STRICT PRODUCTS LIABILITY IN TORT AND THE MEANING OF "UNREASONABLY DANGEROUS" DEFECTS

In *Glass v. Ford Motor Co.*[1] plaintiff had lost control of her car because of an alleged metallurgical defect in a strut connected to the car's steering mechanism. During the trial, controversy arose over a jury instruction on strict liability. The instruction would have predicated defendant's liability upon a showing by plaintiff of an injury caused by a defect that rendered the product *unreasonably dangerous,* and that arose out of the design, preparation, or manufacture of the car while in the control of the manufacturer.[2] Plaintiff maintained that the "unreasonably dangerous" requirement was improper.

On appeal, a New Jersey court rejected this formulation of strict liability, which was essentially drawn from section 402A of the Restatement (Second) of Torts.[3] The court reasoned that to require the jury to weigh the "reasonableness" of the defect was to revert to negligence, with its "reasonably prudent man" standards, considerations of due care, and notions of fault. This negates the rationale of pure strict liability—getting the injured consumer to the jury without the burden of proving such considerations.[4] The court then

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1. 123 N.J. Super. 599, 304 A.2d 562 (L. Div. 1973).

2. *Id.* at 601, 304 A.2d at 563-64.

3. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A]. § 402A states:

> (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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(Emphasis added.)

4. 123 N.J. Super. at 602-03, 304 A.2d at 564.

concluded that the "unreasonably dangerous" language had never been expressly adopted in New Jersey and that it was therefore free to purge this element from that state's strict liability formulation.[5]

Glass introduces an issue over which the authorities have split: the meaning and purpose of the "unreasonably dangerous" requirement. Is it an additional element that raises the degree of danger necessary before recovery in strict liability will be allowed, or does it merely qualify and lend emphasis to the meaning of the preceding element of "defect?"[6] The judicial response to this issue has been varied and inconsistent, resulting in the establishment of a continuum that spans the two polar positions.

Strict products liability in tort is a relatively recent doctrine that developed contemporaneously with the increased consumer consciousness of the American public beginning in the mid-1960's. Its purpose was to enable the injured consumer to circumvent many of the obstacles that earlier legal doctrines had posed.[7] Prior thereto, recovery for injuries caused by defective products was based on a number of variations of two basic theories: (1) negligence and (2) contractual warranty — both express and implied.[8] The turning point for products liability occurred in 1960 in the landmark New Jersey case of *Henningsen v. Bloomfield Motors, Inc.*[9] The case was significant in two

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5. *Id.* at 603, 304 A.2d at 564-65.

6. The latter position would hold that the term "unreasonably dangerous" merely serves to indicate that many products have inherent generic qualities that are potentially dangerous and should not be considered as defects and that something beyond these peculiar characteristics is required.

7. *See* Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 368 (E.D.N.Y. 1972); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966); Elliott v. Lachance, 109 N.H. 481, 484, 256 A.2d 153, 156 (1969); Howes v. Hansen, 56 Wis. 2d 247, 253, 201 N.W.2d 825, 827 (1972); Dippel v. Sciano, 37 Wis. 2d 443, 459-60, 155 N.W.2d 55, 63 (1967); 63 AM. JUR. 2d *Products Liability* § 125 (1972); Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 13 (1965); Annot., 13 A.L.R.3d 1057, 1075 (1967).

8. The historical development of products liability leading up to and culminating in strict liability in tort has been the subject of numerous commentaries; therefore, extensive review here is not necessary. *See, e.g.,* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960).

9. 32 N.J. 358, 161 A.2d 69 (1960). In *Henningsen* plaintiff was injured when the steering mechanism failed on the car that her husband had just pur-

respects; henceforth, liability would be extended to any manufacturer who placed his product into the stream of commerce and promoted it in the market,[10] and privity to the original purchase would no longer be necessary.[11] But *Henningsen* was still a contract case, based upon a theory of implied warranty.[12]

It was the confusion that surrounded the implied warranties in contract, and the attempts to circumvent them, that caused the warranty theory to give way to the simpler rule of strict liability in tort.[13] The breakthrough came in the 1963 California case of *Greenman v. Yuba Power Products, Inc.*[14] Deciding that what was really strict liability in tort had been hiding long enough behind the facade of implied warranty, Justice Traynor of the Supreme Court of California[15] laid down the rule that "[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."[16] In discussing the elements required, *Greenman* held: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."[17]

Although strict liability was recognized in only a few jurisdictions when the American Law Institute (A.L.I.) published the Restatement of Torts (Second)[18] in 1965, the doctrine had sufficiently established

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chased, a transaction to which the injured plaintiff had not been privy. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 654 (4th ed. 1971).

10. 32 N.J. at 384, 161 A.2d at 84. Prior to *Henningsen,* liability extended only to the manufacturer of items for personal consumption, *e.g.,* food and drugs. *See generally* note 8 *supra.*

11. 32 N.J. at 413, 161 A.2d at 100.

12. PROSSER, *supra* note 9, § 97, at 656.

13. *Id.* § 98, at 656.

14. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Greenman* plaintiff was injured while using a multipurpose power tool as a lathe when the fasteners used to hold the wood in place failed to hold, allowing the wood to strike plaintiff's forehead.

15. Justice Traynor had been urging the express adoption of strict liability since 1944. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

16. 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

17. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

18. RESTATEMENT (SECOND) TORTS (1965).

itself for the A.L.I. to incorporate what would become section 402A into the final draft.[19] Basically, strict liability, as formulated by section 402A, incorporated and reflected the essence of the *Greenman* doctrine; subsequently, many courts found no reason to distinguish the two.[20]

Contemporaneous with these developments was the adoption of strict liability in tort in New Jersey. The case of *Santor v. A & M Karagheusian, Inc.*[21] again placed New Jersey in the vanguard of the products liability movement. This case was especially progressive because it established strict liability by "leap-frogging" over the personal injury stage and applying the doctrine to economic property losses.[22] The court, referring to and endorsing *Greenman*,[23] predicated manufacturer responsibility upon an enterprise liability foundation. The court reasoned that the manufacturer who puts a product into the stream of trade is in a better position to guard against possible defects and to bear and distribute the resultant losses when they do occur than is the individual consumer.[24] Henceforth in New Jersey, strict liability in tort would apply

> [i]f the article is defective, *i.e.*, not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer . . . .[25]

This formulation is consistent with *Glass* to the extent that it requires: (1) injury, (2) causation, and (3) a defect that arose while

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19. *See* note 3 *supra*. *See also* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 131 n.13, 501 P.2d 1153, 1160 n.13, 104 Cal. Rptr. 433, 440 n.13 (1972).

20. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 131, 501 P.2d 1153, 1160-61, 104 Cal. Rptr. 433, 440-41 (1972). *See also* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 720 (1970).

21. 44 N.J. 52, 207 A.2d 305 (1965). In *Santor* plaintiff bought a carpet labeled by the manufacturer as "No. 1 grade." Plaintiff sued the manufacturer when the carpeting failed to wear properly and unusual lines developed in the rug.

22. *Id.* at 66, 207 A.2d at 312.

23. *Id.* at 65, 207 A.2d at 311-12.

24. *Id. See also* Carmichael, *Strict Liability in Tort—An Explosion in Products Liability Law*, 20 DRAKE L. REV. 528, 531 (1971); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 19-20 (1966).

25. 44 N.J. at 66-67, 207 A.2d at 313.

under the manufacturer's control. Note, however, that the element of defect does not stand alone, but is subject to the qualification that it be "not reasonably fit for the ordinary purposes for which such articles are sold and used . . . ."[26]

The Supreme Court of New Jersey expounded on this qualification two days later in another leading case that approached the Restatement standard.[27] In *Schipper v. Levitt & Sons, Inc.*,[28] addressing itself to the contention that strict liability, as formulated in *Santor,* would virtually make insurers of contractors and manufacturers, the court indicated: "That is not at all so, for the injured party would clearly have the burden of establishing that the [product] was defective when constructed and sold and that the defect proximately caused the injury. In determining whether the [product] was defective, the test admittedly would be *reasonableness* rather than perfection."[29] Subsequent New Jersey cases have reaffirmed the *Santor-Schipper* position, often relying expressly on section 402A for support, if not actually applying its standard.[30]

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26. *Id.* at 67, 207 A.2d at 313.

27. *See* Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort,* 19 RUTGERS L. REV. 692, 702 (1965). The author states:

> It should be immediately noted that the Restatement provision refers to a product "in a defective condition *unreasonably dangerous.*" Does this mean that the Restatement rule adds a requirement to the strict liability rule enunciated by Justice Francis [in *Santor*]? Probably not. In *Jakubowski v. Minnesota Mining & Mfg.,* [42 N.J. 177, 199 A.2d 826 (1964),] Justice Proctor uses the phrases, "defective," "not reasonably fit for the purposes intended," and "unreasonably dangerous," interchangeably, thus suggesting that they are synonymous in the court's mind.

28. 44 N.J. 70, 207 A.2d 314 (1965). In *Schipper* infant plaintiff was scalded as a result of a building contractor installing a hot water heater lacking a tempering device. *Schipper,* like *Santor,* endorsed and predicated its holding upon the *Greenman* doctrine. *Id.* at 90, 207 A.2d at 325.

29. *Id.* at 92, 207 A.2d at 326 (emphasis added). *See also* Dickerson, *Products Liability: How Good Does a Product Have to Be?,* 42 IND. L.J. 301 (1967). The author suggests that the test of *Schipper* is consistent with the Restatement. *Id.* at 320.

30. For a good general review of the historical development of strict liability in New Jersey see Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973) (concluding that New Jersey case law to date is generally in accord with the Restatement). *See* Lamendola v. Mizell, 115 N.J. Super. 514, 519, 280 A.2d 241, 244 (L. Div. 1971) (stating that § 402A has been adopted verbatim in New Jersey as the basis for actions sounding in strict liability in tort). *But see* Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972) (rejecting § 402A(1)(b)

It is in this context that the court in *Glass* adopted section 402A on strict liability but without the phrase "unreasonably dangerous." The court apparently viewed section 402A as encompassing an expression of strict liability in tort that is internally inconsistent. Theoretically, strict liability is antithetical to negligence[31] because plaintiff-consumer's conduct, regarding due care and behaving with the knowledge and expectations of a reasonably prudent man, is largely, if not totally, irrelevant.[32] Yet the Restatement defines "unreasonably dangerous" in terms of a deviation from the normal expectations of a product's performance and inherent risks as contemplated by an ordinary consumer acting with a knowledge of the product deemed common to the community.[33] The court reasoned that this definition could possibly defeat an injured consumer's claim for recovery if a manufacturer showed that the consumer failed to act in accordance with what amounts to a due care standard.[34] The inconsistency, as even the Restatement acknowledges, is that this action under section 402A is not predicated on negligence, and an ordinary breach of due care by plaintiff should not defeat his recovery.[35]

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to the extent it exempts the manufacturer who contemplates a substantial change in his product before reaching the ultimate consumer); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972).

31. 123 N.J. Super. at 602, 304 A.2d at 564; *accord,* Williams v. Ford Motor Co., 454 S.W.2d 611, 617 (Mo. Ct. App. 1970); Brody v. Overlook Hosp., 121 N.J. Super. 299, 309, 296 A.2d 668, 673 (L. Div. 1972). Note, however, that the *Brody* and *Glass* decisions were written by the same judge. *But see* Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 369 (E.D.N.Y. 1972); Lamendola v. Mizell, 115 N.J. Super. 514, 518, 280 A.2d 241, 243 (L. Div. 1971); Dippel v. Sciano, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 64-65 (1967).

32. *Cf.* Dorsey v. Yoder Co., 331 F. Supp. 753, 759 (E.D. Pa. 1971), *aff'd mem.,* 474 F.2d 1339 (3d Cir. 1973); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 87, 207 A.2d 314, 323 (1965). *Contra,* Maas v. Dreher, 10 Ariz. App. 520, 523, 460 P.2d 191, 193 (1969).

33. § 402A, comment *i,* states: "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."

34. 123 N.J. Super, at 602, 304 A.2d at 564; *accord,* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). The *Glass* court relied extensively on *Cronin,* frequently referring to it for support and in-depth analysis.

35. § 402A, comment *n* at 356; *see* Note, *Products Liability and Section 402A of the Restatement of Torts,* 55 GEO. L.J. 286, 302 (1966). *Contra,* Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967). *See generally* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965); Sweeny v. Matthews & Co., 46 Ill. 2d 64, 66, 264 N.E.2d 170, 171 (1970); Williams v. Brown

Theoretically, *Glass* seems logically consistent in arguing that "unreasonably dangerous" should not be used to introduce negligence into strict liability tort theory. The difference between *Glass* and those cases following the Restatement is one of application and social policy. *Schipper*[36] and a number of other authorities have held that a manufacturer is not an insurer and is not liable for all injuries stemming from the use of his product.[37] The question therefore becomes one of devising a standard that will equitably distribute the losses between the consumer and the manufacturer. In striking this balance, courts have taken varying and sometimes conflicting views on how far liability should be removed from negligence or, viewing the question from the other pole, on how far liability may be removed from absolute liability based upon an analysis of causation problems.

A number of courts have taken the position that strict liability is only one step removed from negligence, the sole difference being that the element of *scienter* is no longer relevant.[38] Given this line of reasoning, strict liability merely relieves the injured consumer from having to point out and prove a specific act of negligence.[39] That is, once injury, defect and causation are established, a presumption of negligence per se arises as a matter of law.[40] Once established, how-

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Mfg. Co., 45 Ill. 2d 418, 426-27, 261 N.E.2d 305, 310 (1970); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 365 (Mo. 1969); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420, 423 (Tex. Civ. App. 1970).

36. 44 N.J. at 92, 207 A.2d at 326.

37. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (Dist. Ct. App. 1972); Farr v. Armstrong Rubber Co., 288 Minn. 83, 93, 179 N.W.2d 64, 70 (1970); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966); Elliott v. Lachance, 109 N.H. 481, 484, 256 A.2d 153, 156 (1969); Dippel v. Sciano, 37 Wis. 2d 443, 459-60, 155 N.W.2d 55, 63 (1967); PROSSER, *supra* note 9, § 79, at 517; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965); Annot., 13 A.L.R.3d 1057, 1066 (1967).

38. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (Dist. Ct. App. 1972); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307, 309 (Fla. Dist. Ct. App. 1967), *cert. denied*, 211 So. 2d 214 (Fla. 1968); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966); Wade, *supra* note 7, at 15 n.2; *cf.* James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550, 1555 (1966).

39. *See* text at note 7 *supra*.

40. Howes v. Hansen, 56 Wis. 2d 247, 253, 201 N.W.2d 825, 828 (1972).

ever, the traditional ground rules of negligence apply, and notions of foreseeability,[41] intervening agency,[42] and plaintiff's contributory negligence[43] all apply as in an ordinary negligence action.[44] This position represents the very approach that the *Glass* court feared—the tendency to relegate strict liability to the status of an offshoot of negligence theory instead of having its own independent identity.

The Restatement's position is that strict liability is distinct from negligence. Plaintiff's conduct, as to defenses, will only defeat his recovery when he "assumes the risk" — *i.e.,* he *subjectively* is aware of the risk and appreciates its danger and yet continues to use the product in light of his subjective realization.[45] It is not enough that plaintiff failed to discover and guard against the defect, even though a reasonably prudent man would have done so.[46]

Other courts, adhering more to the Restatement position, have preferred to limit liability and prevent the manufacturer from becoming an insurer by methods that avoid traditional negligence doctrines as much as possible. Generally, this approach has centered around the question of how broadly the concept of "defect" is to be defined. The fact that an injury has occurred through the use of a product should not automatically result in manufacturer liability. No court has imposed what amounts to absolute liability based upon mere causation without more.[47] Courts have refused to label the inherent characteristics of a product — often the ones that lend the product its very utility and identity — as defects.[48]

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41. Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 368 (E.D.N.Y. 1972); Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 586, 97 Cal. Rptr. 798, 808-09 (Dist. Ct. App. 1971); Mitchell v. Miller, 26 Conn. Supp. 142, 149-50, 214 A.2d 694, 698 (Super. Ct. 1965). *But see* Howes v. Hansen, 56 Wis. 2d 247, 259, 201 N.W.2d 825, 831 (1972).

42. Prosser, *The Fall of the Citadel, supra* note 8, at 826. *See also* Ford Motor Co. v. Eads, 224 Tenn. 473, 482-84, 457 S.W.2d 28, 31-32 (1970).

43. Maiorino v. Weco Prods. Co., 45 N.J. 570, 574, 214 A.2d 18, 20 (1965); Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63-64 (1967).

44. Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (Dist. Ct. App. 1972); *see* text at note 39 *supra.*

45. § 402A, comment *n* at 356.

46. *Id.*

47. *See* cases cited note 60 *infra*; Dickerson, *supra* note 29, at 302.

48. Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353, 369 (E.D.N.Y. 1972); Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 64 (1967); Traynor, *supra* note 37, at 366-67; Wade, *supra* note 7, at 16. For a discussion of the

There has also been hesitancy to impose liability because a normally wholesome quality, for which a product is used and desired, can cause some detrimental effect when consumed or used to excess.[49] The same reasoning has been extended to cover situations in which the aggregate gross effect, or the effect of individual use over an extended period of time, has resulted in injury.[50] Courts have also limited liability by holding the consumer to a certain minimal level of common knowledge, though less than the standard expected of a reasonably prudent man.[51] Some courts have also restricted liability when injury is not caused by a defect in the product but by a peculiar idiosyncrasy or allergy of the consumer that results in a harmful reaction.[52] Finally, courts have generally restricted liability when the product, because of its natural, inherent qualities or because of the laws of physics and chemistry, is theoretically incapable of being produced in a defect-free state, yet still possesses social utility.[53]

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social utility of such products see Dorsey v. Yoder Co., 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1973). The classic example of a product whose very utility renders it dangerous is a knife. The very purpose for a knife's existence is to cut objects; without its dangerous characteristic of sharpness it is useless. To label that quality a "defect" is to subvert the meaning of the word and would lead to absurd results that would pervert the purpose of strict liability. That one may cut himself as a result of his own carelessness cannot be said to incur liability upon the manufacturer. 331 F. Supp. at 759. On the other hand, consider the user of a pocket knife who cuts himself because a faulty catch fails to hold the blade in the closed position.

49. The reasoning seems to be that anything in excess of moderation can be dangerous. § 402A, comment *i*, provides the example of wholesome whiskey used to excess resulting in the attendant ills.

50. *See* City of Chicago v. General Motors Corp., 467 F.2d 1262 (7th Cir. 1972) (holding that the aggregate pollution of all the cars operating in Chicago does not mean that any particular car is defective for the purpose of strict liability). *See also* Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007 (D.N.M. 1971) (denying recovery to an insulation worker who claimed that the hazardous character of asbestos-insulation materials caused him to contact asbestosis over a 20-year period). For a discussion of long-term cigarette smoking and strict liability see James, *supra* note 38.

51. Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967) (holding that just because shoes may become slippery when wet does not mean they are defective). The court held that this is an everyday hazard of life for which common knowledge is presumed.

52. *See* Oakes v. E.I. Du Pont de Nemours & Co., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (Dist. Ct. App. 1969).

53. *E.g.*, Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971). For a discussion of the classic example of the Pasteur rabies treatment, which although made exactly as intended may still result in death, see § 402A, comment *k*.

After defining what qualities, characteristics and injuries are associated with products that cannot be said to be defective or defect-related, the courts have then turned to those products that may be called "defective" for strict liability purposes. In so doing, these courts, as opposed to those that have limited strict liability by the interjection of negligence doctrines, have often added one more qualification to the concept of defect—the "unreasonably dangerous" language of the Restatement. Thus, the question becomes whether strict liability may now be said to turn on a two-fold standard[54] requiring that the product be both defective and unreasonably dangerous.

Unfortunately, it has often been difficult to tell which position a court is taking because of the semantical problems that pervade this area. Some courts, once they find a defect, talk about it in terms of being "unreasonably dangerous" merely to emphasize the great risk involved, though it is unnecessary to establish risk of such magnitude in order to recover.[55] Nonetheless, a number of courts have demanded

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Yet, with this kind of product, the courts have usually been willing to apply a balancing test of risk against social utility. In the case of the rabies vaccine, the decision to exempt the manufacturer from liability is easily justified in light of the fact that the alternative of not using the vaccine is certain death. Elsewhere in this area, there has been some split of opinion on how to reconcile the unavoidably unsafe product with strict liability. Some courts have held that when a product possessing social utility (*i.e.*, drugs, chemicals and cosmetic products) is unavoidably unsafe even though manufactured exactly as intended, that product is not defective as a matter of law. Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 855 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968). Other authorities have held that a full and complete warning apprising the consumer of the risks involved is necessary to protect the manufacturer from an initial presumption of liability. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Oakes v. E.I. Du Pont de Nemours & Co., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (Dist. Ct. App. 1969); § 402A, comment *j* at 353. *Contra,* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Brody v. Overlook Hosp., 121 N.J. Super. 299, 296 A.2d 668 (L. Div. 1972). These are the so-called "blood-plasma" cases, in which strict liability was imposed upon the supplier of blood, contaminated with hepatitis virus, for transfusions notwithstanding the fact that there is no known test for the detection of such viral contamination. These cases may be reconciled, however, because wholesome, virus-free blood does exist in reality, and a tighter, more effective screening of donors is within the control of suppliers.

54. *See generally* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Note, *Products Liability and Section 402A of the Restatement of Torts, supra* note 35, at 296.

55. *Cf.* Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); Finnegan v. Havir Mfg. Co., 60 N.J. 413, 290 A.2d 286 (1972); Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972).

a finding of "unreasonably dangerous" as an independent requirement.[56] Other courts merely use "unreasonably dangerous" to denote that a defect must be more than just an inherent risk. The position of the *Glass* court is to reject the "unreasonably dangerous" language, especially to the extent that it represents an independent element, although the court would prefer to avoid the confusion associated with that phrase altogether.

Even the Restatement uses the "unreasonably dangerous" phrase ambiguously. On one hand, comment *i* discusses the phrase in terms of the expectations and evaluations of the ordinary consumer.[57] On the other hand, it gives examples of products that reflect considerations that are fixed by nature and inherent in the product's character, totally independent of human expectation, evaluation or judgment.[58] Both Dean Prosser and Justice Traynor, respectively the reporter and the adviser to section 402A, thought the purpose of "unreasonably dangerous" was to exempt from liability the manufacturer of those products with generic and inherent possibilities for harm.[59]

Finally, those cases exemplified by *Greenman,* into which *Glass* falls, apply strict liability without considering the "unreasonably dangerous" qualification.[60] Instead of qualifying a defect in terms of the average consumer's expectations and judgment of the product's danger, as does the Restatement, these courts have defined defect in terms of the product's fitness for the ordinary purposes for which it is sold and used.[61] Such an approach assumes, *ab initio,* that a product is not to be held defective merely because of its inherent, generic qualities or capacity for abuse. For such courts, justice is served with-

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56. *E.g.,* Mitchell v. Miller, 26 Conn. Supp. 142, 148, 214 A.2d 694, 698 (Super. Ct. 1965); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. Dist. Ct. App. 1967), *cert. denied,* 211 So. 2d 214 (Fla. 1968); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969); Elliott v. Lachance, 109 N.H. 481, 256 A.2d 153 (1969); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

57. *See* note 33 *supra.*

58. For example, comment *i* refers to whiskey, sugar and butter.

59. Prosser, *supra* note 24, at 23; Traynor, *supra* note 37, at 373.

60. *E.g.,* Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alas. 1969); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

61. *See* text at note 25 *supra.*

out making the manufacturer an absolute insurer by requiring that, in addition to proving injury and causation, plaintiff demonstrate a defect in the strict sense of the word.[62]

Coming full circle back to *Glass*, it should be clear that the area of strict liability, perhaps because of its unusually rapid and haphazard development, has attained varying degrees of acceptance, with divergent, sometimes inconsistent, interpretations. A number of courts have been unwilling to cut the ties with negligence theory, the result being hybrid cases that are not really strict liability in the true sense of the term. Then there are the courts that operate within the context of strict liability, who, in the interest of preventing the manufacturer from becoming an absolute insurer, have manipulated the conceptual definition of defect to this end. Within this latter group, some courts have adopted the Restatement's element of "unreasonably dangerous" as an additional qualification upon defect. Others have rejected this interpretation, contending that if "unreasonably dangerous" is to be used at all, it should merely serve to remind that the defect must be something other than a generic quality inherent in the product. But some courts would deny "unreasonably dangerous" even this function, preferring to take judicial notice that generic qualities are not defects.

It is very difficult to reconcile these divergent cases except at the broadest levels. Ultimately, the only apparent common denominator running through these cases is the desire to prevent manufacturer liability based upon mere causation alone without proof of some kind of defect.[63] Of course, it has been contended that despite these theoretical and philosophical differences surrounding the meaning of "unreasonably dangerous" the result in practice has rarely been any different.[64] After all, if a defect is substantial enough to cause

62. *See, e.g.*, Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. Dist. Ct. App. 1967), *cert. denied*, 211 So. 2d 214 (Fla. 1968); Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970); Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969). *See also* Carmichael, *supra* note 24, at 539; Traynor, *supra* note 37, at 366-67.

63. Traynor, *supra* note 37, at 366-67.

64. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. Dist. Ct. App. 1967), *cert. denied*, 211 So. 2d 214 (Fla. 1968).

an injury, is it not therefore an "unreasonably dangerous" defect?[65]

As to the impact of *Glass* in this area, the most that can be said is that it presents another opportunity to re-examine the semantical problems that pervade the theory of strict products liability in tort. The case rejects "unreasonably dangerous" to the extent that it makes the ordinary consumer's expectations about a product's dangerous qualities irrelevant. Unfortunately, the mere deletion of a phrase laden with so many varying interpretations represents an inadequate and oversimplified response that fails to reconcile most of these difficulties.

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65. *See* Newmark v. Gimbel's, Inc., 54 N.J. 585, 595, 258 A.2d 697, 702 (1969), *commented upon in* Gindy Mfg. Corp. v. Cardinale Truck Corp., 111 N.J. Super. 383, 388 n.2, 268 A.2d 345, 348 n.2 (L. Div. 1970).