The Anatomy of Products Liability in Minnesota: The Theories of Recovery

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Abstract
The law of products liability has undergone a dramatic evolution since MacPherson v. Buick Motor Co. As a result of this rapid development, substantial uncertainty as to the scope of liability of product manufacturers and sellers exists. The purpose of this Article is to eliminate some of that confusion. After tracing the history and development of the law of products liability in Minnesota, the author discusses the various elements and standards of strict liability. Finally, the author proposes several jury instructions that help clarify the relationship between strict liability and negligence. Throughout the Article, Minnesota is used as a model for analysis; however, the principles that are synthesized have extra-jurisdictional import.

Keywords
products liability, strict liability, Minnesota law

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THE ANATOMY OF PRODUCTS LIABILITY IN MINNESOTA: THE THEORIES OF RECOVERY†

by Michael K. Steenson††

The law of products liability has undergone a dramatic evolution since MacPherson v. Buick Motor Co. As a result of this rapid development, substantial uncertainty as to the scope of liability of product manufacturers and sellers exists. The purpose of this Article is to eliminate some of that confusion. After tracing the history and development of the law of products liability in Minnesota, Professor Steenson discusses the various elements and standards of strict liability. Finally, Professor Steenson proposes several jury instructions that help clarify the relationship between strict liability and negligence. Throughout the Article, Minnesota is used as a model for analysis; however, the principles that are synthesized have extra-jurisdictional import.

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† In a second Article, The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation, to be published in the next issue of the William Mitchell Law Review, Professor Steenson will discuss the problems involved in allocating awards among the parties in products liability cases. The Article will analyze defenses to products liability cases, contribution and indemnity, and the impact of the Minnesota Comparative Fault Act on products liability law.

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I. INTRODUCTION

The rapid development of products liability theory has resulted in substantial uncertainty in the law as courts probe for principles that will properly define the scope of liability of product sellers and manufacturers for product defects.\(^1\) Problems relating to the affordability and availability of products liability insurance, created in part by legal uncertainty, have prompted a detailed reconsideration of the law of products liability.\(^2\) The recent burst of

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\(^1\) The changes in the law of products liability law are illustrated in the Final Report of the Interagency Task Force on Product Liability. See U.S. DEPT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT II-6 to -19, VII-15 to -17 (1977) [hereinafter cited as FINAL REPORT].


The Interagency Task Force on Product Liability in its final report pointed out a number of problems that have led to limitations on the availability and affordability of insurance. Aside from the legal uncertainty, the final report stated that problems concerning insurance rating practices, unsafe products, and manufacturing practices are key contributing factors. See FINAL REPORT, supra note 1, at I-20 to -31. For a critical appraisal of the final report, see Johnson, Products Liability “Reform”: A Hazard to Consumers, 56 N.C.L. REV. 677 (1978).

Following the completion of the final report, which did not make specific legislative recommendations, the Carter Administration requested the Department of Commerce to prepare an options paper with recommendations for action to address the product liability problem. See 43 Fed. Reg. 14,612 (1978).

For a discussion of federal action concerning products liability, see Schwartz, Federal Action on Product Liability—What Has Occurred and What May Occur, 14 FORUM 287 (1978);
legislative activity in the products liability area is indicative of the unrest in a common law system of tort liability that has been criti-


After noting that the Model Act is offered for voluntary use by the states, its introduction states:

This Model Law will help to assure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries. It should also help to stabilize product liability insurance rates.

The Model Law, if enacted by the states, would introduce uniformity and stability into the law of product liability. This, in turn, would help stabilize product liability insurance rates. Uniformity and stability in this area are needed because product liability insurance rates are set on a countrywide basis. Thus, product liability law differs from medical malpractice, automobile, and other standard lines of liability.

The current system of having individual state courts develop product liability law on a case-by-case basis is not consistent with commercial necessity. Product sellers and insurers need uniformity in product liability law so they will know the rules by which they are to be judged. At the same time, product users are entitled to the assurance that their rights will be protected and will not be restricted by "reform" legislation formulated in a crisis atmosphere. Thus, the Model Law meets the needs of product users, sellers, and insurers.


cized as achieving too much in an undisciplined fashion.4

The complexity of products liability law, characterized by judicial innovation and legislative reaction, makes a comprehensive view and understanding of products liability law essential to a sound application of the law in any jurisdiction. This Article serves that function for Minnesota, although the principles that are developed have a wider application.

The Article concentrates primarily on the elements and standards for products liability cases. Following a concise history of Minnesota products liability law,5 it discusses first the elements and standards for strict tort liability and the relationship of those elements to negligence and warranty theories.6 It then analyzes the variance in strict tort standards used in Minnesota and other jurisdictions, and the relationship of strict tort liability to negligence and warranty theories.7 Building on this analysis, the final section suggests jury instructions designed to present strict tort liability to a jury in a concise, clear manner.8

A. Methodology and General Observations

This Article is based upon an analysis of Minnesota products defenses); Utah Code Ann. §§ 78-15-1 to -6 (1977) (six to ten-year statute of limitations, defenses, and presumption of nondefectiveness).


4. The criticisms are varied, based in part on the inability of courts to resolve complicated products liability issues, and in part on what is perceived to be an over liberalization of tort principles in products liability cases, with the result that compensation is allowed in an excessive number of cases. The liberalization of tort standards provides no rational guidance for manufacturers required to anticipate their potential liability. For in-depth discussion of these criticisms, see Epstein, Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties, 45 J. Air L. & Com. 87 (1979); Epstein, supra note 2; Henderson, Design Defect Litigation Revisited, 61 Cornell L. Rev. 541 (1976); Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, supra note 2.

5. See notes 20-67 infra and accompanying text.

6. See notes 68-214 infra and accompanying text.

7. See id.

8. See notes 215-26 infra and accompanying text.
liability cases decided between 1868 and 1979. It concentrates primarily on those cases dealing with personal injury and property damage. Cases dealing with economic loss are considered only insofar as they aid in the interpretation of tort law. No attempt has been made to analyze in detail the law of sales outside the personal injury/property damage context.

Although strict liability was adopted by the Minnesota Supreme Court in 1967,\(^9\) strict tort has rarely proved to be the controlling theory of recovery.\(^10\) A general tendency to plead negligence, warranty, and strict liability,\(^11\) with recovery ordinarily being granted on more than one theory, has made the exact impact of strict liability difficult to assess. It seems a fair observation, however, that strict tort has provided the impetus for a reanalysis and reformulation of some previously well-settled legal rules. The starkest examples are the court’s recent decisions modifying the law of

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9. See McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (child scalded by water from vaporizer that had been tipped over). For a further discussion of McCormack, see notes 61-65 infra and accompanying text.


In Waite the case was submitted on the basis of strict liability and negligence, and the jury found defendant strictly liable but not negligent. See 295 Minn. at 290, 204 N.W.2d at 411. In Karjala plaintiff’s case was based on defendant’s failure to warn of the dangers involved in working with asbestos. See 523 F.2d at 156-57. The case was brought under negligence, breach of warranty, and strict liability theories. It was submitted to the jury solely on the basis of strict liability. See id. at 157 n.1. Because there is little distinction between strict liability and negligence in the failure to warn context, see Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978), Karjala should not be viewed as allowing recovery on strict tort alone. In Gilbertson the case was submitted solely on the basis of strict liability. See 492 F.2d at 959. In Busch the jury was instructed on negligence and strict liability but the special verdict form contained only the strict liability question. See 262 N.W.2d at 384. In Farr there were two defendants, the manufacturer and the retailer. The case was submitted to the jury on breach of warranty and strict liability as to the retailer, and negligence and strict liability as to the manufacturer. See 288 Minn. at 86-87, 179 N.W.2d at 67. Because a general verdict form was used, it can be determined that strict liability and warranty, both strict tort theories, applied to the retailer only. See id. at 87, 179 N.W.2d at 67.

contribution and indemnity, and its decision applying the comparative negligence statute to claims based on strict tort.

Conversely, in shaping the boundaries of strict tort, the law of negligence has had a significant impact, both because of the familiarity of negligence principles and the need for principled line drawing necessitated by strict tort. It is not unusual, therefore, that solutions to many of the problems created by strict liability theory are readily resolved by reference to established negligence concepts.

Legislative intervention in the form of a statute broadly touching civil litigation in general and products liability in particular will alter some of the Minnesota Supreme Court's recent decisions. The most significant impact will be on the court's deci-


13. See Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977) (comparative negligence statute applies to strict liability).


Application of state comparative negligence statutes to strict tort cases, see, e.g., Busch v. Busch Constr., Inc., 262 N.W.2d 377, 393 (Minn. 1977); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), and the adoption of comparative fault statutes, see, e.g., MINN. STAT. §§ 604.01-02 (1978); N.Y. CIV. PRAC. LAW §§ 1411-1413 (McKinney 1976), further diminishes the difference between negligence and strict liability. For a discussion of comparative negligence and comparative fault statutes, see Note, A Reappraisal of Contributory Fault in Strict Products Liability Law, 2 WM. MITCHELL L. REV. 235 (1976).

15. See Steenson, supra note 12.

16. See Act of Apr. 5, 1978, ch. 738, 1978 Minn. Laws 836 (codified in scattered sections of MINN. STAT. chs. 541, 544, 549, 604). Section 1 of the Act adds a new subdivision 2 to Minnesota Statutes section 541.05 to provide for a four-year statute of limitations in "any action based on the strict liability of the defendant and arising from the manufacture, sale, use or consumption of a product." Id. § 1, 1978 Minn. Laws at 837 (codified at MINN. STAT. § 541.05(2) (1978)). Section 2 amends Minnesota Statutes section 541.07 to provide for a two-year statute of limitations in actions "[a]gainst the person who applies the pesticide for injury or damage to property resulting from the application, but not the manufacture or sale, of a pesticide." Id. § 2, 1978 Minn. Laws at 838 (codified at MINN. STAT. § 541.07(8) (1978)). Section 3 adds a new section 544.36 to Minnesota Statutes limiting the amount that can be set forth in a pleading in a civil action when there is an unliquidated claim for relief to an amount not greater than $50,000. See id. § 3 (codified at MINN. STAT. § 544.36 (1978)). Section 4, adding a section 549.20 to Minnesota Stat-
sions concerning loss allocation. Because the Minnesota legislation applies only to cases arising on or after April 15, 1978, common law principles will continue to be important in resolving cases arising before that date, as well as in interpreting the legislation in cases arising after that date. The pre-statute cases will, however, have to be considered in the shadow of the tort reform legislation that may by its existence, if not direct application, create subtle pressure for common law conformity.

B. A Concise History of Minnesota Products Liability Law

Minnesota has always been a progressive jurisdiction in tort matters. The supreme court has never been reluctant to modify...
the common law to reflect major shifts in tort doctrine, or to initiate those changes. The development of products liability law has been no exception. The brief history that follows highlights some of the most significant developments in the law of products liability in Minnesota up to the adoption of strict tort liability in *McCormack v. Hanksraft Co.*

The first Minnesota case that could be fairly characterized as a

the legal status of property entrants. Through a comparison of a sample of these decisions, Minnesota's leadership in the advancement of tort law becomes clear. The following case sample does not purport to be an exhaustive examination of Minnesota and California tort reform. The case comparisons, however, are highly indicative of the activity in Minnesota and California.


21. *See, e.g.*, Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949) (wrongful death action allowed for prenatal injuries to viable child); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892) (plaintiff entitled to recover for negligent infliction of fright and mental distress).

22. 278 Minn. 322, 154 N.W.2d 488 (1967).
products liability case is *Marsh v. Webber*, an 1868 case involving a fraud and breach of warranty action arising out of the sale of diseased sheep. The most notable aspect of the court's opinion is the difficulty it had in delineating tort and warranty theories of recovery, a problem that persists to the present day.

1. The Development of Negligence Theory

The first major products liability case in the evolution of products liability doctrine was *Schubert v. J.R. Clark Co.*, an 1892 case involving a defective stepladder. Faced with traditional limitations on the negligence cause of action in cases involving sales of goods, the court held that the lack of privity of contract was not a bar to the plaintiff's negligence action against the manufacturer. In eliminating privity limitations and by applying general negligence principles to the case, the court established unique precedent in sales of goods cases.

*Schubert* presaged Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.* by some twenty-four years. But in spite of the breadth of the opinion, *Schubert* received little notice. The Eighth Circuit's 1903 opinion in *Huset v. J.I. Case Threshing Machine Co.* generally was cited as stating the prevailing law in products liability cases. *Huset* made a fleeting reference to *Schubert*, dismissing it out of hand as a maverick opinion.

In spite of the limiting opinion in *Huset*, *Schubert* was consistently adhered to by the Minnesota Supreme Court.

Given the breadth of the principles established in *Schubert*, negligence law in the products liability area developed smoothly. These principles have been applied to a variety of goods including household and consumer

23. 13 Minn. 109 (Gil. 99) (1868).
24. 49 Minn. 331, 51 N.W. 1103 (1892).
25. Id. at 336-40, 51 N.W. at 1104-06.
26. Even prior to the decision in *Schubert*, the court had established the basics of the doctrine of negligence per se. In *Osborne v. McMasters*, 40 Minn. 103, 41 N.W. 543 (1889), the defendant's clerk sold unlabeled poison to plaintiff's intestate, in violation of certain Minnesota statutes. Id. at 104, 41 N.W. at 543. In holding that the statute established a fixed standard by which negligence is determined, the court imposed a form of strict liability on the defendant. See id. at 105, 41 N.W. at 543-44.
27. 217 N.Y. 382, 111 N.E. 1050 (1916).
28. 120 F. 865 (8th Cir. 1903) (Sanborn, J.) (case arose in Minnesota). *Schubert* was followed by the Eighth Circuit some 30 years later in an opinion written by a different Judge Sanborn. See *Egan Chevrolet Co. v. Bruner*, 102 F.2d 373, 375 (8th Cir. 1939).
29. See 120 F. at 869-70.
products, farm, construction, and industrial equipment and machinery, and chemicals and drugs. The *Schubert* principles have been applied to cases involving leases of products as well as sales, to the sale of used goods as well as new goods, and to personal injury and property damage claims.

Negligence theory encompasses defects in design as well as defects in manufacture. A finding of negligence may be based on a failure adequately to test and inspect a product, a failure to provide adequate instructions or warnings with the product, or the


33. See, e.g., Hungerholt v. Land O'Lakes Creameries, Inc., 209 F. Supp. 177 (D. Minn. 1962) (fertilizer), aff'd, 319 F.2d 352 (8th Cir. 1963); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929) (cød liver oil); Mochlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N.W. 541 (1918) (ether).


35. See Egan Chevrolet Co. v. Bruner, 102 F.2d 373 (8th Cir. 1939) (applying Minnesota law) (used truck); McLeod v. Holt Motor Co., 208 Minn. 473, 294 N.W. 479 (1940) (used car).

36. See, e.g., Blasing v. P.R.L. Hardenbergh Co., 303 Minn. 41, 226 N.W.2d 110 (1975) (property damage); Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929) (property damage); cases cited note 33 supra (personal injury). In Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N.W. 394 (1910), the court allowed a grocer to recover for economic loss attributed to adulterated cooking oil sold to the grocer by the defendant.


38. See, e.g., Carter Carburetor Corp. v. Riley, 186 F.2d 148 (8th Cir. 1951) (failure to test and inspect airplane fuel pump); Mochlenbrock v. Parke, Davis & Co., 141 Minn. 154, 169 N.W. 541 (1918) (impure ether).

negligent installation of a product. In general, the seller must exercise reasonable care to avoid causing unreasonable risks of injury to persons or property when those risks were or reasonably should have been anticipated. The duty extends to any person who may be in the vicinity of the product’s use.

The seller of a product is ordinarily entitled to expect that the product will be put to a normal use, a use for which the product is intended, and that the product will be used in accordance with proper directions. If there is reason for the manufacturer to believe that the product is being used for other than the intended purpose, however, the manufacturer may be required to guard against that risk.

The Minnesota Supreme Court has taken the position that no duty to warn or advise of danger exists in situations in which the danger is obvious or when the person using the product knows or should know of the danger. The general proposition may be modified, however, depending on the setting of the product’s use.

2. The Development of Strict Liability

In contrast to negligence theory, the development of strict liability was more halting. In 1889, in Osborne v. McMasters, a form of strict liability was imposed on a pharmacist who sold mislabeled

40. See, e.g., Hippe v. Duluth Brewing & Malting Co., 240 Minn. 100, 59 N.W.2d 665 (1953) (transformer for neon sign); Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932) (furnace smoke pipe); Crandall v. Boutell, 95 Minn. 114, 103 N.W. 890 (1905) (clogged stovepipe).


42. See, e.g., Bjorklund v. Hantz, 296 Minn. 298, 301, 208 N.W.2d 722, 724 (1973) (per curiam), overruled in part on other grounds, Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977); McCormack v. HanksCraft Co., 278 Minn. 322, 331-32, 154 N.W.2d 488, 496 (1967).


45. Cf. Westerberg v. School Dist. No. 792, 276 Minn. 1, 8, 148 N.W.2d 312, 316 (1967) (“A manufacturer who has actual or constructive knowledge of dangers to users of his product has the duty to give warning of such dangers.”).

46. Id.


48. 40 Minn. 103, 41 N.W. 543 (1889).
poison in violation of a Minnesota statute. In 1909, in *Meshebesh v. Channellene Oil & Manufacturing Co.*, a manufacturer of sweet oil was held liable when the plaintiff became ill after using the oil for cooking purposes. The sale of the adulterated oil was in violation of the Minnesota pure food statute. Liability was imposed on the defendant in absence of privity and in absence of a showing that defendant knew the oil was impure.

Strict liability on the basis of breach of statute, without the requirement of privity, was established early, but the development of warranty law was less clear. In 1911, in *Bark v. Dixon*, the court recognized the applicability of implied warranty to cases involving the sale of adulterated food. Subsequent decisions recognized that implied warranty is an obligation imposed by law attaching independently of the actions of the parties, and that it is unnecessary to prove that the defendant had knowledge of the defect in the product. There were indications that privity would be unnecessary in warranty actions, but the supreme court did not take a clear position on the privity issue until it decided *Beck v. Spindler* in 1959.

*Beck* involved a mobile home that developed a variety of problems when exposed to northern Minnesota weather. Recovery was granted on the basis of express warranty, although in dictum the court took the position that privity would be unnecessary in implied warranty actions. The court took no position on the applicability of other warranty defenses.

*Schubert* and *Beck* were important for voiding privity limitations and for expanding the legal responsibilities of manufacturers and sellers of goods. The final step to strict liability was taken in 1967

49. *Id.* at 104-05, 41 N.W. at 543.
50. 107 Minn. 104, 119 N.W. 428 (1909).
51. *Id.* at 105-06, 119 N.W. at 428-29.
52. *Id.* at 107-08, 119 N.W. at 429.
53. *Id.* at 108-09, 119 N.W. at 430.
54. 115 Minn. 172, 131 N.W. 1078 (1911).
55. See McPeak v. Boker, 236 Minn. 420, 423-24, 53 N.W.2d 130, 131-32 (1952); Bekkevold v. Potts, 173 Minn. 87, 90, 216 N.W. 790, 791 (1927).
56. See, e.g., Pietrus v. J.R. Watkins Co., 229 Minn. 179, 185, 38 N.W.2d 799, 802 (1949).
59. *Id.* at 561-62, 99 N.W.2d at 682-83.
60. *Id.* at 564, 99 N.W.2d at 684.
in *McCormack v. Hanksraft Co.* 61

*McCormack* arose out of serious, permanent, and disabling injuries sustained by three-year-old Andrea McCormack when an electric steam vaporizer manufactured by the Hanksraft Company was tipped over, covering her with scalding water. The case was submitted to the jury on the basis of negligence and express warranty. The negligence theories included failure to warn and negligent design. Following entry of judgment for the plaintiff, the defendant appealed, arguing the insufficiency of the evidence to sustain the verdict under either theory. 62

The supreme court concluded that the evidence was sufficient. 63 In answer to the defendant’s argument that the plaintiff was barred from recovery in express warranty for failure to give notice of the breach of warranty within a reasonable period of time and defendant’s suggestion that lack of privity should bar the plaintiff’s recovery, the court held that neither notice nor privity limitations would bar the plaintiff’s recovery. 64

In rejecting the application of the usual warranty limitations and the necessity of proving negligence, the *McCormack* court made clear its intention to adopt strict liability in tort, relying on sweeping policy considerations in reaching its decision.

[E]nlarging a manufacturer’s liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences. 65

Concepts of deterrence, superior manufacturer loss spreading ability, and a recognition of the consumer’s relative position in the marketplace provided the principal justifications for the adoption of strict tort in Minnesota. The breadth of the policies provide the

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61. 278 Minn. 322, 154 N.W.2d 488 (1967).
62. See id. at 335-37, 154 N.W.2d at 496-97.
63. Id. at 333-36, 154 N.W.2d at 496-98.
64. Id. at 337-40, 154 N.W.2d at 499-501.
65. Id. at 338, 154 N.W.2d at 500.
basis for a variety of strict tort formulations. Although in subsequent decisions the court has made clear its intention to apply section 402A of the *Restatement (Second) of Torts*⁶⁶ (Restatement) as the basic strict liability formulation in Minnesota,⁶⁷ the substance of strict tort remains to be fleshed out.

II. THE ELEMENTS AND STANDARDS FOR STRICT TORT: THE RELATIONSHIP OF STRICT TORT TO NEGLIGENCE AND WARRANTY THEORIES

In order to understand the anatomy of strict tort in Minnesota, both the elements of strict tort and the standards used to define its boundaries must be understood. To place strict tort in proper context, these elements and standards must be considered in light of negligence and warranty theories.

A. The Elements of Strict Liability—The Overlap with Negligence and Warranty

Following *McCormack* the court on several occasions has delineated the elements of strict liability. Although the formulations differ slightly, it seems to be well settled that in order to establish a prima facie case of strict liability the plaintiff must establish that the product is in a defective condition unreasonably dangerous when it left the control of the seller and that the defect was a cause of the plaintiff’s injury.⁶⁸

There are two deviations from these elements that merit discus-

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⁶⁸. In *Kerr v. Corning Glass Works*, 284 Minn. 115, 169 N.W.2d 587 (1969), the court broke strict liability into four elements:

(1) Plaintiff was injured.
(2) The injury was caused by defendant's product.
(3) The injury occurred because the defendant's product was defective.
(4) The defect was present in the product when it was sold by defendant.

*Id.* at 117, 169 N.W.2d at 588.

Justice Rogosheske in his concurring opinion in *Magnuson v. Rupp Mfg. Inc.*, 285 Minn. 32, 171 N.W.2d 201 (1969), summarized the elements as follows:

In order to establish a prima facie case of strict liability against a manufacturer, a plaintiff merely need introduce evidence showing (1) that the product he purchased was in a defective condition unreasonably dangerous for its use, (2) that such defective condition existed when the product left the hands of the man-
sion. The first is the tendency to split the elements to a greater degree than necessary; the second is the addition of an extra element in the Minnesota court’s opinion in *Magnuson v. Rupp Manufacturing, Inc.*

As to the first problem, section 402A of the *Restatement* requires a showing of a “defective condition unreasonably dangerous to the user or consumer or to his property.” Although this is a unitary standard, there seems to be some tendency to split it into two distinct elements: a “defect” and an “unreasonable danger.” Isolation of the term “defect” from its context distorts the *Restatement* standard, in which the key inquiry is whether the product is “unreasonably dangerous.” A product is defective only if it is in a condition unreasonably dangerous to the user, consumer, or his property. Utilization of separate standards to define each term can only lead to unnecessary repetition of similar but potentially confusing standards which, in addition, may tend to overload the burden of proof a plaintiff is required to meet. To avoid the

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ufacturer, and (3) that the defect was the proximate cause of the injury he suffered.

*Id.* at 46-47, 171 N.W.2d at 210 (footnotes omitted).

In *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 188 N.W.2d 426 (1971), written by Justice Rogosheske, the elements were substantially the same as in *Magnuson*:

To recover under the rule, the injured party must present evidence, direct or circumstantial, from which the jury can justifiably find that (1) the product was in fact in a defective condition, unreasonably dangerous for its intended use; (2) such defect existed when the product left defendant’s control; and (3) the defect was proximate cause of the injury sustained.

*Id.* at 329, 188 N.W.2d at 432. The term “direct cause” should be substituted for “proximate cause” to avoid confusion and to bring the treatment of causation questions into line with the treatment of causation questions in negligence cases. See *Gardner v. Germain*, 264 Minn. 61, 65, 117 N.W.2d 759, 762 (1962); *Strobel v. Chicago, R.I. & Pac. R.R.*, 255 Minn. 201, 204-05, 96 N.W.2d 195, 198-201 (1959). The pattern jury instruction can be used to define direct cause. See *Bradford v. Bendix-Westinghouse Automotive Airbrake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1974); 4 *MINNESOTA PRACTICE JIG II*, 140 G-5 (2d ed. 1974).


72. See *Green, supra* note 14, at 1207. A substantial question exists whether the “unreasonable danger” requirement is necessary at all to the strict tort formulation. See notes 176-98 infra and accompanying text.

73. See notes 176-98 infra and accompanying text.
problem, the standard should not be severed but should be embodied in a single definition covering the entire term.

The second, and most significant, deviation is in the court's opinion in Magnuson, a case involving injuries to the plaintiff arising out of a snowmobile accident. Relying on comments g, h, and i of the Restatement and on cases from two other jurisdictions, Greenman v. Yuba Power Products, Inc.,\textsuperscript{74} and People ex rel. General Motors Corp. v. Bu,	extsuperscript{75} the court manufactured an additional element for strict liability cases. The element requires a plaintiff to prove that the injury was not caused by any voluntary, unusual, or abnormal handling.\textsuperscript{76} Although the exact meaning of this additional element is not clear, it appears that the court is referring to conduct constituting assumption of risk and mishandling or misuse of a product.

The voluntary handling portion of the new element is apparently based on Greenman and comment i to section 402A of the Restatement. The portion of the Greenman opinion relied on by the Magnuson court was a summary of the showing made by Greenman in that case:

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith 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 Shopsmith unsafe for its intended use.\textsuperscript{77}

Although this portion of the Greenman court's opinion has been referred to as stating the holding of the case,\textsuperscript{78} the California Supreme Court subsequently clarified its position, holding that it is unnecessary for a plaintiff to prove lack of awareness in order to recover.\textsuperscript{79} The California court held, rather, that assumption of risk is an affirmative defense to be pleaded and proved by the de-

\textsuperscript{74} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
\textsuperscript{75} 37 Ill. 2d 180, 226 N.E.2d 6 (1967).
\textsuperscript{76} 285 Minn. at 40, 171 N.W.2d at 206.
\textsuperscript{77} Id. at 41, 171 N.W.2d at 207 (emphasis in original) (quoting Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963)).
\textsuperscript{79} Id. at 145-47, 501 P.2d at 1169-70, 104 Cal. Rptr. at 449-50. See also Brewster, Comparative Negligence in Strict Liability Cases, 42 J. AIR L. & COM. 107, 109-17 (1976); Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d, 42 INS. COUNSEL. J. 39 (1975); Fisher, Products Liability—Applicability of Comparative Negligence, 43 MO. L. REV. 431 (1978); Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 SAN DIEGO L. REV. 337, 346 (1977); Twerski, The Use and Abuse of Comparative Negligence in
fendant. In his concurring opinion in *Magnuson*, Justice Rogosheske also took the position that assumption of risk is an affirmative defense. The element requiring a plaintiff to negate assumption of risk is grossly inconsistent with the position Minnesota has taken in other personal injury settings.

The unusual or abnormal handling portions of the additional element in *Magnuson* seem to be drawn primarily from comments g and h of the *Restatement*, covering mishandling and abnormal handling. The elements of strict liability set out in the *Restatement* require the plaintiff to prove that he was injured by a defective product unreasonably dangerous to the user or consumer and that the defective condition existed in the product at the time it left the control of the defendant. Proof of those elements may necessitate a showing that the injury was not caused by plaintiff's mishandling or misuse of the product. Formulation of that requirement

80. See 8 Cal. 3d at 145-47, 501 P.2d at 1169-70, 104 Cal. Rptr. at 449-50.
81. See 285 Minn. at 46-50, 171 N.W.2d at 211-12.
82. See, e.g., Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971). In light of Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977), and the amendments to the comparative negligence statute making it a comparative fault statute, see Act of Apr. 5, 1978, ch. 738, §§ 6-8, 1978 Minn. Laws 839-40 (amending MINN. STAT. § 604.01 (1976)), the position in the majority opinion in *Magnuson* is no longer sustainable.
83. See *Restatement (Second) of Torts* § 402A, Comment g (1965):

The rule stated in this section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.
84. See Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969). In *Kerr* the plaintiff was injured when a baking dish manufactured by defendant exploded, cutting her. The dish had been out of the defendant's control for at least seven months and possibly as long as 47 months before the accident occurred. The fracture in the dish could not be traced to the defendant because of the possibility that mishandling by intermediate parties could have caused the fracture. The same principles apply in cases of negligence, see Cerepak v. Revlon, Inc., 294 Minn. 268, 270, 200 N.W.2d 33, 35 (1972), and breach of warranty. See Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 510-11, 127 N.W.2d 557, 561-62 (1964).
in the additional element is simply a repetition of elements that are already established in the basic strict liability formulation.

The Magnuson court seems to have relied on People ex rel. General Motors Corp. v. Bua\(^{85}\) to reinforce its conclusion that the plaintiff has the burden of proving that the injury was not caused by unusual or abnormal handling of the product.\(^{86}\) The Illinois Supreme Court in Bua, in a three-line discussion in the context of a civil contempt proceeding against General Motors, took the position that a plaintiff in Illinois has the burden of pleading and proving his freedom from contributory negligence in a strict liability action, a position consistent with Illinois negligence law.\(^{87}\) Bua, however, was in effect overruled shortly after Magnuson was decided.\(^{88}\) The Illinois position with respect to defenses in a negligence context was not extended to strict liability cases because of the inconsistency with strict liability theory that would have resulted.\(^{89}\)

The position taken by the court in Magnuson is also inconsistent with the position previously taken in the Minnesota cases that discuss the defense of misuse.\(^{90}\) Although misuse may be important in determining whether the product is defective and whether the defect existed at the time it left the control of the seller, Minnesota, at least in the negligence context, has taken the position that misuse, if it constitutes contributory negligence, must be established by the defendant.\(^{91}\)

Placing the burden of proof on the plaintiff to establish that he is unaware of the defect in the product or that he exercised due care when using the product is thus inconsistent with settled law in Minnesota, with Illinois and California law, and with the policy of a strict tort theory of defenses as adopted in the Restatement\(^{92}\) and

\(^{85}\) 37 Ill. 2d 180, 196-97, 226 N.E.2d 6, 15-16 (1967).

\(^{86}\) See Magnuson v. Rupp Mfg., Inc., 285 Minn. at 43, 171 N.W.2d at 208.

\(^{87}\) See 37 Ill. 2d at 196-97, 226 N.E.2d at 15-16.


\(^{89}\) Id. at 430-31, 261 N.E.2d at 312.


\(^{91}\) See cases cited in note 90 supra.

\(^{92}\) See Restatement (SECOND) OF TORTS § 402A, Comment n (1965), stating that:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand
modified by the Minnesota Supreme Court in *Busch v. Busch Construction, Inc.* 93 For purposes of clarity, there should be a forthright rejection of the extra element in *Magnuson.*

Rejection of the *Magnuson* element would bring the elements of strict tort into line with the elements of negligence and warranty theories, and is consistent with the court's opinion in *Worden v. Gangelhoff* 94 in which the court analyzed the similarities among those theories. The case was based upon the sale of contaminated lutefisk trimmings by Gangelhoff to the plaintiff for mink food. The trimmings had been given to Gangelhoff by codefendants Lyons Food Products and Olsen Fish Company in return for Gangelhoff's services in hauling the trimmings away.

The trial court refused to instruct the jury on theories of strict liability, breach of implied warranty, and negligence per se based upon a violation of the Minnesota Commercial Feed Law. 95 The only theory submitted to the jury was simple negligence. The jury found all defendants to be negligent, but found that there was no direct cause between the negligence and the damage to the plaintiff's mink. 96

On appeal the plaintiff argued that the jury might have reached a different conclusion on the causation question had the alternative theories of recovery been submitted to the jury. Relying on

the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

The *Restatement* takes the position that contributory negligence in the sense of failure to discover the product defect or an unreasonable failure to guard against its existence is not a defense, whereas primary assumption of the risk is a complete defense if the plaintiff is aware of the defect, the danger created by the defect, and voluntarily and unreasonably proceeds to encounter the defect. *Id.* The range of defenses available to the defendant is thus restricted to a single defense, assumption of the risk, with the defendant clearly bearing the burden of establishing the defense.

In *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977), the Minnesota Supreme Court took the position that the comparative negligence statute applied to claims based on strict liability and that the defenses available to a strict liability claim would consist of contributory negligence, other than negligence in failing to discover a defect, assumption of the risk, and misuse. *Id.* at 393-94. It is clear from *Busch* that the defendant bears the burden of establishing those defenses. Any continuation of the *Magnuson* extra element must, in addition, be evaluated in light of *Busch.*

93. 262 N.W.2d 377, 394 (Minn. 1977).
94. 308 Minn. 252, 241 N.W.2d 650 (1976).
95. *Id.* at 254, 241 N.W.2d at 651.
96. *Id.*
Prosser,97 the *Worden* court held that negligence, warranty, and strict liability rest upon certain common elements, and that the failure to establish causation precluded recovery on any of those theories.98 First, a plaintiff must prove injury by the product.99 Second, he must prove that the injury occurred because the product was unreasonably unsafe.100 Third, he must prove that the defect existed when the product left the control of the defendant.101

Only after plaintiff has proved these three elements would jury instructions on alternative theories of products liability be significant. Under simple negligence, it would be necessary to prove that the defect in the product was caused by defendant's lack of due care. Negligence per se based on violations of the Commercial Feed Law would make it easier to prove lack of due care. Strict liability or breach of implied warranty would ease plaintiff's burden still further by dispensing altogether with the need to prove lack of due care.102

The common elements of strict tort, negligence, and warranty provide a starting point for consideration of standards for strict liability.

### B. Adopting an Appropriate Strict Tort Standard

Courts have adopted a variety of standards for purposes of determining when responsibility for injuries due to defective products should be placed on the sellers of those products absent any negligence. There are three primary standards, with several variations: the *Restatement* standard;103 the risk-utility standard;104 and the warranty standard.105 All three standards have been sanctioned by the Minnesota Supreme Court.106 At times multiple standards have been used in the same case.107 Coupled with the

98. See 308 Minn. at 254, 241 N.W.2d at 651.
99. Id.
100. Id.
101. Id. at 254-55, 241 N.W.2d at 651.
102. Id. at 255, 241 N.W.2d at 651.
103. See notes 136-48 infra and accompanying text.
104. See notes 149-51 infra and accompanying text.
105. See notes 152-58 infra and accompanying text.
107. The jury instructions in *Halvorson* provide the best example. See 307 Minn. at 53-54, 240 N.W.2d at 306. For a text of these instructions, see notes 185-86 infra and accompanying text.
apparent availability of negligence and warranty as alternative theories of recovery, the standards question becomes important in


An additional theory of recovery is based on the failure to give adequate warnings. As in the design defect context, a question arises whether cases based upon failure to warn are to be treated as negligence or strict liability cases.

In negligence, the duty to warn consists of the duty to give adequate instructions for safe use and the duty to warn of dangers inherent in improper usage. Directions for use that do not warn of dangers from misuse of the product will not necessarily be a sufficient warning. See Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977). A manufacturer may be held liable if he knows or should know that the product is likely to cause harm if it is not used in a specific manner and if no warning is given concerning dangers inherent in the use of the product. If the manufacturer undertakes by printed instructions to advise of the proper use to be made of the product, he assumes the responsibility of giving accurate and adequate instructions with respect to the dangers inherent in its use in some other manner.

In Westerberg v. School Dist. No. 792, 276 Minn. 1, 148 N.W.2d 312 (1967), the court took the following position on warnings:

The duty to warn rests on foreseeability. If a chattel is sold that is free from defects in manufacture and design and is not dangerous if used as intended, the manufacturer is not liable for results caused by improper use of the chattel or changes made in its construction without the manufacturer's knowledge which makes it dangerous. Nor is there any duty to warn of nonexisting dangers, or dangers that are obvious to anyone. If the chattel is safe when sold, a manufacturer is not required to anticipate or foresee that a user will alter its condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alteration in safety devices intended to protect the user from harm.

Id. at 9-10, 148 N.W.2d at 317 (1967) (footnote omitted).


In Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) (applying Minnesota law), the plaintiff claimed that he had contracted asbestosis while working with Johns-Manville asbestos products. The sole theory of recovery was failure to warn of the dangers inherent in working with asbestos. The plaintiff's claim was initially based on negligence, breach of warranty, and strict liability. Only the strict liability claim was submitted to the jury. Even though the claim was based upon strict liability, the controlling principles were clearly negligence principles. The court stated, citing the previous case of O'Hare v. Merck & Co., 381 F.2d 286, 291 (8th Cir. 1967), that a manufacturer will be held to the skill of an expert in its field, but will be held accountable only for those dangers of which it knows or in the exercise of reasonable care could have discovered. 523 F.2d at 159.

A few courts have held that injection of a warning issue into a case does not alter the applicable strict liability principles. See Anderson v. Heron Eng'r Co., 2 PROD. LIAB. REP. (CCH) ¶ 8542 (Colo. 1979); Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976); Phillips
developing the appropriate place of strict tort in the products lia-


Focusing on the condition of the product rather than the seller's conduct, the question becomes whether the warning was adequate, irrespective of what the seller knew about the dangers inherent in the use of the product. Under the Oregon risk-utility standard, pursuant to which knowledge of the defect is imputed to the seller, the question becomes what a reasonable seller, with knowledge of the danger created by the product, would do. Whether the manufacturer knew or should have known of the danger is irrelevant. See Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974). Applying the consumer expectation standard, as did the Colorado Court of Appeals in Hamilton, the question is whether the product was dangerous to an extent beyond that which would be anticipated by the ordinary user or consumer. Focusing on consumer expectations, it arguably becomes irrelevant whether the manufacturer should have anticipated the product dangers.

If liability is imposed on the basis of failure to warn of dangers that were not discoverable, liability in effect becomes absolute. However, even in cases such as Hamilton, which purportedly stand for that proposition, it is not likely that anything approaching absolute liability is anticipated. In Hamilton the court said that:

While plaintiff must prove causation, i.e., [sic] the cause and effect relationship between the dangerous propensity of the drug and her injury, as part of her case under either theory, the adequacy of the warning, which the parties agreed was to be measured by what was known or should have been known at the time of the warning, does not depend on knowledge of a definitive cause and effect relationship.

549 P.2d at 1109.

To the extent that strict liability dilutes the negligence principles ordinarily applicable to warning cases, it seems to do so only to the extent that an obligation is imposed on the drug manufacturer to warn of suspected dangers, absent a clear cause and effect relationship. Cf. Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979) (physician had duty to inform patient of facts necessary to make informed decision regarding future medical care). In addition, the focus would shift from the reasonableness of the manufacturer's warning to the consumer's expectations as to the product. Rather than reasonableness, the question would be whether the warning is adequate in light of consumer expectations. As in other strict liability cases, the focus is on the product rather than the manufacturer's conduct in making and selling the product. To the extent that warning theory conforms to strict liability theory it should not be understood as imposing absolute liability. See Smith v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 94-104, 273 N.W.2d 476, 481-86 (1979) (Levin, J., dissenting).

The Minnesota Supreme Court has not yet taken a clear position on the standards applicable to strict liability cases when the issue is the adequacy of the warning, although there are indications from the court's opinion in Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978), that failure to warn will be predicated on negligence rather than on strict liability principles. In Bigham the court, in deciding whether a jury verdict finding J.C. Penney Co. negligent but not strictly liable was perverse and irreconcilable, considered the relationship between strict liability and negligence. In its analysis of the question, the court stated that in jurisdictions that sharply distinguish strict products liability from negligence, strict liability may provide a broader theory of recovery. The court cited Hamilton, a case that distinguishes sharply between strict tort and negligence in the failure to warn context, as an illustration of that differentiation. One potential implication of the court's reference to Hamilton is that in Minnesota distinctions are not made between strict liability and negligence. This would be consistent with the position the court took in Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 240 N.W.2d 303 (1976), in
bility scheme. Consideration of standards requires both a sorting out of the issues involved in developing strict liability standards and a consideration of how strict tort liability relates to the available alternative theories of recovery.

A variety of issues arise in considering the question of standards in strict tort cases. The difference in standards is a function of several variables, including the type of case, manufacturing flaw or design defect, the proof necessary to establish a defect, the rigidity of the standard, and the degree of guidance a court perceives a jury should be given in deciding the defect question.

1. The Design Defect Problem

Much of the controversy over standards takes place in the context of design defect cases. There is little controversy over standards in the manufacturing flaw cases because of the ready conclusion that the flaw constitutes a defect. A product that is flawed because of a defect in the manufacturing process or a failure to properly test and inspect the product, is defective by comparison to the rest of the products in the line. Such a product does not function the way the manufacturer intends; it presents risks that would not be anticipated by an ordinary consumer. A reasonable manufacturer with knowledge of the defect would be negligent in placing the product on the market. Imposing liability on the manufacturer or seller for non-negligent conduct creates no problem for the courts. Strict liability is readily applied even though the technology available at the time of manufacture would not have allowed the manufacturer of the product to discover the defect in the product.\textsuperscript{109} Liability will be imposed even though the seller has exercised all possible care in the preparation and sale of the product.

In design defect cases, however, the product is made the way the manufacturer intends and functions as intended. Aside from lack of a ready standard of comparison, as found in manufacturing flaw cases, the consequences of liability are more far reaching. Because of these differences, design defect cases have been subject to close scrutiny. One of the principal questions in design defect cases is whether such cases should be decided on the basis of negligence or

strict tort principles.\textsuperscript{110} and what, if any, separation there should be between those theories. Some courts have taken the position, in certain contexts, that strict tort liability does not apply to design cases.\textsuperscript{111} Other courts considering the standards question have adopted formulations that at least facially do not rely on negligence principles.\textsuperscript{112}

The variance in standards adopted by the courts belies what seems to be a rough consistency in the approach of the courts to design defect cases. Focusing on the courts' approaches to the proof required in such cases illustrates a rough uniformity in judicial views. Irrespective of the standard ultimately utilized to make the defect determination, most courts will require the plaintiff to establish some factual basis to support a claim of product defectiveness beyond the fact of the accident alone. In general, the proof required will be a function of the plaintiff's theory of the case,\textsuperscript{113} although the discussion will usually focus on the requirement of a feasible alternative.\textsuperscript{114} In some cases, the danger created by the product may be so clear and substantial, and the corresponding utility of the product so limited, that the conclusion that the product is defective can be readily drawn without the need for establishing a feasible, alternative design.\textsuperscript{115} In other cases the feasible alternative may be readily established without implicating the overall performance and design of the product. Once the alternative design is established, a sufficient foundation will have been established to allow the jury to draw the inference of defectiveness.\textsuperscript{116} In yet other cases, however, the plaintiff's theory may be such that the suggested alternative design will have implications for the performance, design, cost, and safety of the product. In such cases, a plaintiff will be required to establish that the suggested alternative design is feasible and cost efficient, that it will provide better safety than the existing design, and that it will cre-

\begin{itemize}
  \item \textsuperscript{110} See Final Report, supra note 1, at II-23 to -30.
  \item \textsuperscript{111} See, e.g., Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) (liability imposed only when an unreasonable danger in event of collision is created by the vehicle design); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974) (same).
  \item \textsuperscript{114} See Wilson v. Piper Aircraft Corp., — Or. —, 577 P.2d at 1326-27.
  \item \textsuperscript{115} See, e.g., id. at —, 577 P.2d at 1326-27.
  \item \textsuperscript{116} See, e.g., id. at —, 577 P.2d at 1327.
\end{itemize}
ate no new safety hazards.\footnote{In Wilson v. Piper Aircraft Corp., — Or. —, 577 P.2d 1322 (1978), the plaintiff’s decedents were killed in an airplane crash. The plaintiffs based their case on two theories, a defective seat belt and shoulder harness system, and a defective engine design. Specifically, the plaintiffs alleged that the carbureted engine on the aircraft should have been replaced by a fuel-injected engine that would be less susceptible to icing. The plaintiffs’ evidence established that fuel-injected engines are not as subject to icing as carbureted engines, that at the time the airplane was manufactured fuel-injected engines of appropriate horsepower were available, and that FAA approval could probably have been obtained for a fuel-injected engine. See id. at —, 577 P.2d at 1327. No evidence was offered on the impact the fuel-injected engine would have had on the airplane’s “cost, economy of operation, maintenance requirements, over-all performance, or safety in respects other than susceptibility to icing.” Id. The court concluded that the evidence was insufficient: Plaintiffs’ allegations amount to a contention that an airplane furnished with a standard aircraft engine is defective because an engine of a different type, or with a different carburetor system, would be safer in one particular. It is not proper to submit such allegations to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product. Id. at —, 577 P.2d at 1327.}

In order to prove a design defect, the plaintiff must establish some factual standard against which to compare the allegedly defective product. Whether it is done with the use of safety codes,\footnote{See, e.g., Lamberton v. Cincinnati Corp., 312 Minn. 114, 118, 257 N.W.2d 679, 683 (1977); Heise v. J.R. Clark Co., 245 Minn. 179, 184, 71 N.W.2d 818, 822 (1955).} other designs in the industry,\footnote{See, e.g., Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 737, 218 N.W.2d 279, 284 (1974) (location of clutch lever on crop blower contradicted custom and practice of other manufacturers of similar machines).} or subsequent remedial measures,\footnote{See, e.g., Farner v. Paccar, Inc., 562 F.2d 518, 527 (8th Cir. 1977) (evidence of subsequent remedial measures admissible); Robbins v. Farmers Union Grain Terminal Ass’n, 552 F.2d 788 (8th Cir. 1977) (same); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (evidence of subsequent remedial measures and prior and subsequent accidents involving similar vehicles admissible); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972) (expert testimony regarding dangerous conditions, alternatives and post-occurrence changes admissible).} some proof will have to be supplied to establish the standard for comparison.

Whatever distinctive aspects strict liability has in the context of a design defect case may well depend more on the admissibility of certain evidence to prove the defect and on the court’s view concerning the type of evidence necessary to take a case to the jury, than on the standard ultimately utilized by a jury to evaluate an allegedly defective product. One of the principle issues concerns the so-called state of the art defense.\footnote{See Wilson v. Piper Aircraft Corp., — Or. —, 577 P.2d 1322 (1978). Labeling “state of the art” as a defense may be incorrect. The plaintiff bears the burden of establishing a product defect. This requires proof that the design of the product is defective in
plaintiff will be able to introduce evidence of an alternative design only if that alternative was feasible at the time of the manufacture in light of other feasible alternatives. It has been suggested that "state of the art" has at least three possible meanings:

1. What some designers of like products were doing at the time that a product was designed.
2. What some designers of like products were theoretically capable of doing at the time that the product was designed.
3. What designers of like products were doing generally in the exercise of "practical skill in performance" at the time that a product was designed.


While custom will be admissible on the defect issue, it will not be controlling. Conversely, demonstration of theoretical capability will be insufficient to establish a defect. See FINAL REPORT, supra note 1, at II-34 to -39. The need to establish a feasible alternative to the impugned design involves more. See note 112 supra. In Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059 (Alaska 1979), the court took the following position on "state of the art:"

A determination of the "scientific knowability" of the unsafe character of the product is relevant to the above [design defect] inquiry in that it underlies evaluation of the manufacturer's ability to eliminate the harmful aspects of the product. This is because where no techniques for obtaining such information are available, a manufacturer has no basis for concluding that the product should not be marketed. Thus, we think that "scientific knowability" of the injurious nature of the product should be considered because, otherwise, imposition of liability for a design defect would effectively mean absolute liability even though there is no alternative way for the manufacturer to disclose the risk and remedy it. Such a situation would be incompatible with our previous decisions holding that manufacturers are not absolute insurers of their products.

Further, we are not persuaded that consideration of "scientific knowability" would reintroduce elements of negligence concepts into the determination of defectiveness, as the appellants in this case suggest. The balancing should focus on the general state of scientific knowledge about the product and does not turn on the particular manufacturer's level of expertise.

604 P.2d at 1063-64 (footnotes omitted).

The Model Uniform Product Liability Act, in an attempt to avoid the definitional problem associated with "state of the art," has taken the following position:

(A) Evidence of changes in (1) a product's design, (2) warnings or instructions concerning the product, (3) technological feasibility, (4) "state of the art," or (5) the custom of the product seller's industry or business, occurring after the product was manufactured, is not admissible for the purpose of proving that the product was defective in design under Subsection 104(B) or that a warning or instruction should have accompanied the product at the time of manufacture under Subsection 104(C).

If the court finds that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available, this evidence may be admitted for other relevant purposes if confined to those purposes in a specific court instruction. Examples of "other relevant purposes" include proving ownership or control, or impeachment.

(B) For the purposes of Section 107 "custom" refers to the practices followed by an ordinary product seller in the product seller's industry or business.

(C) Evidence of custom in the product seller's industry or business or of the product seller's compliance or noncompliance with a non-governmental safety or performance standard, existing at the time of manufacture, may be considered by the trier of fact in determining whether a product was defective in design under Subsection 104(B), or whether there was a failure to warn or in-
of the product.\textsuperscript{122} There seems to be near unanimity in the conclusion that a manufacturer will not be held to a state of the art that was not in existence at the time the product was made.\textsuperscript{123}

In the context of a strict tort case, unlike in negligence cases, it may not be necessary to establish that the alternative design was either known or should have been known to a manufacturer, although it must be shown that the alternative was technologically feasible. As Professor Phillips has put it, it is the possibility of discovery that is the key issue in considering the feasibility of an alternative design.\textsuperscript{124} This establishes one distinction of significance between negligence and strict tort in design defect cases.

The proof requirements in a strict tort context, however labeled, are in application similar to the requirements in negligence cases. In fact, it has been acknowledged that the proof necessary to establish a strict tort case will rarely, if ever, yield a result different from application of negligence principles in design defect cases.\textsuperscript{125} However, the fact that the results will almost always be the same does not mean that in all cases the results will be the same. Dis-

\begin{footnotesize}
\begin{enumerate}
\item For the purposes of Section 107, "practical technological feasibility" means the technological, mechanical, and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture.
\item If the product seller proves, by a preponderance of the evidence, that it was not within practical technological feasibility for it to make the product safer with respect to design and warnings or instructions at the time of manufacture so as to have prevented claimant's harm, the product seller shall not be subject to liability for harm caused by the product unless the trier of fact determines that:
\begin{enumerate}
\item The product seller knew or had reason to know of the danger and, with that knowledge, acted unreasonably in selling the product at all;
\item The product was defective in construction under Subsection 104(A);
\item The product seller failed to meet the post-manufacture duty to warn or instruct under Subsection 104(C)(6); or
\item The product seller was subject to liability for express warranty under Subsection 104(D) or 105(B).
\end{enumerate}
\item See FINAL REPORT, supra note 1, at II-34 to -39.
\item See id.
\item See Wade, supra note 14, at 836-37.
\end{enumerate}
\end{footnotesize}
tinctions concerning the state of the art defense and distinctions in the standards of jury evaluation can preserve a separate strict tort identity, even though its boundaries may be blurred and the proof overlaps with proof of negligence. In particular, strict tort may provide recovery in situations in which a jury is persuaded that a manufacturer has exercised reasonable care in the design of the product, but measured against the feasible alternative established by the plaintiff, the product is nonetheless defective.\textsuperscript{126} In such cases, liability should be imposed on the manufacturer.

Minnesota has not yet taken a clear position on the question of standards in design cases. In \textit{Halvorson v. American Hoist \\& Derrick Co.},\textsuperscript{127} a design defect case, the court sanctioned jury instructions which stated that strict tort liability could be imposed on the manufacturer even though he exercised all possible care in the preparation and sale of the product.\textsuperscript{128} The court also stated that at the root of both strict tort and negligence is a risk-utility balancing approach.\textsuperscript{129}

The approach the court took in \textit{Halvorson} is consistent with most of the recent state supreme court decisions considering the question of standards in design defect cases.\textsuperscript{130} \textit{Halvorson} rests upon a recognition of the separation of the judge's role in making necessary policy decisions when deciding if a prima facie case has been established from the jury's role in deciding the ultimate question of product definitiveness.\textsuperscript{131} The \textit{Halvorson} court's approach estab-

\textsuperscript{126} See Phillips, supra note 124, at 116.
\textsuperscript{128} 307 Minn. at 53, 240 N.W.2d at 306.
\textsuperscript{129} Id. at 55-56, 240 N.W.2d at 307.
\textsuperscript{131} Recognition of the necessity of balancing does not mean that a jury will perform that function with the same standards used by the courts. Professor Wade has suggested that the following factors are relevant to a court in deciding whether a prima facie case has been established:

\begin{enumerate}
\item The usefulness and desirability of the product—its utility to the user and to the public as a whole.
\item The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
\item The availability of a substitute product which would meet the same need and not be as unsafe.
\item The manufacturer's ability to eliminate the unsafe character of the product.
\end{enumerate}
lishes a proper place for strict tort liability in design defect cases.

2. Formulating a Strict Tort Standard

In articulating distinctions between strict tort liability and negligence, the apparent acceptance of a risk-utility approach as the common denominator of both theories establishes at least a rough consistency in judicial approaches in the formulation of strict tort standards. The fact remains, however, that there is still a variance in the way strict tort standards for the trier of fact are formulated.132 The variance in standards is a function of several factors. One concern is how rigid the standard will be.133 Beyond this

without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, supra note 14, at 837-38.


Although when specific factors assume importance a specific jury instruction may be used instead of a more general instruction, Professor Wade has taken the position that the seven factors that focus the determination of whether there is a product defect should not usually be set forth for the jury. Instead, the jury should be instructed that:

negligence depends upon what a reasonable prudent man would do under the same or similar circumstances. Occasionally, when one of the factors has especial significance, it may be appropriate for the judge to make reference to it in suitable language. For example, . . . if the dangerous condition of the product is perfectly apparent, the judge might refer to this in telling the jury that they are to decide whether a reasonable prudent man would put the product on the market, or whether its danger was so great that it ought not to be marketed at all, despite the obviousness of the danger.

Wade, supra at 840-41.


there is a concern over the clarity of the strict tort standard and a jury's ability to understand the standard.\textsuperscript{134} This second concern gives rise to varying views on the degree of guidance a jury should be given in deciding whether a product is defective.\textsuperscript{135}

\textit{a. The Restatement Standard}

The \textit{Restatement} standard requires a finding that the product in question is in a "defective condition . . . unreasonably dangerous to the user or consumer [or to his property]."\textsuperscript{136} That determination is made according to a consumer expectation standard which asks if the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer [or user] who purchases it, with the ordinary knowledge common to the community as to [the product's] characteristics."\textsuperscript{137}

Much of the discussion of standards revolves around the acceptability of section 402A of the \textit{Restatement} with its unreasonable danger requirement as measured by the consumer expectation standard.\textsuperscript{138} The unreasonable danger requirement has generated substantial controversy. Although there has been widespread acceptance of the \textit{Restatement} formulation, including its unreasonable danger requirement, the requirement was rejected early by the California Supreme Court.\textsuperscript{139} Other courts have preferred substi-


\textsuperscript{135} See cases cited in notes 159-63 infra.

\textsuperscript{136} Restatement (Second) of Torts § 402A, Comment i (1965).

\textsuperscript{137} Id.

\textsuperscript{138} See id., Comments g, i.

\textsuperscript{139} Strict tort theory as initially formulated in California did not require a showing of unreasonable danger. The California Supreme Court stated 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." Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). The decision in \textit{Greenman} was subsequently misinterpreted, some courts injecting the "unreasonable danger" requirement into the California formulation. The California Supreme Court eventually clarified its position, emphasizing that it is not necessary to prove an "unreasonable danger" to establish a strict liability case. See Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 127-35, 501 P.2d 1153, 1158-63, 104 Cal. Rptr. 433, 438-43 (1972).
stitute language, such as "not reasonably safe" or "dangerously defective." Objections to the unreasonable danger requirement have recently been renewed with the California Supreme Court’s reaffirmance of its earlier rejection of the requirement. Decisions of the Pennsylvania and New Jersey Supreme Courts followed. The reasons for the rejections are varied.

In *Barker v. Lull Engineering Co.*, the California Supreme Court expressed a twofold concern over the use of the unreasonable danger requirement. Because strict tort requires a showing of a defect, requiring a showing of unreasonable danger adds an additional element to strict tort, unduly burdening the plaintiff's case with an element that hints of negligence.

In *Azzarello v. Black Bros.*, the Pennsylvania Supreme Court also rejected the requirement, adding an additional reason. The court placed the requirement in context, noting that it was formulated by the drafters of the *Restatement* to be used in making judicial policy judgments concerning imposition of strict liability, and not to provide guidance for juries required to determine if a product is defective. The court was of the opinion that the term had no independent significance apart from the standard used to define that term.

Finally, in *Suter v. San Angelo Foundry & Machinery Co.*, the New Jersey Supreme Court rejected the unreasonably dangerous terminology. The court based elimination of the term on its conclusion that definition of the strict liability concept in terms of a defect and an unreasonably dangerous condition neither advances understanding of the strict liability principle nor assists a jury’s comprehension of the issues to be resolved in a strict liability

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141. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). West Virginia recently followed the *Barker* approach of eliminating the "unreasonable danger" requirement. *See* *Morningstar v. Black & Decker Mfg. Co.*, W. Va. ... 2d 666, 683 (1979) (test for strict tort is whether product is defective in the sense that it is not reasonably safe).

142. 20 Cal. 3d at 422-26, 573 P.2d at 449-52, 143 Cal. Rptr. at 231-34.


144. *Id.* at 556, 391 A.2d at 1025 ("unreasonably dangerous" merely represents a label to be used when risk of loss placed on supplier).


146. *See id.* at —, —, 406 A.2d at 140, 149, 152 (appropriate strict liability charge should be given in terms of reasonable fitness, suitability, and safety).
Aside from the "unreasonably dangerous" terminology, questions have also arisen over the Restatement formulation defining that term, the consumer expectation standard. The standard has been criticized as too restrictive because of its tendency to foster a latent/patent defect distinction in the law, because it may be difficult to determine what consumer expectations are in particular cases, and because it is too confusing for juries to apply.148

b. Risk-Utility Standard

The risk-utility standard suggested by Professor Wade and Dean Keeton149 imputes knowledge of the defect to the manufacturer and asks whether a reasonable manufacturer, with such knowledge, would be reasonable in marketing the product. It is unnecessary to establish that the manufacturer knew or should have known of the defect or of the dangers presented by the product.

The risk-utility standard, including the imputed knowledge aspect of that standard, has also been criticized because, like the consumer expectation standard, it provides too little guidance for a jury if the standard is formulated in detail.150 It is also subject to

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criticism because it provides an insufficient distinction from negligence theory.\textsuperscript{151}

\textit{c. The Warranty Standard}

The warranty standard, so labeled because of its closeness to the implied warranty of merchantability standard of the Uniform Commercial Code,\textsuperscript{152} provides in part that a warranty of merchantability is breached if the product is not fit for the ordinary purposes for which such goods are intended.\textsuperscript{153} Modified to fit the products liability context, the standard is variously phrased, although it will generally provide that a product is defective if it is not reasonably safe for its intended or anticipated uses.\textsuperscript{154}

The warranty standard was initially rejected when strict tort theory was first formulated.\textsuperscript{155} The rejection was based in part on

\begin{footnotes}
\footnote{\textsuperscript{151} See notes 167-68 infra and accompanying text.}
\footnote{\textsuperscript{152} See infra note 14.}
\footnote{\textsuperscript{153} See Morningstar v. Black & Decker Mfg. Co., — W. Va. —, —, 253 S.E.2d 666, 683 (1979) ("We thus conclude in this jurisdiction that the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use."); Keeton, supra note 14, at 35-36.}
\footnote{\textsuperscript{155} See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 900-}
\end{footnotes}
a desire to give strict tort a content and terminology separate from warranty law and, as a substantive matter, to avoid the potential tendency to import warranty limitations into the law of strict tort. The warranty standard has also been criticized because of its lack of focus on the safety of the product, a valid criticism if the merchantability language of the Uniform Commercial Code is used. A product that is fit for the ordinary purposes for which such goods are used may adequately perform the mechanical functions for which it was designed, but may provide inadequate safety.

d. Other Standards

Recent cases dealing with the standards question provide a variety of potential approaches. The California Supreme Court in Barker adopted a dual standard approach under which a product will be deemed to be defective if it either fails to meet the consumer expectation standard or if the risk of using the product outweighs its utility. Under the risk-utility aspect of the standard, the burden of proof is shifted to the defendant to demonstrate that the risk presented by the product is outweighed by its utility, in light of what the court termed the relevant factors, including the "gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

The Pennsylvania Supreme Court in Azzarello adopted a formu-
lation which provides that a product is defective "if it lacked any element necessary to make it safe for [its intended] use or contained any condition that made it unsafe for [its intended] use." 160

The Texas Supreme Court, which had previously adopted a dual standard approach using the consumer expectation and prudent manufacturer standards disjunctively,161 rejected the dual standard in favor of one that defines a defectively designed product as "a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."162 The court's rejection of the dual standard approach was based in part on its perception that the consumer expectation standard was not susceptible of ready application by juries, and in part on the lack of necessity of using the prudent manufacturer standard once the consumer expectation standard is eliminated.

e. Analysis of the Approaches

California's approach has been criticized because it presents the jury with too many loosely interrelated, unquantified factors. The certainty in the standard is illusory.163 Both the Texas and Penn-

160. 480 Pa. at 559 n.12, 391 A.2d at 1027 n.12 (1978).
161. See General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).
162. Turner v. General Motors Corp., 584 S.W.2d 844, 847 n.1 (Tex. 1979). The Turner court noted that while it is improper to instruct a jury to balance specifically enumerated factors of risk and utility, the jury may be instructed in general terms to consider the utility of the product and the risk involved in its use. See id. at 847. Dean Green has proposed the following instruction for juries in section 402 cases:

The seller in this case can be held liable to the consumer for any physical injury he may have suffered only if you find that the product the seller sold was in an unreasonably dangerous defective condition. As people, you have dealt all your lives with products sold and bought, and you are as able as anyone to determine this issue. You have heard what the witnesses have said and the arguments of the lawyers. As representatives of the people of this state chosen to try this case, you must determine the issues to meet the demands of justice between the parties in this action on the basis of the law, the evidence, and your good judgment honestly exercised.

Green, supra note 14, at 1206.
163. 584 S.W.2d at 851. There is a clear acceptance of the need for balancing the risk of the product against its utility. See id. The open-ended jury instruction favored by the Texas Supreme Court, id. at 847 n.1, is a function of its belief that juries would be unable to "know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside that of their own experiences and expectations." Id. at 851. The initial justification for the use of the prudent manufacturer alternative was that it would benefit the plaintiff in cases in which the defect is apparent or when consumer expectations with respect to a particular product would
sylvania courts are skeptical that detailed definitions, such as the one adopted by California in *Barker*, will provide meaningful guidance for a jury required to decide if a product is defective.\textsuperscript{164}

The lack of consensus over strict tort standards revealed by these decisions clearly illustrates that there are no absolutes when considering standards. Adopting a strict tort standard becomes essentially a process of eliminating those standards that are objectionable. The problems with the "unreasonably dangerous" terminology of the *Restatement* are clear. Perhaps the most cogent view of that language is presented in *Azzarello*, in which the Pennsylvania Supreme Court recognized that the term has no independent significance apart from the standard used to define that term.\textsuperscript{165}

The potential restrictiveness of the consumer expectation standard is real enough so that it either should be used only as a threshold determination of product defectiveness or rejected. The risk-utility standard has also been criticized because of the vagueness of the inquiry it required, the difficulty of application, and the insufficient separation it provides between negligence and strict tort theories. The criticisms of the warranty standard were at the outset based upon a desire to clearly separate the new tort theory

\textsuperscript{164} See Epstein, supra note 2, at 651-52:

*Barker* represents all that is unwise in design defect litigation. What design cases need are sharp limitations, not new grounds of liability. When the legislature is persuaded after comprehensive study that certain design standards are appropriate, it can make them mandatory by statute. Such statutes can also give injured parties private causes of action. Beyond that, however, a defendant should be protected by the adoption of any design of substantial use in its own or related trades or businesses. In some cases this standard will lend itself to abuse, but in truth none other is workable. An unbounded determination of costs and benefits places the jury in a position where it can, and must, make the very type of calculations that proved so troublesome under negligence law. It is always difficult to identify the relative costs and benefits in any particular product design. And that task is made more, not less, difficult because the reciprocal interactions of plaintiffs and defendants will be troublesome to analyze. Design suitability must be measured in terms of both intended and foreseeable uses and abuses by many different users whose behavior in turn depends upon the suitability of the design.


\textsuperscript{165} See *Azzarello* v. Black Bros., 480 Pa. at 557-58, 391 A.2d at 1025-26; *Turner v. General Motors Corp.*, 584 S.W.2d at 849.
from warranty limitations. However, in light of the clear recognition that warranty limitations are inapplicable to cases involving strict tort and property damage, it becomes clear that the warranty standard is not to be limited by any of the restrictive provisions of the Uniform Commercial Code.

Although variously phrased, the warranty standard states that a product is defective if it is "not reasonably safe for its intended, anticipated, or reasonably foreseeable uses." In Minnesota, in *Farr v. Armstrong Rubber Co.*, the standard was phrased so as to require a finding of a defective condition if the product "failed to perform reasonably, adequately, and safely the normal anticipated, or specified use to which the manufacturer intends that it be put." The warranty standard does not suffer from the restrictiveness of the consumer expectation standard, since product defectiveness under the standard will not be judged solely by consumer expectations. The standard is not confused by the vagueness of the risk-utility or consumer expectation standards. The warranty standard also provides sufficient differentiation from negligence theory when coupled with a jury instruction stating that strict tort applies even though the manufacturer has exercised all possible care in the design and manufacture of the product.

Section 402A of the *Restatement* has been adopted as the basic strict tort formulation for Minnesota. The supreme court has approved use of the "unreasonable danger" requirement of the *Restatement* and has sanctioned the use of the consumer expectation standard to define that term, but the court has also sanctioned

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166. The Azzarello court noted "that the words, 'unreasonably dangerous' have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." 480 Pa. at 556, 391 A.2d at 1025.

167. See Wade, supra note 14, at 833-35.

168. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965) (the rule in this section is not governed by warranty provisions of the Uniform Commercial Code); see Farr v. Armstrong Rubber Co., 288 Minn. 83, 92-93, 179 N.W.2d 64, 70 (1970) (warranty, as used in section 402A of the Restatement, is not subject to contract rules for the sale of goods); McCormack v. Hanksraft Co., 278 Minn. 322, 337-38, 154 N.W.2d 488, 499-500 (1967) (Minnesota Supreme Court adopts principles of strict liability in tort embodied in the Restatement; lack of privity and failure to give timely notice do not bar recovery for breach of express warranty).

169. 288 Minn. 83, 179 N.W.2d 64 (1970).

170. Id. at 89, 91, 179 N.W.2d at 68, 70; see Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 53-54, 240 N.W.2d 303, 306 (1976).

171. See cases cited note 67 supra.

jury instructions that have left "unreasonable danger" undefined.\textsuperscript{173} Minnesota has also severed the requirement of a defective condition from the unreasonable danger requirement, using either the \textit{Farr} or merchantability standards to define that term.\textsuperscript{174} Finally, the court has indicated that a risk-utility balancing approach underlies both strict tort and negligence theory.\textsuperscript{175}

If the criticisms of these standards by other courts are accepted, the Minnesota formulation should be altered. The first question that has to be considered is whether the unreasonable danger requirement should be retained. If it is retained, it should be understood that the term does not have independent significance apart from the standard used to define that term. The consumer expectation standard, because of its restrictiveness and the problems it creates in relating strict tort to negligence law, should be rejected. The \textit{Farr} standard, used to define the term "defective condition" should provide an adequate substitute as a definition of the entire term, "defective condition unreasonably dangerous" without the limitations of the other standards. The standard is not unduly restrictive and it provides a clear basis for relating strict tort to negligence theory.

The \textit{Farr} standard, when merged with a basic understanding of the relationship between negligence and strict tort established in \textit{Halvorson}, should provide a workable standard for products liability cases. In the design defect context \textit{Halvorson} recognized that the initial risk-utility determination is a judicial function. If the court determines that the plaintiff has established a prima facie case, the case will then be submitted to the jury according to the \textit{Farr} standard.

Settling on a specific standard for strict tort resolves some of the problems in understanding the scope of strict liability. Other problems remain in the use of multiple theories of recovery. The tendency to plead and receive instructions on two or more theories of recovery creates problems in structuring the relationship between those theories.

3. \textit{Strict Tort and Negligence—The Problem of the Inconsistent Verdict}

One of the principal problems created by the use of negligence and strict tort theories is the inconsistent verdict, a problem that

\textsuperscript{173} \textit{See} \textit{Farr} v. Armstrong Rubber Co., 288 Minn. at 88-91, 179 N.W.2d at 68-69.

\textsuperscript{174} \textit{See id.} at 89-90, 179 N.W.2d at 69.

\textsuperscript{175} \textit{See} 307 Minn. at 56, 240 N.W.2d at 307.
arises when a jury in answer to special verdict questions finds a
defendant negligent but not strictly liable. The problem has
arisen several times in other jurisdictions and twice in Minne-
sota, in *Halvorson v. American Hoist & Derrick Co.* and in *Bigham v. J.C. Penney Co.* Halvorson sustained serious injuries when the
boom of a crane touched a high voltage line just as he reached up
to steady a piece of construction equipment attached to the crane.
The jury was instructed on two theories, strict tort and negli-
gence. The jury found the defendant to be causally negligent but not strictly liable. Because the court determined that a find-
ing of unreasonable danger is necessary to both theories, and be-
because a finding of no strict liability necessarily included a finding
that the crane was not unreasonably dangerous, the supreme court
found the verdict to be perverse and irreconcilable. Under the
*Halvorson* approach, strict liability is viewed as the broader theory
of recovery insofar as it allows recovery even though the manufac-
turer has exercised all possible care in the preparation and sale of
the product.

Although requiring a plaintiff to prove that the defendant failed
to exercise reasonable care makes negligence a more restrictive the-
ory of recovery in one respect, the possibility remains that strict
tort may be more restrictive than negligence in other respects. *Big-
ham* illustrates this potential.

Bigham, a Northern States Power Company lineman, sustained
serious burns from a "flashover" that occurred while he was at-
ttempting to change a broken insulator on a high voltage line. The
plaintiff wore "Big Mac" work clothing sold by Penney. The
clothing had not been treated with flame retardants, and, because
of its composition, a "melt and cling" effect occurred when the
clothing was ignited, aggravating the plaintiff's injuries.

The case was submitted to the jury on theories of strict liability,
breach of express and implied warranties, and negligence. The
jury found that the work clothing was not in a defective condition
unreasonably dangerous to the plaintiff and that Penney did not
breach any express or implied warranties. The jury did find,
however, that Penney was causally negligent. Based upon Halvorson, Penney argued that the findings as to strict liability and breach of warranty precluded a finding of negligence.

Had Halvorson been applied, the conclusion would have followed that the verdict was irreconcilable because the findings of no strict liability or breach of warranty would have meant that the clothing was not defective which, in turn, would have precluded a finding of negligence. Taking a position apparently contrary to Halvorson, the Bigham court found the verdict to be reconcilable because the negligence theory was broader than the strict liability theory, given the inclusion in the negligence instruction of a failure to warn theory and the exclusion of that theory from the strict liability and warranty instructions.

Bigham points out that, depending on the specific instructions given, negligence may be a more liberal theory than strict tort particularly if the negligence instructions provide for recovery on a basis not provided for in the strict tort instructions. Bigham also demonstrates that in spite of the common ground between strict tort and negligence, the exact relationship between the theories depends not so much on the abstract proposition established in Halvorson as it does on an analysis of the specific instructions given in a particular case.

If the jury instructions given in the Halvorson case are analyzed in detail it becomes apparent that the possibility exists that negligence is in important respects a broader theory of recovery than strict tort. The Halvorson jury was instructed according to the rubric of section 402A of the Restatement. Following a statement of the elements, the jury was instructed on the standards for strict tort:

This rule as stated applies although the manufacturer has exercised all possible care in the preparation and sale of this product. A product is not in a defective condition if it performs reasonably, adequately, and safely the normal anticipated specific uses to which the seller intends that it be put. A condition is unreasonably dangerous if the product is dangerous when used by an ordinary user who uses it with knowledge common to the community as to the product's characteristics and common usage. A product is in defective condition if it is not

183. See id.
184. See id. at 896-97.
reasonably fit for the ordinary purpose for which it was sold or manufactured and expected to be used.

A product which is sold with instructions and/or warnings is not in a defective condition nor is it unreasonably dangerous if a product is safe when used in accordance with the instructions and/or warnings. Before the strict liability rule can apply, the party asserting the rule must prove that a defect existed when it left the possession of the party charged and was unreasonably dangerous to the user.\textsuperscript{185}

The negligence instruction followed:

Now, negligence is the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under like circumstances. Negligence is the doing of something which a reasonable person would not do or the failure to do something which a reasonable person would do under like circumstances.

We now come to the question of a manufacturer's duty of care. A manufacturer of a product has the duty to use reasonable care in the design, manufacture and inspection or testing of the product to protect those who would use the product from unreasonable risk or harm while the product was being used for its normal and intended use.

The manufacturer or supplier of goods has the duty to give a reasonable warning as to the dangers inherent, or reasonably foreseeable when using the goods in the manner specified. This duty applies even though the goods may not be used in their specified manner so long as such use is one that the manufacturer or supplier should reasonably foresee. Whether or not such a duty has been violated depends upon the risks of the situation, the dangers known or reasonably to be anticipated or foreseen, and all of the attending facts and circumstances as you see them.\textsuperscript{186}

The first thing that becomes apparent about the jury instructions is that the jury was not told that the product had to be found in a defective condition unreasonably dangerous to the user before negligence could be found. That problem can be cured by an instruction that requires the jury to find the product in such a condition before allowing consideration of the negligence question. Requiring a finding of strict tort before allowing a finding of negligence may avoid the inconsistency problem by precluding consideration of the negligence theory if no strict liability is found. It

\textsuperscript{185} 307 Minn. at 53-54, 240 N.W.2d at 306.
\textsuperscript{186} Id. at 54-55, 240 N.W.2d at 306-07.
also highlights the fact that negligence theory is thus bound to the requirements of strict tort.

Viewing the Halvorson instructions in this light, it can be seen that the instructions require a finding of a defective condition, determined according to the Farr v. Armstrong Rubber Co. and merchantability standards, and that the defective condition is unreasonably dangerous, as determined under the consumer expectation standard of the Restatement. The Halvorson court’s view that a finding of strict tort is a prerequisite to a finding of negligence effectively ties negligence to the requirements of the Restatement.

In a situation similar to Halvorson, the Wisconsin Supreme Court has taken the position that a finding of strict liability does not preclude a jury from considering the negligence question. Wisconsin has adopted the Restatement formulation of strict liability, including the unreasonable danger requirement and the consumer expectation standard used to make that determination. In the Wisconsin court’s view, the Restatement requirement of “unreasonable danger” requires a showing of a special or extraordinary danger, a requirement that the Wisconsin court is not prepared to incorporate into the law as a potential limitation on negligence theory. In this respect, the Wisconsin court views strict tort as a narrower theory of recovery than negligence.

Aside from the Wisconsin Supreme Court’s view of the Restatement’s limitations, another potential limitation in the use of the Restatement terminology and standard is in the use of the consumer expectation standard to define unreasonable danger. If a user anticipates the danger in using the product, as Halvorson apparently did, there is a tendency to develop a distinction between obvious (patent) and nonobvious (latent) defects in determining whether a product is in an unreasonably dangerous condition. In addition

187. 288 Minn. 83, 179 N.W. 2d 64 (1970).
190. The court indicated in Halvorson that no Minnesota case had faced the open and obvious danger issue in a negligence context. There is, however, strong precedent stretching back to 1892 for such a position. In Schubert v. J.R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892), the court indicated that the duty to exercise reasonable care existed only with respect to products having a latent defect. This seemed to be reaffirmed by subsequent Minnesota cases. See, e.g., Krahn v. J.L. Owens Co., 125 Minn. 33, 37, 145
there are problems in determining what consumer expectations are

N.W. 626, 627 (1914); O'Brien v. American Bridge Co., 110 Minn. 364, 367, 125 N.W. 1012, 1014 (1910).

Although in some situations, such as when there is a bailment, see Campbell v. Siever, 253 Minn. 257, 263, 91 N.W.2d 474, 478 (1958), or when the product user is inexperienced, see Clark v. Rental Equip. Co., 300 Minn. 420, 426-27, 220 N.W.2d 507, 511 (1974); Miller v. Macalester College, 262 Minn. 418, 429-30, 115 N.W.2d 666, 672-73 (1962), the obviousness of the danger will not preclude recovery. The latent/patent distinction has some continued currency in Minnesota law. See Sowles v. Urschel Laboratories, Inc., 595 F.2d 1361, 1365-66 (8th Cir. 1979) (applying Minnesota law); Magnuson v. Rupp Mfg. Co., 285 Minn. 32, 40-41, 171 N.W.2d 201, 207 (1969).

In Halvorson the court's holding that the product was not defective as a matter of law was based upon a confluence of three factors: the danger was obvious, it was known by all the employees involved, and it was specifically warned against. 307 Minn. at 57, 240 N.W.2d at 308. The court cited Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), in support of its conclusion that the general rule in negligence cases is that there is no recovery for negligent design when the danger is obvious. Campo is the paradigm case illustrating the application of the latent/patent distinction. In Campo the plaintiff lost his hands in an onion-topping machine that had no safety devices to prevent the injury. The New York Court of Appeals held that a remote user "must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users." Id. at 471, 95 N.E.2d at 803.

Campo was repudiated, however, in Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). The trend has been to reject the obviousness of the danger as a controlling factor, see Fabian v. E.W. Bliss Co., 582 F.2d 1257 (10th Cir. 1978); Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167 (Fla. 1979), and to treat obviousness as only one factor in deciding if a product is defective. See id.

In rejecting the latent/patent distinction rigidly drawn by Campo, the New York Court of Appeals noted the problems with Campo:

 Campo suffers from its rigidity in precluding recovery whenever it is demonstrated that the defect was patent. Its unwavering view produces harsh results in view of the difficulties in our mechanized way of life to fully perceive the scope of the danger, which may ultimately be found by a court to be apparent in manufactured goods as a matter of law. As the court itself recently observed: "Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly." (Codling v. Paglia, 32 N.Y.2d 330, 340, 345 N.Y.S.2d 461, 468, 298 N.E.2d 622, 627, supra.) Apace with advanced technology, a relaxation of the Campo stringency is advisable. A casting of increased responsibility upon the manufacturer, who stands in a superior position to recognize and cure defects, for improper conduct in the placement of finished products into the channels of commerce furthers the public interest. To this end, we hold that a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm.
with respect to a particular product.\textsuperscript{191}

\textit{Campe} does not mean, however, that obviousness of the danger might not assume controlling importance as it appeared to do in \textit{Halvorson}. Placing obviousness in context, however, does mean that the same freedom to take cases from juries will exist as it would if obviousness of the danger were adopted as controlling in all cases. Generally, it will be a fact question as it was in Bjerk v. Universal Eng'r Corp., 552 F.2d 1314 (8th Cir. 1977).

\textit{Bjerk} involved injuries sustained by the plaintiff when he attempted to oil a rock crushing machine while it was in operation. Although \textit{Halvorson} was argued as controlling, the court determined that the danger was not so obvious that it could conclude as a matter of law that the product was not defective:

A jury was entitled to determine that the jackshaft bearing needed to be lubricated while the machine operated at an idle speed and, based on past experience of Bjerk and other employees of Thorson, lubrication could be performed safely while in an idle operation. Because under these facts the danger cannot be said to be obvious as a matter of law, the jury was entitled to find negligence on the part of Universal in failing to install certain interior safeguards to prevent an operator from becoming entangled in moving parts, belts, and pulleys while engaged in maintenance work, or in failing to design and install a grease-zerk extension running from the jackshaft bearing to the exterior of the machine or in failing to provide an adequate warning that no lubrication service should be attempted while the machine is in operation.

552 F.2d at 1317. The Eighth Circuit's analysis and its approval by the Minnesota Supreme Court, see Bigham v. J.C. Penney Co., 268 N.W.2d 892, 896 (Minn. 1978), indicates that there is no latent/patent distinction in Minnesota law. This is consistent with the court's approval of a risk-utility balancing approach to products liability cases in \textit{Halvorson}, in which the obviousness of the danger is only one factor to be considered. In some cases, such as \textit{Halvorson}, it may be controlling. In other cases, the obviousness of the danger or the plaintiff's ability to discover that danger, will not be controlling, and the question of defectiveness will be for the jury, as it was in \textit{Bjerk}.

The obviousness question was also raised in Parks v. Allis-Chalmers Corp., No. 48629 (Minn. Nov. 2, 1979), in which the court distinguished \textit{Halvorson}. In \textit{Parks} the plaintiff lost his right arm in a forage harvester. There were warnings telling the machine operator to "keep away from rolls unless power is off," and a sign telling the operator to disconnect the mechanism when it is clogged, before cleaning, and to "keep hands, feet and clothing away from power driven parts." \textit{Id.}, slip op. at 3. The plaintiff was 24 years old at the time of the injury and was familiar with the operation of the harvester.

The jury found the plaintiff to be 49% negligent and the defendant 51% negligent. The defendant requested an instruction, apparently based on \textit{Halvorson}, that "there is no duty to install additional safety devices if the risk is (1) obvious (2) known by the user and (3) specifically warned against." \textit{Id.}, slip op. at 8. The supreme court affirmed the trial court's refusal to give the requested instruction because "[the instruction] assumed, contrary to the evidence, that some safety device or devices material to the particular risk involved, had been installed, and that there had been a specific warning about the particular danger that caused the injury." \textit{Id.}

\textit{Parks} provides another example of judicial reluctance to read \textit{Halvorson} as establishing an inflexible limitation on liability solely because a danger created by a product may be labeled obvious.

\textsuperscript{191} See notes 190 supra; 193 infra and accompanying text.
The Wisconsin Supreme Court's approach may be subject to criticism. The duty imposed by negligence law is to exercise reasonable care to avoid creating unreasonable risks of injury. Whether a jury is required to find a product in a defective condition unreasonably dangerous to the user or that the defendant created unreasonable risk of injury, the terminology seems to be sufficiently similar so that no significant distinction in theories exists.\(^{192}\)

Even assuming that the Wisconsin Supreme Court's approach is rejected, the other limitations still must be considered. Comparing these limitations with the law of negligence highlights the limiting quality of the Restatement standard. In the first place, negligence law has never specifically required a finding of a defective condition unreasonably dangerous to the user or consumer as determined by a consumer expectation standard. If the consumer expectation standard is not met it may be appropriate to find that the defendant has created an "unreasonable risk of injury" as required by negligence law, but it is not the sole criterion a jury considers in deciding if such a risk exists. In addition, to the extent that the consumer expectation standard fosters an obvious-nonobvious distinction in product defects it also unduly limits negligence law, at least in Minnesota, where there has been no clear adoption of such a position by the supreme court.\(^{193}\)


\(^{193}\) The earlier negligence cases in Minnesota appear to impose a duty on the manufacturer of a product only if the defect or flaw in the product is latent. See cases cited note supra. Subsequent cases make such a distinction questionable. See Clark v. Rental Equip. Co., 300 Minn. 420, 220 N.W.2d 507 (1974); Miller v. Macalester College, 262 Minn. 418, 115 N.W.2d 666 (1962). In Halvorson the court found the crane not to be defective as a matter of law:

We hold that American Hoist did not owe this injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that risk was (1) obvious; (2) known by all employees involved; and (3) specifically warned against in American Hoist's operations manual.

307 Minn. at 57, 240 N.W.2d at 308.

The Halvorson court goes on to note that no Minnesota case has expressly faced the issue in a negligence context, although one case, Magnuson v. Rupp Mfg. Co., 285 Minn. 32, 171 N.W.2d 201 (1969), did deny strict liability when the plaintiff was aware of the defect. The reference to Magnuson and the New York Court of Appeals decision in Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), hint at the application of a latent/patent distinction in products liability cases. However, the court's apparent approval in Bingham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978), of the Eighth Circuit's analysis in Bjerk v. Universal Eng'r Corp., 552 F.2d 1314, 1317 (8th Cir. 1977), casts some doubt on whether the Minnesota court would permanently embody such a doctrine in Minnesota
The arguments set out above, while providing a basis for reconciling inconsistent verdicts by recognizing that negligence in important respects may be a broader theory than strict tort, do not provide a conclusive explanation of why the inconsistent verdict problem arises. The fact remains, however, that instructing juries on strict tort theory in terms of the Restatement terminology and standards and on negligence according to traditional principles is resulting in inconsistent verdicts. The problem is not likely to disappear unless adjustments are made in either the standards used to define strict tort or the method of submitting cases to juries.

One solution to the problem is to instruct the jury on a single law. In Bjerk the plaintiff was injured when he attempted to lubricate a rock crushing machine while the machine was operating at an idle speed. Bjerk's head and body somehow came into contact with the moving machinery and he sustained permanently disabling injuries. The court distinguished Halvorson on the facts. See id. For the language the court used, see note 190 supra. The court's analysis and its approval in Bigham indicate that there is no latent/patent distinction in Minnesota law. This is consistent with the Minnesota court's approval of a risk-utility balancing approach to products liability cases in Halvorson, in which the obviousness of the danger is only one factor to be considered. In some cases, such as Halvorson, it may be controlling. In other cases, the obviousness of the danger or the plaintiff's ability to discover that danger will not be controlling and the question of definitiveness will be for the jury, as it was in Bjerk.

194. The inconsistency problem arose in Bjerk v. Universal Eng'r Corp., 552 F.2d 1314, 1316-17 (8th Cir. 1977). The jury instructions on negligence and strict liability were substantially similar. The jury found negligence but no strict liability, providing the basis for defendant's inconsistency argument. The court did not rule on the question because it was raised for the first time on appeal. See id. at 1318. The Eighth Circuit was again presented with the inconsistency question in McIntyre v. Everest & Jennings, Inc., 575 F.2d 155 (8th Cir. 1978) (applying Missouri law). The court declined to establish any general rule on the consistency question, preferring to rest its reversal on the insufficiency of the evidence to support the negligence finding in light of the jury's determination that the product was not defective. Id. at 159-60.

In Hasson v. Ford Motor Co., 19 Cal. 3d 530, 564 P.2d 857, 138 Cal. Rptr. 705 (1977), the California Supreme Court considered the question, but with different results. The court held that the finding of negligence could stand even though the jury found, in answer to a special verdict question, that there was no defect in the product at the time it was manufactured and sold by the defendants.

Although the court declined to consider in the abstract the relationship between strict liability and negligence, it did not find the jury's verdict irreconcilable. First, the court observed that the negligence and strict liability theories were submitted to the jury as independent theories, without an instruction stating that failure to find a defect under strict liability theory would preclude a finding of negligence. Second, the court was of the opinion that the jury might have found the product not defective at the time it left the defendants, the defect manifesting itself only later. See id. at 538-47, 564 P.2d at 863-68, 138 Cal. Rptr. at 711-16. This is similar to the argument made by the plaintiff-respondent in Halvorson. See Respondent's Brief and Appendix at 4-5, Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 53-54, 240 N.W.2d 303, 306 (1976).
theory—strict tort. There are two problems with this approach. First, if strict tort is a more restrictive theory of recovery than negligence, the plaintiff should be given the benefit of the negligence instruction in order to allow him to take advantage of the more liberal theory. Second, with the adoption of comparative fault, there will be the incentive, if not necessity, of proving culpability on the part of the defendant in order to place the plaintiff in a better position for the jury’s allocation of fault. Because comparative fault principles will also control the allocation of fault among multiple defendants, negligence will be introduced into a suit by the defendants if not the plaintiff. If negligence figures into the apportionment of fault, the plaintiff should be entitled to a jury instruction on the negligence theory.

Assuming the continued use of negligence theory, other alternatives must be considered. If the approach of the Minnesota Supreme Court in *Halvorson* is adhered to, findings of negligence but no strict liability will always be deemed inconsistent and irreconcilable. If a jury is instructed that strict liability must be found before negligence can be considered, the jury will not be permitted

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195. In 1978 the Minnesota Legislature made substantial changes in Minnesota tort law. *See* Act of Apr. 5, 1978, ch. 738, 1978 Minn. Laws 836. Part of this tort reform act was an adoption of comparative fault. *See id.* §§ 6-7 (codified at *Minn. Stat.* § 604.01 (1978)). The statute defines fault as follows:

> “Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

*Minn. Stat.* § 604.01(1)(a) (1978). This definition of fault closely parallels the definition of “fault” in the Uniform Comparative Fault Act. *See Uniform Comparative Fault Act* § 1(b). In discussing the Uniform Comparative Fault Act, Professor Wade indicates the desirability of providing the trier of fact with information concerning essentially negligence factors. *See* Wade, *supra* note 79, at 378.


196. The new comparative fault provision of the tort reform act provides that “[w]hen two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.” Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840 (codified at *Minn. Stat.* § 604.02(1) (1978)).
to consider the negligence issue unless the strict liability question is resolved in favor of the plaintiff.197

However, funnelling negligence theory through the consumer expectation standard of the *Restatement* forces negligence theory to conform to that standard. The consequence of using the *Restatement* standard is a restriction not only on strict liability theory but also an undue limitation on negligence theory.

Another alternative is to accept the approach if not the exact rationale of the Wisconsin Supreme Court. This approach involves a simple recognition that the elements of the two theories are sufficiently dissimilar so as to create no inconsistency if differing answers are given by a jury to the strict tort and negligence questions.198

If a jury is required to find a defect or an unreasonably dangerous condition before considering the negligence question, however, a more logical approach to the problem, one consistent with the court's approach in *Halvorson*, involves a redefinition of the standards for strict tort in order to avoid the narrowing potential of the *Restatement* standard.

If a standard such as the standard in *Farr* is utilized, the jury would be instructed that the product is in a defective condition unreasonably dangerous to the user or consumer if it fails to perform reasonably, adequately, and safely the normal, anticipated or specified uses to which the manufacturer intends that it be put. This avoids the potential limitations of the *Restatement* standard, and provides a clearer basis for making the "defect" determination. In essence, the question is whether the product is reasonably safe. If it is not, it is defective. In order to find negligence, the jury must find that the product is not reasonably safe and further, that the manufacturer failed to exercise reasonable care in making the product.

Following such an approach makes the abstract proposition announced in *Halvorson* more palatable. Use of the *Farr* standard would create no problems if a special verdict form required a jury

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197. The only clear exception would be in a case such as Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978), in which one of plaintiff's theories of defect was included in the negligence instruction and omitted from the strict tort instruction.

198. Arguably, the difference in origins of the two theories, and the philosophy underlying those theories, supports separate treatment of the theories. It may not be necessary to tie strict liability to negligence principles given those differences. See Green, *supra* note 14, at 1212 n.47.
first to answer whether the product is in a defective condition unreasonably dangerous to the user and second, if there is an affirmative answer to the first question, whether the defendant was negligent in the design, manufacture, or testing of the product.

4. Strict Tort and Warranty

In adopting strict tort liability in *McCormack v. Hanksraft Co.*,\(^{199}\) the supreme court stated that warranty limitations would be inapplicable to cases involving personal injuries.\(^{200}\) Although the irrelevance of warranty limitations seemed to be established, at least in the personal injury context, the exact place of warranty remained unclear. However, beginning with *Farr v. Armstrong Rubber Co.*,\(^{201}\) the court clarified the role of warranty law in cases to which strict tort applies.

*Farr* involved personal injuries sustained by the plaintiffs when a tire manufactured by the Armstrong Rubber Company exploded, causing the vehicle in which the plaintiffs were riding to overturn. The jury instructions in the case followed the rubric of the *Restatement* in establishing the essential elements of strict tort. The trial court instructed the jury that the plaintiff must prove the product to be "unreasonably dangerous."\(^{202}\) That term was not further defined, although the instructions did define the term "defective": "Now, a product is defective if it fails to perform reasonably, adequately, and safely the normal, anticipated or specified use to which the manufacturer intends that it be put."\(^{203}\) The court found the instructions to be an accurate incorporation of the substance of section 402A of the *Restatement*.\(^{204}\)

The *Farr* court was aware of the similarity between the strict liability instruction and warranty standards.\(^{205}\) The instruction was closely related to the merchantability standard in the Uniform Commercial Code, in which "merchantable" means, in part, that the product is "fit for the ordinary purpose for which such goods are used."\(^{206}\)

Although the *Farr* court recognized the similarity between strict

\(^{199}\) 278 Minn. 322, 154 N.W.2d 488 (1967).

\(^{200}\) See id. at 337-38, 154 N.W.2d at 499-500.

\(^{201}\) 288 Minn. 83, 179 N.W.2d 64 (1970).

\(^{202}\) Id. at 88-89, 179 N.W.2d at 68.

\(^{203}\) Id. at 89, 179 N.W.2d at 68.

\(^{204}\) See id. at 91, 179 N.W.2d at 69-70.

\(^{205}\) See id. at 89-90, 179 N.W.2d at 69.

tort and warranty, the court indicated its intent to confine warranty to cases involving economic loss and allow strict tort to control in cases involving personal injury or property damage.\textsuperscript{207} The

\textsuperscript{207} See 288 Minn. at 91-94, 179 N.W.2d at 70-71. In spite of the separation in \textit{Farr} of claims for economic loss from claims for property damage and personal injury, it is not completely clear just exactly how the breakdown will work. In general, the question of what types of cases strict liability applies to is a perplexing one. See Ribstein, \textit{Guidelines for Deciding Product Economic Loss Cases}, 29 \textit{Mercer L. Rev.} 493 (1978). The problem is compounded when negligence and warranty theories are considered.

At a relatively early date, negligence theory in Minnesota encompassed both property damage and economic loss. Recovery was allowed under a negligence theory for economic loss in Nieman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N.W. 394 (1910). Cf. Donovan Constr. Co. v. General Elec. Co., 133 F. Supp. 870 (D. Minn. 1955) (installer could not recover damages in tort action against manufacturer for losses caused by delay in performance of contract for installation as alleged result of negligent manufacture of product). In Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929), recovery was allowed for economic damage to the plaintiff's poultry business resulting from the mislabeling of raw linseed oil as cod liver oil. Recovery was allowed against the wholesale drug company in absence of privity, for a violation of the Minnesota Pure Food Act. In general, property damage claims create no problems. \textit{See}, \textit{e.g.}, Blasing v. P.R.L. Hardenbergh Co., 303 Minn. 41, 226 N.W.2d 110 (1975). The critical question is whether recovery will be allowed for economic loss under a negligence theory. Although recovery for economic loss would not ordinarily be allowed, \textit{see} W. \textit{Prosser, supra} note 43, at 665, there seems to be a growing body of respectable authority stating that claims for negligently caused economic loss, even absent physical damage to property, are compensable. Recent decisions of the Oregon, Texas, and Washington Supreme Courts have indicated that such losses can be recovered under a negligence theory, even though strict tort theory would be inapplicable. \textit{See} Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977); Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976); Franklin, \textit{When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases}, 18 \textit{Stan. L. Rev.} 974, 983-86 (1966).

Recovery of economic loss has also been allowed on the basis of breach of warranty in cases in which the tort origins of implied warranty were recognized. \textit{See}, \textit{e.g.}, Bekkevoord v. Potts, 173 Minn. 87, 216 N.W. 790 (1927). In Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959), the court allowed recovery in express warranty for breach of a conditional sales contract pursuant to which plaintiffs had purchased a trailer from a dealer. The trailer was unsuited to northern Minnesota weather, with the consequence that in cold weather large quantities of water condensed in the ceiling and walls due to poor insulation. In dictum the court indicated that recovery would be allowed on the basis of implied warranty absent privity of contract with the manufacturer, although the court took no position on the applicability of other defenses to implied warranty claims. \textit{Id.} at 558-82, 99 N.W.2d at 680-83.

Subsequent to McCormack v. Hankcraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967), the court has had only one occasion to address the question of recoverable damages in a strict liability action. From the court's decision in \textit{Farr} v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970), the inference may be drawn that strict tort liability will be confined to claims involving personal injury and property damage. The inference is supported by the \textit{Farr} court's reference to Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), in which the California Supreme Court took the position that strict liability is inapplicable to claims involving economic loss:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not
conclusion appears to be that strict tort is preemptive of warranty in such cases.

Subsequent Minnesota Supreme Court cases have reaffirmed

rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

*Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. The California Supreme Court also stated that strict tort liability would extend to physical injury to property. The same approach is taken in the *Restatement.* See *Restatement (Second) of Torts* § 402A, Comment d (1965).

Subsequent to *Farr*, no Minnesota Supreme Court case has directly addressed the question of the types of damages to which strict liability applies, although its applicability to property damage seemed to be assumed in *Peterson v. Crown Zellerbach Corp.*, 296 Minn. 438, 209 N.W.2d 922 (1973). In *Peterson* the plaintiff, a meat processor, alleged that the defendant's meat freezer-wrapping paper caused meat wrapped in the paper to become tainted. The applicability of strict liability was not directly discussed, and the case was disposed of because of the plaintiff's failure to prove causation. *Id.* at 439, 442, 209 N.W.2d at 923-24.

In *Noel Transfer & Package Delivery Service, Inc. v. General Motors Corp.*, 341 F. Supp. 968 (D. Minn. 1972), the United States District Court for the District of Minnesota had occasion to rule on the issue of whether strict liability applied to cases involving economic loss. Following the dictum in *Farr*, the court determined that strict tort liability was inapplicable to a claim based on economic loss. *Id.* at 970. This is in accord with the position previously taken by a Minnesota District Court in a case involving a negligence claim for economic loss. See *Donovan Constr. Co. v. General Electric Co.*, 133 F. Supp. 870, 873 (D. Minn. 1955). *Donovan* involved claims for economic loss due to a delay on a construction project caused by General Electric's failure to deliver generators to the construction site on time. It is distinguishable from cases in which the purchaser of the product suffers a loss, as in *Neiman v. Channellene Oil & Mfg. Co.*, 112 Minn. 11, 127 N.W. 394 (1910).

In *Allied Aviation Fueling Co. v. Dover Corp.*, 287 N.W.2d 657 (Minn. 1980), the court considered the applicability of strict liability in a case involving property damage. The plaintiff lost over 200,000 gallons of airplane fuel from an airplane fueling system when a shaft located on a valve dropped out, leaving a hole in the fuel line. The shaft fell because a horizontal carbon steel spring pin designed to hold the shaft in place was sheared due to the application of some unknown force on the pin.

Allied had had a similar valve failure some two years earlier. It was aware from this earlier experience that there were devices available which would have prevented such an occurrence. Allied was experienced in installation of fuel systems, and the specifications and installation methods for this type of valve were approved by its own consulting engineers and architects.

At issue was whether the trial court properly directed a verdict for defendant after
the preemptive nature of the Farr standard. In Lee v. Crookston

having rejected proffered expert testimony with respect to defendant's responsibilities as supplier of the valve. In considering the plaintiff's strict liability claim, the court said:

Plaintiff failed to establish a factual basis for a finding based on strict liability. The evidence is undisputed that Allied was a skilled and experienced user of valves of the kind in question and knew that a blow of the kind to which the failed valve was admittedly subjected would cause the pin to shear, dropping the shaft so as to permit escape of the fuel. The doctrine of strict liability does not apply in such a situation.


Given the authority cited by the court, strict liability could be deemed inapplicable for a variety of reasons. It could be, from the references to McCormack and Farr, that strict liability applies to cases involving personal injury and property damage and that the damage suffered by Allied does not constitute the right kind of damage. Or, more probably, those references, combined with the reference to Magnuson and the quoted portion of the court's opinion, justify the conclusion that strict liability is inapplicable to commercial transactions, such as the one involved in the case, in which the product user possesses an ability equal or superior to the distributor or designer of the product to determine the use to be made of the product.

While Allied does not directly consider the applicability of strict liability theory to property damage it does indicate that the sophistication of the product user will be important in determining if strict liability is applicable at the outset. The analysis is similar to situations in which strict liability is applicable to a particular loss, but has been disclaimed. See McNichols, Who Says That Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree, 28 Okla. L. Rev. 494, 497-98 (1975); Shanker, A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty, 29 Case W. Res. L. Rev. 550, 564, 565 (1979); cf. Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 445-46, 40 N.W.2d 73, 79-80 (1949) (court in warranty action upheld provision in contract that provided that plaintiff as seller shall not be liable for certain liabilities and assumed no liability for consequential damages). Even if strict liability is applied to property damage claims, it would follow logically from Allied that such liability could be disclaimed.

Assuming the validity of limiting strict liability theory to cases involving property damage and personal injury, thus excluding economic loss, problems still arise in classifying losses. As an example, some jurisdictions will classify cases involving crop loss due to a defective herbicide as property damage for purposes of strict liability, while others will classify it as economic loss. See Ribstein, supra, at 496-97. In Minnesota such cases have been decided on breach of warranty grounds, without direct consideration of the applicability of strict liability. See Wenner v. Gulf Oil Corp., 264 N.W.2d 374, 384 (Minn. 1978); Kleven v. Geigy Agricultural Chems., 303 Minn. 320, 323-24, 227 N.W.2d 566, 569 (1975). However, no clear standard has emerged in Minnesota for classifying losses. Several alternatives are available. See Russell v. Ford Motor Co., 281 Or. 587, 590, 575 P.2d 1383, 1385-86 (1978).

The issue of whether strict liability should apply to cases involving economic loss will frequently turn on the need for applying strict liability to avoid privity limitations. See, e.g., Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 608-09, 182 N.W.2d 800, 804 (1970); Santor v. A & M Karagehasian, Inc., 44 N.J. 52, 61-63, 207 A.2d 305, 310 (1965); Nobility Homes of Texas, Inc., v. Shivers, 557 S.W.2d 77, 81 (Tex. 1977); Air
Coca-Cola Bottling Co., an exploding bottle case, the court stated as an alternative holding that it was reversible error for the trial court to refuse to instruct the jury on strict liability in tort, even though the jury was instructed on negligence and implied warranty theories.

The jury instructions on breach of implied warranty were as follows:

[If you find that the bottle of Coca-Cola delivered to the Norman Steak House was reasonably fit for the ordinary and usual handling as defendant might reasonably anticipate then plaintiff cannot recover; but if on the other hand you find the bottle was not fit for the ordinary handling as is customary with such a product in the exercise of reasonable care and that such unfitness was a direct cause of the injury of the plaintiff and that plaintiff was not contributorily negligent or if so such negligence on the part of the plaintiff was not a direct cause of the injury then you should bring a verdict for the plaintiff.

The supreme court acknowledged the similarity between strict liability and warranty theories, but determined that the implied war-

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208. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 358 (Minn. 1978), noted in 5 WM. MITCHELL L. REV. 241 (1979); Milbank Mutual Ins. Co. v. Proksch, 309 Minn. 106, 113, 244 N.W.2d 105, 109 (1976); McCormack v. Hanksraft Co., 278 Minn. 322, 339, 154 N.W.2d 488, 500-01 (1967); Beck v. Spindler, 256 Minn. 543, 562, 99 N.W.2d 670, 683 (1959); Schubert v. J.R. Clark Co., 49 Minn. 331, 340, 51 N.W. 1103, 1106 (1892), and the adoption by the Legislature of the most liberal privity alternative of the Uniform Commercial Code, see MINN. STAT. § 336.2-318 (1978), one of the primary reasons for applying strict tort theory to economic loss claims disappears. Even assuming the limitation of strict tort liability to personal injury and property damage cases, there seems to be no difference between the treatment of economic loss in those jurisdictions applying strict liability to avoid privity limitations and the Minnesota approach, under which privity limitations in the warranty context have been judicially and legislatively eliminated.

Given similarities in defenses in strict liability and warranty actions, see Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171 (Minn. 1978), and the lack of any distinction based on privity of contract, the remaining distinctions between strict tort and warranty are the other Minnesota Uniform Commercial Code limitations such as notice, see MINN. STAT. § 336.2-607(3)(a) (1978), limitations of liability and disclaimers, see MINN. STAT. §§ 336.2-316, .2-719 (1978), distinctions in the remedies available for breach of warranty, and the statute of limitations. See MINN. STAT. § 336.2-725 (1978). These distinctions are significant, however, because they may be totally avoided if recovery in strict tort is allowed for all economic loss. See McNichols, supra.

208. 290 Minn. 321, 188 N.W.2d 426 (1971).
209. See id. at 334-35, 188 N.W.2d at 435.
rancy instruction "falls short of conveying to the jury that if a defect existed in defendant's product when it left its control, defendant should be found liable for the injuries caused by such defect." 211

In Goblirsch v. Western Land Roller Co., 212 a case in which the plaintiff lost his hand while pushing wet corn down the intake chute of a corn grinder, the plaintiff argued the reverse of the Lee proposition. The plaintiff argued that he was prejudiced by the refusal of the trial court to submit the case to the jury on express and implied warranty theories even though the court did instruct on strict liability. In holding that there was no prejudice to the plaintiff, the supreme court distinguished Lee as follows:

We reasoned that the jury could have concluded that the bottle was defective when it left the defendant's control but that the defendant was not liable because the defect did not result from negligence. This defense should not be available under a strict liability instruction. Plaintiff Goblirsch can obtain no aid from our holding in Lee, however, because unlike the plaintiff in Lee, Goblirsch received the benefit of the stronger and broader instruction on strict liability and was denied only an instruction on breach of implied warranty, which, in the circumstances of this case, merely would have been redundant and possibly confusing. 213

Taken together, Lee and Goblirsch establish that Farr is a stronger and broader standard than the implied warranty standard, and that when the Farr standard is utilized it is appropriate to refuse to instruct on implied warranty theory. This approach is consistent with the comments to the Restatement which make it clear that strict tort overrides warranty. 214

In light of the preemptive nature of the Farr standard, instruc-

211. 290 Minn. at 334-35, 188 N.W.2d at 435.
212. 310 Minn. 471, 246 N.W.2d 687 (1976).
213. Id. at 476, 246 N.W.2d at 690.
214. See Restatement (Second) of Torts § 402A, Comment m (1965). Comment m makes it clear that if warranty is to be used it should be recognized that it is a very different type of warranty from that usually found in the sale of goods, and that it is not subject to contract rules surrounding such warranties. The court in Farr clearly recognized this. See 288 Minn. at 92, 179 N.W.2d at 70. In Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979), the Wisconsin Supreme Court held that it was not error for the trial court to exclude implied warranty from the plaintiff's case. The court found that warranty was a duplicative theory and that cases in which strict liability applies should be tried on that theory alone. 86 Wis. 2d at 645, 273 N.W.2d at 240.

In spite of Farr and Goblirsch, cases have been submitted on multiple theories and sanctioned, implicitly or explicitly, by the supreme court. See Bigham v. J.C. Penney Co.,
tions on implied warranty should not be given when strict tort ap-

268 N.W.2d 892 (Minn. 1978); O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826 (Minn. 1977).

O'Laughlin was a personal injury action arising out of serious injuries sustained by Mrs. O'Laughlin when she collapsed on top of a furnace grate allegedly because of carbon monoxide poisoning caused by improper installation of the furnace by Ries, a subcontractor hired to do the job by Dellwo, a general contractor who had been engaged to remodel the O'Laughlin house. Ries purchased the furnace and installed it.

The plaintiff pled negligence, strict liability, and breach of warranty theories. The trial court refused to submit the case on strict liability or breach of warranty theories, submitting the case solely on negligence theory. Following a judgment for the defendants, plaintiffs appealed, arguing that it was error for the trial court to refuse to instruct on the alternative theories of recovery. The supreme court agreed.

The court had no problem in finding that the installer of a furnace was a seller and subject to either the implied warranty of merchantability or warranty of fitness for a particular purpose. See id. at 831-32. The court found that instruction on both theories would have been proper. Id. The court also determined that section 402A of the Restatement applied. Id. The court did not, however, consider whether implied warranty and strict tort theories would be cumulative theories.

In Bigham, a case involving personal injuries due to a severe electrical shock aggravated by certain clothing worn by the plaintiff, the case was submitted to the jury on theories of express and implied warranties, strict liability, and negligence. No question was raised concerning the propriety of submission on those theories. See 268 N.W.2d at 895. For a discussion of Bigham, see notes 178-84 supra and accompanying text.

Section 2-314 of the Uniform Commercial Code provides that:

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under contract description; and

(b) in the case of fungible goods, are of fair average quality within the description, and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. § 2-314. The “fit for ordinary purposes” aspect is usually used in the products liability context to set the standard of responsibility. If this standard is sufficiently broad then it should be preemptive of the remaining aspects of the merchantability definition unless those standards are perceived to be broader than the strict tort warranty standard.

The first five parts of the standard seem to be absorbed in the Farr standard. There is a question about part (f), where the inquiry is whether the goods “conform to the promises or affirmations of fact made on the container or label if any.” Id. In a commercial context, the purpose of the standard is to ensure that an individual who orders goods from a manufacturer for resale, when receiving those goods in a sealed container, will have the protection contained in the representation on the label. See id., comment 10. The standard could be applied, however, in a personal injury or property damage context when the product does not conform to the promises or affirmations of fact on the label. As an example, statements or representations of safety on the product packaging might provide a basis for the use of such a standard. See Hauer v. Zogarts, 14 Cal. 3d 104, 114-20, 534 P.2d 377, 383-87, 120 Cal. Rptr. 681, 687-91 (1975).

Such a statement may constitute an express warranty, see R. Nordstrom, Handbook of the Law of Sales § 76, at 238 (1970), as well as an implied warranty of
plies. The only apparent advantage to be gained from such an instruction is a possible alternative method of defining the term "defect", an insufficient reason for use of the implied warranty theory when strict tort should govern.

C. Jury Instructions

The first step in developing reasonable jury instructions for products liability cases is to determine the elements of strict tort.

merchantability, the only difference being the potential for the disclaimer of the statement if it is treated as an implied warranty. This could be treated either as an implied warranty, in which case Section 402A should be sufficiently broad to encompass defects based on product packaging, see Restatement (Second) of Torts § 402A, Comment g (1965), or it could be part of an instruction on express warranty.

In situations in which express warranties or implied warranties of fitness for a particular purpose are involved, the considerations are somewhat different. Under either theory, liability may be imposed on a product seller even though, in absence of the warranty, the product would not be deemed to be defective under the ordinary merchantability standard. See Milbank Mutual Ins. Co. v. Proksch, 309 Minn. 106, 115, 244 N.W.2d 105, 110 (1976); Baxter v. Ford Motor Co., 168 Wash. 456, 462-63, 12 P.2d 409, 412, aff'd per curiam, 168 Wash. 465, 15 P.2d 1118 (1932); Shanker, supra note 202.

In many situations, however, express warranty or implied warranty of fitness for a particular purpose may add nothing to the plaintiff's case. Coblirsch provides a good example. In addition to determining that it was not error to refuse to submit the plaintiff's case on the basis of implied warranty of merchantability theory, the court determined that there was no error in refusing to instruct on an express warranty theory. The court's reasoning was that the express warranty that the product was safe for use added nothing to the strict liability standard which, of course, required that the product be safe for its foreseeable use, grinding corn. 310 Minn. at 476-77, 246 N.W.2d at 690.

If strict liability is sufficiently broad to encompass implied or express warranty theories, no instruction should be given on those theories. Instruction on duplicative theories only creates the possibility of jury confusion and possible inconsistency in verdicts. See note 218 infra and accompanying text.

Even in situations in which express warranty is applicable it may be preempted by Restatement (Second) of Torts § 402B, Comment d (1965), covering misrepresentations leading to personal injury. Although Minnesota has not yet adopted Section 402B, its application should present no problem. For examples of section 402B's application, see Hauter v. Zogarts, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); Klages v. General Ordinance Equip. Co., 240 Pa. Super. Ct. 350, 367 A.2d 304 (1976); Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974).

Even if a property damage claim is found to be covered by strict liability, however, there is no guarantee that strict liability will apply. Although the Uniform Commercial Code may not be directly applicable, courts are not precluded from applying the Code by analogy to determine that disclaimers or limitations of liability are valid. See McNichols, supra note 207, at 499-500; cf. Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 445-46, 40 N.W.2d 73, 79-80 (1949) (disclaimer upheld in case involving property damage by fire).

Focusing again on the crop loss cases, it would seem that the factors motivating the supreme court to uphold disclaimers of liability are no less weak just because the plaintiff's claim is classified as a strict tort claim rather than breach of warranty.
The elements the Minnesota Supreme Court has said are necessary are threefold:

In order for the plaintiff to recover under strict liability it is necessary for him to establish:

1. That the product in question is in a defective condition (unreasonably dangerous).
2. That the defective condition existed at the time the product left the control of the seller (manufacturer).
3. That the defective condition was a cause of the plaintiff’s injury.\(^{215}\)

Although the formulation may be made more complicated if the specific terminology of the Restatement is followed,\(^ {216}\) the above elements fairly define the strict liability theory.

The second aspect of formulating the instructions concerns standards for defining the scope of strict liability. As the parenthetical language indicates, the first question is whether the “unreasonable danger” requirement should be included. If it is, it should be recognized that the Restatement anticipates a single definition for the term “defective condition unreasonably dangerous.” In Minnesota, there are two primary alternatives, the *Farr v. Armstrong Rubber Co.*\(^ {217}\) and the *Restatement* standards. The conclusion reached in this Article is that the *Farr* standard should be used as the exclusive definition of the terms “defective condition” or “defective condition unreasonably dangerous” because it avoids the problems associated with other available standards.\(^ {218}\)

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215. See note 68 supra.
216. See Restatement (Second) of Torts § 402A (1965).
217. 288 Minn. 83, 179 N.W.2d 64 (1970).
218. The relative vagueness of a strict liability standard may be some cause for concern. There are problems, however, with attempting to provide too much detail in a jury instruction, such as that prompted by the California Supreme Court’s decision in Barker v. Lull Eng’r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). The pattern California jury instruction is as follows:

A product is defective in design [unless the benefits of the design of the product as a whole outweigh the risk of danger inherent in the design] [or] [if the product failed to perform as safely as an ordinary consumer of the product would expect when used in a manner reasonably foreseeable by the defendant[s]].

[In determining whether the benefits of the design outweigh such risks you may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.]

Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California, California Jury Instructions Civil, Inst. No.
pectation standard is to be used, however, there should be some clarification of its use.

9.00.5 (Supp. 1979). The instruction is open ended, with no attempt made to indicate how the factors relate to each other.

Another example of an attempt to detail the appropriate strict tort standards appears in Bowman v. General Motors Corp., 427 F. Supp. 234 (E.D. Pa. 1977):

After distinguishing a conscious design defect from a manufacturing flaw and explaining the notion of crashworthiness (we charged the jury that GM had a duty to design its vehicles with a view to the foreseeability of accidents and to minimize their effect), we instructed the jury that a product is defective, even though made exactly as it was designed, if it is unreasonably dangerous to the users of the product. We then explained the "unreasonably dangerous" concept as follows:

In determining whether a product is unreasonably dangerous and therefore defective because of its design, there are a number of factors which you should consider. As you will see, when I have listed all these factors, you may have to balance them against each other, sort of like in a formula. In other words, some may cut one way and some the other. No one factor by itself will be all-important.

First, you should consider the likelihood that the product as thus designed will result in injury to a user. Applied to the present 'crashworthiness' case, you should consider the likelihood that the '66 Toronado, as it was designed, would, in an accident situation, cause (or fail to protect an occupant from) injury. In this regard, you must in turn also consider the likelihood that a '66 Toronado would be struck in the rear on a highway: (1) at a closure speed such as you in fact find to have been present in this case; and (2) in the manner in which you find the collision to have occurred in this case. If you find that an accident of this kind was not unlikely to occur, that would be a factor to consider in the balancing formula on unreasonableness of danger. If you so find, you should also consider the likelihood that a Toronado designed in the manner of the '66 model would, in circumstances such as you find occurred, experience a fire resulting from ignition of the fuel system's gasoline vapors which would invade the passenger compartment. If you find such a likelihood of injury, you should consider that factor in deciding whether the automobile here was unreasonably dangerous.

The second factor you should consider in the unreasonably dangerous formula is the seriousness of potential injury in such circumstances.

Third, you should consider the ability of the manufacturer, GM, to eliminate any unsafe characteristics which you find in the car, without impairing the usefulness of the car or significantly increasing its cost.

Fourth, you should consider whether the Toronado was dangerous to an extent beyond that which would be contemplated or expected by the ordinary user, considering the ordinary knowledge common to the community as to an automobile's characteristics. In this regard, you should consider the question of warnings, for I instruct you that a product can be rendered defective by reason of failure to give warnings as to risks or dangers in the product. As I have previously stated, the degree of warning depends upon the degree of danger since a greater degree of danger requires a greater degree of warning. However, you should also consider the ability of the manufacturer to notify or warn the user of the danger in a given situation, and the degree to which warning was meaningful.

In applying those factors to the formula you may find that some cut one way—toward unreasonable danger—and some the other—away from the conclusion. It is for you, the jury, to evaluate them in
If the *Farr* standard is used, the jury instruction would be as follows:

A product is in a defective condition (unreasonably dangerous to the consumer, the user, or to his property) if it fails to perform reasonably, adequately, and safely the normal, antici-

light of the facts as you find them in the case, and to determine where the correct balance lies. You may of course find there to be other factors which appear from the evidence to shed light on whether the Toronado's design was defective, and if so you may consider them.

To recapitulate: I have told you that Mr. Bowman's second claim in this case—wholly distinct from his claim of negligence—is based on the doctrine of Manufacturer's Liability for Defective Products. I have defined 'defect' in terms of 'unreasonableness of the danger,' because I believe that to have assigned you the task of determining whether there was a 'defect' without such guidance would have been too difficult. However, I believe that it may also be helpful to give you a general definition of defect which you may also apply in your deliberations. In terms pertinent here, Webster defines 'defect' to mean 'an absence of something necessary to adequacy of function.' Applied to this case, the question would be: Did the design of the Tornado lack something necessary for adequate performance of its function—namely, to provide a reasonably safe compartment for transportation of occupants of motor vehicles; that is, one designed not to be crashproof or to provide absolute safety against all risks of the road, but to provide reasonable safety against foreseeable risks of the road. In formulating the balancing test we have drawn heavily upon the works of Dean Wade.

*Id.* at 243-44 (footnotes omitted) (emphasis in original). The instruction is so complex that it has to be questioned whether it could be followed. It is interesting to note the simplicity of the court's instruction in the last paragraph, focusing the jury's attention on a standard that should be comprehensible.

Even though such instructions, as a standard jury instruction, may be undesirable, it may be possible to define with specificity the critical inquiry in a lawsuit. Generally, Professor Wade has advocated giving a general instruction, without focusing on the specific factors involved in a risk-utility balancing approach. See Wade, *supra* note 14, at 840-41. The rationale is that those factors are important in deciding, as a matter of policy, whether the case should be given to the jury. After the policy decision is made, the jury should consider the factual issue of whether the product is defective or not reasonably safe.

Once the court has resolved the crucial question of whether strict liability applies to a particular product or transaction, however, the inquiry narrows to whether the product in question is defective or not reasonably safe. To the extent that specific factors assume importance, there is no reason a jury should not be instructed accordingly. See Gravley v. Sea Gull Marine, Inc., 269 N.W.2d 896 (Minn. 1978); Wade, *supra* note 14, at 838. If, for example, the determination is made that feasibility will be the controlling issue, then a specific instruction on feasibility might be warranted. A suggested instruction implementing the critical factors in deciding the feasibility issue is as follows:

In deciding if the suggested alternative was feasible, there are several factors you must consider.

First, was the suggested alternate design technologically feasible? This means that, given the technology available at the time the product was manufactured, could the suggested alternative have been implemented.

Second, you must consider the safety of the suggested alternative. Does it provide overall safety as good or better than that of the allegedly defective
pated or specified uses to which the seller intends (or reasonably can foresee) that it be put.

The parenthetical language at the end of the suggested instruction is intended to bring the standard into line with treatment of the misuse question in negligence law.

If the Restatement's consumer expectation standard is used, some modification in that standard would be required. The confusion created by the consumer expectation standard may be due to problems in failing to indicate in clearer language what the standard means, rather than to difficulties inherent in the standard itself. A simpler statement of the standard and a definition of the relevant community may be of assistance in deciding whether or not the standard has been met.

In Minnesota Practice JIG II, the consumer expectation standard is formulated as follows: "A condition is unreasonably dangerous if it is dangerous when used by an ordinary (user) (consumer) who uses it with the knowledge common to the community as to the product's characteristics and common usage." The instruction tracks the comments to section 402A of the Restatement. The comments are intended to emphasize that when consumer expectations as to safety with respect to a particular product are not met, the user or consumer of that product is entitled to recover. The essence of the inquiry is whether the product in question presents risks that a reasonable consumer, with knowledge common to the community as to the product's characteristics and common usage, would not expect.

The problem of defining the relevant community remains. The product, and does it provide better protection against the particular hazard of which the plaintiff complains?

Third, you must consider the cost of the suggested alternative. Will the suggested alternative significantly increase the cost of the product?

Fourth, you must consider whether the suggested alternative will affect the performance of the product.

Before you find the suggested alternative to be feasible, you must find that any increases in the cost of the product or changes in the performance and function of the product are outweighed by the added safety of the alternate design.

In determining whether specific emphasis should be placed on a given factor, however, the ability of a jury to comprehend the jury instruction should be considered. The very complexity of the suggested feasibility instruction makes it questionable. It covers the relevant factors involved in deciding the feasibility issue, but it is subject to the same criticisms as the instructions in Barker and Bosman.

219. 4 MINNESOTA PRACTICE JIG II, 118S (2d ed. 1974).

220. See RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, i (1965).

221. See id.
juries in two Minnesota cases, Bigham v. J.C. Penny Co. and Halvorson v. American Hoist & Derrick Co., received the pattern instruction without further definition. In the context of these workplace injuries, several questions come to mind. Aside from questions concerning the expectations of the specific plaintiffs involved in those cases, a question arises as to what the relevant community is. Is it a community composed of all individuals or just of construction workers, as in Halvorson, or linemen, as in Bigham? How the community is defined may make a substantial difference in the outcome of the case. Evaluating a product that is designed for industrial use in terms of an ordinary consumer who does not work in the industry would result in a distortion of the concept. It seems obvious that consumer expectations, if the community is narrowed, may differ from the expectations of the members of the community at large. Those expectations may be lower, given a greater degree of knowledge of the danger by individuals working in hazardous occupations, or they may justifiably be higher in light of the custom or practice of the industry.

In cases in which the product is manufactured for multiple uses, one of which may involve an occupation that presents unusual risks, a user or consumer of the product should be entitled to have the product evaluated in terms of the expectations of individuals working in his occupation. The jury instructions in Bjerk v. Universal Engineering Co. provide a good example of how the standard should be refined. Bjerk involved injuries sustained by the plaintiff when he was servicing a rock crushing machine while the machine was in operation. The trial court instructions on the consumer expectation standard were as follows: "Now, the rock crusher was unreasonably dangerous to Mr. Bjerk if it had a propensity for causing physical harm beyond that which would be contemplated by an ordinary worker who uses it, with the knowledge common to those who use it as to its characteristics."

222. 268 N.W.2d 892 (Minn. 1978).
223. 307 Minn. 48, 240 N.W.2d 303 (1976).
224. 552 F.2d 1314 (8th Cir. 1977).
225. See Record at 747, Bjerk v. Universal Eng'r Co., 552 F.2d 1314 (8th Cir. 1977).

The experience of the user of the product should be a critical factor in determining if a product is defective according to the consumer expectation standard. Compare DeSantis v. Parker Feeders, Inc., 347 F.2d 357, 363-64 (7th Cir. 1965) with Collins v. Ridge Tool Co., 520 F.2d 591, 596 (7th Cir. 1975), cert. denied, 424 U.S. 949 (1976).

Application of the concept is illustrated in the supreme court's recent decision in Parks v. Allis-Chalmers Corp., No. 48629 (Minn. Nov. 2, 1979). In Parks plaintiff lost his arm in a forage harvester. Although there were warnings on the machine, the plaintiff's
In an industrial accident setting, this jury instruction clarifies the inquiry. The defectiveness of the product is measured, not by reference to the community at large, but by reference to those individuals who actually use the machine.\textsuperscript{226}

A suggested jury instruction incorporating a slight simplification of the consumer expectation standard and a refinement of the standard to reflect the relevant community is as follows:

A product is in a defective condition unreasonably dangerous if the plaintiff establishes that the potential for injury by the product is greater than would be expected by an ordinary user who uses the product with the knowledge common to those who use it as to the product’s characteristics.

The final question concerns the relationship between strict tort and negligence theory. If the \textit{Farr} standard is used there should be no problem in instructing a jury that a finding of negligence must be preceded by a finding of strict liability. The strict liability instructions, coupled with a negligence instruction, would read as follows:

In order for the plaintiff to recover under strict liability it is necessary for him to establish:

1. That the product is in a defective condition (unreasonably dangerous to the consumer, the user, or to his property).
2. That the defective condition existed at the time the product left the control of the seller.
3. That the defective condition was a cause of plaintiff’s injury.

A product is in a defective condition (unreasonably dangerous to the consumer, the user, or to his property) if it fails to perform reasonably, adequately, and safely the normal, anticipated or specified uses to which the seller intends (or reasonably can foresee) that it be put.

In order for the plaintiff to recover under negligence it is nec-

experience with the machine did not, according to the court, necessarily make him aware of the danger of catching his hand in the machine. Citing Blasing v. P.R.L. Hardenbergh Co., 303 Minn. 41, 48, 226 N.W.2d 110, 115 (1975), the court said that “[p]ast experience with a product does not necessarily alert users to all of the dangers associated with the product.” Parks v. Allis-Chalmers Corp., slip. op. at 7 n.7.

The consumer expectation standard should take into consideration the relative experience of the user of the product if application of the standard is to have any accuracy.\textsuperscript{226} In addition, it is important to define the relevant community. \textit{See, e.g.,} d’Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 892 (9th Cir. 1977) (community consists of users of product, not distributors); Bellotte v. Zayre Corp., 531 F.2d 1100 (1st Cir. 1976) (state standards for products liability); Hamilton v. Hardy, 37 Colo. App. 375, 380, 549 P.2d 1099, 1103-04 (1976) (community standard of medical practice).
necessary to find first that the product is in a defective condition, and second, that the defendant was negligent in the design (manufacturing or testing) of the product. Negligence is the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under like circumstances. Negligence is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under like circumstances.

III. CONCLUSION

Many of the problems that have arisen in products liability law are due to a confusion of the terminology utilized in thinking about products liability cases. Other more basic problems are created by a failure to formulate principles for deciding strict tort cases consistent with the fundamental assumptions providing the basis for the adoption of strict tort.

To begin with, the elements of strict tort can be clarified. Although that is perhaps the simplest task, it is important to understand the elements in order to prevent the overloading of strict tort to an unwarranted degree. Another problem, duplication of theories of recovery, can be eliminated in part by recognizing that it has been the clear intent of the Minnesota Supreme Court to avoid reliance on implied warranty theory in cases in which strict tort applies.

Although there may be some overlap between strict tort and negligence, it is standard practice to continue to utilize negligence as an alternative theory of recovery. The argument can be made that it is unnecessary to use negligence when strict tort governs, but its continued use is desirable and, perhaps, unavoidable.

In defining strict tort for the jury, there must be a clear understanding of the problems and limitations of the prevailing Restatement standard. Its use may not only sacrifice clarity, but it may place strict tort on too narrow a ground. Use of alternative standards may avoid the problem by providing a clearer approach to strict tort, an approach that is conceptually broader than the Restatement's approach. The Minnesota approach to strict tort has been flexible enough to recognize alternative standards. If the consumer expectation standard is used, however, it should be with modifications that will clarify its intent and operation.

Given the continued use of negligence, it is clear that there are problems in determining how negligence relates to strict liability,
as is illustrated by the continuing problem of the inconsistent verdict. If the approach suggested herein is followed, the possibility of arriving at an inconsistent verdict should be eliminated without sacrificing the conceptual consistency between the theories that the supreme court has said exists.

The predominant goal of this Article has been to attempt to clarify some of the many problems that exist with the use of strict tort liability. The intent has been simply to provide a clearer framework for thinking about the place of strict tort in products liability law.