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### Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd

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# REFLECTIONS ON SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS: A MIRROR CRACK'D\*

Charles E. Cantu\*\*

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>1</sup>

In 1965 the American Law Institute<sup>2</sup> published Section 402A of the *Restatement (Second) of Torts* and forever changed the means by which an individual would be held liable for placing a defective product into the stream of commerce.<sup>3</sup> Strict liability, which had been previously re-

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\* Out flew the web and floated wide;  
The mirror crack'd from side to side;  
'The curse is come upon me,' cried  
The Lady of Shalott.

*The Lady of Shalott* by Alfred, Lord Tennyson.

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

2. The individual members at the time were: Francis M. Bird, Esq., Professor Laurence H. Eldredge, Professor James Fleming, Jr., Professor Robert E. Keeton, Dean W. Page Keeton, Judge Calvert Magruder, Professor Wex Smathers Malone, Professor Allan H. McCoid, Dean William L. Prosser, Dean Samuel D. Thurman, Jr., Chief Justice Roger J. Traynor, and Dean John W. Wade.

3. Generally, before the publication and widespread adoption of the *Restatement (Second) of Torts* section 402A, unless an injured plaintiff could qualify for one of the few narrow exceptions in strict liability, he or she had only the choice between a traditional negligence action or a contract action based on warranty. Under traditional negligence, the

stricted to cases involving dangerous activities<sup>4</sup> and wild animals,<sup>5</sup> became a new cause of action in almost all product cases.<sup>6</sup> As a result, this section of the *Restatement* has been a catalyst to a multitude of litigation. The number of lawsuits arising from this one promulgation can be described as nothing less than explosive.<sup>7</sup> More causes of action have been brought

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individual charged with placing a defective product in the stream of commerce could safely rely on privity to escape liability. See generally *McCormack v. Handcraft Co.*, 278 Minn. 322, \_\_\_, 154 N.W.2d 488, 499-500 (1967) (court stated that this traditional limitation did not appeal to a sense of justice). See also *Dippel v. Sciano*, 37 Wis. 2d 443, \_\_\_, 155 N.W.2d 55, 58-63 (1967) (discussing the evolution and policies involved in elimination of privity requirement). As for a contract action on warranty, the defendant could safely hide behind disclaimers and limitations. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, \_\_\_, 161 A.2d 69, 87 (1960) (standardized limited warranties in auto industry result in "gross inequality" of bargaining position for consumer).

4. Strict liability for dangerous activities is most often traced back to an 1868 English case in which water stored in a reservoir on Mr. Ryland's property flooded Mr. Fletcher's coal mines. See *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). The English court held that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

*Id.* at 339-40.

Since then the policy, which has evolved to include personal injury as well as property damage, has come to have its own set of definitions, rules, and exceptions independent of other theories of strict liability. See *Luthringer v. Moore*, 31 Cal. 2d 489, \_\_\_, 190 P.2d 1, 8 (1948) (use of cyanide compound by a pest exterminator); see also *Siegler v. Kuhlman*, 81 Wn.2d 448, 459, 502 P.2d 1181, 1184 (1973) (hauling gasoline as freight), *cert. denied*, 411 U.S. 983 (1973). The second *Restatement* sets forth the law of strict liability for dangerous activities essentially as it was propounded in *Rylands*. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

5. It is well settled that "one who harbors a wild animal, which by its very nature is vicious and unpredictable, does so at his peril, and liability for injuries inflicted by such animal is absolute." *Collins v. Otto*, 149 Colo. 489, \_\_\_, 369 P.2d 564, 566 (1962) (coyote); *Briley v. Mitchell*, 238 La. 551, \_\_\_, 115 So. 2d 851, 854 (1959) (wild deer; owner liable for injuries caused regardless of how animal escaped). Even municipal corporations, which could traditionally rely on immunity, have been held liable where a wild animal is concerned. See *Moloney v. City of Columbus*, 2 Ohio St. 2d 213, 208 N.E.2d 141 (1965). A guano housed at the city zoo bit and injured a young girl. *Id.* at \_\_\_, 208 N.E.2d at 142. The court held the city strictly liable. *Id.* at \_\_\_, 208 N.E.2d at 146.

6. In most product liability suits, the pattern is to allege a claim of negligence, a breach of warranty as set forth in the *Uniform Commercial Code*, and a claim for strict liability in tort. See generally W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 11, at 17 (1979); see also U.S. DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT (1977) (recounting statistics of burgeoning claims in strict product liability).

7. See *Bivins, The Products Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595, 598 (1978) (describing products liability reform as a "volatile" area of law).

alleging strict liability for injuries caused by a defective product than in any other area of tort law.<sup>8</sup>

Now that almost two-and-one-half decades have passed since the adoption of this rule, much of the early uncertainty associated with it has abated. For the most part, the concept and its elements have been clearly established and universally accepted.<sup>9</sup> Now is a good time to look back, consider what the drafters of this section intended, and reflect on the judicial changes that have been brought about as a result of its enactment.

## I. HISTORICAL BACKGROUND

What should be emphasized to law students and young attorneys alike is that this particular rule, unlike other sections of the second *Restatement*, was not a previously accepted doctrine. At the time of its adoption, it represented neither a majority nor minority position in the United States.<sup>10</sup> As far back as the early 1940's, only concurring and dis-

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8. While statistical findings vary from sample to sample, in general the reports support the proposition that products liability suits outnumber other types of tort actions. See generally Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 326-27 (1986). One sample taken in the federal court system reported that the broad category of products liability suits escalated from 1,579 in 1974 to 8,994 in 1982. *Id.* at 321 n.1. In cases where strict liability and negligence were alleged, strict liability was emphasized as the primary action in the majority of the suits. *Id.* at 327. Where strict liability, negligence, and breach of warranty were alleged, strict liability was slightly more emphasized. See *id.* at 328. In 1976 the United States Interagency Task Force on Products Liability estimated lawsuits of this nature at between 60,000 and 70,000 and rising at a dramatic rate. See *Hearing on Products Liability Reform Before the Senate Comm. on Commerce, Science and Transportation, Subcomm. on the Consumer*, 97th Cong., 2d Sess. 257 (1982) (statement of Senator Robert W. Kasten (R.Wis.)), as reported in AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH LEGISLATIVE ANALYSIS PUBLICATION: FEDERAL PRODUCTS LIABILITY PROPOSALS 1984, 98th Cong., 2d Sess. 5-6 (1984); see also Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Alleged Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69 (1983) (contemporary increase in litigation caused by changing social conditions such as greater knowledge of injury causation and better dissemination of such knowledge to consuming public).

9. See, e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986) (Supreme Court recognizing strict products liability as part of general maritime law); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789-90 (Tex. 1967) (Texas Supreme Court adopting section 402A strict liability); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 582 (Tex. Ct. App. 1987), *writ ref'd, no rev. err.* (noting that strict products liability adopted and applied in Texas since 1967).

10. See, e.g., *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 919 (5th Cir. 1964). The Fifth Circuit court, fully aware that section 402A of the *Restatement (Second) of Torts*, in its final form, was moving toward adoption, intimated that since 1958, practically every court that had considered the question of applying strict liability had taken positions indi-

senting opinions called for the application of strict liability to manufacturers and/or sellers of defective products.<sup>11</sup> In fact, many legal writers had been advocating such a position,<sup>12</sup> but until the time of its adoption, only one court had gone so far as to impose strict products liability.<sup>13</sup> Up to that point, the basis of liability in defective products cases had been either negligence, or express or implied warranty.

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cating a favorable response to the new section as it was ultimately written. *Id.* at 919 n.19. However, in deciding *Putman*, the federal court noted the common obstacle: even though the trend in Texas was toward strict liability, the Texas Supreme Court had not issued an opinion that could absolutely guide the Fifth Circuit as to Texas law. *Id.* at 912. Texas, like the majority of states, had not officially embraced the spirit, much less the text of the second *Restatement*. See Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970). The *Restatement* reporter, Dean Prosser, evidently made a choice to present the section, as finally expressed, so that the new *Restatement* would not be outdated before it was released. *Id.* at 750.

11. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, \_\_\_, 150 P.2d 436, 438-40 (1944). Technically, one of the earliest "dissents" in the area was not a dissent per se. In 1944, Judge Traynor of the California Supreme Court concurred with a decision that allowed a waitress to recover for injury inflicted by an exploding soft drink bottle. The majority holding was based on the defendant's negligence and the court found all the requirements necessary to entitle plaintiff to rely on the doctrine of *res ipsa loquitur*. Judge Traynor, concurring in the result, dissented from the majority's reasoning and said "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* at \_\_\_, 150 P.2d at 440.

12. Judge Traynor's 1944 concept was not totally new by any means, but until then it had only been espoused by legal writers. See K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 341, 342 (1930). In 1930, Professor Llewellyn argued that the law should shift the immediate incidences of the hazards of life in an industrial society away from the individual and over to a group which could distribute the loss. See also Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 704 (1936).

13. In 1962, Judge Traynor implemented this concept first articulated in 1944. See *Greenman v. Yuba Power Products, Inc.*, 39 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The plaintiff had been injured by a power tool and had given written notice to the retailer and the manufacturer of breaches of warranties, express and implied. He also sued on grounds of negligence, citing negligent design and inspection. *Id.* at \_\_\_, 377 P.2d at 898, 27 Cal. Rptr. at 698. In affirming the trial court's verdict for the injured plaintiff, the court also closed doors previously used by defendants. The court first outlined the tortious maze through which other courts had wandered to apply what was, in essence, strict liability. *Id.* at \_\_\_, 377 P.2d at 900, 27 Cal. Rptr. at 700. The court said:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

*Id.* at \_\_\_, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

The original *Restatement of Torts* published in the 1920's and 1930's followed this traditional position, and included no provision for the application of strict liability.<sup>14</sup> By 1961, however, *Tentative Draft No. 6 of the Restatement (Second)* advocated the adoption of section 402A.<sup>15</sup> This new section, while recognizing that an individual could be held strictly liable, limited the applicability of this rule to claims involving "food for human consumption."<sup>16</sup> One year later, however, it became increasingly apparent to the Institute that the *Restatement (Second)* had expressed this revolutionary new concept much too narrowly.<sup>17</sup> As a result, in 1962, *Tentative Draft No. 7* extended the section to encompass "'products intended for intimate bodily use,' 'whether or not [they] ha[ve] any nutritional value.'"<sup>18</sup> This last provision was intended to clarify that such products as "chewing gum, chewing tobacco, snuff, cigarettes, drugs, clothing, soap, cosmetics, liniments, hair dye, and permanent wave solution" were included.<sup>19</sup> Apparently, the drafters of 402A felt that these products, although intended for external use or application, were of such "an intimate character" that they warranted liability without fault if defective.<sup>20</sup>

The following year Justice Traynor, a member of the Institute, future Chief Justice of the Supreme Court of California, and major supporter of the concept of strict liability for injuries caused by defective products,<sup>21</sup> wrote the opinion in the landmark case of *Greenman v. Yuba Power Products, Inc.*<sup>22</sup> The plaintiff in *Greenman* had been injured when a shopsmith—a power tool that could be used as a saw, drill, and wood lathe—unexpectedly ejected a piece of wood he had been working on and caused serious injuries.<sup>23</sup> In the product liability suit which followed, the issues submitted to the jury included breach of implied warranties against the manufacturer.<sup>24</sup> The jury returned a verdict in favor of the retailer against the plaintiff, and in favor of the plaintiff against the manufac-

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14. See *Putman v. Erie City Mfg.*, 338 F.2d 911, 918 (5th Cir. 1964) (outlining progress and development of section 402A).

15. *Id.*; see also Titus, *supra* note 10, at 713.

16. See *Putman*, 338 F.2d at 918.

17. *Id.*

18. *Id.*

19. *Id.* at n.16 (citing RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 7, 1962)).

20. *Id.*

21. See Titus, *supra* note 10, at 720 (noting that Justice Traynor was adviser to *Restatement (Second) of Torts* and long-time supporter of strict products liability).

22. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

23. *Id.* at \_\_\_, 377 P.2d at 898, 27 Cal. Rptr. at 698.

24. *Id.* at \_\_\_, 377 P.2d at 899, 27 Cal. Rptr. at 699.

turer.<sup>25</sup> On appeal, the manufacturer alleged that it was not liable on the basis of warranty because the plaintiff had failed to give notice of the breach of warranty within a reasonable time as required by the *Uniform Commercial Code*.<sup>26</sup>

Justice Traynor, in an unprecedented move, side-stepped the issue of breach of warranty and held the defendant liable on the basis of strict liability.<sup>27</sup> Justice Traynor reasoned that strict liability under the guise of breach of warranty, whether express or implied, had in reality been in existence for quite some time.<sup>28</sup> Recognized first in the area of unwholesome food products, the doctrine was subsequently extended to include other products where the hazard was equally as great.<sup>29</sup> Traynor stressed that

the abandonment of the requirement of contract between [the parties], the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.<sup>30</sup>

## II. SECTION 402A

In 1964, the Institute approved the final draft of section 402A, which made the rule of strict liability applicable to all products. The inclusion of this provision marked the first time in the history of the *Restatement* that a new section was added which was not supported by prior case law.<sup>31</sup> Other than *Yuba*, no decision, much less a minority or majority position, had authorized such a recovery as that represented by 402A.<sup>32</sup> This fact, however, along with the argument that strict liability invaded a

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25. *Id.*

26. *Id.*

27. *Id.* at \_\_\_, 377 P.2d at 900, 27 Cal. Rptr. at 700.

28. *Id.*

29. *Id.*

30. *Id.* at \_\_\_, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

31. Professor Titus succinctly states the argument that erupted over the adoption of the rule and the proper role of the American Law Institute (A.L.I.). On one side stood the critics who insisted that the Institute's role was to state the law as it would be decided by most courts. This group took the position that "the adoption of Section 402A [was] an unprecedented departure" from the traditional role of the Institute. Titus, *supra* note 10, at 747. However, Professor Titus avers that the 1923 A.L.I. organizational committee included as one of its purposes the role of promoting changes that would better align the law "to the needs of life." *Id.* at 748.

32. See Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. 647, 663 (1977) (stating that cases in support of section

field pre-empted by legislative enactment of the *Uniform Commercial Code*,<sup>33</sup> did not prevent the section's adoption. In 1965, 402A was published as part of the *Restatement (Second) of Torts*.<sup>34</sup> Although it met with early opposition,<sup>35</sup> this section has become virtually the universal rule over cases which involve injuries caused by defective products.<sup>36</sup> What has become clearer since 1965, however, is that the interpretation of section 402A may not in all cases be the same as that originally intended.

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402A, including *Yuba*, were not decided until after initial tentative drafts of sections were written); see also Noel, *Strict Liability of Manufacturers*, 50 A.B.A. J. 446, 447 (1964).

33. See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RESERVE L. REV. 5, 23 (1965). Some scholars contended that the *Uniform Sales Act*, predecessor of the *Uniform Commercial Code* (U.C.C.), did not provide essential elements for a "modern sense of justice." Article 2 of the U.C.C., on the other hand, was regarded favorably, and section 402A was consequently regarded as "not necessary nor wise." *Id.*

Professor Shanker pointed out that in the early sixties, when strict products liability concepts were being formulated, the official text of the 1962 U.C.C. was in the process of gradual adoption by the state legislatures. *Id.* at 5. He contended that the early cases in tort were decided in favor of strict liability simply because the U.C.C. was not yet in effect in certain states. *Id.* at 22. In 1965, Professor Shanker applauded the results of these decisions, but stated that the U.C.C. should provide any further necessary relief. *Id.* at 47. By 1978, however, he was apparently outraged by a perceived favoring of the *Restatement* position over legislative enactments by courts. See Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697, 705 (1978). But see Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the U.C.C. and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 712 (1965) (noting that judge-made strict products liability law "bypasses" the U.C.C., but is necessary to fill the vacuum left by Code drafters).

Some writers have alleged that comment m of section 402A was an attempt to bypass interference from the U.C.C. See Dickerson, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469, 477 (1974). Comment m states that section 402A is not governed by the *Uniform Sales Act* nor the U.C.C. See RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965). One writer has stated that "[a] more beautiful example of bootstrap-pulling, not involving the pain of reading the statute, would be hard to imagine. And the amazing thing is that for most judges and pedagogues, Dean Prosser got away with it." Dickerson, *supra*, at 477.

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

35. See generally Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

36. See Goldberg, *Manufacturers Take Cover*, 72 A.B.A. J. 52 (July 1986); see also W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2, at 14-16 & n.41 (1979). As of 1979, approximately twenty-six jurisdictions follow section 402A as written, and an additional six states have expanded its application in various ways. Others have adopted strict liability concepts without expressly applying 402A. *Id.*



## A. "One who sells . . ."

From the beginning, the section was intended to apply to situations involving the sale of a product.<sup>37</sup> The early cases not only supported, but were adamant on this point.<sup>38</sup> It did not take long, however, for the ingenuity of plaintiffs' attorneys and courts, eager to adopt the strict product liability doctrine, to apply the rule to other types of transactions. Lease agreements were the first extension. In *Cintrone v. Hertz Truck Leasing & Rental Service*,<sup>39</sup> the court noted that in today's modern society it is possible to lease anything that can be purchased.<sup>40</sup> In discussing the situation of a leased vehicle, the court stated: "A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer."<sup>41</sup> This subjects a leased vehicle "to more sustained use on the highways than most ordinary [purchased] car[s]," and exposes "the bailee, his employees, passengers and the travelling public . . . to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer."<sup>42</sup> On this basis, the New Jersey court held that strict liability should and would be applicable to the lessor of a defective product, even though no sale had taken place.<sup>43</sup> If the courts could hold the

37. See RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965) (justification for the rule stems from the fact that a seller has responsibility for its product); see also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 814-16 (1966). The author makes it clear that a sale must be involved at some point in the commercial chain from manufacturer to consumer in order for strict products liability concepts to apply. *Id.* at 814-15; see also R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 60 (1980) (section 402A extends strict liability principles to all members in the chain of distribution).

38. See *Speyer, Inc. v. Humble Oil & Refining Co.*, 403 F.2d 766, 772 (3d Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969). The court held that if a defendant was not also the seller of the product in question, section 402A would not apply. *Id.* The court drew a distinction between "sellers" and "suppliers." Sections 407 and 408 of the second *Restatement* deal directly with lessors' liability, based on negligence principles rather than strict liability. *Id.* at n.10. Therefore, section 402A was presumably not intended to apply to lessors. See *id.*; see also *Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968) (court refusing to extend strict liability to include improper fitting of contact lenses prescribed for plaintiff because fitting regarded as service not sale); *Shivers v. Good Shepherd Hosp., Inc.*, 427 S.W.2d 104, 107 (Tex. Civ. App. 1968), *writ ref'd, no rev. err.* (refusing to hold hospital liable for injuries caused by injection of contaminated medication).

39. 45 N.J. 434, 212 A.2d 769 (1965).

40. *Id.* at \_\_\_, 212 A.2d at 776.

41. *Id.* at \_\_\_, 212 A.2d at 777.

42. *Id.*

43. *Id.* at \_\_\_, 212 A.2d at 777-78, 781.

seller of a defective product strictly liable,<sup>44</sup> there seemed to be no difficulty in extending this idea to a non-sale/lease transaction.<sup>45</sup>

Once freed from the parameters of the sales limitation, 402A was soon applied to other types of bargains. For example, in subsequent cases, strict liability has been the basis of recovery for injuries caused by a defective product used in demonstrations.<sup>46</sup> The transactions were further expanded to include free samples given to a prospective customer,<sup>47</sup> complimentary gifts that accompanied the sale of a product,<sup>48</sup> and products loaned for the purpose of demonstration.<sup>49</sup> It has become clear from these decisions that the original phrase "one who sells" should now be interpreted to mean "one who places into the stream of commerce."<sup>50</sup> As long as the product causing the injury has been placed in the market, strict

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44. *Id.* at \_\_\_, 212 A.2d at 781.

45. *Id.* at \_\_\_, 212 A.2d at 779; *see also* Price v. Shell Oil Co., 2 Cal. 3d 245, 251-52, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 181 (1970). The court stated, "Similarly we can perceive no substantial difference between *sellers* of personal property and *non-sellers*, such as bailors and lessors." *Id.* The thrust of the court's opinion was that the policy justifications applying to sellers of defective products apply with equal force to lessors of such products.

A restriction which has persisted is that the defendant, to be held strictly liable, must be in the business of placing the product in question into the marketplace. *See* Freitas v. Twin City Fisherman's Coop. Ass'n., 452 S.W.2d 931, 938 (Tex. Civ. App. 1970), *writ ref'd, no rev. err.* (defendant oil company held not liable for injuries caused by defective ladder and platform oil tank installed by independent contractor). *See generally* Prosser, *supra* note 37, at 814 (predicting that section 402A cannot apply to those sellers not regularly engaged in the sale of the product at issue). *But see* Thomas v. St. Joseph Hosp., 618 S.W.2d 791, 796 (Tex. Civ. App. 1981), *writ ref'd, no rev. err.* (hospital held strictly liable for supplying defective hospital gown because not related to primary professional service relationship between plaintiff and defendant).

46. *See, e.g.*, Delaney v. Towmotor Corp., 339 F.2d 4, 6 (2d Cir. 1964) (defendant held strictly liable for injury caused by forklift provided as demonstrator model to plaintiff's employer); First Nat'l Bank v. Cessna Aircraft Co., 365 So. 2d 966, 968 (Ala. 1978) (profit motive is apparent whenever defendant has placed product in stream of commerce, whether or not sale has taken place).

47. *See, e.g.*, McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 792 (Tex. 1967) (defendant strictly liable for injuries caused by free sample of defective permanent wave solution given by defendant to plaintiff).

48. *See, e.g.*, Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, \_\_\_, 258 N.E.2d 681, 688 (1970) (can of paint provided as free sample held to be within scope of section 402A).

49. *See, e.g.*, Delaney, 339 F.2d at 6 (defendant held strictly liable for injury caused by forklift loaned to plaintiff's employer by seller of such equipment); *see also* McClaffin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, \_\_\_, 79 Cal. Rptr. 337, 340 (1969) (bailor of maintenance equipment held strictly liable for death of bailee resulting from defective ladder provided).

50. *Delaney*, 339 F.2d at 6.

liability is applicable notwithstanding the fact that no sale has taken place.<sup>51</sup> The rationale for this position is that

When a product is placed in the 'stream of commerce,' the marketing cycle as it were, whether by demonstration, lease, free sample or sale, the doctrine should attach. In each of these situations the profit motive of the manufacturer is apparent whether or not a 'sale' in the strict sense takes place. Moreover, the manufacturer who enters the market is in a better position to know and correct defects in his product and as between him and his prospective consumers should bear the risk of injury to those prospective consumers when any such defects enter the market uncorrected.<sup>52</sup>

All of these reasons for applying liability without fault in a pure sales transaction appear to be applicable to any method of distribution once the product in question enters the market place. The seller's profit motive, coupled with the idea that the vendor should bear the risk of loss over an innocent consumer, prevails even when the defective product enters the stream of commerce in a non-sale transaction.

B. "[A]ny product . . ."

Other than New Jersey,<sup>53</sup> which allows a strict liability action in situations where the defendant has provided a service, all jurisdictions limit the applicability of 402A to situations involving a product.<sup>54</sup> In imposing this requirement, the courts have adhered to a strict interpretation of the second *Restatement's* position. This adherence is founded on the view that individuals like lawyers, doctors, engineers, and other persons who

51. *Id.*; see also *First Nat'l Bank v. Cessna Aircraft Co.*, 365 So. 2d 966, 968 (Ala. 1978). The Alabama court discussed "the market cycle," and held that one of the principle underlying policies of strict liability is to place the burden of accidental injuries due to defective products "upon those who market them." *Id.* at 968.

52. *Id.*; see also *Atkins v. American Motors Corp.*, 335 So. 2d 134, 139 (Ala. 1976) ("[J]ustification for new tort theory must be founded on . . . notions of consumer protection and on economic and social grounds, placing burden to compensate for loss incurred by defective products on the one best able to prevent distribution of those products."); Hill, *How Strict is Strict?*, 32 TEX. B.J. 759 (1969). The author states that if a transaction through which a product was placed in the stream of commerce was "essentially commercial in character," then liability would attach under section 402A, and a sale *per se* would be irrelevant. *Id.* at 767.

53. *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) (no sound reason for restricting liability to sales of goods).

54. See *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, \_\_\_, 539 P.2d 584, 587 (1975) (*Restatement (Second)* deals only with the sale of products and with one exception, no court has adopted strict liability for personal services).

render services rather than sell products, practice inexact sciences.<sup>55</sup> Therefore, they should only be required to exercise their best judgment.<sup>56</sup> Since virtually no one can guarantee the result of their work, these individuals should only be held to the standard of the reasonable person.<sup>57</sup> In other words, strict liability should not be applicable to a damaging event involving a service transaction.

The real question in many cases is whether the situation involves the sale of a product, so that 402A is applicable, or involves the rendering of a service. Transactions which involve elements of both product sales and services have generated their share of litigation.<sup>58</sup> In response to this dilemma, the courts have devised the "predominant factor" test, which seeks to determine the main thrust of the transaction.<sup>59</sup> Did the individual sell a product with incidental services attached thereto, for example, installation of a water heater?<sup>60</sup> Or, was the main purpose of the transaction rendering a service with a product incidentally involved, such as fitting an individual with contact lenses?<sup>61</sup> If the basis of the transaction is found to be the sale of a product, the courts have unhesitatingly applied strict liability. If on the other hand, the predominant factor is found to be a service, section 402A is not applicable.<sup>62</sup> In most cases, this "predominant factor" test presents a question of fact for the jury. When, however, the issue is so clear that reasonable minds could not differ, the final determination of the issue would be for the court.

One notable exception to this sort of transaction concerns the use of blood. Some jurisdictions maintain that blood transfusions involve the

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55. See, e.g., *Hoven v. Kelble*, 79 Wis. 2d 444, \_\_\_, 256 N.W.2d 379, 392-93 (1977) (moving from malpractice to strict liability appears dubious); see also *Gagne v. Bertran*, 43 Cal. 2d 481, \_\_\_, 275 P.2d 15, 21 (1954) (hiring experts does not justify expectations of infallibility).

56. See, e.g., *Hodges v. Carter*, 239 N.C. 517, \_\_\_, 80 S.E.2d 144, 146 (1954) (attorneys exercise best judgment in duty entrusted to them).

57. *Gagne*, 43 Cal. 2d at \_\_\_, 275 P.2d at 21.

58. See, Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 18 (1978) (the area between pure sales and pure services has caused confusion).

59. See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 104, 123 N.E.2d 792, 794 (1954) (when transfer of property is only incidental to a service, it is not a sales transaction).

60. See *Kopet v. Klein*, 275 Minn. 525, \_\_\_, 148 N.W.2d 385, 390 (1967) (the transaction involved in the sale of a chattel and a related service, such as installation, causes the buyer to expect an installed product).

61. See *Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968) (strict liability not applied to prescription, fitting, and sale of contact lenses).

62. See *Delta Ref. Co. v. Procon, Inc.*, 552 S.W.2d 387, 389 (Tenn. Ct. App. 1976) (no strict liability for properly installing pump with a latent defect).

sale of a product, and as such strict liability is applicable.<sup>63</sup> Other jurisdictions view the transaction as the rendering of a service, making 402A inapplicable.<sup>64</sup> These two positions appear to be incapable of reconciliation and the reader should be aware of this dichotomy.

Another problem with the sale of goods, which has given rise to much litigation, revolves around used, rather than new, products. Does strict liability apply when a used product has been introduced into the stream of commerce? The second *Restatement* is silent on this point,<sup>65</sup> and the jurisdictions that have addressed the question are divided.<sup>66</sup> Those that take the position that strict liability is not available for the sale of a used product<sup>67</sup> reason that such a product is no longer within the original production and marketing chain.<sup>68</sup> Therefore, the reasons for imposing liability without fault—the seller's ability to treat such liability as a production cost,<sup>69</sup> and the ability of a seller to exert pressure on the manufacturer to enhance the safety of the product<sup>70</sup>—are not present. Imposing liability would, in effect, make the original seller an insurer, holding that seller strictly liable for defects which could have arisen while the product was under the control of an intermediate consumer.

Supporters of the view that sellers of used products should be strictly liable point out that the second *Restatement* makes no distinction between products that are new and those that are used, but instead merely speaks in terms of any defective product.<sup>71</sup> Furthermore, sellers of a defective used product have profited by introducing this article into the

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63. See *Weber v. Charity Hosp.*, 487 So. 2d 148, 150 (La. Ct. App. 1986) (blood bank, as distributor, strictly liable).

64. See *Zichichi v. Middlesex Memorial Hosp.*, 204 Conn. 399, \_\_\_, 528 A.2d 805, 808 (1987) (transaction labeled service is outside of product liability).

65. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

66. See generally Comment, *Used Products and Strict Liability: Where Public Safety and Caveat Emptor Intersect*, 19 CAL. W.L. REV. 330 (1983).

67. See *Peterson v. Lou Backrodt Chevrolet Co.*, 61 Ill. 2d 17, 329 N.E.2d 785 (1975) (used car dealer could not be held strictly liable as a matter of law when there was no allegation as to whether the defect existed when product left manufacturer's control or was created by the dealer).

68. *Id.* at \_\_\_, 329 N.E.2d at 787 (imposing strict liability on such facts would make the car dealer an insurer against defects which may not have existed until after the chain of distribution was completed).

69. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, \_\_\_, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (risk spread among public as a cost of doing business).

70. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, \_\_\_, 247 N.E.2d 401, 404 (1969) (strict liability arises from sellers' role in the marketing scheme and affords more incentive for safety).

71. See *Hovenden v. Tenbush*, 529 S.W.2d 302, 306 (Tex. Civ. App. 1975) (nothing in section 402A or its comments would indicate that the rule is not applicable to merchants of used products).

stream of commerce. Therefore, the sellers, and not the innocent purchasers, should, like the manufacturers, wholesalers, or any other retailers, bear the loss of a damaging event. These jurisdictions have had no difficulty in extending the impact of 402A to an area that was either not intended to be included by the writers of this section or at least was not foreseen as an area of concern. Nevertheless, liability for used products has been clearly established in some jurisdictions.

An additional area in which 402A has had an important impact involves real estate transactions. Even though the largest number of reported decisions deal with the doctrine of strict liability as it relates to the sale of personal property, some courts have had little difficulty in extending the idea from chattels to the sale of land<sup>72</sup> and houses.<sup>73</sup> In fact, the concept that a house constitutes a product is widely accepted.<sup>74</sup> This is especially true in situations where new homes are constructed by mass production developers.<sup>75</sup> The reasoning is that by employing mass production techniques, the developer resembles the manufacturer of chattels and should be held liable accordingly.<sup>76</sup>

Perhaps the greatest area of concern in future years is how far the courts will be willing to extend this concept of a "product." As shown, the courts have had little difficulty in expanding the impact of 402A to situations not mentioned by the original text of the section, as well as to transactions involving non-chattels, such as those involving land and houses. Recent cases have gone so far as to hold that commodities, such as water and electricity, constitute products for purposes of 402A.<sup>77</sup> How much further can this concept be stretched? Could contaminated air from an air conditioning unit, or the paved surface of a road or highway be consid-

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72. See *Avner v. Longridge Estate*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969) (strict liability applied to house lots which subsided due to defective subsurface conditions).

73. See *Hyman v. Gordon*, 35 Cal. App. 2d 769, 773, 111 Cal. Rptr. 262, 264 (1973) (strict liability applied where design defect of residential building and installation of an object on the building causes injury).

74. See *Vincent v. Jim Walter Homes, Inc.*, 1978 Prod. Liab. Rep. (CCH) ¶ 8,278 (when parties contract to build and purchase a home, the completed structure constitutes a product within section 402A).

75. See *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, \_\_\_, 207 A.2d 314, 325 (1965) (no meaningful differences between the mass-production of homes and the mass production of automobiles).

76. *Id.*

77. See, e.g., *Schriner v. Pennsylvania Power & Light Co.*, 348 Pa. Super. 177, \_\_\_, 501 A.2d 1128, 1133 (1985) (electricity is a product for the purposes of strict liability under section 402A); *Aversa v. Public Serv. Elec. & Gas Co.*, 186 N.J. Super. 130, \_\_\_, 451 A.2d 976, 980 (1982) (where electricity is placed in the stream of commerce, principles of strict liability are applicable); *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, \_\_\_, 275 N.W.2d 641, 648 (1979) (electricity is a product for the purposes of strict liability).

ered a product? The answer is limited only by the ingenuity, imagination, and foresight of future plaintiff's attorneys and courts sympathetic to the expectations of consumers.

C. "[I]n a defective condition . . ."

Perhaps the part of 402A that has caused the most debate, spawned the most litigation, and evoked the most creativity from the courts concerns the concept of "defect."<sup>78</sup> From the beginning, the drafters were adamant that the purpose of this provision was not to impose absolute liability where liability would attach merely because an injury had occurred.<sup>79</sup> Instead, they advanced the position of strict liability, where liability would arise because one had placed a dangerously defective product that caused injury into the stream of commerce.<sup>80</sup> As a result, establishing the defect became the crux of all products liability cases.<sup>81</sup> Initially, there was some confusion as the courts struggled to define this element.<sup>82</sup> Some of the confusion stemmed from the fact that the courts failed to recognize the different stages during which a product may develop a defect, and instead applied a uniform test in all situations. The courts did not recognize that the test used to determine whether a product was mismanufactured was not necessarily the appropriate test to determine whether the product was defective due to error in the designing or marketing process.<sup>83</sup> In addition, if one considers that no product is ever technologically perfect, that at some level of investigation all goods are flawed,<sup>84</sup> then it becomes necessary to utilize some judgmental standard to determine

78. See generally Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. Rev. 339 (1974).

79. See *Rooney v. Federal Press Co.*, 751 F.2d 140, 143 (3d Cir. 1984) (section 402A was never intended to turn the manufacturer into an insurer for all its products).

80. The argument is founded on the literal reading of section 402A of the *Restatement (Second) of Torts*, which states that "[o]ne 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 . . . user or consumer, or to his property . . . ."

81. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, \_\_\_, 230 N.W.2d 794, 798 (1975) (an unreasonably dangerous defective condition is a requisite element to strict liability).

82. Compare *Heaton v. Ford Motor Co.*, 248 Or. 467, \_\_\_, 435 P.2d 806, 808 (1967) (product is defective if it does not meet the reasonable expectations of the average user) with *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, \_\_\_, 525 P.2d 1033, 1038 (1974) (utility of product may be so high that change to alleviate danger may impair utility, or cost of change may be so great that no one would buy the product).

83. See Keeton, *Product Liability and the Meaning of Defect*, 5 St. MARY'S L.J. 30 (1973).

84. See Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 430 (1974) (all products flawed at some technological level); *id.* at n.11 (to metallurgist, all structures have flaws).

when these conditions emerge as a "defect." This dilemma was eventually solved when it became apparent that when speaking in terms of *defect*, the courts were confronted with three different facets of the same problem. It soon became apparent that a product could be defective either because it was mismanufactured,<sup>85</sup> misdesigned,<sup>86</sup> and/or mismarketed,<sup>87</sup> and that the most appropriate test for each is not necessarily the same.

### 1. Mismanufactured Products

The most appropriate means for determining whether a product is defective because it has been mismanufactured is whether the product, as placed into the stream of commerce,<sup>88</sup> meets the reasonable expectations of the ordinary user-consumer.<sup>89</sup> The objective approach is best suited for this scenario, because the product causing the injury is different from the rest of those produced by the defendant. In its defective condition, it stands alone. To illustrate, consider that when a product is mismanufactured it may be defective for one of two reasons: The manufacturer may have used substandard or non-complying raw materials,<sup>90</sup> or the product may have been misassembled.<sup>91</sup> In either case, the item as introduced into the market place is in a condition not intended by the manufacturer. The best test, therefore, in determining whether such a product is in fact defective is the reasonable expectations test:<sup>92</sup> Considering the particular

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85. See *Pouncey v. Ford Motor Co.*, 464 F.2d 957, 961 (5th Cir. 1972) (in applying Alabama law, the court of appeals stated that it is settled law that manufacturers' liability is predicated upon negligence in design or manufacture; the jury was permitted to infer negligence from evidence of an actual defect in the product).

86. See *McCormack v. Hanksraft Co.*, 278 Minn. 322, \_\_\_, 154 N.W.2d 488, 498 (1967) (plaintiff was able to show that steam vaporizer which scalded a child was defectively designed because manufacturer did not guard against the foreseeable danger that a child could overturn it, even though a safe and practical alternative design was available).

87. See *McCormick v. Bacyrus-Erie Co.*, 81 Ill. App. 3d 154, \_\_\_, 400 N.E.2d 1009, 1014 (1980) (manufacturer has duty to give adequate instructions for product use as well as warnings against dangers in the use of its product).

88. See *Heaton v. Ford Motor Co.*, 248 Or. 467, \_\_\_, 435 P.2d 806, 308 (1967) (manufacturer liable for an unreasonably dangerous product that is placed on the market).

89. *Id.* at \_\_\_, 435 P.2d at 808 (unreasonably dangerous to user means dangerous to an extent beyond that contemplated by ordinary user).

90. See *Pouncey v. Ford Motor Co.*, 464 F.2d 957, 961 (5th Cir. 1972) (there was evidence the defendant's supplier used "dirty" steel to manufacture defective fan blades and the plaintiff produced expert testimony to show that the steel used was the proximate cause of the damaging event).

91. *Curtiss v. Young Men's Christian Ass'n*, 82 Wn.2d 455, 471, 511 P.2d 991, 1000 (1973) (Hamilton, J., concurring in part, dissenting in part) (no question that plaintiff's injuries were caused by improper assembly).

92. RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965) (among other elements, defective condition is defined as that condition not contemplated by the user which is unreasonably dangerous to the user).



characteristics and general usage of the product, as well as representations concerning the product by advertisements or otherwise, were certain expectations created regarding its use?<sup>93</sup> If these expectations are not met and if, as a result, the item is unreasonably dangerous, then the product is deemed to be defective.<sup>94</sup> This standard is by no means universally applied, and as to some products, such as food, the courts at first applied other standards.<sup>95</sup> In the final analysis, however, the reasonable expectation test has been accepted by a majority of jurisdictions and appears to be the best means of accomplishing the court's objective of determining whether the product in question is a defective one.

## 2. Misdemeanor Products

The best way of determining whether a product is defective because it has been misdesigned is the risk-benefit analysis.<sup>96</sup> Misdemeanor products hold the possibility of condemning the defendant's entire production

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93. See Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370 (1974). In his "Statement of the Thesis," Professor Shapo states that product disappointment depends on a portrayal made or permitted to be made by the seller. The portrayal is viewed in context of the impression that it is reasonable for the consumer to receive from the advertised product's appearance as well as the widespread social consensus of the product's function. *Id.*

94. See Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 466 (1978) (does the product deviate from what it should be, and if so, is the deviation the reason for injury). *But see* Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1211 (1976) (consumer should be given credit for expecting product to be reasonably safe).

95. Some jurisdictions have followed what is known as the "foreign-natural" doctrine which emerged in *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936). In *Mix*, the California Supreme Court held that a chicken bone in a chicken pie could not be called a foreign substance and should have been anticipated. Thus, the dish was not unfit for human consumption. The foreign-natural view is clear cut as long as the object encountered is obviously foreign. *See, e.g.*, *Athens Canning Co. v. Ballard*, 365 S.W.2d 369 (Tex. Civ. App. 1963) (burr in a can of peas); *Brumit v. Cokins*, 281 S.W.2d 154 (Tex. Civ. App. 1959), *writ ref'd, no. rev. err.* (glass in milkshake). However, many jurisdictions have rejected the foreign-natural test in favor of the reasonable expectation test. *See Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824 (Fla. Dist. Ct. App. 1967) (consumer injured by walnut shell in bowl of maple-walnut ice cream). "The test should be what is 'reasonably expected' by the consumer in the food as served, not what might be natural to the ingredients of the food prior to preparation." *Id.* at 826.

96. *See Phillips v. Kimwood Mach. Co.*, 269 Or. 485, \_\_\_, 525 P.2d 1033, 1038 (1974) (utility of product may be so great that design change to alleviate danger may impair utility).

line.<sup>97</sup> This approach takes into consideration that, unlike the producer of a mismanufactured product, the defendant in these instances intended to place the product into the stream of commerce in its present condition.<sup>98</sup> In determining whether such a product is defective, the courts engage in a balancing test, weighing the risk involved in introducing the product into the market place in its present condition against the burden of reducing or eliminating the risk of harm from the product.<sup>99</sup> The outcome is then weighed against the benefit that would arise from a safer design.<sup>100</sup> If, after the damaging event has occurred, it is determined that the benefit to society of a safer design would have been greater than the burden involved in reducing or eliminating the risk, the product is deemed to be defective.<sup>101</sup> If, on the other hand, the burden would have been greater than the benefit to be derived from eliminating or reducing the risk, the product is not defective.<sup>102</sup>

When analyzing the burden of reducing or eliminating the risk, we are speaking in terms of an alternate design,<sup>103</sup> which takes into account such factors as cost,<sup>104</sup> utility,<sup>105</sup> marketability,<sup>106</sup> state of the art,<sup>107</sup> and,

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97. *Id.* at \_\_\_, 525 P.2d at 1037 (a case in which the product claimed to be defective and dangerous due to misdesign is not as simple as a case of mismanufacture because all products in that line are the same).

98. *Id.* (the law assumes the manufacturer has knowledge of the product's dangerous tendency).

99. See *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970) (reasonable care involves balancing the likelihood and gravity of harm against the burden to avoid the harm).

100. See *Wade, On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 844 (1973) (is the social usefulness of product so high that defendant should not be liable for the injuries).

101. See, e.g., *Helicoid Gage Div. v. Howell*, 511 S.W.2d 573, 577 (Tex. Civ. App. 1974), *writ ref'd, no. rev. err.* (evidence showed that shatterproof material would have only increased unit cost by approximately one dollar).

102. See, e.g., *Garst v. General Motors Corp.*, 207 Kan. 2, \_\_\_, 484 P.2d 47, 62 (1971) (defendant was not required to spend such sums of money to design a braking system that would price the product out of the market).

103. *McCormack v. Hanksraft Co.*, 278 Minn. 322, \_\_\_, 154 N.W.2d 488, 494 (1967) (product's defect could have been eliminated by adopting an existing alternative design).

104. See *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 854 (Tex. Civ. App. 1977), *writ ref'd, no. rev. err.* (court held that stove was defectively designed because a valve which could not have been accidentally turned on would have only cost manufacturer an additional \$1.50).

105. See *Hagens v. Oliver Mach. Co.*, 576 F.2d 97, 100 (5th Cir. 1978) (plaintiff argued that the blade guard of a table saw should have been designed to be non-removeable; however, the court held that because the guard was an obstruction to other standard uses, the saw's utility would be substantially impaired if the guard could not be removed).

106. See *Garst*, 207 Kan. at \_\_\_, 484 P.2d at 62.

107. The phrase "state of the art" is subject to different interpretations. The emphasis of the phrase "defective condition" means that the condition was not contemplated by the

of course, safety.<sup>108</sup> When dealing with the issue of benefit, however, we are concerned with a product where the risk of harm or the potential for harm has been greatly reduced.<sup>109</sup> This test of analyzing the risk and benefit of a particular product is best suited for such common situations as those where a defect is allegedly due to the absence of a safety device, such as a guard on a machine,<sup>110</sup> or an electrical interlock cut-off device,<sup>111</sup> or a safety on a gun.<sup>112</sup> In addition, multitudes of cases involve allegations of defects concerning fabrics that are inherently dangerous because they have not been treated with an effective flame retardant chemical,<sup>113</sup> or drain cleaners with chemical compositions that are too caustic.<sup>114</sup> In all of these instances, the burden of redesigning the product must be weighed against the resulting benefit, and as previously mentioned, if the benefit outweighs the burden, the product is deemed defective.<sup>115</sup>

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consumer at the time the product left the seller's hands. See RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965). Thus a manufacturer should not be liable for a product that met the level of scientific or technical knowledge at the time of the sale, even though that knowledge may have been superseded at a later date. See *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). The question then becomes: what is the state of the art at the time of the sale? See *Boatland v. Bailey*, 609 S.W.2d 743, 749 (Tex. 1980).

108. See *McCormack v. Hanksraft Co.*, 278 Minn. 322, —, 154 N.W.2d 488, 496 (1967) (manufacturer subject to liability for failure to use reasonable care to protect against unreasonable risk when product used for intended purpose).

109. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973) (\$200 to \$500 cutter guards on \$8,000 slitter machine would not diminish usefulness and would decrease seriousness of potential harm).

110. See Annotation, *Products Liability: Duty of Manufacturer to Equip Product With Safety Device to Protect Against Patent or Obvious Danger*, 95 A.L.R. 3d 1066 (1979).

111. *Fischer v. Cleveland Punch & Shear Works Co.*, 91 Wis. 2d 85, —, 280 N.W.2d 280, 285 (1979) (manufacturer liable, inter alia, in failing to provide interlock switch that would make inadvertent tripping of control impossible).

112. *Phillipe v. Browning Arms Co.*, 375 So. 2d 151, 155 (La. Ct. App. 1979) (evidence of defect in safety mechanism or pin on shotgun that exploded sufficient to hold manufacturer and importer liable).

113. See, e.g., *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1026 (1st Cir. 1973) (flannelette material unreasonably dangerous without effective retardant in fabric); *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111, 112 (5th Cir. 1972) (seller could be held liable for death resulting from nightgown igniting while one foot away from heater); *La Gorga v. Kroger Co.*, 275 F. Supp. 373, 381 (W.D. Pa. 1967) (seller of child's jacket which caught fire held strictly liable), *aff'd*, 407 F.2d 671 (3d Cir. 1969).

114. See, e.g., *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081, 1089-90 (N.D. Ohio 1975), *modified and aff'd*, 591 F.2d 352 (6th Cir. 1978) (manufacturer of liquid drain cleaner liable for chemical burns suffered by infant).

115. See, e.g., *Mickle v. Blackmon*, 252 S.C. 202, —, 166 S.E.2d 173, 192 (1969) (manufacturer at little or no cost could change composition of knob on gear shift lever so as not to deteriorate and avoid exposing driver to impalement in a collision). *But see Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073 (4th Cir. 1974) (if design change adds to price

Two related issues regarding a misdesigned product include the problems of misuse and obvious dangers. When a product has been misused, may the defendant be absolved of liability? The answer depends upon whether such misuse was foreseeable.<sup>116</sup> If the manufacturers placed the product into the stream of commerce, and could or should have foreseen the misuse in question, then they remain liable for resulting injuries under the risk-benefit analysis.<sup>117</sup> Individuals are required to take foreseeable misuses into consideration when engaged in the product design. Obvious dangers in the product, on the other hand, present a more complex analysis. In these instances, the injured party's contributory negligence must be factored into the damaging event.<sup>118</sup> If, for example, reasonably prudent persons would not have exposed themselves to the danger in question, then defendants may escape liability on the basis of the injured party's contributory negligence.<sup>119</sup> If, however, reasonable persons would have used the product in its present condition, the defendants may remain liable for resulting injuries.<sup>120</sup> The theory behind this rule is that the courts do not wish to reward individuals by absolving them of liability when they have placed a product with an obvious design defect into the stream of commerce.<sup>121</sup>

Finally, it should be noted that like the test for mismanufactured products, the risk-benefit analysis is not universally applied. However, this test appears to be the best means for accomplishing the courts' objective, which is to determine whether the product in question is defective.

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so as to take product out of price range and intended market, it may be unreasonable to require adoption of change).

116. See *Findlay v. Copeland Lumber Co.*, 265 Or. 300, \_\_\_, 509 P.2d 28, 31 (1973) (use must be so unusual that average user could not reasonably expect item to withstand misuse).

117. *Cornette v. Searjeant Metal Products, Inc.*, 147 Ind. App. 46, \_\_\_, 258 N.E.2d 652, 665 (1970) (Sharp, J., concurring) (misuse defense available when product used in manner not reasonably foreseeable nor for a reasonably foreseeable purpose).

118. See *Compo v. Schofield*, 301 N.Y. 468, \_\_\_, 95 N.E.2d 802, 804 (1950) (manufacturer under no duty to guard against injury from obviously dangerous source).

119. *Id.* (manufacturer had right to expect persons would avoid contact when nature of article gives warning of danger).

120. See, e.g., *Codling v. Paglia*, 32 N.Y.2d 330, 340, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973) (many articles defy detection of defect except by expert).

121. See *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 509, 517, 476 P.2d 713, 719 (1970) (manufacturer should not escape liability when product design was obviously bad). The court further supported its reasoning, stating, "[L]aw [should] discourage misdesign rather than encouraging it in obvious form." *Id.*

### 3. Mismarketed Products

The test for determining whether a product has been mismarketed is the risk-benefit analysis.<sup>122</sup> Once again, if an individual has intended to introduce the product into the stream of commerce in its present condition,<sup>123</sup> the same concern with risk, burden,<sup>124</sup> and resulting benefit<sup>125</sup> must be applied to the fact situation at hand. The main difference between a product that has been misdesigned and one that has been mismarketed, however, is that instead of concentrating on an alternate design, the courts in these latter instances must focus on the instructions and warnings that accompany or should accompany the product. These two points differ in that instructions pertain to the effective use of a product,<sup>126</sup> whereas warnings deal with its safe use.<sup>127</sup>

Since it is impossible to warn and/or instruct users and consumers of all possible risks inherent in the use of a particular item, the first question encountered is how much of an instruction or warning must be given?<sup>128</sup> The importance of this question is accentuated by two facts. First, it would appear that since the burden would always be to issue additional information and the benefit would always be a safer product, then the decisions involving a mismarketed product would consistently result in a finding of defect. However, the second fact, the law of dimin-

122. See Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 403 (1970) (“[T]he question whether a product was properly designed is inseparable from the question whether adequate instructions are provided to insure safe usage.”); see also Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 844 (1976) (“[T]he reasonable-with-full-knowledge-test gives an important additional perspective to the meaning of ‘unreasonably dangerous.’”).

123. See *supra* text accompanying note 98.

124. See *Pavildes v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (burden of warning costs manufacturer little to prevent losses and avert harm).

125. See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1106 (5th Cir. 1973) (user has right to make decision whether to be exposed to risk product entails).

126. See, e.g., *McCully v. Fuller Brush Co.*, 68 Wn.2d 675, 678, 415 P.2d 7, 10 (1966) (“Directions and warnings are intended to serve different purposes. The former are designed to assure *effective* use of the product; a warning on the other hand, is intended to assure a *safe* use.”).

127. See, e.g., *Brown v. Sears, Roebuck & Co.*, 136 Ariz. 556, —, 667 P.2d 750, 758 (1983) (“Instructions are to be followed to secure the most efficient or satisfactory use of the product; warnings are instructions as to *dangers* that might occur if the instructions are not followed.”).

128. See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514 (1976). To be effective, a warning must be selective. To have impact, manufacturers must select carefully the dangers which are to become part of the consumer’s reasoning process when using the product. *Id.*

ishing returns, soon becomes evident in these cases. If the instructions and/or warnings become too voluminous, the individuals involved will more than likely disregard this information.<sup>129</sup> Therefore, the burden becomes one of issuing the right amount of information. This dilemma often becomes clearer in hindsight than at the time the product was initially introduced into the stream of commerce.<sup>130</sup> As a result, the test for determining whether the aim of issuing adequate warnings and instructions has been met is determined by the reasonable prudent person. Would a reasonable person be satisfied by the amount of information given?<sup>131</sup> If the answer is yes, then the product is not deemed to be defective.<sup>132</sup> If on the other hand, a reasonable individual would have desired more data, the product is said to be defective in this regard, and the end result is the conclusion that the product has been mismarketed.<sup>133</sup>

The next question that arises in this area is: To whom should this information be given?<sup>134</sup> This issue becomes increasingly complex when dealing with a product that is capable of inflicting harm as it passes

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129. See *id.* ("The story of the boy who cried wolf is an analogy worth contemplating when considering the imposition of a warning in a case of rather marginal risk.").

130. *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975). In *Griggs*, components of a wheel rim assembly were mismatched by a prior owner. This damaging event occurred more than 25 years after manufacture of the part. The manufacturer had distributed literature to wholesalers and retailers warning of the danger of mismatching components. The court held that it was unreasonable for a supplier to entrust distribution of the safety information to middlepersons in the distribution, when it was possible to affix warnings to the components themselves.

131. RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965), describes a product as defective when it is "in a condition not contemplated by the ultimate consumer." It is making the user/consumer aware of such a condition that is the purpose of an adequate warning. In *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), it was held that there was a duty to warn if a reasonable person would want to know of the risk and then decide whether to take that risk. In *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974), the defendant, a manufacturer of polio vaccine, had distributed information to public health departments about the remote possibility of a recipient contracting polio from the vaccine. The court held the defendant liable to the plaintiff who contracted polio after the vaccine was administered by a public health agency. Although a warning circular was contained in the vaccine's packages, it was not seen by or read to the plaintiff's parents. *Id.* at 1270. The court reasoned that because it was foreseeable that the vaccine would not be administered by a prescribing physician, the risk, regardless of how remote, was one the consumer would want to know, and thus the package circular was an inadequate warning. *Id.* at 1277-78.

132. See *supra* note 131.

133. *Id.*

134. See RESTATEMENT (SECOND) OF TORTS § 388 (1965); see also 72 C.J.S. *Products Liability* § 27 (Supp. 1975).

through the various stages of its marketing scheme.<sup>135</sup> In other words, it may be necessary to issue warnings and instructions to individuals other than the ultimate users and/or consumers originally mentioned in 402A.<sup>136</sup> For example, if the product is one capable of inflicting harm while on display in a shop, prospective customers and shoppers should be alerted accordingly.<sup>137</sup> Unfortunately, this is a problem that often becomes more clear after a damaging event has taken place. Therefore, the solution to avoiding liability is to warn or instruct all foreseeable plaintiffs.<sup>138</sup> The issue of foreseeability, more often than not, will be a question of fact for the jury.<sup>139</sup> This seems to be the most effective means of discerning exactly to whom these warnings and instructions should be given.

The issues of obvious dangers and misuse, discussed with regard to design defects, resurface in the arena of marketing defects. In this regard, it should be noted that unlike misdesigned goods, there is no duty to warn against obvious dangers.<sup>140</sup> As one court has said, "We hardly believe it is anymore necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth."<sup>141</sup> The real question in cases of this nature is whether the danger in question was obvious.<sup>142</sup> In many instances, reasonable minds will differ on this point, so the question is often one for the

135. See *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 299 S.E.2d 897 (1983) (manufacturer of component part of larger product may have duty to warn ultimate user of hazards connected with part).

136. See *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, \_\_\_, 181 N.E.2d 430, 433, 226 N.Y.S. 2d 407, \_\_\_ (1962) (duty to warn extends to ultimate purchasers, their employees, and to third persons exposed to foreseeable risk).

137. See, e.g., *Davis v. Gibson Prod. Co.*, 505 S.W.2d 682 (Tex. Civ. App. 1973), *writ ref'd, no rev. err.* (failure to place sharp machetes out of reach of customers and failure to warn customers as to danger constituted sufficient evidence to require submission of issue relating to strict liability to jury).

138. *Mitchell v. Miller*, 26 Conn. Supp. 142, \_\_\_, 214 A.2d 694, 699 (1965) (policy which protects user/consumer should also protect bystander); see also *supra* text accompanying note 130.

139. See *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969) (when lawn mower threw bolt that struck bystander, whether manufacturer should have warned bystander was a question for the jury).

140. *Bishop v. Firestone Tire & Rubber Co.*, 814 F.2d 437 (7th Cir. 1987) (manufacturer has no duty to warn if danger is obvious).

141. *Bartkewich v. Billinger*, 432 Pa. 351, \_\_\_, 247 A.2d 603, 606 (1968).

142. *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524, 527 (Ind. Ct. App. 1984) (whether danger is open and obvious is an objective test based on what the user should have known).

jury.<sup>143</sup> However, if it is clear that the condition in question is obvious, there is no corresponding duty to warn of its danger.<sup>144</sup>

Situations involving the misuse of a product, on the other hand, generally depend upon the single element of foreseeability.<sup>145</sup> If the product's misuse is foreseeable, also a question of fact for the jury,<sup>146</sup> then there is a duty to warn and/or to issue adequate instructions.<sup>147</sup> If, however, the use of the product in question was an unforeseeable one, there is no corresponding duty to warn and/or to issue instructions for the product's use.<sup>148</sup>

A special problem is encountered in the marketing of a product when dealing with drugs and products that cause allergic reactions. Drugs are divided into two categories: Those sold over-the-counter or those sold by prescription.<sup>149</sup> If the particular drug falls into the former category, then all instructions and warnings should be given to the potential user/consumer.<sup>150</sup> If, on the other hand, the product is sold by prescription, then the required information should be given to the "learned intermediary"

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143. *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 37 (D.C. Cir. 1957) (Washington, J., dissenting) (question of fact as to whether manufacturer could justifiably expect user to be aware of danger), *cert. denied*, 355 U.S. 855 (1957).

144. *See Jamieson*, 247 F.2d at 28.

145. RESTATEMENT (SECOND) OF TORTS § 395 comment k (1965): "*Foreseeable uses and risks*. The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily intended. The maker of a chair, for example, may reasonably expect that someone will stand on it . . . ."

146. *Moran v. Faberge, Inc.*, 273 Md. 538, \_\_\_, 332 A.2d 11, 16 (1975) ("There is a vast middle ground of product uses about which reasonable minds could disagree as to whether they are or should be foreseeable to the manufacturer, thus requiring resolution by the trier of fact . . . ."); *see also Giordano v. Ford Motor Co.*, 165 Ga. App. 644, \_\_\_, 299 S.E.2d 897, 899 (1983) (duty to warn depends on foreseeability of use in question, danger involved, and foreseeability of consumer knowledge of danger, which are matters not compatible with summary judgment).

147. *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 288, 71 Cal. Rptr. 306 (1968) (foreseeable to a tire manufacturer that tires would be subject to overloading and therefore had a duty to inform and instruct users as to safe carrying capacity and to warn of the danger of overloading).

148. *Trotter v. Hamill Mfg. Co.*, 143 Mich. App. 593, \_\_\_, 372 N.W.2d 622, 626 (1985) (where seat belt assembly was removed from a conventional automobile and installed by decedent in a dune buggy, the court held that neither the seat belt manufacturer nor the manufacturer of the vehicle had a duty to warn of the danger of such an unforeseeable use).

149. *See, e.g., Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1276 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974) (manufacturers have duty to warn ultimate purchasers of inherent dangers in over-the-counter drugs, but producer of prescription drugs need only warn prescribing physician, a "learned intermediary" between manufacturer and consumer).

150. *Wells v. Ortho Pharmaceutical Corp.*, 615 F. Supp. 262, 294-95 (N.D. Ga. 1985) (plaintiff on recommendation of physician purchased non-prescription spermicide, yet manufacturer still had duty to warn purchaser of product's side effects), *aff'd in part, modified*



or prescribing physician.<sup>151</sup> The most notable exception to this rule involves prescription drugs dispensed by some other means. If, for example, the drug is used in a mass inoculation, such as the polio vaccine, then as with over-the-counter drugs, the rule is that the information should be given directly to the patient.<sup>152</sup> The rationale for this rule is that the dispensing physician may not be present to warn or inform the person directly of any impending danger.<sup>153</sup>

In the case of allergic reactions to products, the jurisdictions have developed three prevailing rules. One is that there is no duty to warn of an idiosyncratic reaction to a product unless there is an "appreciable number" of individuals who are allergic to it.<sup>154</sup> The second is that there is a jury question as to whether a warning must be given if "some" individuals will be hypersensitive to the product,<sup>155</sup> and finally, the most stringent position is that there must be an accompanying warning in those instances where "a" person may suffer some harm from the use of the product.<sup>156</sup> The weight of recent authority, however, favors the first position.<sup>157</sup>

*in part, and remanded*, 788 F.2d 741 (11th Cir. 1986), *reh'g denied*, 795 F.2d 89 (11th Cir. 1986), *cert. denied*, 479 U.S. 950 (1986).

151. *McKee v. Moore*, 648 P.2d 21, 24 (Okla. 1982) (regarding prescription products or devices, the general rule is that the manufacturer has a duty to warn only the prescribing physician).

152. Where a prescription medicine is dispensed at a mass inoculation or public clinic when there is no prescribing physician, as an exception to the general rule, the manufacturer has a duty to warn the patient for non-over-the-counter drug medicines. Such use is foreseeable and in such cases the manufacturer is responsible for warning the consumer to balance the risks against the drug's benefit. *Reyes*, 498 F.2d at 1264.

153. *Id.* at 1276.

154. *See, e.g., Tayar v. Roux Laboratories, Inc.*, 460 F.2d 494, 496 (10th Cir. 1972) (idiosyncratic reaction to hair rinse, normally safe to the public, did not entitle plaintiff to recover); *Griggs v. Combe, Inc.*, 456 So. 2d 790, 793 (Ala. 1984) (manufacturer of over-the-counter drug not liable under theories of negligence, strict liability, or breach of implied warranty for failure to warn of injuries resulting from allergic reaction by hypersensitive user); *Alberto-Culver Co. v. Morgan*, 444 S.W.2d 770, 777 (Tex. Civ. App. 1969), *writ ref'd, no rev. err.* (plaintiff who was hypersensitive failed to show she was within the class of users that defendant could reasonably foresee); *Presbrey v. Gillett Co.*, 105 Ill. App. 3d 1082, \_\_\_, 435 N.E.2d 513, 520 (1982) (rule barring idiosyncratic users from recovery applies where suit is brought under negligence, warranty, or strict liability).

155. *Holmes v. Grumman Allied Indus.*, 103 A.D.2d 909, \_\_\_, 478 N.Y.S.2d 143, 145 (1984) (notwithstanding small percentage of persons sensitive to subject chemical, possibility of danger raised substantial fact issue).

156. *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, \_\_\_, 528 P.2d 522, 530 (1974) (not unreasonable to impose liability where product only dangerous to small percentage of consumers).

157. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) (warning required where product contains ingredient to which substantial number of population will be allergic; *see also* 72 C.J.S. *Products Liability* § 26b (Supp. 1975)).

From the above discussion relating to "a defective product," one may conclude that what was published in 1965 has evolved into a broader concept than intended by the framers of the second *Restatement*.<sup>158</sup> The courts have taken section 402A and extended it into areas most likely not contemplated by the original drafters.<sup>159</sup> While this phenomenon is probably best illustrated by the sections dealing with products and defects, it is by no means limited to these areas.

D. "[U]nreasonably dangerous . . ."

The phrase "unreasonably dangerous" was inserted in 402A to distinguish between those products capable of causing injury and those products causing injury because they are in a defective condition, and therefore, unreasonably dangerous.<sup>160</sup> In other words, there was a general agreement that such products as butter, drugs, whiskey, cigarettes, and automobiles can cause harm even though there is nothing wrong with them.<sup>161</sup> The intent of 402A, however, was to impose liability only when

158. *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964). In *Putman*, Judge Wisdom summarized the development of section 402A, pointing out that the original *Restatement of Torts* had no provision for strict liability. *Id.* at 918-19.

In 1961, *Tentative Draft No. 6* of the *Restatement (Second) of Torts* recommended the adoption of section 402A, but limited application to "food for human consumption." Application was expanded to include items of "intimate bodily use" and "products intended for external application or contact." However, in May, 1964, the final draft of section 402A was approved expanding the application to all products. See *supra* Section I. Historical Background.

159. See *supra* Section I. Historical Background.

160. RESTATEMENT (SECOND) OF TORTS § 402A (1965): "(1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property." (emphasis added)

161. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965):

*Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart at-

the product was defective. The section was intentionally designed to protect prospective defendants against undue liability<sup>162</sup> and as a result, this phrase was included. Consequently, an injured plaintiff is required to establish that the damaging event was caused by a defective product, and that this defective condition was an unreasonably dangerous one.<sup>163</sup> Thus, a reasonable person would not have expected the harm.

Some states, such as California, have refused to follow this position, stating that it is too onerous to require a plaintiff to establish both elements.<sup>164</sup> However, the majority view has decidedly rejected the California rule,<sup>165</sup> and has required that a plaintiff allege and prove that the product was in a defective condition and unreasonably dangerous.<sup>166</sup> As one court stated, "To speak in terms of 'defect' only causes confusion . . . . The key . . . is whether the product is 'unreasonably dangerous.'"<sup>167</sup> In this respect, 402A has been followed verbatim.

E. "[T]o the user or consumer or to his property . . ."

One of the principle reasons for the adoption of 402A was the inability of the law of warranty to adequately deal with the issues that arose

tacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

162. *Greenman v. Yuba Power Co.*, 59 Cal. 2d 57, \_\_\_, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). Although published three years before the final draft of section 402A, Justice Traynor, an author of the second *Restatement*, set forth in *Greenman* the common law precursor to section 402A, the basic aim of strict liability. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves." *Id.*

163. *Phipps v. General Motors Corp.*, 278 Md. 337, \_\_\_, 363 A.2d 955, 958 (1976) (in order to recover in an action under section 402A, plaintiff must establish that the product was in a defective condition when the product left control of the seller, was unreasonably dangerous to the user, the defect was the cause of injuries, and the product reached the consumer without substantial change in condition).

164. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, \_\_\_, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972) (to require proof of both product defect and unreasonably dangerous condition places greater burden on injured plaintiff than is required in *Greenman*).

165. See, e.g., *Burns v. Riddell, Inc.*, 113 Ariz. 264, \_\_\_, 550 P.2d 1065, 1067 (1976) (citing *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968)) (Arizona specifically adopted section 402A and the concept of unreasonably dangerous defect, rejecting the California approach); *Potthoff v. Alms*, 41 Colo. App. 51, \_\_\_, 583 P.2d 309, 311 (1977) (majority of states clearly mandate defective product must be shown to be unreasonably dangerous for action in strict liability to prevail); *Heldt v. Nicholson Mfg. Co.*, 72 Wis. 2d 110, \_\_\_, 240 N.W.2d 154, 157 (1974) (unreasonably dangerous is essential element of product liability action).

166. *Cepeda v. Cumberland Eng'g Co.*, 76 N.J. 152, \_\_\_, 386 A.2d 816, 828 (1978) (plaintiff must prove that article which caused injury was unreasonably dangerous).

167. *Ross v. Up-Right, Inc.*, 402 F.2d 943, 947 (5th Cir. 1968).

when the damaging event injured a person who was not in privity with the seller of the defective product.<sup>168</sup> The need for a contractual relationship between the plaintiff and the defendant in order to recover had long been on the decline.<sup>169</sup> The adoption of strict liability finally did away with the issue of privity. The drafters of the section made relief available if personal injury was sustained by the user, the consumer, or the property of either.<sup>170</sup> The courts, however, have once more extended the provisions of 402A to provide a remedy not mentioned in the original text.

Cases involving the innocent bystander are illustrative.<sup>171</sup> There is general agreement that since the bystander has no voice in the selection of the product, nor any say in the inspection of the goods, nor any influence in the manner in which it is to be used, he or she more than any other person involved in the damaging event, should be protected by 402A.<sup>172</sup> Imposition of 402A in cases involving innocent bystanders is further justified by the belief that it is equitable since no additional burden is placed upon the seller. Since "[t]he same precautions required to protect the buyer or user would generally do the same for the bystander,"

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168. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1852). The decision of *Winterbottom* held products liability actions in check for over 60 years. The plaintiff sued the manufacturer of a stagecoach supplied to the British government for damages when the defective vehicle overturned, causing injury. The court held that without privity of contract, the law would provide a means of letting in an "infinity of actions" leading to "absurd and outrageous consequences." *Id.* at 404-05.

169. See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). In *MacPherson*, Justice Cardozo created the eminently-dangerous-product exception to the privity requirement, stating that a rule that extended liability beyond contracting parties was not an anomaly when injury to others was a foreseeable result. *Id.* at \_\_\_, 111 N.E. at 1054.

170. RESTATEMENT (SECOND) OF TORTS § 402A (1965): "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property."

171. RESTATEMENT (SECOND) OF TORTS § 402A comment o (1965). The drafters of section 402A recognized the possible need to protect those who come into casual or unintentional contact with a defective product, but who are by definition beyond the scope of "user" or "consumer." The drafters stated that there was no essential reason why plaintiffs, such as bystanders, should be deprived of the protection of section 402A, but neither approved nor disapproved of such an expansion of the rule.

172. See *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 587, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969) (bystander has no opportunity to inspect product or limit purchase to only products from reputable manufacturers and is therefore in greater need of protection from defective products); see also *Giberson v. Ford Motor Co.*, 504 S.W.2d 8, 11 (Mo. 1974) ("[B]ecause of inability to 'kick the tires' the bystander is in need of more protection . . ." (quoting *Howes v. Hansen*, 56 Wis. 2d 247, \_\_\_, 201 N.W.2d 825, 831 (1972))).

there is no resulting hardship.<sup>173</sup> The result, however, is that once again, the text has been extended beyond its original terms.

*F. "[I]s subject to liability for the physical harm thereby caused to the ultimate user or consumer, or to his property . . ."*

It may appear obvious that the intent of 402A is to compensate for physical injuries or property damage sustained by users and consumers. The courts, however, have in some instances projected the coverage of this section far beyond its apparent scope.

In one of the earliest cases, the Supreme Court of New Jersey extended 402A to include economic loss. In *Santor v. A. & M. Karagheusian, Inc.*,<sup>174</sup> the plaintiff purchaser's only compensable injury was the purchase price. After laying carpet, it became apparent that it was defective. A line, due to an improper dying process, became increasingly noticeable. As the pile wore down, the line became worse and two additional lines appeared.<sup>175</sup> Plaintiff brought suit, and in a unanimous decision, the court held that a cause of action could be maintained against the manufacturer on either of two theories: Breach of implied warranty of reasonable fitness or strict liability.<sup>176</sup> The court reasoned that liability was imposed in this case to insure that the cost of injury was borne by the product manufacturer who put the product into the stream of commerce.<sup>177</sup> In other words, if an individual sustained loss, whether to the person, property, or of an economic nature, as a result of a defective product placed into the market place, the manufacturer would be held strictly liable.

Barely four months after *Santor* was decided, it was rejected by the Supreme Court of California in *Seely v. White Motor Co.*<sup>178</sup> Plaintiff had purchased a truck manufactured by the defendant. After taking possession, it became obvious that the vehicle was defective. When the brakes failed and the truck overturned, plaintiff brought suit seeking to recover damages related to the repair of the truck and damages for loss of busi-

173. *Giberson*, 504 S.W.2d at 12.

174. 44 N.J. 52, \_\_\_, 207 A.2d 305, 312 (1965) (where only damage is to product sold and other property, manufacturer is still strictly liable to consumer).

175. *Id.* at \_\_\_, 207 A.2d at 307.

176. *Id.* at \_\_\_, 207 A.2d at 310, 312.

177. *Id.* at \_\_\_, 207 A.2d at 312 (strict liability arises from mere presence of product on the market).

178. 63 Cal. 2d 9, \_\_\_, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965) (doctrine of strict liability governs distinct problems of physical injuries and has not superseded scheme of recovery under breach of warranty).

ness due to the accident.<sup>179</sup> The California Supreme Court affirmed the trial court's award of damages in the amount of the payments made plus lost profits on the grounds that defendant manufacturer had breached an express warranty to plaintiff.<sup>180</sup> The majority opinion, written by Chief Justice Traynor, condemned *Santor's* application of strict liability principles to a case involving economic loss alone.<sup>181</sup> In effect, Justice Traynor emphasized that strict liability was applicable only when the injuries were related to the safety of the product, not for the violation of a contractual expectation.<sup>182</sup>

After almost twenty-five years, *Seely* appears to represent the majority position on the issue of whether strict liability should apply when economic loss is plaintiff's only injury.<sup>183</sup> Nevertheless, it is clear that once again, some courts have gone beyond the intended limits of 402A.

Punitive damages represent another area in which the courts have extended the scope of this section.<sup>184</sup> Nowhere in the ambit of 402A are exemplary damages provided for, yet the courts have had no difficulty in awarding them.<sup>185</sup> In fact, some of the more noteworthy decisions involve

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179. *Id.* at \_\_\_, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.

180. *Id.* at \_\_\_, 403 P.2d at 148, 45 Cal. Rptr. at 20.

181. *Id.* at \_\_\_, 403 P.2d at 151, 45 Cal. Rptr. at 23 (strict liability was designed to govern problem of physical injuries, not undermine warranty).

182. *Id.*

183. *See, e.g.,* *Sanco, Inc. v. Ford Motor Co.*, 771 F.2d 1081, 1084 (7th Cir. 1985) (majority of jurisdictions have not permitted recovery of purely economic losses in negligence or strict liability action); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962, 971 (D. Ariz. 1975) (laws of Alaska, Arizona, California, Hawaii, and Texas do not permit recovery of purely economic loss under theory of strict liability), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Clark v. International Harvester Co.*, 99 Idaho 326, \_\_\_, 581 P.2d 784, 791 (1978) (purchaser of defective product who sustained only economic loss, but no personal injury or property damage, cannot recover in products liability action against manufacturer); *see also* *Washington Water Power v. Graybar Elec. Co.*, 112 Wn.2d 847, 774 P.2d 1199 (1989) (product liability act preempts common law remedies, therefore no recovery allowed for economic loss).

184. *See, e.g.,* *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975) (under Ohio law, punitive damages may be awarded in products liability action where failure to design product or warn public amounted to conduct that was intentionally reckless, wanton, or gross), *cert. denied*, 424 U.S. 913 (1976); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980) (in products liability action against manufacturer of pajamas which caught fire and burned a child, jury could find that manufacturer's conduct was with disregard for the rights of others and award of punitive damages of \$1,000,000.00 was not excessive), *cert. denied*, 449 U.S. 921 (1980); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, \_\_\_, 294 N.W.2d 437, 444-45 (1980) (punitive damages can be recovered on theory of strict product liability where defendant's conduct was outrageous).

185. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

the recovery of such an award. Much has been written on this issue,<sup>186</sup> and the pros and cons of these recoveries need not be discussed at present. The issue of punitive damages is mentioned here only to emphasize how some courts have gone far afield of the original parameters of the section.

G. "[I]f (a) the seller is engaged in the business of selling such a product . . ."

As noted above, even though the second *Restatement* speaks in terms of a sale,<sup>187</sup> it is clear that this term has been interpreted to mean "one who places into the stream of commerce."<sup>188</sup> This is true regardless of the means used to introduce the product in question into the market place.<sup>189</sup> The courts, however, have been very strict in interpreting this section as being applicable only to those transactions wherein the defendant is in the business of placing the product in question into the channels of commerce.<sup>190</sup> In other words, isolated transactions do not come within the realm of intended liability. If the defendants are engaged in the business of selling such a product, strict liability applies. If they are not then the injured plaintiff's remedy lies in some other area of law.<sup>191</sup>

H. "[A]nd (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold"

In addition to establishing a defect, an injured plaintiff must also be able to allege and prove that the product was in its defective condition at the time it left the defendant's control.<sup>192</sup> In fact, it may be a defense for an individual to be able to claim that the product was tampered with or

186. See, e.g., Annotation, *Allowance of Punitive Damages in Products Liability Case*, 13 A.L.R. 4th 52 (1982); Allen, *Controlling the Growth of Punitive Damages in Products Liability Cases*, 51 J. AIR L. & COM. 567 (1986); Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985-86).

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

188. See, e.g., *Link v. Sun Oil Co.*, 160 Ind. App. 310, \_\_\_, 312 N.E.2d 126, 130 (1974) (the word "sell" is merely descriptive and product need not be actually sold if placed into stream of commerce by other means).

189. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967) (strict liability applies to those who distribute samples in hopes of making future sales).

190. See *Gardner v. Chevron U.S.A., Inc.*, 675 F.2d 658, 661 (5th Cir. 1982) (strict liability is not applicable to entities who construct a product but are not normally in the business of selling such items); *Bailey v. ITT Grinnell Corp.*, 536 F. Supp. 84, 87 (N.D. Ohio 1982) (under Ohio law, occasional seller is not subject to strict product liability); *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, \_\_\_, 654 P.2d 343, 351 (1982) (the "occasional seller" exception applies to an ordinary person involved in the isolated sale of a product).

191. RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965).

192. *Id.* comment g.

in some way altered, after it was placed into the stream of commerce.<sup>193</sup> This position is not only logical, but equitable as well. If one considers all of the policy arguments underlying the doctrine,<sup>194</sup> strict product liability should only ensue when the product was in a defective condition at the time it left the defendant's possession.<sup>195</sup> Any other interpretation would result, not in strict liability, but absolute liability.<sup>196</sup> An individual would be liable for events taking place after they were no longer in control, which was clearly never the intention of this section. In the interpretation of this part of the second *Restatement*, as was the case in the preceding discussion, the courts have closely adhered to the drafters' intent.

*I. "The rule stated in Section (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product . . ."*

As clarified by the section noted above, negligence is never an issue in a product liability suit. Any argument that the defendant did what was reasonable and/or prudent under the circumstances is not relevant. The basis of liability under 402A is strict products liability, and this is true in regard to the designing, manufacturing, and/or marketing of the product in question.<sup>197</sup> The fact that the defendant did, could have, or should have foreseen harm and thus should have acted as a reasonable prudent person to avoid it never arises. The only questions asked are: Was the product a defective one, and did this defect cause the damaging event?

*J. "[A]nd (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller"*

Finally, this last part of 402A stresses that privity is no longer an issue. The fact that the user, consumer, or as we have seen, the innocent bystander has no contractual relationship with the defendant is immaterial.<sup>198</sup> Privity, which was so important in the early days of product liabil-

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193. See, e.g., *Trotter v. Hamill Mfg. Co.*, 143 Mich. App. 593, \_\_\_, 372 N.W.2d 622, 625-26 (1985) (where defect is created by alteration, manufacturer or seller may not be held liable); *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, \_\_\_, 467 A.2d 615, 620 (1983) ("If the condition of a product is substantially changed before it reaches the consumer, the manufacturer or seller will not be held strictly liable.").

194. *RESTATEMENT (SECOND) OF TORTS* § 402A comments g, h & i (1965).

195. See, e.g., *Colvin v. Robert E. McKee, Inc.*, 671 S.W.2d 556, 559 (Tex. Ct. App. 1984) (product must be shown to be defective when it left manufacturer).

196. *Gossett v. Chrysler Corp.*, 359 F.2d 84, 88 (6th Cir. 1966) (manufacturer is not insurer).

197. *RESTATEMENT (SECOND) OF TORTS* § 402A comment a (1965).

198. *Id.* comment l.



ity law,<sup>199</sup> is no longer an element needed for recovery under this section.<sup>200</sup> In fact, one of the early arguments in favor of adopting 402A was the inability of the courts to effectively deal with the problems that arose where privity did not exist.<sup>201</sup> Presently, such issues are important only from a historical point of view.

### III. CONCLUSION

The purpose of this article has been to illustrate that the section of the second *Restatement* enacted in 1965 is not necessarily the law that is in effect today. Now that two-and-one-half decades have passed since the adoption of 402A, much of the early uncertainty associated with it has abated. For the most part, the concept and its elements are firmly established. What is clear, however, is that the apparent intent of the drafters has in some respects been altered. The section has been extended to include events and individuals not mentioned in the original text. As a result, today we can in effect restate the *Restatement* so as to reflect the current law. Section 402A should now read as follows:

(1) One who places into the stream of commerce any product which is defective in its manufacture, design, or marketing scheme and as such is in an unreasonably dangerous condition to the user, consumer, or innocent bystander, or to that person's property is subject to strict liability for physical harm and economic loss, and may be subject to liability for punitive damages thereby caused to the ultimate user, consumer, or innocent bystander, or to that person's property, if (a) the seller is engaged in the business of placing such product into the stream of commerce, and (b) it is expected to and does reach the user, consumer, or innocent bystander without substantial change.

(2) The rule stated in Subsection (1) applies although the defendant has exercised all possible care in the manufacture, design, or marketing scheme of the product, and (b) there is a total lack of privity between such parties.

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199. See generally Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925).

200. Prosser, *supra* note 37, at 791 (*Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960), marked "the fall of the citadel of privity").

201. See generally Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).