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ELIMINATING PROXIMATE CAUSE AS AN ELEMENT OF THE PRIMA FACIE CASE FOR STRICT PRODUCTS LIABILITY

*Peter Zablotsky**

Section 402A of the Restatement (Second) of Torts articulates the basic principles of the strict products liability cause of action.¹ It is a significant section; perhaps more than any other section ever drafted, it has come to be regarded as critical black letter law.² Section 402A is cur-

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section states:
 - (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
 - (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

2. See, e.g., *Lee v. Crookston Coca-Cola Bottling Co.*, 188 N.W.2d 426, 433 (Minn. 1971) (holding that circumstantial evidence is a sufficient basis for a finding of strict liability); *Cochran v. Brooke*, 409 P.2d 904, 906 (Or. 1966) ("It has been said that the adoption of this section is one of the most spectacular developments of tort law in this century."); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966) ("We hereby adopt the foregoing language [of § 402A] as the law of Pennsylvania."); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 263 (R.I. 1971) (adopting § 402A in Rhode Island); *McKisson v. Sales Affiliates*, 416 S.W.2d 787, 789 (Tex. 1967) (adopting § 402A in Texas). See also James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1512 (1992) ("Only rarely do provisions of the American Law Institute's Restatements of the Law rise to the dignity of holy writ . . . [S]ection 402A of the *Restatement (Second) of Torts* is such a provision."); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793 n.9, 794-97 (1966) (discussing the states' rapid embrace of strict liability without privity of contract as reflected in § 402A); Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 287 (1966) ("[S]ection 402A will have a substantial impact on the future

rently being revised.³ The occasion of revision has provided the opportunity for a broad and often bitter debate over the exact form of the strict products liability cause of action.⁴ Critical to this debate is the underlying theory-of-liability issue, *i.e.*, whether the cause of action for products liability ought to lie in strict liability or negligence.⁵ The resolution of this

of products liability. An understanding of this section is therefore increasingly imperative for the practicing attorney and the courts.”).

3. A final vote on the revision has been scheduled for 1995. The debate concerns the exact form of the strict products liability cause of action. As of this writing, the following draft revisions of § 402A have been published by the American Law Institute: RESTATEMENT (THIRD) OF TORTS § 402A (Preliminary Draft No. 1, 1993) [hereinafter Preliminary Draft]; RESTATEMENT (THIRD) OF TORTS § 402A (Council Draft No. 1, 1993) [hereinafter Council Draft No. 1]; RESTATEMENT (THIRD) OF TORTS § 402A (Council Draft No. 1A, 1994) [hereinafter Council Draft No. 1A]; RESTATEMENT (THIRD) OF TORTS § 402A (Tentative Draft No. 1, 1994) [hereinafter Tentative Draft No. 1]; Restatement (Third) of Torts § 402A (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2].

4. See, *e.g.*, Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241, 241 (1993) (criticizing the Reporters' recommendations for revisions to § 402A); John F. Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 Touro L. REV. 21 (1993) (anticipating considerable disagreement over the Reporters' proposed revisions of § 402A); Henderson & Twerski, *supra* note 2, at 1513 (proposing their own unofficial draft revisions to § 402A and noting that the two authors were appointed as Reporters for the revision of the section); Peter N. Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857, 858, 858 n.6 (1993) (urging Virginia to recognize a strict liability remedy in tort action modeled after Professors Henderson and Twerski's proposed revisions to § 402A).

5. Requirements of a prima facie case for negligent product liability include: a breach of duty on the part of the manufacturer or seller toward the person complaining of the defect; an injury to the person whom that duty is owed proximately caused by the breach of duty on the part of the seller/manufacturer; that the product was defective; and that the seller/manufacturer's acts or omissions regarding the product was causally related to the harm. See *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 969 n.3 (Ala. 1985) (quoting David G. Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267, 270). Epstein stated that: “The basic elements of negligence in a products liability case are the same as those in any tort litigation: duty, breach of duty, cause in fact, proximate or legal cause, and damages.” *Id.*; see also *Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570, 1573 (S.D. Fla. 1992) (“A prima facie case of products liability negligence, similar to an action for common law negligence, requires some evidence that the defendant breached a duty which actually and proximately caused plaintiff's injury.”); *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440, 440-43 (N.Y. 1980) (holding that a manufacturer may not be held liable for defects caused by subsequent modifications to the product that were beyond the manufacturer's control). The prima facie case for strict products liability include the following: the defective and unreasonably dangerous condition of the product and a causal connection (cause in fact and proximate cause) between the defect and the plaintiff's injuries. Additionally, plaintiff must show that the defect existed at the time that the product left manufacturer/seller's control and that it reached the user or consumer substantially unchanged. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962) (ruling that “[A] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspec-

theory-of-liability issue hinges upon two major sub-issues: (1) the extent to which the risk-benefit test is used as a means of determining whether a product is unreasonably dangerous;⁶ and (2) the relationship between strict liability and proximate cause.⁷ This Article focuses on the second issue.

It is the thesis of this Article that proximate cause should not be included as an element of a strict products liability cause of action. At first, this thesis may appear contrary to the fundamental doctrine that liability must be limited to foreseeable harm. Further explanation, however, demonstrates that other elements of the products liability cause of action already limit liability. The strict products liability cause of action necessarily excludes proximate cause as a separate element of proof.

This Article first discusses the background surrounding the efforts to redraft section 402A. Next, this Article discusses historical and theoretical points about proximate cause that illustrate the difficulty of including the doctrine as an element of the strict products liability cause of action. Then, this Article analyzes how the courts, legislatures, and section 402A have dealt with proximate cause in the strict products liability context. Finally, this Article suggests that the exclusion of the proximate cause

tion for defects, proves to have a defect that causes injury to a human being"). In *Giglio v. Connecticut Light & Power Co.*, 429 A.2d 486, 488 (Conn. 1980), the court declared:

In order to recover under the doctrine of strict liability in tort the plaintiff must prove that: (1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in condition.

Id. Furthermore, in *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974), the court explained:

[The plaintiff] must prove that: 1) the product in question was defective; 2) the defect existed at the time the products left the hands of the defendant; 3) that because of the defect the product was unreasonably dangerous to the user or consumer (plaintiff); 4) that the consumer was injured or suffered damages; 5) and that the defect (if proved) was the proximate cause of the injuries suffered.

Id. (quoting *Gravis v. Parke-Davis & Co.*, 502 S.W. 2d 863, 868 (Tex. Civ. App. 1973)).

6. See *infra* note 21 and accompanying text (discussing the risk-benefit test in greater detail).

7. Proximate cause is a statement of policy whereby the courts can place limitations upon the actor's responsibility for the consequences of his conduct. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 41-42 (5th ed. 1984). "[L]egal responsibility must be limited to those causes which are so closely connected with the result . . . that the law is justified in imposing liability." *Id.* Cause in fact deals with the physical connection between the defendant's act and the plaintiff's injury. *Id.* Plaintiff must show that the defendant caused the harm that was the but for cause of plaintiff's injury. *Id.*

requirement is the only viable way of preserving a products liability cause of action grounded in strict liability.

I. EARLY VIEWS, THE HISTORY OF LIABILITY, AND THE PARAMETERS OF THE CURRENT DEBATE

For the second time in its young life, the strict products liability cause of action is entering a critical phase, with the American Law Institute's (A.L.I.) Restatement of Torts again playing an important role. The first critical phase occurred during the early 1960s, when the A.L.I. drafted, debated, and ultimately published section 402A of the Restatement (Second) of Torts.⁸ This section charts the birth and infancy of the strict products liability cause of action.⁹

A turbulent period of development saw a basic consensus emerge on certain fundamental points, such as the need for separate causes of action for manufacturing defect and design defect.¹⁰ Other issues,

8. Section 402A was drafted by the A.L.I. to assist consumers in recovering claims against manufacturers for defective products. The section established a cause of action under a theory of strict liability, which did not require proof of the manufacturer's fault. It also enabled a consumer to pursue this theory without privity of contract, which was required under the warranty theory. See, e.g., Oscar S. Gray, *Reflections On The Historical Context Of Section 402A*, 10 *TOURO L. REV.* 75, 85-87 (1993) (noting that § 402A was drafted to make clear that a manufacturer could be held strictly liable, even without a finding of fault, for products causing harm because of unmerchantable qualities); Henderson & Twerski, *supra* note 2, at 1515 ("In the early 1960s, American courts came to recognize that a seller of any product containing a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action."); Prosser, *supra* note 2, at 791-97 (noting how rapidly the states recognized strict liability without negligence in the wake of bedrock cases in the early 1960s); Aaron Twerski, *From a Reporter's Perspective: A Proposed Agenda*, 10 *TOURO L. REV.* 5, 9-11 (1993) (noting that § 402A sought to eliminate privity from products liability law).

9. Twerski, *supra* note 8, at 9-11.

10. See *RESTATEMENT (SECOND) OF TORTS* § 402A (1965); KEETON ET AL., *supra* note 7, at §§ 95-96 (discussing two types of product conditions that can result in loss to a purchaser); Sheila L. Birnbaum and Barbara Wrubel, "State of the Art" and Strict Products Liability, 21 *TORT AND INS. L.J.* 30, 30 (1985) ("Traditionally, three categories of product defect have been recognized as providing a basis for the imposition of liability upon manufacturers and sellers: defect in manufacture, defect in design, and defect by reason of the absence or inadequacy of a warning."); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 *VAND. L. REV.* 593, 599-600 (1980) (discussing the problems of applying the defect concept to the two distinct factual situations that characterize manufacturing and design defect cases); John L. Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 *HASTINGS L.J.* 529, 534-35 (1982) (stating that determining what is a design defect has proven difficult); David A. Fischer, *Products Liability — The Meaning of Defect*, 39 *MO. L. REV.* 339, 343 (1974) (contrasting manufacturing defect with "unavoidably unsafe" product defect and proposing to include different standards of liability for manufacturing and design, and warning defects, in revisions to § 402A); *Id.* at 340-42 (noting that § 402A distin-

however, have remained unresolved for decades. Contrasting views abound regarding whether separate actions ought to exist for design defect and failure-to-warn,¹¹ the appropriate use of the consumer expectation and risk-benefit tests,¹² the appropriate role of plaintiff misuse,¹³ and the appropriate use of expert testimony.¹⁴ Most recently,

guishes between manufacturing and design defect through its definition of defect); Henderson & Twerski, *supra* note 2, at 1514-16 (proposing to include different standards of liability for manufacturing, design, and warning defects in revisions to § 402A); Twerski, *supra* note 8, at 10 n.22 (defining manufacturing defect as "an abnormality or a condition that was unintended, and makes the product more dangerous than it would have been as intended").

11. See, e.g., Henderson & Twerski, *supra* note 2, at 1532-33 (advocating the use of a reasonableness standard for liability in design defect and failure-to-warn cases); Dix W. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 260-61 (1969) (noting that plaintiffs often pursue failure-to-warn claims because juries are better able to understand and detect the need for better product directions and warnings than to identify a technical flaw in a product's design); Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 501 & n.22 (1976) (contending that the courts' tendency to consider both design defect and failure-to-warn grounds for strict products liability is tantamount to a very thorough consideration of design defect); Phillips, *supra* note 4, at 246-48 (criticizing the Reporters' attempt to articulate bright line standards for failure-to-warn claims).

12. See, e.g., Henderson & Twerski, *supra* note 2, at 1532-34 (arguing that consumer expectations are one factor to consider in undertaking a "risk-utility" analysis); Twerski, *supra* note 8, at 13-14 (arguing that design defect cases are best analyzed using the "risk-utility" rather than the "consumer expectation" test); W. Page Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 588-96 (1980) (advocating abandonment of the "consumer expectation test" and adoption of the "risk-utility" test).

13. See, e.g., *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 546 (Iowa 1980) (rejecting plaintiff misuse as an affirmative defense and noting that the issue will be considered in connection with the plaintiff's burden of proving an "unreasonably dangerous condition" and causation); cf. *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 355 (Md. 1985) (declaring that plaintiff misuse may bar recovery where it is the sole proximate cause or the intervening superseding cause); *Moran v. Faberge, Inc.*, 332 A.2d 11, 21 (Md. 1975) (declaring that plaintiff misuse may bar a recovery if plaintiff is guilty of contributory negligence); Peter Zablotsky, *The Appropriate Role of Plaintiff Misuse of Products Liability Causes of Action*, 10 Touro L. REV. 183, 209 (1993) (arguing that the Restatement should adopt the majority view that plaintiff misuse should be treated as an affirmative defense).

14. See, e.g., Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 578 (1986) (exploring the issues associated with the proliferation of expert testimony in modern litigation under Federal Rule of Evidence 703); William A. Donaher et al., *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303 (1974) (arguing that "[i]n strict products liability litigation the role of the technologist is pivotal"); Barry M. Epstein and Marc S. Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 656 (1987) (describing the problems arising from the paramount role that experts play in products liability litigation and what measures the courts can take to temper any abuse from expert testimony); Gerard Harrison, Comment, *Liars, Damn Liars, and Expert Witnesses: Unhelpful Approaches to Unreliable Scientific Testimony in the Third and Fifth Circuits*, 29 HOUS. L. REV. 1029, 1057 (1992) (arguing that Federal Rules of Evidence 702 and 703 provide superior gui-

debate has focused on the fundamental nature of strict products liability.¹⁵

The second critical phase resulted from the A.L.I.'s initiation of a re-drafting process to respond to the controversies created by section 402A.¹⁶ If the history surrounding the existing version of section 402A is any guide, the re-drafted version will determine whether the cause of action for strict products liability survives to adulthood and, if so, what the nature and character of the mature cause of action will be.

Consequently, the current re-drafting process presents a unique opportunity to resolve what is arguably the major issue concerning strict products liability: whether the cause of action for products liability should be grounded in strict liability or negligence. Some commentators believe, for reasons of jurisprudence and economics, that all products liability causes of action should lie in negligence.¹⁷ Other legal commentators believe that at least two of the three types of strict products liability causes of action, those for design defect and failure to warn, should, or for all practical purposes already do, reside in negligence.¹⁸ This author joins a

dance for the admissibility of novel scientific evidence than the doctrines adopted by the Third and Fifth Circuits).

15. See, e.g., Birnbaum, *supra* note 10, at 649 ("calling a theory of liability based on a duty of due care and a standard of reasonable conduct anything other than negligence is pure sophistry."); Henderson & Twerski, *supra* note 2, at 1530-32 (declining to take a position on whether design and warning defects are governed by strict liability); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14 (1965) ("In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe."); Twerski, *supra* note 8, at 12 n.29 (1993) (quoting Henderson & Twerski, *supra* note 2, at 1532, which argues that strict products liability should not be distinguished as doctrinally separate from negligence).

16. See *infra* note 21 and accompanying text; see also Henderson & Twerski, *supra* note 2, at 1513 (proposing a revision of Section 402A); M. Stuart Madden, *Strict Products Liability Under Restatement (Second) of Torts § 402A: "Don't Throw the Baby Out With the Bathwater,"* 10 TOURO L. REV. 123, 124-25 (1993) (recommending that the § 402A revision process should continue to include uniform interpretation of seller liability concerning product defects); Jerry Phillips, *The Proposed Products Liability Restatement: A Misguided Revision*, 10 TOURO L. REV. 151, 181-82 (1993) (warning that the proposed revisions should not move towards a negligence standard); Vargo, *supra* note 4, at 23 (criticizing the proposed revision process as a return to negligence).

17. E.g., William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 639-41 (commenting that current products liability law is flawed); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992) (documenting the "downfall of strict products liability").

18. See, e.g., Birnbaum, *supra* note 10, at 648; Henderson & Twerski, *supra* note 2, at 1530-32; 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, 271-78 (1990) (noting that in design and warning cases it is not easy to find a difference between negligence and strict liability).

third group of commentators who believe that strict liability has always been, and continues to be, the appropriate theory of liability for all products liability causes of action.¹⁹

The debate over the theory of liability permeates the discussion of many other issues surrounding strict products liability. This attests to the central nature of the liability issue. Following the maxim that "the whole is equal to the sum of its parts," the resolution of enough sub-issues in favor of either strict liability or negligence ultimately will carry the major issue, along with the entire products liability cause of action, in that direction as well.

The debate over the risk-benefit and consumer expectation tests illustrates this point. Despite the similarity between a risk-benefit test and a simple negligence analysis,²⁰ some argue that a risk-benefit test is the only relevant test for evaluating a design defect cause of action.²¹ Others

19. See, e.g., Madden, *supra* note 16, at 147-49; Phillips, *supra* note 16, at 180-82 (stating that it would be mistake to try to return to negligence principles in these cases); Vargo, *supra* note 4, at 24 (declaring that "[t]here are good reasons why strict liability should be the rule").

20. See *Raney v. Honeywell, Inc.*, 540 F.2d 932, 935 (8th Cir. 1976) (noting that the question is whether the risk was "unreasonable"); *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973) (balancing the likelihood and gravity of the harm against the burden of taking precautions to avoid the harm); *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978) ("Proof of unreasonableness involves a balancing process . . . [of] the utility of the product [against] . . . the risk of its use."); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 850-51 (Tex. 1979) (stating that "unreasonable danger" necessarily involves balancing a product's utility against the danger); *Birnbaum*, *supra* note 10, at 605 n.54 (citing numerous cases supporting this proposition); *Donaher et. al*, *supra* note 14, at 1307 ("The unreasonable danger question, then, is posed in terms of whether, given the risks and benefits of and possible alternatives to the product, we as a society will live with it in its existing state or will require an altered, less dangerous form."); James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991) ("Risk-utility, without doubt, will emerge victorious as the liability standard in generic [design] defect cases"); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830 (1973).

21. As of this writing, Tentative Draft No. 2 has adopted this approach. Section 2 of the Draft takes the position that the risk-benefits test should be controlling, and the consumer expectation test eliminated as a separate test for product defect. See Tentative Draft No. 2, *supra* note 3, at 50-83.

This approach is clearly against the weight of a significant majority of relevant cases. Specifically, 20 jurisdictions define design defect by almost exclusive reference to the consumer expectations test. ARK. CODE ANN. § 16-116-102 (Michie 1987) (defining "unreasonably dangerous" in terms of consumer expectations); IND. CODE ANN. § 33-1-1.5-2.5 (Burns 1992) (providing that a product is defective if it is (1) in a condition not contemplated by a reasonable consumer, and (2) unreasonably dangerous); N.D. CENT. CODE § 28-01.1-05 (1991) (defining "unreasonably dangerous" in terms of an ordinary and reasonable consumer's contemplation of the products characteristics, risks, and benefits); S.C. CODE ANN. §§ 15-73-10, 15-73-30 (Law. Co-op. 1991) (establishing liability for sale of

product in a "defective condition unreasonably dangerous" to consumers, and adopting the comments to § 402A); TENN. CODE ANN. § 29-28-102(8) (1980) (defining "unreasonably dangerous" in terms of consumer expectations). The following cases adopt the consumer expectation test in a variety of situations. See *Hull v. Eaton Corp.*, 825 F.2d 448, 454 (D.C. Cir. 1987) (applying Maryland risk-utility balancing sheet to a strict liability claim involving a forklift because the District of Columbia did not have a case setting out the element of products liability); *Casrell v. Altec Indus.*, 335 So. 2d 128, 133 (Ala. 1976) (uninsulated telescopic truck arm); *Giglio v. Connecticut Light & Power Co.*, 429 A.2d 486, 487-88 (Conn. 1980) (defective home furnace); *Slepski v. Williams Ford, Inc.*, 364 A.2d 175, 178 (Conn. 1975) (unreasonably dangerous automobile wheel suspension); *Rojas v. Lindsay Mfg. Co.*, 701 P.2d 210, 210-12 (Idaho 1985) (drive shaft of an irrigation system); *Aller v. Rodgers Machinery Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978) (applying the balancing test in the case of a defective saw manufactured by defendant); *Barnes v. Vega Indus.*, 676 P.2d 761, 762-63 (Kan. 1984) (firestop spacer in metal chimney); *Lester v. Magic Chef, Inc.*, 641 P.2d 353, 354, 359-61 (Kan. 1982) (gas stove for mobile home); *Miles Labs. v. Doe*, 556 A.2d 1107, 1112-13 (Md. 1989) (HIV-contaminated blood); *Phipps v. General Motors Corp.*, 363 A.2d 955, 956, 959 (Md. 1976) (automobile accelerator mechanism); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 68-69 (Neb. 1987) (guillotine metal scrap shear); *Kohler v. Ford Motor Co.*, 191 N.W.2d 601, 607 (Neb. 1971) (automobile steering sector gear); *Ginnis v. Mapes Hotel Corp.*, 470 P.2d 135, 138 (Nev. 1970) (automatic hotel door); *Skyhook Corp. v. Jasper*, 560 P.2d 934, 937-38 (N.M. 1977) (uninsulated construction crane electrocuted the operator); *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988) (tractor trailer with no method for determining gas level in tanks); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362-63 (Okla. 1974) (automobile seat support); *Ewen v. McLean Trucking Co.*, 706 P.2d 929, 934 (Or. 1985) (truck design with blind spot); *Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp.*, 596 A.2d 845, 847 (Pa. Super. 1991) (alcoholic beverage); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 779 (R.I. 1988) (the drug DES); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 261-63 (R.I. 1971) (home stove); *Vincer v. Esther William All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 798 (Wis. 1975) (lack of latch on pool gate); *Arbet v. Gussarson*, 225 N.W.2d 431, 435 (Wis. 1975) (location of automobile gas tank).

Four jurisdictions define design defect by almost exclusive reference to the risk-utility test. *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 587-88 (La. 1980) (department store escalator); *Prather v. Caterpillar Tractor Co.*, 526 So. 2d 1325, 1326, 1330-31 (La. Ct. App.) (excavator ingress and egress system), *cert. denied*, 531 So. 2d 272 (La. 1988); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1284-85 (Me. 1988) (chain saw); *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1146, 1148 (Me. 1983) (fall from a mobile home); *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252-56 (Miss. 1993) (combine); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 845-46 (N.H. 1978) (power lawn mower).

Finally, 13 jurisdictions define design defect by using both the consumer expectations test and the risk-utility test. N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1993) (establishing consumer recognition of product's potential harmfulness as a defense to products liability action for design defect, but refusing to allow the defense where danger posed by product could be eliminated without impairing product's usefulness); WASH. REV. CODE ANN. § 7.72.030(1)(a)&(3) (West 1992) (establishing manufacturer liability for design defects by reference to risk-benefit test, but directing trier of fact to consider consumer expectations in determining whether product was not reasonably safe); *Birchfield v. International Harvester Co.*, 726 F.2d 1131, 1136 (6th Cir. 1984) (applying Ohio law, court held either test applicable to a front end loader that did not have a protective guard); see, e.g., *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992) (holding that both the consumer, in this case a physician expectation test and risk-utility test applicable in evaluating drug design); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 884-86 (Alaska 1979) (finding either test applicable in evaluating the design of a front end loader); *Dart v. Wiebe Mfg.*, 709 P.2d

argue that the consumer expectation test still should play a significant role.²² Clearly, the consumer expectation test places far less emphasis on the reasonableness of the product design and, therefore, is significantly less similar to a negligence analysis. Thus, depending on the prominence the risk-benefit test is given, the theory-of-liability issue can be decided without even being articulated.

876, 882 (Ariz. 1985) (declaring preference for consumer expectations test, but allowing risk-utility test where it was impossible to evaluate consumer expectations of an industrial paper shredder); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454-56 (Cal. 1978) (adopting two-pronged approach in which either test could be used to evaluate forklift design); *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1244-48 (Colo. 1987) (reasoning that an integrated consumer expectations-risk-benefit test was appropriate to evaluate the motorcycle design because the technical nature of the evidence precluded total reliance on the consumer expectations test), *cert. dismissed*, 485 U.S. 901 (1988); *Hobart Corp. v. Siegle*, 600 So. 2d 503, 504-05 (Fla. Dist. Ct. App.) (approving instructions for jury to apply an integrated consumer expectations test to evaluate food grinder design), *review denied*, 606 So. 2d 1165 (Fla. 1992); *Masaki v. General Motors Corp.*, 780 P.2d 566, 579 (approving an instruction allowing the jury to apply either test to evaluate van design), *recons. denied*, 833 P.2d 899 (Haw. 1989); *Besse v. Deere & Co.*, 604 N.E.2d 998, 1001 (Ill. App. Ct. 1992) (declaring that an integrated consumer expectations/risk-utility test is applicable to evaluate a corn combine design), *appeal denied*, 612 N.E.2d 511 (Ill. 1993); *Scoby v. Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. Ct. 1991) (noting the general applicability of either test, but holding that only the consumer expectations test was applicable to evaluate deep fat fryer); *Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 433 (Ky. 1980) (holding that consumer expectations test and other factors were applicable to evaluate design of flammable T-shirt); *Johansen v. Makita U.S.A., Inc.*, 607 A.2d 637, 642-43 (N.J. 1992) (listing consumer expectations as a factor to be considered in application of the risk-utility test to power miter saw); *Dewey v. R. J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1252-55 (N.J. 1990) (combining both tests to harms incurred from cigarettes prior to enactment of relevant statute, but affirming the lower court's decision to proceed under risk-utility analysis); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 207-09 (N.Y. 1983) (applying the integrated test to circular saw design); *Fallon v. Clifford B. Hannay & Son, Inc.*, 550 N.Y.S.2d 135 (App. Div. 1989) (applying integrated test to hose reel design); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 818 (Ohio) (holding either test applicable to evaluate design of industrial press without safety guard), *cert. denied sub nom.*, *Cincinnati Milacron Chems. v. Blankenship*, 459 U.S. 857 (1982); *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 786 (Tex. 1988) (concurring opinion) (finding consumer expectations test applicable to design of utility wire); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 583 (Tex. Ct. App. 1987) (finding consumer expectations test applicable to alcoholic beverage); *Falk v. Keene Corp.*, 782 P.2d 974, 980 (Wash. 1989) (holding either test applicable to asbestos).

The risk-benefit/consumer expectations issue is not the focus of this article. Commentators who have written exhaustively on the subject have concluded that the consumer expectation test is the preferred method of achieving strict liability. Phillips, *supra* note 16, at 168-70 (commenting that the consumer expectations test is easier for a juror to grasp); Vargo, *supra* note 4, at 26 (stating that the consumer expectations test is the most popular). In addition, the authority cited in Tentative Draft No. 2 that supports applying the risk-benefit test has been criticized. See, e.g., Roland F. Banks & Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 413-14 (1993).

22. See *supra* note 21 and accompanying text.

An equally significant sub-issue affected by the theory-of-liability issue centers on the role that proximate cause plays in products liability actions. Though this role has received far less discussion than other issues surrounding section 402A, the expansion of the relationship between proximate cause and products liability actions is equally capable of ultimately deciding the theory of liability issue for products liability actions in general.

II. THE INEXTRICABLE CONNECTION OF THE DOCTRINE OF PROXIMATE CAUSE TO NEGLIGENCE

Whether viewed from either a historical or theoretical perspective, the American tort law doctrine of proximate cause primarily is a negligence doctrine. While this does not necessarily preclude the doctrine's application to strict liability causes of action, it clearly complicates the effort.²³

A. A Historical Perspective

The doctrine of proximate cause was introduced into, and developed within, American tort law through negligence cases.²⁴ While there are a myriad of ways to illustrate this point, the most direct and efficient method is by reference to the two cornerstone cases, *MacPherson v. Buick Motor Company*²⁵ and *Palsgraf v. Long Island Rail Company*²⁶

23. A number of commentators have written insightfully on the questionable use of foreseeability in strict liability causes of action. See, e.g., ROBERT E. CARTWRIGHT & JERRY J. PHILLIPS, 2 PRODUCTS LIABILITY § 8.17 (1986) ("Foreseeability is a negligence concept—defendant is negligent if he has failed to exercise due care to avoid a foreseeable injury. As a negligence concept, it arguably has no place in strict liability law.")

24. See, e.g., Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1403-17 (1961) [hereinafter *foreseeability*]; Leon Green, *Palsgraf v. Long Island Railroad Company*, 30 COLUM. L. REV. 789, 791 (1930) [hereinafter *Green-Palsgraf*]; William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 1-2 (1953).

25. 111 N.E. 1050 (N.Y. 1916). The plaintiff purchased an automobile manufactured by the defendant. *Id.* at 1051. The automobile subsequently collapsed, throwing the plaintiff from the car and injuring him. *Id.* At trial, the evidence suggested that one of the car's wheels contained defective wood. *Id.* Although the defendant had not manufactured the wheel, the evidence suggested the defendant could have discovered the defect through a reasonable inspection of the wheel. *Id.* The defendant, however, failed to conduct a reasonable inspection of the automobile prior to the sale. *Id.*

26. 162 N.E. 99 (N.Y. 1928). Mrs. Palsgraf, the plaintiff, was a ticketholder who was standing on defendant's railroad platform. *Id.* at 99. Two men ran to catch a train that was departing from the station. *Id.* Despite the movement of the train, one of the men reached the car without incident. *Id.* The other man, carrying a small package wrapped in newspaper, jumped aboard the train, but seemed unsteady as if about to fall. *Id.* A guard on the train reached forward to help him in, and as another guard attempted to steady the man, the package fell onto the tracks. *Id.* Nothing in the appearance of the package alluded to the fireworks contained inside. *Id.* The fireworks exploded when they fell. *Id.*

In two ways, *MacPherson* eloquently crowned the transformation from liability based on privity of contract to liability based on foreseeability.²⁷ First, *MacPherson* defined the concept of duty, not by the contractual relationship between the parties, but by the relationship between the parties as determined by the overall circumstances.²⁸ Second, *MacPherson* defined the concept of breach with reference to disregarding a foreseeable risk, as opposed to referencing the terms of a contract.²⁹ As a result, the modern-day negligence cause of action, which is the unreasonable exposure of another to a foreseeable risk of harm, finally established its solid theoretical underpinnings in *MacPherson*.³⁰

But the task was only half complete, for not all negligence that was the but for cause of an injury warranted the imposition of liability. A limiting principle was required, and the concept of foreseeability, as articulated in *Palsgraf*, provided the solution.

Although the defendant company in *Palsgraf* was negligent, it was not held liable to the particular plaintiff who had suffered injury. At the time, this idea was expressed as the defendant not having breached a duty toward the plaintiff.³¹ Despite casting itself as a discussion of breach,

The shock of the explosion threw down some scales at the other end of the platform and injured the plaintiff. *Id.*

27. KEETON ET AL., *supra* note 7, § 96.

28. "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected." *MacPherson*, 111 N.E. at 1053; see KEETON ET AL., *supra* note 7, § 96.

29. "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else." *MacPherson*, 111 N.E. at 1053; see KEETON ET AL., *supra* note 7, § 96.

30. *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291, 295 (5th Cir. 1962) (recognizing that the *MacPherson* decision is widely accepted in nearly all American courts); *Carter v. Yardley & Co.*, 64 N.E.2d 693, 696-97 (Mass. 1946) (explaining that the reasoning behind *MacPherson* was that the manufacturer of an article assumes responsibility to consumers arising from the manufacturer's affirmative action of putting an item on the market that is likely to affect the interests of another); KEETON ET AL., *supra* note 7, § 96 (stating that *MacPherson* "struck through the fog of the 'general rule' . . . and held the maker liable for negligence"); see Robert M. Davis, *A Re-Examination of the Doctrine of MacPherson v. Buick and its Application and Extension in the State of New York*, 24 FORDHAM L. REV. 204, 205 (1955) (stating that the doctrine proclaimed in *MacPherson v. Buick* recognized a tendency to impose liability for personal injury caused by negligently manufactured articles despite a lack of privity of contract); see also Keeton, *supra* note 12, at 581-82 (recognizing the uniqueness of the *MacPherson* decision); Dix W. Noel, *Manufacturer's Liability for Negligence*, 33 TENN. L. REV. 444, 444 (1966) (stating that "Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.* still is recognized as the leading one in the field").

31. *Palsgraf v. Long Island Rail Co.*, 162 N.E. 99 (N.Y. 1928). "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all." *Id.*

Palsgraf represents result-within-the-risk based proximate cause.³² Employing the nomenclature of the subsequent result-within-the-risk language, *Palsgraf* held that the defendant was not liable for the plaintiff's injuries because such injuries were not within the risk created by the defendant's negligence. In essence, the defendant's negligence was not the proximate cause of the plaintiff's injuries.³³

Since the reinterpretation of *Palsgraf*, result-within-the-risk based proximate cause has been subdivided further into three categories: person-within-the-risk,³⁴ manner-within-the-risk,³⁵ and type-within-the-

32. See *Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1124-25 (8th Cir. 1990) (imposing liability if defendant owed a duty to plaintiff); *Hegyes v. Unjian Enterprises, Inc.*, 286 Cal. Rptr. 85, 101 (Ct. App. 1991) (limiting liability for negligence to the area of foreseeable plaintiffs); *Green*, *supra* note 24, at 789-91; *KEETON ET AL.*, *supra* note 7, § 43 (explaining that there is no negligence if the injury could not reasonably have been foreseen from the conduct); *Prosser*, *supra* note 24, at 19 (declaring that foreseeability of risk can be defined broadly to impose liability).

33. *KEETON ET AL.*, *supra* note 7, § 43 (stating that if one cannot reasonably foresee the possibility of harm as a result of one's conduct, no liability is imposed); *Dartez v. City of Sulphur*, 179 So. 2d 482, 484 (La. Ct. App. 1965) (stating that "the risk of injury encountered by the plaintiff was not within the scope of protection afforded by the duty so breached, and therefore the defendant's negligence was not a legal cause of the plaintiff's injuries"). The Pennsylvania Supreme Court, in *Dahlstrom v. Shrum*, 84 A.2d 289, 292 (Pa. 1951), stated:

a reasonable man, under the present circumstances, could not foresee that anyone standing in the street behind the bus would be injured by an object struck by defendant's car. Plaintiff was clearly outside the orbit of risk and therefore no right of plaintiff was invaded and defendant breached no duty which he owed to plaintiff.

Id.; see also *Oehler v. Davis*, 298 A.2d 895, 898 (Pa. Super. 1972) (imposing no liability because the breach of duty had no legal connection to the resulting harm).

34. See, e.g., *Drames v. Sun River Inv., S.A.*, 820 F. Supp. 209, 216 (E.D. Pa. 1993) (stating that liability for harm is imposed only if defendant's conduct creates a recognizable risk of harm to a plaintiff or a particular class of persons of which the plaintiff is a member), *aff'd*, 17 F.3d 1429 (3d Cir. 1994); *Dahlstrom*, 84 A.2d at 291-92 (ruling that it was not foreseeable that the defendant's car would strike decedent, who crossed the street behind a bus, and also that it was not foreseeable that the decedent's body would strike the plaintiff causing injuries; consequently, no liability was imposed).

35. *Rikstad v. Holmberg*, 456 P.2d 355, 358 (Wash. 1969) (stating that if the result of the act was within the foreseeable scope of risks arising from defendant's duty then liability is imposed regardless of whether the risk the defendant creates culminates in harm through an unusual manner); see *Munsey v. Webb*, 231 U.S. 150, 156 (1913) (declaring that "[i]t was not necessary that the defendant should have had notice of the particular method in which an accident would occur"); *Katz v. Swift & Co.*, 276 F.2d 905, 906 (2d Cir. 1960) (finding an injury foreseeable and concluding that it was "not necessary that defendant should have been able to anticipate the particular chain of events that would result in injury in order to be held liable"); *Ventricelli v. Kinney Sys. Rent a Car, Inc.*, 383 N.E.2d 1149, 1150 (N.Y. 1978) (holding it was not foreseeable that a defective trunk lid would cause plaintiff to be hit by a car; consequently, no liability was imposed).

risk.³⁶ This categorizing focuses exactly on what must be foreseeable, and thereby on the scope and limits of the defendant's liability. The result is an overall doctrinal development of proximate cause that is sophisticated, detailed, useful, and substantially derived from negligence cases.

B. *The Theoretical Perspective*

It is not just the historical baggage of negligence that questions the applicability of proximate cause to strict liability. Negligence and proximate cause are so inextricably interwoven on a theoretical level that performing a negligence analysis has become a de facto prerequisite for performing a proximate cause analysis.

Traditionally, negligence has been defined as a breach of duty.³⁷ To determine if the defendant's conduct constitutes a breach, courts generally consider two elements: whether the defendant took a foreseeable risk, and what alternative courses of conduct were available to the defendant. A breach is established if the reasonable person would have foreseen the risk and chosen an alternative course of conduct.³⁸

Assuming that the plaintiff's injuries would not have occurred but for the defendant's conduct, the plaintiff's final burden is to show that the breach of duty is the proximate cause of the plaintiff's injury.³⁹ With result-within-the-risk based proximate cause, this amounts to a comparison of the risk that made the defendant's conduct a breach of duty in the first place with the several aspects of the plaintiff's resulting injury.⁴⁰ Specifically, the subdivisions of the result-within-the-risk based category of proximate cause serve to limit a negligent defendant's liability. The person-within-the-risk approach focuses on whether it was foreseeable that the person who was injured was subject to the risk that made the defendant's conduct a breach of duty in the first place.⁴¹ The manner-within-

36. 36. See *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 105 (2d Cir. 1954) (explaining that "where an article is not inherently dangerous in its normal or intended use neither its manufacturer nor vendor is liable for a result which is brought about by its subjection to unusual and extraordinary conditions"), *cert. denied*, 349 U.S. 923 (1955); *Beickert v. G.M. Labs.*, 151 N.E. 195, 196 (N.Y. 1926) (holding that the article causing an injury must be inherently dangerous before plaintiff may recover).

37. *KEETON ET AL.*, *supra* note 7, § 30 (defining breach of duty as "[a] failure on the person's part to conform to the standard required").

38. *Id.* §§ 30, 31.

39. *Id.* § 42.

40. *Id.* § 43; *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co., Ltd.*, 1961 App. Cas. 388, 393 (P.C. 1961) (comparing the foreseeability of the risk caused by escaping oil underneath a wharf and the resulting damages caused when it caught fire).

41. See *Tropea v. Shell Oil Co.*, 307 F.2d 757, 766 (2d Cir. 1962) (holding that the burn sustained by the plaintiff when an employee of the defendant washed a gasoline mixture down the drain of a filling station was within the risk that the defendant's employee had a

the-risk approach focuses on whether the way in which the injury occurred was foreseeable at the time the risk was taken.⁴² Finally, the type-within-the-risk approach focuses on whether the type of harm suffered was foreseeable at the time the risk was taken.⁴³

From this perspective, the *Palsgraf* court's refusal to impose liability on the defendant could be expressed as a failure to show that either a duty to the plaintiff was breached or that the plaintiff was a person-within-the-risk of the breach of duty. Additionally, the plaintiff in *Palsgraf* arguably was not injured in a foreseeable manner, nor was the type of injury suffered foreseeable at the time of the negligent action.

Applying this proximate cause analysis to strict products liability creates a significant theoretical problem: what should be compared to the plaintiff's resultant injury due to a defective product. The injury cannot simply be compared to the defendant's risk-creating conduct because that would amount to a negligence analysis. One answer is that result-within-the-risk based proximate cause should be integrated into the realm of strict products liability by comparing the plaintiff's injury to the risk the unreasonably dangerous product creates.⁴⁴ Applying this approach to the subdivisions of proximate cause, the person-within-the-risk approach would focus on whether it was foreseeable that the product could have

duty not to create, consequently, liability was imposed); *Ozark Indus. v. Stubbs Transports*, 351 F. Supp. 351, 359 (W.D. Ark. 1972); *Dahlstrom v. Shrum*, 84 A.2d 289, 290 (Pa. 1951) (stating the test as "whether the wrongdoer could have anticipated and foreseen the likelihood of harm to the injured person, resulting from his act"); 38 AM. JUR. 2D *Negligence* § 14 (1989); 65 C.J.S. *Negligence* § 4 (1966).

42. See *Swearngin v. Sears, Roebuck & Co.*, 376 F.2d 637, 642 (10th Cir. 1967) (declaring that "[w]here an act is negligent, it is not necessary, to render it the proximate cause, that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred"); *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980); *Diakolios v. Sears, Roebuck & Co.*, 127 A.2d 603, 605 (Pa. 1956); *Vereb v. Markowitz*, 108 A.2d 774, 777 (Pa. 1954).

43. See *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 786 (Minn. 1977) (harm caused by space heater was foreseeable where the seller was informed of the condition under which the heater was to be used); *Doughty v. Turner Mfg. Co.*, 1964 1 Q.B. 518, 524-25 (C.A. 1963) (imposing no liability because the type of damage resulting from defendant's conduct was unforeseeable).

44. See, e.g., *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1275 n.5 (8th Cir. 1972) (explaining that foreseeability depends upon accumulated experience and observations of a product's usage); *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1196-97 (Alaska 1992) (describing factors, such as the gravity of the danger, that the fact-finder should consider when deciding whether a prescription drug manufacturer has met the burden of proving that the benefits of design outweigh the risk); *Crankshaw v. Piedmont Driving Club, Inc.*, 156 S.E.2d 208, 210 (Ga. Ct. App. 1967) (the defendant's serving of unwholesome food to another person was not the proximate cause of the plaintiff's injuries from the fall); *Richelman v. Kewanee Mach. & Conveyor Co.*, 375 N.E.2d 885, 889 (Ill. App. Ct. 1978) (holding that whether a child's injuries, sustained when the child tripped into a grain auger, were foreseeable, was a question for the jury).

injured the person;⁴⁵ the manner-within-the-risk would focus on whether it was foreseeable that the defective product could inflict an injury in the way the plaintiff was injured;⁴⁶ and the type-within-the-risk approach would focus on whether it was foreseeable that the defective product could inflict the type of injury sustained.⁴⁷

Result-within-the-risk based proximate cause focuses on the product as opposed to conduct and, therefore, superficially maintains the distinction between strict liability and negligence. This framework appears suspect because of the degree of foreseeability it injects into the strict products liability analysis. In addition, this framework is too susceptible to becoming a misdirected analysis of the manufacturer's conduct as he manufactured the product, instead of a proper analysis focusing on the product itself.

This suspicion is confirmed upon examination of the risk-benefits test, the principal test for defining "defective product." Under this test, a product is defective if the risk it creates outweighs the benefits it bestows.⁴⁸ The extent of the risk created is calculated with reference to a number of factors, including any economically and technologically feasible alternatives.⁴⁹

45. See, e.g., *Winnett v. Winnett*, 310 N.E.2d 1, 4 (Ill. 1974) (stating that liability only will be imposed if the plaintiff's conduct "in placing her fingers in the moving screen or belt of the forage wagon was reasonably foreseeable"); *Richelman*, 375 N.E.2d at 888 (reviewing authorities that focus on the foreseeability of an injury).

46. See, e.g., *Katz v. Swift & Co.*, 276 F.2d 905, 906 (2d Cir. 1960) (imposing liability for a butchers' injuries sustained when a rubber band sprang off a shank of lamb and struck the butcher in the eye, because the injury resulted from an improper application of the rubber band and the meat company knew or should have known that such an injury could result); *Swearngin*, 376 F.2d at 642 (submitting to the jury the question of whether the defendant could have reasonably known or foreseen injury suffered by plaintiff when his sunglass lens was shattered and his eye penetrated by a stick thrown from the discharge chute of a lawnmower the defendant sold).

47. See, e.g., *Frey*, 258 N.W.2d at 787 (holding that whether defendant could reasonably foresee that its space heater would be used in a trailer where plaintiffs raised chinchillas and would overheat causing death of the animals was a question properly submitted to the jury).

48. KEETON ET AL., *supra* note 7, § 99.

49. See, e.g., *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410, 414 (Colo. 1986) (listing the factors that may be considered in determining the reasonableness of a product); *Cepeda v. Cumberland Eng'g*, 386 A.2d 816, 827 (N.J. 1978) (recognizing that a factor to consider when determining whether a product is not duly safe is the manufacturer's ability to eliminate the unsafe character of the product without impairing the products utility or incurring too much expense), *overruled on other grounds* by *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979); *Roach v. Kononen*, 525 P.2d 125, 128-29 (Or. 1974) (agreeing that the feasibility of a substitute product meeting the same need but that would not be unsafe is a factor to be considered by the court before submitting a design defect case to the jury); see, e.g., *Henderson & Twerski*, *supra* note 2, at 1512 n.27 (citing Wade,

Clearly, the risk-benefits test is conduct based; it balances the alternatives available to the manufacturer with the risk his conduct created. Comparing the risk of the defective product to the resultant injury suffered by the plaintiff really amounts to a comparison of the manufacturer's conduct with the resultant injury. Thus, by using the risk-benefit test to define product defectiveness on one end, and proximate cause to limit liability for injuries caused by defective products on the other, the strict product liability cause of action is effectively boxed into negligence.

C. A Necessary Perspective

Though the subtleties of the risk-benefit analysis as a means for determining product defectiveness are beyond the scope of this article,⁵⁰ the test will remain in place even in the strict liability cause of action. In any event, it would be inaccurate for any revision of section 402A to deny the significance of the test.⁵¹ Nonetheless, it is undeniable that focusing on the test pushes the liability action toward negligence and that one of the two critical sub-issues, therefore, is being resolved in a way that reduces the chance that the strict liability-based products liability cause of action will survive. It is imperative to the survival of the strict products liability-based cause of action to eliminate proximate cause as a separate component of the product liability cause of action.

At first, such a proposal may seem counterintuitive, as it is a fundamental principle of United States civil law that tort and contract damages be limited to what is reasonably foreseeable.⁵² If eliminating proximate

supra note 20, at 837-38 which lists seven factors to be balanced in determining whether a product is reasonably safe).

50. See *supra* notes 20-21 and accompanying text (detailing the application of risk-benefit analysis in product liability actions).

51. *Id.*

52. *Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1124 (8th Cir. 1990) (imposing no liability because the defendant could not reasonably foresee injury to plaintiff); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir.) (declaring that "the rule of *Hadley v. Baxendale* . . . corresponds to the tort principle that limits liability to the foreseeable consequence of defendant's carelessness"), *cert. denied*, 459 U.S. 1017 (1982); *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 826 (M.D. Pa. 1984) (limiting chemical transporter's liability to the scope of harms that result from abnormally dangerous activities); *Hughes Tool Co. v. United Artists Corp.*, 110 N.Y.S.2d 383, 385 (1952) (stating that "damages for breach of contract shall be such as have resulted directly and naturally from the breach, and were within the contemplation of the parties"), *aff'd*, 110 N.E.2d 884 (N.Y. 1953); *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854) (holding that recovery for damages should be limited to what reasonably could have been foreseen by the parties at the time they formed a contract); see also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.6, at 831 (1973) (noting that in order to recover, the damages claimed must have been within the contemplation of the parties); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.14, at 240 (1990) (stating that "[a] party in breach is not liable

cause in strict products liability constitutes removing foreseeability as a limiting principle, then the proposal will have no impact. The courts overwhelmingly have rejected⁵³ the hindsight approach,⁵⁴ which is the one major theoretical approach that goes furthest toward eliminating the problem offered by foreseeability.

The proposal to eliminate proximate cause as a separate element of the strict products liability cause of action is not at risk of being similarly discounted. This is because foreseeability has penetrated the strict products liability cause of action at many other levels. Even absent a separate proximate cause component, damages will nonetheless be limited to the foreseeable consequences. Thus, the cause of action for strict products liability can be preserved without sacrificing the limits that protect defendants from unforeseeable damages. The next section provides an analysis of how the protection afforded defendants by result-within-the-risk based proximate cause is either unnecessary or already afforded by other burdens placed upon the plaintiff in the strict products liability cause of action.

for damages that the party did not at the time of contracting have reason to foresee as a probable result of the breach"); KEETON ET AL., *supra* note 7, at Ch. 7 (discussing proximate cause); 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* (2d ed. 1990).

53. See *Feldman v. Lederle Lab.*, 479 A.2d 374, 388 (N.J. 1984) (restricting the New Jersey Supreme Court's earlier decision in *Beshada v. Johns-Manville Prods. Corp.* which imputed manufacturer's knowledge to asbestos cases); Andrew T. Berry, *Beshada v. Johns-Manville Products Corp.: Revolution—Or Aberration—In Products Liability Law*, 52 FORDHAM L. REV. 786, 787 (1984) (concluding that *Beshada* was an "unprecedented departure from prior products liability cases" and should be limited to its facts); James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *TOURO L. REV.* 107, 121-22 (1993) (arguing that the hindsight analysis of *Beshada* was bad in that it permitted tort law to be used as social insurance); see also Henderson & Twerski, *supra* note 18, at 274-75 (warning that "liability for unknowable risks is a weed that should not be allowed to take root in the failure-to-warn garden"); Victor E. Schwartz, *The Death of "Super Strict Liability" Common Sense Returns to Tort Law*, 27 *GONZ. L. REV.* 179, 180 (1992) (arguing that hindsight liability will discourage production of goods that consumers want).

54. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 544 (N.J. 1982) (assuming the manufacturer's knowledge that a product was dangerous, even if the manufacturer had no such actual knowledge); Diamond, *supra* note 10, at 540 (explaining that hindsight analysis without exceptions differentiates strict products liability from negligence); see also Wade, *supra* note 20, at 834-35 (arguing that in strict liability actions "the scienter is supplied as a matter of law" even if at time of manufacture, the dangerousness of a product was unknown to the manufacturer); W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 *SYRACUSE L. REV.* 559, 568 (1969); see generally John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 *N.Y.U. L. REV.* 734 (1983) (addressing the availability of knowledge to the manufacturer of a product's safety and any potential liability).

III. THE RELATIONSHIP OF RESULT-WITHIN-THE-RISK BASED PROXIMATE CAUSE TO THE STRICT PRODUCTS LIABILITY CAUSE OF ACTION

A. *Person-Within-the-Risk*

It always has been possible to group strict products liability plaintiffs into one of several categories: one in privity with the seller,⁵⁵ user or consumer,⁵⁶ or bystander.⁵⁷ Over the years, several rules have emerged that reflect the policy decisions regarding whether a category of plaintiffs was foreseeable from the defendant manufacturer's point of view.⁵⁸ Due to these developments, applying the person-within-the-risk category of result-within-the-risk based proximate cause now involves little more than classifying the plaintiff as a member of one of the foreseeable categories.

Regarding plaintiffs in privity of contract with the seller, Comment 1 to section 402A states clearly that such classification is irrelevant to bringing a strict products liability cause of action.⁵⁹ Using language that is intended to be inclusive, the Comment specifically states that those who have not acquired the product directly from the seller (as well as those who have) can bring a strict products liability action.⁶⁰ In effect, the Restatement simply tracks the doctrinal developments away from privity and toward foreseeability.⁶¹ The relevant portion of Comment 1 affirms

55. See *supra* notes 27-30 and accompanying text (marking the change from liability based on priority of contract to liability based on foreseeability).

56. The terms "user" or "consumer" of a product are applied in a very broad sense when arguing about strict liability. *KEETON ET AL.*, *supra* note 7, § 100; see, e.g., *Thompson v. Reedman*, 199 F. Supp. 120, 121-23 (E.D. Pa. 1961) (holding that passengers in automobiles were users); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31, 32-33 (S.D.N.Y. 1959) (holding passengers in airplanes were users); *Connolly v. Hagi*, 188 A.2d 884, 887 (Conn. Super. Ct. 1963) (holding a filling station mechanic doing work on a car was a user); *Graham v. Bottenfield's Inc.*, 269 P.2d 413, 415 (Kan. 1954) (affirming that a customer of a beauty shop was a user).

57. *KEETON ET AL.*, *supra* note 7, § 100 (explaining that a bystander is "one who was making no use at all of [a] product except to be injured by it"); see *Elmore v. American Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969) (holding that the purpose of strict liability in tort was to make the industry responsible for all the foreseeable harm done by its defective products and that the bystander was entitled to as much if not more protection as the consumer); cf. *Mull v. Ford Motor Co.*, 368 F.2d 713, 717 (2d Cir. 1966) (holding that a pedestrian hit by an automobile could not recover in the absence of negligence because he was not within the class of persons the seller sought to reach and pedestrian had not relied in any way upon the seller's implied warranty).

58. See *infra* note 59 and accompanying text.

59. RESTATEMENT (SECOND) OF TORTS § 402 cmt. 1 (1965) (stating that "[i]t is not even necessary that the consumer have purchased the product at all").

60. *Id.*

61. See *supra* notes 27-30 and accompanying text.

that "[t]he liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant."⁶²

The Restatement is equally clear regarding the category of "user or consumer." Section 402A states that sellers of defective products are liable "to the user or consumer."⁶³ Comment I then defines "user or consumer" very broadly to include direct purchasers, indirect purchasers, family members, employees, invitees, and donees of the purchaser, as well as those preparing, ultimately using, passively enjoying, or working on the product.⁶⁴ There is universal agreement that a user or consumer is an appropriate category of plaintiff in a strict products liability cause of action.⁶⁵ In addition, there is also a consensus regarding those situations in which a user should not be allowed to bring a strict liability cause of action, such as the sub-category of sophisticated bulk user.⁶⁶

The only remaining issue is whether strict products liability extends to bystanders. The Restatement expressly left the issue open.⁶⁷ While noting that most courts have not extended recovery to bystanders, the Restatement offers that "[t]here may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded."⁶⁸ Subsequently, many courts have followed this suggestion.⁶⁹

The Illinois cases of *Winnett v. Winnett*⁷⁰ and *Richelman v. Kewanee Machinery and Conveyor Company*⁷¹ provide dramatic illustrations of the conflicting results that can occur depending on whether bystanders

62. RESTATEMENT (SECOND) OF TORTS § 402A cmt. 1 (1965). The text of § 402A incorporates comment I by stating in relevant part: "The rule stated in Subsection (1) applies although . . . the user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.* § 402A(2)(b).

63. *Id.* § 402(A)(1) (stating in relevant part: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer").

64. *Id.* § 402(A) cmt. 1.

65. KEETON ET AL., *supra* note 7, § 100.

66. See, e.g., *Higgins v. E.I. DuPont de Nemours & Co.*, 671 F. Supp. 1055 (D. Md. 1987) (holding that "[t]here is no duty on product suppliers to warn ultimate users . . . of product-related hazards in products supplied in bulk to a knowledgeable user"), *aff'd*, 863 F.2d 1162 (4th Cir. 1988); *Purvis v. PPG Indus.*, 502 So. 2d 714, 722 (Ala. 1987) (discussing the difficulty of warning devices on bulk sale items); *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1456-57 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984).

67. RESTATEMENT (SECOND) OF TORTS § 402A (stating as a caveat that "[t]he Institute expresses no opinion as to whether the rules . . . may not apply . . . to harm to persons other than users or consumers").

68. *Id.* § 402A cmt. O.

69. See *infra* notes 79-82 and accompanying text.

70. 310 N.E.2d 1 (Ill. 1974).

71. 375 N.E.2d 885 (Ill. 1978).

are persons within the risk in strict product liability. Both cases involved children who were injured after a limb became entangled in a piece of farm machinery, and both plaintiffs brought strict liability design defect causes of action based on the design of the guards involved.⁷²

In *Winnett*, the plaintiff argued that foreseeability was inapplicable to strict tort liability, and that, alternatively, the bystander-child was a person-within-the-risk.⁷³ The court rejected both arguments, holding that:

[i]t cannot, in our judgment, fairly be said that a manufacturer should reasonably foresee that a four-year-old child will be permitted to approach an operating farm forage wagon or that the child will be permitted to place her fingers in or on the holes in its moving screen.⁷⁴

The dissent recognized this statement as a negligence-based conclusion, and sought to reduce the impact of foreseeability on the analysis by responding that “the only foreseeability question presented on this record is whether it is reasonably foreseeable that someone might be injured by reason of coming into contact with the inadequately protected and unreasonably dangerous mechanism.”⁷⁵ In effect, the dissenting opinion abolished the distinction between bystander and user, limited the scope of person-within-the-risk, and moved the analysis back toward strict liability.

The *Richelman* case embraced the view of the *Winnett* dissent. In allowing recovery under very similar facts, the majority held that the only question relevant to a person-within-the-risk analysis was whether the machine had the capacity to injure because of its defective design.⁷⁶ The court specifically held that it was irrelevant whether an adult or a child was actually injured.⁷⁷

72. *Winnett*, 310 N.E.2d at 2 (forage wagon conveyor belt); *Richelman*, 375 N.E.2d at 886 (grain auger).

73. *Winnett*, 310 N.E.2d at 3.

74. *Id.* at 5.

75. *Id.* at 6 (Goldenhersh, J., dissenting).

76. *Richelman*, 375 N.E.2d at 888.

77. *Id.* at 889.

Currently, the overwhelming majority of legislatures⁷⁸ and courts⁷⁹ that have dealt with the issue have allowed bystanders to recover if they otherwise satisfy the elements of the cause of action. The reasons generally proffered for allowing bystander recovery include: (1) the fact that the bystander is often the quintessential innocent victim, with no control over the choice, inspection, use, or maintenance of the product;⁸⁰ (2) the fact that protecting bystanders does not impose any additional burden on the manufacturer because the same precautions that protect users or con-

78. See, e.g., CONN. GEN. STAT. ANN. § 52-572m (West 1991) (defining claimant for products liability purposes); IDAHO CODE § [6-1402] 6-1302 (4) (1990) (defining claimant as any person or entity that suffers harm); ILL. REV. STAT. ch. 735, para. 5/13-213(a)(3) (1993); IND. CODE ANN. § 33-1-1.5-2 (Burns 1992 & Supp. 1995); KAN. STAT. ANN. § 60-3302 (c,d) (Supp. 1993); KY. REV. STAT. ANN. §§ 411.300-320 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 9:2800.53 (4) (West 1991) (defining claimant as any person or entity that asserts a claim); MO. ANN. STAT. § 537.760 (Vernon 1988); N.J. STAT. ANN. § 2A:58C-1(b)(1) (West 1987); N.M. STAT. ANN. § 13-1406 (Michie 1995) (providing a jury instruction that places liability on the supplier for injuries to both reasonably foreseeable consumers of the product and persons in the general vicinity when the product is used); OHIO REV. CODE ANN. § 2307.71(A) (Anderson 1995); OR. REV. STAT. § 30.920(3) (1993) (declaring that liability for unreasonably dangerous product must be constructed according to § 402A); TENN. CODE ANN. § 29-28-102(6) (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 (Supp. 1995); WASH. REV. CODE ANN. § 7.72.010(5) (West 1992).

79. See *Elmore v. American Motors Co.*, 451 P.2d 84, 89 (Cal. 1969) (providing protection to bystanders from reasonably foreseeable product defects); *West v. Caterpillar Tractor Co.*, 366 So. 2d 80, 92 (Fla. 1976) (applying strict liability to bystanders within the range of harm); *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 705 (Ky. 1975) (finding no substantial reason for not protecting bystanders from defective products); *Osborne v. International Harvester Co.*, 688 P.2d 390, 397 (Or. Ct. App.) (extending the doctrine of strict liability to bystanders injured by unreasonably dangerous products), *review dismissed*, 691 P.2d 483 (Or. 1984); see also *Wasik v. Borg*, 423 F.2d 44, 47 (2d Cir. 1970); *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 780-81 (N.D. Ind. 1969); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979); *Sullivan v. Green Mfg. Co.*, 575 P.2d 811, 816 (Ariz. Ct. App. 1977); *Cottom v. McGuire Funeral Serv.*, 262 A.2d 807, 809 (D.C. 1970); *Rindlisbaker v. Wilson*, 519 P.2d 421, 428 (Idaho 1974); *Mieher v. Brown*, 278 N.E.2d 869, 874 (Ill. 1972), *rev'd on other grounds*, 301 N.E.2d 307 (Ill. 1973); *Walker v. Clark Equip. Co.*, 320 N.W.2d 561, 562 (Iowa 1982); *Weber v. Fidelity & Casualty Ins. Co.*, 250 So. 2d 754, 755 (La. 1971); *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129, 135 (Mich. 1965); *Coca-Cola Bottling Co. v. Reeves*, 486 So. 2d 374, 378 (Miss. 1986); *Giberson v. Ford Motor Co.*, 504 S.W.2d 8, 11 (Mo. 1974); *Tirrell v. Navistar Int'l, Inc.*, 591 A.2d 643, 649-50 (N.J. Super. Ct. App. Div.), *cert. denied*, 599 A.2d 166 (N.J. 1991); *Codling v. Paglia*, 298 N.E.2d 622, 628 (N.Y. 1973); *Jones v. White Motor Corp.*, 401 N.E.2d 223, 226, 230 (Ohio Ct. App. 1978); *Moss v. Polycoc, Inc.*, 522 P.2d 622, 626 (Okla. 1974); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966); *Russell v. Bishop*, 1986 WL 653 *2, 3 (Tenn. Ct. App. Jan. 7, 1986); *Darryl v. Ford Motor Co.*, 440 S.W. 630, 633 (Tex. 1969); *Howes v. Hansen*, 201 N.W.2d 825, 828 (Wis. 1972).

80. See, e.g., *Elmore*, 451 P.2d at 89; *Weber*, 250 So. 2d at 755; *Reeves*, 486 So. 2d at 378 n.2; *Osborne*, 688 P.2d at 397; *Howes*, 201 N.W.2d at 830-31.

sumers also protect bystanders;⁸¹ and (3) the general notion that bystanders should be protected at least as much as users or consumers.⁸²

Based on the traditional protection afforded users and consumers, along with the more recent development regarding bystanders, the strict products liability cause of action has developed to the point that virtually all potential plaintiffs are qualified to bring an action. Initially, this may seem to deprive defendants of all protection afforded by the person-within-the-risk category of result-within-the-risk based proximate cause. Moreover, notions of foreseeability, person-within-the-risk, and proximate cause usually are not even articulated during the course of debate. Consequently, it is unclear why most authorities and commentators appear willing to impose liability.

This lack of explicit acknowledgement, however, does not hide the fact that everyone is a foreseeable plaintiff from the point of view of defective products and person-within-the-risk. Appropriately, consumers, users, and bystanders recover in strict products liability in an almost endless variety of contexts.⁸³ Even Mrs. Palsgraf herself, the most famous of disappointed bystanders, would surely be considered a person-within-the-risk under a modern strict liability analysis if she had been injured by a defective train or explosive device.

Thus, result-within-the-risk based proximate cause should not be an element of the strict products liability cause of action if it is employed to afford the defendants person-within-the-risk category protection. A realistic assessment of foreseeability and the rules and policies that have flowed therefrom have rendered the protection inapplicable. Theoretically, person-within-the-risk always was available to limit the liability of manufacturers. In virtually all cases, however, liability with respect to person-within-the-risk is appropriate. As such, the person-within-the-risk concept safely can be eliminated as a matter of law.

When person-within-the-risk has been used to protect defendant manufacturers in strict products liability actions, the analysis has been misplaced. For example, in *Kirk v. Michael Reese Hospital & Medical Center*,⁸⁴ a passenger who was injured by a driver who consumed alcohol after taking prescription drugs brought a failure-to-warn claim against the

81. See, e.g., *Embs*, 528 S.W.2d at 705; *Miecher*, 278 N.E.2d at 874; *Moss*, 522 P.2d at 627.

82. *Sills*, 296 F. Supp. at 781; *Green Mfg. Co.*, 575 P.2d at 816; *Cottom*, 262 A.2d at 809; *West*, 336 So. 2d at 92; *Miecher*, 278 N.E.2d at 874; *Giberson*, 504 S.W.2d at 11-12; *Howes*, 210 N.W.2d at 829.

83. See *supra* notes 65-82 and accompanying text.

84. 513 N.E.2d 387 (Ill. 1987), *cert. denied*, 485 U.S. 905 (1988).

drug manufacturer.⁸⁵ In denying recovery, the court stated that the manufacturer could not “have reasonably foreseen that their drugs would be dispensed without warnings by the physicians, that the patient would be discharged from the hospital, drink alcohol, drive a car, lose control of his car, hit a tree, and injure the passenger . . . on the same day.”⁸⁶ Basing this reasoning on the concept of person-within-the-risk clearly is wrong. A passenger, bystander, or anyone or anything on a street is within the risk created by a drug whose manufacturer fails to adequately warn the ingesting consumer that driving or operating heavy machinery should be avoided.

On the other hand, the reasoning could be based on concepts of intervening cause, misuse, or other concepts more generally associated with the manner in which, as opposed to on whom, the injury was inflicted. Such analysis raises the following issue of manner-within-the-risk category of result-within-the-risk based proximate cause.

B. Manner-Within-the-Risk

1. In general

The manner-within-the-risk category of result-within-the-risk based proximate cause focuses on the way the harm occurs. As developed in negligence and applied to the actor's conduct, the precise manner in which negligent conduct will cause harm need not be foreseeable, but harm that occurs in a highly extraordinary way will relieve the negligent actor of liability.⁸⁷ Thus, *Palsgraf* also can be analyzed as a manner-within-the-risk case. From the defendant Long Island Railroad's perspective, injuries could have resulted from its negligent conduct in several ways: a plaintiff could have been pushed down, knocked over, or even forced between cars or under the train; all would have been foreseeable, but the triggering of an explosion knocking a scale onto a distant plaintiff would not be on the list of foreseeable occurrences.

In the strict products liability context, the attempt is made to apply manner-within-the-risk to the way the harm from the defective product occurred. From this perspective, *Winnett* could also be thought of as a

85. *Id.* at 390-91.

86. *Id.* at 394. The plaintiff sought to recover damages on the theory that the manufacturers failed to adequately warn of Thorazine's dangerous propensities, which include diminishing the physical and mental abilities of the user. *Id.* at 391.

87. See RESTATEMENT (SECOND) OF TORTS § 435(1) (1965) (stating that “the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable”); see, e.g., *Derdarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 671 (N.Y. 1980) (noting that “[t]he precise manner of the event need not be anticipated”).

manner-within-the-risk case. Accordingly, the focus is on the fact that the harm occurred because the child intentionally inserted her fingers into the machine, and that this manner could not be foreseen. Most courts have not required that the manner of the injury be foreseen so precisely.⁸⁸ Two arguably extreme examples are provided by *Moran v. Faberge, Inc.*,⁸⁹ and *Green v. Denney*.⁹⁰

In *Moran*, a teenage girl, “[a]pparently . . . at a loss for entertainment,”⁹¹ poured a bottle of the defendant’s Tigress Cologne over a burning candle. The cologne ignited and burned the plaintiff.⁹² The plaintiff argued that the defendant manufacturer should have provided a warning that the cologne was highly flammable.⁹³ The defendant argued that the manner in which the cologne was ignited, and thus the manner in which the harm occurred, was unforeseeable.⁹⁴ In rejecting the defendant’s argument, the court quoted everyone from Cicero to Quinton Ennius, but ultimately settled on the following language from Professor Harper:

[T]he courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if ‘foreseeability’ refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.⁹⁵

88. See, e.g., *Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637, 642 (10th Cir. 1967). The court, quoting *Atherton v. Goodwin*, 180 P.2d 296, 300 (Kan. 1947) stated that:

[w]here an act is negligent, it is not necessary, to render it the proximate cause, that the person committing it could or might have foreseen . . . the particular manner in which it occurred, if by the exercise of reasonable care it might have been foreseen or anticipated that some injury might result.

Id.; see, e.g., *Katz v. Swift & Co.*, 276 F.2d 905, 906 (2d Cir. 1960) (holding that the defendant did not have to anticipate the exact chain of events resulting in injury for liability to be imposed); *Noonan v. Buick Co.*, 211 So. 2d 54, 56 (Fla. Dist. Ct. App. 1968) (finding that foreseeability depended on whether the type of negligent act reasonably could be expected to recur).

89. 332 A.2d 11 (Md. 1975).

90. 742 P.2d 639 (Or. Ct. App. 1987).

91. *Moran*, 332 A.2d at 13.

92. *Id.*

93. *Id.* at 13-14.

94. *Id.* at 14.

95. *Id.* at 19 (quoting HARPER, A TREATISE ON THE LAW OF TORTS § 7 (1933) (emphasis added)).

The *Moran* court concluded that “it was not necessary for a cologne manufacturer to foresee that someone would be hurt when a friend poured its product near the flame of a lit candle.”⁹⁶ Rather, “it was only necessary that it be foreseeable to the producer that its product, while in its normal environment, may be brought near a catalyst” for ignition.⁹⁷

In *Green*, the plaintiff was driving a Ford Pinto when he collided with a horse.⁹⁸ The horse was thrown into the air and landed on the roof of the car.⁹⁹ The roof collapsed and the plaintiff’s wife was killed.¹⁰⁰ The plaintiff sued the manufacturer for defective roof design. The manufacturer made several manner-within-the-risk arguments, including that “the accident was freak and bizarre,”¹⁰¹ and that it was not foreseeable that a collision with a horse or other heavy animal “would produce an impact on the roof concentrated at a particular point rather than being more evenly distributed.”¹⁰² Focusing on the evidence that the roof of the car should have been designed to be stronger, the court rejected these arguments and held that the way the accident occurred was foreseeable.¹⁰³

The rejection of the manufacturer’s manner-within-the-risk arguments in such extreme circumstances minimizes manner-within-the-risk to the point of elimination as an element of the plaintiff’s prima facie strict products liability case. While relieving the plaintiff of this proximate cause burden runs counter to traditional principles regarding the role of proximate cause in the tort context, defendants are afforded ample protection regarding unforeseeable manner by the doctrine of plaintiff misuse. In the products liability context specifically, it has long been established that any unforeseeable misuse of the product by the plaintiff provides the manufacturer with an affirmative defense. That a plaintiff has put a product to an unforeseeable misuse is nearly identical to arguing that the harm occurred in a manner that was unforeseeable. Thus, the manufacturer is relieved of liability upon unforeseeable misuse of the product.¹⁰⁴

96. *Id.* at 20.

97. *Id.*

98. *Green v. Denney*, 742 P.2d 639, 640 (Or. Ct. App. 1987).

99. *Id.*

100. *Id.*

101. *Id.* at 641.

102. *Id.*

103. *Id.* at 642.

104. See KEETON ET AL., *supra* note 7, § 102 (explaining that “the majority American position seems to be that an unforeseeable misuse of a product . . . is a superseding cause”); John F. Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary with an Old Meaning*, 29 MERCER L. REV. 447, 455-59 (1978) (noting abnormal use or misuse are defenses); Zablotzky, *supra* note 13, at 205 (finding that misuse of a product is an affirmative defense for the manufacturer).

Indeed, several courts have recognized and articulated the relationship between unforeseeable misuse and proximate cause. One of the most notable was *Hughes v. Magic Chef, Inc.*¹⁰⁵ The plaintiff in *Hughes* lit only two of three pilot lights on a camping stove and a resulting explosion injured him.¹⁰⁶ The plaintiff argued design defect; the defendant countered with unforeseeable misuse. The court held that:

Misuse of product is no longer to be considered an affirmative defense in products liability actions but is rather to be treated in connection with the plaintiff's burden of proving an unreasonably dangerous condition and legal cause. Regardless of whether a defendant does or does not plead misuse of the product the burden is on the plaintiff to prove that the legal cause of the injury was a product defect which rendered the product unreasonably dangerous in a reasonably foreseeable use.¹⁰⁷

The *Hughes* court correctly analyzed the relationship between misuse and proximate cause, but erred by requiring the plaintiff to bear the burden of proof as to the foreseeability of the accident. To the contrary, it becomes critical at this point to minimize manner-within-the-risk based proximate cause by focusing on misuse rather than proximate cause. Placing the focus on proximate cause and requiring the plaintiff to establish the foreseeability of the accident, in effect, requires the plaintiff to prove that misuse was foreseeable. Thus, this shift turns the affirmative defense of no foreseeable misuse for which the defendant bears the burden, into an element of the prima facie case for which the plaintiff bears the burden.

Two significant problems result from this burden shifting. First, by adding yet another aspect of foreseeability to the plaintiff's prima facie case, the last brick in the wall between strict products liability and negligent products liability crumbles. Second, shifting the burden to the plaintiff is contrary to the law in most jurisdictions. Of the twenty-nine states that specifically have addressed the allocation of the burden regarding foreseeable misuse, seventeen states follow the traditional view by placing the burden on the defendant.¹⁰⁸ As the most recent cases and statutes in

105. 288 N.W.2d 542 (Iowa 1980).

106. *Id.* at 543.

107. *Id.* at 546.

108. The courts in the following cases have expressly held or characterized misuse as an affirmative defense in which the defendant ordinarily bears the burden: *Banner Welders, Inc. v. Knighton*, 425 So. 2d 441, 448 (Ala. 1982) (holding that user's misuse constituted a valid defense under the "extended manufacturer's liability doctrine" where plaintiff sustained injuries while operating a shuttle welder); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46-47 (Alaska 1976) (holding that the defense of comparative negligence extends to misuse in strict liability where plaintiff sustained injuries while riding

a snowmobile); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978) (holding that misuse is a defense to strict liability where plaintiff sustained injuries when she was ejected from a car during a collision); *Nelson v. Caterpillar Tractor Co.*, 694 P.2d 867, 869 (Colo. Ct. App. 1984) (holding that misuse that could not reasonably be anticipated is a valid defense to a strict products liability claim involving plaintiff's operation of a forklift); *Matthews v. F.M.C. Corp.*, 462 A.2d 376, 377-78 (Conn. 1983) (holding the special defense of misuse is available in strict liability where plaintiff sustained injuries when her hand becoming caught in a sandwich machine); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976) (holding that defense of misuse is available as stated in Restatement (Second) of Torts § 402A where plaintiff was run over by a backward moving soil grader); *McBride v. Ford Motor Co.*, 673 P.2d 55, 63 (Idaho 1983) (holding that "misuse . . . is an affirmative defense to a strict liability action" where plaintiff sustained injury while operating a branch chipping machine); *Wells v. Coulter Sales*, 306 N.W.2d 411, 415 (Mich. Ct. App. 1981) (holding that misuse is a proper defense to a products strict liability action where plaintiff was killed while operating a forklift); *Hancock v. Paccar, Inc.*, 283 N.W.2d 25, 37 (Neb. 1979) (holding that misuse is a valid defense to a strict liability action where a deer, and subsequent loss of control of the vehicle, contributed to plaintiff's death when his tractor collided with the median in the road); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978) (holding that product misuse is an affirmative defense to strict liability where plaintiff was injured as a result of his foot becoming caught under a power mower); *Marchese v. Warner Communications*, 670 P.2d 113, 116 (N.M. Ct. App.) (holding misuse or abnormal use of the product are defenses to a strict liability action where plaintiff was killed as a result of driving in the wrong direction at the Malibu Grand Prix race track), *cert. denied*, 669 P.2d 735 (N.M. 1983); *Sheppard v. Charles A. Smith Well Drilling & Water Sys.*, 463 N.Y.S.2d 546, 548 (App. Div. 1983) (holding that the defense of misuse was adopted as stated in RESTATEMENT (SECOND) OF TORTS § 402A, cmt g, where plaintiff was injured as a result of a trolley device snapping); *Davis v. Cincinnati, Inc.*, 610 N.E.2d 496, 497 (Ohio Ct. App. 1991) (holding that unforeseeable misuse is an affirmative defense to be asserted by defendant manufacturer where plaintiff was injured while using a press brake); *Norman v. Fisher Marine, Inc.*, 672 S.W.2d 414, 422 (Tenn. Ct. App. 1984) (holding that jury could be instructed on misuse as an affirmative defense where plaintiff was killed as a result of being thrown from a fishing boat); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1981) (holding that misuse is an affirmative defense to strict liability and should be applied according to comparative principles where plaintiff was injured as a result of standing on a mining winch); *Smith v. Sturm, Ruger & Co.*, 695 P.2d 600, 604 (Wash. Ct. App. 1985) (holding that "[t]he defendant has the burden of proving misuse"); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 862 (W. Va. 1982) (holding that misuse and comparative negligence are affirmative defenses in strict liability where plaintiff's property was damaged as a result of faulty wiring from a clock).

The courts in the following cases have held or recognized, either explicitly or implicitly, that the misuse defense in strict products liability cases is not an affirmative defense for the defendant: *Lewis v. Rego Co.*, 757 F.2d 66, 70-71 (3d Cir. 1985) (applying Pennsylvania law to hold misuse is not a separate defense but is related to issues of defectiveness and proximate cause in plaintiff's case where plaintiff suffered severe injuries as a result of an explosion of a propane cylinder); *Trust Corp. v. Piper Aircraft Corp.*, 506 F. Supp. 1093, 1099 (D. Mont. 1981) (applying Montana law to determine conduct by the plaintiff that could include misuse must be used only to compare fault and reduce damages and not as an affirmative defense where plaintiff sustained injuries as a result of an airplane crash); *Amburgery v. Holan Div. of Ohio Brass Co.*, 606 P.2d 21, 22 (Ariz. 1980) (holding that a plaintiff must prove that a product was defective by showing that it was being used for its intended, normal, and anticipated use and that the manufacturer cannot restrict liability because the use was not within its intended use). *Gallee v. Sears, Roebuck & Co.*, 374 N.E.2d 831, 834 (Ill. App. Ct. 1978) (holding that "misuse of a product is not an affirmative defense to . . .

these jurisdictions indicate, the clear trend is toward keeping misuse as an affirmative defense for the defendant to prove.¹⁰⁹

On the other hand, given the relationship between misuse and manner-within-the-risk, keeping misuse as an affirmative defense continues to require the defendant to bear the burden regarding manner-within-the-risk based proximate cause.¹¹⁰ This is a clear break from traditional rules regarding proximate cause, but only when viewed from a negligence perspective. When viewed from a strict liability perspective, this approach keeps the cause of action for strict products liability one (small) step from negligence.

2. *The Special Case of Intervening Cause*

Situations involving intervening or superseding causes present special problems in the products liability analysis. As developed in the negligence context, an intervening cause, under certain circumstances, supersedes the defendant's breach of duty and relieves the defendant of liability.¹¹¹ According to section 440 of the Restatement (Second) of Torts, "[a] superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to

strict liability" where plaintiff sustained injuries as a result of falling from a ladder); *Hughes*, 288 N.W.2d at 545 (holding that "misuse [of a product] is not an affirmative defense but rather has to do with 'an element of the plaintiff's own case' " where plaintiff was severely burned when his stove exploded); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 356 (Md. 1985) (holding that misuse is not an affirmative defense, but is a defense which may negate essential elements of a plaintiff's case where plaintiff was injured as a result of her nightgown catching on fire); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977) (holding that plaintiff's conduct labeled as misuse is not an affirmative defense but is part of plaintiff's case where plaintiff sustained injury as a result of a defect in the plastic yoke of a turn-signal switch); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 637 (Mo. Ct. App. 1975) (holding that misuse is not a defense to strict liability but an element of plaintiff's cause of action where plaintiff sustained injury when a lawnmower struck him); *Mauch v. Manufacturers Sales & Serv.*, 345 N.W.2d 338, 347-48 (N.D. 1984) (holding that plaintiff must prove proximate cause of injuries and that if plaintiff's injuries result from her own actions the seller cannot be held liable under products-liability theory). *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 832-33 (N.J. 1978) (holding that plaintiff must prove his conduct was not the proximate cause of his injury where plaintiff was injured by a pelletizing machine), *overruled on other grounds by Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 147 (N.J. 1979) (finding that employee injured while engaged at his assigned task on plant machine is not guilty of contributory negligence even if the employee may have unreasonably and voluntarily encountered known risk).

109. See *supra* note 108.

110. *Id.*

111. KEETON ET AL., *supra* note 7, § 44, at 301, 303 (explaining that "[a]n intervening cause is one which comes into active operation in producing the result *after* the negligence of the defendant"); RESTATEMENT (SECOND) OF TORTS § 441 (1965) (concluding that "[a]n intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed").

another which his antecedent negligence is a substantial factor in bringing about."¹¹²

The issue then becomes under what circumstances does an intervening cause become a superseding one. In the negligence context, this issue is resolved by focusing on foreseeability, wherein an intervening cause relieves the negligent defendant of liability only if the intervening force is improbable or unforeseeable. Liability is not relieved if the defendant should have foreseen the intervening cause as a natural and probable result of his negligence.¹¹³ Conceptualized in this way, superseding cause is just another aspect of the manner-within-the-risk category of result-within-the-risk based proximate cause. Quite simply, the focus of the analysis is on the way the accident happened.

Although the doctrine of superseding cause was developed in negligence theory, it also has been applied in the strict products liability context.¹¹⁴ While such application may be appropriate, its reliance on foreseeability and its essential nature as a manner-within-the-risk problem require care in order to prevent the superseding cause from overwhelming the strict liability-based products liability *prima facie* case. Specifically, in the area of strict products liability, problems of superseding cause usually become manifest in situations involving misuse, alteration, and modification.¹¹⁵ Applying the approach taken by the majority of courts over the past few decades, foreseeability can be de-emphasized and the cause of action for strict products liability can be preserved by keeping the burden of proof regarding misuse, alteration, and modification on the manufacturer.¹¹⁶

For example, in *Anderson v. Dreis & Krump Manufacturing Corporation*,¹¹⁷ the plaintiff was injured while operating an employer-owned

112. RESTATEMENT (SECOND) OF TORTS § 440 (1965).

113. See, e.g., *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670-71 (N.Y. 1980) (affirming a finding of liability of the defendant because the injury caused by its negligence was a foreseeable, normal, and natural result).

114. See, e.g., *Bursch v. Beardsley & Piper*, 971 F.2d 108, 112 (8th Cir. 1992) (stating that "a cause is not superseding if . . . it was foreseeable by the original wrongdoer"); *Dugan v. Sears, Roebuck & Co.*, 454 N.E.2d 64, 67 (Ill. App. Ct. 1983) (quoting *Lewis v. Stran Steel Co.*, 311 N.E.2d 128, 132 (Ill. 1974), which stated that "[t]he intervention of independent, concurrent or intervening forces will not break the casual connection if the intervention of such independent force was itself *probable and foreseeable*"); *Anderson v. Dreis & Krump Mfg.*, 739 P.2d 1177, 1184 (Wash. Ct. App. 1987) (declaring that "[w]hether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant").

115. See *supra* notes 10-17 and accompanying text.

116. See *Zablotsky, supra* note 13, at 188-90 (arguing that the effect a plaintiff's misuse has upon proximate cause does not justify shifting the burden of denying misuse onto the plaintiff).

117. 739 P.2d 1177 (Wash. Ct. App. 1987).

press, which corrugated metal. As sold by the manufacturer, the press was designed to be activated by a two-button control system.¹¹⁸ The buttons were located at shoulder level and had to be pressed simultaneously, using both hands, to start the press.¹¹⁹ This system ensured that the operator's hands were safely away from the press bed.¹²⁰ Subsequent to receiving the press, the employer disconnected the two-button control system and altered the press so that it could be activated by pressing a single button attached to the end of an electrical cord.¹²¹ This system allowed the operator's hands to be in the press bed at the time of activation. The plaintiff injured his hand when he accidentally leaned against the single button activator and started the press.¹²² The plaintiff sued the manufacturer for design defect, and the manufacturer responded that the employer's modification of the two-button system was the superseding cause of the plaintiff's injuries.¹²³

In reversing the trial court's grant of summary judgment for the manufacturer, the Washington Court of Appeals held that: (1) "only intervening acts which are *not* reasonably foreseeable are deemed superseding causes;"¹²⁴ (2) a manufacturer "will not be relieved of responsibility simply because the exact manner in which the injury occurred could not be anticipated;"¹²⁵ and (3) "reasonable persons could disagree as to whether [the employer's] modification broke the causal chain between" the manufacturer's design and the plaintiff's injury.¹²⁶

As *Anderson* illustrates, the best way to analyze the employer modification issue is to distinguish between superseding cause and the manner-within-the-risk category of result-within-the-risk based proximate cause. In addition, the case demonstrates the importance of focusing on the modification and maintaining the burden of proof on the defendant, as opposed to manner-within-the-risk proximate cause, which would shift the burden of proof to the plaintiff. If the case had merged the modification analysis into the proximate cause analysis, it would be difficult to distinguish the process from a proximate cause analysis for negligence.

118. *Id.* at 1180.

119. *Id.*

120. *Id.*

121. *Id.* at 1181.

122. *Id.*

123. *Id.* at 1185.

124. *Id.* at 1184.

125. *Id.*

126. *Id.* at 1186.

3. *The Special Case of Comparative Fault*

The ascendancy of the doctrine of comparative fault should dispel any doubts over the appropriateness of relieving the plaintiff of the burden of proving manner-within-the-risk. Comparative fault is the application of the principles of comparative negligence to causes of action based in strict liability.¹²⁷ As determined by either negligence or strict liability, culpable conduct on the part of the plaintiff would reduce, by an appropriate percentage, the damages arising from the culpable conduct of the defendant.¹²⁸ In the context of strict products liability, if the plaintiff is negligent in misusing, altering, or modifying the product, and this negligence is in part a cause in fact of the harm suffered, the plaintiff's conduct will result in the diminution of damages.¹²⁹ Some jurisdictions have refused to recognize the principle of comparative fault, reasoning that a negligent plaintiff's conduct cannot, theoretically, affect a defendant's liability that is grounded in strict liability.¹³⁰ Other jurisdictions,

127. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 1.6 (1974); Vargo, *supra* note 104, at 460-62 (noting the recent trend of comparative fault principles in strict liability); Henderson & Twerski, *supra* note 2, at 1525 (discussing the use of comparative fault to reduce awards to plaintiffs); see also *infra* note 130 and accompanying text (discussing the jurisdictions that do not apply comparative fault).

128. See *supra* note 127 and accompanying text.

129. Vargo, *supra* note 104, at 460.

130. See, e.g., CONN. GEN. STAT. ANN. § 52-572I (West 1991) (stating that "[i]n causes of action based on strict tort liability, contributory negligence or comparative negligence shall not be a bar to recovery"); Roy v. Star Chopper Co., 584 F.2d 1124, 1133-34 (1st Cir. 1978) (rejecting use of comparative negligence in a strict liability action), *cert. denied*, 440 U.S. 916 (1979); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (rejecting plaintiff's suggestion to submit issue of comparative fault to the jury in a products liability case); Kinard v. Coats Co., 553 P.2d 835, 837-38 (Colo. Ct. App. 1976) (holding that comparative negligence has no application in a products liability case); Lippard v. Houdaille Indus., 715 S.W.2d 491, 492-93 (Mo. 1986) (concluding that a plaintiff's contributory negligence is not an issue in a products liability action); Bowling v. Heil Co., 511 N.E.2d 373, 380 (Ohio 1987) (searching numerous jurisdictions and finding that comparative negligence or comparative fault has no application in a products liability case); Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974) (holding that comparative negligence statutes in Oklahoma have no application in a products liability action); McCrown v. International Harvester Co., 342 A.2d 381, 382 (Pa. 1975) (rejecting comparative assessment of damages in strict products liability action to recover damages from an automobile manufacturer); Staymates v. ITT Holub Indus., 527 A.2d 140, 145 (Pa. Super. 1987) (holding that comparative negligence is not applicable in a strict products liability case); Seay v. Chrysler Corp., 609 P.2d 1382, 1384 (Wash. 1980) (holding that Washington comparative negligence statute is not applicable in a strict products liability case), *superseded by* WASH. REV. CODE ANN. §§ 4.22.005, 4.22.015 (West 1988); Albrecht v. Groat, 588 P.2d 229, 231 (Wash. 1978) (holding that contributory negligence has no application in common carrier action); Bich v. General Elec. Co., 614 P.2d 1323, 1328 (Wash. Ct. App. 1980) (finding that comparative negligence has no application in a strict liability action).

however, have adopted either pure or modified comparative fault systems.¹³¹

Prior to comparative fault, there never existed any one definition of unforeseeable misuse, but there was a consensus that unforeseeable misuse comprised something more severe than contributory negligence.¹³² Comparative fault simply sweeps away this distinction. In the context of strict products liability, comparative fault offers some significant advantages to manufacturers, because the defense of contributorily negligent conduct, as manifested by negligent misuse, alteration, or modification, becomes available to the defendant.¹³³

131. See, e.g., *McPhail v. Municipality of Culebra*, 598 F.2d 603, 606 (1st Cir. 1979) (adopting comparative negligence rule in strict liability actions); *Murray v. Fairbanks Morse*, 610 F.2d 149, 160-61 (3d Cir. 1979) (holding that comparative negligence rule applies in strict liability actions); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1975) (finding that the trial judge instructed the jury correctly in allowing application of comparative negligence principles in a strict liability case); *Zahrte v. Sturm, Ruger & Co.*, 498 F. Supp. 389, 393 (D. Mont. 1980) (recognizing application of comparative fault to a strict liability action), *certif. question answered*, 661 P.2d 17 (Mont.), *and vacated and remanded*, 709 F.2d 26 (9th Cir.), *and cert. denied*, 464 U.S. 961 (1983); *Sun Valley Airlines v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 603 (D. Idaho 1976) (applying Idaho's comparative negligence statute to strict products liability cases); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 42 (Alaska 1979) (reversing and remanding to allow for jury consideration of plaintiff's potential comparative negligence in products liability case), *modified on other grounds*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 890 (Alaska 1979) (applying comparative negligence in strict products liability action); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 43 (Alaska 1976) (holding that comparative negligence is applicable to products liability cases for personal injuries); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978) (extending comparative fault to strict products liability actions); *Kennedy v. City of Sawyer*, 618 P.2d 788, 798 (Kan. 1980) (applying doctrine of comparative fault to strict liability action); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 850 (N.H. 1978) (recognizing comparative negligence in strict liability actions); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 147 (N.J. 1979) (holding that New Jersey Comparative Negligence Act is applicable to strict products liability cases), *superseded by statute*, N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987); *Baccelleri v. Hyster Co.*, 597 P.2d 351, 355 (Or. 1979) (holding that an Oregon statute provides that comparative fault is applicable to strict liability actions); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 352 (Tex. 1977) (holding that "[t]he defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect"); *Dippel v. Sciano*, 155 N.W.2d 55, 64-65 (Wis. 1967) (discussing in dicta that comparative negligence can be applied in strict liability actions).

132. See *Zablotsky*, *supra* note 13, at 190-91 ("Regardless of which definition is adopted, the concept of plaintiff misuse is broken down into at least two components—plaintiff's conduct and manufacturer foreseeability of that conduct."); see also *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 357 (Md. 1985) ("Momentary inattention or carelessness on the part of the user, while it may constitute contributory negligence, does not add up to misuse of the product.").

133. See *supra* notes 127-29, 131 and accompanying text.

Comparative fault also provides two more justifications for keeping the burden of proving misuse, alteration, and modification, and thereby manner-within-the-risk, on the manufacturer. First, the application of comparative fault assures that manufacturers have more foreseeability-based protection in the strict products liability context than ever before. Second, the adoption of comparable fault by many jurisdictions illustrates how even traditionally and universally accepted principles, such as the principle that a plaintiff's contributory negligence cannot operate to reduce strict liability-based manufacturer liability, can be set aside to further the greater jurisprudential good. In the same way, traditional notions of proximate cause can be re-distributed in order to salvage a cause of action for strict products liability.

C. Type-Within-the-Risk

1. In general

The type-within-the-risk category of result-within-the-risk based proximate cause focuses on the type of harm suffered by the plaintiff. As developed in negligence and applied to an actor's conduct, the question becomes whether the type of harm the plaintiff suffered was foreseeable by the defendant as a result of his conduct.¹³⁴ From this perspective, *Palsgraf* actually might satisfy a type-within-the-risk requirement: the defendant's conduct was negligent, in part, precisely because it was foreseeable that the conduct could inflict injuries that were associated with the plaintiff being crushed.¹³⁵

In the strict products liability context, type-within-the-risk is relevant to manner-within-the-risk and superseding cause. This relationship grows out of Restatement (Second) of Torts section 442, which articulates important factors in discerning whether an intervening force is a superseding cause. The section begins with an analysis of whether the intervention has brought about a harm that is "different in kind."¹³⁶

134. See *infra* notes 135-42 and accompanying text.

135. *Palsgraf v. Long Island Rail Co.*, 162 N.E. 99, 99 (N.Y. 1928).

136. Under the RESTATEMENT (SECOND) OF TORTS § 442 (1965):

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

Again, *Anderson* illustrates the relationship between manner-within-the-risk, superseding cause, and type-within-the-risk. By holding as a matter of law that the employer's alteration of the press design was not a superseding cause, the court relied on the fact that "the modification did not result in a different type of harm than otherwise would have occurred" from the manufacturer's alleged design defect.¹³⁷

Even when a type-within-the-risk argument exists, most manufacturers have focused instead on either foreseeability as related to the risk-benefit test or foreseeability as related to manner-within-the-risk. *McCormack v. Hanksraft Company*¹³⁸ offers a typical example of such avoidance of the type-within-the-risk argument. In *McCormack*, a child was burned by hot water when she tipped over a vaporizer.¹³⁹ The plaintiff argued that the vaporizer, which consisted of three component parts that fit, but did not screw together, was designed defectively because it allowed hot water to escape when tipped over.¹⁴⁰ The manufacturer's argued that the chosen design was to prevent an explosion caused by excessive steam pressure within the unit.¹⁴¹ In risk-benefit terms, this argument translates into a claim that the benefits of this chosen design in eliminating the risk of explosion outweigh the risk of spilled hot water. In manner-within-the-risk terms, the argument translates into a claim that an injury inflicted by explosion was foreseeable, but an injury inflicted by spilling was not.

The corollary type-within-the-risk argument that abrasions inflicted by flying glass are foreseeable but burns inflicted by spilled water are not, however, played essentially no role in the analysis.¹⁴² The minimization of the type-within-the-risk argument in the strict products liability context is neither surprising nor inappropriate. Given its relative insignificance as

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Id.

137. *Anderson v. Dreis & Krump Mfg. Corp.*, 739 P.2d 1177, 1186 (Wash. Ct. App. 1987).

138. 154 N.W.2d 488 (Minn. 1967).

139. *Id.* at 493.

140. *Id.* at 495. Even though the plaintiff's mother realized that the vaporizer could be tipped over by an external force, she relied upon the defendant's representations that the unit was "safe," "practically foolproof," and "tip-proof." *Id.* Plaintiff's two expert witnesses claimed that the vaporizer could be tipped over with little effort and that the unit's defective design placed children at risk of physical harm should the unit be left operating and unsupervised. *Id.*

141. *Id.* at 498.

142. *Id.* at 491.

an independent analytical concept in the products liability area, type-within-the-risk safely can be grouped with manner-within-the-risk. Consequently, it remains a part of the manufacturer's burden in the misuse, alteration, modification, or superseding cause context.

2. *The Special Case of Damages for Emotional Distress*

The only instance in which type-within-the-risk emerges as a separate, significant component of the strict products liability cause of action is when damages for emotional distress are claimed. Typically, these cases involve food or beverage products containing foreign objects.¹⁴³ The damage claim for emotional distress is based on harm suffered when the plaintiff perceives and is distressed by the object. The claim is distinct from, and generally does not involve, physical harm suffered by ingestion of the foreign object.¹⁴⁴

143. See, e.g., *Jasper Coca-Cola Bottling Co. v. Roberts*, 252 So. 2d 428, 430, 432 (Ala. Civ. App. 1971) (finding that plaintiff became ill as a result of drinking a bottle of Coca-Cola that contained cigarette stubs, tobacco, and match sticks); *Opelika Coca-Cola Bottling Co., v. Johnson*, 241 So. 2d 327, 330-31 (Ala. Civ. App.) (affirming judgment for damages resulting from plaintiff's ingestion of a beverage containing a partially decomposed worm), *cert. denied*, 241 So. 2d 331 (Ala. 1970); *Way v. Tampa Coca-Cola Bottling Co.*, 260 So. 2d 288, 290 (Fla. Dist. Ct. App. 1972) (adopting the rule in *Wallace v. Coca-Cola Bottling Plants*, 269 A.2d 171 (Me. 1970), the court found in favor of plaintiff regarding his claim of emotional distress after drinking a beverage containing substance that appeared to be a hairless rat); *Reine v. Baton Rouge Coca-Cola Bottling Co.*, 126 So. 2d 635, 636-37 (La. Ct. App. 1961) (affirming judgment in damages for injuries, including mental revulsion, when plaintiff drank a beverage containing a roach egg and a year later drank a soft drink containing a toy jack); *Culbert v. Sampson's Supermarkets*, 444 A.2d 433, 437-38 (Me. 1982) (finding that a mother could recover damages for mental distress after observing her son choke on foreign substance found in jar of baby food, although she experienced no physical harm); *Wallace*, 269 A.2d at 121 (involving damages awarded for emotional distress without requiring a showing of external trauma regarding plaintiff's consumption of a soft drink containing an unpackaged prophylactic), *overruled in part by Culbert*, 444 A.2d at 436; *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 859 (Nev. 1966) (finding \$2,500 in damages for physical and mental distress not to be excessive when plaintiff consumed a soft drink containing a dead mouse); *Miller v. Atlantic Bottling Corp.*, 191 S.E.2d 518, 520 (S.C. 1972) (concluding that the evidence was sufficient to maintain a reasonable inference that plaintiff was made ill by drinking a beverage containing a "large mass of unidentifiable foreign substance"); *Wright v. Coca-Cola Bottling Co.*, 414 N.W.2d 608, 610 (S.D. 1987) (remanding case for jury trial on the issue of damages for emotional distress resulting from plaintiff's alleged consumption of a beverage containing a decomposed mouse); *Coca-Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279, 280 (Tex. Ct. App. 1976) (affirming judgment for pain and suffering when child drank beverage containing remains of a mouse).

144. In the following cases, the plaintiff claimed physical harm as well as emotional distress: *Opelika Coca-Cola Bottling Co.*, 241 So. 2d at 330-31; *Way*, 260 So. 2d at 290; *Reine*, 126 So. 2d at 637; *Culbert*, 444 A.2d at 437; *Wallace*, 269 A.2d at 121; *Dolinski*, 420 P.2d at 859; *Miller*, 191 S.E.2d at 519; *Wright*, 414 N.W.2d at 609; *White*, 545 S.W.2d at 280.

Courts are divided over whether to allow plaintiffs to recover damages for emotional distress in this products liability context. In terms of type-within-the-risk proximate cause, courts allowing recovery reason that emotional distress is a foreseeable type of harm that a plaintiff will suffer when encountering a foreign object in a consumable product.¹⁴⁵ Conversely, courts denying recovery reason that foreseeable types of harm are limited to physical injuries.¹⁴⁶

Although emotional distress actions can involve type-within-the-risk, no reason exists to place a type-within-the-risk proximate cause burden on the plaintiff in the strict products liability cause of action. Rather, the pattern of jurisdictions deciding as a matter of law that damages for emotional distress are foreseeable should continue for two reasons. First, once again, this approach avoids enhancing the role of foreseeability in the strict products liability analysis. Second, the approach takes into account that the damages for emotional distress extend far beyond products liability to many other causes of action in the civil system.¹⁴⁷ Accordingly, the availability of damages for emotional distress has less to do with the impact of a defective product, and much more to do with the jurisdiction's attitude toward policies regarding the appropriate scope of the plaintiff's recovery generally.¹⁴⁸

145. See, e.g., *Opelika Coca-Cola Bottling Co.*, 241 So. 2d at 331; *Way*, 260 So. 2d at 290; *Reine*, 126 So. 2d at 637; *Culbert*, 444 A.2d at 438; *Wallace*, 269 A.2d at 121-22; *Miller*, 191 S.E.2d at 520; *Wright*, 414 N.W.2d at 610 n.3; *White*, 545 S.W.2d at 280.

146. See, e.g., *Legac v. Vietmeyer Bros.*, 147 A. 110, 110-11 (N.J. 1929) (granting non-suit to defendant when plaintiff suffered fright, but non-physical injury, after eating insect infected bread that was purchased from defendant); *Koplin v. Louis K. Liggett Co.*, 185 A. 744, 744-45 (Pa. 1936) (reinstating judgment for defendant upon finding that plaintiff suffered no physical injury from eating soup containing an insect).

147. For example, in *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968), the plaintiff brought a wrongful death action because of the emotional distress she experienced from witnessing a fatal accident involving her child, which was caused by defendant motorist's negligence. *Id.* The court held that plaintiff's witnessing, in close proximity, the death of her child due to defendant motorist's negligence alleged a prima facie action for emotional distress against defendant. *Id.* at 921; see also *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981) (discussing a bystander's claim for emotional distress); *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978) (holding that a bystander may recover for emotional distress caused by witnessing peril to a victim proximately caused by the reasonably foreseeable negligence of another).

148. Some courts have maintained that reasonable foreseeability should not be a primary factor in evaluating emotional distress claims because it "would produce . . . a risk of liability disproportionate to the defendant's culpability. . . [and] courts have decided not to give full effect to reasonable foreseeability and have adopted limitations on liability, such as the impact rule or the zone of danger rule." *Dziokonski*, 380 N.E.2d at 1302. Other courts have stated that there is "no good reason why the general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability, long applied to all other types of injury, should not govern" a claim of emotional distress. *Dillon*, 441 P.2d at 924.

IV. THE TREATMENT OF PROXIMATE CAUSE BY THE DRAFT REVISIONS OF SECTION 402A

The process for revising section 402A has produced five drafts: Preliminary Draft No. 1;¹⁴⁹ Council Draft No. 1;¹⁵⁰ Council Draft No. 1A;¹⁵¹ Tentative Draft No. 1;¹⁵² and Tentative Draft No. 2.¹⁵³ Either directly or indirectly, the major proximate cause issues have been addressed in these drafts, with decidedly mixed results.

Person-within-the-risk appears to have been minimized out of existence, for the revisions have made commercial sellers liable "to persons" for harm caused by defective products.¹⁵⁴ The old distinction between users and bystanders is no longer articulated, and this simple "to persons" formula has not been elaborated upon in either the Comments or the Reporters' Notes.¹⁵⁵ This approach comports with the view that manufacturers should be liable to all categories of plaintiffs, including bystanders. It completes a development encouraged by original section 402A and the great majority of authorities that have addressed the issue.¹⁵⁶ While this approach does not speak in terms of the person-within-the-risk category of result-within-the-risk based proximate cause, its inclusion of all possible plaintiffs in a statement of liability effectively eliminates the person-within-the-risk burden.

The text of the drafts do not directly deal with manner-within-the-risk and type-within-the-risk. These concepts, however, obviously are affected by general language in Tentative Draft No. 2, Section 10. In a section entitled "Causal Connection Between Product Defect and Harm," Tentative Draft No. 2 states: "Whether a product defect caused harm is determined by the prevailing rules and principles governing cau-

The California Supreme Court rejected the contention "that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred." *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952). Furthermore, "[t]he jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury." *Id.*

149. Preliminary Draft, *supra* note 3.

150. Council Draft No. 1, *supra* note 3.

151. Council Draft No. 1A, *supra* note 3.

152. Tentative Draft No. 1, *supra* note 3.

153. Tentative Draft No. 2, *supra* note 3.

154. Preliminary Draft, *supra* note 3, at 7.

155. See generally *id.* at 10-96; Tentative Draft, *supra* note 3, at 1-9.

156. See *supra* notes 63-77 and accompanying text

sation in tort.”¹⁵⁷ This language has been carried forward through all five drafts.¹⁵⁸

While this language sounds neutral and straightforward, the Comments and Reporters Notes, however, advocate that product misuse, alteration, and modification should be treated as an aspect of proximate cause. By stating that “product misuse and alteration may be treated as an aspect of proximate causation,”¹⁵⁹ the Comments to Council Draft No. 1 indicate that the burden of misuse, alteration, and modification should be shifted to the plaintiff. The Comments then quote the minority view as articulated by *Hughes*.¹⁶⁰ Tentative Draft No. 2 relegates the discussion of *Hughes* to the Reporters’ Notes,¹⁶¹ but includes in a Comment an illustration that treats modification as an aspect of proximate cause.¹⁶² Thus, similarly neutral sounding language combines to urge a shift to the minority view regarding burden of proof and proximate cause.

The proposed language would make foreseeability a prominent component of the strict products liability analysis, thereby transforming strict products liability into a negligence cause of action. Future courts should resist the Restatement’s push toward this approach. Rather, they should continue to apply the majority view and maintain the burden of proof on the manufacturer regarding misuse, alteration, and modification, and thereby manner-and-type-within-the-risk.¹⁶³

V. CONCLUSION

The legal debate may continue indefinitely, but the revision process for section 402A will not. In the relatively near future, the impact of the revised section 402A will be substantial and it will be a most important point of reference. It is vital that section 402A preserve a products liability cause of action based in strict liability. Resolving the extent to which proximate cause is integrated into the strict products liability analysis is thus critical, particularly as proximate cause relates to misuse and manner-within-the-risk.

The authorities cited demonstrate that proximate cause can be eliminated as a separately-articulated element of the strict products liability cause of action. While a failure to articulate proximate cause may appear

157. Tentative Draft No. 2, *supra* note 3, at 260.

158. See Preliminary Draft, *supra* note 3, at 125; Council Draft No. 1, *supra* note 3, at 155; Council Draft No. 1A, *supra* note 3, at 75; Tentative Draft No. 1, *supra* note 3, at 105.

159. Council Draft No. 1, *supra* note 3, at 162.

160. *Id.* at 162-63.

161. Tentative Draft No. 2, *supra* note 3, at 265-66.

162. *Id.* at 262-63.

163. See *supra* notes 108-10 and accompanying text.

to disregard fundamental notions of United States jurisprudence, ultimately, this is not the case because foreseeability concerns are inherent to other elements of the cause of action. Thus, person-within-the-risk considerations are addressed in the cause of action component dealing with who may bring suit. Manner-within-the-risk concerns are addressed in the cause of action component dealing with misuse and cause in fact. Type-within-the-risk concerns are addressed in the cause of action component dealing with defect and cause in fact. Articulating how these other components have assumed the responsibility normally borne by the proximate cause doctrine should leave us with an appropriate strict products liability cause of action that is effective and straightforward.

Dealing with proximate cause in this way offers the best, and perhaps only, way of maintaining the wall between strict products liability and negligence. It also assists in accurately restating the current law and, therefore, achieves the paramount goal of any restatement.

