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COMMENTS TO THE REPORTERS AND SELECTED
MEMBERS OF THE CONSULTATIVE GROUP,
RESTATEMENT OF TORTS (THIRD):
PRODUCTS LIABILITY

I very much regret that the Reporters and apparently a majority of the Advisers and the Council have decided to follow their own instrumentalist views rather than the dominant case law on the subject and to reintroduce nineteenth-century concepts of "fault" into modern products liability law in the form of negligence. That effort can be seen most clearly in the proposed draft of subsection 2(b), purporting to define "defect" in cases of an alleged defect in design,² and in the proposed draft of subsection 2(c), purporting to define "defect" in cases involving an alleged failure to have adequately warned of a risk of use or to provide adequate instructions.³

In effect, both the Director⁴ and the Reporters⁵ assert that the dominant case law no longer supports the use of the ordinary users' or consumers' expectations and contemplation tests under section 402A⁶ to determine "defectiveness" either in design or inadequate warning or instruction cases. Instead, they contend that the case law supports the use of a risk-utility test,

1. These comments were written by Howard C. Klemme, Professor of Law Emeritus at the University of Colorado at Boulder. They were originally submitted to the Reporters and selected members of the Consultative Group, of which Professor Klemme is a member, shortly before the annual meeting of the American Law Institute in mid-May, 1994. His comments were directed primarily toward subsections 2(b) and 2(c) of Tentative Draft No. 1 (April 12, 1994) of the *Restatement*. Subsection 2(b) defines a design defect in terms of "foreseeable risks of harm" that "could have been reduced by the adoption of a reasonable alternative design," the omission of which "renders the product not reasonably safe." Subsection 2(c) defines a defect of inadequate instructions or warnings in terms of "foreseeable risks of harm" that "could have been reduced by the provision of reasonable instructions or warnings," the omission of which "renders the product not reasonably safe."

In his cover letter Professor Klemme stated that his "analyses of the case authorities offered [by the Reporters] in support of Subsections 2(b) and 2(c), as now proposed, raise serious doubts about whether those subsections are in fact accurate restatements of the existing law, or are, instead, an effort to revise that law to suit the political ends of others." Professor Klemme consented to publication of these comments by the *Tennessee Law Review*. However, to have them conform to a style more suitable to their present context, some editorial changes have been made in the text and several references have been added. Three corrections have also been made, as described *infra* in notes 17 and 80.

2. Tentative Draft, *supra* note 1, § 2(b), at 9.

3. Tentative Draft, *supra* note 1, § 2(c), at 9-10.

4. Tentative Draft, *supra* note 1, at xiii-xiv.

5. Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmt. c, at 39.

6. RESTATEMENT (SECOND) OF TORTS § 402A cmts. g-j (1965).

that is, a negligence test. By the way they have drafted and defended subsections 2(b) and 2(c), they have also necessarily concluded that under the dominant case law only a risk-utility test may be used to prove such defects.

In taking these positions, they have apparently decided that the holdings in such well-known defective design cases as *Greenman v. Yuba Power Products, Inc.*⁷ are no longer relevant authority. In addition, their treatment of the subject fails to recognize the common economic marketplace concepts and legal principles the modern law of products liability shares with other legislatively and judicially created areas of strict liability for accidental injuries—workers' compensation, no-fault auto insurance, vicarious liability under *respondeat superior*, abnormally dangerous activities, and the like.⁸ In failing to recognize those common principles, they seek to shift back to juries the principal responsibility for making the economic marketplace decisions that the modern law of products liability has sought to leave primarily in the hands of those who participate in the manufacture, distribution and consumption of tangible goods.

Finally, without any regard for the express language of section 2-314 of the Uniform Commercial Code,⁹ and the several diverse ways which that section provides for establishing a breach of an implied warranty of merchantability, Tentative Draft No. 1 proposes to make a risk-utility theory the exclusive method for determining a "defect," not only when a party's claim for relief is based on the theory of strict liability in tort, but also when the claim is based on breach of an implied warranty of merchantability under the U.C.C.¹⁰

Notwithstanding the elaborate discussion and citation of cases purporting to support these positions, the drafters of Tentative Draft No. 1 provide neither adequate nor reliable support for any of them. For example, in the Reporters' Note to comment c of section 2, the claim is made that "Subsection [2(b)] is consistent with the approaches taken by most courts [which has been to reject the ordinary consumer's expectations test] as an independent test for determining [design] defect."¹¹ They also claim that "[a]n overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases."¹² To the extent that those statements are based on cases such as the illustrative ones cited in the Reporters' Note to comment c,¹³ they are substantial misrepresentations of the fact. More than half the cases

7. 377 P.2d 897 (Cal. 1962).

8. Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).

9. U.C.C. § 2-314, 1A U. L. A. 212 (Master ed. 1989).

10. See Tentative Draft No. 1, *supra* note 1, § 2, Reporters' Note to cmt. j, at 75-76.

11. *Id.* § 2, Reporters' Note to cmt. c, at 39.

12. *Id.*

13. *Id.* at 39-40.

cited fail to provide anything but the most fanciful support for those statements.¹⁴ Indeed, the opinions in several of them actually contradict the propositions for which they have been cited.

The remaining cases cited on pages 39 and 40 in the Reporters' Note to comment c do provide some support, but most often only in the form of dicta.¹⁵ Even in the opinion which the Reporters describe as containing a "particularly lucid analysis,"¹⁶ the court's discussion about the use of a risk-utility test in product cases, particularly in cases based on strict liability in tort, is obviously dicta. The plaintiff did not seek relief on that theory, but on the theory of a breach of an implied warranty of merchantability. Moreover, as the court acknowledged, it had never expressly adopted a strict liability in tort theory.¹⁷ The court also conceded that in the five cases it cited to support its application of a risk-utility test to the plaintiff's defective design claim, the risk-utility test had been considered the exclusive test for determining such a defect only in two of the five.¹⁸

Proposed subsection 2(c), relating to warnings and instructions, fares even less well¹⁹ than does subsection 2(b) when one seeks to find adequate support for it in the lengthy discussion offered in Tentative Draft No. 1.²⁰

Frankly, as one who has long engaged in similar work as the reporter for the Colorado Supreme Court Committee on Civil Jury Instructions, I can only say that had I or the Committee offered such weak, and often contradictory or irrelevant, authority to support the Committee's work,²¹ I would never have survived as the Committee's reporter. Neither, I suspect, would the Committee have so long enjoyed the high regard in which the bench and bar of Colorado have held its work and the intellectual integrity on which it is based.

Because the present Tentative Draft No. 1 is itself demonstrably defective, I would suggest that any further action on Tentative Draft No. 1 be postponed until a more thoughtful, thorough analysis can be made of all the holdings in the cases in which the courts have actually decided the issues that Tentative Draft No. 1 seeks to address.

Such an analysis is likely to reveal the dominant case law to be:

14. See *infra* Appendix A.

15. See *infra* Appendix B.

16. Tentative Draft, *supra* note 1, Reporters' Note to cmt. c, at 40 (citing *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984)).

17. 365 N.W.2d at 183 n.23.

18. *Id.* [Author's note. In the original version of these comments I had mistakenly stated that the court had cited four rather than five cases, and that the risk-utility test had been considered "exclusive" in only one, rather than in two of them.]

19. See *infra* Appendix C.

20. Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmts. f-i, at 66-75.

21. COLORADO JURY INSTRUCTIONS—CIVIL, COLORADO SUPREME COURT COMMITTEE ON CIVIL JURY INSTRUCTIONS (3d ed. 1988-90).

1. When seeking to prove a design defect for purposes of establishing strict liability in tort, a plaintiff may use either a risk-benefit test or an ordinary consumers' expectations test, or both, provided there is sufficient evidence in the case to support such use.²²

2. In the typical lack of warning or instructions case, a party is entitled to establish liability, if possible, using either or both a risk-benefit test in the form of negligence, or, under a strict liability in tort theory, the ordinary user's or consumer's expectations and contemplation tests of section 402A.

3. Although it may be that a warning of a risk of which the seller is not aware, and reasonably so, may relieve that seller of liability in some circumstances, it does not follow that a seller should or would not be held strictly liable in tort if the seller was or should have been aware of a risk and the failure to warn of that risk rendered the product defective under the ordinary user's expectations and contemplation tests of section 402A.

4. Because a breach of an implied warranty of merchantability under section 2-314 of the U.C.C. can occur in several ways, the test for determining a breach will vary, depending on the applicable standard set out in the state's version of the U.C.C. As to a claim of breach based on lack of "fitness," the drafters of the U.C.C. undoubtedly contemplated that a consumers' expectations test would be used, not a risk-benefit test. The language in the U.C.C. relating to "fitness" requires a party to prove only that the product was not "fit for the *ordinary purposes* for which *such* goods are used,"²³ rather than that the product was not "reasonably fit," as was required under the old language of the Sales Act as construed by the courts. In some circumstances, however, a party seeking relief for a breach of implied warranty of merchantability based on lack of "fitness" may be able to use a risk-benefit test, such as negligence, to establish that the product was "not fit," but, logically, only if a reasonable jury could find that under the circumstances the failure of the product to pass such a risk-benefit test also rendered the product not "fit for the ordinary purposes for which such goods are used."²⁴

Respectfully Submitted,

Howard Klemme

22. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978); *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246-47 (Colo. 1987).

23. U.C.C. § 2-314, 1A U. L. A. 212 (Master ed. 1989) (emphasis added).

24. *Id.*

APPENDIX A:
CONCERNING THE ADEQUACY OF THE CLAIMED AUTHORITY
FOR PROPOSED SUBSECTION 2(B): NON-SUPPORTING CASES

Fewer than half the cases cited in the Reporters' Note to comment c at pages 39-40 support the propositions for which they are cited, that is, that "[a]n overwhelming majority of American jurisdictions rely on risk-utility balancing [*i.e.*, a negligence theory] in design cases," and that "most courts" "have explicitly rejected" the consumer's expectations tests of section 402A for determining whether a product was "defective" or "unreasonably dangerous."²⁵

1. *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala. 1976). This case does not, as claimed, retain negligence or any other form of traditional fault as the only standard for determining defective design. The court specifically held that the ordinary consumers' expectations and contemplation tests of section 402A were appropriate for determining whether the product was "defective" and "unreasonably dangerous."²⁶ When those tests have been met, a defendant's conduct constitutes "fault" or "negligence"²⁷ as a matter of law. No other proof of negligence or the like is required. The plaintiff may, of course, also seek to establish liability using ordinary negligence.

2. *Hull v. Eaton Corp.*, 825 F.2d 448 (D.C. Cir. 1987). Having concluded that Maryland law would be applicable, the court then decided that Maryland would probably use a risk-utility balancing test to determine "defect," citing *Phipps v. General Motors Corp.*²⁸ The *Phipps* case, however, does not support that conclusion.²⁹ The D.C. Circuit Court also cited *Kelley v. R.G. Industries, Inc.*;³⁰ *Simpson v. Standard Container Co.*;³¹ and *Troja v. Black & Decker Manufacturing Co.*³² But, again, except for the decision of the Maryland Court of Special Appeals' in *Troja*, none of these cases provides any better support for the D.C. Circuit Court's conclusion. For example, citing the well known holding of the California

25. Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmt.c, at 39.

26. 335 So. 2d 128, 132-33 (1976).

27. *Id.* at 132.

28. 825 F.2d 448, 454 (D.C. Cir. 1987) (citing *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976)).

29. See discussion *infra* in the next numbered paragraph in this Appendix.

30. 825 F.2d at 454 (citing *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985)).

31. *Id.* (citing *Simpson v. Standard Container Co.*, 527 A.2d 1337 (Md. Ct. Spec. App. 1987)).

32. *Id.* (citing *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516 (Md. Ct. Spec. App. 1985)).

Supreme Court in *Barker v. Lull Engineering Co.*,³³ along with other cases, the most the Maryland Court of Appeals can be read as saying in *Kelley*³⁴ is that a party may use either a negligence theory (*i.e.*, a risk-utility test) or the ordinary consumer's expectations test of section 402A to prove a product was defective in design.³⁵

In *Kelley*, the Maryland Court of Appeals also held that under either test the product (a handgun) could not have been considered defective because the pleaded facts did not allege the product had malfunctioned in any way, that is, had failed to meet an ordinary consumer's expectations.³⁶

3. *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976). The Maryland Court of Appeals held that although a plaintiff *may* use a negligence theory to prove that a product was defective, a plaintiff is not *limited* to that risk-utility theory.³⁷ The court specifically held that to prove defectiveness of a product under the theory of strict liability in tort, a plaintiff *need not* prove negligence.³⁸ Neither must the plaintiff prove that the defendant was at fault in any other way.³⁹ It is sufficient if the plaintiff proves that the defendant put a product on the market which was defective and unreasonably dangerous, as measured by the ordinary consumers' expectations and contemplation tests of section 402A.⁴⁰

4. *Radiation Technology, Inc. v. Ware Construction Co.*, 445 So. 2d 329 (Fla. 1983). Only in an irrelevant dictum did the court say that risk-utility test was a proper way to determine defectiveness under section 402A.⁴¹ No strict liability tort claim appears to have been made in the case.⁴² The only issue the court decided was whether, as to the plaintiff's negligence claim, the "defendant was entitled to present to the jury [the evidence of] the warranty clause [in the parties' contract] tending to show that the plaintiff had been warned to test the product for the specific use."⁴³ The court held that the defendant was entitled to present such evidence.⁴⁴

5. *Toner v. Lederle Laboratories*, 732 P.2d 297 (Idaho 1987). The jury found that the defendant was negligent in its marketing of the product that injured the plaintiff, specifically, in having negligently failed to market a

33. 573 P.2d 443 (Cal. 1978).

34. 497 A.2d at 1149.

35. *Accord Simpson*, 527 A.2d 1337.

36. 497 A.2d at 1149.

37. *Phipps*, 363 A.2d at 959, 962-63.

38. *Id.* at 962.

39. *Id.* at 963.

40. *Id.*; *accord Simpson v. Standard Container Co.*, 527 A.2d 1337 (Md. Ct. Spec. App. 1987).

41. 445 So. 2d 329, 331.

42. *Id.*

43. *Id.*

44. *Id.*

safer alternative.⁴⁵ On the other hand, the jury found for the defendant on the plaintiff's section 402A claim.⁴⁶ The only issues before the court were: (1) whether the unavoidably unsafe product defense (comment k to section 402A) applied to strict liability tort claims generally, and, if so, to the plaintiff's strict liability claim in this case; (2) whether that defense applied to negligence claims in general and, if so, to the plaintiff's claim in this case; and, (3) whether, assuming that defense did apply to the plaintiff's negligence claim, it was adequately covered by the negligence instructions given the jury.⁴⁷

The Idaho Supreme Court concluded that the defense of "unavoidably unsafe" products may be applicable in certain cases involving strict liability claims, but that the issue was not one the court needed to decide because that defense does not shield sellers from negligence claims and the instructions under which jury had found the defendant negligent in this case were sufficient.⁴⁸

The court considered a risk-utility analysis only in its discussion of the purposes and scope of the "unavoidably unsafe product" defense (or "comment k." defense) and its potential applicability to strict liability and negligence claims.⁴⁹ The court did not consider the issue of whether a risk-utility test would have been a proper test for determining the defectiveness of the product.⁵⁰

6. *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990). The issue before the court was "whether a manufacturer may be liable [in negligence or strict liability] for the enhancement of injuries sustained while using a [defective] product even though the cause of the accident was not the product itself."⁵¹ The court held that "an action can lie for such damages."⁵² The claimed defect was that the motorcycle on which the plaintiff was riding as a passenger did not have rear passenger crash bars.⁵³

Although the court held that the "open and obvious" defense (that is, that the defect was "patent") was applicable to the plaintiff's negligence claim, the court also held that defense did not apply to the plaintiff's strict liability claim.⁵⁴ Therefore, the plaintiff was entitled to try to prove that the product was defective in design by proving "that a feasible, safer, more

45. 732 P.2d 297, 299.

46. *Id.*

47. *Id.* at 303.

48. *Id.* at 303-12.

49. *Id.* at 304-11.

50. *Id.*

51. 551 N.E.2d 1139, 1140.

52. *Id.*

53. *Id.*

54. *Id.* at 1143.

practicable product would have afforded better protection."⁵⁵ The court did not say, however, that this risk-utility test was the only test a party should be permitted to use to prove that a product was sold "in a 'defective condition unreasonably dangerous.'"⁵⁶

7. *Skyhook Corp. v. Jasper*, 560 P.2d 934 (N.M. 1977). This case was decided on the basis of the consumers' expectations test, not the risk-utility test.⁵⁷ Specifically applying the consumer expectations test, the New Mexico Supreme Court held that the trial court had not erred when it granted a directed verdict in the defendant's favor⁵⁸ because there was insufficient evidence in the case for a reasonable jury to have found the product defective and unreasonably dangerous under the ordinary consumer's contemplation test of section 402A.⁵⁹

8. *McCollum v. Grove Manufacturing Co.*, 293 S.E.2d 632 (N.C. Ct. App. 1982). The North Carolina Court of Appeals held only that the trial court did not err when it granted a directed verdict in the defendant's favor because the plaintiff's evidence in support of the plaintiff's negligent design claim was insufficient.⁶⁰ In dicta, the court also concluded that the plaintiff could not have recovered on a theory of strict liability in tort, because "[w]e have not adopted the doctrine of strict liability except for a few exceptional situations not applicable herein."⁶¹

9. *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909 (S.D. 1987). This case involved a claimed defect based on lack of adequate warning, not defective design. The court held that it was error to have granted the commercial lessor of scaffolding a summary judgment on the plaintiff's strict liability claim based on the lack of an adequate warning.⁶² Although the court said that under the South Dakota products liability statute the plaintiff must prove that the defendant knew or should have known of such deficiency, the court concluded there was a material issue of fact raised by the record as to such facts.⁶³ The court, however, said nothing about which standard should be applied to determine whether the lack of warning of such a "known risk" would constitute a defect, that is, an ordinary consumer or user's contemplation test under section 402A, or a risk-utility test, such as negligence.⁶⁴

55. *Id.*

56. *Id.*

57. 560 P.2d 934, 938, *overruled on other grounds*, *Klopp v. Wackenhut Corp.*, 824 P.2d 293, 297 (N.M. 1992).

58. *Id.* at 935.

59. *Id.* at 939.

60. 293 S.E.2d 632, 635-36 (N.C. Ct. App. 1982).

61. *Id.* at 638.

62. 400 N.W.2d 909, 914 (S.D. 1987).

63. *Id.* at 915.

64. *Id.*

10. *Griebler v. Doughboy Recreational, Inc.*, 466 N.W.2d 897 (Wis. 1991). The court held that the "open and obvious" defense applies to both negligence and strict liability tort claims "whenever a plaintiff voluntarily confronts an open and obvious condition and a reasonable person in the position of the plaintiff would recognize the condition and the risk the condition presents."⁶⁵ Applying an ordinary consumers' reasonable expectations test, the court also concluded that "the expectations of ordinary or average consumers do not make a product unreasonably dangerous and defective if their expectations are unreasonable," which the court held those of the plaintiff to be as a matter of law.⁶⁶ The opinion is silent about the use of a risk-utility theory to prove a defect.

11. *Dreisonstok v. Volkswagenwerk, A.G.*, 498 F.2d 1066 (4th Cir. 1974). In this early "crashworthiness" case in which the plaintiff had based his claim only on negligence, the three-judge court took the position that, under Virginia law, the plaintiff could not recover damages caused by the claimed negligent failure of the manufacturer to have designed the vehicle to make it more crashworthy because "it is clear that there was no violation by the defendant of its duty of ordinary care in the design of its vehicle."⁶⁷

12. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979). In this opinion, the Texas Supreme Court reversed the Court of Civil Appeals and reinstated the trial court's judgment based on a jury verdict in which the jury had found that the product had been defectively designed.⁶⁸ The court upheld the trial court's use of an instruction defining defect in terms of a failure to meet the expectations of an ordinary consumer, noting that that test was consistent with the court's earlier opinions.⁶⁹ The court also concluded that the Court of Civil Appeals had erred when, in reversing the trial court, it had directed the trial court to instruct the jury using a risk-utility test that included a description of several specific factors they were to consider.⁷⁰

However, in a remarkable advisory opinion, effectively overruling prior decisions prospectively, the Texas Supreme Court stated

that henceforth in the trial of strict liability cases involving design defects the issue and accompanying instruction will not include either the element of the ordinary consumer or of the prudent manufacturer; [although the accompanying instruction] *may* [instruct the jury] in general terms to consider the utility of the product and the risks involved in its use.⁷¹

65. 466 N.W.2d 897, 898 (Wis. 1991) (footnote omitted); *see also id.* at 902.

66. *Id.* at 902.

67. 489 F.2d 1066, 1073 (4th Cir. 1974).

68. 584 S.W.2d 844, 847 (Tex. 1979).

69. *Id.*

70. *Id.*

71. *Id.* (emphasis added).

13. *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980). After the plaintiff had used a negligence, or risk-utility, theory to prove a design defect in a strict liability case, the Kentucky Supreme Court held that it was error for the trial court to instruct the jury at the request of the defendant that a product was “‘unreasonably dangerous’ *only* if it is dangerous to an extent beyond that contemplated by an ordinary adult purchaser thereof”⁷² In reaching this conclusion, the court did equate “defectiveness” in design cases to negligence.⁷³ However, in a later case, *Ingersoll-Rand Co. v. Rice*,⁷⁴ the Court of Appeals held it was error, in light of the evidence in the case, for the trial court to have given the plaintiff’s requested risk-utility instructions on the issue of design defect. The court stated that such an instruction “*was not approved by the majority opinion in [Nichols v. Union] and we do not proffer an opinion on its appropriateness in future cases.*”⁷⁵

14. *Back v. Wickes Corp.*, 378 N.E.2d 964 (Mass. 1978). The plaintiff sought relief on the basis of both negligence and breach of implied warranty of merchantability,⁷⁶ claiming that the product was not fit for its “ordinary purposes.”⁷⁷ The jury returned defense verdicts on both claims.⁷⁸ On appeal, ruling in favor of the plaintiff, the Massachusetts Supreme Judicial Court held that (1) it was error for the trial court to have given an instruction on “misuse” as a defense to the plaintiff’s warranty claim because there was insufficient evidence in the case to support that defense;⁷⁹ and (2) “[t]he ‘fitness’ of [the product] and all others of the same design is a question of degree, *depending largely, although not exclusively on reasonable consumer expectations,*”⁸⁰ citing *Barker v. Lull Engineering*.⁸¹ However, the court also stated, again citing *Barker*, that in deciding a warranty fitness claim as it relates to design, “the jury must weigh competing factors much as they would in determining the fault of the defendant in a negligence case.”⁸²

APPENDIX B: CONCERNING THE ADEQUACY OF THE CLAIMED AUTHORITY FOR PROPOSED SUBSECTION 2(B): SUPPORTING CASES

1. *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me. 1988). On the plaintiff’s strict liability claim, based on a defect in design, the trial court directed

72. 602 S.W. 429, 432 (Ky. 1980) (emphasis added).

73. *Id.* at 433.

74. 775 S.W.2d 924 (Ky. Ct. App. 1988).

75. *Id.* at 933 (emphasis added).

76. 378 N.E.2d 964, 966 (Mass. 1978).

77. *Id.* at 969.

78. *Id.* at 966.

79. *Id.* at 968.

80. *Id.* at 970 (emphasis added).

81. 573 P.2d 443 (Cal. 1978).

82. 378 N.E.2d at 970.

a verdict in favor of the manufacturer.⁸³ In a 3 to 2 decision, a majority of the Supreme Judicial Court of Maine held the granting of the directed verdict was error, but concluded that it was harmless. The majority concluded that the error was harmless because the trial court would have given the same instruction for determining the plaintiff's strict liability claim that it had given for determining the plaintiff's negligence claim, and under that instruction the jury had found for the defendant.⁸⁴ The majority reasoned that under the Maine products liability statute⁸⁵ the same instruction would have been given for both claims because Maine follows the "danger utility test," not the "consumer contemplation test."⁸⁶

2. *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 (Mich. 1984). In this opinion, the Michigan Supreme Court contended that "the overwhelming consensus among courts deciding defective design cases is in the use of some form of risk-utility analysis, either as an exclusive or alternative ground of liability."⁸⁷ The court cited five illustrative cases as its authority for this "overwhelming consensus,"⁸⁸ and noted that only in two of them was a risk-utility test considered to be the "exclusive" test for determining "defectiveness" in design cases.⁸⁹

The plaintiff had sought relief on the theories of negligence and breach of implied warranty of merchantability.⁹⁰ The plaintiff made no claim on the basis of strict liability in tort, perhaps because the court had "never expressly adopted" that doctrine, as the court acknowledged.⁹¹

The only issue before the court was whether the trial court erred in refusing to instruct the jury on the plaintiff's breach of warranty claim when the alleged defect was one of design and the jury had been properly instructed on the theory

83. 544 A.2d 1283, 1284 (Me. 1988).

84. *Id.* at 1284, 1286.

85. The statute was virtually a codification of section 402A, as noted in the dissenting opinion, *id.* at 1287 n.3.

86. *Id.* at 1285. [Author's note. In the original version of these comments I had concluded that the majority's reasoning was only dicta because the evidence the plaintiff had presented to prove her strict liability claim was in the nature a negligence or risk-utility analysis. If, therefore, the plaintiff by using such evidence had, in effect, elected to use a risk-utility test to determine her strict liability claim, and that test was considered to be the same as a negligence test, then the majority's reasoning is sound, whether or not the plaintiff might originally have also been entitled to use the ordinary consumers' expectations test to prove the product was defective. Upon further analysis of both the majority and dissenting opinions, however, it appears to me that all members of the court thought that a risk-utility test was the only test that should be used to determine "defectiveness" under the statute. They appear to have differed only on the question of whether a risk-utility test should be considered the same as a negligence test.]

87. 365 N.W.2d 176, 183 (1984).

88. *Id.* at 183 n.23.

89. *Id.*; see also author's note, *supra* at note 17.

90. *Id.* at 177-78.

91. *Id.* at 183 n.23.

of negligent design.⁹² Limiting its "opinion . . . solely to its facts,"⁹³ the court concluded that the trial court's failure to instruct the jury on the plaintiff's breach of warranty claim was not "reversible error" because

[s]uch instructions could have created juror confusion and prejudicial error. Indeed, such an instruction would have been repetitive and unnecessary and could have misled the jury into believing that plaintiff could recover on the warranty count even if it found there was no 'defect' in the design on the product."⁹⁴

Without giving any consideration to the language or policies of the several possible forms of breach of implied warranties of merchantability under Michigan's version of the U.C.C.,⁹⁵ the court also announced that it should "adopt, forthrightly, a pure negligence, risk-utility test in [negligence and breach of implied warranty of merchantability] products liability actions against manufacturers of products, where liability is predicated upon defective design."⁹⁶ In reaching this conclusion, the court relied almost entirely on the Model Uniform Products Liability Act, promulgated by the Department of Commerce in 1979, and its rationale. Apparently, the court thought the rationale underlying that model act was superior to that of the Michigan state legislature when it adopted the breach of implied warranty of merchantability provisions of the U.C.C.

3. *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982). The only issue in this case was whether "the manufacturer of a [product] in a defective condition unreasonably dangerous to the user is liable to the user if that defective condition is obvious."⁹⁷ Reversing a summary judgment in favor of the defendant,⁹⁸ and rejecting the "open and obvious" defect rule as a complete defense,⁹⁹ the majority held that "a 'reasonable care' balancing test"¹⁰⁰ should be used to determine not only the possible contributory negligence of the plaintiff, but also the liability of the defendant, with the "open and obvious" nature of any risk being a consideration to be weighed by the jury.¹⁰¹

4. *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993). In this strict liability case based on section 402A, the Mississippi Supreme Court held that the plaintiff was entitled to use a risk-utility test to prove

92. *Id.* at 177-78.

93. *Id.* at 186.

94. *Id.*

95. MICH. COMP. LAWS ANN. § 440.2314 (1994).

96. 365 N.W.2d at 186.

97. 324 N.W.2d 207, 209 (Minn. 1982).

98. *Id.* at 208.

99. *Id.* at 213.

100. *Id.*

101. *Id.* at 211-13.

that the product was defective in design.¹⁰² It was not error, therefore, as the manufacturer claimed, for the trial court to have applied that test rather than the "consumer expectations" test.¹⁰³ In an elaborate dictum, the court also went on to explain why it thought a risk-utility test should be considered the exclusive test for deciding defectiveness in design cases under section 402A.¹⁰⁴

The court cited two articles¹⁰⁵ it claimed supported the proposition that "[a]round the country, the test generally employed to determine liability for products defects is the 'risk-utility' test developed by Dean Wade."¹⁰⁶ However, if the authors of those articles relied on cases similar to those cited in Tentative Draft No. 1,¹⁰⁷ then their claim is incorrect, as is that of the court.

5. *Voss v. Black & Decker Manufacturing Co.*, 450 N.E.2d 204 (N.Y. 1983). The only holdings of the New York Court of Appeals in this case were that, in proving that a product is defective in design in strict liability in a torts case, a plaintiff is entitled to use a risk-utility analysis;¹⁰⁸ and, because there was sufficient evidence in the case for that issue to go to the jury, the trial court erred in not submitting it to them.¹⁰⁹ The court, however, did not say whether the ordinary consumer's contemplation test, which the court had earlier adopted,¹¹⁰ could no longer be used, although some of the court's language suggests that.¹¹¹

6. *Fitzpatrick v. Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993). After utilizing the nonexclusive risk-utility test set out by the California Supreme Court in *Barker v. Lull Engineering*,¹¹² the Pennsylvania Superior Court held, as a matter of law, that a manufacturer of an outboard motor could not be held liable for defective design either on the theory of strict liability in tort or negligence because of it had failed to provide a propeller guard on the motor.¹¹³

7. *Claytor v. General Motors Corp.*, 286 S.E.2d 129 (S.C. 1982). In this alleged defective design and inadequate warning case, the plaintiff sought to recover on the theories of negligence, strict liability in tort and breach of warranty.¹¹⁴ The South Carolina Supreme Court upheld the trial

102. 617 So. 2d 248, 256 (Miss. 1993).

103. *Id.* at 256-57.

104. *Id.* at 253-57.

105. *Id.* at 255.

106. *Id.*

107. Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmt. c, at 39-40.

108. 450 N.E.2d 204, 208 (N.Y. 1983).

109. *Id.* at 209-10.

110. *Id.* at 207.

111. *Id.* at 208-09.

112. 573 P.2d 443 (Cal. 1978).

113. 623 A.2d 322, 325-26 (Pa. Super. Ct.).

114. 286 S.E.2d 129, 130 (S.C. 1982).

court's directed verdict in favor of the defendant manufacturer on the grounds that the plaintiff's evidence was insufficient for a reasonable jury to find that product was defective or unreasonable dangerous when it left the hands of manufacturer.¹¹⁵ Rather than the product's being defective, the court held that the only reasonable inference that could be drawn from all the evidence was that "[t]he defective condition, the cracks in and subsequent breakdowns in the lug bolts, were caused by subsequent mishandling of the product."¹¹⁶ In a passing dictum, the court did suggest that a risk-utility test would probably have been an appropriate test for determining whether the product was defective.¹¹⁷

8. *Morningstar v. Black & Decker Manufacturing Co.*, 253 S.E.2d 666 (W. Va. 1979). In response to questions certified by the federal district court,¹¹⁸ the West Virginia Supreme Court of Appeals concluded that (1) a third party not in privity can recover damages for injuries caused by a defective product¹¹⁹ and (2) to determine whether a product is defective,

"the general test for establishing strict liability in tort is whether the . . . product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time product was made."¹²⁰

APPENDIX C: CONCERNING THE ADEQUACY OF THE AUTHORITY OFFERED IN SUPPORT OF SUBSECTION 2(c)

To decide when a product should be considered legally "defective" for lack of a warning or an instruction relating to use, there are two, not one, basic questions that must be answered. First, should a defendant be held strictly liable in tort only if the defendant was aware, or reasonably should have been aware, of the risks involved in the use of the product? Second, as to those risks of which a defendant was, or should have been aware, what standard or test should be used to decide whether a failure to provide a particular warning or instruction rendered the product "defective"? Should it be a "risk-utility" test, such as the negligence test proposed in Tentative Draft No. 1 in Subsection 2(c)?¹²¹ Or should it be the test recognized

115. *Id.* at 132.

116. *Id.*

117. *Id.*

118. 253 S.E.2d 666, 668-69 (W. Va. 1979).

119. *Id.* at 680.

120. *Id.* at 683.

121. Tentative Draft, *supra* note 1, § 2(c), at 9-10.

under section 402A,¹²² that is, whether the lack of warning or instruction rendered the product more dangerous than an ordinary consumer or user would normally have expected or contemplated the product to be when the product was being used in a way a manufacturer might reasonably have expected?

Although the claim made in the Tentative Draft as to the first question may be correct,¹²³ there is nothing but the most scattered hints in the parenthetical descriptive notes in the citations to the cases cited on page 74 and 75 of the Tentative Draft as to how most courts have answered this second basic question. Neither is there a straightforward discussion of this important second question in the Reporters' Note.¹²⁴

Even though the Reporters and the Council have indicated¹²⁵ that they believe the standard should be one based on "fault," that is, "negligence," the cases on this question have not been brought together in the present draft and carefully analyzed. That may be, perhaps, because a thoughtful, careful analysis of all the relevant cases might be found to support the use of the ordinary users' or consumers' expectations and contemplation tests of section 402A,¹²⁶ rather than the negligence test favored by the Reporters and a majority of the Council. Whatever the reason may be for this failure, the ALI membership cannot fairly be expected to approve subsection 2(c) unless that work is done and its results appropriately presented to them.

122. RESTATEMENT (SECOND) TORTS § 402A cmts. i-j (1965).

123. That is, that an "overwhelming majority of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person." Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmt. i(2), at 73.

124. Tentative Draft, *supra* note 1, § 2, Reporters' Note to cmts. f-i, at 66-75.

125. See, e.g., *id.* §2 cmt. a, at 11-12; cmt. f, at 24-25.

126. See *supra* note 115.

