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THE EVOLUTION OF MASSACHUSETTS PRODUCTS LIABILITY LAW AND THE CONUNDRUM OF STRICT LIABILITY

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INTRODUCTION

Few statements of Massachusetts law have been as confounding and as frequently repeated as this: liability under the implied warranty of merchantability is congruent in nearly all respects with strict products liability in tort.[1] Coming to terms with what strict products liability[2] really means has been the central issue throughout the modern era of Massachusetts products liability law.[3] Massachusetts courts have struggled to articulate workable stan-

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1. Back v. Wickes Corp., 378 N.E.2d 964, 968-69 (Mass. 1978).

2. As discussed in Part I of this Article, there is, strictly speaking, "no strict liability in tort" in Massachusetts because the implied warranty of merchantability, in MASS. GEN. LAWS ch. 106, §§ 2-314-318 (2008), has been thought to do essentially the same duty. Swartz v. Gen. Motors Corp., 378 N.E.2d 61, 62-64 (Mass. 1978). This Article will take note of the limited circumstances in which the theoretical distinction between the implied warranty of merchantability and strict liability in tort has made a difference, but it will refer to "strict liability" as the concept which purports to underlie the implied warranty of merchantability.

3. *See* David R. Geiger & Stephanie Copp Martinez, *Design and Warning Defect Claims Under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 BOSTON B. J. 12, 12-13 (1999). The modern era of Massachusetts products liability law will be referred to in this Article as the period beginning in 1971 when MASS. GEN. LAWS ch. 106, §§ 2-314-318, was originally amended to create a remedy for injured plaintiffs similar to RESTATEMENT (SECOND) OF TORTS § 402A (1965).

dards that advance consumer protection.[4] In 2010, forty-five years after section 402A of the Restatement (Second) of Torts heralded a new enlightened era of products liability law, that process is still not complete. The evolution of modern Massachusetts products liability law, which began with the notion that the traditional negligence cause of action in tort was inadequate in a complex economy with sophisticated consumer products, has shown that negligence concepts still animate, and should animate, most products liability cases. The resilience of negligence theory in Massachusetts law is owed, in part, to its effectiveness in advancing worthy public policy goals.[5] But this resilience also stems from unfortunate choices Massachusetts courts have made in constructing implied warranty of merchantability doctrine. Warranty liability doctrine purports to be a robust mechanism for holding manufacturers and sellers responsible for their defective products.[6] In reality, Massachusetts courts have made the implied warranty of merchantability into a cause of action that over-promises and under-delivers. A frank acknowledgment of that fact would be a significant benefit to the courts, lawyers, consumers, manufacturers, and product sellers.

This Article will contend that "strict liability," at least as the concept has been used in Massachusetts products liability law, has no independent, widely-understood meaning. It has served mainly as a rhetorical device to express commendable aspirations about consumer protection and for progressive social policy in general. It has, on the other hand, failed to serve as a useful principle for deciding actual cases. Strict liability,[7] understood in its most basic sense as liability without fault, cannot be reconciled with how Massachusetts courts have decided most products liability cases in the modern era, a truth that the Supreme Judicial Court has only recently and fitfully begun to acknowledge.[8] That is not to say that the preference for the strict liability label has been anything less

4. Geiger & Martinez, *supra* note 3, at 13. **R**

5. *See* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922 (Mass. 1998) (rejecting strict liability "hindsight approach" in favor of negligence-style standard in failure to warn cases by noting "[t]he goal of the law is to induce conduct that is capable of being performed").

6. *See* Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040 (Mass. 1983) (warranty liability imposes on product sellers "duty . . . unknown in the law of negligence" requiring sellers to "stand behind their goods").

7. *See* Clark-Aiken Co. v. Cromwell-Wright Co., 323 N.E.2d 876, 877 (Mass. 1975) (strict liability is "absolute liability without fault").

8. *Compare* Lewis v. Ariens Co., 751 N.E.2d 862, 865 (Mass. 2001) ("[W]e [have] abandoned the strict liability approach to implied warranties of merchantability . . . ."), *with* Haglund v. Philip Morris, Inc., 847 N.E.2d 315, 321 (Mass. 2006) ("Warranty liabil-

than hugely influential during the modern era. The meaning of strict liability language has to be understood within the factual circumstances of each decision in which it has been invoked. Scholars and products liability practitioners should understand that references to strict liability and its supposed counterpoint, negligence, by Massachusetts courts are really questions, rather than explanations. A keen observer will use these references to ask, "what does the court really mean by strict liability (or negligence) here?" This Article will attempt to be precise about the meaning behind these labels wherever they are used.

Part I of this Article will describe the beginnings of the modern era by analyzing the still seminal decisions from the mid-to-late 1970s. In doing so, it will first place the new strict liability regime in context by sketching the state of the law before the amendments to the implied warranty of merchantability were passed between 1971 and 1974.[9] This background will illuminate the perceived shortcomings in Massachusetts products liability doctrine, and it will define the problems the makers of this new products liability doctrine saw as they began to interpret the new warranty cause of action. This Article will argue that these early cases confronted some of the most difficult issues in products liability law, broke important ground, and arrived at sound decisions which have stood the test of time.

Part II of this Article will discuss a period during the 1980s and 1990s during which Massachusetts courts, enamored with the idea of strict liability, went off course by producing decisions that were logically inconsistent with each other and with precedent. These cases imposed duties on manufacturers and sellers that could not be carried out in the real world. To counterbalance these onerous duties, the Supreme Judicial Court created the unreasonable use doctrine,[10] which has hampered the ability of injured plaintiffs to recover damages to the point where traditional negligence claims have often been more fruitful than implied warranty claims. In short, modern products liability law in Massachusetts became a muddle that did not promote the public policies it ostensibly supported. It was during this period that federal courts in Massachusetts diverged from the state courts they were supposedly following,

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ity is 'fully as comprehensive as the strict liability theory of recovery . . . .'" (quoting Back v. Wickes Corp., 378 N.E.2d 964, 968 (Mass. 1978)).

9. *See* Swartz v. General Motors Corp., 378 N.E.2d 61, 63-64 (Mass. 1978) (describing 1971 and 1974 amendments).

10. *Correia*, 446 N.E.2d at 1040-41.

to the point that they developed a separate and more enlightened doctrine. All of this produced a period of painful confusion, a condition that has not altogether dissipated, even today.

Part III treats the most recent part of the modern era, from the Supreme Judicial Court's 1998 decision in *Vassallo v. Baxter Healthcare Corp*.[11] to the present, in which Massachusetts courts have backtracked from some of the rhetorical flourishes of the "muddled" period and have begun to define strict liability in more logical, practical terms. *Vassallo*, which sensibly decided that manufacturers and sellers had no duty to warn of dangers that experts could not have known about, was a much-needed prick to the strict liability balloon, but it remains a partial step toward a functional, policy-driven methodology for deciding products liability cases.[12] After *Vassallo*, Massachusetts products liability law is still saddled with wooden rules that unnaturally limit and enlarge liability.[13] The unreasonable use defense endures with its capacity to confuse juries and to protect defendants who could have prevented serious injuries with reasonable accident avoidance measures.[14] Most surprisingly, key issues remain unclear due to contradictory precedent, despite ample opportunity to clarify them.[15]

This Article will argue that Massachusetts products liability law should worry less about parsing the concepts of "negligence" and "strict liability" and focus more on the fact that current law includes both fault-based and non-fault-based standards. This Article will further argue that the Restatement (Third) of Torts: Products Liability, with its agnosticism about doctrinal labels,[16] provides a rubric that is largely consistent with the core concepts of Massachusetts products liability law, minus some of its less enlightened elements, and one which would fill in the gaps of the current jurisprudence. Adopting the Restatement (Third) of Torts: Products Liability as a guide to interpreting the implied warranty of merchantability would provide benefits to deserving litigants on both sides and would better serve the social policies of consumer protection, consumer choice, and compensation to injured persons.

11. Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).
12. *Id.* at 923.
13. *See infra* section III.
14. *See infra* section III.C.
15. *See infra* section III.
16. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (1998).

I. SKETCHING OUT THE MODERN DOCTRINE (1975-1978)

The Massachusetts judges who decided the first products liability cases after the implied warranty of merchantability was amended between 1971 and 1974 began their construction of the strict liability doctrine with an understanding of negligence and warranty cases that stretched back several decades.[17] These cases exposed deficiencies in the injured plaintiff's right to recovery that the statutory amendments were clearly designed to address.[18] Only by understanding the state of the law prior to 1971 is it possible to appreciate how the implied warranty of merchantability was shaped, and how it should have been shaped.

A. *The Pre-Modern Era and the Problems the New Implied Warranty Cause of Action Was Trying to Solve*

1. Rise and Fall of the Privity Rule in Negligence Actions

In the early twentieth century, persons injured by consumer or industrial products were confronted at the outset with the privity requirement, which demanded that a plaintiff show a contractual relationship with the defendant.[19] While this understandably applied to contractual remedies such as the breach of an express warranty, it had been applied to the tort doctrine of negligence as a bulwark to the unwarranted expansion of liability to an unlimited class of plaintiffs.[20] Stemming from the 1842 English case of *Winterbottom v. Wright*,[21] this rule spread throughout the United States, including Massachusetts.[22] Thus, in the 1866 case of *Davidson v. Nichols*, a plaintiff, having bought a potion in a bottle from a retailer, was barred from recovering in negligence from the whole-

17. In *doCanto v. Ametek, Inc.*, 328 N.E.2d 873, 879 (Mass. 1975), the first significant products liability case to be decided after the 1971 and 1974 amendments, the court cited and relied upon numerous pre-modern cases, indicating that it was well aware of the pre-modern case law.

18. See *infra* section I.A.

19. Carter v. Yardley & Co., 64 N.E.2d 693, 698-700 (Mass. 1946) (recounting history of privity rule).

20. *See* Lebourdais v. Vitrified Wheel Co., 80 N.E. 482, 482-83 (Mass. 1907). The court noted that:

> If such an extended liability attached where no privity of contract exists it would include all persons however remote who had been damaged either in person or property by his carelessness, and manufacturers as a class would be exposed to such far-reaching consequences as to seriously embarrass the general prosecution of mercantile business.

Id.

21. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.).

22. *Carter*, 64 N.E.2d at 698.

sale druggist who had sold the potion to the retailer.[23] The Supreme Judicial Court came to this result assuming that the wholesale druggist had mistakenly placed the wrong mixture in the bottle through "negligence and want of skill," that the bottle had been sealed prior to its delivery to the retailer, and that the consumer had suffered severe injuries when the concoction had exploded.[24] *Davidson* held that the wholesale druggist owed no duty to the plaintiff simply because he owed no duty in contract.[25]

Harsh results such as these began a prompt search for exceptions to the privity rule.[26] Soon carved out from the operation of the privity rule were inherently dangerous products, which included explosives such as gunpowder and nitroglycerine, as well as poisonous drugs.[27] Also finding refuge in this exception was a man applying stain to a room who struck a match and ignited the fumes that had been released from the stain.[28] Massachusetts courts thus distinguished "inherently dangerous" or "intrinsically harmful" products from those that are ordinarily harmless, unless they contain some defect.[29] This exception grew to include many consumer products, including combs placed in a woman's hair to produce a wave hairstyle.[30] The combs themselves could not cause injury, but when placed in the hair and subjected to hot air from an electric dryer, they released a flammable chemical.[31] The combs caught fire and caused burns to a woman's head.[32] *Farley v. Edward E. Tower & Co.* found the combs to be inherently dangerous, reasoning that "the dangerous quality of an article is none the less inherent because it is brought into action by some external force."[33]

Carter v. Yardley & Co. put an end to these creative circumventions of the privity rule by abolishing it in 1946.[34] By that time, the privity rule had been dead for thirty years in New York, follow-

23. Davidson v. Nichols, 93 Mass. (11 Allen) 514, 516-20 (1866).

24. *Id.* at 516.

25. *Id.* at 518-19.

26. *See Carter*, 64 N.E.2d at 698.

27. *See* Lebourdais v. Vitrified Wheel Co., 80 N.E. 482, 482-83 (Mass. 1907).

28. Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 491-92 (Mass. 1915).

29. *Id.* at 491; *see* Farley v. Edward E. Tower & Co., 171 N.E. 639, 641 (Mass. 1930) ("Danger is inherent when it is due to the nature of an article and not to a defect in an article naturally harmless . . . .").

30. *Farley*, 171 N.E. at 640.

31. *Id.* at 640-41.

32. *Id.*

33. *Id.* at 641.

34. Carter v. Yardley & Co., 64 N.E.2d 693, 700 (Mass. 1946).

ing Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*, in which he famously declared that:

> 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. We have put the source of the obligation where it ought to be. We have put its source in the law.[35]

By the time *Carter* was decided, there was no need for the boldness or eloquence of Justice Cardozo because the majority of jurisdictions had already abandoned the privity rule.[36] It was enough to observe that the distinctions from the "inherently dangerous" exception lacked any "rational basis."[37]

2. Pre-Modern Cases Limited to Hidden Dangers with Wholly Innocent Victims

Having torn down the artificial privity barrier for negligence actions, but maintaining it for express warranty or implied warranty claims,[38] the Supreme Judicial Court was still faced with defining the duties owed by product manufacturers and sellers to the consumer. The pre-modern cases in Massachusetts tended to stem from situations where hidden dangers in the product had caused injury to unsuspecting users.[39] Products liability suits fell into two general categories: (1) hidden manufacturing defects, and (2) failure to warn of hidden, inherent dangers in the product.[40] Today, this represents only a portion of the modern products liability docket.[41] It appears that plaintiffs' lawyers did not even conceive of trying to hold manufacturers and sellers responsible for design choices that created obvious but avoidable dangers.[42] Likewise,

35. MacPherson v. Buick Motor Corp., 111 N.E.1050, 1053 (N.Y. 1916).
36. *Carter*, 64 N.E.2d at 700.
37. *Id.* at 698-99.
38. *Id.* at 695 n.2.
39. *See infra* sections I.A.3 and I.A.4.
40. *See infra* sections I.A.3 and I.A.4.
41. *See* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 483-84 (1990) (describing how products liability litigation has come to include design defect claims and how significant design issues have become in products liability law).
42. Of course, the defenses of contributory negligence and assumption of risk, not abolished until 1969 and 1973, respectively, were powerful deterrents to all but wholly innocent plaintiffs. *See* Riley v. Davison Constr. Co., 409 N.E.2d 1279, 1282-84 (Mass. 1980) (describing defenses and their histories). On the other hand, published decisions relating to products liability and the assumption of the risk defense are virtually non-

Massachusetts courts were not called upon to grapple with injuries stemming from uses of the product that departed from the uses that the manufacturer had intended. In warning cases, plaintiffs alleged a complete lack of warning, rather than complaining that the warning was inadequate, incomplete, or failed to capture the user's attention.[43]

It should be quickly noted that the foregoing observation about these two categories of products liability cases suggests a degree of analytical rigor that Massachusetts courts did not themselves apply. Similarly, products liability jurisprudence in most states remained focused on the issues surrounding manufacturing defects, and to some extent, warning claims.[44] Design claims had not been, in a sense, invented yet.[45] William Prosser, in his influential 1960 article *The Assault Upon the Citadel (Strict Liability to the Consumer)*, spoke of holding sellers responsible for manufacturing defects, even as he made the argument for strict liability in almost revolutionary terms.[46]

In 1965, when the American Law Institute adopted section 402A of the Restatement (Second) of Torts, a provision also authored by Prosser, it focused on manufacturing defects.[47] "Section 402A had little to say about liability for design defects or for products sold with inadequate warnings. In the early 1960s, these areas of litigation were in their infancy."[48]

3. Pre-Modern Warning Cases

The presence of a hidden danger and the unquestioned exercise of due care by the plaintiff, were common to the pre-modern Massachusetts cases that recognized liability, or at least potential liability, on the part of a manufacturer or seller. In a typical pre-

existent in Massachusetts during the pre-modern era. This shows that plaintiffs' lawyers were not bringing products liability cases that tested the limits of the defense.

43. *Compare* Farley v. Edward E. Tower & Co., 171 N.E. 639, 641-42 (Mass. 1930), *with* MacDonald v. Ortho Pharm.Corp., 475 N.E.2d 65, 70-71 (Mass. 1985).

44. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (1998) (describing how products liability began with manufacturing defects and extended to design and most warning claims only in the 1960s and 1970s).

45. *See id.*

46. *See* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Liability for hidden manufacturing defects has a history dating back to medieval English law. RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (noting high degree of responsibility for food products dating back to 1266).

47. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. introductory cmt.

48. *Id.*

modern warning case, the Supreme Judicial Court could confidently say that:

> [I]t is settled that a person who sells an article, which he knows is inherently dangerous to human life, limb or health, to another person, who has no knowledge of its true character, and fails to give notice thereof to the purchaser, is liable in damages to a third person who, while in the exercise of due care, is injured by a use of it which should have been contemplated by the seller.[49]

In the 1961 case of *Mealey v. Super Curline Hair Wave Corp.*, the plaintiff was a nine year old girl who went to a hair salon where a lotion was applied to her hair.[50] The lotion was to be used with a heating pad, and the combination of the two produced an ammonia gas that caused burns to the child's scalp.[51] Free of the privity requirement and the need to evade it, *Mealey* was presented with the traditional negligence inquiries of whether the injury was foreseeable and whether the manufacturer had breached its duty of due care by failing to give notice of the danger.[52] *Mealey* had no trouble in affirming a judgment for the plaintiff where the manufacturer's instructions had directed the use of a heating pad with the lotion and had said nothing about the danger of burns.[53]

One notable exception to the fairly straightforward warning cases like *Mealey* was the Supreme Judicial Court's 1961 decision in *Ricciutti v. Sylvania Electric Products Inc.*,[54] which proved to be a forerunner to the toxic tort litigation of the modern era. In warning cases where the manufacturer had simply neglected to warn of a hidden danger the plaintiff had no way of suspecting, the basic duty to warn was unquestioned.[55] In *Ricciutti*, the manufacturer disclaimed such a duty where the plaintiff had contracted berylliosis from having been exposed to beryllium while working with the defendant's florescent tubes some years earlier.[56] The manufacturer sought to show that it did not know about the risk of disease at the time it sold the products which allegedly harmed the plaintiff.[57]

49. Farley v. Edward E. Tower & Co., 171 N.E. 639, 640 (Mass. 1930).
50. Mealy v. Super Curline Hair Wave Corp., 173 N.E.2d 84, 85-86 (Mass. 1961).
51. *Id.* at 86.
52. *Id.*
53. *Id.*
54. Ricciutti v. Sylvania Elec. Prod. Inc., 178 N.E.2d 857, 860-62 (Mass. 1961).
55. *See* Farley v. Edward E. Tower & Co., 171 N.E. 639, 642 (Mass. 1930) (stating that while knowledge of risk is presumed, it is clear that manufacturer, in fact, did know of the risk).
56. *Ricciutti*, 178 N.E.2d at 860-62.
57. *Id.*

The trial court sustained the manufacturer's objection to a jury instruction which would have said that "[e]very manufacturer is presumed to know the nature and quality of his products."[58] On appeal, *Ricciutti* held that the plaintiff was required to prove that the defendant "knew or through the exercise of reasonable care should have known that his product was dangerous."[59] Prior Massachusetts cases had lent support to the presumption of knowledge advocated by the plaintiff.[60] In fact, the proposed jury instruction had been a familiar incantation in warning cases for decades. *Thornhill v. Carpenter-Morton Co.* had explicitly held that "[p]roof . . . of actual knowledge is not required where the article is so made up as to be inherently harmful."[61] In the earlier cases, the courts were dealing with simpler products, and they had not been confronted with products involving a complex disease process that took many years to manifest itself.[62]

Ricciutti eschewed the presumption of knowledge that Massachusetts courts had blithely applied in cases where the manufacturer's lack of knowledge about the dangers posed by its products was not seriously presented. This presumption would be resurrected in the 1980s in Massachusetts and elsewhere with a "hindsight" test, where in the name of strict liability, the manufacturer and seller of a product would be presumed to know of dangers discovered after the sale of the product.[63] The Supreme Judicial Court would later repudiate precedent, as it did in *Ricciutti*, to again require the plaintiff to prove that the defendant knew or should have known of the dangerous quality of the product.[64]

4. Pre-Modern Manufacturing Defect Cases

Manufacturing defect cases during the pre-modern era involved hidden imperfections that caused injuries when the products were used as the manufacturer intended.[65] Plaintiffs bringing negligence actions faced practical problems of proving how the manufacturer's negligence in the production or quality control process had

58. *Id.* at 861.

59. *Id.*

60. *See id.* at 861-62 (citing cases advanced by plaintiff).

61. Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 491 (Mass. 1915).

62. *See, e.g.*, Carter v. Yardley & Co., 64 N.E.2d 693, 694-95 (perfume caused immediate burns to skin).

63. *See infra* Part II.B.

64. *See infra* Part III.A.

65. *See* Evangelio v. Metro. Bottling Co., 158 N.E.2d 342, 344-46 (Mass. 1959) (canvassing manufacturing defect cases involving bottles and other products).

allowed a defective product to enter the marketplace.[66] In these cases, the concept of "defect" had a straightforward meaning since the product, such as a soda bottle containing a crack, departed from the intended design. When the product, like a shattering soda bottle,[67] would fail suddenly, often in catastrophic fashion, the plaintiff would be left with little evidence of what exactly the imperfection was, and little ability to trace the defect back to the specific act of negligence that had been visited upon one of a multitude of seemingly identical products.[68]

In the 1959 case of *Evangelio v. Metropolitan Bottling Co.*, the Supreme Judicial Court was presented with a claim by a woman who was injured when a soda bottle exploded in her hand.[69] At trial, the plaintiff sued the bottler in negligence but presented no evidence of a specific act of negligence on the part of the bottler.[70] Instead, she relied upon the doctrine of *res ipsa loquitor* to draw an inference of negligence because such an unusual event would not have happened unless the defendant had been negligent.[71] Because her evidence consisted of broken pieces of glass, the plaintiff could not even say whether the bottle had contained an imperfection in the glass, had been given an excessive amount of carbonation, or had been mishandled.[72] *Evangelio* allowed recovery, finding as a matter of common knowledge that an exploding bottle permitted an inference of negligence, where it was clear that the bottle had not been mishandled since it had left the hands of the bottler.[73] In doing so, it overruled prior cases which held that the plaintiff must show a specific act of negligence.[74]

The Supreme Judicial Court allowed the *res ipsa loquitor* inference of negligence in a 1963 case involving a manufacturing defect

66. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 438-39 (Cal. 1944) (*res ipsa loquitur* inference of negligence permitted where it was unclear even in hindsight what kind of manufacturing defect caused product to fail); *Evangelio*, 158 N.E.2d at 344-46.

67. *Evangelio*, 158 N.E.2d at 343-44.

68. *See id.* at 344-46; *Escola*, 150 P.2d at 438-39; RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998) (often manufacturing defects are caused by defendant's negligence but plaintiff has trouble proving it).

69. *Evangelio*, 158 N.E.2d at 342-44.

70. *Id.* at 344.

71. *Id.* at 344-45.

72. *Id.* at 346-47 (acknowledging multiple possible causes of product failure).

73. *Id.* at 347.

74. *Id.* (overruling Howard v. Lowell Coca-Cola Bottling Co., 78 N.E.2d 7 (Mass. 1948)).

in an automobile's transmission.[75] The plaintiff was able, through expert testimony, to identify the problem in the transmission.[76] The inference that the problem stemmed from negligence in the manufacture of the car was appropriate because the vehicle had not left the car dealer's lot at the time of the accident.[77]

The limits of negligence theory, *res ipsa loquitur*, and the implied warranty of merchantability remedy were exposed in a 1970 case that played a significant role in bringing about the amendments to section 2-314 through 2-318[78] between 1971 and 1974. In *Necktas v. General Motors Corp.*,[79] a man had purchased a new General Motors (GM) automobile from a dealer, and he drove it about 500 miles in the next fifteen days before he was involved in a fatal accident caused by a defective power steering unit.[80] The man's estate sued GM and the dealer for negligence and breach of the implied warranty of merchantability.[81] *Necktas* held that there was sufficient evidence that there had been a defect in the power steering unit at the time of sale and that this constituted a breach of warranty.[82] The plaintiff could not recover against GM on the warranty claim due to lack of privity, but it could recover from the dealer on the warranty claim because the dealer had sold the car directly to the decedent.[83] However, the plaintiff could not, based on the breach of warranty, recover damages due to the man's death, since by statute, such a remedy existed only if there had been either "negligence or . . . a wilful, wanton or reckless act causing death."[84] Meanwhile, the court found that the plaintiff had presented insufficient evidence of negligence on the part of GM or the dealer because the evidence about the nature of the defect was not specific enough.[85]

Necktas showed how the combination of negligence theory and the implied warranty of merchantability could be inadequate in the pre-modern era to provide an avenue for compensation in a deserving case. The automobile contained a dangerous flaw at the time of

75. LeBlanc v. Ford Motor Co., 191 N.E.2d 301, 304-05 (Mass. 1963).
76. *Id.* at 304.
77. *Id.* at 305.
78. MASS. GEN. LAWS ch. 106, §§ 2-314 to -318 (2008).
79. Necktas v. Gen. Motors Corp., 259 N.E.2d 234, 235 (Mass. 1970).
80. *Id*.
81. *Id.* at 235-36.
82. *Id.* at 236.
83. *Id.*
84. *Id.*
85. *Id.* at 235.

sale which was hidden to the consumer.[86] The product did not perform as it was intended to perform, and the resulting injury was fatal.[87] The court did not indulge in the *res ipsa loquitor* inference of negligence where the product was more complex than an exploding soda bottle, and "common knowledge"[88] provided little in the way of explanation for the accident.[89] The court was satisfied that the plaintiff had proven a defect, but the plaintiff had not provided specific evidence about acts of negligence giving rise to that defect on the part of GM or the dealer.[90] The inability to prove negligence then precluded recovery for the man's death.[91] GM, the obvious culprit for the faulty power steering unit, escaped liability altogether.[92] These anomalies paved the way for passage of the new implied warranty of merchantability statute.

B. *Section 402A and the Strict Liability Wave*

Outside of Massachusetts, momentum had been building for an explicit recognition of strict liability in tort for manufacturing defects. A number of jurisdictions recognized strict liability for food products in the early twentieth century, and the rule spread to the majority of jurisdictions and to a number of other products by the 1950s.[93] Numerous legal scholars had been writing during the 1950s about the inadequacies of warranty law and the need to expand strict liability beyond food products.[94] In 1960, New Jersey adopted a general theory of strict liability in *Henningsen v. Bloomfield Motors, Inc.*, through the implied warranty of merchantability by stripping away the privity requirement and by invalidating the manufacturer's disclaimers, which prevented recovery for personal

86. *Id.*

87. *Id.*

88. Evangelio v. Metro. Bottling Co., 158 N.E.2d 342, 346 (Mass. 1959).

89. *Necktas*, 259 N.E.2d at 235-38 (holding evidence of negligence insufficient in face of dissent that argued that jury could make inference negligence based on common knowledge).

90. *Id.* at 236.

91. *Id.*

92. *Id.*

93. Prosser, *supra* note 46, at 1106-14. **R**

94. Fred R. Shapiro, *The Most-Cited Articles From the Yale Law Journal*, 100 YALE L.J. 1449, 1470 (1991) (Prosser's *Assault Upon the Citadel* was one of many articles criticizing the limitations of warranty law arguing for the expansion of strict liability).

injury.[95] In 1962, California became the first jurisdiction to hold that strict liability in tort would apply to all products.[96]

All of this set the stage for the American Law Institute to publish Restatement (Second) of Torts § 402A in 1965. Although Prosser, the Restatement's author, had predicted that adoption of strict liability across the United States could take fifty years, section 402A "spread like wildfire" to virtually every jurisdiction from the mid-1960s to the mid-1980s.[97] Some jurisdictions almost immediately followed California's lead in adopting section 402A and strict liability in tort.[98] One 1966 opinion exclaimed that "[i]t has been said that" [section 402A] was "one of the most spectacular developments of tort law in this century."[99] Surely, it is also fairly said that section 402A has been the most influential provision of any Restatement of the Law.[100]

C. *1971-1974 Amendments to the Implied Warranty of Merchantability*

Against the backdrop of clear inadequacies in Massachusetts negligence and warranty law illuminated by *Necktas*, and a powerful movement in academia and in the courts advocating a strict liability regime for defective products, it was all but inevitable that Massachusetts would revamp its products liability law. Massachusetts chose to make these changes legislatively by amending its version of the Uniform Commercial Code's implied warranty of merchantability.[101]

The most significant change was the elimination of the privity requirement, a legislative action that was the equivalent of New

95. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 99-102 (N.J. 1960).

96. Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901-02 (Cal. 1963); Dominick Vetri, *Order out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1381 (2009).

97. David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 977 (2007); *see* Prosser, *supra* note 46, at 1138. R

98. *See* William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 242 n.79 (1995) (describing "race" to adopt section 402A and citing cases).

99. Cochran v. Brooke, 409 P.2d 904, 906 (Or. 1966) (en banc) (citation omitted).

100. Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 12 (1995) (noting that section 402A has been cited in over three thousand judicial opinions).

101. *See* Swartz v. Gen. Motors Corp., 378 N.E.2d 61, 63 (Mass. 1978) (describing amendments to the implied warranty of merchantability to make it equivalent to section 402A); Hoffman v. Howmedica, Inc., 364 N.E.2d 1215, 1216-18 (Mass. 1977) (discussing history of applicable Massachusetts legislative amendments).

Jersey's *Henningsen* decision.[102] The legislature also amended the wrongful death statute to allow for recovery in warranty actions.[103] Together, these two amendments had the effect of fixing the injustices identified in *Necktas*.[104] The amendments also extended implied warranty protection beyond sales transactions to commercial leases.[105] The statute of limitations period was changed to three years, which only begins to run upon the occurrence of the injury or damage sustained by the plaintiff, rather than upon the sale of the product.[106] The old rule allowed claims to be extinguished before the plaintiff was injured and could have sued.[107] The legislature gave teeth to these changes by forbidding, and in some cases, limiting the extent to which these protections could be disclaimed or excluded by contract.[108]

Together, these various legislative enactments "jettisoned many of the doctrinal encumbrances of the law of sales and what remains is a very different theory of recovery from that traditionally associated with the sale of goods."[109] As important as these amendments were, they were limited to removing what may be termed "wooden rules" that automatically and somewhat arbitrarily foreclosed recovery. In short, they were directed to the more limited set of issues that Massachusetts courts had grappled with during the pre-modern era. The amendments addressed who could sue, who could be sued, and what kinds of products would be subject to the implied warranty of merchantability.[110] They established some

102. *See Hoffman*, 364 N.E.2d at 1216 (discussing the elimination of privity requirement); *supra* section I.B.

103. *See* Back v. Wickes Corp., 378 N.E.2d 964, 969 n.4 (Mass. 1978).

104. *See id.* (noting the result in *Necktas* and the amendment to the wrongful death statute); *Swartz*, 378 N.E.2d at 63 (noting the result in *Necktas* and the elimination of the privity requirement).

105. *See Swartz*, 378 N.E.2d at 63 (amended section 2-318 applies to commercial leases).

106. *See* MASS. GEN. LAWS ch. 106, § 2-318 (2008).

107. *See* Cannon v. Sears, Roebuck & Co., 374 N.E.2d 582, 584 (Mass. 1978) (describing the effect of the old statute of limitations for implied warranty actions). In *Cannon*, the plaintiff brought his action shortly before the statute was amended, two years after he was injured and nine years after the sale and manufacture of the product. *Id.* at 583. The three year statute of limitations was held not to bar the negligence claim because it accrued at the time of the injury. *Id.* at 584. The warranty claim, however, was barred because the plaintiff could not take advantage of the amended section 2-318 and its new accrual rule. *Id.* at 584 n.3.

108. *See* ch. 106, § 2-316A.

109. *Back*, 378 N.E.2d at 969.

110. *See* ch. 106, § 2-318 (defining classes of plaintiffs and defendants); ch. 106, § 2-316(5) (excluding certain products from implied warranty of merchantability); *see*

helpful procedural rules for regulating the relationship between manufacturer, seller, and consumer, and they expanded the kinds of damages that could be sought.[111] These basic issues were also at the heart of the strict liability movement in other states.[112] Prosser, the acolyte of strict liability, concentrated his energies on the abolition of privity and the extension of strict liability from foods to other products.[113] Tellingly, section 402A finds it necessary to address the kinds of products subject to the new rule, and then to list a number of them, product by product.[114]

Left undone by the Massachusetts legislative amendments and by section 402A was the more nuanced work of elaborating on the duties owed by manufacturers and sellers. Duties relating to the design of products were not addressed at all in either the Massachusetts laws or in section 402A. These omissions stem from the fact that strict products liability, in its infancy, was concerned with manufacturing defect cases such as *Necktas*, or cases involving exploding bottles.[115] The defectiveness of the product in these situations was without question.[116]

Thus when the Supreme Judicial Court formulated its declaration that "[t]he Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed

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also Hoffman v. Howmedica, 364 N.E.2d 1215, 1216-18 (Mass. 1977) (discussing amendments).

111. Ch. 106, §§ 2-316 to -316A (regulating extent to which seller may disclaim warranties); ch. 106, § 2-318 (establishing statute of limitations and eliminating notice defense); *see also Back*, 378 N.E.2d at 969 n.4 (noting amendment of statute to allow for wrongful death for a breach of warranty).

112. *See* Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK L. REV. 807, 815 (2009).

113. *See generally* Prosser, *supra* note 46, at 1110-14 (arguing for extension of strict liability to products beyond food). R

114. RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (1965).

115. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. introductory cmt. (1998). "The major thrust of § 402A was to eliminate privity so that a user or consumer, without having to establish negligence, could bring an action against a manufacturer, as well as against any other member of a distribution chain that had sold a product containing a manufacturing defect." *Id.*

116. *See Back*, 378 N.E.2d at 970. The Supreme Judicial Court recognized how the issue of merchantability was a much clearer question when the product involved a manufacturing defect, by saying:

> If this were a case involving a manufacturing defect, the jury might simply compare the propensities of the product as sold with those which the product's designer intended it to have and thereby reach a judgment as to whether the deviation from the design rendered the product unreasonably dangerous and therefore unfit for its ordinary purposes.

Id.

in Restatement (Second) of Torts § 402A (1965),"[117] it was a true statement in that the legislature had eliminated privity as a defense and had established strict liability for products that were not of merchantable quality. Products that failed because they departed from the intended design and were not what they purported to be, i.e., products with manufacturing flaws, were plainly not of merchantable quality when those flaws caused injury.[118] It was left to Massachusetts courts to establish standards that would govern liability in design and warning cases, which have come to dominate modern products liability litigation.[119] The extent to which the declaration about the congruency of section 402A and the Massachusetts implied warranty of merchantability, which came to be a mantra in Massachusetts products liability law, remained true depended on future decisions of Massachusetts courts and on the evolving meaning of section 402A, as it became infused with the decisions of the many courts which had adopted it.

D. *1975-78: First Attempts to Create the Modern Doctrine*

The new implied warranty cause of action did not, by any means, abolish or make redundant the traditional negligence suit. Throughout the modern era, negligence and implied warranty have become intertwined as the two claims have been defined in reference to each other and in contrast to each other. Massachusetts courts have used negligence principles and precedent to define and expand the duties owed to the consumer under the implied warranty of merchantability.[120] But as Massachusetts courts began their construction of the modern doctrine, even the old negligence cases were of limited value as the courts began to confront issues that had never been litigated in Massachusetts before.[121] A reader of the opinions from the first part of the modern era will notice how

117. *Id.* at 969.

118. *See id.* at 969-70; RESTATEMENT (SECOND) OF TORTS § 402A cmt. d; *see also* RESTATEMENT (THIRD) OF TORTS § 2(a) cmt. c.

119. By contrast, issues involving manufacturing defects have scarcely troubled modern courts. The huge litigation over exploding bottles in the pre-modern era, for example, has become a virtual nullity. A search of Massachusetts cases since 1975 reveals just a single published decision dealing with a claim of personal injury from a defective bottle. *See* Gleasons v. Source Perrier, 553 N.E.2d 544, 545-46 (Mass. App. Ct. 1990); *cf* Evangelio v. Metro. Bottling Co., 158 N.E.2d 342, 345-46 (Mass. 1959) (canvassing numerous cases).

120. *See*, *e.g.*, *Back*, 378 N.E.2d at 970 (describing design defect inquiry under implied warranty of merchantability as essentially the same as negligence inquiry).

121. *See id*. (citing decisions from other jurisdictions rather than older Massachusetts negligence cases).

little precedent is cited and how that precedent provides only inferential, rather than direct, support.[122] Massachusetts courts were faced with a nearly blank canvas.

1. Constructing a Methodology for the Judicial Review of Product Designs

Coinciding with the amendments to the implied warranty of merchantability were bold attempts by plaintiffs' lawyers during the 1970s to challenge the designs of products.[123] Massachusetts courts were thus forced, almost all at once, to resolve a number of contentious and fundamental issues that were, at their root, policy judgments about the reach of the implied warranty of merchantability. The first attempt to deal in a comprehensive way with design defects came in *Back v. Wickes Corp*.,[124] a case that later courts have recognized as establishing some of the important tenets of the modern doctrine by ritual citation of the decision.[125] *Back* acknowledged that reviewing a product's design was a very different inquiry than had been conducted for manufacturing defects.[126] In *Back*, the plaintiffs challenged the placement of the fuel tank on a motor home, contending that putting the tank outside the frame made it more vulnerable to puncture.[127] The court saw this as a question of whether the manufacturer's "conscious design choices . . . [had] rendered the product unreasonably dangerous . . . [and] unfit for highway travel."[128] This was a key insight, and it followed from the manufacturer's unrepentant contentions that the motor home was built exactly how it should have been, and that the vehicle conformed to industry safety standards.[129] Unlike in *Leblanc* and *Necktas*, where the motor vehicles had plainly failed because they did not conform to their intended designs, the motor home failed, in the plaintiffs' view, precisely because it did conform to the intended design.[130]

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122. *Id.*

123. Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1064 (2009) [hereinafter *Triumph of Risk-Utility*] (noting how design cases began to reach juries in great numbers in 1970s).

124. *Back*, 378 N.E.2d 964.

125. *See*, *e.g.*, Gillespie v. Sears, Roebuck & Co., 386 F.3d 21, 26 (1st Cir. 2004) (citing *Back*, 378 N.E.2d at 970).

126. *Back*, 387 N.E.2d at 970.

127. *Id.* at 967.

128. *Id.* at 970.

129. *Id.* at 967-68.

130. *Id.* (explaining plaintiff's theory of vehicle's design deficiencies).

After recognizing that a case alleging unreasonable, conscious design choices "present[ed] a more difficult jury question" than a case involving a manufacturing defect, *Back* set forth, for the first time in Massachusetts law, factors a jury should consider in evaluating the adequacy of a product's design: (1) "gravity of the danger posed by the" design; (2) "likelihood" of the danger occurring; (3) "mechanical feasibility of a safer alternative design"; (4) "cost of an improved design"; and (5) drawbacks of an alternative design "to the product and to the consumer."[131] These factors can be seen as drawing from the classic mathematical negligence test postulated by Judge Learned Hand in the well known decision of *United States v. Carroll Towing Co.*: B < PL.[132] In that formulation, "L" represented the amount of the loss, and "P" represented the probability it would occur.[133] If "B," the burden of avoiding that loss, is less than "P" multiplied times "L," then it would be negligent for an actor not to incur the costs of avoiding the loss.[134] The enumerated *Back* factors suggest a similar comparison of the costs of accidents caused by a design with the costs of avoiding those accidents. The first two factors represent the "L" and the "P" from Hand's test, and the final three factors represent aspects of "B," the accident avoidance costs through a different design. This balancing process came to be known as the risk-utility test.[135]

These factors were a needed elaboration on the general "reasonable care" negligence standard. Just three years earlier, in *doCanto v. Ametek, Inc.*, the Supreme Judicial Court affirmed the viability of a negligent design theory in a case involving a commercial ironing machine.[136] In *doCanto*, there was no expert testimony introduced about an alternative design that could have prevented the plaintiff's hand from being pulled under the ironer.[137] There was, on the other hand, evidence about pre-accident and post-accident safety improvements that were admitted for the purpose of showing the manufacturer's knowledge of the risk and the feasibil-

131. *Id.* at 970.

132. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

133. *Id.*

134. *Id.*

135. *See, e.g.*, Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990) (noting that the risk-utility factors in *Back v. Wickes Corp.* "requires an inquiry essentially the same as the negligence inquiry"), *vacated on other grounds*, 505 U.S. 1215 (1992), *remanded to* 981 F.2d 7 (1st Cir. 1992).

136. doCanto v. Ametek, Inc., 328 N.E.2d 873, 876-79 (Mass. 1975).

137. *Id.* at 877.

ity of making those improvements to the product.[138] This evidence, along with the fact that the employee who designed the product knew about the risk, was enough to submit the negligent design claim to the jury.[139] As significant as it was to subject a manufacturer's design choices to judicial review, *doCanto* did not see its decision as a matter of public policy, but rather as another permutation of longstanding negligence principles.[140]

While the enumerated *Back* factors made design review more concrete, they were not an exclusive list, and *Back* did not indicate how they would be weighed against each other or against unenumerated factors. More crucially, it was not clear that a safer alternative design was essential to showing that the product was defectively designed. In *Smith v. Ariens Co.*, decided on the same day as *Back*, the Supreme Judicial Court upheld the plaintiff's judgment based on the negligent design of a snowmobile that had sharp metal protrusions on a handle bar.[141] When the plaintiff became involved in a collision, her face struck the protrusions, and she suffered serious injuries.[142] *Smith* did not balance the *Back* factors, and it did not address the fact that the plaintiff had not introduced evidence of an alternative design.[143] Six months after *Back* and *Smith*, *Uloth v. City Tank Corp.*, hinted that a safer alternative design was a nec-

138. *Id.* at 876-77.

139. *Id.* at 877.

140. *Id.* The court saw design review as just another species of negligence. In support, it cited two negligent failure to warn cases, *Carter v. Yarkley & Co.*, 64 N.E.2d 693 (Mass. 1946), and *Mealey v. Super Curline Hair Weave Corp.*, 173 N.E.2d 84 (Mass. 1961), which were from the pre-modern era and the court saw no need to explain how those precedents applied in a negligent design case.

141. Smith v. Ariens Co., 377 N.E.2d 954, 955-57 (Mass. 1978).

142. *Id.* at 955.

143. *Id.* at 957-58. The manufacturer in *Smith* took aim at the fact that the plaintiff had "not introduce[d] any expert testimony tending to show that the snowmobile was negligently designed." *Id.* at 957. As the court held in *doCanto*, expert testimony was not essential where jurors using their lay knowledge could conclude that the design presents unreasonable risks of injury. *Id.*; *doCanto*, 328 N.E.2d at 877. While the design feature in *Smith* was not very complicated, and it did seem to present needless dangers, *doCanto* could have been distinguished in that there was other evidence of alternative designs that were technologically feasible and practical; this evidence, while not in the form of expert testimony, came in the form of pre-accident and post-accident improvements. *Id.* at 875-76. *Smith* found there was sufficient evidence of negligent design, noting "the absence of guards to cover [the protrusions]." *Id.* at 958. Yet, the jury apparently had no evidence about how the presence of guards would have been accommodated in the layout and design of the snowmobile, how it would have impacted the operation or handling of the machine, or how it would have increased the cost of the product. *Id.* at 957-58. Persuasive evidence probably could have been introduced on these issues, but without it, the jury's evaluation of the snowmobile's design must have been somewhat speculative.

essary element of the plaintiff's proof but did not say so explicitly.[144] In *Uloth*, the Supreme Judicial Court upheld a plaintiff's design defect claim in part by distinguishing its decision in *Schaeffer v. General Motors Corp.*,[145] which held that the plaintiff had not presented enough evidence for a jury to conclude that the product contained a design defect.[146] *Uloth* distinguished *Schaeffer* by pointing out that "Schaeffer did not offer proof that the [part] could have been designed to perform the same function in a safer fashion."[147] In contrast, the plaintiff in *Uloth* showed evidence of alternative designs that would have reduced the danger without significantly reducing efficiency.[148] Later in the *Uloth* opinion, the court stated that "there is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery."[149]

Despite these hints, the necessity of a safer alternative design remained a mystery. *Back*, by its formulation, was an open-ended, multi-factor test which attempted to retain a maximum of flexibility as Massachusetts courts developed the parameters of the new doctrine.[150] The plaintiffs in *Back* had, in fact, introduced evidence of alternative designs.[151] The plaintiff in *Smith* had not, and the court upheld the claim nonetheless.[152] In reality, the Supreme Judicial Court seems not to have appreciated the importance of requiring, or deciding not to require, proof of an alternative design. After all, *Back*'s open-ended risk-utility test was derived from the law in other jurisdictions,[153] and it was becoming the majority rule in design cases.[154] Courts in those other jurisdictions,[155] and even scholars in the field,[156] did not see the need to make the fine point of

144. Uloth v. City Tank Corp., 384 N.E.2d 1188, 1193 (Mass. 1978).

145. *Id.* at 1191 (discussing Schaeffer v. Gen. Motors Corp., 360 N.E.2d 1062, 1064 (Mass. 1977)).

146. *Schaeffer*, 360 N.E.2d at 1064.

147. *Uloth*, 384 N.E.2d at 1191.

148. *Id.*

149. *Id.* at 1193.

150. Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978).

151. *Id.* at 967.

152. *See* Smith v. Ariens Co., 377 N.E.2d 954, 954-58 (Mass. 1978).

153. *See Back*, 378 N.E.2d at 970 (citing cases from other jurisdictions).

154. *See* John H. Chun, Note, *The New Citadel: A Reasonably Designed Products Liability Restatement*, 79 CORNELL L. REV. 1654, 1658 (1994).

155. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (Cal. 1978); Bowman v. Gen. Motors Corp., 427 F. Supp. 234, 242 (E.D. Pa. 1977).

156. *See* W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573, 574, 580 (1990) (risk-utility test developed by Dean Wade; criticiz-

whether a safer alternative design was simply a factor, or an essential factor. Moreover, these early modern era cases in Massachusetts did not squarely present the question. Even in *Smith*, which allowed recovery without evidence of an alternative design, the defendant appears not to have argued the point.[157] Later cases outside of Massachusetts and in Massachusetts made it necessary to face this issue head-on.[158] The Supreme Judicial Court can be forgiven then for creating this ambiguity in its initial foray into design defect cases. It is more perplexing that this ambiguity continues in Massachusetts over thirty years later.

2. Breaking Away from the Hidden Danger Paradigm

As this Article has previously explained, Massachusetts products liability law in the pre-modern period was primarily concerned with hidden dangers to the consumer. The three seminal design cases decided in 1978, *Uloth*, *Smith*, and *Back*, dealt with the particular problems that patent dangers pose. They did away with the hidden danger paradigm and reached decisions that promoted consumer protection in practical, cost-efficient ways.

Uloth has become a classic illustration of the duty to design around patent risks, where the design changes can be made at reasonable cost.[159] At the time it was decided, that duty was far from established, and certainly not in Massachusetts.[160] In *Uloth*, the plaintiff was working on a garbage truck, which was equipped with a rear step on which the workmen rode between stops.[161] The plaintiff hopped onto the step and slipped into the trash compaction area, where his foot was severed by a descending blade.[162] Evidence of several alternative designs was presented at trial, including side steps for the workers, which would have reduced the danger

ing Wade's risk-utility factors as "[a] list of concerns," not a liability test (citing John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973))).

157. *See Smith*, 377 N.E.2d at 954-59.

158. *See* discussion *infra* Parts II.C and III.D.

159. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. l, illus. 14 (1998) (illustration patterned from facts of *Uloth*).

160. *Uloth* noted that one of the leading patent danger cases, *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950), had just recently been overruled. Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 n.5 (Mass. 1978)*; see also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 reporters' note to cmt. d (canvassing cases rejecting patent danger rule). Some jurisdictions retain the patent danger rule. *Id.*

161. *Uloth*, 384 N.E.2d at 1190-91.

162. *Id.* at 1191.

with little impact on the efficiency of the machine.[163] The manufacturers argued, as a general matter, that they only had a duty to warn of dangers attendant in their product.[164] Of course, the danger of the descending blade was obvious, which meant that they had no duty at all, since there is no duty to warn of obvious dangers.[165] *Uloth* held, in effect, that a warning (or the obviousness of a danger which serves as a warning) may not substitute for a faulty design.[166]

Uloth rejected the patent danger rule, which held that users of a product should bear any risks that were obvious.[167] The rule held sway in most jurisdictions until the 1970s, but had never been explicitly announced in Massachusetts.[168] In *Uloth*, the court reasoned that products liability "law . . . 'ought to discourage misdesign rather than encouraging it in its obvious form.'"[169] By departing from the hidden danger paradigm, *Uloth* made practical judgments about the world we live in. It was unabashed social policy-making, rather than the mythical process of "finding" the law by tracing the logical consequences of precedent. It was not lost on the *Uloth* court that the plaintiff was a forty-four year old man working as a general laborer for the town of Amesbury, that he had a learning disability, that he had little experience working on the garbage truck, and that he had received little training or instruction for the job he was doing.[170] With this surely in mind, the court observed that "a user may not have a real alternative to using a dangerous product, as where a worker must either work on a dangerous machine or leave his job."[171] *Uloth* also found that "warning[s] [were] not effective in eliminating injuries due to instinctual reactions, momentary inadvertence, or forgetfulness on the part of a worker."[172] The reason for "safety devices," after all, "is to guard against such foreseeable situations."[173] The Supreme Judicial Court thus showed a tolerance for human frailties, and it recognized that mo-

163. *Id.*

164. *Id.* at 1191-92.

165. *Id.*

166. *Id.* at 1192-93.

167. *Id.*

168. JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 169-70 (5th ed. 2004).

169. *Uloth*, 384 N.E.2d at 1193 (quoting Palmer v. Massey-Ferguson, Inc., 476 P.2d 713, 719 (Wash. App. 1970)).

170. *Id.* at 1190, 1193.

171. *Id.* at 1192.

172. *Id.*

173. *Id.*

mentary, foreseeable lapses in the execution of a task are different from careless or reckless conduct.[174]

Smith and *Back* should also be seen as movement away from the hidden danger paradigm. The hidden danger paradigm of the pre-modern era was premised, in part, on the notion that the consumer did not receive what he bargained for.[175] Put differently, the product had disappointed consumer expectations through a manufacturing defect,[176] or because the lack of a warning made the user think the product was safer than it was. *Back* explicitly noted that "reasonable consumer expectations" are a legitimate part of determining whether it is "fit for [its] ordinary purposes" under the implied warranty of merchantability.[177] *Smith* and *Back* did not make those consumer expectations, or consumer choices, dispositive.[178] After all, the metal protrusions on the handle bar of the snowmobile in *Smith* should have been obvious to any user.[179] The purchaser of the snowmobile chose that snowmobile among others on the market, and presumably could have bought another machine without that needless risk. The design error of the motor home in *Back*, the unwise placement of the fuel tank,[180] was surely less obvious, but it certainly was no secret either. A careful consumer might have inspected the layout of the motor home and could have bought something else without the same risk. It is even possible that the purchasers of the snowmobile and the motor home bought those models precisely because they were cheaper, perhaps because the manufacturers had invested less safety. In *Smith* and *Back*, these consumer choices were beside the point where the products presented risks that could have been avoided at a reasonable cost. Thus, the focus of Massachusetts products liability law was shifting away from whether the consumer had "no notice"[181] of the product's danger, to whether that danger, as a matter of social policy, should be eliminated.

174. *Id.* at 1192 n.6.

175. *See* Farley v. Edward Tower & Co., 171 N.E. 639, 640-42 (Mass. 1930) (imposing liability where consumer product used as intended and without any warnings caused injury to consumer, emphasizing unknown quality of risk to consumer).

176. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998).

177. Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978).

178. *See id.* (noting fitness "depend[s] largely, although not exclusively, on reasonable consumer expectations").

179. Smith v. Ariens Co., 377 N.E.2d 954, 957 (noting location of protrusions).

180. *Back*, 378 N.E.2d at 967 (location of gas tank outside the perimeter of the chassis frame).

181. Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 491 (Mass. 1915).

3. Breaking Away from the Intended Use Paradigm

As was discussed in Parts I.A and I.B, cases in the pre-modern era involved consumers using products as the manufacturer had intended. For example, in *Mealey v. Super Curline Hair Wave Corp.*, the injured plaintiff was using the hair product in exactly the way that the manufacturer had directed in the instructions to the product.[182] The cases of the pre-modern era tended not to deal with situations where a plaintiff had used a product in ways that the manufacturer had not explicitly intended, or where the product had been subjected to stresses the manufacturer had not intended. At the beginning of the modern era, Massachusetts courts were presented with cases that raised the question of whether manufacturers and sellers could be held liable where a defective product caused injury in foreseeable, but unintended situations. At stake was whether the manufacturer, or the courts using some independent standard, would decide whether a product was defectively designed.

Two of the first cases of the modern period held out hope to manufacturers that it would be their standards, i.e., the manufacturer's intended uses of the product, that would decide whether a product contained a design defect. *Schaeffer v. General Motors Corp.* upheld a directed verdict for a manufacturer where an automobile mechanism, alleged by plaintiff to be defectively designed, had "adequately performed the functions for which it was designed and manufactured."[183] The court went on to say that a jury question would have presented "if there were evidence indicating that the plaintiff's injuries resulted from the differential's failure to perform its intended function, but there was no such evidence."[184] Missing was any attempt to second guess the manufacturer's design choices since the mechanism had done what the manufacturer had intended it to do. *Schaeffer* was unwilling to undertake this inquiry despite there being, by its own admission, "considerable evidence . . . that the . . . [mechanism] might reduce safety and stability in certain road conditions."[185] The court apparently thought it would be inappropriate, for example, for a jury to delve into whether the mechanism, designed to improve safety in certain situations, might have reduced the vehicle's overall safety, thereby inviting the jury

182. Mealey v. Super Curline Hair Wave Corp.,173 N.E.2d 84, 86 (Mass. 1961).
183. *See* Schaeffer v. Gen. Motors Corp., 360 N.E.2d 1062, 1064 (Mass. 1977).
184. *Id.*
185. *Id.* at 1064-65.

to decide that the manufacturer had been unreasonable in its design choices.[186] *Schaeffer* cited as support *doCanto v. Ametek, Inc.*,[187] which did not explicitly adopt the intended use paradigm, but *doCanto* was consistent with the result reached in *Schaeffer*.[188] In *doCanto*, the product's improper design had caused it to fail to perform a function that the manufacturer had affirmatively promised that it would perform.[189]

These decisions show that it was not inevitable that Massachusetts courts and juries would conduct their own cost/benefit analyses of manufacturer's design choices. Until the mid-1970s, courts around the country had been unwilling to impose liability where the product performed exactly in the way it was intended to perform.[190] It was, after all, possible for Massachusetts courts to have limited recovery to a narrow category of "self-defeating" design cases in which the product's deficiency is much like a manufacturing defect because it fails to perform its "manifestly intended function."[191] These cases stem from "inadvertent design errors," mistakes made by the product designers that "if [the product designers] could have recaptured [the product] before it had hit the market and started hurting people, [they would] have done so. They are designs about which there is simply no argument that they may be okay."[192] These cases are relatively rare, and it appears that they have not often made their way into the published decisions of Massachusetts

186. *Id.*

187. *Id.* at 1064 (citing doCanto v. Ametek, Inc., 328 N.E.2d 873 (Mass. 1975)).

188. *doCanto*, 328 N.E.2d at 875-80.

189. *Id.* at 877.

190. *Cf.* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 484 (1990) ("[C]ourts generally were reluctant, until the mid-1970s, to impose liability for harm caused by product designs that performed exactly as they were intended to perform. For example, when a driver of an automobile inadvertently crashed into a tree, courts traditionally refused to consider seriously the argument that the vehicle should have been designed to prevent or reduce injury to its occupants. Notwithstanding predictions of doom from some quarters, courts gradually overcame their reluctance and by the late 1970s and the early 1980s they routinely imposed liability for harm caused by manufacturer's conscious design choices.").

191. *Triumph of Risk-Utility*, *supra* note 123, at 1064.

192. James A. Henderson, Jr., *A Discussion and a Defense of the Restatement (Third) of Torts: Products Liability*, 8 KAN. J.L. & PUB. POL'Y 19, 19 (1998); *see* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1547-52 (1973) [hereinafter *Conscious Design Choices*] (explanation of "inadvertent design errors").

courts,[193] but in other jurisdictions, courts were prepared, even prior to the publication of section 402A, to impose liability where products would "collapse during normal use because of inadvertently designed-in weaknesses."[194] For example, if brakes were designed such that they failed unexpectedly, the argument for liability was unassailable.[195] Limiting design review to these "inadvertent design error" cases would not have taxed the competence of courts to adjudicate these disputes since the matter of determining whether the product failed during its intended use is a question of engineering and mathematics, not value judgments about the appropriate level of safety.[196] In 1973, one influential scholar and law professor from Massachusetts argued against extending judicial review beyond the inadvertent design error cases, calling the review of conscious design choices "a suicide mission" for courts.[197]

And yet, *Smith* and *Back*, just a year after *Schaeffer*, undertook the difficult task of assessing the reasonableness of manufacturers' design choices. In *Smith*, the defendant argued that a product need only be fit for its intended purpose, and that intended purpose did not include participation in collisions.[198] After all, no manufacturer intends for its products to become involved in accidents. The defendant argued that it owed no duty to design its product in a way that would help protect the user in a collision.[199]

193. *But see* Carey v. Gen. Motors Corp., 387 N.E.2d 583, 588 (Mass. 1979) (noting that design defects alleged by plaintiff were based on improper engineering practice).

194. *Conscious Design Choices*, *supra* note 192, at 1551.

195. *Id.*

196. *Id.* at 1552 ("In effect, the intended design serves as a standard with which to assess (and almost automatically condemn) the actual design."). See also *Carey*, in which the proof advanced by plaintiff was the testimony of a mechanical engineer about proper engineering practice. *Carey*, 387 N.E.2d at 585-88. There was no need to engage in balancing the costs and benefits of the manufacturer's design choices through the *Back* factors. Indeed, the testimony of the plaintiff's expert about the inadvisability of using thin plastic in a small, but essential, automobile part could hardly be disputed by the manufacturer, which had issued a recall for the part. *Id.* at 588. This illustrates the true test for distinguishing an inadvertent design error case from a conscious choice design case: if the designer could have turned back time and changed the design decision, would he have done so? In an inadvertent design error case, the designer surely would do so. In a conscious design case, the designer would stand by the judgment calls he made in balancing safety with other factors. *See* Brocklesby v. United States, 767 F.2d 1288, 1295 (9th Cir. 1985) (illustrating an inadvertent design error case where an airplane crashed into mountain because aeronautical chart, deemed to be a "product," was inaccurate).

197. *Conscious Design Choices*, *supra* note 192, at 1578. **R**

198. Smith v. Ariens Co., 377 N.E.2d 954, 956-57 (Mass. 1978).

199. *Id.*

The defendants in *Back* made essentially the same argument, except that they maintained that a motor home crashing into a highway railing was "an extraordinary" use, or misuse, of the product.[200] In either formulation, a departure from the intended use of the product would work to completely cut off liability before any of the manufacturer's design decisions were considered. The Supreme Judicial Court opted to break away from the intended use paradigm, and in so doing, insisted that the proper question was the reasonable foreseeability of the use.[201]

Back held that "a manufacturer must anticipate the environment in which its product will be used, and it must design against the reasonably foreseeable risks attending the product's use in that setting."[202] In both *Smith*, a case involving a snowmobile accident, and *Back*, a case about a highway accident involving a motor home, the risks from an accident were found to be sufficiently foreseeable that the designer had a duty to minimize the likelihood of injury in the event of a crash.[203] Crashworthiness and foreseeability were not absolute concepts. The designer had no duty to anticipate "bizarre, unforeseeable accidents,"[204] and it needed only to prevent the user from being subjected "to unreasonable risks"[205] in a collision. The Supreme Judicial Court acknowledged that it was wading into matters of social policy, noting that the "major argument" against extending tort liability to crashworthiness cases was that the legislature should make decisions about design standards.[206] The court decided it would intervene, at least temporarily, until the legislature acted.[207]

Defendants made another stab at reviving the intended use/intended function paradigm a year later in *Uloth*.[208] After all, the garbage truck had performed "precisely as intended," and therefore, according to the manufacturers, could not have been negligently designed.[209] The Supreme Judicial Court brushed aside the

200. Back v. Wickes Co., 378 N.E.2d 964, 968 (Mass. 1978).

201. Henderson & Eisenberg, *supra* note 190, at 484. **R**

202. *Back*, 378 N.E.2d at 969.

203. *Smith*, 377 N.E.2d at 957; *Back*, 378 N.E.2d at 969-70.

204. *Back*, 378 N.E.2d at 969.

205. *Smith*, 377 N.E.2d at 957.

206. *Id.*

207. *Id.*

208. Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978).

209. *Id*. at 1191.

defendants' invocation of *Schaeffer*,[210] and by then it was confident enough to state that "the focus in design negligence cases is not on how the product is meant to function, but on whether the product is designed with reasonable care to eliminate avoidable dangers."[211] In other words, the manufacturer's intended function of the product had gone from being dispositive to being almost beside the point. The question, quite simply, was how the product ought to function, as determined by courts and juries.

4. The Interplay Between Warranty and Negligence and the Importance of Doctrinal Labels

The early cases of the modern era attempted to stake out differences between implied warranty and negligence liability, but the congruity between the two theories was more impressive than the distinctions. Only later did Massachusetts courts become preoccupied by the doctrinal labels, with rather unfortunate results, as this Article argues in Parts II and III. *Smith*, *Uloth, doCanto*, and *Schaeffer* were all negligence cases.[212] *Back* was an implied warranty case, but it conceded that a jury reviewing the manufacturer's conscious design choices under the implied warranty of merchantability "must weigh competing factors much as they would in determining the fault of the defendant in a negligence case."[213] In other words, the functional analysis for warranty and negligence was the same. The real story then was that the Supreme Judicial Court had affected a sea change in Massachusetts products liability law through changes to the common law of negligence, not because the implied warranty of merchantability had enlarged consumer protection. Had that been the lesson of these early modern products liability cases, the development of the implied warranty of merchantability and of negligence theory would have proceeded more or less in tandem. There would have been no need to make

210. *Id. Uloth*'s attempt to distinguish *Schaeffer* is not persuasive. Rather than announcing that "intended function" was no longer the touchstone for design review, and thereby clearly relegating *Schaeffer* to the ash heap, *Uloth* claimed that the plaintiff failed in *Schaeffer* because he had failed to provide proof of a safer alternative design. *Id.* There is nothing in *Schaeffer* to indicate that the court was remotely interested in weighing the costs and benefits of a different version of the product. The issue began and ended with the fact that the allegedly defective automobile part had done what it was designed to do. Schaeffer v. Gen. Motors Corp., 360 N.E.2d 1062, 1064 (Mass. 1977). There is no credible way to reconcile *Schaeffer* and *Uloth*.

211. *Uloth*, 384 N.E.2d at 1191.

212. *See supra* Parts I.D.1, I.D.2, and I.D.3.

213. Back v. Wickes Co., 378 N.E.2d 964, 970 (Mass. 1978).

pained attempts to distinguish the old negligence cause of action from its supposedly more progressive brethren, the implied warranty of merchantability. Instead, *Back*'s attempts in dicta to explain the differences between the two theories became maxims upon which future cases would founder.

These maxims, destined to be repeated and puzzled over, are as follows:

1. *The Strict Liability Maxim*: The amendments to the implied warranty of merchantability "[had] transformed [it] into a remedy intended to be fully as comprehensive as the strict liability theory of recovery that has been adopted by a great many other jurisdictions."[214]

2. *The 402A Maxim*: "Massachusetts law of warranty [is] congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)."[215] As a result, strict liability cases in other jurisdictions are a useful guide to interpreting the implied warrant of merchantability.[216]

3. *The Product, Not Conduct Maxim*: Warranty focuses on the product's characteristics, not the defendant's conduct, as negligence does.[217]

From these maxims, the strict liability conundrum was born. As this Article has previously argued, both section 402A of the Restatement (Second) of Torts and the amendments to the Massachusetts implied warranty of merchantability, as they were initially conceived, had the similar, and comparatively modest, goals of abolishing the privity rule, removing various encumbrances from the law of sales, and extending strict liability to manufacturing defects.[218] Later, section 402A and the Massachusetts implied warranty of merchantability came to be interpreted as extending strict liability to design and warning cases.[219] The remainder of this Article will explore how Massachusetts courts have tried, in many cases with unsatisfactory results, to come to terms with the idea of strict liability. Before doing so, it is important to observe that *Back*, as it was making the statements that would become inflexible maxims, was hardly attempting to apply liability without fault on its facts. *Back* insisted that it was reasonable foreseeability, in the classic

214. *Id.* at 968.
215. *Id.* at 969.
216. *Id.*
217. *Id.* at 970.
218. *See supra* Part I.A.
219. *See Triumph of Risk-Utility*, *supra* note 123, at 1062-63.

negligence formulation, that defined the duty to be owed.[220] The duty to design a crashworthy vehicle was a rule of reason, and no vehicle would be required to be "collision-proof."[221] Even as it was making the logically inconsistent statement that the focus should be on the product, not the defendant conduct, where the alleged fault in the product lay in the defendant's conscious design choices (i.e., the defendant's conduct), *Back* hastened to add that "the nature of the decision is essentially the same."[222]

This important qualifier would be forgotten by some Massachusetts courts. The criticisms, which follow in this Article, are criticisms directed at the strange and circuitous voyage taken by Massachusetts courts in subsequent years where they became overly interested in adherence to these maxims and to doctrinal labels. These criticisms are not directed at *Back* or at the other early landmark cases of the modern period, which did not display doctrinal rigidity but instead did away with it. The fault lies not in *Back* but in the misbegotten interpretations of its maxims.

II. Strict Liability Becomes a Muddle: 1983 to 1992

The second (or middle) part of the modern era of Massachusetts products liability law saw the creation of two entirely avoidable controversies: the unreasonable use defense, and the hindsight test for warning claims. It also saw the ambiguity over the necessity of a safer alternative design present itself in more concrete ways, yet the ambiguity remained (and still remains) unresolved. These issues led to incoherence and confusion in Massachusetts products liability law, and they have unnaturally limited or foreclosed recovery to plaintiffs injured by defective products. During this time, Massachusetts courts became more concerned with delineating the theoretical distinctions between negligence and warranty (i.e., strict liability) and staying true to the maxims outlined in Part I.D.4 than shaping the law in a practical way to promote an optimal level of consumer protection.

220. *Back*, 378 N.E.2d at 969; *see* Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.) ("The risk reasonably to be perceived defines the duty to be obeyed . . . .").

221. *Back*, 378 N.E.2d at 969.

222. *Id.* at 970.

A. *The Lamentable "Unreasonable Use" Defense*

The middle part of the modern era began with the Supreme Judicial Court's 1983 decision in *Correia v. Firestone Tire & Rubber Co.*,[223] which spawned the "unreasonable use" or "*Correia*" defense.[224] The case was presented to the Supreme Judicial Court as a set of certified questions from federal court having to do with the alleged negligence on the part of the plaintiff and the plaintiff's employer.[225] The plaintiff's decedent was driving his employer's tractor-trailer loaded with steel plates when one of the tires blew out, causing an accident that led to the death of the employee.[226] One of the questions asked was whether contributory or comparative negligence could be a partial or complete defense to an implied warranty of merchantability claim.[227] *Correia* concluded that the Massachusetts comparative negligence statute did not "literally apply," since the warranty claim was essentially strict liability in tort, not negligence.[228] It invoked the Strict Liability Maxim, the 402A Maxim, and the Product, Not Conduct Maxim to sharply contrast strict liability from negligence.[229] Calling upon comment c to section 402A of the Restatement (Second) of Torts, the court described strict liability in terms of social justice, invoking the "'special responsibility'" of "'reputable sellers [to] stand behind their goods.'"[230] "'[P]ublic policy demand[ed]'" strict liability.[231] This theory of liability was further premised upon the "'right[s]'" of the public, and the notion that the consumer is "'entitled to the maximum of protection'" from those who could "'afford it.'"[232] This description logically suggested an uncompromising standard once the rights and entitlements of the powerless public were arrayed against powerful sellers and manufacturers. The populist tone and absolute language were more typical of constitutional

223. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983).

224. The confusion about this defense, described below, has prompted courts to eschew the more descriptive unreasonable use moniker in favor of simply "*Correia*." *See* Haglund v. Philip Morris, Inc., 847 N.E.2d 315, 323 (Mass. 2006) (analyzing the "*Correia*" defense). This Article will use both terms but will take care to distinguish this defense from other, closely related concepts.

225. *Correia*, 446 N.E.2d at 1033.

226. *Id.* at 1034.

227. *Id.* at 1039.

228. *Id.*

229. *Id.* at 1039-40.

230. *Id.* at 1040 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965)).

231. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c).

232. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. c).

law,[233] with its emphasis on indefeasible rights, than traditionally flexible tort doctrines. Strict liability, *Correia* maintained, imposed a duty "unknown in the law of negligence," which is not fulfilled even upon the exercise of all reasonable care.[234]

In propounding this theory of strict liability, *Correia* never paused to consider the theory of defect the plaintiff alleged.[235] It is unclear whether the plaintiff had claimed that the tire contained a manufacturing defect that caused the blowout, or whether the tire contained a design defect that caused the tire to fail prematurely under a load that it should have handled.[236] The Supreme Judicial Court had clearly recognized the difference between manufacturing and design defects in cases like *Back* and *Smith*. Those decisions had held that courts should apply a rule of reason for products alleged to be defectively designed.[237] After all, no tire can be expected to last forever, nor can it handle an unlimited amount of weight; the circumstances of the product failure had to be reckoned with. By not considering or addressing the distinction between manufacturing and design defects, *Correia* began to set in cement the idea that strict liability applied in all types of products liability cases. This idea would lead to unfortunate, and perhaps unintended, consequences.

Having expressed the strict liability rhetoric, *Correia* felt compelled to invent a restriction on this expansive theory of recovery. It announced, without citation to authority, that "[w]hen a user unreasonably proceeds to use a product which he knows to be defective and dangerous, he violates that duty [to act reasonably] and relinquishes the protection of the law."[238] In a stroke, the court created a complete defense to "balance[ ]" what it imagined was a very robust theory of liability.[239] The "unreasonabl[e] use[ ]" of the product was thought to be the sole "proximate cause of [the plaintiff's] injuries as a matter of law," which would appropriately deny

233. *See, e.g.*, Konigsberg v. State Bar of Calif., 366 U.S. 36, 61 (1961) (Black, J., dissenting) (First Amendment rights not to be balanced against other interests).

234. *Correia*, 446 N.E.2d at 1040.

235. *Id.* at 1040-41 (describing liability under implied warranty of merchantability without analyzing type of defect alleged by plaintiff).

236. *Id.* at 1034.

237. Back v. Wickes Corp., 378 N.E.2d 964, 969 (Mass. 1978) (emphasizing that "warranty liability is not absolute liability" and there is no duty to make vehicle "collision-proof"); Smith v. Ariens Co., 377 N.E.2d 954, 957 (Mass. 1978) (adopting reasonable care standard).

238. *Correia*, 446 N.E.2d at 1040.

239. *Id.*

all recovery.[240] The doctrinal inconsistencies in this new defense should have been readily apparent. First, it looked remarkably similar to the assumption of risk defense abolished by the Massachusetts legislature.[241] *Correia* could avoid the assumption of risk bar since it only applied to negligence, which it insisted was a "well-defined" sphere separate from strict liability.[242] Neither *Correia*, nor any subsequent decision of a Massachusetts court, has attempted to justify how such a significant restriction on warranty liability could comport with the legislature's intent when: (1) the legislature did not provide for it; (2) the legislature had abolished assumption of the risk to make negligence a more generous means of recovery; and (3) the legislature had made warranty law still more generous than negligence law.

Additionally, the very nature of the *Correia* defense was at odds with the recently decided *Uloth*, which remains undisturbed to the present, and which has never been meaningfully distinguished. After all, had not the garbage truck worker known of the patent danger posed by the descending teeth of the trash compactor and nonetheless proceeded to work on the back of the truck? *Uloth* itself felt compelled to analyze this conduct to determine whether it fell within the old assumption of the risk defense, which applied since the accident had predated the abolition of that defense.[243] It is hard to imagine how *Uloth* would not have been subject to the unreasonable use defense. The great insight of *Uloth*, which the reporters for the new Restatement have called in their survey of the law the leading design defect case in Massachusetts,[244] was the abolition of the patent danger rule.[245] Decisions subsequent to *Correia* have failed to give much definition to the second prong of the defense, "unreasonably" proceeding toward the danger.[246] It appears

240. *Id.*

241. *See* Riley v. Davison Constr. Co., 409 N.E.2d 1279, 1282-84 (Mass. 1980) (describing defenses and their histories, including statutory repeal of the assumption of risk defense).

242. *Correia*, 446 N.E.2d at 1040.

243. *Id.* 1193 n.7.

244. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 Reporters' Note (1998).

245. Uloth v. City Tank Corp., 384 N.E.2d 1188, 1192 (Mass. 1978) (rejecting patent danger rule because burden of preventing "needless injury" should be placed on manufacturer).

246. *See, e.g.*, Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1312-13 (Mass. 1988) (worker injured when trying to put grease in industrial machine in quasi-emergency situation barred from recovery under warranty due to unreasonable use defense; no discussion of what made the conduct, beyond knowledge of the danger, unreasonable).

to be enough that the plaintiff knew of the danger and used the product anyway.[247] There is nothing more to the unreasonableness component than using the product with knowledge of the danger, making it indistinguishable in practice from the patent danger rule condemned in *Uloth*.

In theory, the unreasonable use defense differed slightly from assumption of the risk in that *Correia* contained a subjective element of whether the plaintiff knew of the danger, and an objective element of "unreasonably" proceeding toward it.[248] Paradoxically, the *Correia* defense was more protective of defendants than the old assumption of risk defense. The objective element of *Correia* meant that the more nuanced consideration of the plaintiff's particular characteristics was gone. In *Uloth*, the court decided that a directed verdict for the defense was not warranted in part because the plaintiff was a slow learner, had never received instructions, and was inexperienced.[249] All of this went to the issue of whether that particular user had subjectively known and appreciated the risks of working on the garbage truck.[250] Further, *Uloth* noted that it was rare for a court to determine, as a matter of law, that a plaintiff had assumed the risk; it was typically a jury question.[251] By its formulation, the *Correia* defense opened the door to courts to make the objective "unreasonable use" determinations as a matter of law, which would preclude recovery before the plaintiff reached a jury.[252]

Ironically, *Correia* became the greatest victory for product manufacturers and sellers in the modern era of Massachusetts products liability law. It traded the rhetorical triumph of strict liability for an enormous litigation advantage which defendants would employ to great effect.[253] In *Correia* itself, the defendant tire manufacturer, Firestone, had argued for the application of the comparative negligence statute to warranty actions.[254] The Supreme Judicial Court turned aside Firestone's arguments for the ap-

247. *See, e.g.*, *id.*

248. Allen v. Chance Mfg. Co. (*Allen I*), 494 N.E.2d 1324, 1326 (Mass. 1986).

249. *Uloth*, 384 N.E.2d at 1193.

250. *Id.*

251. *Id.*

252. *See* Wasylow v. Glock, Inc., 975 F. Supp. 370, 380 (D. Mass. 1996) (granting summary judgment in part due to *Correia* defense).

253. Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1312-14 (Mass. 1988) (plaintiff barred from recovery under warranty theory even though defendant negligent in designing product).

254. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1039 (Mass. 1983).

plication of what is often a partial defense, and maintained, for the moment, the rhetorical and theoretical purity of strict liability.[255] But it had given Firestone a complete defense that was more effective in defeating recovery.[256] Because the unreasonable use defense was created out of whole cloth, Firestone could scarcely have predicted such a result, or have expected to do so well. *Correia* was not a bad decision because it is unhelpful to plaintiffs. *Correia* was a bad decision not only because it is confusing and requires mind-bending inquiries by courts and juries, but mostly because it blocks liability where it should be imposed and it attempts to extend liability where it should not.

After *Correia*, Massachusetts courts quickly experienced difficulty in applying it. Because *Back*, *Smith*, and *Uloth* had held that the manufacturer's duty to design and provide warnings turned on the reasonable foreseeability of the uses of the product, and not just on the manufacturer's intended uses, it became necessary to parse out "misuse," "unforeseeable use[ ]," and "unreasonable misuse."[257] Since it was not enough to simply cry that a plaintiff had misused a product, a court was called upon to assess whether the use was reasonably foreseeable.[258] If the use was reasonably foreseeable, then the manufacturer had a duty to take reasonable steps to design around that use.[259] It was the burden of the plaintiff to show reasonable foreseeability, since it was the plaintiff's burden to prove the existence of the manufacturer's duty.[260] The Massachusetts Appeals Court in *Fahey v. Rockwell*[261] then read *Correia* to say that "unforeseeable misuse" and "unreasonable use" could be used interchangeably.[262]

The next year, in *Allen v. Chance Manufacturing Co.* (*Allen I*), the Supreme Judicial Court was confronted with a certified question from a federal district court confused about the state of the law.[263] The federal court asked whether the "misuse defense" applied to foreseeable and unforeseeable uses of the product in a

255. *Id.* at 1040-41.

256. *Id.*

257. *See generally*, *Allen I*, 494 N.E.2d 1324, 1325-27 (Mass. 1986) (trying to explain the interplay between the three concepts).

258. *See* Back v. Wickes Corp., 378 N.E.2d 964, 968-69 (Mass. 1978).

259. *Id.*

260. *See Correia*, 446 N.E.2d at 1041 n.15; *Back*, 378 N.E.2d at 969.

261. Fahey v. Rockwell Graphic Sys., Inc., 482 N.E.2d 519, 525-26 (Mass. App. Ct. 1985).

262. *Id.* at 526 n.13.

263. *Allen I*, 494 N.E.2d 1324, 1325-26 (Mass. 1986).

breach of implied warranty action.[264] *Allen I* attempted to alleviate the confusion first by noting that there never had been a "misuse defense" to a warranty claim.[265] Second, *Allen I* said that it was the plaintiff's burden to prove the reasonable foreseeability of his use of the product, and that it was an affirmative defense for the defendant to prove that the plaintiff had unreasonably used the product within the meaning of *Correia*.[266] These two inquires, *Allen I* maintained, had "nothing to do" with each other.[267] Thus, only after the plaintiff had proved that his use of the product was reasonably foreseeable, would the defendant attempt to show that the use was unreasonable.[268] Having set out this methodology, *Allen I* took the opportunity to correct *Fahey*'s statement that "unreasonable use" and "unforeseeable misuse" could be used interchangeably.[269]

These fine distinctions caused obvious doctrinal tensions, not to mention a level of abstraction apt to perplex the most attentive and intelligent jury. After *Correia*, a trial court and the jury would be required to assess the plaintiff's use of the product through a number of different lenses. Take, for example, the facts of *Fahey*, which involved a worker who removed a safety guard on a printing press and then performed a common task (removing an impurity from a plate) that caused his arm to be pulled into the press, crushing it.[270] After the decision of the appeals court, the case was to be submitted to a jury.[271] First, it would have been necessary for the jury to determine whether the plaintiff's removal of the impurity after removing the guard was reasonably foreseeable as part of the plaintiff's proof on negligent design and breach of warranty, taking into account the amount of inefficiency and waste of time caused by the placement of the guard on the machine, which were considerable.[272] Second, these same actions would have been assessed to determine whether the plaintiff's injuries were proximately caused by the design of the product or by some intervening cause, such as the

264. *Id.* at 1325.

265. *Id.* at 1326.

266. *Id.* at 1326-27.

267. *Id.*

268. *Id.* at 1326.

269. *Id.* at 1327 n.2.

270. Fahey v. Rockwell Graphic Sys., Inc., 482 N.E.2d 519, 521-22 (Mass. App. Ct. 1985).

271. *Id.* at 529.

272. *Id.* at 523-24.

plaintiff's own conduct.[273] This proximate cause question would turn on the foreseeability of the plaintiff's removal of the guard.[274] Third, the plaintiff's conduct would have been considered to determine the plaintiff's degree of negligence (i.e., the reasonableness of his conduct, taking into account the risks and benefits of removing the guard) under the comparative fault statute.[275] Fourth, the plaintiff's actions would have to be examined to determine whether they were knowing and unreasonable, as part of the *Correia* defense, presumably taking into account the same risks and benefits of removing the guard.[276] The court and the jury would have to also understand as part of *Correia* that the unreasonable use inquiry was separate from the plaintiff's "ordinary negligence," which is irrelevant on the warranty claim.[277] All of these issues overlap to such a degree that they collapse into a single question: How reasonable was it for the plaintiff to remove the guard and to continue to do his job? It is no wonder that *Allen I* acknowledged that distinguishing misuse from *Correia* (or the old assumption of the risk defense) "has proven to be difficult to achieve."[278]

The falseness of the distinction between "unforeseeable misuse" and "unreasonableness use" in a case like *Fahey* is explained by one prominent scholar in explaining how misuse and proximate cause meld into one question:

> If a court determines that a design defect exists [solely] because the manufacturer has failed to include . . . safety devices, there is no proximate cause question of any moment left to consider. The very reason for declaring the design defective was to prevent this kind of foreseeable misuse. Proximate cause could not, in

273. *See* Richard v. Amer. Mfg. Co., 489 N.E.2d 214, 215 n.1 (Mass. App. Ct. 1986) (finding of unreasonable use under *Correia* does not preclude finding for plaintiff on proximate cause, thus separating the two inquiries).

274. *See id.*

275. *See id.* at 215 (affirming verdict dividing responsibility between defendant and plaintiff); *Fahey*, 482 N.E.2d at 524 (comparative negligence question for jury).

276. *See Fahey*, 482 N.E.2d at 526 (*Correia* defense to be decided by jury).

277. *See* Hallmark Color Labs v. Damon Corp., 477 N.E.2d 1052, 1053-54 (Mass. App. Ct. 1985) (jury instruction on *Correia* defense had to make clear that "ordinary negligence" was irrelevant); Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1, 17 (1st Cir. 2001) (ordinary negligence irrelevant to breach of warranty claim).

278. *Allen I*, 494 N.E.2d 1324, 1327 n.2 (Mass. 1986). *Allen I* went on to claim that the distinction was in fact clear as there were two different scenarios: (1) the plaintiff misuses the product when the danger posed by the defect is not apparent; and (2) the plaintiff misuses the product when the danger is apparent. *Id.* at 1326. Only in the second situation would the *Correia* (or the old assumption of risk) defense apply. Unfortunately in the second situation, the alleged "misuse" is usually alleged to be the knowing, unreasonable use of the product, as was true in *Fahey*.

> such a case, present an obstacle on the grounds of misuse. To do so would negate the very reason for declaring the design defective in the first [place].[279]

The *Correia* defense established yet another layer of reviewing the reasonableness of the plaintiff's conduct. If, for example, it was determined in *Fahey* that it was reasonably foreseeable that the worker would have removed the guard because (1) the guard substantially increased the amount of time required to make the machine ready for operation; (2) the guard caused the press workers to have to stand off-balance while changing plates; and (3) the guard caused scratches to the plates, and the machine was defectively designed because the guard could have been placed elsewhere at little cost and with increase productivity,[280] then it would be redundant to ask, as part of the proximate cause question, whether the injury was a foreseeable result of the poor design. It was a poor design because it encouraged the removal of the guard and made more likely the kind of injury that was in fact sustained. It is increasingly redundant to ask under *Correia* whether using the product without the guard was unreasonable after having determined that it was reasonably foreseeable for a press worker to do just that. Massachusetts courts have struggled to find a coherent way to explain *Correia* for the simple reason that it cannot be done.

Having firmly established *Correia* as an affirmative defense, Massachusetts courts were left with other doctrinal tensions. *Correia* decided that the knowing, unreasonable use of a product was, as a matter of law, the sole proximate cause of a plaintiff's injury.[281] Proximate cause must be established by the plaintiff in his prima facie case to prevail.[282] If "unreasonable use" simply negated an element of the plaintiff's proof, it should not properly be thought of as a defense for which the plaintiff has the burden of proof. If it is a true affirmative defense, then the plaintiff's unreasonable use would only come into play once the plaintiff had established proximate cause, i.e., a sufficiently foreseeable causal connection between the product's defect and the events leading to the injury,[283] which would already include the plaintiff's use of the product.

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279. Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 421 (1978).

280. *Fahey*, 482 N.E.2d at 521-22.

281. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040 (Mass. 1983).

282. *Id.*

283. *See* Delaney v. Reynolds, 825 N.E.2d 554, 556 (Mass. App. Ct. 2005) (proximate cause standard under Massachusetts law).

Correia became more awkward still when the defendant in *Colter v. Barber-Greene Co.* attempted to apply the "unreasonable use" defense to a negligence claim.[284] In *Colter*, an industrial worker was injured while trying to put grease into a machine while it was running in a situation that he considered to be an emergency.[285] The plaintiff's theory, much like the theory of defect in *Fahey*, was that the machine was defectively designed because it encouraged the removal of a safety guard, which would have prevented the injury had it been in place.[286] At trial, the jury found that the plaintiff, manufacturer, and a seller of the product were each partially at fault, which entitled plaintiff to partial recovery on the negligence claim.[287] The jury also found that the defendants had breached the implied warranty of merchantability, but found against the plaintiff on the *Correia* defense.[288] The defendants argued that since they had prevailed on the *Correia* defense, the plaintiff's unreasonable use was the "sole proximate cause" of his injuries, according to the plain language of *Correia*.[289] If the plaintiff's conduct was the sole proximate cause for his injuries, which would ordinarily be a complete defense to a negligence claim, then the defendants would arguably be entitled to a judgment in their favor as a matter of law.[290]

By making the *Correia* defense a part of proximate cause, the court in *Colter* found itself in an embarrassing position. As *Colter* aptly pointed out, allowing the plaintiff's negligent behavior to serve as a complete bar to recovery was foreclosed by the Massachusetts comparative fault statute, which had abolished contributory negligence as a defense unless it was greater than the fault of the defendants.[291] The jury in *Colter* had found that the plaintiff's fault was not greater than the combined fault of two defendants, and the court could hardly make, as a matter of law, a contrary finding.[292] Further, the assumption of risk defense was expressly abolished by the legislature in negligence cases.[293] Admitting that the *Correia* defense and assumption of the risk were rather similar,

284. Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1312 (Mass. 1988).
285. *Id.* at 1308-09.
286. *Id.* at 1309-10.
287. *Id.* at 1307.
288. *Id.*
289. *Id.* at 1312-13.
290. *Id.*
291. *Id.* at 1314-15.
292. *Id.*
293. *Id.* at 1315 n.14.

Colter said that applying *Correia* in negligence actions "may" be precluded by the legislature's action against assumption of the risk.[294] *Colter* tried to escape this imbroglio by distinguishing the nature of proximate cause in warranty and negligence actions, stating that "negligence liability does not focus on a sole cause of the plaintiff's injuries."[295] With that, *Colter* held that the *Correia* defense would not apply to the negligence claim.[296] It did, however, notice the incongruity of the results obtained.[297] The supposedly more robust theory of recovery, breach of implied warranty, had been defeated by the all-or-nothing nature of the *Correia* defense. Because the jury was allowed to apportion fault on the negligence claim, the plaintiff could be allowed to recover damages for severe injuries caused by an admittedly defectively designed product.[298] The *Colter* court suggested that a "fairer system" be installed that would make the results in negligence and warranty cases "more consistent," but this was a matter, it believed, for legislative action.[299] This plea for legislative assistance was strange in that the *Correia* defense had been a judicial creation, not the product of legislation. Having perhaps not thought through the implications of this new, powerful defense, the court was asking for help to clean up the mess it had created. *Colter* apparently did not think abrogating *Correia* was a solution.

The First Circuit Court of Appeals, in reviewing the jury verdicts handed down in *Allen v. Chance Manufacturing Co.,* (hereinafter *Allen II*), which followed the Supreme Judicial Court's answers to certified questions in *Allen I*, soon faced the problems caused by *Correia* and *Colter*.[300] In *Allen II*, the defendant sought to establish that the conduct of the plaintiff or the plaintiff's employer was the "sole proximate cause" of the plaintiff's injuries, which occurred while the plaintiff was using a product without safety goggles.[301] The trial court had refused to give an instruction that stated that the product manufacturer was entitled to a verdict in its favor if the negligence of the employer or the plaintiff em-

294. *Id.*

295. *Id.* at 1312-13.

296. *Id.* at 1315.

297. *Id.*

298. *Id.* at 1314-15 (explaining how plaintiff could recover under negligence theory even if partially at fault).

299. *Id.* at 1315.

300. Allen v. Chance Mfg. Co. (*Allen II*), 873 F.2d 465 (1st Cir. 1989).

301. *Id.* at 467-71.

ployee was the "sole proximate cause" of the injuries.[302] The First Circuit held that this was error and that the instruction should have been given with respect to the warranty claim as well as the negligence claim, notwithstanding *Colter*'s reasoning that the concept of sole proximate cause does not apply to negligence actions.[303] *Allen II* explained that *Colter* was trying to show why the *Correia* defense only applied to breach of warranty claims; it was not doing away with "sole proximate cause" entirely, a doctrine which the *Correia* decision itself recognized.[304] In short, the *Allen II* court essentially repudiated the logic but not the holding of *Colter*, which was the most diplomatic way to extricate itself from the awkward spot the First Circuit found itself in. It was thus apparent that *Colter*'s attempt to square the circle in its explanation of why the *Correia* defense would not apply to negligence actions had failed. The misbegotten *Correia* defense led to the unsatisfactory mental gymnastics in *Colter*, which led to the strained logic of *Allen II*, which in turn led to the strange result in *Allen II*. On remand, the First Circuit held, the jury would have to consider whether the plaintiff's failure to wear goggles was the "sole proximate cause" of his injuries on the negligence and warranty claims, and then to consider whether that failure was the "sole proximate cause" of his injuries as a result of the *Correia* defense.[305] Meanwhile, the jury would have to be told that the "ordinary negligence"[306] of the plaintiff should be disregarded on the warranty claim, necessitating a decision on whether the failure to wear goggles was ordinary negligence, or more severe negligence, before it even reached the *Correia* defense. How these dual "sole proximate cause" inquiries, both relating to the same fairly simple factual issue, could be articulated separately and coherently was left unsaid.[307]

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302. *Id.* at 467.

303. *Id.* at 471.

304. *Id.*; *see also* Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1038-39 (Mass. 1983) (explicitly recognizing that negligence of plaintiff's employer would be relevant to issue of sole proximate cause on negligence claim).

305. *Allen II*, 873 F.2d at 473. The court made it clear that the submission to the jury of the *Correia* defense would depend on the evidence developed about the plaintiff's subjective awareness of the risk. *Id.*

306. *See* Hallmark Color Labs, Inc. v. Damon Corp., 477 N.E.2d 1052, 1054 (Mass. App. Ct. 1985).

307. Richard v. Am. Mfg. Co., 489 N.E.2d 214, 215-16 n.1 (Mass. App. Ct. 1986). Presaging the result in *Colter*, the *Richard* court envisioned that a finding of unreasonable use on a warranty count would not stop a jury from appropriately finding that the defendant's negligence was a proximate cause of the plaintiff's injuries. *Id.*

It may be persuasively argued that the test of a legal doctrine is not its logical consistency or its elegant formulation, but whether it consistently arrives, by one route or another, at satisfactory results. By that measure, the *Correia* doctrine should be found wanting. The *Colter* opinion, as previously noted, expressed misgivings about the end result, which gave the plaintiff a partial recovery under negligence, but nothing under warranty, due to the *Correia* defense.[308] In *Richard*, a worker whose hand was crushed for want of a simple guard was able to recover in a design case under negligence where the jury found the manufacturer 70% at fault and the worker 30% at fault.[309] The worker recovered nothing on the warranty claim because of *Correia*.[310]

A similar result was obtained in *Cigna Insurance Co. v. Oy Saunatec, Ltd.* where the plaintiff was found to be 35% negligent but was found to be guilty of unreasonable use, allowing partial recovery under negligence but nothing under warranty.[311] These outcomes show that the *Correia* defense has, in many cases, transformed the implied warranty of merchantability into an instrument of consumer protection that is unforgiving to injured consumers. One practitioner recognized this dynamic shortly after *Correia* was decided, when he noted that the all or nothing nature of the unreasonable use defense presented something of a dilemma for plaintiff lawyers choosing an avenue of recovery.[312] If an injured consumer is better off seeking compensation under a negligence theory that is intelligently applied and shorn of encumbrances like the patent danger rule,[313] than under a warranty claim burdened by the *Correia* defense, is the implied warranty of merchantability a significant addition to the cause of consumer protection in Massachusetts? The *Correia* court certainly saw the Massachusetts version of strict liability as significant, almost revolutionary, and effecting a large expansion of liability.[314] It can be fairly said then that the *Correia* court failed to meet its own objectives.

308. Colter v. Barber-Green Co., 525 N.E.2d 1305, 1315 (Mass. 1988).

309. *Richard*, 489 N.E.2d at 215.

310. *Id.*

311. Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1, 6 (1st Cir. 2001).

312. Raymond J. Kenney, Jr., *Defective Products in Massachusetts—A 1984 Update*, 69 MASS. L. REV. 108, 109 (1984).

313. *See Richard*, 489 N.E.2d at 215 (affirming plaintiff's verdict on negligent design on theory that machine lacked simple guard that could have been installed without undue cost) (citing Uloth v. City Tank Corp., 384 N.E.2d 1188 (1978)).

314. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1038-40 (Mass. 1983) (expansive language about how strict liability is different from negligence).

It is finally worth asking why the Supreme Judicial Court, twelve years after the first amendments to the implied warranty of merchantability, and several years after the landmark decisions in *Smith*, *Back*, and *Uloth*, found it necessary to erect such a significant barrier to recovery, bearing an uncanny resemblance to the assumption of risk defense abolished in negligence actions by the Massachusetts legislature?[315] If the *Correia* decision had been an acknowledged retrenchment in products liability law, one coming after the court had realized that earlier decisions had expanded the rights of plaintiffs too much, the new defense would have been understandable. Yet, *Correia* purported to do nothing of the kind, enthusiastically propounding an expansive theory of strict liability.[316] Perhaps the *Correia* court did not fully appreciate the implications of its decision, believing that "unreasonable use" would be a limited defense, especially with its qualifier that "ordinary negligence" would do nothing to limit the plaintiff's recovery on a warranty claim. If true, the court must have had dim memories of the assumption of risk defense, which had been part of Massachusetts law not long before.[317] The real explanation lies with *Correia*'s unquestioning adherence to the 402A Maxim. By 1983, section 402A had become what some commentators have called a "holy writ," because of its near universal adoption in the United States.[318] Section 402A contained, despite its bold advancement of strict liability in tort, vestiges of the law that existed prior to 1965, such as the assumption of the risk defense.[319] The *Correia* defense is a reiteration of Comment n of section 402A, which stated the well-established rule (for 1965) that assumption of the risk could completely bar recovery.[320] Rather than engaging in practical policymaking, as the court did in *Uloth*, (which itself is difficult to square with the *Correia* defense), the *Correia* court placed its faith in the words of section 402A.

315. *See supra* Part I.D for discussions of *Smith*, *Back*, and *Uloth*.

316. *Correia*, 446 N.E.2d at 1040.

317. *See Uloth*, 384 N.E.2d at 1193 n.7 (noting assumption of risk abolished by statute as of January 1, 1974).

318. *See, e.g.*, 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).

319. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

320. *Correia*, 446 N.E.2d at 1040-41.

B. *The Lamentable Hindsight Test*

While consumer protection advocates may have suffered a defeat with the invention of the *Correia* defense, they probably saw the adoption of the so-called "hindsight test" in failure to warn cases as the beginning of true strict liability in Massachusetts. This test, announced in the 1984 decision of *Hayes v. Ariens Co.*, presumes that the manufacturer or seller knew of all the risks of the product and measures the duty to warn in warranty cases against that presumed knowledge.[321] It is called the "hindsight test" because it imputes all of the knowledge of risk at the time of trial back to the time the alleged failure to warn occurred.[322] It does not matter whether the defendant knew, should have known, or could have known about the risk at the time the product was made.[323] Indeed, the knowledge may not have even existed at the time the product was made or sold.[324] As such, it truly was liability without fault.[325]

The hindsight test did not suffer from the doctrinal inconsistencies and logical errors of the *Correia* defense; it was simply unwise policy. While it might have lightened considerably the burdens of injured plaintiffs in proving their cases, and it might have turned manufacturers and sellers into virtual insurers of product users,[326] the victory for plaintiffs was ephemeral. It was announced and repeated in contexts where it had no practical effect, in dicta.[327] When it came time to actually apply the hindsight test, courts, especially federal courts, blanched at imposing a duty to warn that manufacturers and sellers could not perform.[328] By 1998, the flirtation with true strict liability in warning cases was over when the Supreme Judicial Court decided in *Vassallo v. Baxter Healthcare Corp.* to put an end to the hindsight test.[329]

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321. Hayes v. Ariens Co., 462 N.E.2d 273 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

322. *Vasallo*, 696 N.E.2d at 922-23.

323. *Hayes*, 462 N.E.2d at 277-78.

324. Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982) (stating that the fact that the state of technology made the product unsafe does not matter under strict liability).

325. Owen, *supra* note 97, at 978.

326. *See Beshada*, 447 A.2d at 546-47 (adopting explicitly risk-spreading rationale for hindsight test while acknowledging that liability is not imposed for failing to do what should have been done).

327. *Hayes*, 462 N.E.2d at 277-78; Simmons v. Monarch Mach. Tool Co., 596 N.E.2d 318, 320 n.3 (Mass. 1992).

328. *See* Anderson v. Owens-Ill., Inc., 799 F.2d 1, 3-5 (1st Cir. 1986); Welch v. Keene Corp., 575 N.E.2d 766, 770 (Mass. App. Ct. 1991).

329. Vasallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 923 (Mass. 1998).

Hayes v. Ariens Co.[330] was an unlikely case to serve as a conduit for true strict liability in Massachusetts. The plaintiff had tried to clear out some snow that was clogging the discharge chute of a snow blower he was using.[331] He had put his hand in the chute while the machine was still running, in contravention of a warning on the chute, and his fingers came into contact with moving blades injuring several of his fingers.[332] The plaintiff claimed that the warning was inadequate and that the design was defective.[333] An expert for the plaintiff testified about two alternative designs that would have prevented the injury, and which were "economically and technologically feasible" at the time the snow blower was made.[334] On its facts, *Hayes* did not call for the application of the hindsight test, since the fault-based "knew or should have known" standard used in negligence law would have allowed the plaintiff to prevail on the warning and design claims, provided that his witnesses were believed. Indeed, the plaintiff contended that the design of the snow blower did not comply with existing industry standards.[335] The court was not faced with the real-life implications of telling a manufacturer that it should have warned of dangers only known in hindsight.

The hindsight test emerged from this unlikely set of facts because the jury's verdicts appeared inconsistent. On the negligence count, the manufacturer and the plaintiff were found 40% and 60% responsible, respectively, precluding recovery under the comparative fault statute.[336] On the warranty count, the jury found that the manufacturer did not breach the implied warranty of merchantability.[337] Since a finding of negligence meant that the defendant had breached the warranty, the plaintiff claimed that the jury should have been told the verdicts were inconsistent and should have been told to deliberate further.[338] The manufacturer attempted to reconcile the verdicts, since they were in its favor, arguing that the finding of the defendant's negligence must have been based on a negligent post-sale failure to warn.[339] This would have

330. *Hayes*, 462 N.E.2d at 273.
331. *Id.* at 274.
332. *Id.*
333. *Id.*
334. *Id.* at 275.
335. *Id.* at 275-76.
336. *Id.* at 274.
337. *Id.*
338. *Id.* at 274-75.
339. *Id.* at 276.

jibed with the finding of no breach of warranty, since the breach would have occurred, if at all, at the time of sale.[340] This was a specious argument since the jury had received no instruction on post-sale warnings.[341] *Hayes* noted other reasons why the defendant's post-sale failure to warn theory was flawed and could have stopped there to order a new trial.[342]

Instead, the court elaborated on warranty liability, invoking the Strict Liability Maxim, the 402A Maxim, and the Product, Not Conduct Maxim, to give another reason why the jury's verdicts were inconsistent.[343] *Hayes* said that in strict liability, the warning is measured by the warning given by a seller who is "*fully aware of the risks presented by the product*."[344] In strict liability, the state of industry or scientific knowledge is irrelevant, "as is the culpability of the defendant."[345] Accordingly, in a breach of warranty warning case, the duty to warn subsumes all of the subsequently-acquired knowledge that would underlie a negligent post-sale duty to warn claim.[346] *Hayes* did not base the hindsight test on the precedent of Massachusetts cases; instead it relied on authority from other jurisdictions, and it did not even give a polite nod to the long-established rule in negligent failure to warn cases that the knowledge of risk would not be presumed.[347]

The hindsight test was dicta, but there could be little doubt that *Hayes*' expansive statement about strict liability was an earnestly held view about Massachusetts products liability law. Strict liability, it believed, was "imposed as a matter of social policy,"[348] echoing the sentiments of *Correia*, decided just a year before.[349]

340. *Id.*
341. *Id.*
342. *Id.* at 276-77.
343. *Id.* at 277-78.
344. *Id.* at 277.
345. *Id.*
346. A post-sale failure to warn claim can be validly asserted when a commercial product seller is in a position to provide a warning about a product-related risk after the sale of the product, and a reasonable seller, under the circumstances, would provide such a warning. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 (1998).
347. *Hayes*, 462 N.E.2d at 277-78 (citing Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982), as the leading hindsight test decision). *Beshada*'s holding was quickly limited to its facts in *Feldman v. Lederle Labs.*, 479 A.2d 374, 387-88 (N.J. 1984). The Supreme Judicial Court had long held that the duty to warn extended only to dangers that the defendant knew or should have known. *See, e.g.*, Schaeffer v. Gen. Motors Corp., 360 N.E.2d 1062, 1065 (Mass. 1977) (rejecting presumption of knowledge); doCanto v. Ametek, Inc., 328 N.E.2d 873, 879 n.9 (Mass. 1975).
348. *Hayes*, 462 N.E.2d at 278.
349. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040 (Mass. 1983).

Although it invoked social policy, *Hayes* did not articulate how the hindsight test specifically would further any social policy goal. Instead, the hindsight test was aimed at vindicating the Product, Not Conduct Maxim, which held that a breach of warranty claim would look at the product only, and not the conduct of the seller. This maxim could work in a manufacturing defect case, where the fitness of the product could be discerned from examining the product itself. In a warning case, the manufacturer's sin, if any, was its failure to provide instructions, to warn of a risk, to do something. In short, the sin was the manufacturer's conduct. The hindsight test came closest to taking the focus away from the manufacturer's conduct by attempting to make the reasonableness of that conduct irrelevant.[350]

Despite the relative clarity with which it was announced, the hindsight test found few adherents, even among the justices of the Supreme Judicial Court which had propounded it. In *MacDonald v. Ortho Pharmaceutical Corp.*, a 1985 warning case decided just a year after *Hayes*, the Supreme Judicial Court grappled with the learned intermediary rule for prescription drugs and the adequacy of warnings, but it was content to describe the duty to warn for both negligence and warranty claims in terms of reasonable care.[351] *MacDonald* did not take issue with the trial court having treated the failure to warn under negligence and warranty as a "single claim."[352] Although the issue of the defendant's knowledge of risk was not squarely presented in *MacDonald*,[353] the case was a stark example of the harm the hindsight test could cause. The prescription drug industry depends on innovation, and the law has traditionally recognized that the risks of prescription drugs must be weighed against the substantial social benefits they provide.[354] If

350. Of course, the Product, Not Conduct Maxim could never be true even with the presumption of knowledge, because the adequacy of the warning would still need to be judged. Massachusetts courts have never attempted to impose absolute duties as to the adequacy of warnings, since the content of warnings depends so much on the context in which they are given. Inevitably, the adequacy of warnings must be judged by a rule of reason. *See* MacDonald v. Ortho Pharm. Corp., 475 N.E.2d 65, 70-71 (Mass. 1985) (articulating an open-ended reasonableness standard for judging adequacy of warnings where "common sense" prevails).

351. *Id.* at 70.

352. *Id.* at 68.

353. *Id.* (noting "narrow issue" presented of whether manufacturer owes duty to directly warn patient).

354. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (limiting liability for prescription drugs on account of the social benefits they provide and the risk that comes with innovative drugs).

manufacturers were held responsible for knowledge acquired years later in a rapidly changing field of science, the liability and chilling effect on the development of new drugs could be enormous.[355]

Federal courts applying Massachusetts law did not recognize the hindsight test. In *Anderson v. Owens-Illinois, Inc.*, the plaintiff attempted, on the strength of *Hayes*, to exclude "state of the art" (i.e., the state of scientific knowledge) evidence and to obtain an instruction that informed the jury that a product seller is presumed to know of all risks of the product.[356] The federal district court and First Circuit Court of Appeals refused to bar state of the art evidence or to apply the presumption of knowledge, instead holding that the seller's duty to warn is bounded by what it knew or should have known about the product's risks.[357] *Anderson* involved asbestos-containing products, and it was one of thousands of such cases against a large number of defendants.[358] Because all Massachusetts federal court asbestos cases had been consolidated, the disposition of the state of the art issue applied to all of those cases.[359] The stakes were enormous, since the state of the art defense was one of the most useful defenses raised by attorneys for asbestos companies and because the state of the art issue was vigorously contested.[360] Applying the presumption of knowledge would have greatly tilted the odds at trial in favor of plaintiffs. Unlike in *Hayes*, where the issue was theoretical, applying the hindsight test in asbestos cases had real consequences.

Anderson could not take seriously what *Hayes* had plainly said, predicting that Massachusetts courts would not in fact follow the *Hayes* dicta about the hindsight test.[361] Its critique was poignant and was proved true, eventually. *Anderson* pointed out that the dangers from the snow blower's blades were obvious in *Hayes*, unlike with asbestos where even experts did not know, at least at some points, about the dangers.[362] Indeed, the duty to warn was scarcely

355. *See* Brown v. Sup. Ct., 751 P.2d 470, 479-80 (Cal. 1988) (rejecting strict liability for prescription drugs because it would stifle the development of new drugs and for other policy reasons).

356. Anderson v. Owens–Ill., Inc., 799 F.2d 1, 1-2 (1st Cir. 1986).

357. *Id.* at 2-5.

358. *Id.* at 1 & n.1; John H. Kennedy, *Asbestos Consolidation Wins Mixed Reviews*, BOSTON GLOBE, July 31, 1991, at 49 (noting 2800 federal court cases then pending in Massachusetts).

359. *Anderson*, 799 F.2d at 1 & n.1.

360. *See* Gideon Mark, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 885-89 (1983).

361. *Anderson*, 799 F.2d at 3-4.

362. *Id.* at 3.

contested in *Hayes*, since the manufacturer had in fact provided a warning.[363] *Anderson* took aim at the foundations of the hindsight test, pointing out that imposing the presumption of knowledge could not improve the real world behavior of product manufacturers and sellers, since a warning that the product may pose unknown dangers is no warning at all.[364]

This, after all, was the telling blow against the hindsight test; it could not be tied to making products safer and preventing injuries in the first place. While the hindsight test could unquestionably aid in the compensation of injured product users, where would those compensation funds come from? The loss-spreading rationale recognized in section 402A and the early strict liability cases, involving manufacturing defects only had force if those losses could be insured against (either by the manufacturer itself or through a policy with an insurance company), which required some knowledge of the risk. Insuring against the rare soda bottle that makes it through quality control is one thing, insuring against generic risks that might become known decades later is something else entirely. *Anderson* refused to force product manufacturers to buy insurance on a "blind basis."[365]

Anderson, despite its rejection of the hindsight test, did stake out something of a middle ground between the "knew or should have known" standard from negligence theory, and the presumption of knowledge that *Hayes* had appended to warranty law.[366] In *Anderson*, the charge to the jury, affirmed by the First Circuit, held the defendants to the knowledge of experts in the industry "or in view of the state of medical and scientific knowledge in general."[367] This expert standard increased the duty of product sellers to discover risks about their products.[368] Previously, the seller was simply held to the standard of an "ordinary, reasonably prudent manufacturer in like circumstances."[369] This rule made the burden on product sellers more onerous, but it was a rule that they could theoretically comply with. Although the expert standard was probably more a refinement of the negligence duty of reasonable care

363. Hayes v. Ariens Co., 462 N.E.2d 273, 275 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

364. *Anderson*, 799 F.2d at 4.

365. *Id.* at 5.

366. *Id.* at 4 (noting expert knowledge standard is higher than negligence standard).

367. *Id.* at 2.

368. *Id.* at 4.

369. Back v. Wickes Corp., 378 N.E.2d 964, 971 (Mass. 1978).

under the circumstances, it provided a convenient way for *Anderson* and other courts, to maintain the supposedly clear distinction between warranty and negligence, and thereby not run headlong into the three Maxims, which Massachusetts courts held dear.[370] The expert rule would prove influential once the hindsight rule was abolished.[371]

While federal courts in Massachusetts followed *Anderson*,[372] Massachusetts state courts were not following the hindsight test either. In *Welch v. Keene Corp.*, another personal injury asbestos case, the appeals court described the duty to warn in traditional negligence terms for a warranty claim.[373] *Welch* cited *Hayes* for another point of law, and then cited *Anderson* for the proposition that the duty to warn only extends to dangers that are known or reasonably knowable.[374] *Welch* did not even bother to acknowledge the hindsight test, or attempt to reconcile *Hayes* with *Anderson*.[375]

In light of what might be called obtuseness, or perhaps rebellion, against the hindsight test, the Supreme Judicial Court tried in the 1992 decision of *Simmons v. Monarch Machine Tool Co.*, to bring these errant courts back into line by reaffirming its support for the hindsight test.[376] *Simmons* observed quite correctly that the *Hayes* dicta was a clear statement of Massachusetts law.[377] *Simmons*' admonition was also dicta, and so the hindsight test had still not been applied where the imputation of knowledge could have actual effect.[378]

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370. In *Kotler v. Am. Tobacco Co.*, the First Circuit took pains to note that section 402A imposes a duty higher than due care due to the expert standard before coming to the conclusion that in failure to warn cases negligence and warranty were quite similar. Kotler v. Am. Tobacco Co., 926 F.2d 1217, 1231-33 (1st Cir. 1990) (judgment vacated on federal preemption grounds unrelated to holdings on Massachusetts tort law), *vacated on other grounds*, 505 U.S. 1215 (1992), *remanded to* 981 F.2d 7 (1st Cir. 1992); *see also supra* Part I.D.4 (discussing the three Maxims).

371. *See infra* Part III.A.

372. *See Kotler*, 926 F.2d at 1231-33; Wasylow v. Glock, Inc., 975 F. Supp. 370, 378 (D. Mass. 1996); Collins v. Ex-Cell-O Corp., 629 F. Supp. 540, 543 (D. Mass. 1986) (following *Anderson*'s trial court decision rejecting *Hayes*' dictum).

373. Welch v. Keene Corp., 575 N.E.2d 766, 770 (Mass. App. Ct. 1991).

374. *Id.* at 770.

375. *Id.*

376. Simmons v. Monarch Mach. Tool Co., 596 N.E.2d 318, 320 n.3 (Mass. 1992), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

377. *Id.*

378. *Id.* (noting explicitly that the advisory nature of its discussion of the hindsight test).

The next year, the Massachusetts Appeals Court suggested that the viability of the *Hayes* dicta was still an open question, despite the statement in *Simmons*, but the appeals court did not reach the issue because the plaintiff had not objected to the introduction of state of the art evidence at trial.[379] Two years later, a federal court stated that the duty to warn extended to dangers the manufacturer "knows or should know," again without acknowledging *Hayes* or the hindsight test.[380]

By the time *Simmons* renewed vows with the hindsight test in 1992, the nominal state of products liability law in Massachusetts differed greatly from the actual state of affairs in failure to warn cases. *Hayes* had given Massachusetts a revolution in products liability law and nobody came. The federal courts were not following two clearly written decisions by Massachusetts' highest court, a court they were bound to follow on matters of state law. The hindsight test seemed like it might be a dead letter in state courts as well. In the *City of Boston* asbestos case, a massive litigation in state court involving thousands of pages of testimony, hundreds of exhibits, forty-five days of trial, and presumably very able counsel, neither side ever took the position that state of the art evidence was irrelevant,[381] despite *Hayes*' statement that "[t]he state of the art is irrelevant."[382] It was difficult to predict what a Massachusetts trial court might do in a failure to warn case. Would it follow the dicta in *Hayes* and *Simmons*, or would it follow the better reasoned decisions of the First Circuit? This was not an academic question, especially in asbestos cases like *Anderson*, *Welch*, or *City of Boston*, where the difference between what was known about asbestos in the 1980s and 1990s was markedly different from what was known decades earlier when some of the asbestos workers had been exposed.[383] This ambiguity on a question so important cried out for resolution, and the Supreme Judicial Court did resolve it in 1998, in the final part of the modern era of Massachusetts products liability law.

379. City of Boston v. U.S. Gypsum Co., 638 N.E.2d 1387, 1393 (Mass. App. Ct. 1994).

380. Wasylow v. Glock, Inc., 975 F. Supp. 370, 378 (D. Mass. 1996).

381. *U.S. Gypsum Co.*, 638 N.E.2d at 1388, 1393.

382. Hayes v. Ariens Co., 462 N.E.2d 273, 277 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

383. *See* Alex J. Grant, Note, *When Does the Clock Start Ticking?: Applying the Statute of Limitations in Asbestos Property Damage Actions*, 80 CORNELL L. REV. 695, 701-03 (1995); Mark, *supra* note 360, at 885-89.

C. *The Uncertainty About the Reasonable Alternative Design Requirement Grows*

The question of whether to require the plaintiff to show an alternative design that is arguably safer than an allegedly defective design has been the single most contentious products liability issue in the last twenty-five years.[384] During the six years (1992 to 1998) the new Restatement was being drafted, debate centered on that very subject in a project that canvassed all of the major tort issues in products liability law.[385] The new Restatement's ultimate decision to explicitly require a showing of a reasonable alternative design as part of the plaintiff's prima facie case is what made the new Restatement controversial, with charges that the document had taken a decidedly pro-defendant slant.[386] By contrast, the debate over the hindsight test, which could easily be framed in terms of whether a court was being sufficiently faithful to the concept of strict liability, has proven to be a somewhat one-sided affair, as it became quickly apparent during the 1980s that decisions like *Hayes* in Massachusetts and *Beshada* in New Jersey were outliers.[387] Although the reasonable alternative design requirement does not fit neatly within the strict liability/negligence divide that has preoccupied courts, commentators, and practitioners in Massachusetts and elsewhere, it is of fundamental importance because it significantly increases the plaintiff's burden of making a viable claim, and because of its potential widespread impact on consumer choice and the American marketplace.[388] All of this is to say that the issue of whether a reasonable alternative design was a non-essential factor in the judicial review of product designs, or whether it was, in fact, a requirement, was no idle question during the middle part of the modern era of Massachusetts products liability law from 1983 to 1992.[389] And yet, Massachusetts state courts refrained from resolving it, continuing to suggest that it was just a factor but never saying

384. *Triumph of Risk-Utility*, *supra* note 123, at 1062-63. **R**

385. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. introductory cmt. (1998).

386. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 90-93 (2002).

387. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 Reporters' Note.

388. *See Triumph of Risk-Utility*, *supra* note 123, at 1069-70.

389. *See id.* at 1062-64 (describing controversy over reasonable alternative design requirement).

so explicitly.[390] The First Circuit took up the issue in 1990, and held explicitly that a reasonable alternative design is required in Massachusetts,[391] and that has continued to be the law, at least in federal court, to the present day.[392] This led to another federal/state disparity on an important issue where state court decisions are supposed to be controlling.[393] It was another muddled area of Massachusetts products liability law to emerge during this middle period.

As discussed earlier, *Back* had in 1978 set forth risk-utility factors for reviewing the conscious design choices of manufacturers.[394] It was a good start on the construction of a modern products liability law, and the question of whether a safer alternative design was required had not presented itself. In *Back*, the plaintiff had presented persuasive proof that specific aspects of the design of a motor home contributed to making it unnecessarily dangerous in the event of a crash.[395] The plaintiff's expert presented evidence of alternative designs, which experts for defendants disputed, but that disagreement was one for the finder of fact to resolve.[396] The plaintiff's theory of defect centered around its evidence of design improvements, and three of the five enumerated factors related to the alternative design.[397] Subsequent cases used the same *Back* factors and those cases too involved plaintiffs assailing the design choices of manufacturers by proposing marginal improvements to the design that were technologically and economically feasible.[398] Whether the alternative designs were feasible or not, whether they were safer or not, or whether they would have prevented the plaintiff's injuries or not, were all matters for the finder of fact to decide, but that was the battleground upon which the litigants fought.[399]

By making the *Back* factors non-exclusive and by making none of them essential, Massachusetts courts had invited plaintiffs to make design claims based on the overall risks and utilities of prod-

390. Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1310-11 (Mass. 1988) (setting forth design defect factors, but not stating clearly whether alternative design is required).

391. Kotler v. Am. Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990), *vacated on other grounds*, 505 U.S. 1215 (1992), *remanded to* 981 F.2d 7 (1st Cir. 1992).

392. Gillespie v. Sears, Roebuck & Co., 386 F.3d 21, 26 (1st Cir. 2004).

393. *Compare Colter*, 525 N.E.2d at 1310-11 *with Kotler*, 926 F.2d at 1225.

394. *See supra* Part I.D.1.

395. Back v. Wickes Corp., 378 N.E.2d 964, 967-68 (Mass. 1978).

396. *Id.*

397. *Id.*

398. *See, e.g.*, Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978).

399. *Id.*

ucts, without proof of a safer alternative design.[400] An open-ended risk-utility test meant that costs and benefits could be weighed with respect to competing designs of the product, or could be weighed with respect to the product itself.[401] In the latter case, plaintiffs would ask the jury to find that the product's dangers outweighed its utility.[402]

The difference between these two inquiries might have seemed obscure at the time the risk-utility factors were formulated by courts across the United States in the 1970s, but a 1983 decision of the New Jersey Supreme Court made it clear that the difference was fundamental. In *O'Brien v. Muskin Corp.*, the plaintiff had dived into an aboveground swimming pool and had suffered serious injuries when his head struck the bottom.[403] The plaintiff argued that the vinyl bottom of the pool was too slippery, preventing him from using his outstretched hands to brace himself before his head hit the bottom.[404] The plaintiff could not point to alternative material that would have made the bottom less slippery, so his claim was reduced to the proposition that the manufacturer should not have sold aboveground swimming pools because the pools were too dangerous.[405] The New Jersey Supreme Court essentially accepted this argument and held that a jury question existed on whether "the risks of injury so outweighed the utility of the product as to constitute a defect."[406] With *O'Brien*, the issue of whether it was appropriate for courts to engage in this kind of broad-based risk-utility balancing was joined.[407] Other jurisdictions began to accept this theory in the 1980s.[408] Massachusetts courts remained silent on the question.

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400. *Id.* at 1191-93.

401. *Id.*

402. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e (1998) (product's risks and utilities compared to determine whether it is manifestly unreasonable design).

403. O'Brien v. Muskin Corp., 463 A.2d 298, 302 (N.J. 1983), *superseded by statute*, N.J.S.A. 2A: 58C-3 (1987), *as recognized in* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990).

404. *Id.* at 302-03.

405. *Id.*

406. *Id.* at 306.

407. *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986), *superseded by statute*, Louisiana Products Liability Act, Acts of 1988, N. 64, *as recognized in* Fredrick v. Gen. Motors Corp., 544 So. 2d 757 (La. App. 1989) (adopting broad-based risk-utility balancing similar to O'Brien).

408. *See id.* at 114; Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1158-59 (Md. 1985) (allowing imposition of liability on theory that the dangers of a type of cheap handgun

In *Kotler v. American Tobacco Co.*,[409] the First Circuit Court of Appeals was faced with a design defect claim with no claim that a safer alternative design existed. Instead, the plaintiff argued that the inherent risks of smoking cigarettes outweighed cigarettes' overall social utility.[410] *Kotler* canvassed Massachusetts products liability decisions and could find no instance of liability being imposed in a design case without evidence that a "different, arguably safer, alternative design was possible."[411] It then maintained that a "safer alternative design is a *sine qua non* for the imposition of liability," citing *Uloth* and *Colter*.[412] As this Article has previously discussed, *Uloth* did hint at the essential nature of an alternative design: "there is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery."[413] *Colter* repeated the same language, citing *Uloth*.[414] *Kotler* had ample authority to reject a design claim on the theory that all cigarettes were inherently defective and unreasonably dangerous, not the least of which being comment i of section 402A of the second Restatement, which rejected liability for "good tobacco."[415] However, *Kotler* overread *Uloth* and *Colter* because those cases did not say that a safer alternative design was required.

Uloth and *Colter* stated that there was a case for the jury if such proof was presented; they did not explicitly say that the jury could not consider a design claim without such proof.[416] Moreover, *Colter*, *Correia*, and *Hayes* had also stated that "a defendant may be liable on a theory of breach of warranty of merchantability even though he or she properly designed, manufactured, and sold his or her product," on the theory that strict liability did not require proof

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outweigh its benefits), *superseded in part by statute*, MD. CODE art. 27 § 36-1, *as recognized in* Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1156 (Md. 2002).

409. Kotler v. Am. Tobacco Co., 926 F.2d 1217 (1st Cir. 1990), *vacated on other grounds*, 505 U.S. 1215 (1992), *remanded to* 981 F.2d 7 (1st Cir. 1992).

410. *Id.* at 1225.

411. *Id.*

412. *Id.* (citing Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1310-11 (Mass. 1988); Uloth v. City Tank Corp., 384 N.E.2d 1188, 1193 (Mass. 1978)).

413. *See Uloth*, 384 N.E.2d. at 1193; *supra* notes 144-149.

414. *Colter*, 525 N.E.2d at 1310-11.

415. RESTATEMENT (SECOND) OF TORTS § 402A cmt. I (1965) ("good tobacco" not unreasonably dangerous).

416. *Colter*, 525 N.E.2d at 1310-11; *Uloth*, 384 N.E.2d at 1193.

of the defendant's misconduct.[417] This reference to "properly designed" could have been interpreted as holding open the possibility of liability where there was no quarrel with the configuration of the product, but where the inherent risks were assailed. That language, purportedly derived from comment a of section 402A, was imprecise and unwisely formulated. As this Article has contended, section 402A was primarily concerned with imposing strict liability for manufacturing defects. When comment a spoke of liability even where the defendant "has exercised all possible care in the preparation and sale of the product,"[418] it was contemplating the odd lot (i.e., a small crack in a soda bottle) that had slipped through the manufacturer's quality control process. Comment a said nothing of "proper designs," but strict liability under section 402A would indeed attach for a manufacturing defect in a properly designed product. The problem for the First Circuit was that Massachusetts courts had no shared understanding that the concept of "strict liability" was limited to manufacturing defects. *Colter* and *Hayes*, after all, were design cases and they contained florid strict liability language.[419]

Kotler did not deal with the inconvenient "properly designed" language, nor did it address the fact that the *Back* factors were presented as points for a court to consider, among other factors.[420] There had been no attempt to assign importance or priority to the factors, so it was a stretch, based on the cases decided prior to *Kotler*, to find that the reasonable alternative design requirement was a settled issue. *Smith v. Ariens Co.*, decided the same day as *Back*, saw no problem with extending design defect liability on a theory that lacked any specific alternative design.[421] In reality, *Kotler* was making a prediction of how a Massachusetts state court would handle a case premised upon the inherent dangers of a product, rather than applying well-established law. Such a case, like *Kotler*, would hold vast implications for the American economy if widely-used products like cigarettes or aboveground swimming pools could be condemned on a categorical basis.[422] But the picture

417. *Colter*, 525 N.E.2d at 1313 (citing Hayes v. Ariens Co., 462 N.E.2d 273, 279 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998); Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1044 (Mass. 1983)).

418. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a.

419. *Colter*, 525 N.E.2d at 1313; *Hayes*, 462 N.E.2d at 277-78.

420. *See* Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978) (jury should consider enumerated factors "among other factors").

421. Smith v. Ariens Co., 377 N.E.2d 954, 957-58 (Mass. 1978).

422. *See Triumph of Risk-Utility*, *supra* note 123, at 1069-70. **R**

was still fuzzy for anyone having a stake in Massachusetts products liability law. Arrayed against the holding of *Kotler* was a great deal of language from Massachusetts courts that made this kind of categorical liability possible.[423] *Kotler* was another instance of a federal court getting ahead of Massachusetts courts in formulating state products liability law, as the First Circuit had done in rejecting the hindsight test in *Anderson*.

III. The Unfinished and Uncertain Redefinition of Strict Liability: 1998 to Present

As the new millennium approached, the strict liability wave had crested in other American jurisdictions, and the continuous expansion of liability since the fall of the privity rule had stopped.[424] In 1998, the final version of the Restatement was published, and it was a substantial rethinking of section 402A.[425] It was not surprising then that in 1998, Massachusetts courts began to rethink some prior decisions and to redefine, at least in some areas, the notion of strict liability and the duties imposed by the implied warranty of merchantability.

A. *The End of the Hindsight Test*

In 1998, the Supreme Judicial Court chose to abolish the hindsight test, appropriately enough, when it did not matter. In *Vassallo v. Baxter Healthcare Corp.*, the plaintiff was a woman whose silicone breast implants had failed.[426] One had ruptured and the other had holes through which silicone gel could leak.[427] The failure of the implants had caused scarring, autoimmune disease, pain and suffering, and surgery to remove the medical devices.[428] The plaintiff claimed that the manufacturer of the implants had negligently failed to provide adequate warnings, had negligently designed the product, and had breached the implied warranty of merchantability.[429]

On the negligent failure to warn claim, the plaintiff introduced evidence which showed that the manufacturer knew, prior to the

423. *See Back*, 378 N.E.2d at 970 (alternative design just a factor jury could consider).

424. Owen, *supra* note 97, at 978-79.

425. Restatement (Third) of Torts: Prod. Liab. introduction (1998).

426. Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

427. *Id.* at 912-13.

428. *Id.*

429. *Id.* at 912.

sale, that the implants were subject to rupture and that silicone gel could escape, migrate though the patient's body, and cause problems with the body's immune system.[430] The warnings provided to doctors addressed some of the research studies concerning silicone implants, but they did not give notice of all of the risks.[431]

At trial, the jury found in favor of the plaintiff on the negligence and breach of warranty claims.[432] On appeal, the Supreme Judicial Court upheld the plaintiff's verdict on the negligence count, and therefore found it unnecessary to address the warranty count.[433] The court took the opportunity however to address the defendants' argument that the hindsight test should be abolished and replaced with a standard requiring actual or constructive knowledge of the product's risks.[434]

Vassallo agreed that it was time to end Massachusetts' experiment with the hindsight test for warranty claims in warning cases; a decision that had no effect in *Vassallo* but would apply in future litigation.[435] The trial judge had, despite the open rebellion against the hindsight test, given the presumption of knowledge instruction over the defendants' objection.[436] On the facts, such an instruction was unnecessary for plaintiff to prevail since there was substantial proof that the manufacturer did in fact know about the risk that eventually felled Florence Vassallo.[437] The court noted that the instruction was a "correct statement" of [the] law," but it also recognized that Massachusetts was one of only four states to apply the hindsight test.[438] New Jersey's law, which *Hayes* had found to be persuasive support for the hindsight test in 1984, had changed.[439] *Vassallo* also acknowledged that the presumption of knowledge was not popular among scholars, and the test had "not been uniformly applied [in] Massachusetts State and Federal courts,"[440] an understatement to be sure.

430. *Id.* at 913-15.

431. *Id.* at 915.

432. *Id.* at 912.

433. *Id.* at 921-22.

434. *Id.*

435. *Id.* at 922.

436. *Id.* at 922-23.

437. *Id.* at 921.

438. *Id.* at 922.

439. *Id.*; Hayes v. Ariens Co., 462 N.E.2d 273 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

440. *Vassallo*, 696 N.E.2d at 922-23.

Vassallo did more than acknowledge the obvious, which was that the hindsight approach had little judicial support inside and outside of Massachusetts, that academics were against it, and that the court had rejected it. *Vassallo* stepped away from the strict liability rhetoric and the easy incantation of the three Maxims. Although the court repeated the 402A Maxim,[441] its analysis was rooted in functional policy concerns, rather a desire to square the result with notions of "strict liability."[442] Gone was the juxtaposition of the "special responsibilities" of deep-pocketed product manufacturers and the rights and entitlements of the consumer.[443] Gone was the problematic risk-spreading rationale, which *Anderson* had dismantled effectively.[444] In its place was a desire "to induce conduct that is capable of being performed," a policy not advanced by requiring warnings of unknowable risks.[445] Leaning heavily on the new Restatement, which had noted "that [u]nforeseeable risks . . . by definition cannot specifically be warned against,"[446] *Vassallo* made the primary behavior of product manufacturers and sellers the chief concern of Massachusetts products liability law by concentrating on how best to incentivize them to achieve an optimal level of product safety, and by recognizing the limits of the judicial system to do so.[447] Compensation to injured users, by easing their burden of proof, was less important. The authority of the new Restatement was obviously important in the decision to reverse precedent, as was the fact that comment j of section 402A had also used the "knew or should have known" standard.[448]

Vassallo adopted the expert standard endorsed by *Anderson*, and it emphasized that a manufacturer would retain a continuing duty to give warnings (at least to purchasers) of risks discovered after the sale.[449] As a result, Massachusetts law would continue to recognize duties unknown to negligence theory in the pre-modern

441. *Id.* at 923.

442. *Id.* at 922-23 (explaining how liability standard should induce product sellers to give better warnings).

443. Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040 (Mass. 1983).

444. Anderson v. Owens-Ill., Inc., 799 F.2d 1, 4-5 (1st Cir. 1986).

445. *Vassallo*, 696 N.E.2d at 922-23.

446. *Id.* at 923.

447. *Id.* at 909.

448. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) ("[T]he seller is required to give warning against [the risk], if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.").

449. *Vassallo*, 696 N.E.2d at 924.

era. *Vassallo*'s endorsement of the new Restatement seemed to signal a new way of thinking about Massachusetts products liability law, but it had not replaced section 402A, which remained the official source of doctrine. In 1999, one of the attorneys representing a trade group for Massachusetts businesses who had submitted an amicus brief in *Vassallo*, suggested in an Article that *Vassallo* represented "the merger of negligence and warranty theories in" design and warning cases.[450] This merger, i.e., the end of strict liability except for manufacturing defects, he argued, should be completed by submitting design and warning claims under a single theory to juries, rather than separately under negligence and warranty, and by applying the comparative negligence statute to all design and warning claims.[451] If that course had been taken, the Strict Liability Maxim, the 402A Maxim, and the Product, Not Conduct Maxim would have all been discarded in favor of a more enlightened and less ideological approach. This has not happened. *Vassallo* presented an opportunity to not only do away with the hindsight test, but also to affect a doctrinal rethinking and to announce a new theoretical basis for Massachusetts products liability law. That moment passed, and *Vassallo* now just represents a significant addition to the canon of Massachusetts products liability cases; it did not fully break free from the strict liability baggage, and it did not represent a full-scale reversion to negligence theory, as the defense bar would no doubt favor.

B. *Retention of the Strangely Orthodox Post-Sale Duty to Warn*

During the modern era of Massachusetts products liability law, courts have been wary of expanding the duty to give warnings to users after the product has been sold.[452] While such a duty creates the prospect of a never-ending, open-ended potential liability, it also could prevent injuries and save lives.[453] Balancing those competing policy concerns is a line-drawing exercise, and it invites the application of a flexible rule of reason that takes into account the

450. *See* David R. Geiger & Stephanie C. Martinez, *Design and Warning Defect Claims under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 BOSTON B. J. 12, 12 (1999).

451. *See id.* at 27.

452. *See* Hayes v. Ariens Co., 462 N.E.2d 273, 276 (Mass. 1984) (explaining limits of post-sale duty to warn), *abrogated by Vassallo*, 696 N.E.2d 909.

453. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 cmt. a (1998); Kenneth Ross & J. David Prince, *Post-Sale Duties: The Most Expansive Theory in Products Liability*, 74 BROOK. L. REV. 963, 965 (2009) (describing post-sale duty to warn as "'monster duty'").

costs and benefits of recognizing a post-sale duty to warn in particular circumstances. Since the 1970s, Massachusetts has recognized a limited post-sale duty to warn of product dangers.[454] On the other hand, giving notice of safety improvements for products that were reasonably safe at the time they were manufactured has simply not been required.[455] This no-duty rule is a reminder of the inflexible, wooden rules that unnaturally hampered recovery in the pre-modern era, like the privity rule or the patent danger rule.[456] After *Vassallo*, which explicitly recognized a post-sale duty to warn for at least direct purchasers and which embraced a negligence-style reasonable care standard,[457] it might have been expected that the post-sale duty to warn would be shorn of this particular no-duty rule.

Although there has been some perception that the post-sale duty to warn is of recent vintage,[458] it has existed throughout the modern era. In 1975, *doCanto v. Ametek, Inc.* held that a manufacturer owed a post-sale duty to warn of design changes and improvements that would eliminate the risk from a negligent design.[459] This duty was carefully framed as one that arose from "the manufacturer's initial fault" in selling a product that contained a design defect, i.e., lacking a safety feature that was feasible at the time of sale.[460] *doCanto* also noted that the product had also been misrepresented, which aggravated the manufacturer's original failure to design the product safely enough.[461] Thus, the post-sale duty to warn could be understood as an obligation to ameliorate risk caused by one's own negligent behavior.[462] Having established that limitation, *doCanto* opened the door a bit wider by suggesting that

454. doCanto v. Ametek, Inc., 328 N.E.2d 873, 878-79 (Mass. 1975).

455. *Hayes*, 462 N.E.2d at 276.

456. *See* Henderson & Eisenberg, *supra* note 190, at 483; Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 524 (1982) (discussing demise of single factor no-duty rules); *see also* RESTATEMENT (THIRD) OF TORTS § 1 cmt. a (1998) (noting the erosion of restrictive rules which made recovery difficult in design and warning cases). R

457. Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 923-24 (Mass. 1998) (noting manufacturer remains subject to continuing duty to warn while rejecting presumption of knowledge if failure to warn cases).

458. Lewis v. Ariens Co., 751 N.E.2d 862, 865 n.7 (Mass. 2001). The trial court in *Lewis v. Ariens Co.* found the timing of *Vassallo*'s recognition of a post-sale duty to warn to be crucial in resolving that issue, apparently believing that *Vassallo* had created the basis for a new theory of liability. *Id.*

459. *doCanto*, 328 N.E.2d at 878.

460. *Id.*

461. *Id*.

462. *Id.*

"there may be a duty to give reasonable warning of a product's dangers which are discovered after the sale."[463]

This uncertain extension was made clearer in 1984, when *Hayes v. Ariens Co.* said that the duty to warn of subsequently discovered risks did exist for "properly designed" products.[464] *Hayes* was quick to say, however, that the duty to give notice of design improvements only applied to products that were defectively designed at the time of sale, and that the post-sale duty to warn had never been recognized as extending to remote purchasers (i.e., beyond the consumer buying the product new).[465] After *Hayes*, there was a delineation between the post-sale duty to warn of a product's inherent risks, and the post-sale duty to warn of safety improvements that would reduce risk; the former duty extended to all products, and the latter duty extended to negligently designed products.[466]

Massachusetts courts generally did not attempt to justify the distinction, beyond noting the extent to which prior decisions had, and had not, recognized a post-sale duty to warn.[467] *Williams v. Monarch Machine Tool Co. Inc.*[468] and *City of Boston v. United States Gypsum Co.*[469] were able, in almost *ipse dixit*[470] fashion, to dispatch arguments that the duty to warn of safety improvements should be extended to products that had not been deemed defectively designed at the time of sale.[471] The harshness of this rule could be seen in *Williams*, in which a worker was injured by an

463. *Id.* at 879 n.9.

464. Hayes v. Ariens Co., 462 N.E.2d 273, 276 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

465. *Id.*

466. *doCanto*, 328 N.E.2d at 878-79; *Hayes*, 462 N.E.2d at 276.

467. *Hayes*, 462 N.E.2d at 276 ("[W]e have never said, that a manufacturer has a duty to advise purchasers about post-sale safety improvements that have been made to a machine that was reasonably safe at the time of sale.").

468. Williams v. Monarch Mach. Tool Co., 26 F.3d 228, 232-33 (1st Cir. 1994).

469. City of Boston v. U.S. Gypsum Co., 638 N.E.2d 1387, 1393-94 (Mass. App. 1994).

470. *Ipse Dixit* means "something asserted but not proved." BLACK'S LAW DICTIONARY 905 (9th ed. 2009).

471. *See also* Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1 (1st Cir. 2001). In *Cigna*, the First Circuit again noted that the post-sale duty to warn of design improvements was limited to negligently designed products, but there the plaintiff had convinced a jury on sufficient evidence that a sauna heater contained a design defect at the time it was made. *Id.* at 12-13. As a result, the manufacturer had a post-sale duty to give notice of safety improvements instituted just a year or two after the sale. *Id.* at 13-14.

industrial machine that lacked a certain safety guard.[472] There was evidence that a safety guard had been developed by the defendant itself after the machine had been manufactured, but before the accident.[473] During this interim period, the defendant manufacturer serviced the machine and was aware that the machine lacked the guard.[474] The jury, considering the state of technology existing at the time of sale, found no design defect.[475] The jury may well have found, had it been given the opportunity, that giving notice of the subsequently developed guard was feasible and in keeping with a duty of reasonable care under the circumstances, especially since the design improvement had occurred shortly after the sale and was quickly adopted.[476] In any event, the failure to give a post-sale warning helped lead to a severe injury that could have been easily prevented.[477]

Lewis v. Ariens Co.[478] was the first significant post-sale duty to warn case subsequent to *Vassallo*, giving the Supreme Judicial Court a chance in 2001 to elaborate on the Massachusetts post-sale duty to warn in light of the Restatement. *Vassallo* had used the new Restatement as support to abolish the hindsight test.[479] The new Restatement also recognized a post-sale duty to warn that differed from the Massachusetts rule.[480] The plaintiff in *Lewis* urged the court to adopt explicitly the new Restatement's post-sale warning standard, which the court was willing to do, calling it "a natural extension" of the ruling in *Vassallo*.[481] Section 10 of the new Restatement is essentially a reasonable care standard that qualifies the post-sale duty to warn in important ways that distinguish it from the more open-ended duty to warn of a product's risk at the time of the

472. *Williams*, 26 F.3d at 232.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at 229 (new shielding equipment had been available for ten years at time of accident). The First Circuit in *Williams* explained that its unwillingness to expand the post-sale duty to warn stemmed from the limits of diversity jurisdiction. *Id.* at 232. It lectured that "litigants who reject a state forum in order to bring suit in federal diversity jurisdictions cannot expect that new trails will be blazed." *Id.* Of course, after the First Circuit's virtual rebellion against the hindsight test in *Anderson v. Owens-Illinois, Inc.*, 799 F.2d 1 (1st Cir. 1986), such reticence was, to say the least, selective. *See supra* Part II.B.

478. Lewis v. Ariens Co., 751 N.E.2d 862 (Mass. 2001).

479. Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 923-24 (Mass. 1998).

480. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 (1998).

481. *Lewis*, 751 N.E.2d at 866-67.

original sale.[482] Section 10 is limited to "substantial" risks of harm; it is also limited to situations where the users can be identified and the warning can be effectively communicated to those users.[483] Finally, manufacturers may escape the post-sale duty to warn if the burden (i.e., cost) is "sufficiently great" in relation to the risk of harm.[484] The new Restatement also envisions that trial courts will actively screen post-sale duty to warn claims before submitting them to juries.[485] By adopting section 10, *Lewis* was adopting a standard that carefully calibrated the responsibilities of manufacturers to provide ongoing warnings; it was not a bold step. On its essential points, *Lewis* was mostly a refinement of previously-existing principles.[486] On its facts, *Lewis* held that there was no post-sale duty to warn owed to a person who had purchased a second-hand snow blower some sixteen years after the original sale.[487] Under those circumstances, the second-hand purchaser was part of a universe of users too difficult to identify, a holding fully consistent with the long-held reluctance to require post-sale warnings to "remote purchasers."[488]

Despite engaging in some lengthy deliberation in whether to make this section of the new Restatement part of Massachusetts law, *Lewis* failed to address the one aspect of the existing Massachusetts rule that differed from section 10. Section 10, like the law of many jurisdictions, "does not draw a sharp distinction between failure to warn of risk and failure to warn of safety improvements."[489] The dichotomy in Massachusetts law between warning of risks and warning of risk-avoidance measures is missing from the new Restatement.[490] One would have expected that adopting a provision of the new Restatement would have been done for the purpose of changing Massachusetts law in areas that differ from the Restatement. Otherwise, there is little point in the exercise. Yet, *Lewis* can only be read to affirm the rule limiting the post-sale duty

482. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 (1998).

483. *Id.* § 10(b)(1)-(3).

484. *Id.* § 10(b)(4).

485. *Id.* § 10 cmt. a.

486. *See* Kalsow v. Shaughnessy Crane Service, Inc., No. 06-P-1565, 2007 WL 4441080 (Mass. App. Ct. Dec. 19, 2007) ("*Lewis* did not establish a new principle, but clarified the interpretation of existing law.").

487. Lewis v. Ariens Co., 751 N.E.2d 862, 867-68 (Mass. 2001).

488. Hayes v. Ariens Co., 462 N.E.2d 273, 276 (Mass. 1984), *abrogated by* Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909 (Mass. 1998).

489. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 Reporters' Note.

490. *Id.*

to warn of safety improvements, since it noted that *Vassallo* had done nothing to change the rule, and *Lewis* did nothing to upset the status quo.[491] Perhaps *Lewis* did not realize this difference between Massachusetts law and the new Restatement, since it appeared to accept section 10 without reservation.[492]

Lewis and subsequent decisions have shown that establishing the feasibility of giving post-sale warnings will continue to be the most significant hurdle for plaintiffs to overcome.[493] With the passage of time, the already tenuous links between the manufacturer or retail seller and the consumer vanish.[494] When a snow blower is re-sold informally as in *Lewis*,[495] or when a piece of construction equipment is re-sold on three different occasions over thirty years,[496] the ability of a manufacturer or a seller to deliver a meaningful warning is virtually non-existent. As a result, the scope of the post-sale duty to warn is hardly poised to spiral out of control under the new Restatement. In fact, it may turn out that the economic and practical feasibility of giving post-sale warnings becomes an added limitation on the duty to warn where the manufacturer's "initial fault" had led to a design defect. Massachusetts law prior to the new Restatement did not recognize such a limitation where "initial fault" had been established.[497] The new Restatement should be used to expand the post-sale duty to warn to situations in which a post-sale warning about design improvements can be done with little effort or little cost. This can often be done where the seller and purchaser have an ongoing relationship. There is no good reason for Massachusetts to hew to its no-duty rule with respect to safety improvements when the scope of the post-sale duty to warn has already been judiciously managed.[498]

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491. *Lewis*, 751 N.E.2d at 865.

492. *Id.* at 866-67.

493. *See, e.g.*, Robinson v. Brandtjen & Kluge, Inc., 500 F.3d 691, 697-98 (8th Cir. 2007) (no duty to warn remote user, citing *Lewis*).

494. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 cmt. e (explaining how lack of customer records make it difficult to identify users).

495. *Lewis*, 751 N.E.2d at 863.

496. Hanlan v. Chandler, No. 4-0259B, 2008 WL 5608253, at *3 (Mass. Super. Nov. 13, 2008) (entering summary judgment for a product manufacturer on a post-sale warning claim because the duty to warn did not extend to remote purchasers).

497. *See* doCanto v. Ametek, Inc., 328 N.E.2d 873, 878 (Mass. 1975) (postsale warnings reasonable step to eliminate risk created by manufacturer's "initial fault"); City of Boston v. U.S. Gypsum Co., 638 N.E.2d 1387, 1393-94 (Mass. App. Ct. 1994) (no post-sale duty to warn where product is reasonably safe at time of sale).

498. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 Reporters' Note ("It is clear that in most cases it will be difficult to establish each of the four § 10 factors that

C. *Correia, Unreasonable Use, and the Conundrum of Strict Liability Live On*

The judicially-created "unreasonable use" defense recognized in *Correia* was put to a stern test in 2006 when the Supreme Judicial Court was called upon to apply it to cigarettes. The important role of *Correia* in Massachusetts products liability litigation was revealed in *Haglund v. Philip Morris, Inc.* when the plaintiff, the wife of a deceased smoker, sought at a very early stage of the case to preclude, as a matter of law, the *Correia* defense, which Philip Morris, the manufacturer of the cigarettes smoked by the decedent, had asserted.[499] The plaintiff was determined to achieve clarity on the unreasonable use defense before she engaged in the expensive discovery and trial process.[500] Her argument was simple: cigarettes are a unique product because they cause injury when used exactly as intended, therefore, it is illogical to think of the "unreasonable use" of cigarettes as the sole cause of a smoker's injury, as contemplated by *Correia*.[501] In order to sharpen the question into a pure issue of law, the plaintiff made stipulations to clear away issues of fact, such as admitting that the decedent was aware of the risks of smoking and acted unreasonably in smoking.[502] The fact that the plaintiff was prepared to stipulate away virtually her entire case, in the event that the *Correia* defense was held to apply to cigarettes, shows that "unreasonable use" had become the main battleground upon which many Massachusetts products liability cases were decided.

In coming to the question of whether it would recognize the "unreasonable use" of a product whose only safe use is nonuse, *Haglund* outlined the precepts of the implied warranty of merchantability.[503] It was here that the conundrum of strict liability re-emerged, after *Vassallo* had seemingly broken with the nostrums of the past by discarding the hindsight test and liability without fault in warning cases.[504] *Haglund* repeated the Strict Liability Maxim, the 402A Maxim, and the Product, Not Conduct Maxim, while insisting on the "distinct duties and standards of care" for

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are a necessary predicate for a post-sale duty to warn if the warning is merely to inform of the availability of product-safety improvement.").

499. Haglund v. Philip Morris, Inc., 847 N.E.2d 315 (Mass. 2006).

500. *Id.* at 321.

501. *Id.* at 324.

502. *Id.* at 321.

503. *Id.* at 321-23.

504. *See supra* Part III.A.

negligence and warranty liability.[505] These incantations of strict liability were a break not only from *Vassallo*, which had implicitly recognized the similarity between negligence and warranty standards, but also the 2001 cases of *Lewis v. Ariens Co.*[506] and *Hoffman v. Houghton Chemical Corp.*[507] Lewis had stated that in *Vassallo*, Massachusetts "abandoned the strict liability approach to implied warranties of merchantability in favor of a 'state of the art' standard similar to [the one found] in the Restatement (Third) of Torts: Products Liability § 2(c) (1998)."[508] *Hoffman* acknowledged that the failure to warn under negligence and the failure to warn under warranty are governed by the same reasonableness standard, with the court recognizing the "convergence" of the two theories.[509] With *Hoffman* repeating the observation in *Back* that the inquiries under negligence and under warranty in a design case are "'essentially the same,'" a reader of Massachusetts products liability law would have justly concluded that the days of insisting that a strict liability facade cover a negligence framework were over.[510] *Haglund* repeated the strict liability rhetoric, even the parts from *Correia* about consumers being "entitled to the maximum of protection," without so much as a nod to the "convergence" announced by the same court five years earlier in *Lewis* and *Hoffman*.[511]

Haglund also maintained the adherence to section 402A found in the pre-*Vassallo* cases, while saying nothing of the new Restatement, which had been endorsed in *Vassallo*, *Lewis*, and *Hoffman*.[512] This fidelity to section 402A was curious in light of *Haglund*'s holding. It held that in most instances, *Correia* would be inapplicable to cigarettes, except when it could be shown that the

505. *Haglund*, 847 N.E.2d at 323 n.9 (quoting Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1316 (Mass. 1988)).

506. Lewis v. Ariens Co., 751 N.E.2d 862 (Mass. 2001).

507. Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848 (Mass. 2001).

508. *Lewis*, 751 N.E.2d at 865.

509. *Hoffman*, 751 N.E.2d at 860 n.19 (quoting Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978)).

510. *Id*. at 859 n.19. "The Court will leave the task of distinguishing between negligence and strict liability in the duty to warn to those who count angels on the heads of pins." *Id.* at 860 n.20 (quoting Nigh v. Dow Chem. Co., 634 F. Supp. 1513, 1517 (W.D. Wis. 1986)).

511. Haglund v. Phillip Morris, Inc., 847 N.E.2d 315, 322 (Mass. 2006) (quoting Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033, 1040 (Mass. 1983)) (internal quotations omitted).

512. *Hoffman*, 751 N.E.2d at 859; *Lewis*, 751 N.E.2d at 866-67; Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922-23 (Mass. 1998).

plaintiff had begun smoking at a time when he knew of a specific medical condition that would be exacerbated by cigarette use, i.e., an emphysema sufferer who begins smoking.[513] The logic of stripping away *Correia* was compelling for cigarettes. The "unreasonable use" doctrine presumed that normal use was safe, but cigarettes are always dangerous.[514] *Correia* was designed to encourage consumers to use products more safely, but safer use could only mean not using the product, "which runs contrary to our entire scheme of commerce," not to mention Philip Morris' business model.[515] *Haglund* relied upon section 402A for the rationale that the cost of reasonably foreseeable injuries should be borne by those who place products on the market, but it omitted the fact that section 402A never envisioned liability flowing from the inherent dangers of cigarettes. Comment i to section 402A states that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."[516] By "good tobacco," it meant unadulterated tobacco, distinguishing a tobacco product that contained some marijuana, which could make the product unreasonably dangerous.[517] Of course, section 402A's treatment of tobacco is itself open to criticism since attitudes toward tobacco and the knowledge of tobacco's risks have grown greatly since 1965.[518] But section 402A had long been seen as a dead end for cigarette plaintiffs.[519] Philip Morris' analogies to products like sugar and suntan oil, which also carry certain risks, were rejected as false by *Haglund*,[520] but comment i had credited those same kinds of analogies, including the one about sugar.[521]

The preference for section 402A's strict liability tenets seems to have been deliberate, since it would have provided a more open-ended standard for judging the inherent risks of a product, and the

513. *Haglund*, 847 N.E.2d at 326-27.

514. *Id.* at 324.

515. *Id.* at 325.

516. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

517. *See id.*

518. *See*, *e.g.*, Helling v. McKinney, 509 U.S. 25, 35 (1993) (recognizing prisoner's claim under Eighth Amendment of Constitution for exposure to secondhand smoke).

519. *See* Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation–Is Anything Really So New?*, 54 TENN. L. REV. 551, 585 (1987) (noting that comment i is often "the beginning and the end of [the] analysis" in cigarette suits).

520. *Haglund*, 847 N.E.2d at 325.

521. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i.

standard did not specifically exclude tobacco from liability.[522] It is hard to see *Haglund* as anything but a retrograde opinion, meant to re-introduce the notion, if not the actuality, of strict liability into Massachusetts products liability law.[523] As it did so, *Haglund* was reaffirming *Correia* itself, making clear that cigarettes were a special case. So *Haglund* may have opened the doors, at least theoretically, to broader cigarette liability, and it may provide ammunition for future litigants to argue for the adoption of non-fault-based standards, but product manufacturers and sellers won the broader victory by keeping in place a complete defense. *Haglund* might have taken the opportunity presented by a cigarette case to abolish *Correia* and account for the plaintiff's negligent conduct, to the extent it existed, as part of the jury's comparative fault decision. It could have taken that step by admitting, as recent decisions of the Supreme Judicial Court had done, that the reasonableness of the manufacturer's conduct is at issue in design and warning cases,[524] and therefore the reasonableness of the plaintiff's conduct can be weighed against it. *Correia*'s refusal to subject warranty claims to the comparative negligence regime was grounded in the belief that all product defect actions were based on strict liability, a misconception that *Vassallo*, *Lewis*, and *Hoffman* had apparently solved.[525] *Haglund* allowed that misconception to continue. *Haglund*'s rhetorical triumph for strict liability and consumer protection carried with it a practical defeat for injured consumers.

D. *The Unresolved Place of the Reasonable Alternative Design*

Part II.C of this Article described how during the 1980s and 1990s a reasonable alternative design became required in federal courts applying Massachusetts law, while the question of whether that element of proof was truly required in Massachusetts state courts remained unanswered. That ambiguity has persisted in the decisions that have followed *Vassallo*. Federal courts have continued to state with confidence, following the First Circuit's 1990 deci-

522. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e (1998). It would be fair to say, however, that the new Restatement does not create a receptive environment to a cigarette suit in that categorical liability is thought to be inappropriate for widely distributed products. *Id.* at cmt. d.

523. *Haglund* seems to have been written as if *Vassallo*, *Lewis*, and *Hoffman* had not been decided. *Haglund*, 847 N.E.2d at 321-23.

524. Back v. Wickes, 378 N.E.2d 964, 970 (Mass. 1978); Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922-23 (Mass. 1998).

525. Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848, 859 (Mass. 2001); Lewis v. Ariens Co., 751 N.E.2d 862, 866-67 (Mass. 2001); *Vassallo*, 696 N.E.2d at 922-23.

sion in *Kotler v. American Tobacco Co.*,[526] that the plaintiff must prove the existence of a safer alternative design in a design defect claim.[527] In *Gillespie v. Sears, Roebuck & Co.*, the plaintiff was injured using a table saw.[528] He put forward two theories as to why the saw was defectively designed.[529] For each theory, an expert testified about other designs which the expert believed were safer.[530] *Gillespie* held that one of those theories was flawed and could not be the basis for recovery because the arguably better design would not have prevented the actual injury sustained by the plaintiff.[531] In *Gillespie*, the reasonable alternative requirement was essential to the decision because the proof on that point was held to be insufficient, necessitating a new trial.[532] Meanwhile, Massachusetts state courts have continued to hint at the importance of a safer alternative design, but they have not spoken with the clarity of federal courts.

Haglund, unlike *Kotler*, was a cigarette case premised upon a safer alternative design.[533] The plaintiff in *Haglund* argued that Philip Morris could have marketed a non-addictive cigarette with the nicotine removed.[534] Although the issue on appeal pertained to the *Correia* defense, and not the viability of the plaintiff's design defect theory, *Haglund* did say that "[t]he plaintiff need only convince the jury that a safer alternative design was feasible, not that" it had been adopted by any manufacturer in the industry.[535] This statement, as the court had done in previous decisions from the 1980s, skirted the question of whether the alternative design is essential, rather than just a sufficient basis for presenting a design claim to a jury.[536] To the extent it can be argued that a reasonable alternative design requirement is implicit in the court's discussion in *Haglund*, it does not seem to be a mistake that Massachusetts federal courts have spoken clearly on the subject, and state courts have

526. Kotler v. Am. Tobacco Co., 926 F.2d 1217 (1st Cir. 1990), *vacated on other grounds*, 505 U.S. 1215 (1992), *remanded to* 981 F.2d 7 (1st Cir. 1992).

527. *See* Gillespie v. Sears, Roebuck & Co., 386 F.3d 21, 27 (1st Cir. 2004); Public Serv. Mut. Ins. v. Empire Comfort Sys., Inc., 2008 WL 3884342, at *5 (D. Mass 2008).

528. *Gillespie*, 386 F.3d at 24-25.

529. *Id.* at 25.

530. *Id.* at 26-28.

531. *Id.* at 27.

532. *Id.* at 31.

533. Haglund v. Philip Morris, Inc., 847 N.E.2d 315, 320 (Mass. 2006).

534. *Id.*

535. *Id.* at 323.

536. *See supra* Part II.C (discussion of previous decision avoiding question of whether reasonable alternative design is required).

not.[537] *Haglund* also emphasized strict liability under the implied warranty of merchantability even for "properly designed" products,[538] as did *Colter*, *Correia*, and *Hayes* during the 1980s.[539] The reluctance to finally decide this issue suggests that Massachusetts courts are unwilling to tie themselves to a reasonable alternative design requirement. After all, *Haglund*'s broad language condemning cigarettes as inherently unsafe may have signaled a willingness to impose liability where *Kotler* did not, that is, under a design defect theory that the risks of cigarettes outweigh their utility.

The impact of not explicitly requiring a reasonable alternative design is unlikely to lead to many products being condemned for inherent attributes that cannot be made any safer, like castor oil, whiskey, or butter, invoked by section 402A. The Restatement (Third) of Torts does allow for an exception to the reasonable alternative design requirement when the product has very low social utility and a high degree of danger.[540] It has been rare for courts anywhere to make that judgment.[541] Rather than making a frontal assault on the overall danger of a product, plaintiffs are more likely to make criticisms of certain design features, while wishing not to be held to the burden of showing how those features could be made better. Expert testimony is ordinarily required to meet that burden,[542] and even with expert testimony, the supposedly better design can be attacked by defense counsel in the same way that the defendant's original design was attacked.[543] The alternative design might carry its own risks, and it might not, as was true in *Gillespie*,

537. *Haglund*, 847 N.E.2d at 323; *see* Fidalgo v. Columbus McKinnon Corp., 775 N.E.2d 803, 808-09 (Mass. App. Ct. 2002). In *Fidalgo*, the appeals court assumed that the Supreme Judicial Court in *Colter* and *Uloth* had required a safer alternative design. *Id.* at 808. In characterizing those holdings, however, *Fidalgo* inserted the word "must," a word that neither *Colter* or *Uloth* used. *Id. Fidalgo* held that a design claim was inadequate where the proposed alternative design was simply not feasible. *Id.* at 808-09.

538. *Haglund*, 847 N.E.2d at 323.

539. *See* Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1313 (Mass. 1988) (citations omitted).

540. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e (1998).

541. *See id.* § 2 Reporters' Note.

542. *See* Pub. Serv. Mut. Ins. v. Empire Comfort Sys. Inc., 573 F. Supp. 2d 372, 380 (D. Mass. 2008); Goffredo v. Mercedes-Benz Truck Co., 520 N.E.2d 1315, 1318-19 (Mass. 1988).

543. *See, e.g.*, Fidalgo v. Columbus McKinnon Corp., 775 N.E.2d 803, 806-09 (Mass. App. Ct. 2002).

have prevented the harm suffered by the plaintiff.[544] In *Smith v. Ariens Co.*, the plaintiff was allowed to recover based on apparent deficiencies in a snowmobile's design.[545] The design feature that caused harm seemed unwise and was probably fixable, but the plaintiff did not have to show how exactly the snowmobile should have been designed.[546] As it stands now under Massachusetts law, a reasonable alternative design is a recognized way of proving a design defect case, but it may not be the only way.

IV. The Future and a Better Way Forward

The modern era of Massachusetts products liability law has been plagued by the conundrum of strict liability. It has led to doctrinal incoherence, wooden rules, and outcomes that do not benefit society. Reasonable people can differ over policy objectives, but there should be no argument over the need for change when the law fails to effectuate widely shared goals. Massachusetts products liability law should be changed in some specific ways, which this Article discusses, but more importantly, Massachusetts courts need a more logical framework for allocating burdens of proof, setting standards of conduct, and balancing competing interests. The Restatement (Third) of Torts provides a clear, functional approach to deciding products liability cases, and one which is fundamentally consistent with longstanding precedent. With that approach in mind, this Article argues for the overdue rationalization of Massachusetts products liability law.

A. *Agnosticism over Doctrinal Labels*

The new Restatement has attempted to avoid the pitfalls associated with doctrinal categories. The rules it states are functional, and so long as those functional requirements are met, it expresses no opinion on how the claims are denominated.[547] While that diplomatic approach has its virtues, this Article argues that "negligence" and "strict liability" have acquired so much baggage, have meanings, which are so imprecise, and have caused so much mischief. It would be best, at a minimum, to refrain from using "strict liability" to describe the theory of products liability in Massachu-

544. Gillespie v. Sears, Roebuck & Co., 386 F.3d 21, 27-29 (1st Cir. 2004) (discussing contradictory evidence on whether alternative design would have prevented injury).

545. Smith v. Ariens Co., 377 N.E.2d 954, 957-58 (Mass. 1978).

546. *Id.* at 958-59.

547. Restatement (Third) of Torts: Prod. liab. § 2 cmt. n (1998).

setts. The "strict liability" label has led Massachusetts courts to repeatedly claim that in design and warning cases, they are only looking at the product, and not the conduct of the defendant, as if the product could be shipped to a laboratory and the absence of a warning could be viewed under a microscope, in the way a manufacturing flaw could be. In reality, design choices and the choices whether to give warnings involve a defendant's conduct. Ending the conundrum of strict liability would stop the perplexing practice of what one scholar has described as calling "a pig a mule."[548]

B. *Acknowledging Fault and Non-Fault Based Standards*

Removing "strict liability" from the vocabulary does not mean that liability without fault does not exist in Massachusetts. Indeed, liability without fault has an appropriate place in Massachusetts products liability law. On the other hand, most of the important questions during the modern era have been resolved, and will continue to be resolved, under fault-based, reasonableness standards.[549] This may not satisfy doctrinal purists, but a mixture of fault-based and non-fault-based rules will best advance social policy. Under Massachusetts law and the new Restatement, a consumer injured due to a manufacturing defect in a product need not prove the product manufacturer or seller was at fault.[550] Similarly, inadvertent design error cases, in which the product manifestly fails to perform as intended, such as when an airplane's wings fall off during normal operation, should allow for recovery without the plaintiff needing to prove that the manufacturer's negligence led to a product defect.[551] That defect can be inferred from the circumstances, and liability can follow without direct proof of fault.[552] In addition, the liability of a product seller, such as a distributor or

548. David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 749 ("Quite simply, most courts have been saying one thing while doing quite another—calling a pig a mule.").

549. *See supra* Part I.D.1 (discussing risk-utility standard for design claims); *supra* Part III.A (discussing fault-based standard for duty to warn); *supra* Part III.B (discussing reasonableness standard for post-sale duty to warn).

550. *See* Gleason v. Source Perrier, 553 N.E.2d 544 (Mass. App. Ct. 1990) (affirming liability in case of manufacturing defect in bottle); Back v. Wickes Corp., 378 N.E.2d 964, 970 (Mass. 1978) (noting straightforward application of liability without fault in case of manufacturing defect); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(a).

551. *See* Carey v. Gen. Motors Corp., 387 N.E.2d 583 (1979) (theory of design defect based on improper engineering practice upheld without showing of alternative design); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 3 cmt. b.

552. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 3.

retailer who is not involved in the design or manufacture of the product, is vicarious in nature.[553] The seller of a product that is defectively designed due to the design choices of the manufacturer may be held liable for that defect even though the seller did nothing negligent.[554]

Fault-based standards have been dominant in Massachusetts products liability law, as they are in the new Restatement, and in other jurisdictions in the United States.[555] As this Article has pointed out, the *Back* design defect factors are mostly a refinement of the Judge Learned Hand's B<PL negligence formulation, and Massachusetts law has always judged a manufacturer's design choices by nothing more than a rule of reason.[556] A designer must only design against reasonably foreseeable risks.[557] The duty to warn, at least since *Vassallo*, has extended only to risks that are known or should have been known to an expert in the field.[558] The adequacy of warnings has always been governed by a reasonableness standard.[559] Massachusetts courts have permitted a product manufacturer to discharge his duty to warn through intermediaries, so long as the reliance upon the intermediary is reasonable.[560] The post-sale duty to warn, whatever its limitations, has been extended no further than an obligation to act reasonably under the circumstances.[561] These reasonableness standards are aimed at judging conduct, because "the goal of products liability law is to induce conduct that is capable of being performed."[562]

Where Massachusetts products liability law has gone off course, it has not been because these flexible fault-based standards have been found wanting. Indeed, it was through application of negligence principles that the patent danger rule was eliminated in

553. *See id.* § 2 cmt. o.

554. *See id.*

555. *See id.* § 2 Reporters' Note (surveying fifty states and finding risk-utility standard dominant); Owen, *supra* note 548, at 785-88 (noting the "explosion" of the myth of strict liability in design and warning cases). **R**

556. *See supra* Part I.D.4.

557. Back v. Wickes Corp., 378 N.E.2d 964, 969 (Mass. 1978).

558. Vassallo v. Baxter, 696 N.E.2d 909, 923-24 (Mass. 1998); Lewis v. Ariens Co., 751 N.E.2d 862, 865-66 (Mass. 2001) (re-affirming knew or should have known standard for duty to warn).

559. *See, e.g.*, MacDonald v. Ortho Pharm. Corp., 475 N.E.2d 65, 71-72 (Mass. 1985).

560. *See* Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848, 858-59 (Mass. 2001) (bulk supplier doctrine); *MacDonald*, 475 N.E.2d at 68-70.

561. *See supra* Part III.B.

562. *Vassallo*, 696 N.E.2d at 922-23.

Uloth and the intended use paradigm was abolished in developing crashworthiness standards in *Smith* and *Back*.[563] When Massachusetts courts began to embrace the rigidity of the supposedly progressive strict liability standard, unjust and perplexing results began to appear due to wooden rules that appeared detached from any social policy justification. When *Correia* introduced the "unreasonable use" defense in the name of strict liability, the seemingly dead assumption of risk and patent danger rules were revived.[564] In a stroke, the often complex issue of the plaintiff's conduct toward the product became a yes or no question that often served as a complete bar to recovery.[565] As a result, negligence claims have often been a better vehicle for recovery.[566] Warranty seems only to offer the unreasonable use defense while maintaining the same design and warning standards as negligence.

C. *Recognizing the Convergence and Clarifying the Muddle*

With the insight that in design and warning cases, negligence and warranty standards are essentially the same, it is clear that the inquiries made by courts and juries need to be simplified. Asking finders of fact to make fine doctrinal distinctions that had no substance in reality was never wise. As this Article has pointed out, these distinctions created the need to apply the overlapping analyses of reasonably foreseeable misuse, unreasonable use, proximate cause, ordinary negligence, and comparative fault to the fact, for example, that a product user did not wear goggles.[567] As the Restatement (Third) of Torts holds, factually identical design and warning claims should not be submitted to a jury under different doctrinal labels.[568] The new Restatement warns, and experience in Massachusetts has shown, doing so would lead to confusion and inconsistent verdicts.[569] Similarly, with the insight that it is the reasonableness of the manufacturer's conduct at issue in design and

563. *See supra* Parts I.D.2 and I.D.3; *see also* Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978); Smith v. Ariens Co., 377 N.E.2d 954 (Mass. 1978); Back v. Wickes Corp., 378 N.E.2d 964 (Mass. 1978).

564. *See supra* Part II.A; *see also* Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983).

565. *See supra* Part II.A (discussing contours of unreasonable use defense).

566. *See supra* Part II.A (discussing plaintiffs' difficulty in recovering under warranty claims); Colter v. Barber-Greene Co., 525 N.E.2d 1305, 1307-08 (Mass. 1988) (plaintiff recovered on negligence claim but not on warranty claim).

567. *See supra* notes 301-306 (discussing *Allen II*).

568. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. n (1998).

569. *See Correia*, 446 N.E.2d 1033 (inconsistent jury instruction submitted by the court); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. n.

warning cases, the comparative fault statute should be applied to judge the conduct of the plaintiff and to act as a complete or partial defense. Applying a unitary standard and submitting a factual claim of warning or design defect just once to the jury will require the elimination of the *Correia* defense. Once the fiction, that the defendant's conduct is not at issue, is removed, the theoretical basis for *Correia* vanishes, and the plaintiff's conduct can be judged under the comparative fault statute. Besides, it would complicate, rather than simplify, matters to allow the unreasonable use defense to be layered on top of the comparative fault defense.[570] Without *Correia*, the jury would be allowed to decide in a design case, where the plaintiff's use of the product arguably diverged from the manufacturer's intended use, whether the use was reasonably foreseeable, whether the defect was a proximate cause of the plaintiff's injury in light of the plaintiff's use of the product, and whether the plaintiff's conduct was negligent under the comparative fault statute.[571] That would be a comprehensible and logical analysis.

Clarifying the muddle will also require careful thought by courts in delineating affirmative defenses from elements of the plaintiff's proof. The two may look similar when the defendant is attempting to negate the plaintiff's proof; the defendant's attack may look like a defense. Misuse should not be seen as an affirmative defense, a mistake the First Circuit made in *Cigna Insurance Co. v. Oy Saunatec, Ltd.*, where the error meant that the defendant had the burden of showing sufficient evidence to warrant a jury instruction on the issue.[572] In fact, misuse is not a distinct concept;[573] the question simply is whether the use was reasonably foreseeable or not.[574]

D. *Getting Rid of Wooden Rules and Making Wise Policy Choices*

This Article has argued that the distinction between the post-sale duty to warn of risks and the post-sale duty to warn of risk

570. *See generally*, Correia, 446 N.E.2d 1033.

571. As this Article has previously argued, the foreseeability analysis usually involved in proximate cause should drop out in a case involving a manufacturer's failure to include a safety device in the design of a product, as it overlaps with the antecedent duty question, which also hinges on reasonable foreseeability. *See supra* Part II.A (citing Twerski, *supra* note 280).

572. Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1 (1st Cir. 2001).

573. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. p.

574. *See* Allen v. Chance Mfg. Co., 494 N.E.2d 1324, 1326-27 (Mass. 1986) (holding that a plaintiff must prove the use (or alleged misuse) was reasonably foreseeable).

avoidance measures is arbitrary and has never been justified.[575] This is a wooden rule that can be rectified by doing nothing more than requiring the manufacturer or seller to act with reasonable care under the circumstances. The touchstone of duty in a post-sale failure to warn case is the economic and practical feasibility of giving a warning to the user.[576] Once that feasibility is established, which is no easy matter,[577] and the risk to the user is non-negligible, there is no good reason to withhold notice of a product's risks, or to withhold notice of a design improvement that would reduce risk.

The implied warranty of merchantability, despite its alleged congruence with strict liability in tort, contains a technical limitation that appears to have no basis in public policy, if it is indeed true that the implied warranty of merchantability imposes duties by the operation of law rather than by contract.[578] It has been held that there is no implied warranty made unless there has been a sale or a lease.[579] As a result, a person who test-drove a vehicle from an automobile dealership did not enjoy the protection of the implied warranty of merchantability.[580] The distinction between the driver who test-drives a vehicle, and the driver who drives that same vehicle out of the lot after purchasing it, is akin to the old privity rule in that it erects an artificial barrier to recovery unconnected to any policy objective. While it appears that only the legislature can remedy this deficiency,[581] it should do so, as this rule undermines the policy of broad consumer protection.

This Article has pointed out that the place of the reasonable alternative design requirement remains an open question in Massachusetts state courts.[582] This ambiguity serves no constructive purpose. If, as has been hinted, proof of a reasonable alternative design is required, litigants ought to know because the expense of providing the proof can be considerable.[583] If there is some cate-

575. *See supra* Part III.B.

576. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10(b) (illustrating that three of four factors involve burden and feasibility of giving post-sale warning).

577. *See*, *e.g.*, Lewis v. Ariens Co., 751 N.E.2d 862, 867 (Mass. 2001) (stating that it is not feasible to warn second hand purchaser of snow blower).

578. *See* Back v. Wickes Corp., 378 N.E.2d 964, 969 (Mass. 1978) (holding that a duty under implied warranty of merchantability is imposed by law as a matter of social policy, not by contract).

579. Mason v. General Motors Corp., 490 N.E.2d 437, 441-42 (Mass. 1986).

580. *See id.*

581. *See id.*

582. *See supra* Parts I.D.1, II.C, and III.D.

583. *See* Pub. Serv. Mut. Ins. v. Empire Comfort Sys., Inc., 573 F. Supp. 2d 372, 380 (D. Mass. 2008) (stating expert testimony almost always required).

gory of cases where the alternative design requirement does not apply, then that category should be carefully defined. In a case assailing the conscious design choices of the manufacturer, the Restatement (Third) of Torts requires a practical, feasible, safer alternative design in order to show a design defect.[584] There is an exception for manifestly unreasonable designs that involve gratuitous risk and virtually no social value.[585] This balance honors consumer choice in that widely distributed products, like above-ground swimming pools, cannot be condemned on a categorical basis.[586] Where the plaintiff takes issue with particular design features of the product, by suggesting that the features should not exist or should be different, a reasonableness standard quickly generates questions about how removing or changing the contested design features would impact the cost, usefulness or attractiveness of the product, or how it would create other risks.[587] Without an alternative design as a point of comparison, juries will be asked to engage in rootless reasonableness inquiries of relative risk. They would be placed in the position of attempting to re-conceive the design process, evaluating the tradeoffs between functionality, cost, and safety that the original designer made, but without all of the information or the expertise possessed by the original designer. Evaluating conscious design choices in reference to a proposed alternative design makes an already difficult task manageable. In short, plaintiffs need to be put to the burden of proving a technically feasible, reasonable alternative design that would have prevented the injury suffered, as winning plaintiffs have generally done in Massachusetts.[588]

CONCLUSION

The longstanding attachment to section 402A of the Restatement (Second) of Torts, and to the rhetoric of strict liability, shown by Massachusetts courts during the modern era of products liability law ceased, some time ago, to serve the interests of the adjudicatory process or the interests of consumers or of product sellers. Experi-

584. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1998).

585. *See id.* § 2 cmt. e.

586. *See id.* § 2 cmt. d.

587. *See generally Conscious Design Choices*, *supra* note 192, at 1552-58. **R**

588. *See*, *e.g.*, Uloth v. City Tank Corp., 384 N.E.2d 1188, 1191 (Mass. 1978) (plaintiff's verdict on negligent design affirmed where there was evidence of several design changes that could have made product safer); Richard v. Amer., Mfg. Co., 489 N.E.2d 214 (Mass. App. Ct. 1986) (plaintiff's verdict on negligent design upheld where there was evidence that simple guard would have reduced risk).

ence has shown that completing the rationalization of Massachusetts products liability law will require putting aside old nostrums; the mischief caused by imprecise language and incoherent doctrine is simply too great. Some forty-five years after its promulgation, section 402A has run its course, and it is time to adopt explicitly the standards found in the Restatement (Third) of Torts. The new Restatement's functional rules represent wise policy, and provide needed clarity to questions that section 402A did not attempt to answer. Breaking with past tenets can be difficult in a common law system that respects precedent, but Massachusetts courts have been able to make a clean break with products liability rules that no longer work. When *Carter v. Yardley & Co.* abolished the privity rule in negligence actions in 1946, the Supreme Judicial Court was blunt: "In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."[589] Notions of strict liability in design and warning cases are rightly subject to a similar indictment and deserve a similar fate.

589. Carter v. Yardley & Co., 64 N.E.2d 693, 700 (Mass. 1946).