuses on how much an additional warning would cost only to indicate that, because the cost is low, the test generally would result in a defective product); see also Locke, *supra* note 92, at 794 n.90 (noting the difficulty faced by defense attorneys when defending mismarketing cases).

127. Twerski, *supra* note 123, at 514-17 (highlighting the true cost of added warnings). In this article, the authors argue that a marketing scheme that relays all of the risks inherent in a particular product is not feasible. *Id.* at 514. Accordingly, the authors state that if the warning process is to be effective, the manufacturer must be selective or the warnings will lose their effectiveness. *Id.* at 514-15.

128. *Aetna Cas. & Sur. Co. v. Ralph Wilson Plastics Co.*, 509 N.W.2d 520, 523 (Mich. Ct. App. 1993) (recognizing "that excessive warnings on product labels may be counterproductive, causing 'sensory overload' that literally drowns crucial information in a sea of mind-numbing detail"); see also Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM. 309, 322-27 (1997) (recognizing that people will not stop reading warnings if they feel they do not appropriately disclose all non-material hazards because it is only the material ones that consumers care about).

129. Thomas H. Lee, Note, *A Purposeful Approach to Product Liability Warnings and Non-English-Speaking Consumers*, 47 VAND. L. REV. 1107, 1124 n.90 (1994) (relating the definition of adequate warning as related by the court in *Hubbard-Hall Chemical Company v. Silverman*, 340 F.2d 402, 404 (1st Cir. 1965)); M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1056 (1998) (defining adequate warning as a warning that "when necessary, must by its size, location, and intensity of language or symbol, be calculated to impress upon a reasonably prudent user of the product the nature and extent of the hazard involved").

130. BARBARA WRUBEL, LIABILITY FOR FAILURE TO WARN OR INSTRUCT, IN PRODUCT LIABILITY OF MANUFACTURERS 1987: PREVENTION AND DEFENSE 163-64 (P.L.I. Litig. & Admin. Practice Course, Handbook Series No. H4-5025, 1987) (advancing the 7th Circuit's holding that the issue of adequate warning is a question for the jury to decide); Soule & Moen, *supra* note 125, at 397 (reporting that the role of the jury in mismarketing cases is the same as their role in manufacturing cases); see also George Arthur Davis, Note, *The Requisite Specificity of Alcohol Beverage Warning Labels: A Decision Best Left for Congressional to Determine*, 18 HOFSTRA L. REV. 943, 978-80 (1990) (conveying the problems associated with allowing juries to hear the issue on

The situation is further clouded by a follow-up question: to whom must this information be conveyed? Since a product is capable of inflicting injury at various points of the marketing scheme when displayed, demonstrated, and/or after it has been purchased, to users as well as bystanders, the solution is to make sure adequate information is conveyed to all foreseeable plaintiffs.¹³¹ This information must not only be conveyed, but represented in such a manner as to be noticed, and just as important, absorbed by the intended individual.¹³² Again, this is a question of fact for the jury which will always be decided from a retrospective position.

Other marketing problems involving prescription and over-the-counter drugs, allergic reactions, obvious dangers, and misuse of the product could be explored.¹³³ They, however, have been adequately discussed elsewhere and need not be mentioned here.¹³⁴ Suffice it to say that the issues involved in marketing a product can be interesting as well as complex, and often decided by a jury with the advantage of hindsight. Nevertheless, the risk-benefit analysis, when applied to the area of misdesign, has proven over time to be one of the best-suited methods for determining this perspective of defectiveness.

adequate warning).

131. Cantu, *supra* note 61, at 338-39 (asserting that the manufacturer is required to warn all possible plaintiffs because an injury can occur at any stage of a product's useful life); John G. Culhane, *The Limits of Product Liability Reform Within a Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 HASTINGS INT'L & COMP. L. REV. 1, 56 (1995) (discussing how "the class of proper plaintiffs grew to embrace users and bystanders" in some jurisdictions); Peter Zablotsky, *Eliminating Proximate Cause as an Element if the Prima Facie Case for Strict Products Liability*, 45 CATH. U. L. REV. 31, 52 (1995) (acknowledging that "everyone is a foreseeable plaintiff from the point of view of defective products and person-within-the-risk").

132. Richards v. Upjohn Co., 625 P.2d 1192, 1196 (N.M. Ct. App. 1980) (requiring that a proper warning is one in which "the manufacturer must bring the warning home" to the user); James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 559 (1982) (asserting that a proper warning is one that conveys the warning "in such a manner as to assure that a user's attention will be attracted").

133. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (singling out drugs as a product that is "quite incapable of being made safe for its intended and ordinary use"). According to the drafters of section 402A, comment k addresses products that are unavoidably unsafe. *Id.*

134. See, e.g., Joseph A. Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 867-73 (1983) (discussing the breadth of Comment k and its effect on strict product liability under the Second Restatement); Sales, *supra* note 132, at 521-586 (writing about product misuse, allergic reactions, and unavoidably unsafe products); Daniel W. Whitney, *Product Liability Issues for the Expanding OTC Drug Category*, 48 FOOD & DRUG L.J. 321, 333-34 (1993) (relating the special defenses provided for drugs).

D. *Unreasonably Dangerous*

Section 402A begins with the phrase: "One who sells any product in a defective condition unreasonably dangerous. . . ."¹³⁵ These words have been interpreted to mean that regardless of whether the defectiveness is in the product's design, manufacturing, and/or marketing, the plaintiff must prove that the condition in question makes the product unreasonably dangerous.¹³⁶ Thus, the plaintiff's burden is twofold: prove the product is defective and establish that because of the defect, the product is dangerous to an unreasonable degree.¹³⁷ This requirement was in no doubt inserted to distinguish between those products that can cause harm even though nothing is wrong with them; products that are flawed but produce no injury; and products that are defective and present a foreseeable risk.¹³⁸ There is no technologically perfect product,¹³⁹ and any product is capable of inflicting injury. No doubt the drafters of the Second Restatement sought to limit liability only to those products that are defective and produce a foreseeable risk. Thus, we use the term "unreasonably dangerous."

Regardless of the test employed, this phrase has been almost universally interpreted to mean that the product is dangerous because it

135. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

136. Michelle M. Hoss, Note, *Halphen v. Johns-Manville Sales Corp.—A New Product in the Area of Product Liability*, 47 LA. L. REV. 637, 640 (1987) (discussing that the plaintiff has the burden of proving, among other things, that the product was unreasonably dangerous); Robert F. Thompson, *The Arkansas Product Liability Statute: What Does "Unreasonably Dangerous" Mean in Arkansas?*, 50 ARK. L. REV. 663, 666-67 (1998) (reporting that Arkansas requires that the plaintiff prove that the product was unreasonably unsafe in addition to proving that the product caused the plaintiff's injury); Todd M. Thornhill, *Products Liability: The Open and Obvious Danger Rule*, 51 J. MO. B. 203, 203-05 (1995) (relating the requirements for a plaintiff to be successful under Missouri products liability law).

137. *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1148 (Me. 1983) (requiring the plaintiff to prove that the product was the cause of the injury as well as dangerous); *Barker v. Lull Engineering Co., Inc.*, 573 P.2d 443, 455-56 (Cal. 1978) (creating the two-prong standard for an unreasonably dangerous product); Tara Cacciabaudo Drew, *Products Liability—Malfunction Alone does not Prove a Defect—Walker v. General Electric Co.*, 968 F.2d 116 (1st Cir. 1992) 27 SUFFOLK U. L. REV. 1140, 1142 n.21 (1993) (relaying the two prongs of the plaintiff's case); Thompson, *supra* note 136, at 665 (reporting that Arkansas requires the plaintiff to prove that the product both caused his injury and that the product was unreasonably unsafe).

138. *Kirk v. Hanes Corp. of N.C.*, 16 F.3d 705, 712-13 (6th Cir. 1994) (asserting the rationale for requiring the plaintiff to meet the two-prong test); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i, k (1965) (reporting that products can be dangerous in many different ways while not causing the manufacturer to incur liability).

139. Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 96 n.328 (1991) (arguing that "if product markets were perfect, there would be no need for products liability laws. . .").

does not meet the expectations of the user or consumer.¹⁴⁰ Some jurisdictions have refused to impose the double requirement on the injured plaintiff arguing that it is too burdensome; their position is that a mere showing of defectiveness is sufficient.¹⁴¹ The majority of states, however, insist that the injured plaintiff must establish the product is dangerous in order to prevail.¹⁴²

IV. CONCLUSION

As we have seen, the concept of strict liability for ultra-hazardous activities is entirely different from strict liability under Section 402A of the Restatement (Second) of Torts. The former is concerned with the appropriateness of the defendant's activities to the locale. If the conduct is not suitable to the area, and it can be shown that the conduct poses great risk of harm to others and has no particular redeeming value to the community, it will be condemned on the basis of strict liability if injury results. What we are weighing is the inherent risk involved with the appropriateness to the surroundings.

On the other hand, strict products liability requires the defendant to introduce a defective product into the stream of commerce that is unreasonably dangerous to the user or consumer. Appropriateness, locale, and value to the community are not issues. Rather, the focus is on the product itself. If the product is unreasonably dangerous because of its manufacture, misdesign, or mismarketing, the manufacturer is held

140. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) ("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."); DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 5:6 (3d ed. 2000) (relating that Comment g calls for employment of the consumer expectations test when determining whether a product is unreasonably dangerous).

141. William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 OKLA. L. REV. 201, 273-74 (1994) (relating that the jurisdictions are mixed when determining what the injured plaintiff must prove in order to recover); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 556 (1996) (reporting that some jurisdictions still apply an independent consumer expectations requirement before they find the manufacturer liable under Section 402A).

142. OWEN, *supra* note 140 (asserting that the majority of courts continue to utilize the consumer expectations standard either alone or in combination with other tests); Vargo, *supra* note 141, at 556 (revealing that over half of the jurisdictions require that the plaintiff show that the product is dangerous in order to recover damages).

strictly liable under Section 402A. These are two lines of reasoning that are distinct, separate, and independent of each other and should never meet.

ACCOMMODATION CLIENTS

*Douglas R. Richmond**

I. INTRODUCTION

The designation “client” is significant in several aspects of the law.¹ As a matter of evidence law it is the client who holds the attorney-client privilege. With rare exception only clients may sue lawyers for malpractice. Lawyers are fiduciaries to their clients. When it comes to professional responsibility law, the term “client” has special meaning.² “Although it is true that lawyers may owe some duties to third persons who are not clients, and to the legal system and the law generally, the most basic duties run to clients.”³ It is clients to whom lawyers owe continuing duties of loyalty and confidentiality.

Lawyers sometimes represent more than one client in a matter. A lawyer may represent a second client as an accommodation to the lawyer’s regular client to avoid duplication of effort and the

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1. *Black’s Law Dictionary* defines a client as “[a] person or entity that employs a professional for advice or help in that professional’s line of work.” BLACK’S LAW DICTIONARY 247 (7th ed. 1999). This definition is flawed in the context of a person’s or entity’s relationship with an attorney because it suggests that client status depends on payment for the professional’s advice or help. The existence of an attorney-client relationship, however, does not turn on payment for the attorney’s services. “The attorney’s right to be compensated for his advice and services arises from [the attorney-client] relationship; it is not the definitional basis of that relationship.” *Macomb County Taxpayers Ass’n v. L’Anse Creuse Pub. Schs.*, 564 N.W.2d 457, 462 (Mich. 1997). Rather, “[a]n attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney’s professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” *Richardson v. Griffiths*, 560 N.W.2d 430, 435 (Neb. 1997).

2. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 2.1 (3d ed. 2001).

3. *Id.*