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Products Liability: Is § 402a Strict Liability Really Strict in Kentucky?

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PRODUCTS LIABILITY: IS § 402A STRICT LIABILITY REALLY STRICT IN KENTUCKY?

A manufacturer's liability for injuries to consumers has been predicated upon several different bases, including negligence, warranty, and more recently, strict liability in tort. With the adoption by the American Law Institute of the strict liability theory in its Restatement,[1] this basis for recovery is gaining rapid acceptance in an increasing number of jurisdictions. While under previous theories, the manufacturer's care in production, the consumer's privity of contract, or the notice of breach of warranty to the manufacturer were primary issues of fact, under a theory of strict liability these are no longer important. The key to a manufacturer's liability lies in the existence of a discernible defect in the product that caused the injury. While the existence of the defect is a question of fact often hotly contested, the identification of a defect that is caused by some malfunction in the manufacturing process does not give rise to the conceptual problem of *defining* what a defect is. If a particular product has some quirk or variance from other products intended to be identical to it, then the "defect" is readily discernible; and the theory of strict liability removes from the plaintiff the necessity of showing that the quirk or defect was caused by a lack of due care in the manufacturing process.

The problem is quite different, however, when the "defect" complained of is in the *design* of the product. In such a case, the product must be shown to be defective even though it entered the stream of commerce in exactly the form intended by the manufacturer. While the courts could have decided that the term "defect" does not include a product that has no traces of any mistake in the manufacturing process and that so-called "defective designs" do not fit the definition of defect that causes strict liability to attach, they have not done so.[2]

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[1] The present form of § 402A first appeared in *Tentative Draft No.* 10 of the *Restatement (Second) of Torts* (1964) and was the third form of the section submitted to the American Law Institute since the first appearance of § 402A in *Tentative Draft No.* 6 (1961). The original version of § 402A created liability only in the very limited case of bodily injury resulting from consumption of defectively manufactured food. This earlier version was adopted in May, 1961, but in an amended form. The amended form is found in *Tentative Draft No.* 7 (1962) and exhibits a broadened form of liability including liability for injury resulting from products involved in intimate bodily use, as well as for injury resulting from consumption of defective food. Courts were expanding even beyond this; and the American Law Institute, in an attempt to stay abreast of the rapidly changing field, then adopted the present form of § 402A in 1964 as presented in *Tentative Draft No.* 10. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[2] Wright v. Massey-Harris, 215 N.E.2d 465 (Ill. App. 1966); Stephen v. Sears, Roebuck & Co., 266 A.2d 855 (N.H. 1970); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420 (Tex. Civ. App. 1970). Dean Page Keeton argues strongly that this,

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On the contrary, it has been affirmatively held that design defects give rise to strict liability in tort.[3] At the same time, however, courts are quick to point out that such strict liability is not absolute and that manufacturers are not intended to be insurers of users of their products.[4] Courts have assured that strict liability does not become absolute in several different ways. They have required that the plaintiff establish proximate cause between the injury and the alleged defect;[5] that the use employed during the injury be proper, or at least foreseeable by the manufacturer;[6] and, in particular, that some demonstrable defect exist.[7] It is this last requirement that has given rise to the greatest controversy, due to the fact that there seems to be little agreement as to specifically how a design defect is to be defined.[8] Occasionally, the definition of defect in "manufacturing defect" cases is directly applied to the "design defect" cases, and, although the defect could be common to the entire line of defendant's products, a defect is found only when there is a quirk or a variance in the individual product from some broad standard, such as the design most commonly used in the industry.[9]

This was the basis for a recent Kentucky decision, *Jones v. Hutchinson Manufacturing Co., Inc.*,[10] in which the Court of Appeals chose to define defect as a variation from industry standards for similar products in such a way that it was negligent to produce such a variation. In the *Jones* case, the plaintiff, a five year old child, was injured when she fell into an auger that her father, a farmer, was using to move corn

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however, is not the better view and that "defective" should be defined in such a way as *not* to include design defects. He would "limit the use of the word 'defective' to the case of an unintended condition, a miscarriage in the manufacturing process." Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 562 (1969).

[3] Wright v. Massey-Harris, Inc., 215 N.E.2d 465 (Ill. App. 1966); Berkebile v. Brantly Helicopter Corp., 281 A.2d 707 (Pa. Super. Ct. 1971).

[4] Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Cintrone v. Hertz Truck Leasing & Rental Service, 212 A.2d 769 (N.J. 1965); Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967).

[5] Mazzi v. Greenlee Tool Co., 320 F.2d 821 (2d Cir. 1963); Valdosta Coca-Cola Bottling Works, Inc. v. Montgomery, 116 S.E.2d 675 (Ga. Ct. App. 1960); Jacquot v. Wm. Filene's Sons Co., 149 N.E.2d 635 (Mass. 1958); Rizzo v. Jordan Wholesale Co., 214 So. 2d 604 (Miss. 1968).

[6] Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Maiorino v. Weco Products Co., 214 A.2d 18 (N.J. 1965).

[7] United States Rubber Co. v. Bauer, 319 F.2d 463 (8th Cir. 1963); Hill v. Harbor Steel & Supply Corp., 132 N.W.2d 54 (Mich. 1965).

[8] Justice Traynor of California noted that there has been such a number of varying definitions that "no single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries." Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

[9] *Id.* at 369.

[10] 502 S.W.2d 66 (Ky. 1973).

from a truck into a storage elevator. Asserting that the defect was an unsafe design, the plaintiff sued the manufacturer alleging both negligence and strict liability. Plaintiff contended that the design was unsafe because there were no guards to prevent the insertion of foreign objects into the moving parts and that such guards could have prevented her leg from becoming enmeshed in the working apparatus. The Court resolved the issue of liability by first deciding that there is substantially no difference between assessing liability under § 402A of the Restatement[11] and assessing it under § 398, which bases liability upon negligence.[12] The Court held that where the defect complained of is unsafe design, the standard of conduct required of the defendant is reasonable care in the development of the design and that absent a showing that the defendant was negligent, he will not be held liable.[13] In holding that a design is defective only when negligently produced, the Court seems to be struggling to define what a defect is, in order that courts can determine when a defect exists and when it does not. Such a definition is necessitated by the requirement that the plaintiff show a defect in order for strict liability to attach. This requirement is created in order to limit strict liability, to keep it within some definable bounds, and to prevent it from becoming absolute. The Court of Appeals has thus restricted the scope of strict liability without openly appearing to do so, by purporting to define the word "defect." It would seem far better to recognize the purpose for the definition in order to properly deal with it. By holding that the standard to be applied in product design cases is the manufacturer's *negligence* in producing that design, the incongruous result is two separate and distinct tests for liability in defective products cases. If the defect is shown to be the result of some malfunction in the manufacturing process, the defendant is strictly liable, regardless of his care or lack of it. However, if the defect is shown to be an unsafe *design*, the defendant is liable only if the plaintiff can show that the defendant was negligent in designing the product. The obvious question is whether there is any valid reason for applying separate and

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[11] The Kentucky Court of Appeals first accepted the language of the *Restatement (Second) of Torts* § 402A in Dealer's Transport Co. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. 1965) as being dispositive of Kentucky law bearing upon the issue of manufacturer's liability for defective products.

[12] Jones v. Hutchinson Manufacturing, Inc., 502 S.W.2d 66, 70 (Ky. 1973).

[13] *Id.* at 70. § 398 states the standard developed by the *Restatement* for a manufacturer's liability in an action based upon negligence: that standard is one of reasonable care. § 402A, however, purports to impose strict liability in cases where the product is "defective." The Court apparently intends § 402A to apply only to "manufacturing" defects, and to apply § 398 (which antedates § 402A) to "design" defects, although this is not entirely clear.

distinct tests of liability in "design defect" and "manufacturing defect" cases.[14]

II. HISTORICAL DEVELOPMENT OF STRICT LIABILITY

The road to the present state of the law in products liability is rather winding and has been often traveled by legal scholars.[15] Perhaps, however, by briefly touring it we can gain some insight as to why the law has developed as it has.

The original rule was established in *Winterbottom v. Wright*[16] which held that a manufacturer owed no duty to anyone other than the one to whom he sold his goods and would not be liable for injuries resulting from defects in those goods except to the person with whom he had dealt directly. When we consider that this case was decided in the infancy of the Industrial Revolution, the reason for the decision is clear. It was felt that fettering industry with the cost of compensating victims of its products when the industry had not even seen the individual who had been injured would be more than it could bear. As industry progressed and proliferated, many more people were being injured. The idea emerged that certain exceptions to the general rule could be tolerated without fear of destroying the Revolution. In *Olds Motor Works v. Shaffer*,[17] the Court of Appeals of Kentucky recognized one of these exceptions when it held that if articles were "imminently dangerous" the manufacturer could be held liable for injuries proximately resulting from its negligence even if the injured party did not deal directly with the manufacturer. The Court in *Olds Motor Works* used "imminently dangerous" to mean products which were not inherently dangerous but which could still inflict serious harm if defectively produced. In effect, the Court was laying the groundwork for the landmark decision of *MacPherson v. Buick Motor Co.*[18] when it argued that "[i]f an automobile is defective or

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[14] Justice Traynor, one of the first to recognize strict liability in tort in his decision in Greenman v. Yuba Power Products, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), has stated his disapproval of the "variance from the norm" test that has resulted in this dual result.

> [I]f a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scritinize all the more the product whose norm is danger?

His answer to this rhetorical question is an unqualified yes. Traynor, *supra* note 8, at 368.

[15] *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); *see also* Keeton, *supra* note 2, at 560-61.

[16] 152 Eng. Rep. 402 (Ex. 1842).

[17] 140 S.W. 1047 (Ky. 1911).

[18] 111 N.E. 1050 (N.Y. 1916). Justice Cardozo even relied upon *Olds Motor Works* for the proposition that an automobile is imminently dangerous.

insufficiently constructed, there can be no doubt that it is an imminently dangerous thing . . . ."[19] Recognizing that industry must no longer be permitted to avoid compensating the victims of its defective products, the Court allowed a party other than the purchaser to recover by bringing his case within the exception to the rule of non-liability. There are two reasons why this case did not become the landmark case that *MacPherson* did. First, the Court brought the case within the exception rather than expanding the rule to fit the case as did Justice Cardozo in *MacPherson;* and, secondly, the Court based liability upon fraud and deceit rather than upon negligence.[20] Thus knowledge by the purchaser of the defect would defeat a non-purchaser's claim.

This set the stage for Justice Cardozo's statement in *MacPherson* that any product which "is reasonably certain to place life and limb in peril when negligently made"[21] would fit within the imminently dangerous articles exception, thus causing the exception to swallow up the rule. No longer was privity a bar in negligence actions. Kentucky soon accepted this broadened form of *Olds Motor Works* when, in *Payton's Administrator v. Childer's Electric Co.*,[22] the Court held that when an article "which by reason of negligent construction is manifestly dangerous when put to the use for which it is intended" caused injury, the manufacturer was liable to any person who might have suffered that injury.[23] For the first time, protection of the consumer became a factor in determining the manufacturer's liability.

This desire to protect the consumer led courts to find new ways to hold manufacturers responsible for injuries caused by their defective products. This broadened interest in the protection of the consumer found its first acceptance in food products cases, which became the avenue for the expansion of products liability. Since sellers and manufacturers of food products for human consumption have always been held to have a special responsibility to consumers of their products,[24] courts began to hold manufacturers of food products liable for injuries caused by their products whether the plaintiff was able to show negligence or not.[25] Some courts held that this liability without proof of negligence should attach even though the person injured did not buy the food from the defendant. Thus a Mississippi court introduced the

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[19] Olds Motor Works v. Shaffer, 140 S.W. 1047, 1051 (Ky. 1911).
[20] *Id.* at 1052.
[21] MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).
[22] 14 S.W.2d 208 (Ky. 1929).
[23] *Id.* at 210.
[24] Prosser, *supra* note 15, at 1103.
[25] Mazetti v. Armour & Co., 135 P. 633 (Wash. 1913).

idea of a warranty of wholesomeness that ran with the title, analogous to covenants running with title to land, based on the theory that the manufacturer warranted that the food was pure and wholesome.[26] Rejecting defendant's argument that the warranty could not arise in absence of privity between plaintiff and defendant, the court held that the warranty was not based upon a contractual relationship, but instead was impliedly made to anyone holding the title and rightful possession of the food.[27] Therefore, the analysis extended to whether plaintiff actually had title to the goods, *i.e.*, by purchase or gift, or whether he was merely in possession of the food.[28] This limited expansion did not satisfy the courts, however. Other jurisdictions extended strict liability, under a theory of warranty, to articles for intimate bodily use, such as soap[29] and hair dye.[30] Once the extension was made, the theory of a special responsibility of food purveyors no longer applied, and there was little difficulty in further extending the warranty to other products.

The New Jersey Supreme Court, in an exceptionally exhaustive and lucid opinion, laid the ideas of privity and negligence quietly to rest in the case of *Henningsen v. Bloomfield Motors, Inc.*,[31] wherein they declared that there was "no rational doctrinal basis" for applying strict liability to a maker of soft drinks but not to an automobile manufacturer.[32] The only requirement was that the articles be "such that if defectively manufactured they will be dangerous to life or limb. . . ."[33] If it were such an article, there was an implied warranty that extended to any user of the product. It was at this point that protecting "society's interests"[34] in compensation for injury from defective products finally tipped the scales in favor of the consumer. No longer was the general rule one of non-liability. Consumer protection had vaulted from a position of little or no importance into the forefront; once peripheral, it now dominated social policy.

California, however, saw one last problem to be conquered—the contractual requirements that had grown up around warranty liability.

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[26] Coca-Cola Bottling Works v. Lyons, 111 So. 305 (Miss. 1927). However, this idea was never accepted in Kentucky. The Court of Appeals insisted that liability, "if any, must arise because of [the manufacturer's] negligence under one of the well-known exceptions to the usual rule . . . ." Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 703 (Ky. 1930).

[27] Coca-Cola Bottling Works v. Lyons, 111 So. 305, 306 (Miss. 1927).

[28] *Id.* at 307.

[29] Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953), *rev'd on other grounds*, 117 N.E.2d 7 (Ohio 1954).

[30] Graham v. Bottenfield's, Inc., 269 P.2d 413 (Kan. 1954).

[31] 161 A.2d 69 (N.J. 1954).

[32] *Id.* at 83.

[33] *Id.* at 81.

[34] *Id.*

Though warranty first arose as a fiction to apply tort liability, it soon found a base in sales law and became inextricably intertwined with contract doctrines of notice, disclaimer, and limitation of actions. In *Greenman v. Yuba Power Products, Inc.*,[35] Justice Traynor finally put strict liability in its place, squarely in tort law. No longer could the defendant escape liability because the injured plaintiff failed to notify him or because the manufacturer disclaimed any implied warranties in the sales contract. The rationale for the elimination of these traditional defenses by the reclassification of the injured person's cause of action was explained by Justice Traynor as follows:

> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[36]

A part of this argument is based also upon the fact that the manufacturer is in a better position to absorb the costs and spread them equitably as a cost of doing business. Other arguments used to support strict tort liability are that in today's market situation, characterized by national media advertising, the purchaser often is actually dealing directly with the manufacturer rather than the manufacturer's dealers. In addition, if recovery were based upon negligence, the purchaser could recover only against the manufacturer (middle-men generally only non-negligently funnel the products), over whom it is sometimes difficult to obtain jurisdiction. Strict liability, on the other hand, allows recovery against a middle-man who then can either recover against the maker, distribute the cost as a cost of business, or put economic pressure on the maker. Finally, improvement of the quality of products and reduction of the number of injuries is a basic purpose expressed by all proponents of strict liability. Under whatever theory it is accomplished, it is clear that there is "a trend and a design in legislative and judicial thinking toward providing protection for the buyer."[37]

This broadened form of strict liability found acceptance in the Restatement as § 402A[38] and in Kentucky in the case of *Dealers*

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[35] 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
[36] *Id.* at 901, 27 Cal. Rptr. at 701.
[37] Henningson v. Bloomfield Motors, Inc., 161 A.2d 69, 77 (N.J. 1959).
[38] RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads in full:
§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
(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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Transport Co., Inc. v. Battery Distributing Co., Inc.[39] Kentucky reaffirmed its position that negligence no longer has a place in products liability law when it declared, in *Kroger Co. v. Bowman*,[40] that "the liability exists even though [the manufacturer] has exercised *all possible* care . . . ."[41]

What this survey shows is a constant trend toward greater protection for the consumer and dissatisfaction with artificial limits upon his ability to recover for injuries proximately resulting from defects in manufacturers' products. Industry no longer needs protection; in fact, it is better able than the person injured to bear the loss occasioned by such injuries. For this reason the rules of non-liability, privity, and negligence have been replaced as rules regarding recovery. The ultimate goal is the protection of consumers from defective products.

III. STRICT LIABILITY, THE PRINCIPLE APPLIED IN *Jones*

This brief overview of the development of strict liability illustrates the movement away from using standards of negligence to determine liability. Yet, the Court of Appeals in *Jones v. Hutchinson Manufacturing, Inc.*[42] held that a manufacturer's liability is to be determined by applying negligence principles. This seems to be a long step backwards historically and raises serious questions.

It could be argued that the Court has adopted a two-step approach to determining liability, applying § 402A strict liability to a defective product whose defect is an unsafe design and using negligence concepts to determine if the product is "defective." It is possible that this interpretation is allowable under § 402A, since that section says only that liability attaches when a defective product causes injury; the section does not attempt to define when the product is defective. This argument seems sound, but is deceptively simplistic. By using negligence theory to determine whether a product is defective, the manufacturer is liable only when he has been negligent; he is liable only if there is a defect, and there is a defect only

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(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.

[39] 402 S.W.2d 441 (Ky. 1965).
[40] 411 S.W.2d 339 (Ky. 1967).
[41] *Id.* at 341 (emphasis added).
[42] 502 S.W.2d 66 (Ky. 1973).

when he is negligent. The methodology and result are exactly the same as if § 398 of the Restatement[43] were applied directly—which is simply to apply negligence liability. To speak of applying strict liability after using negligence theory to determine whether a defect exists is simply to hide the truth behind verbiage. By applying negligence theory in the determination of whether there is a defect, design defects are removed from § 402A, and only manufacturing defects will subject the manufacturer to strict liability. Thus the real issue is whether there is sound reason to apply one test of liability where the alleged defect is due to design and to apply another, dissimilar test where the alleged defect is due to manufacture.

Many courts have held that design defect cases should not turn on the issue of the manufacturer's negligence. The New Jersey Supreme Court has held that "imposition of warranty or strict liability principles to a case of defective design . . . would render unnecessary any allegation of negligence . . . ."[44] In Pennsylvania, actions based upon § 402A strict liability are governed by the evidentiary standards of warranty, which have long abandoned negligence.[45] As noted earlier, the principal reason negligence was replaced by strict liability was because of increased emphasis on consumer protection; accordingly, the Minnesota Supreme Court has declared that strict liability in design defect cases "more adequately meets public policy demands to protect consumers from . . . risks of bodily harm created by mass production . . . ."[46]

Moreover, there is no policy reason to differentiate between design defects and defects resulting from manufacture. As discussed above, the primary reason for adopting strict liability in tort grew out of a policy decision "to protect against unreasonable risk of physical harm while the product is used for its intended purposes,"[47] and a

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[43] RESTATEMENT (SECOND) OF TORTS § 398 (1965) was included in the *Restatement* before strict liability was adopted by the *Restatement* and states the rule of manufacturer's liability as it was developed in negligence. In some respects, § 402A supersedes § 398 by its very terms, because negligence is no longer necessary under § 402A. Not all jurisdictions have adopted § 402A, however, and even in those jurisdictions which have, there remains an action based upon negligence where such can be shown. § 398 reads in full:

> § 398. Chattel Made Under Dangerous Plan or Design A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

[44] Schipper v. Levitt & Sons, 207 A.2d 314, 326 (N.J. 1964).

[45] MacDougall v. Ford Motor Co., 257 A.2d 676, 678 (Pa. 1969).

[46] McCormack v. Hankscraft Co., 154 N.W.2d 488, 500 (Minn. 1967).

[47] *Id.* at 496.

determination that the manufacturer was in the best position to absorb the costs of any such physical harm which it could recoup as a cost of doing business.[48] These reasons are found in defective design cases to the same extent as in defective manufacture cases. Where a whole product line is involved in a defective design case, the potential for harm is multiplied, and the policy of consumer protection that underlies the theory of strict liability would suggest that strict liability has even greater application here.

In *Pizza Inn, Inc. v. Tiffany*,[49] an employee at a pizzaria caught his hand in a device that rolled out pizza dough. The court refused to apply the test of reasonable care to the failure to provide adequate guards to protect the hands of the user,[50] stating that "there is no adequate rationale to apply the rule of strict liability in a defect in manufacture case, but deny it in a defect of design case."[51] To require the plaintiff to show negligence in the development of the design in question is to deny recovery, except to those few who are able to hire the proper experts and amass the multitudinous evidence necessary to persuade a jury that the elaborate precautions employed by the manufacturer did not measure up to the standard of reasonable care.[52] Such a requirement would undermine the purpose of strict liability, which is to "[meet] public demands to protect consumers,"[53] and is also inappropriate because under the doctrine of strict liability, the manufacturer's fault (or lack of it) in the production of the unsafe product is not a factor to be considered.[54]

The Court of Appeals in *Jones* also failed to note that, in determining the defective condition, the drafters of the Second Restatement contemplated looking to the safety of the product involved, rather than to the acts or omissions by the manufacturer in production.[55] One commentator has said that "the entire emphasis in cases interpreting section 402A, therefore, is on safety . . . ."[56] Thus, the important factor is how safe or dangerous the product is when used as it was intended to be used.

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48 Keeton, *supra* note 2, at 561.
49 454 S.W.2d 420 (Tex. Civ. App. 1970).
50 *Id.* at 423.
51 *Id.*
52 McCormack v. Hankscraft Co., 154 N.W.2d 488, 500 (Minn. 1967).
53 *Id.* at 500.
54 The *Restatement* intends for strict liability to apply even though "the seller has exercised all possible care." Given this statement, it is difficult to see how fault could be a factor. Generally, applying negligence standards at least implies that one who does not meet the standards is "at fault." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965). For the full text *see* note 38 *supra*.
55 RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).
56 Comment, *Products Liability—Strict Liability in Torts*, 11 DUQUESNE L. REV. 726, 728 (1973).

In *Cronin v. J.B.E. Olson Corp.*,[57] the Supreme Court of California sought to completely abolish the application of negligence concepts to actions based upon design defects. In that case the driver of a bread van was injured when a latch failed to hold the bread racks in place during a collision, and the bread racks forced the plaintiff-driver of the van through the windshield. Justice Sullivan sought to remove all considerations of negligence by making it clear that in California a product need not be "unreasonably dangerous" in order for the plaintiff to recover. By removing the requirement that the product be "unreasonably dangerous," the California court effectively precluded negligence theory from becoming a determinative factor in assessing liability. As long as the product is defective, the plaintiff suffers injury as a proximate result of that defect, and the product was not being used improperly, the plaintiff may recover.[58] This result is logically consistent with the public policy arguments which gave rise to the doctrine of strict liability originally, and it prevents the concept of negligence from creeping back into products liability cases. As Justice Sullivan ably points out, the manufacturer is sufficiently protected by the requirement that the damages occur proximately from a defect.[59] This puts the burden on the plaintiff to show that there is a defect in the product and that the defect was the proximate cause of his injuries. The concept of strict liability was engendered in an effort to shift losses caused by defective products to the manufacturer which produced the defective goods in order to protect unwary consumers who were in no position to control the quality of goods.

It should be remembered that the purpose of requiring the plaintiff to prove a defect is merely to prevent strict liability from becoming absolute. However, the Kentucky Court's failure in *Jones* to recognize that this is merely a limiting device leads it to seek a definition of defect as an end in itself, and causes it to overlook the *effect* of the definition as a limiting factor. If the effect is to add elements to the plaintiff's case, those additional elements should be justifiable. When the definition as a limiting factor is too efficient, when it limits to a degree beyond that which is necessary, its use should be re-evaluated.

In practice, strict liability with overtones of negligence rarely

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[57] 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[58] Id. at 1162.

[59] *Id.* Justice Sullivan argues that the manufacturer *should* be held liable for injury *proximately* resulting from a *defect* in its product. This means that while a manufacturer should not be held liable for *all* injuries resulting from use of its product (which would make it an insurer of users of its product), it should be liable for injury occurring as a proximate result of a *defect* in its product. This requirement of a showing of proximate result from a defect sufficiently distinguishes between the cases when liability should attach and those in which it should not.

leads to a different conclusion than that which would have been reached under pure negligence theories,[60] which is directly contrary to the purpose of strict liability. This principle, that negligence should not be allowed to creep back into actions based upon strict liability, was expressed by the Appellate Court of Illinois in *Wright v. Massey-Harris, Inc.*,[61] in which liability was determined by asking ". . . whether the product in question has lived up to the required standard of safety."[62] To determine whether the product was "defective," the court correctly looked to the condition of the product rather than to the acts of the defendant. The test is "danger in fact, as that danger is found to be at the time of the trial, that controls."[63] Therefore, proof of the manufacturer's negligence has no place in an action based upon defective design.[64]

In the *Jones* opinion the Kentucky Court of Appeals placed heavy emphasis upon a quotation from Prosser which suggests that the test of defective design is the manufacturer's negligence:

> There are, in addition, two particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence. One of these involves the design of the product . . . .[65]

Since Prosser was the principal draftsman of § 402A of the Restatement, his opinion concerning the test to be employed thereunder in defective design cases should carry great weight. If read in isolation, this quote does indeed suggest that Prosser thought negligence to be the proper standard for design defect cases. A more careful reading of the entire section, however, discloses that Prosser is not discussing strict liability at all; he is discussing the proper standards in actions brought upon *negligence theory*. Negligence and strict liability in tort are treated separately in the hornbook from which the quotation is taken,[66] and this quote does not concern the standards involved in

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[60] *Cf.* Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 (1971).

[61] 215 N.E.2d 466 (Ill. App. Ct. 1966).

[62] *Id.* at 470.

[63] Keeton, *supra* note 2, at 568.

[64] Santor v. A & M Karagheusian, Inc., 207 A.2d 305, 313 (N.J. 1965).

[65] Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69 (Ky. 1973), *citing* W. PROSSER, LAW OF TORTS 644 (4th ed. 1971).

[66] Prosser addressed the recovery problems a plaintiff faces in a defective products case based upon a theory of negligence in § 96 of his book, which section is appropriately entitled *Negligence*. The cause of action based upon strict liability in tort is discussed in a separate section, § 98, which also is appropriately entitled *Strict Liability in Tort*. Prosser's approach is to analyze these bases for recovery independently because, though they sometimes involve overlapping proof,

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strict liability in tort. Prosser is saying merely that even though strict liability exists, many attorneys also allege negligence, which still has a place in products liability law.[67] This statement clearly relates only to negligence actions, and the casual reference to the fact that strict liability also exists does not mean that this is the standard to be used in strict liability actions. When specifically discussing strict liability in relation to unsafe products, Prosser asserts that "strict liability, whether on warranty or in tort, *does not require* negligence . . . ."[68] Therefore, Prosser did not think that the manufacturer's negligence should be the test to determine whether a defect exists; to the contrary, he says that a requirement of negligence is entirely out of place in an action based upon strict liability in tort.

IV. TOWARD A BETTER STANDARD

In strict liability cases there must be an affirmative showing of a defect, which has given rise to the subordinate problem of defining exactly what constitutes a defect. This requirement seems to stem from a fear that strict liability may force a manufacturer to compensate any user of its products who becomes injured by such use. This fear was reflected in the evolution of strict liability theory; liability was never meant to attach unless there actually was a defect. But requiring a showing of negligence in product design cases imposes an unnecessarily severe limitation on a plaintiff's right to recover in order to achieve that result. It seems clear that the courts have not approached design defects as conceptually different from manufacturing defects; therefore, the goal of limiting liability to a case in which a defect can be shown should not subject design cases to a different basis for liability. Rather, protection for the manufacturer can be obtained in other ways, which would allow both manufacture and design cases to be treated as conceptually alike. A definition of defect should be developed which would apply equally well in either the design defect or manufacturing defect cases.

In developing such a definition, two important factors should be kept in mind. First the definition must focus upon the condition of the particular instrumentality in question. Secondly, the definition must recognize that certain products, although dangerous, are con-

(Footnote continued from preceding page)
they are conceptually separate and distinct. For an analysis of the three separate bases for recovery (negligence, implied warranty, and strict liability in tort) *see* W. PROSSER, LAW OF TORTS §§ 96-98, at 641-57 (4th ed. 1971).

[67] *Cf.* W. PROSSER, LAW OF TORTS 641-42 (4th ed. 1971). Prosser points out that by alleging negligence it is possible to introduce evidence of negligence which tends to affect the size of the jury's verdict on damages.

[68] *Id.* at 661 (emphasis added).

sidered valuable enough to society to be used notwithstanding their dangerous nature.[69] An excellent example of such a definition was developed by the Illinois Supreme Court in *Dunham v. Vaughn & Bushnell Manufacturing Co.*,[70] in which the court held that "those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function."[71] This test puts proper emphasis on the condition of the product as the controlling factor and uses consumer expectation, as suggested by the Restatement,[72] to protect products of high utility. Another definition of defect, worded only slightly differently, could be: those products are defective which are in fact dangerous to an extent greater than could reasonably be expected in light of their nature and function, giving due weight to the high social utility of certain products, such as drugs and medicines, and to the feasibility of making the product safer. Such a definition would sufficiently protect products of high social utility and would prevent manufacturers from being insurers of users of their products. At the same time, it would place greater emphasis upon the reasonable expectations of consumers for one primary reason: strict liability theory evolved as a device to protect consumers, and the consumer needs protection only from those products which are more dangerous than can reasonably be expected. If the product in question is dangerous, but no more so than can be expected, such as a knife or ax, the consumer can take steps to protect himself. However, if the product is dangerous beyond a consumer's expectation, he cannot be expected to protect himself from it. This definition, then, would give the manufacturer sufficient protection and would be consistent with the theory behind strict liability. The manufacturer would be liable only when he produced an instrumentality which was more dangerous than a reasonable consumer should have expected and which was

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[69] This was the policy factor behind the "unreasonably dangerous" language of § 402A originally (*see* RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965)) and was what Prosser, the primary draftsman of that section, was concerned with in his discussion of the possible deterrent effect on the drug industry of holding manufacturers liable for any dangerous product. *See* W. PROSSER, LAW OF TORTS 661 (4th ed. 1971).

[70] 247 N.E.2d 401 (Ill. 1969).

[71] *Id.* at 403.

[72] *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965):

> The rule stated in this section applies only when the product is . . . in a condition not *contemplated by the ultimate consumer*, which will be unreasonably dangerous to him (emphasis added).

And *see* RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965):

> The article sold must be dangerous to an extent beyond that which would be *contemplated by the ordinary consumer* who purchases it . . . . (emphasis added).

more dangerous than it needed to be. At the same time the consumer would be protected from products which were "unreasonably dangerous." In addition, the definition would work equally well whether the dangerous condition is due to a malfunction in the manufacturing process or due to a design that is unsafe.

V. CONCLUSION

The Court's reliance upon negligence theory as a limiting factor in strict liability recoveries introduces another element into the plaintiff's case which is both unnecessary and inconsistent with the theory of strict liability. If the goal is to prevent recovery when in fact no defect exists, this can be reached by methods which conform to the policies underlying strict liability in tort. On the other hand, if the reason for the introduction of negligence as a factor was actually a dissatisfaction with the results of the adoption of strict liability, then *Dealer's Transport* should have been squarely overruled. Unless and until the Court chooses to reverse its current thinking, strict liability will only be strict in Kentucky when the defect complained of is a result of the manufacturing process. Defects designed into the products will not give rise to strict liability; only when the manufacturer is negligent in adopting the design will he be liable for injuries proximately resulting from that "defect."

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