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Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation

Aaron D. Twerski

CHASING THE ILLUSORY POT OF GOLD AT THE END OF THE RAINBOW: NEGLIGENCE AND STRICT LIABILITY IN DESIGN DEFECT LITIGATION

AARON D. TWERSKI*

I. INTRODUCTION

It may be our fault. When drafting the design defect standard of liability for the Products Liability Restatement,[1] advisors importuned my co-reporter, Jim Henderson, and me to simply state that a product was defectively designed if the manufacturer had acted negligently, i.e. had not acted reasonably in designing the product. In deciding whether the conduct of a manufacturer was reasonable, the fact-finder would assess the risk-utility tradeoffs between the alternative design suggested by the plaintiff that would have avoided the plaintiff's harm and the product as marketed. Instead of articulating the standard in classic negligence terminology, we chose to adopt a functional test for defect that predicates liability "when the foreseeable risks of harm . . . could have been reduced or avoided by the adoption of a reasonable alternative design."[2] Our critics believed that it was more honest to frankly acknowledge that common law negligence principles govern design defect litigation.[3] We championed a functional test for defect

* Dean and Professor of Law, Hofstra University. A.B., 1962, Beth Medrash Elyon Talmudic Research Institute; B.S., 1970, University of Wisconsin – Milwaukee; J.D., 1965, Marquette University Law School.

1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

2. *See id.* § 2(b) ("A product is . . . defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . .").

3. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 355 (2000) ("[C]ourts have now generally adopted a risk-utility test to determine whether a harmful design is also a defective design. When a risk-utility test is applied, the courts seem to be requiring negligence or at least some similar species of fault."); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 654 ("[C]ourts have had to expend considerable energy trying to explain how defectiveness under the risk-utility test differs from negligence. The effort has been far from successful."); Alan Schwartz, *The Case Against Strict*

that made no mention of any particular doctrine. Neither negligence, strict liability, nor the implied warranty of merchantability are mentioned in the black letter rule.[4] We prevailed, but our critics may yet have the last laugh.

What brings this confessional to the fore is a recent decision by the Illinois Supreme Court, *Blue v. Environmental Engineering, Inc.*[5] In truth, I believe the case was correctly decided. I cannot help but be gratified that, between the majority and concurring opinions, the court cited thirty times to the Products Liability Restatement. But, with it all, there are some significant glitches in the opinion, all produced by the belief that a design case sounding in strict products liability must be different than one sounding in negligence. Our critics must be laughing (or crying) in their beers. With some justification they should be saying "We told you so. That is the price you pay for not being brutally honest." For reasons that I will explain later in this Article I believe that adopting the functional test for design defect liability was probably correct. But, I must admit that the critics' desire for brutal honesty seems more alluring as time goes on.

II. THE *BLUE* STORY

Blue is a rather run-of-the-mill design defect case. Plaintiff, Glen Blue, injured himself while working on a heavy-duty trash compactor.[6] Blue had placed a large sofa box into the compactor when it stopped and would not crush the box. In order to facilitate the crushing, he pushed his leg into the box so that the ram would come down and grab it. Blue's "foot became caught in the box and [he] was pulled into the compactor as the ram took hold of the box."[7] The ram subsequently hit Blue "three times, breaking his pelvis, leg and foot."[8] Plaintiff's expert testified to several safety features that were technologically available at the time the compactor was manufactured that would have averted plaintiff's injury, and he opined that the compactor was negligently

Liability, 60 FORDHAM L. REV. 819, 824 (1992) ("Products designs are currently regulated under a negligence test: a design is defective if, in the opinion of a jury, the design creates risks in excess of benefits."). Although these comments came before and after the promulgation of the Products Liability Restatement, they reflect the views of many that were presented to us when we were drafting the Restatement.

4. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

5. 828 N.E.2d 1128 (Ill. 2005).

6. *Id.* at 1134.

7. *Id.*

8. *Id.*

designed because of the absence of these safety features.[9]

Plaintiff's complaint alleged counts in strict liability and negligence.[10] The strict liability count was dismissed because the case was "filed beyond the applicable limitations period and the statute of repose."[11] The jury returned a general verdict against the manufacturer on the negligence count and found the plaintiff to be thirty-two percent contributorily negligent.[12] The jury also responded to a special interrogatory. Over the plaintiff's objection, the jury was asked, "Was the risk of injury by sticking a foot over or through a gate into a moving compactor open and obvious?"[13] The jury answered in the affirmative.[14] After the trial, the defendant moved for judgment based on the special interrogatory claiming that a finding that the risk was open and obvious controlled over the finding that the defendant was negligent.[15] In the defendant's view, it could not be found negligent for designing a machine with risks that were open and obvious. The trial court granted defendant's motion and entered judgment in favor of defendant.[16] On appeal, the intermediate appellate court reversed the trial court.[17]

The intermediate appellate court held that the fact that a danger was open and obvious did not preclude a finding that the compactor was negligently designed.[18] It also found that there was sufficient evidence to support a finding that the compactor failed to meet risk-utility standards since the plaintiff's expert had shown that there were several safety features available at the time the compactor was manufactured that could have been incorporated into the compactor and would have avoided the plaintiff's injury.[19]

If this were all there were to the case, it would hardly deserve attention. The patent danger (or open and obvious danger) rule has been moribund for decades.[20] The Products Liability Restatement

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9. *Id.*
10. *Id.* at 1133.
11. *Id.*
12. *Id.*
13. *Id.* at 1135.
14. *Id.*
15. *Id.*
16. *Id.*
17. Blue v. Envtl. Eng'g, Inc., 803 N.E.2d 187 (Ill. App. Ct. 2003).
18. *Id.* at 198.
19. *See id.* at 198–99.
20. *See, e.g.*, Pike v. Frank G. Hough Co., 467 P.2d 229, 235 (Cal. 1970); Micallef v. Miehle Co., 348 N.E.2d 571, 577–78 (N.Y. 1976).

found that the overwhelming majority of jurisdictions reject it in cases based on defective design.[21] A product with open and obvious dangers may still present risks to those who through their inadvertence or impulsive conduct encounter the patent danger. If a safety feature that eliminates the risk can reasonably be adopted, then there is no reason that liability should be denied.[22] As to the sufficiency of the evidence, there appeared to be ample expert testimony to support a finding of design defect.[23] The case seemed to call for nothing more than a routine affirmance by the Illinois Supreme Court of the intermediate appellate court decision reinstating the plaintiff's verdict.

The Illinois Supreme Court did, in fact, affirm and reinstate the plaintiff's verdict, but in doing so wrote an opinion that, in many ways, is mystifying. It has needlessly complicated the law of products liability. Illinois courts do not stand alone. Other courts have floundered on similar issues. It is time to set the record straight.

III. THE ILLINOIS SUPREME COURT OPINION

Before addressing the Illinois Supreme Court opinion, I need to make a disclaimer. It is beyond the scope of this Article to comment on a host of product liability issues that are mentioned in the opinion. Issues such as the role of the consumer expectations test in design defect litigation;[24] who should bear the burden of proof on the issue of defective design;[25] whether the exceptions to the open and obvious

21. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, subpart IV.C (1998).

22. *See id.*

23. The recitation of the evidence of reasonable alternative designs was more than ample to sustain a plaintiff's verdict. *See Blue*, 803 N.E.2d at 199.

24. Illinois allows recovery in a design defect case when a product fails to meet consumer expectations or when a product fails to meet the risk-utility test. Blue v. Envtl. Eng'g, Inc., 828 N.E.2d 1128, 1138 (Ill. 2005) (citing Hansen v. Baxter Healthcare Corp., 764 N.E.2d 35, 43–46 (Ill. 2002)). Presumably, the obvious nature of the defect would have barred the plaintiff in *Blue* under the consumer expectations test. The Illinois Supreme Court appropriately held that the obvious nature of the defect did not bar the plaintiff on the risk-utility prong. *Id.* at 1146. As to when the consumer expectations test is appropriate in a design defect case, see James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 872–76, 879–82, 889–90 (1998).

25. In *Wortel v. Somerset Industries, Inc.*, 770 N.E.2d 1211, 1219, 1223 (Ill. App. Ct. 2002), the court noted that Illinois was one of three states that shifted the burden on risk-utility tradeoffs to the defendant. The Illinois Supreme Court in *Blue* rejected that view and now holds that, whether a design defect claim sounds in negligence or strict liability, a plaintiff bears the burden of proving the product is defectively designed. *Blue*, 828 N.E.2d at 1143. In doing so, the court expressly agreed with RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998).

danger rule in premises liability cases should be applicable to design defect cases;[26] and whether a "simple machine" exception should bar liability[27] are all discussed in the opinion and will not be addressed in the ensuing discussion.

As noted earlier, the plaintiff's strict liability claim was dismissed on statute of limitations grounds. The court thus turned its attention to whether the plaintiff had made out a prima facie case of negligence in the design of the product. In order to answer this question, the court had to determine the meaning of negligence in a products liability setting. The court began its analysis with an extensive discussion of section 2(b) of the Products Liability Restatement that sets forth the standard for defective design.[28] It provides:

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[29]

The court notes that the comments to the Products Liability Restatement make it clear that whether a proposed alternative design is reasonable depends on risk-utility balancing no different than that endemic to the classic test for negligence articulated in the Restatement (Second) of Torts sections 291 through 293.[30] But then the court goes on to argue that there are several differences between strict liability and

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26. *Blue*, 828 N.E.2d at 1147. Given the fact that the court held that the open and obvious nature of a product defect is not a bar to recovery under either negligence or strict liability, the issue of whether to apply the premises liability exception to products liability cases is moot in any event. *See id.* at 1148.

27. The court recognizes that under both negligence and strict liability the open and obvious nature of a danger may in some instances bar a plaintiff from recovering. *Id.* at 1144–46 (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, subpart IV.C (1998)). The court opined that a court may have to confront the question as to whether a machine is so simple that there is no duty to design against a defect. *Id.* at 1148–50. In *Blue*, the defendant failed to raise the duty issue in a motion to dismiss or in a motion for summary judgment. *Id.* at 1151. The duty issue is solely for the court to decide as a matter of law. *Id.* at 1148, 1150. Since the defendant failed to raise the issue below, it was not preserved on appeal. *Id.* at 1151.

28. *Id.* at 1139–40.

29. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

30. *Blue*, 828 N.E.2d at 1440.

negligence in a product design defect case. They bear careful examination.

A. The Product-Conduct Distinction Under Risk-Utility Balancing

Although the court admits that a design defect claim is more akin to a negligence claim than one for strict liability, it says that "[a]ny difference between the two would lie in the fault concept. In a defective design case sounding in negligence, the focus is on the conduct of the defendant, but in a strict liability defective design case, the focus is on the product."[31]

If risk-utility tradeoffs are to be utilized to decide whether a design is defective, then there is no difference between negligence and strict liability. The Products Liability Restatement test requiring a "comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person,"[32] is the identical test utilized in deciding whether a defendant was negligent. In both, a fact-finder must determine whether a reasonable person would find that the product did not meet the reasonableness standard. That hypothetical reasonable person stands in judgment of the manufacturer in negligence cases and decides not whether a "reasonable manufacturer" would have adopted the proposed design alternative, but whether a "reasonable person" reflecting the values of society would have adopted the alternative design. The decision whether to adopt an alternative design must be decided by an objective, reasonable person. Robots do not make design decisions, human designers do. Juries sit in judgment on those decisions and do so from an objective perspective. There simply is no difference between reviewing the conduct of the manufacturer and the product design. Ultimately, products are neither reasonable nor unreasonable; they are deemed so only because a human fact-finder utilizing risk-utility tradeoffs decides one way or another on the issue.[33]

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31. *Id.* at 1141(citations omitted).

32. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

33. The court in *Blue* cites to section 1, comment a, of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY to the effect that some courts prefer to impose liability for strict liability rather than negligence in design defect cases because negligence

> might allow a finding that a defendant with meager resources was not negligent because it was too burdensome for such a defendant to discover risks or to design or warn against them. The concept of strict liability, which focuses on the product rather than the conduct of the manufacturer,

B. Does Risk-Utility Balancing Determine Defective Design Under Negligence?

The Illinois Supreme Court split on the issue of whether risk-utility balancing should be used to determine defect when a products liability case is brought in negligence. No single view carried a majority of the court.[34] The view of the plurality that risk-utility balancing does not apply to a products liability design defect case brought under a negligence theory is beset by some fundamental problems.[35] It is clear that in non-products cases risk-utility balancing is the operative theory for determining whether conduct is negligent.[36] Illinois case law is replete with decisions to that effect, and the court acknowledges that at the outset of its discussion.[37] The court begins its analysis on this issue by saying that "a plaintiff raising a negligence claim must do more than simply allege a better design for the product; he must plead and prove evidence of a standard of care by which to measure a defendant's design and establish a deviation from that standard."[38] This statement standing alone is perfectly consistent with the standard for defective design set forth in section 2(b) of the Products Liability Restatement. If a product

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> may help make the point that a defendant is held to the expert standard of knowledge available to the relevant manufacturing community at the time the product was manufactured.

Blue, 828 N.E.2d at 1140 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998)). In setting forth this view expressed by some courts, we did not intend to endorse it as a proper concern. In an article published prior to the Products Liability Restatement project we said:

> Concern that a negligence standard may be too forgiving is clearly misplaced. The law of negligence is based on the hypothetical reasonable person. The test is objective; subjective factors peculiar to individual defendants generally do not excuse liability. Moreover, manufacturers are held to the standard of investigation and knowledge of an expert in the field. Thus, courts already have a specific rule, devised long ago in negligence law, to assure that ignorance will not be excused where information was reasonably attainable by those with sophisticated expertise.

James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 276 (1990) (footnotes omitted).

34. *See Blue*, 828 N.E.2d at 1151 (Freeman, J., concurring).

35. *Id.* at 1142 (plurality opinion).

36. *See, e.g.*, McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987) (applying Illinois law); Deibert v. Bauer Bros. Constr. Co., 566 N.E.2d 239, 243 (Ill. 1990); Fancher v. Cent. Ill. Pub. Serv. Co., 664 N.E.2d 692, 696 (Ill. App. 1996) (citing *Deibert*, 566 N.E.2d at 243).

37. *Blue*, 828 N.E.2d at 1140.

38. *Id.* at 1141.

is to be declared defective in design, it is because there was, at the time of sale, an alternative design that should have been adopted, against which the injury-causing product can be measured.

The court, however, citing to two earlier cases, goes on to say that

> to establish a negligence claim for a defective design of a product, a plaintiff must prove that either (1) the defendant deviated from the standard of care that other manufacturers in the industry followed at the time the product was designed, or (2) that the defendant knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous and defendant failed to warn of its dangerous propensity.[39]

Any doubt as to what the court meant is dispelled in the next paragraph when the court says:

> *In contrast to negligence's focus on the standard of care established by other manufacturers in the industry*, strict liability focuses on the product and only requires proof that the benefits of the challenged design do not outweigh the risk of danger inherent in such designs, that the alternative design would have prevented the injury, and that the alternative design was feasible in terms of cost, practicality and technology.[40]

In short, to make out a case under negligence, a plaintiff must prove that the defendant failed to meet existing industry standards. Compliance with such standards appears to be an absolute defense.

Why the Illinois court adopted a rule in product design cases that requires a plaintiff alleging negligence to prove that the defendant failed to conform to industry custom is puzzling. It is black letter law throughout the country that conformance to industry custom is not dispositive on the issue of negligence vel non.[41] Industry custom is relevant but rarely binding as to whether an actor acted with reasonable care. This hoary rule is set forth in both the Second and Third Restatement of Torts,[42] is endorsed by all the major commentators,[43]

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39. *Id.*

40. *Id.* at 1142 (emphasis added).

41. *See, e.g.*, DOBBS, *supra* note 3, §§ 164–65.

42. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 13(a)

and is the law in Illinois itself.[44] Compliance with custom is often raised by a defendant as evidence that the defendant acted reasonably. The plaintiff usually counters with a proposed standard of care that is superior to that of customary conduct. Only when the industry custom is beyond reproach will a court direct a verdict for defendants; otherwise, the issue is for the jury.[45]

Once rid of the myth that a plaintiff must prove that the defendant departed from industry standards to establish a negligence case for defective product design, the Illinois court has no alternative but to resort to risk-utility balancing to determine whether a defendant breached the standard of care. And as the previous section demonstrates, once risk-utility balancing is required, the product-conduct distinction is totally illusory.

It would appear that under a risk-utility balancing test, the plaintiff in *Blue* presented adequate expert testimony that a reasonable alternative design was available when the compactor was designed in 1975. Notwithstanding the industry custom, the jury was entitled to conclude that the defendant did not act reasonably when it failed to adopt the suggested alternative design. Although the Illinois Supreme Court ultimately upheld the finding of negligence because the defendant did not timely object to the jury finding in its post-trial motions, the Illinois Supreme Court needlessly drew an illegitimate distinction between negligence and strict liability in design defect products liability cases. What is worse, it gave voice to an absolute "industry custom" bar for a design defect case brought under a negligence theory.

C. Is There a Foreseeability Requirement in Design Defect Litigation?

In a concurring opinion, Justice Fitzgerald leaves open the question of whether risk-utility balancing applies in a design defect case predicated on a negligence theory.[46] Instead, Justice Fitzgerald sees the distinction between strict liability and negligence in design defect cases as being dependent upon the requirement that a risk be foreseeable.[47]

(Proposed Final Draft No. 1, 2005); *see* RESTATEMENT (SECOND) OF TORTS § 295A (1965).

43. *See, e.g.*, DOBBS, *supra* note 3; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33 (5th ed. 1984).

44. *E.g.*, Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253, 257 (Ill. 1965); McNealy v. Ill. Cent. R.R., 193 N.E.2d 879, 885 (Ill. App. Ct. 1963).

45. *See* RESTATEMENT (SECOND) OF TORTS § 295A, cmt. b (1965).

46. Blue v. Envtl. Eng'g, Inc., 828 N.E.2d 1128, 1152 (Ill. 2005) (Fitzgerald, J., concurring).

47. *Id.* at 1153–54.

A case brought in negligence requires foreseeability of harm; in strict liability, scienter plays no role. Justice Fitzgerald correctly notes that section 2(b) of the Products Liability Restatement imposes liability only when risks are foreseeable.[48]

He further notes that in an earlier Illinois case the court put off deciding whether to adopt the Restatement's foreseeability requirement in strict liability design defect until a case comes before the court that appropriately raises the issue.[49] Justice Fitzgerald eschews making the decision on foreseeability in the instant case since plaintiff's claim for strict liability was barred by the statute of limitations.[50]

The issue of whether a plaintiff must establish foreseeability of risk in a strict liability design defect case remains undecided in Illinois. When a case is predicated on a failure-to-warn strict liability theory, Illinois law is clear. In *Woodill v. Parke Davis & Co.*, the Illinois Supreme Court said:

> We perceive that requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and on the adequacy of the warning, rather than on the conduct of the manufacturer.[51]

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48. *See id.* at 1154.

49. *Id.* at 1153; *see* Hansen v. Baxter Healthcare Corp., 764 N.E.2d 35, 46 (Ill. 2002). The *Hansen* court declined to address the issue of whether the risk-utility test includes a "foreseeability" requirement, in the context of RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, section 6 (1998), which deals with design defects in prescription drugs and medical devices. Presumably, if a court mandated a "foreseeability" requirement for prescription drugs and medical devices, it would do so for all products covered under section 2, which sets forth the rules governing design liability for non-drug related products. One cannot, however, be certain because courts have taken a more lenient view, exempting drug products from the strictures of strict liability. *See also* RESTATEMENT (SECOND) OF TORTS §402A cmt. k (1965).

50. *Blue*, 828 N.E.2d at 1152 (Fitzgerald, J., concurring).

51. 402 N.E.2d 194, 198 (Ill. 1980). In failure to warn cases, the overwhelming majority of courts require foreseeability of risk as a predicate to imposing strict liability. *See, e.g.*, Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 557 (Cal. 1991) (en banc) (holding that "knowledge, actual or constructive, is a requisite for strict liability for failure to warn"); Payne v. Soft Sheen Prods., Inc., 486 A.2d 712, 721 (D.C. 1985); Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994); Johnson v. Am. Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986); Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922–24 (Mass. 1998) (overruling prior case law and adopting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS

The court goes on to say that imposing a requirement that the manufacturer know or should know of the dangerous propensity of a product

> is justified because a logical limit must be placed on the scope of a manufacturer's liability under a strict liability theory. To hold a manufacturer liable for failure to warn of a danger of which it would be impossible to know . . . would make the manufacturer the virtual insurer of the product.[52]

The court in *Woodill* left open the question of whether there is a foreseeability requirement in a design defect case.[53] Twenty-six years later it still remains an open question in Illinois.

Why there should be a difference between a case based on failure-to-warn and design defect is a mystery. If it is unfair to impose liability in a failure-to-warn case because a risk was unknowable and therefore could not be warned against, it is equally unfair to impose liability for failing to design against an unknowable risk.[54] As the comments to the Products Liability Restatement point out, in most cases where plaintiffs allege a design defect in a mechanical product, it is rare that the risk of harm is unknowable.[55] In drug failure-to-warn cases, defendants may legitimately claim that it may take decades to discover latent risks.[56]

LIABILITY (1998) foreseeability requirement for strict liability for failure-to-warn); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 640 (Md. 1992); Opera v. Hyva, Inc., 450 N.Y.S.2d 615, 618 (App. Div. 1982). *But see* Sternhagen v. Dow Co., 935 P.2d 1139, 1147 (Mont. 1997) ("[E]vidence that a manufacturer knew or through the exercise of reasonable human foresight should have known of the dangers inherent in his product is irrelevant.").

52. *Woodill,* 402 N.E.2d at 199.

53. *Id.*

54. The notion that there is no scienter requirement in strict liability cases had its origin in articles written by two seminal scholars in the field of products liability. *See* Page Keeton, *Products Liability – The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693, 702; John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965). Both authors repudiated their early views. *See* KEETON ET AL., *supra* note 42, at 697–98; John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing,* 58 N.Y.U. L. REV. 734, 761 (1983). Professor David Owen notes that many courts continue to profess allegiance to the Wade-Keeton test imputing knowledge of unforeseeable risks while knowing that most of the major commentators have rejected that view. In a pithy conclusion, Professor Owen states, "The ghost of the Wade-Keeton test continues to haunt judicial halls, but its time has come and gone." DAVID G. OWEN, PRODUCTS LIABILITY LAW § 8.7 (2005).

55. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1998).

56. *See id.*

Thus, as a practical matter, it is more likely that foreseeability of risk will be a real problem in some failure-to-warn cases. But, it is not impossible that foreseeability of risk will be a problem in a design defect case. When it does arise, the issue should be treated in a similar fashion.

IV. LOOKING FOR THE ILLUSORY POT OF GOLD

If the analysis set forth above makes good sense, then we are faced with the question as to why the Illinois Supreme Court and some other courts have written opinions in the area of design defect seeking to differentiate strict liability from negligence with distinctions that are spurious at best. The answer is, I believe, relatively simple. With the adoption of section 402A, the courts embraced the theory of strict liability for defective products. The focus in the early years of section 402A was on manufacturing defect cases. Defining defect for manufacturing cases was not complex. A product is defective if it departs from the manufacturer's intended design.[57] It makes no difference whether the manufacturer exercised all reasonable care in the preparation and marketing of the product. Manufacturing defects are rare events, and the implications for imposing strict liability were not serious. As many have noted, liberal use of the doctrine of res ipsa loquitur under negligence allowed plaintiffs to recover.[58] The shift to strict liability went smoothly.

Having adopted a theory of strict liability, courts were then faced with the question of how strict liability could be applied to design defect and failure-to-warn cases. They reasoned that there must be some comparative advantage in advancing a strict liability theory. Unless a court is prepared to apply a consumer expectations test totally devoid of risk-utility balancing, there really is no difference between strict liability and negligence. Risk-utility balancing lies at the heart of negligence, and switching labels to strict liability does not change matters.

In the search to find some difference, courts have said some very strange things: (1) Illinois, as noted earlier, has said that negligent design of products is not risk-utility based but requires proof that a defendant

57. *Id.* § 2 cmt. c.

58. *See, e.g.*, William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960) ("Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."); JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY, PROBLEMS AND PROCESS 23 (2004).

departed from industry custom.[59] In doing so, it needlessly tortured classic negligence law. (2) Illinois courts and other courts have said that negligence focuses on the conduct of the specific manufacturer and might absolve the manufacturer of liability if it acted reasonably according to its own evaluation of risk, whereas strict liability looks to the risk information available to the industry.[60] This too is gross error. An expert is always held to information that is available to the industry and cannot absolve itself with the argument that it acted reasonably based on its own assessment of risk.[61] (3) Still others have said that there is no scienter requirement in design defect cases, but there can be no finding of liability in failure-to-warn cases without establishing that a risk is foreseeable.[62]

It is high time that these irrational distinctions be wiped away. They complicate the law without reason. Not only are they irrational, they are downright harmful. If *Blue* stands as the law in Illinois, a plaintiff bringing his suit in negligence will not be able to mount a case without proving violation of industry custom. Furthermore, by insisting that there are differences between negligence and strict liability in design defect cases, we encourage plaintiffs to bring suit under both theories. Not infrequently, plaintiffs bring suit under both theories and a jury finds that the product is not defective but that the defendant was negligent. Most courts have found that such verdicts are inconsistent and require a retrial.[63] And the courts that have found such jury verdicts to be consistent have had to resort to warped reasoning to sustain their conclusion.[64]

Enough is enough. Courts ought not to insist that negligence and strict liability are similar in design defect cases with regard to the core definition of defect and then fumble to find a nonsensical distinction. If then you ask why did we not, as reporters, simply say that design defect litigation is predicated on negligence and that strict liability was a mirage, I would answer that many courts are so committed to the

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59. *See* discussion *supra* Part III.B.

60. Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 559 (Cal. 1991) (en banc); *see* discussion *supra* note 54.

61. *See, e.g.*, 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 28.4 (2d ed. 1986).

62. *See* OWEN, *supra* note 54, §§ 8.7 n.39, 9.2 n.11.

63. *See, e.g.*, Tipton v. Michelin Tire Co., 101 F.3d 1145, 1150 (6th Cir. 1996) (applying Kentucky law); Garrett v. Hamilton Standard Controls, Inc., 850 F.2d 253, 257 (5th Cir. 1988) (applying Texas law). *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).

64. *See* Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 5 (1st Cir. 2002) (applying New Hampshire law); Greiten v. LaDow, 235 N.W.2d 677, 685 (Wis. 1975).

language of strict liability for design and failure-to-warn that we believe it preferable to state the test for defect functionally rather than enter into a squabble with the courts as to which doctrinal label to paste on the test for defect. Our point is that either label is acceptable, so long as the labels are not allowed to obscure the fact that the substance is the same in either case.

Furthermore, issues such as the applicability of comparative fault and liability for non-manufacturing sellers were seen to depend on whether a case was brought under negligence or strict liability.[65] But, our critics are right that we paid a price for doing so. Though we imposed a functional test for defect, courts had gotten used to the doctrinal strict liability-negligence dichotomy and looked for some wiggle room to differentiate the two. By not tackling the doctrinal issue head on, we may have missed an opportunity to clarify the law.

V. CONCLUSION

I begin my Products Liability course every year by telling my students that perhaps there should be no independent course called Products Liability. Fundamental first-year tort principles will serve them well. With the exception of manufacturing defects, products liability is based on fundamental concepts of negligence. Whenever they encounter decisional law that sounds like it creates a separate doctrine for products liability, it is most often wrong. If courts were to stick to the basics, they would serve themselves and the practicing bar well. If we can make it easy, why should we make it difficult?

65. Satellite issues may be affected by whether a case sounds in strict liability or negligence. For example, most courts allow comparative fault as a defense to a products liability claim brought under strict liability; a minority of courts do not. *See* Webb v. Navistar Int'l Transp. Corp., 692 A.2d 343 (Vt. 1997) (discussing and analyzing policies and case law on both sides of the question.); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2(b), 17 cmt.a (1998). Furthermore, whether a non-manufacturing seller can be held liable for selling a defective product may also depend on whether the case is brought under negligence or strict liability. *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. e (1998). Even if courts feel compelled to decide the satellite issues based on whether a case is brought in negligence or strict liability, they are still free to adopt the negligence/risk-utility framework for the core issue of defect.