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Restating the Law: The Dilemmas of Products Liability

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RESTATING THE LAW: THE DILEMMAS OF PRODUCTS LIABILITY

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Tracing products liability law from its origins to present day developments, Professor Rabin discusses the long-standing presence of interwoven strands of contract and tort ideology, as well as the perennial tensions between strict liability and negligence. These themes are evident both in the distinctly influential California case law and in the two Restatement efforts to systematize the doctrine that has emerged nationally. Rabin identifies the manner in which foundational ideological precepts of consumer expectations and enterprise liability have contributed to a continuously dynamic, if often unsettled, debate over the appropriate regime for resolving product injury claims.

The pathway to the current effort to establish a set of foundational principles for cases involving product-related injuries—the *Restatement (Third) of Torts: Products Liability*[1]—is long and tortuous, with many diversionary forks along the way. Where to begin—*Winterbottom v. Wright*?[2] *MacPherson v. Buick Motor Co.*?[3] *Escola v. Coca Cola Bottling Co.*?[4] Traces of each of these landmark decisions can be found in the *Restatement (Third)*, as they could be in its ground-breaking forerunner, section 402A of the *Restatement (Second) of Torts*.[5] My intention in this introduction is to provide some context to the current debate about the *Restatement (Third)* by offering an overview of the products liability law landscape, with particular attention to the key features that have regularly troubled courts and commentators: the mixed contract-tort heritage of products liability law and the troubled relationship between strict liability and negligence approaches.[6]

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, Preliminary Version, 1996) [hereinafter Proposed Final Draft].
2. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
3. 111 N.E. 1050 (N.Y. 1916).
4. 150 P.2d 436 (Cal. 1944).
5. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
6. To keep the inquiry manageable, I will largely restrict my vantage point to a particular setting which has been especially influential: the evolution of products liability law in California against the backdrop of the *Restatement* efforts.

I. IN THE BEGINNING

The conventional starting point in relating the evolution of products liability law is the mid-nineteenth century case of *Winterbottom v. Wright*,[7] in which a passenger brought suit for personal injuries against the supplier of a mail coach that broke down. Lord Abinger's famous opinion articulated a privity limitation that protected remote suppliers and manufacturers from liability to injured consumers and users of products.[8] In doing so, Lord Abinger was in harmony with much of mid-nineteenth century accident law, which relegated tort principles—in particular: the fledgling negligence principle—to second-class status. Consider, in this regard, the exalted contemporaneous reliance on the contract paradigm in workplace injury cases and the property paradigm in land occupier cases.[9] Moreover, there was a natural feel to a contract perspective in product injury cases, most of which (although, ironically, not *Winterbottom*) originated in a sale of goods—a commercial, relational transaction in distinct contrast to the highway injuries involving strangers that served as the raw material for the emerging doctrinal principles of negligence in tort law.[10]

A half century (and many exceptions) later, Judge Cardozo finally put the *Winterbottom* limitation to rest in the most widely influential early twentieth century tort case, *MacPherson v. Buick Motor Co.*[11] Cardozo's *MacPherson* opinion is, in some ways, quite opaque. For the most part he busies himself (in good common law fashion) with rationalization of earlier precedents. The tip-off that something more is happening comes midway through the opinion, however, when he remarks almost in passing:

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7. 152 Eng. Rep. at 402.

8. *See id.* at 405 (holding that without privity of contract only a public duty or public nuisance could give rise to a cause of action for tort).

9. *See generally* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933–48 (1981) (describing the influence of contract and property principles on the development of tort law).

10. *See id.* at 947–48 (noting the importance of the fault principle to cases involving strangers).

11. 111 N.E. 1050 (N.Y. 1916).

> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[12]

"The law," in this context, could only be read one way—*tort* law, with its concomitant general duty of due care. This perspective would be the new prism through which to view product-related injuries henceforth.

These two early landmarks set up a polar tension in products liability thinking that has never been fully resolved: the contrasting paradigms of contract and tort characterization of product injuries. The law of products liability remained grounded in the tort law concept of liability for negligent conduct for the next half century, but beneath an apparently calm surface, new dynamic forces were stirring. To begin with, in a number of cases involving injuries from food products, the contractual heritage of products liability had re-emerged, in the form of reliance on warranty theory.[13] In sharp contrast to *Winterbottom*, however, contract notions now appeared as a sword rather than a shield from liability: courts extended sales-related warranties beyond the immediate contracting parties to create strict liability against the maker of harm-producing foodstuffs.

At least one soon-to-be-prominent jurist, however, Justice Roger Traynor of the California Supreme Court, had a still-broader vision. In *Escola v. Coca Cola Bottling Co.*,[14] a case involving injury to a waitress from a shattering soda bottle, Justice Traynor suggested in his much-celebrated concurring opinion that tort law, itself, might reach beyond a *MacPherson*-based duty of reasonable care and extend general protection to injured parties on strict liability grounds.[15] Traynor anchored his position not in the consumer expectations perspective rooted in the warranty law of contractual relations,

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12. *Id.* at 1053.

13. *See, e.g.*, Ryan v. Progressive Grocery Stores, Inc., 175 N.E. 105, 107 (1931) (finding a grocer liable under an implied warranty of merchantability for selling a loaf of bread with a pin in it). *See generally* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1104 (1960) (acknowledging begrudgingly that "the assault" had proceeded, at the time, under warranty theory, and proposing tort as the more appropriate legal regime).

14. 150 P.2d 436 (Cal. 1944).

15. *See id.* at 440–44.

but in the ideology of enterprise liability, which had served as one of the foundational principles for the workers' compensation movement.[16] As Justice Traynor saw it:

> Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[17]

Thus, in succinct terms Traynor described the twin engines of enterprise liability theory that would serve as the generative force for doctrinal developments occurring two decades later: products liability law as a medium for creating incentives to safety and as a vehicle for broad risk-spreading. In 1944, however, and for another two decades, his manifesto was ignored. Products liability law—indeed, tort law generally—remained a rather sleepy backwater in the civil justice system.

II. PATIENCE REWARDED

Eventually, Justice Traynor was vindicated. In *Greenman v. Yuba Power Products, Inc.*,[18] which involved an injury to the user of a power tool, he wrote for a unanimous California Supreme Court, ruling that the courts of that state henceforth would decide product defect injuries under a regime of strict

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16. *See generally* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY *passim* (1995) (arguing that the theory of enterprise liability emerged from the legal and political fervor that produced workers' compensation legislation).

17. *Escola*, 150 P.2d at 440–41.

18. 377 P.2d 897 (Cal. 1962).

liability in tort.[19] The case served as the foundation not only for a series of landmark California opinions establishing the contours of the newly articulated strict liability principle, but also as the buttress for section 402A,[20] which the American Law Institute (ALI) formally adopted one year later.[21]

Although these developments might have seemed to herald both the conquest of tort over contract as the favored legal regime for products cases and the triumph of strict liability over negligence as the reigning liability principle, in fact neither victory was complete. Just three years before *Greenman*, the New Jersey Supreme Court, in *Henningsen v. Bloomfield Motors, Inc.*,[22] had opted for the warranty route taken in the earlier food cases in extending strict liability to product injuries generally.[23] *Greenman* eclipsed *Henningsen* in short order, as most states adopted a tort regime, but the *Restatement* showed the unmistakable mark of the contract/warranty thinking of *Henningsen* even as it articulated a theory of strict liability in tort.

Under the *Restatement* approach, liability turned on the sale of "any product in a defective condition unreasonably dangerous to the user or consumer."[24] Critically, however, the *Restatement* defined the concept of defect as "a condition not

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19. *See id.* at 900–01.

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

21. On the evolution of section 402A and the influence of *Greenman*, see Herbert W. Titus, Restatement (Second) of Torts *Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 720 (1970). Although it was formally adopted by the ALI in 1964, a narrower draft version—limited to sales of food—had been introduced as early as 1961.

22. 161 A.2d 69 (N.J. 1960).

23. *See id.* at 76–77.

24. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). Section 402A reads, in its entirety:

> (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.

Id. § 402A.

contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[25] And, in spelling out the latter notion of "unreasonably dangerous," the commentary provides that the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[26] This reference point of consumer expectations, with its heritage in warranty/contract, has proven to be a continuing point of contention to this very day.[27]

If the ambiguity regarding tort and contract justifications for liability has proven hard to eliminate, so too has the relationship between strict liability and negligence been remarkably resistant to easy resolution. Contrast Traynor's confident assertion in *Greenman* that a strict tort liability regime should govern product defect cases[28] with section 402A—in particular, with the qualifying language that a seller would be liable for injury from a product sold in a defective condition that is "unreasonably dangerous."[29] Does this language indicate that negligence considerations had crept back into supposedly strict liability? This question, along with the continuing debate generated by the mixed contract/tort heritage of the *Restatement*, has contributed to protracted disagreement over the strictness of strict liability in products liability law. Indeed, it was not long before these lines of cleavage became apparent in the case law.

III. EXUBERANCE REINED IN

Initially, the courts strongly endorsed the expansive defect concept enunciated in *Greenman*. In *Cronin v. J.B.E. Olson Corp.*,[30] involving a bakery truck driver injured by inadequately secured trays when his vehicle ran off the road, the California Supreme Court stood its ground against the invasive menace of negligence. Specifically, the court resisted the section 402A

25. *Id.* § 402A cmt. g.
26. *Id.* § 402A cmt. i.
27. *See infra* Part IV.A.
28. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1962) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.").
29. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).
30. 501 P.2d 1153 (Cal. 1972).

requirement that a defect be " 'unreasonably dangerous' [which had] crept into our jurisprudence without fanfare,"[31] and which threatened to undermine the newly articulated regime of strict liability in tort. The *Cronin* court saw "no difficulty in applying the *Greenman* [strict liability] formulation to the full range of products liability situations."[32] Harkening back to *Escola*,[33] and reaffirming the authority of *Greenman*,[34] the court asserted that manufacturers were to bear the costs of injuries from defective products.[35] In short, strict liability meant strict liability.

This position of certitude would not last the decade—nor could it, to my mind. The early landmark California cases had failed to acknowledge that products cases come in different packages: some involve manufacturing defects (the flawed unit that differs from standard units of the product), some involve design defects (the risk that is intrinsic to the entire product line), and some involve deficient warnings. Indeed, in both *Greenman* and *Cronin* one cannot be sure whether the claimed defect was an aberration or intrinsic to the product line. The court simply was not thinking in those terms. Moreover, none of these early cases came to grips with the appropriate standard in an adequacy of warning claim.

As soon as these distinctions became evident, the shortcomings of the *Greenman/Cronin* approach were apparent. Strict liability operated in a conceptually satisfying fashion as long as manufacturing defects were involved. A flawed unit of a standardized product which caused injury could be considered a sufficient basis for recovery without further inquiry into the efforts to minimize risks prior to marketing.

Strict liability did not function as smoothly, however, in the other types of products cases. How were courts to administer strict liability in warning cases? Was *every* warning inadequate, no matter how comprehensive and prominent, whenever the product caused an injury that heeding the proposed warning would have avoided? Both fairness and efficiency considerations underlying tort liability seemed to argue otherwise.[36] And what

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31. *Id.* at 1159.
32. *Id.* at 1162.
33. Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).
34. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962).
35. *See Cronin*, 501 P.2d at 1162–63.
36. Indeed, so did a consumer expectations standard under a reasonable interpretation of the concept. After all, it has to be possible, at some point, to have satisfied the dictates of informed choice.

of cases involving a design defect claim, as distinguished from a manufacturing defect? Was an automobile that failed to prevent injury to its driver when struck by another travelling ninety miles per hour defective per se, because it failed to have "secondary collision" features that made it accident-proof—no matter how many safety features had been designed into the product? Neither tort nor warranty goals could be squared with unconditional strict liability based on a contentless standard of "defect."

These fundamental considerations illuminate the predicament of section 402A only a few years after its passage. Lacking the dynamic character of common law—a dynamism that, as we will see, allowed California to move beyond *Cronin* six years later in *Barker v. Lull Engineering Co.*[37]—section 402A soon stood for whatever courts decided to engraft upon it. An anomaly to begin with—a "restatement" before there was any law to restate—it soon took on a somewhat Delphic character.

The illustrations are numerous. Like *Greenman* and its early progeny, section 402A does not recognize explicitly the categorical variety of products cases.[38] Adopted prior to the assimilation of comparative negligence into tort law—and in advance of any judicial attention to defensive claims of consumer misconduct in strict liability product injury cases—section 402A adopts by reference an all-or-nothing approach to contributory fault derived from defenses to traditional strict liability.[39] Antedating the major pharmaceutical litigation of the succeeding decades, section 402A offers an arguably superfluous comment on "unavoidably unsafe products" that has been the

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37. 573 P.2d 443 (Cal. 1978).

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

39. *See id.* § 402A cmt. n. Comment n reads:

> Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id.

source of great confusion.[40] The section also fails to address product injuries that cause only economic loss as distinguished from personal injury or property damage,[41] and it takes no position on whether liability under its provisions extends to bystanders.[42] In sum, while the lofty impulse to state a new charter for products liability was understandable, its execution —at least as a "restatement"—was premature.

Twenty-five years after its adoption, two courses were possible: section 402A could continue its fall into desuetude, or the ALI could start from scratch—taking a fresh look at the state of products liability law in the 1990s. In choosing the latter course, it soon became apparent that the ALI operated in a milieu in which old tensions between tort and contract perspectives and between strict liability and negligence standards remained unresolved.

IV. CENTRAL TENSIONS REVISITED

The California chronology is again illustrative, if not necessarily representative. Six years after the California Supreme Court's bold effort to stay the course in *Cronin*, by insisting that *Greenman* could be applied without qualification to all variety of products cases, the court in *Barker v. Lull Engineering Co.*[43] confronted the inadequacy of a blanket rule in all

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40. *Id.* § 402A cmt. k. The comment appears to be aimed at ensuring that strict liability will not discourage manufacturers from marketing products with great social benefits, like prescription drugs. To this end, comment k provides: "Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous." *Id.* The scope of the intended exemption has never been clear. *See* Joseph A. Page, *Generic Product Risks: The Case Against Comment k and For Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 864–72 (1983) (recounting the genesis of comment k to explain its ongoing ambiguity).

41. The California Supreme Court had an early occasion to consider whether its new strict liability principle applied to pure economic loss cases in *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965). *Seely* involved a defective truck that caused its owner considerable lost profits but no personal injury or property damage. Writing for the court, Justice Traynor held that product defect cases involving exclusively economic loss should be governed by contract and warranty law, rather than strict liability in tort. *See id.* at 149–51. The U.S. Supreme Court later adopted the *Seely* approach in an admiralty case. *See* East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871 (1986).

42. In a caveat following the black letter text, section 402A provides that no position is taken on whether the section applies "to harm to persons other than users or consumers." RESTATEMENT (SECOND) OF TORTS § 402A caveat (1).

43. 573 P.2d 443 (Cal. 1978).

products cases. *Barker* involved a claim of injury by the operator of a high-lift loader which capsized while being driven on a hill. A contentless "defect" standard provided no basis for distinguishing between liability for the loader's overturning while being operated on a level surface as opposed to while being driven up a steep mountainside. Forced to confront the inadequacy of its prior jurisprudence, the court responded by formulating a two-prong test: A design was defective either if it failed to satisfy consumer expectations, or if through hindsight the product's design posed "excessive preventable danger."[44]

For present purposes, the salient aspect of *Barker* is that by adopting this hybrid test it clearly reveals the continuing, deep-seated ambivalence about the underlying foundation of liability for product injuries—an ambivalence that, even today, remains at the core of products liability law in California, and that has, more generally, generated continuing controversy over the new *Restatement* effort.

A. Mixed Heritage Revisited

On the mixed tort/contract heritage axis, *Barker* steers an ecumenical course by incorporating both a contract-warranty-grounded consumer expectations test and a tort-enterprise liability-based excessive preventable dangers test. The latter constitutes California's contribution to a seemingly endless series of efforts by courts and commentators to spell out a risk-utility standard for defining defect.[45]

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44. *Id.* at 454. In the same passage, the court treats excessive preventable danger as synonymous with risk-benefit analysis. *See id.*

45. *See id.* at 455. The *Barker* test provides that

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

Id.

Compare the widely noted seven-factor test proposed in John W. Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825 (1973):

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

The new *Restatement*, on the other hand, comes down on the side of those courts and commentators who would cut ties with consumer expectations as a distinct standard of liability, opting instead for a risk-utility approach to defining design defects.[46] In doing so, the Reporters implicitly relegate any residual allegiance to contract law notions of consumer expectations —apart from its applicability as one factor among many in measuring risk in design cases—to manufacturing defect cases, where they recognize deviance from the product norm as a sufficient basis for grounding liability.[47]

There are substantial reasons that can be put forward for making risk-utility considerations the central focus in design defect cases. To begin with, consumer expectations arguably are nonexistent in many situations, particularly those involving technical product designs.[48] The California court's response to

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

Id. at 837–38.

46. Specifically, section 2(b) provides that a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe." Proposed Final Draft, *supra* note 1, § 2(b). The reasonable alternative design (RAD) concept is central to the *Restatement's* approach. *See id.* § 2 cmt. e (discussing relevant factors to consider in applying section 2(b)'s RAD test).

Comment d does recognize an exception, however, for "products that are so manifestly unreasonable, in that they have low social utility and high degree of danger, [such] that liability should attach even absent proof of a reasonable alternative design." For criticism of this exception, see Michael J. Tŏke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1201–08 (1996).

47. The *Restatement* also recognizes a special exception for food products, such as an unexpected bone in a commercial food preparation, where consumer expectations are recognized as an appropriate standard. *See id.* § 2 cmt. g.

48. Another important situation in which the role of consumer expectations is dubious to say the least is injuries to bystanders. Strict liability to bystanders for

this particular objection has been to sharpen its *Barker* test by making explicit the inapplicability of the consumer expectations prong in complex design cases.[49]

From another perspective, consumer expectations can be viewed as a two-edged sword that can be used readily to undermine the enterprise responsibility objectives of products liability—at least as far as risk-spreading is concerned. More specifically, in cases where the risk of injury posed by the product is fairly apparent (for example, a motorcycle without leg guards), a consumer expectations test, interpreted literally, could be taken to preclude liability in any case of an "open and obvious" risk.[50] Once again, the test can be read charitably to product users to avoid this result. It can be argued, however, that the better course is to focus exclusively on balancing risks and utility in assessing the adequacy of a design, and to treat the patent character of the risk as simply a negative factor in assessing overall product risk.

B. Strict Liability and Negligence Revisited

While *Barker* most obviously reflected a continuing ambivalence regarding the proper justification for liability (consumer expectations or risk-utility), the decision also had important implications for the appropriate liability standard in products cases, strict liability or negligence. On first impression, the second prong of *Barker* seems to reject *Cronin* outright. Excessive preventable danger, as spelled out in the court's

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product injuries was recognized early in the *Greenman* line of cases. *See* Elmore v. American Motors Corp., 451 P.2d 84, 89 (Cal. 1969). In these cases, a consumer expectations test seems entirely misplaced.

49. *See* Soule v. General Motors Corp., 882 P.2d 298, 310 (Cal. 1994) (stating that while the consumer expectations test is still valid, it is inappropriate where the plaintiff's theory is based upon a highly technical design defect). A subsequent intermediate appellate court case holds that it is plaintiff's choice whether to proceed on a consumer expectations or risk-utility theory when both are available. *See* Bresnahan v. Chrysler Corp., 38 Cal. Rptr. 446, 450 (Cal. Ct. App. 1995).

50. *See, e.g.*, Kutzler v. AMF Harley-Davidson, 550 N.E.2d 1236, 1239 (Ill. App. Ct. 1990) (citing the open and obvious nature of the alleged design defect as a determinative factor in favor of finding the defendant not liable for plaintiff's injuries). For an illustrative case discussing this possibility, and rejecting consumer expectations in favor of risk-utility, see *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1245 (Colo. 1987).

opinion,[51] may not be the precise counterpart of the *Restatement's* "unreasonably dangerous" modification of the defect definition that the *Cronin* court was so anxious to disavow. Stripped to their essentials, however, both tests sound suspiciously like the *Carroll Towing* negligence formulation.[52]

Inadvertently or not, however, the *Barker* court gave the strict liability legacy of Justice Traynor its due by slipping into its excessive preventable danger test a single phrase—"if through hindsight"[53]—that had no bearing on the immediate case, but proved a harbinger of things to come. Taken literally, that phrase directed that the risks of a particular product were to be measured ex post (at the time of trial) rather than ex ante (at the time of distribution). An ex ante test is the logical counterpart of a negligence approach (raising questions about what the defendant knew or should have known when the product was marketed), and an ex post test follows naturally from a strict liability standard (focusing on the product's intrinsic risks rather than the manufacturer's conduct). The distinction becomes especially critical in pharmaceutical and toxics cases where new risks associated with a product often become apparent only after the product has been on the market. In practice, the issue most frequently arises in duty-to-warn situations: the injured party claims that from a strict liability perspective a warning is deficient if it fails to warn of *all* risks, discoverable or not at the time the product was marketed.

Once again, the tension has not been put to rest. In *Brown v. Superior Court*,[54] the California Supreme Court's effort to bring a semblance of order to the DES cases,[55] the court

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51. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 454–55 (Cal. 1978).

52. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), in which Judge Learned Hand spelled out his famous formulation of the negligence calculus, stating that a breach of duty occurs where the burden of adequate protection is less than the probability of injury multiplied by the gravity of the injury if it should occur. The test generally has been taken to articulate a cost-benefit standard of liability for negligent acts. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

53. *Barker*, 573 P.2d at 454. The court also shifted the burden of proof on excessive preventable danger to the defendant. *See id.* at 455.

54. 751 P.2d 470 (Cal. 1988).

55. In *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), a claim based on DES exposure, the court announced its much-noted market share theory of liability in cases where identification of a single responsible manufacturer in an industry making a fungible product was impossible. *See id.* at 936–38. The court left open a

seemed to weigh in on the side of those jurisdictions which had embraced the special treatment that comment k to section 402A afforded to prescription drugs. The court essentially applied a negligence standard of liability: "[W]e hold that a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution."[56]

Only three years later, however, a dissonant note crept in. In *Anderson v. Owens-Corning Fiberglas Corp.*,[57] the court faced the parallel question of whether to hold asbestos manufacturers responsible for failure to warn irrespective of whether they reasonably might have known of the product risks at the time of distribution. In what might have been taken as a quick retreat from *Brown*—except for the sui generis status of asbestos cases—the court in *Anderson* asserted that strict liability dictated a more stringent standard than negligence. The court took pains to explain just what this distinction entailed:

> [A] reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community. Such a manufacturer might escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product.[58]

One well might question, whether, in reality, a manufacturer would escape liability under negligence by claiming its good faith belief in its own tests, despite results to the contrary in the outside scientific community. As long as this somewhat mystifying distinction was limited to asbestos cases, however,

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variety of issues about how to define the market and how to allocate liability among defendants—issues which *Brown* addressed—along with the question of the proper standard of liability for drug manufacturers that is my present concern.

56. *Brown*, 751 P.2d at 482–83 (footnote omitted).
57. 810 P.2d 549 (Cal. 1991).
58. *Id.* at 559.

it could be taken as an exception for a particularly disfavored industry, rather than as a wholesale retreat from *Brown*.

This distinction soon proved illusory, however—demonstrating the tenacious grip of strict liability thinking, even in adequacy-of-warning cases. The court's effort at a grand synthesis comes in *Carlin v. Superior Court*,[59] a claim by a plaintiff alleging failure to warn of the risks of the prescription drug Halcion. The court, reaffirming *Anderson*, claims consistency with *Brown*, as well. Admittedly, *Brown* had held that the adequacy of prescription drugs was to be measured by ex ante knowledge of the manufacturer, or, to put it another way, that there would be no liability for risks unknowable at the time of distribution. But, according to the *Carlin* court, that test did not mean a retreat to a negligence standard—as *Anderson* explained. Rather, *Anderson* created—for *all* products—a "hybrid" standard: Product manufacturers would be liable only for ex ante risks, but they would be held to a standard approximating *perfect* knowledge, rather than reasonable knowledge, about known or knowable risks.[60] The byword seems to be omniscience regarding known or knowable risks at the time of distribution.[61]

"True" strict liability would, of course, demand still more. When the New Jersey Supreme Court handed down its widely noted opinion in *Beshada v. Johns-Manville Products Corp.*,[62]

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59. 920 P.2d 1347 (Cal. 1996).

60. *Id.* at 1348–51. Is it possible to think of an example where this distinction would have real meaning? Consider the possibility of a small company in Finland discovering a risk that was unknown to defendant, the maker of a similar product. Further, the Finnish company has already begun marketing its "competing" product, which avoids the risk that causes injury to plaintiff. This seems to be the type of situation where the court thinks defendant's liability turns on its being strict. But in this era of global communication and heightened expectations of corporate research and development responsibilities, would defendant escape liability under a risk-utility test even in this situation, if plaintiff argued constructive knowledge?

61. *Cf.* Hoven v. Kelble, 256 N.W.2d 379, 392–93 (Wis. 1977) (rejecting plaintiff's claim that doctors should be held to a strict liability standard in medical malpractice cases). The plaintiff's difficulty in articulating a theory arose out of the fact that any such liability standard exceeding responsibility for unreasonable conduct has to take account of the reality that patients frequently are not "cured" in some magical, pain-free sense even after successful treatment. The court articulated the plaintiff's argument as follows (although ultimately rejecting strict liability): "[I]f a plaintiff could show that a hypothetical virtually perfectly informed doctor, working in a perfectly equipped hospital, could have avoided the untoward result, the plaintiff could recover, notwithstanding that the defendants exercised reasonable care in all respects." *Id.* at 387. The thinking here seems similar to the *Carlin* court's omniscient manufacturer standard.

62. 447 A.2d 539 (N.J. 1982).

it brooked no compromise. Asbestos manufacturers were to be held responsible for failing to warn of risks that came to fruition, even if entirely unknowable at the time of distribution; liability was to be measured ex post. The firestorm of criticism set off by *Beshada* and the quick retreat of the New Jersey court to an ex ante approach for all products other than asbestos is a now familiar story.[63] Presumably the California Supreme Court "hybrid" approach in *Carlin* is an effort to avoid the criticism of an ex post liability standard on intuitive fairness grounds: How can one justly be held responsible for failing to warn of risks that are unknowable at the time of marketing?

The effort at reconciliation is deeply problematic, however, if understandable. Simply put, an expansive negligence principle obliging manufacturers to "keep abreast of any scientific discoveries and . . . know the results of all such advances"[64] would accomplish virtually the same results in the real world of products cases as the *Carlin* "hybrid" approach, without all of the confusion engendered by reference to a "strict liability" standard that is not really "strict."[65] In the final analysis, all of the straining and potential confusion in the recent California cases appears to be little more than an effort to pay obeisance to the *Escola/Greenman* manifesto of a brave new world of strict liability for defective products.[66]

V. OCCAM'S RAZOR

California's ongoing struggle with strict liability and negligence exemplifies a problem that the *Restatement (Third)* tries to avoid. From one perspective, the new *Restatement* can be

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63. *See* Feldman v. Lederle Lab., 479 A.2d 374, 387–88 (N.J. 1984) (citing to some of the many critics of the *Beshada* reasoning, and limiting the holding to its facts); *see also* Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 693 (1985). It should be pointed out, however, that *Feldman* did shift the burden of proof on questions of knowledge of risk to the defendant—arguably creating responsibility roughly equivalent to that which would be imposed, in real world cases, under an ex post strict liability standard. *See* Robert L. Rabin, *Indeterminate Risk and Tort Reform: Comment on Calabresi and Klevorick*, 14 J. LEGAL STUD. 633, 635 (1985).

64. *Carlin*, 920 P.2d at 1351 n.3.

65. Reconsider the illustrative hypothetical, *supra* note 60.

66. *See supra* notes 14–21 and accompanying text.

viewed as an effort to cut through the confusion engendered by all of this loose talk about strict liability and negligence, as well as the failure in the earlier section 402A even to acknowledge the need for establishing categories of product defect cases. Section 2 of the new *Restatement* articulates the now familiar tripartite breakdown of products cases into manufacturing, design, and warning defects, and then proceeds to create what amounts to strict liability for manufacturing defects and negligence liability for design and warning defects—but without getting caught up in labeling issues.[67] The approach is straightforward and comprehensive.

But, of course, the new *Restatement* effort is more than an exercise in the aesthetics of design. It takes strong positions on issues that remain highly divisive. At the most fundamental level a twofold problem exists. First, the contract paradigm for conceptualizing product injuries has never been put entirely to rest. This is most clearly evident in the continuing debate over the appropriate standard—consumer expectations or risk-utility balancing—in design defect litigation. To the extent that the competing tort paradigm is identified with risk-utility analysis, a continuing tension exists between those courts and commentators who view products liability primarily as an engine for creating efficient incentives for safety and those who view it primarily as a mechanism for achieving fair treatment and compensation for injury victims.[68]

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67. Section 2, which makes no mention of the terms "strict liability" or "negligence," provides:

> For purposes of determining liability under § 1:
>
> (a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Proposed Final Draft, *supra* note 1, § 2.

68. For criticism on this score of the risk-utility perspective taken in the new *Restatement*, see Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 666 (1995) (faulting the proposed

Second, within the tort regime, there is no clear consensus on whether the dominant strand of enterprise liability ideology should be risk-spreading or deterrence. This disagreement is most apparent in the sustained warfare over the appropriate standard in adequacy of warning cases—strict liability or negligence.[69] The lines of divergence are demarcated clearly when unknowable risks of harm exist at the time a product is marketed. One strand of enterprise liability ideology is premised on the manufacturer's superior ability to spread the risk: in particular, through spreading via the pricing mechanism. Under this risk-spreading rationale, just as under a consumer expectations perspective, "true" strict liability seems appropriate. The manufacturer remains the better risk-spreader whether or not the injury occurred from risks that were knowable at the time the product was put on the market. By contrast, under a safety incentives rationale for products liability, there is no basis for allocating responsibility to the manufacturer for risks that cannot reasonably be discerned when the product is marketed. A liability rule creates no incentive to warn of risks that are unknown at the time of distribution.

The present *Restatement* enterprise may cause discomfort to some because it brings these fundamental tensions to the surface. In my view, however, these disagreements are healthy. They foster a continuing dialogue that deepens our understanding of the implications of policy choices made at the doctrinal level. A *Restatement* effort that awaited a shared consensus in an area as dynamic as products liability—rather than taking well-considered and forthright positions on issues that have reached maturity—would have to be postponed indefinitely.

Restatement (Third) because of its "lack of recognition of the importance of product portrayal and product image [which] leads to a lack of appropriate emphasis on the expectations that consumers reasonably develop about products"); *see also* Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189, 1203–04 (1994) (criticizing risk-utility analysis under the proposed *Restatement (Third)* because it completely eliminates strict liability in design defect cases, forcing plaintiffs to prove a reasonable alternative design even in cases involving inherently dangerous products).

69. For a wide-ranging expression of views on the *Restatement (Third)* effort, much of it critical of the departures from strict liability principles, see *A Symposium on the ALI's Proposed* Restatement (Third) of Torts: Products Liability, 61 TENN. L. REV. 1043 (1994).