
ARTICLES

PROSPECTIVE APPLICATION OF THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY IN ALASKA

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This Article examines Alaska's products liability jurisprudence in relation to the Restatement (Third) of Torts: Products Liability, the American Law Institute's most recent formulation of the law of torts. The Article begins with an analysis of the Alaska Supreme Court's seminal products liability decisions, including the Court's partial adoption of products liability provisions from the First and Second Restatements. The Article then analyzes the provisions of the Third Restatement, comparing them with current Alaska law. The Article next analyzes Alaska's preference for preserving the doctrinal wall between negligence principles and products liability principles, concluding that the Third Restatement does not recognize this distinction. The author concludes that the Third Restatement should be adopted only to the extent that it does not conflict with Alaska law, and in conformity with Alaska's adoption of First and Second Restatement provisions.

I. INTRODUCTION

In 1998, the American Law Institute ("ALI") completed its restatement of the law regarding products liability with the publication of the Restatement (Third) of Torts.¹ The ALI expanded its treatment of products liability into a separate volume as opposed to its previous status as a subpart (section 402A) of the Restate-

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1. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

ment (Second) of Torts.² The ALI first promulgated section 402A in 1964. By eliminating the traditional requirement of privity, section 402A recognized the development of strict products liability, which allowed consumers to bring actions directly against manufacturers or distributors.³ The Second Restatement “has been called ‘the most widely accepted distillation of the common law of torts.’”⁴ Thirty-four years after section 402A earned a broad following among the states,⁵ the ALI has engaged in a “total overhaul” of the Second Restatement, and section 402A in particular, by drafting the Third Restatement.⁶

The Restatement (Third) of Torts: Products Liability, though criticized by some as too political,⁷ nevertheless recognized emerging trends and decisions adopted by the various states.⁸ In-

2. *See id*; *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

3. The doctrine of strict liability essentially began with *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), which abandoned privity of contract with a manufacturer as a prerequisite to tort liability for a defective product.

4. *In re Maldonado*, 228 B.R. 735, 738 (9th Cir. 1999) (quoting *Field v. Mans*, 516 U.S. 59, 69 (1995)).

5. The Second Restatement’s provisions regarding products liability enjoy popularity in the federal courts as well. *See, e.g.*, *Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co.*, 565 F.2d 1129, 1134 (9th Cir. 1977) (“We hold that strict products liability actions have become sufficiently well-established to justify its being incorporated into the law of admiralty We hold that the correct law to be applied to this case is expressed in Restatement (Second) of Torts § 402A (1965), as it is the best expression of the doctrine as it is generally applied . . .”).

6. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998); *see also* David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 746 (“The Gospel According to Prosser, as it were, has been rewritten.”).

7. *See, e.g.*, Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH. J.L. REFORM 215, 217-20 (1997) (asserting that the Restatement reporters were essentially advocating different political positions); Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 279 (1997) (summarizing that “[t]he treatment of design defect in the Restatement (Third) is a political statement” and concluding that it did not properly reflect existing case law).

8. Two of the reporters for the Third Restatement prepared a lengthy reply to this criticism and justified their approach:

Some critics . . . have argued that the project was highly politicized, with the Reporters acting as brokers negotiating compromises among powerful interests. Having served as the Reporters in question, we would like to set the record straight. In no meaningful sense of the term did we “play politics” in our roles as drafters of the new Restatement Stated differently, we sincerely believe that the new Restatement is as good as we were capable of making it. We are human and surmise it is

stead of shrinking from the “politicized” characterization, the ALI justified its approach on the ground that products liability is “of course ‘political’ in that it involves issues of distributive justice and has attracted the attention of vocal and aggressive partisans.”⁹ Accordingly, controversial and disputed issues had to be scrutinized in drafting a new restatement and the ALI attempted to synthesize a consensus view. In some areas, however, the Third Restatement did slightly more than simply restate or codify the law followed in a majority of jurisdictions; it set forth some concepts that were not well settled, even by the ALI’s own admission.¹⁰

Historically, Alaska has only embraced portions of the Second Restatement and expressly rejected key elements. In several material respects, Alaska has applied its own unique formulation for products liability. It has adopted a three-pronged approach to products liability where a product “may be defective because of a manufacturing defect, a defective design, or a failure to contain adequate warnings.”¹¹ In this respect, Alaska has set its own course and applied the Second Restatement only when it conformed with the better-reasoned public policy. In Montana, the Supreme Court explained a similar relationship with the Restatement:

We have stated that this Court shall not blindly follow the dictates of the Restatement commentaries. We emphasize that this Court adopted the rule as set out in the Restatement, but we did not and do not intend the restraints in the comments to this rule to hamstring us in developing and refining the rule of strict liability. To the extent that the comments are helpful in our development of the law, we shall accept them; but we will reject them where we believe a more appropriate explanation of the rule of strict liability can be provided.¹²

As discussed more fully below, this statement reflects the Alaska Supreme Court’s approach as well. This Article evaluates several provisions of the Third Restatement and compares them to existing Alaska law. The goal is to examine the policy governing prod-

not perfect. But we also know it is not a “political” document as the phrase is commonly used.

James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667, 667-68 (1998).

9. Foreword to RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB., xv (1998).

10. See *id.* at 4 (“Section 2(b) generated considerable controversy.”).

11. *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992); see also *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 n.15 (Alaska 1979) (hereinafter “Beck I”). This case will be referred to as *Beck I* since a second *Beck* opinion was handed down several years later. See *Caterpillar Tractor Co. v. Beck*, 624 P.2d 790 (Alaska 1981) (hereinafter “Beck II”).

12. *McJunkin v. Kaufman & Broad Home Sys., Inc.*, 748 P.2d 910, 917 (Mont. 1987).

ucts liability, clarify the present status of Alaska products liability law, and then reconcile both with the Third Restatement and ultimately provide reasoned recommendations regarding the prospective application or adoption of some of these provisions in light of existing Alaska law. This Article begins with a thirty-year overview of Alaska products liability law and then juxtaposes the current state of this law with the Third Restatement modifications.

II. DIFFERENTIATING “STRICT” LIABILITY FROM ABSOLUTE LIABILITY

Before discussing the provisions of the Third Restatement as they relate to current Alaska law, one caveat is in order: the term “strict” should generally be avoided as a modifier of the term “products liability” unless referring to manufacturing defects (as opposed to design or warning defects) or vicarious liability imposed on sellers and retailers. Use of the traditional term “strict products liability” is not utilized herein except when discussing manufacturing defects or vicarious liability of sellers; it creates a false aura of absolute liability where none exists. Rather, the doctrine is simply referred to as “products liability.”

This is done for three reasons. First, use of the term “strict” relative to a manufacturer is a misnomer that implies “absolute liability” irrespective of defect. The Alaska Supreme Court, in *Caterpillar Tractor Co. v. Beck* (“*Beck I*”),¹³ reasoned that “manufacturers are not absolute insurers of their products” and that plaintiffs must prove more than harm from the product.¹⁴ Thus, use

13. 593 P.2d 871 (Alaska 1979).

14. *Id.* at 879.

Although courts and commentators have struggled with diverse approaches to strict products liability, most authorities appear to agree that manufacturers are not absolute insurers of their products. Strict liability will not impose legal responsibility simply because a product causes harm. A product must be defective as marketed if liability is to attach, and “defective” must mean something more than a condition causing physical injury.

Id.; see also *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1063-64 (Alaska 1979) (“[W]e think that ‘scientific knowability’ of the injurious nature of the product should be considered because, otherwise, imposition of liability for a design defect would effectively mean absolute liability even though there is no alternative way for the manufacturer to discover the risk and remedy it. Such a situation would be incompatible with our previous decisions holding that manufacturers are not absolute insurers of their products.”); *O’Brien v. Muskin Corp.*, 463 A.2d 298, 303 (N.J. 1983) (“The necessity of proving a defect in the product as part of the plaintiff’s prima facie case distinguishes strict from absolute liability . . .”).

of the term “strict” is avoided here to eliminate even the inference of absolute liability against a manufacturer, notwithstanding the fact that many Alaska decisions qualify products liability with the term “strict.”¹⁵ This also avoids confusion with true strict liability relative to ultrahazardous activities, where liability is imposed for any injury irrespective of the safety precautions taken.¹⁶

It is more accurate to state that once a defect is proven, the manufacturer will be liable for that product defect if it caused injury, since proof of a defect is “tantamount to fault in the sense that we will impose legal responsibility for it.”¹⁷ For manufacturing defect cases, the term “strict” is more apropos since liability is certain if the plaintiff can establish that the product purchased differed from what the manufacturer intended to make (and that difference caused harm).¹⁸

In contrast, it is questionable whether the liability for design products liability really is “strict.” Decisions in this area, especially under a risk-utility analysis, inevitably balance competing designs,

15. See, e.g., *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1215 (Alaska 1998); *Maddox v. River & Sea Marine, Inc.*, 925 P.2d 1033, 1038 (Alaska 1996) (“We have refused to impose strict liability based upon failure to warn of ‘hazards or dangers that would be readily recognized by the ordinary user of the product.’” (quoting *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984))).

16. See *Matomco Oil Co., Inc. v. Arctic Mechanical, Inc.*, 796 P.2d 1336, 1341 (Alaska 1990) (holding that “welding, buffing, or grinding of a petroleum tanker . . . is not an ultrahazardous activity” where strict liability would be imposed as opposed to proof of negligence); *Yukon Equipment v. Fireman’s Fund Ins. Co.*, 585 P.2d 1206, 1210 (Alaska 1978) (discussing the court’s role in determining whether an activity is “abnormally dangerous” under the Second Restatement or constitutes an “ultrahazardous activity” as defined in the First Restatement); *Siegler v. Kuhlman*, 502 P.2d 1181, 1184-85 (Wash. 1972) (hauling gasoline constitutes an ultrahazardous activity subjecting the defendant to strict liability for any resulting harm). It is improbable for a *product* to be subject to “strict liability” under an ultrahazardous activity analysis; a flame thrower might be such an example.

17. *Beck I*, 593 P.2d at 889 (“[S]trict products liability is not absolute liability but stems from the existence of a defect. The production and marketing of a defective product is tantamount to ‘fault’ in the sense that we will impose legal responsibility for it.”).

18. See *id.* at 880 (holding that “manufacturing flaws can be evaluated against the intended design of the product”); *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243, 1246 (Alaska 1992) (imposing liability where “the absorption of the fuel by the float was a result of a defect in the manufacturing process”); *Colt Indus. Operating Corp., Quincy Compressor Div. v. Frank W. Murphy Mfr.*, 822 P.2d 925, 930 (Alaska 1991) (discussing manufacturing defects versus design defects (sometimes finding little demarcation between the two) as well as the argument that manufacturing defects occur where there are “deviation[s] from the condition intended by the manufacturer”).

and implicitly weigh the “reasonableness” of the product design with product alternatives. Negligence is a concept rooted in reasonableness.¹⁹ To the extent courts, at least in part, utilize reasonableness principles in the risk-benefit analysis, it does not help to clothe the doctrine with an incorrect or misleading label. The Alaska Supreme Court, however, has consistently attempted to maintain a doctrinal wall between products liability and negligence concepts.²⁰

Thus, there are two circumstances where true “strict” liability is imposed: (1) for manufacturing defects (where no question about the reasonableness of the manufacturer’s conduct is usually raised), and (2) for the liability of distributors and retailers, who are liable though they had no role in the manufacturing or design process. In this manner, the term “strict” has some force. “Strict” liability in this context may nevertheless be better described as “vicarious” or “derivative” liability because even a retailer or distributor will not be derivatively liable if the manufacturer is not liable for selling a defective product.²¹ On the other hand, if the product proves defective, all parties in the chain of distribution will face vicarious liability, which is in a sense “strict” or “absolute” because there is no defense, vis-à-vis the plaintiff, for the retailer or seller once a defect is proven.²² In Alaska, however, the potential liability of the innocent retailer may be circumscribed by Alaska’s strict

19. *See* Lyons v. Midnight Sun Transp. Servs., Inc., 928 P.2d 1202, 1204 (Alaska 1996) (finding negligence where party “did not exercise the care and prudence a reasonable person would have exercised under the circumstances”); Shanks v. Upjohn Co., 835 P.2d 1189, 1201 (Alaska 1992) (discussing “the common law tort duty to act reasonably under the circumstances”).

20. *See infra* Part V.

21. *See, e.g.*, City of North Pole v. Zabek, 934 P.2d 1292, 1300 (Alaska 1997) (“For vicarious liability to attach, some sort of underlying liability must be established . . .”); State v. Will, 807 P.2d 467, 471 (Alaska 1991) (holding that the state cannot be vicariously liable for negligence through a trooper when the trooper himself was not negligent); Bevins v. Ballard, 655 P.2d 757, 760 n.2 (Alaska 1982) (broker not vicariously liable for acts of employee when trial court found in favor of employee).

22. The term “strict liability” has been used by courts to describe vicarious or derivative liability in other contexts, including respondeat superior. *See, e.g.*, Fairbanks North Star Borough v. Kandik Constr., Inc., 823 P.2d 632, 638 n.9 (Alaska 1991) (noting that “[c]ommon settings in which tortfeasors are jointly liable but not jointly at fault are where one is only liable by operation of vicarious or strict liability”); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 350 (Alaska 1990) (holding that “this intentional misconduct may fall within the scope of a therapist’s employment so that it is appropriate to apply the doctrine of ‘respondeat superior’ to impose strict liability on his employer”) (Moore, J., dissenting).

fault allocation statute, mandating monetary liability to be imposed in strict accordance with actual “fault,”²³ as well as the liberal standards for implied indemnification from the manufacturer to the innocent retailer. It is therefore an open question today whether the chain of distribution standards were legislatively impacted when Alaska Statutes section 09.17.080(b)²⁴ was enacted.²⁵

III. ALASKA PRODUCTS LIABILITY OVERVIEW

Under Alaska law, manufacturers, wholesalers and distributors, and retail sellers are all subject to products liability.²⁶ Indeed, products liability in Alaska “applies to any person engaged in the business of selling products for use or consumption.”²⁷ The doctrinal foundation for the Third Restatement rests upon these principles,²⁸ thus it is inevitable for Alaska courts to turn to the Third

23. ALASKA STAT. § 09.17.90 (LEXIS 1999). Section 09.17.90 defines “fault” as including those acts that “subject a person to strict tort liability” for purposes of allocating liability. *Id.* Under this statute, damages may be imposed only in lock-step proportion to the defendant’s percentage of fault. Potentially, the innocent retailer would have zero percentage of fault, and thus no liability.

24. *Id.* § 09.17.080(b) (LEXIS 1999) (“In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.”). In defining “fault,” the legislature included actions that “subject a person to strict tort liability.” *Id.* § 09.17.080; *see also id.* § 09.17.060 (“In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant’s contributory fault, but does not bar recovery.”).

25. *See Borg-Warner Corp. v. Avco Corp.* (Lycoming Div.), 850 P.2d 628, 632 (Alaska 1993) (holding that “the traditional two-step system of first establishing liability and then seeking contribution is not inconsistent with the comparative negligence principles underlying the Tort Reform Act” and, therefore, the plaintiff’s claim against the primary manufacturer was tried first, and subsequently, the manufacturer was allowed a separate trial to determine comparative negligence of other parties for purposes of allocation of fault). Accordingly, products liability cases are subject to the allocation of fault statutes. *See id.*; *see also supra* note 23 and accompanying text.

26. *See Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 787 (Alaska 1993) (noting that “the following are subject to strict products liability: sellers, manufacturers, wholesale or retail dealers and distributors”) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965)).

27. *Id.* at 787 n.5 (citing § 402A) (noting that products liability “applies to any person engaged in the business of selling products for use or consumption”).

28. The basis for the Third Restatement mirrors Alaska law in breadth in that the Third Restatement recognizes (1) products liability in tort for defective products (Section 1 of the Third Restatement) and (2) manufacturing defects, design

Restatement to evaluate both current and future issues. A principled approach to evaluating and comparing current law with the Third Restatement should result in a more rational transition when an Alaskan court is first faced with the decision of applying the Third Restatement.

One method for evaluating whether the Third Restatement, or even any part of it, is appropriate under Alaska law, is to clarify the purposes and goals underlying current law and compare them to the aspirations of the Third Restatement. If the purpose of one reflects the result of another, then the transition, if it is to be made, would not represent a radical departure from current Alaska products liability law. If there are portions that merely overlap, but do not coincide completely, then the court reviewing this issue would weigh the old with the new and make its decision based on the better-reasoned public policy.²⁹ For the moment, *stare decisis* is not a barrier to such a change because the law is constantly evolving, with the Third Restatement representing another step in the evolutionary process. *Stare decisis* will be further relegated to secondary status to the extent that the refinements set forth in the Third Restatement are not precedent changing so much as precedent developing and extending. This is consistent with the approach taken by the Alaska Supreme Court when faced with the development of the law in other areas.³⁰

A. Principles of Alaska Products Liability Law

The touchstone for any court considering the Third Restatement is whether its provisions comport with the public policy underlying that court's existing products liability rationale. Before this can be done, the existing principles and public policy must be

defects and warning or instruction defects (Section 2). It is the details and commentary that depart from Alaska law.

29. *See, e.g.*, *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979) (discussing the balancing of interests required when competing policies are at issue). Further, when weighing competing interests in the products liability arena, the Alaska Supreme Court will accept or reject a proposed rule of law based on its evaluation of policy and reason. *See Shanks v. Upjohn Co.*, 835 P.2d 1189, 1198 (Alaska 1992) (rejecting an argument for exempting prescription drugs from products liability, reasoning that “[n]either policy nor reason supports the approach taken by some courts in barring such claims”).

30. For example, when the court abandoned the *Frye* test and adopted the *Daubert* test regarding the admissibility of expert testimony, it reasoned that “the judicial doctrine of *stare decisis* accords the prior holdings of the highest courts of this State precedential value while still permitting the reconsideration of legal issues when conditions warrant.” *State v. Coon*, 974 P.2d 386, 394 (Alaska 1999) (citing *State v. United Cook Inlet Drift Ass’n.*, 895 P.2 947, 953 (Alaska 1995)).

clarified and examined. Starting with the first adoption of products liability in *Clary v. Fifth Avenue Chrysler Center*,³¹ and continuing through its most recent pronouncements, the Alaska Supreme Court has identified several policy considerations justifying the doctrine. These goals include the following:

- (1) ensuring that the social and economic costs incurred by injured consumers are borne by the manufacturers and retailers who profit from these products as opposed to those injured persons who are otherwise “powerless to protect themselves” from the sometimes “catastrophic losses”³² imposed by defective products;³³
- (2) removing evidentiary barriers that prevented consumers from obtaining a remedy for injuries that had developed under negligence and warranty theories;³⁴
- (3) allocating the social and economic costs incurred by injured consumers to all enterprises in the chain of distribution by imposing vicarious liability on intermediaries and retail sellers who may not have had any active participation in producing a defective product;³⁵ and

31. 454 P.2d 244 (Alaska 1969).

32. *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1180 (Alaska 1993) (“The essential public policy on which strict liability is built is the spreading of risk and ensuring that a manufacturer who is able to absorb loss and spread it is held liable rather than the consumer for whom loss may be catastrophic.”).

33. *Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co.*, 604 P.2d 1113 (Alaska 1980); *Cloud v. Kit Mfg. Co.*, 563 P.2d 248 (Alaska 1977); *Pratt & Whitney Can.*, 852 P.2d at 1176 (“We were persuaded that strict products liability would ‘insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.’”) (citing *Clary v. Fifth Ave. Chrysler Ctr.*, 454 P.2d 244, 248 (Alaska 1969)).

34. See *Pratt & Whitney Can.*, 852 P.2d at 1180 (reaffirming the rejection of warranty-based theories and noting that “it does not make sense to permit a disclaimer of strict liability”); *Butaud v. Suburban Marine & Sporting Goods, Inc.* [hereinafter “*Butaud II*”] 555 P.2d 42 (Alaska 1976) (this case will be referred to as *Butaud II*, since an earlier opinion in the case was handed down the year before this decision in *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 213 (Alaska 1975), and will be referred to as *Butaud I*); *Beck I*, 593 P.2d at 871.

35. *Clary*, 454 P.2d at 248 (holding that “[t]he purpose of imposing such strict liability on the manufacturer and retailer is to insure that the costs of injuries” are borne by the marketers of such products); *Maddox v. River & Sea Marine, Inc.*, 925 P.2d 1033 (Alaska 1996) (holding that seller must shoulder some responsibility for defective products placed into the stream of commerce); *Bachner v. Pearson*, 479 P.2d 319, 328 (Alaska 1970) (“[T]he lessor will in most instances be in a better position than the consumer to prevent circulation of defective products . . . [and] will generally be able to spread damages and insure against the risk of injuries stemming from the use of defective products which [sic] he has placed on the mar-

- (4) providing an “incentive for manufacturers to provide safer products.”³⁶

Above all else, the “concept of risk allocation has been the primary policy rationale” supporting products liability.³⁷ Although the emphasis is to shift the true costs of product injuries to the manufacturers and retailers, undoubtedly some or all of these costs may be shifted back to the consumers in the form of higher product prices. Presumably, if a product results in enough injuries and liabilities, the cost for that product will be sufficiently higher than competing products that are safer. Therefore, economic market forces may compel either a safer product or withdrawal of the product for lack of sales.

The products liability system imposing economic sanctions on makers of defective products has met considerable success relative to the goal of providing an “incentive for manufacturers to provide safer products.”³⁸ Products liability lawsuits result in safer consumer products, such as the following: (1) more flame resistant pajamas;³⁹ (2) over-the-counter medications with warnings about possible drug interactions;⁴⁰ (3) tampons made with lower absorbency in order to lower the probability of toxic shock;⁴¹ (4) removal of the Dalkon Shield interuterine device;⁴² (5) removal of artificial jaw implants; and (6) modifications of breathing and ventilator medical devices after an adverse verdict.⁴³ Certainly this is one area of the law that has a direct and important influence in nudging manufacturers to make safer products where the manufacturers

ket”). See generally Bernard P. Kelly, *Strict Product Liability In Alaska: A Retreat From Enterprise Liability?*, 9 U.C.L.A.-ALASKA L. REV. 25 (1979).

36. *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499, 503 (Alaska 1988).

37. *Beck I*, 593 P.2d at 877.

38. *Koehring Mfg.*, 763 P.2d at 503.

39. See *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (where the manufacturer was utilizing a flammable material and, as a result of verdict, manufacturer utilized flame retardant in manufacturing process).

40. See Steve Bates & Charles W. Hall, *Tylenol Verdict Puts Spotlight on Drug Labels*, WASHINGTON POST, Oct. 22, 1994, at A1.

41. See *O’Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1449-50 (10th Cir. 1987) (trial court ordered manufacturer to either withdraw fiber from use in tampons and obtain remittitur on punitive damages or accept imposition of punitive damages; appellate court reinstated punitive damage award although manufacturer modified tampon design).

42. See, e.g., *Tetuan v. A. H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

43. See *Airco, Inc. v. Simmons First Nat’l Bank Guardian*, 638 S.W.2d 660 (Ark. 1982) (where after the verdict the manufacturer voluntarily issued a medical device alert in conjunction with the FDA).

have proven reluctant or unwilling to do so based simply on market factors. However, one commentator posited that certain industries, such as alcohol and tobacco, have been able to mold tort law around what are otherwise inherently dangerous products:

[I]t is worth considering what it is about our tort-liability system which has permitted tobacco companies to continue their operations unabated for the more than forty years that it has been known that cigarettes make people sick. Part of the answer . . . is that tort law has accommodated itself to cigarettes rather than tobacco companies accommodating to the law.⁴⁴

Although there may be some industries that have had the ability to have their products change the law rather than the law change their products, these appear to be in the minority. If this system is working as intended, products that cause harm should be more expensive than those that do not because the costs of litigation and verdicts should be included in the market price, thus spreading these costs onto all consumers instead of imposing all costs on just the injured consumer.

B. Achieving Efficacy Through Evidentiary Standards

The Alaska courts have developed various evidentiary and legal standards for products liability cases in order to effectuate these public policy goals. For instance, a products liability action focuses on the condition of the product itself, not on the reasonableness of the conduct,⁴⁵ decision-making, or marketing of the manufacturer.⁴⁶ In this manner, the Alaska Supreme court has expressly rejected the incorporation of any type of negligence terminology into products liability:

44. Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 869 (1998).

45. The reasonableness, or lack thereof, of a defendant's conduct would be relevant, however, if there is a claim for punitive damages, which by definition focuses on the defendant's conduct and knowledge. *See Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46 (Alaska 1979).

46. *See Beck I*, 593 P.2d at 883 ("The focus of strict products liability is on the condition of the product, not on the manufacturing and marketing decision of the defendant.") (citing *Bachner v. Pearson*, 479 P.2d 319, 325 (Alaska 1970)); *see also Keogh v. W.R. Grasle, Inc.*, 816 P.2d 1343, 1352 (Alaska 1991) ("The focus in a strict product liability case is on the product, not on the conduct of the defendant."). The Alaska Supreme Court has admonished the trial courts that jury instructions in products liability cases should avoid negligence concepts and negligence language by eliminating references to a defendant's reasonableness. *See Shanks v. Upjohn Co.*, 835 P.2d 1189, 1199-200 (Alaska 1992); *Patricia R. v. Sullivan*, 631 P.2d 91, 102-03 (Alaska 1981) (reversing verdict because of negligence language in jury instructions); *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1062-63 (Alaska 1979).

In the *Beck [I]* case, we expressly rejected the approach taken by some legal commentators of reinserting negligence terminology into the jury's inquiry into the "diverse factors related to the product's desirability and to its dangerousness," which is the crucial analysis in the jury's overall determination that a product's design is defective and the manufacturer should bear legal responsibility for the mistake. We emphasized there that "[t]he focus of strict products liability is on the condition of the product, not on the manufacturing and marketing decision of the defendant."⁴⁷

Moreover, liability will be imposed if a design is dangerous to a consumer, notwithstanding the fact that the design conforms to industry standards or practices.⁴⁸ Additionally, the manufacturer is obligated to design a product that considers not only the intended use of the product, but *any* reasonably foreseeable product use.⁴⁹

Another method chosen by the court for fulfilling the policies underlying products liability is to shift the burden of proof to the defendant once a plaintiff sets forth a prima facie case.⁵⁰ For example, once a plaintiff establishes a defect by submitting evidence that the product failed to perform as safely as an ordinary consumer would expect when used as intended, or establishes a prima facie case that product design features were a proximate cause of the injury, the burden of proof shifts to the defendant who then has the obligation to offer evidence under a risk-benefit analysis or refute the plaintiff's theory of causation.⁵¹ The court has consistently shifted the burden of proof to the defendant, including the imposi-

47. *Heritage*, 604 P.2d at 1062 (footnotes omitted).

48. *See Beck I*, 593 P.2d at 886 (noting that it is no defense even if "the manufacturer took reasonable precautions in an attempt to design a safe product or otherwise acted as a reasonably prudent manufacturer") (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 457 (Cal. 1978)).

49. *See id.* Here again, however, the risk of commingling and confusing negligence concepts with products liability concepts emerges. For example, in determining whether a particular use was "foreseeable," the focus is on what was foreseeable to the manufacturer, not the consumer, which will necessarily involve objective proof of what a reasonable manufacturer would have, or should have, known — a negligence principle. *See Hiller v. Kawasaki Motors Corp.*, 671 P.2d 369, 373 (Alaska 1983); *Lamer v. McKee Indus., Inc.*, 721 P.2d 611, 615 (Alaska 1986).

50. *See Beck I*, 593 P.2d 885 ("[A] manufacturer who seeks to escape liability for an injury proximately caused by the product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence." (quoting *Barker*, 573 P.2d at 455)).

51. *See Dura Corp. v. Harned*, 703 P.2d 396, 406 (Alaska 1985).

tion upon the defendant to prove that the consumer's injuries in a motor vehicle accident were not enhanced by a defective safety product.⁵² Further, evidence of subsequent remedial measures are admissible against the defendant to prove both design defect and feasibility of alternative designs.⁵³ Notably, evidence of compliance with the "state of the art" may not be used as a shield for defense, but evidence of noncompliance with the "state of the art" is admissible as a sword to establish a defect.⁵⁴ Similarly, it is no defense for a manufacturer to claim that a certain industry safety code was not adopted in the particular state where the manufacturing took

52. See *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220 (Alaska 1998) ("We agree with Farnsworth that it should be the proven wrongdoer who must bear the burden of limiting its liability; it would be unfair to require a plaintiff who has already proved that a defect was a substantial factor in causing his or her injuries to try another case based upon what *might* have happened absent the defect. Thus, we conclude that [the jury instruction] accurately stated the law of apportionment by placing the burden of apportioning injury on the defendant.").

53. See *Dura Corp.*, 703 P.2d at 411; see also FED. R. EVID. 407; *Beck II*, 624 P.2d 790, 794 (Alaska 1981) ("We therefore hold that evidence of post-injury accidents and design changes is admissible.").

54. See *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 45 (Alaska 1979); see also *Beck I*, 593 P.2d at 881 (jury may consider what other manufacturers were producing and designing to the extent evidence establishes feasibility of alternative design). The *Beck I* court reasoned, however, that a defendant could utilize feasibility evidence to help establish lack of feasibility of the alternative design. 593 P.2d at 886 (discussing the defendant's obligation to prove "the mechanical feasibility of a safer alternative design, [and] the financial cost of an improved design"). Also, although "state of the art" is not a defense, a related concept of "scientific knowability" is a defense, wherein the manufacturer may be allowed to present evidence that the harm complained of was not scientifically knowable when the product was made. See *Heritage*, 604 P.2d at 1063 ("In *Beck I* we held that the defendant in a strict liability case may prove that the product was not defective by introducing evidence showing the various trade-offs in the design process. We stated there that the fact-finder is required 'to consider and compare a number of competing factors, including but not limited to ' . . . the mechanical feasibility of a safer alternative design . . . ' A determination of the 'scientific knowability' of the unsafe character of the product is relevant to the above inquiry in that it underlies evaluation of the manufacturer's ability to eliminate the harmful aspects of the product."). The court reasoned that where no indication of danger existed prior to the injury, a manufacturer would have no basis for concluding that the product should not be marketed as designed. See *id.*

place.⁵⁵ In this regard, the court rejected the Second Restatement's contrary provision.⁵⁶

Another example lies in defective warning cases: In Alaska, if the most stringent warning possible fails to protect the public, the defect itself (i.e., the problem giving rise to the warning), must be eliminated in order for the manufacturer to avoid liability.⁵⁷ Finally, as a means to ensure that the innocent consumer is compensated for all losses, vicarious liability is imposed upon "innocent"⁵⁸ retailers and sellers,⁵⁹ with an implied right of indemnity from the culpable manufacturer.⁶⁰ The following has been deemed an "accurate summary"⁶¹ of the innocent retailer's implied right to indemnity:

55. See *Dura Corp.*, 703 P.2d at 410. The court reasoned that public policy requires a manufacturer to meet the highest safety standards in effect, irrespective of whether a particular jurisdiction had adopted such standards into law. See *id.*

56. See *id.* The court rejected section 288A(2)(b) from the Second Restatement, which allowed ignorance of a national safety standard as a defense if the jurisdiction where the product was made did not adopt that standard. See *id.* Alaska law thus requires a manufacturer to comply with the highest safety standards known at the time of manufacture.

57. See *Sturm*, 594 P.2d at 44 ("Where the most stringent warning does not protect the public, the defect itself must be eliminated if the manufacturer is to avoid liability.").

58. "Innocent" in the sense that these entities played no role in the design and manufacturing, but are culpable as a matter of public policy for participating in the marketing and profit-making enterprise as a whole.

59. See *Maddox v. River & Sea Marine, Inc.*, 925 P.2d 1033, 1036 (Alaska 1996) ("Courts have long recognized that a seller must shoulder some responsibility for the costs imposed by defective or dangerous products.").

60. The imposition of vicarious products liability upon retailers, distributors and sellers does not extend to one who simply repairs a defective product. Rather, if there is a faulty repair, the claim against the repairer will sound in negligence, not products liability. See *Kodiak Elec. Ass'n, Inc. v. DeLaval Turbine, Inc.*, 694 P.2d 150, 154 (Alaska 1984) ("Kodiak Electric cannot prevail, however, on its strict liability claim against Westinghouse. Westinghouse did not manufacture generator Unit 10 All that Westinghouse provided was repair service."); *Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co.*, 604 P.2d 1113, 1117 (Alaska 1980) (citation omitted) ("Arguably, a business that sells used products, like the manufacturer and the original retailer, 'put(s) such products on the market.' A repairer does not."). These holdings were foreshadowed by the court's dicta in *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833, 839 n.21 (Alaska 1967), where the court first broached strict liability theory and reasoned that it did "not believe that policy considerations justify extension of strict liability to one rendering boiler repair services." See *id.*

61. *Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1224 (Alaska 1995).

The general rule of implied indemnity in Alaska is that an innocent supplier of a defective product who is liable on a theory of strict liability is entitled to indemnity from the manufacturer of the defective product.⁶² Even if no liability is found, the innocent supplier may nonetheless be entitled to indemnity from the manufacturer for the attorney's fees and costs in defending the action.⁶³ A supplier entitled to indemnity may be a retailer, a lessor, or even a manufacturer who incorporates an already defective component part into its product.⁶⁴

Importantly, however, a party who is "independently negligent is completely barred from recovery under the theory of implied indemnity."⁶⁵ This is simply another way of saying that if a retailer or distributor is not truly "innocent" then indemnity from the manufacturer will not be available.

These evidentiary and substantive standards were adopted, and justifiable, under the rubric established by the four policy formulations set forth above. Accordingly, the evidentiary and substantive standards set forth in the Third Restatement should be evaluated in light of these policies and with the understanding that no Third Restatement provision that contradicts these policies should be adopted unless and until the pertinent policy is jettisoned or has lost its efficacy.

C. The Development of Alaska Products Liability Law and Partial Adoption of the Second Restatement

1. *The Standards for Products Liability.* In order to compare the Third Restatement with existing Alaska law, several of the more important decisions on products liability must be set forth. The seminal products liability case in Alaska is *Clary v. Fifth Avenue Chrysler Center*.⁶⁶ In *Clary*, the court reasoned that a car dealer could be "strictly" liable in tort for a consumer's claim of

62. See *Ross Labs. v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986); *D.G. Shelter Prods. Co. v. Moduline Indus., Inc.*, 684 P.2d 839, 841 (Alaska 1984).

63. See *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059 (Alaska 1979).

64. See *Ross Labs.*, 725 P.2d at 1081 (retailer); *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499 (Alaska 1988) (lessor); *D.G. Shelter Prods.*, 684 P.2d at 840 (manufacturer).

65. *Palmer*, 904 P.2d at 1225 (citing *Koehring Mfg.*, 763 P.2d at 504); *Ross Laboratories*, 725 P.2d at 1081; *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 626 (Alaska 1983).

66. 454 P.2d 244 (Alaska 1969); see also *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993) ("Alaska strict products liability precedent begins with *Clary v. Fifth Ave. Chrysler Ctr.* . . .").

hypoxia arising out of a carbon monoxide leak into the car.⁶⁷ The court rejected the warranty theory of liability, along with its privity defense, and adopted a “strict” liability scheme because it provided the “most logical, least technical, and most comprehensive” means for achieving the goal of insuring that “the cost of injuries resulting from defective products are borne by the manufacturers.”⁶⁸ The reasoning set forth in *Clary* maintains its force today and has not been questioned by subsequent decisions; rather, its holding has been expounded upon and broadened.⁶⁹ *Clary* holds that the plaintiff need only prove that a manufacturer or retailer places “on the market” a product that “proves to have a defect that causes injury to a human being.”⁷⁰

Importantly, the court in *Clary* rejected the Second Restatement’s products liability formulation set forth in section 402A.⁷¹ Instead, the court chose the approach taken by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,⁷² finding it to be the least technical and “most comprehensive.”⁷³ The *Greenman* approach, which is still followed in Alaska,⁷⁴ provides that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”⁷⁵ The rejection of the section 402A approach was reaffirmed in *Butaud v. Suburban Marine & Sporting Goods, Inc.* (“*Butaud I*”)⁷⁶ reiterating that “this court will follow the view taken by the California Supreme Court in *Greenman*.”⁷⁷

By rejecting the Second Restatement’s section 402A, the court in *Clary* unmistakably intended to create a products liability scheme that benefited the consumer by not just eliminating privity (as accomplished in section 402A(2)(b)), but by crafting a low threshold standard of proof, namely, proof of (1) a defect that (2)

67. 454 P.2d at 245.

68. *Id.* at 248.

69. *See Pratt & Whitney Can.*, 852 P.2d at 1177 (“Essentially for the policy reasons identified in *Clary*, we extended strict liability beyond the narrow ‘personal injury’ reading in *New Moon*.”); *Beck I*, 593 P.2d 871, 886 (“[W]e intend no retreat from our holdings in *Clary*.”).

70. 454 P.2d at 245.

71. *Id.* at 247-48.

72. 377 P.2d 897 (Cal. 1962).

73. *Clary*, 454 P.2d at 248.

74. *See Pratt & Whitney Can.*, 852 P.2d at 1176 (discussing *Greenman* and its application in Alaska products liability law).

75. *Greenman*, 377 P.2d at 900.

76. 543 P.2d 209, 213 (Alaska 1975).

77. *Id.*

caused an injury.⁷⁸ The *Clary* court did not explain what “defect” meant.⁷⁹ As one court reasoned, “[c]ritical, then, to the disposition of products liability claims is the meaning of ‘defect.’ The term is not self-defining and has no accepted meaning suitable for all strict liability cases.”⁸⁰ In *Clary*, however, it was apparent that a vehicle’s heating system should not allow carbon monoxide into the passenger compartment, based on expert testimony and a comparison with other cars.⁸¹ Since the car at issue in *Clary* allowed carbon monoxide to enter into the passenger compartment, the jury was allowed to conclude that it was in fact defective.⁸² Thus, the consumer’s hypoxia, resulting from a faulty heating system, would be actionable and sufficient, without more proof, to impose liability.⁸³ This same reasoning was applied as a matter of law in *Bachner v. Pearson*⁸⁴ involving another faulty heating system, this time in an airplane instead of in a car.⁸⁵

*Butaud I*⁸⁶ is significant because it represents the first concrete expression that the Alaska courts would not require the plaintiff to prove that a product was “unreasonably dangerous” in addition to being defective, despite the contrary requirements of the Second

78. 454 P.2d at 245-48.

79. *Id.*

80. *O’Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983).

81. 454 P.2d at 249-50 (discussing expert testimony regarding the design of heating systems).

82. *Id.* at 245-48.

83. *See id.*; *see also* Gary Ableser, *Products Liability—From Warranty to Strict Liability: Clary v. Fifth Avenue Chrysler Center and Pearson v. Bachner*, 1 U.C.L.A.-ALASKA L. REV. 105 (1972); Kelly, *supra* note 35, at 25-26 (construing *Clary*, noting that “[f]or enterprise liability to exist under a strict products liability theory, the injured plaintiff need only prove that a product is defective and that the defect proximately caused the injury”). Kelly posited that the Alaska Supreme Court’s allowance of comparative negligence defenses in products liability actions undercut the enterprise theory and loss allocation purposes of products liability and unduly interjected negligence principles. But a review of *Clary* reveals that the plaintiff offered evidence of other vehicle designs, a comparison that establishes defect by showing a breach of industry standards and, in a sense, a breach of reasonable conduct. Certainly if absolute liability were the rule, comparative negligence principles would be doctrinally anathema. As absolute liability is not the rule, comparative negligence principles are not inherently contradictory to products liability analysis.

84. 479 P.2d 319 (Alaska 1970).

85. *Id.* at 327. Notably, strict liability was imposed as a matter of law on appeal, based on the undisputed facts. Another notable finding is that there is no significant legal difference in applying products liability theory to products that were leased instead of sold.

86. 543 P.2d 209 (Alaska 1975).

Restatement section 402A.⁸⁷ This is extremely important in evaluating the Third Restatement, because the Third Restatement carries this dual-pronged requirement forward from the Second Restatement. The *Butaud I* court explained its holding in *Clary*,⁸⁸ rejecting the unreasonably dangerous requirement, and reasoned that under *Greenman*,⁸⁹ the plaintiff need only prove “that the product is defective and the defect is the proximate cause of the injuries.”⁹⁰ In *Cloud v. Kit Manufacturing Co.*,⁹¹ the court noted that in *Clary* it had “adopted the simpler approach of *Greenman* over the Restatement approach” but adopted the Second Restatement to the extent it recognized “the similarity between suits for physical injury and direct property damage.”⁹²

Following the establishment of products liability law in Alaska in *Clary*,⁹³ the court’s decision in *Beck I*⁹⁴ represents the next major development, and remains the cornerstone of Alaska products liability law. While the court in *Clary* did not expound on the basis for liability, such as design defect or manufacturing defect, *Beck I* represents the first clear delineation of these theories in Alaska law. In *Beck I*, the operator of a loader was crushed to death when the loader rolled over an embankment.⁹⁵ The estate claimed that the loader was defectively designed because the manufacturer failed to install a protective roll bar.⁹⁶ The *Beck I* court adopted the test established by the California Supreme Court in *Barker v. Lull Engineering Co.*,⁹⁷ which provided that the factfinder can find a product defective either

87. *Id.* at 213-14.

88. *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244 (Alaska 1969).

89. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962). The *Butaud I* court reasoned that a plaintiff “need not prove that the defect made the product ‘unreasonably dangerous’ to the user or consumer. [H]aving to prove the element of ‘unreasonably dangerous’ as required by the Restatement places an added burden on the plaintiff not consonant with *Greenman*.” *Butaud I*, 543 P.2d at 214 (citing *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1159 (Cal. 1972)). The court cited California law approvingly, reasoning that requiring proof of unreasonable danger “represents a step backwards in the development of products liability cases.” *Id.*

90. *Butaud I*, 543 P.2d at 213.

91. 563 P.2d 248 (Alaska 1977).

92. *Id.* at 251 & n.6.

93. 454 P.2d 244 (Alaska 1969).

94. 593 P.2d 871 (Alaska 1979).

95. *Id.* at 874.

96. *See id.*

97. 573 P.2d 443 (Cal. 1978).

if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [consumer expectation test] . . . or if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design [risk-benefit test].⁹⁸

Once the plaintiff has established either of these standards, the manufacturer must then demonstrate that on balance the benefits of the existing design outweigh the risk of danger associated with that design.⁹⁹ The *Barker* test represents an important adaptation of Alaska law because it shifts the burden of proof to the defendant to prove that the benefits outweigh the risks, and that "burden is one affecting the burden of proof, rather than simply the burden of producing evidence."¹⁰⁰ The manufacturer's burden of risk-utility balancing remains the operative test for establishing design defect,¹⁰¹ although the consumer expectation test may apply in situations where the risk-utility test does not and vice-versa.¹⁰² *Beck I* takes on added importance in light of the Third Restatement's rejection of the consumer expectation test that was first recognized in Alaska in that case.¹⁰³ As more fully discussed below, this part of *Beck I* will have to be reevaluated before the court can completely adopt the Third Restatement's approach.

2. *Defective Warnings or Instructions.* The decision in *Sturm, Ruger & Co. v. Day* was the first Alaska opinion focusing on warning defects.¹⁰⁴ In *Sturm* the plaintiff was injured when he dropped his sidearm and it accidentally fired.¹⁰⁵ He claimed that the sidearm was defective in "that the hammer had been on the loading notch" and thus should not have been capable of firing when it improperly fired, notwithstanding a warning in the owner's manual regarding the possibility of the gun firing when the hammer

98. *Id.* at 457-58. See also *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220 (Alaska 1998).

99. See *Beck I*, 593 P.2d at 885-86.

100. *Id.* at 885 (citing *Barker*, 573 P.2d at 455).

101. See *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992) (discussing the *Barker* test as it applies to prescription drugs).

102. See *id.* at 1194-95.

103. 593 P.2d 871, 882-83 (Alaska 1979).

104. 594 P.2d 38 (Alaska 1979). The court in *Dura Corp. v. Harned*, 703 P.2d 396, 405 & n.5 (Alaska 1985), overruled *Sturm* to the extent that *Sturm* held that failure to exercise ordinary care could give rise to a comparative negligence defense based on strict liability.

105. 594 P.2d at 41.

was in the loading notch.¹⁰⁶ Importantly, the *Sturm* court held that a company could still be liable for defective warning even if the danger resulting from a product was obvious or hidden, or even if a stringent warning was provided pointing out the danger.¹⁰⁷ Rather, “[w]here the most stringent warning does not protect the public, the defect itself must be eliminated if the manufacturer is to avoid liability.”¹⁰⁸ *Sturm* also established that punitive damages are available in products liability cases where the “manufacturer knew that its product was defectively designed and that injuries and deaths had resulted from the design defect, but continued to market the product in reckless disregard of the public’s safety.”¹⁰⁹ Establishing product defect through inadequate warnings was extended in *Prince v. Parachutes, Inc.*,¹¹⁰ where the court held that even if the product is designed and manufactured without a defect, inadequate use instructions or warnings can constitute a defect resulting in liability.¹¹¹ Further, in determining whether the consumer had or should have had knowledge of the defect, the court adopted an objective standard of whether an “ordinary user” would have known of the product risk — not whether that particular plaintiff in fact knew of the potential risk.¹¹² The plaintiff’s awareness of the potential risk is not relevant as a defense to the duty to warn,¹¹³ although it is relevant to comparative negligence for “voluntarily and unreasonably proceeding to encounter a known danger.”¹¹⁴ A plaintiff can establish a breach of a duty to warn, and thus impose liability on the manufacturer, irrespective of the plaintiff’s actual knowledge or conduct. In allocating fault for damages, however, the jury can weigh the plaintiff’s knowledge or conduct.¹¹⁵

106. *Id.*

107. *Id.* at 44.

108. *Id.*

109. *Id.* at 47

110. 685 P.2d 83 (Alaska 1984). In *Prince*, the plaintiff, a novice parachute enthusiast, was injured while using a parachute intended for more experienced practitioners. *Id.* at 85-86.

111. *Id.* at 89-90.

112. *See id.* at 88 (“On the issue of duty to warn, however, the question to be put to the jury is whether ‘the danger, or potentially [sic] of danger, is generally known and recognized’ (quoting *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974))).

113. *See Prince*, 685 P.2d at 89.

114. *Id.*

115. *See id.*

In *Shanks v. Upjohn Co.*,¹¹⁶ the court set forth three criteria for manufacturers to satisfy in order to adequately warn consumers.¹¹⁷ To be adequate, the warning should “(1) clearly indicate the scope of the risk or danger posed by the product; (2) reasonably communicate the extent or seriousness of the harm that could result from the risk of danger; and (3) be conveyed in such a manner as to alert the reasonably prudent person.”¹¹⁸ Nothing in *Shanks* retreated from the court’s holding in *Sturm*, that, notwithstanding compliance with all three of these criteria, a manufacturer may still be liable “where the most stringent warning does not protect the public,” in which case “the defect itself must be eliminated if the manufacturer is to avoid liability.”¹¹⁹

3. *Medical Devices and Prescription Drugs.* *Shanks v. Upjohn Co.*¹²⁰ represents the next major step in Alaska products liability law, particularly with respect to the Second Restatement. In *Shanks*, the estate of a deceased patient claimed that a prescription medication caused the patient to commit suicide.¹²¹ As discussed above, the court applied a modified consumer expectation test and held that liability could be imposed if the drug did not meet the reasonable expectations of an ordinary physician.¹²² Taking issue with the approach of the California Supreme Court in *Brown v. Superior Ct.*,¹²³ the Alaska Supreme Court held that the risk-benefit test adopted in *Beck I*¹²⁴ would apply to design defect claims involving prescription medications.¹²⁵ Notably, the Second Restatement, comment k, addressed this issue and recommended that no liability be imposed against drug manufacturers “merely because [they have] undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.”¹²⁶ The Alaska Supreme Court expressly rejected this approach, and directed the trier of fact to weigh both the risks and benefits of

116. 835 P.2d 1189 (Alaska 1992).

117. *See id.* at 1200.

118. *Id.*

119. *Sturm*, 594 P.2d at 44.

120. 835 P.2d 1189 (Alaska 1992).

121. *See id.* at 1192.

122. *See id.* at 1195.

123. 751 P.2d 470, 481 (Cal. 1988). The *Shanks* court found the reasoning in *Brown* “unpersuasive.” 835 P.2d at 1195.

124. 593 P.2d 871 (Alaska 1979).

125. *See Shanks*, 835 P.2d at 1196.

126. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

vaccines and medications.¹²⁷ Where the risks outweigh the benefits, the product will be deemed defective.

The *Shanks* court's rejection of comment k¹²⁸ and its application of the *Barker* test regarding risk-utility¹²⁹ marked the third instance¹³⁰ where the Alaska Supreme Court expressly rejected the Second Restatement approach in favor of its own formulation. This judicial independence and critical thinking warrants a closer examination of the Third Restatement, since many of the Second Restatement principles were carried forward. This is particularly true since comment k from the Second Restatement was not just reincorporated into the Third Restatement, but was given its own separate chapter.¹³¹ *Shanks* also exemplifies the court's use of the general principles giving rise to products liability¹³² as its touchstone when evaluating a claimed defense or immunity.¹³³

4. *The Recognition of Affirmative Defenses.* The development and adoption of the theory for products liability created the necessary groundwork for the development of certain affirmative defenses. *Bachner v. Pearson*¹³⁴ established that comparative negligence was not a defense to a products liability claim unless "the plaintiff voluntarily and unreasonably encounter[ed] a known risk."¹³⁵ The standard for comparative negligence in a strict liability tort requires a "voluntary assumption

127. See *Shanks*, 835 P.2d at 1197.

128. See *id.* at 1197-98 ("[W]e find it undesirable and unnecessary to impose an additional layer of comment k on an area of law which is already strained under its own doctrinal weight.").

129. See *id.* at 1198.

130. See *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244, 247-48 (Alaska 1969) (rejecting the Second Restatement's "strict tort liability" in favor of the approach of *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Alaska 1969), finding it the "most logical, least technical and most comprehensive"); *Butaud v. Suburban Marine & Sporting Goods*, 543 P.2d 209, 213-14 (Alaska 1975) (rejecting the Second Restatement's "unreasonably dangerous" standard).

131. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (1998) (expanding upon the separate treatment afforded manufacturers of prescription drugs and medical devices that originated with comment k).

132. See *supra* Part III.A.

133. 835 P.2d at 1197-98. The court extensively discusses both the comment to the Second Restatement and the decisions of other jurisdictions following comment k. The court compares each defense raised with the overall purpose of products liability law as set forth in *Clary* and *Beck I*, and ultimately rejects these arguments on that basis.

134. 479 P.2d 319 (Alaska 1970).

135. *Id.* at 329-30.

of a known risk.”¹³⁶ This standard, set forth in the Second Restatement section 402A, comment n, was confirmed in *Butaud I*,¹³⁷ where the court clarified that the “defense does not arise unless the plaintiff is aware of the defect and danger and still proceeds unreasonably to make use of the product.”¹³⁸ One year later, the court expanded this defense to include plaintiff misuse of the product as a defense.¹³⁹ The Alaska Supreme Court adopted the *Butaud I* reasoning, and thereby comment n of section 402A, in *Dura Corp. v. Harned*.¹⁴⁰

Until recently, the comparative negligence defense generally did not apply in design defect cases where the defect was a lack of safety devices,¹⁴¹ rendering the *Butaud I* defense of a knowing use of a defective product unavailable.¹⁴² This rule, however, was undercut by the court in *General Motors Corp. v. Farnsworth*,¹⁴³ where the court addressed whether the defense of comparative negligence by product misuse could be asserted against a plaintiff who claimed the safety restraint system in her car was defective. The court held that it could, rejecting the plaintiff’s argument that product misuse was not a defense relative to safety products.¹⁴⁴ Based on the rulings up to that point, it would appear that the trial court was arguably correct in its conclusion that comparative negligence should not be available in this context, although the Alaska Supreme

136. *Id.* at 330 n.24.

137. 543 P.2d 209 (Alaska 1975).

138. *Id.* at 212.

139. *See* *Butaud II*, 555 P.2d 42, 46 (Alaska 1976) (“The defense of comparative negligence is [no longer] limited to those cases where the plaintiff uses the product with knowledge of the defective condition, but also extends to those cases where the plaintiff misuses the product and that misuse is a proximate cause of his injuries.”).

140. 703 P.2d 396, 404 & n.2 (Alaska 1985). Importantly, although this is a defense for purposes of comparative negligence, it is not a complete bar to recovery. Thus, to the extent comment n concludes that this defense, if proven, is a bar to recovery, Alaska law rejects that conclusion.

141. *See* *Beck I*, 593 P.2d 871, 892 (Alaska 1979).

142. *See* *Beck II*, 624 P.2d 790, 795 (Alaska 1981). “In *Beck I*, we held that: ‘when the design defect is the lack of a safety device, the jury may be instructed that the plaintiff may be comparatively negligent in the knowing use of a defective product only if he voluntarily and unreasonably encounters the known risk.’” *Id.* at 593 n.10 (quoting *Beck I*, 593 P.2d at 892); *see also* *Dura Corp.*, 703 P.2d at 404 (affirming standard requiring proof of the consumer’s actual knowledge of the product’s defect (including the lack of a safety device) and proof that the consumer voluntarily used the product and unreasonably encountered a known risk).

143. 965 P.2d 1209, 1215 (Alaska 1998).

144. *See id.*

Court disagreed. Now, comparative negligence can be asserted as a defense in any type of products liability action where the plaintiff misuses the product, even those involving safety devices.¹⁴⁵ While perhaps inconsistent with true products liability principles, this approach is consistent with true allocation of fault principles and other tort goals, including the principle that “[t]ort law seeks to deter future behavior that exposes others to injury.”¹⁴⁶

145. *See id.* The decision in *Farnsworth* glosses over the impact that allocation of fault may have in the context of safety products and crashworthiness cases. The court held that the “original tortfeasor” in a car accident is the person who drove negligently. *Id.* at 1217. Thus, it reasoned, the driver of the other vehicle is “liable as a matter of law” for the plaintiff’s injuries, notwithstanding the plaintiff’s claim that a defect in the vehicle’s safety features failed to prevent the harm. *Id.* While the court left it open for the jury to determine the actual percentage of fault to be allocated to the original tortfeasor (but noted that at least 1% must be allocated as a matter of law), the practical effect will likely be a complete or majority allocation of fault to the original tortfeasor. When faced with a defective seat belt, brake system or airbag, versus a drunk driver (or a driver impaired by cocaine, as in *Farnsworth*), it would not be unreasonable for a jury to assign virtually all fault to the impaired third party driver. In this manner, a manufacturer of a defective product could essentially obtain immunity from any significant damage award. By allowing the harm caused by defective safety products to be reduced or offset completely, this decision overlooks the controlling purpose of products liability law: making products safer and allocating risks from the innocent consumer to those who profit from the product. It further glosses over the fact that vehicle safety features assume by their very existence that a driver will act negligently, thus causing an accident. Accordingly, in all but the most bizarre incidents, where a vehicle safety feature proves to be defective in that it fails to perform as an ordinary consumer would expect or fails when compared to the benefits of an alternative design, there may still be no liability for the resulting harm since the “original tortfeasor,” i.e., whoever is the negligent driver, is liable as a matter of law. To this extent, the result of *Farnsworth* does not promote the stated goals and principles of products liability. This reasoning elevates comparative allocation of fault principles above products liability principles. Since this aspect of *Farnsworth* is inconsistent with its prior reasoning, the court’s change in emphasis is most likely due to legislative changes, particularly the modification of Alaska Statutes section 09.17.080, Alaska’s comparative fault statute. ALASKA STAT. § 09.17.080—09.17.900 (LEXIS 1998) (stating that “‘fault’ includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability”); *see also* *Fancyboy v. Alaska Village Elec. Coop., Inc.*, 984 P.2d 1128, 1132-33 (Alaska 1999) (finding that this statute “expressly instructs a court or jury to apportion fault to each party liable on the basis of several liability” and that fault is defined to include products liability). Literal application of this statute would achieve the result reached in *Farnsworth*.

146. *Farnsworth*, 965 P.2d at 1218.

In *Heritage v. Pioneer Brokerage & Sales, Inc.*,¹⁴⁷ the court recognized a third defense, that of scientific knowability.¹⁴⁸ If the harm that occurred was the result of a defect that could be corrected only by information not “scientifically knowable” at the time the product was marketed, no liability will be imposed.¹⁴⁹ Yet another defense, in rare circumstances, is that of a superseding cause for the harm in a products liability claim.¹⁵⁰ This defense may rarely apply because, by definition, it is available only where there is evidence that the incident that caused the harm was “highly extraordinary”¹⁵¹ in that it would not have happened without “the act of a third person or other force.”¹⁵² Where an intervening cause is foreseeable, it is not a “superseding cause” and the defense is not available.¹⁵³ In warning cases, a claim that the cost of a warning outweighs the benefits is no defense, since the “cost of giving an adequate warning is usually so minimal.”¹⁵⁴ In a defective warning claim, where a dangerous or defective condition is “open and obvious,” the manufacturer may have a defense,¹⁵⁵ e.g., knives tend to be sharp, and no warning should be required pointing that out. Lastly, the manufacturer can defeat liability by asserting that a consumer “substantially altered” the product, if that alteration caused the injury.¹⁵⁶

147. 604 P.2d 1059 (Alaska 1979).

148. *Id.* at 1063-64.

149. *See id.* at 1063 (defining “scientific knowability” as “where no indication of danger exists and no techniques for obtaining such information are available”).

150. *See Dura Corp.*, 703 P.2d at 402-03.

151. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

152. *Dura Corp.*, 703 P.2d at 402 (quoting *Yukon Equip., Inc. v. Gordon*, 660 P.2d 428, 433 n.4 (Alaska 1983)).

153. *Id.*

154. *Ross Labs. v. Thies*, 725 P.2d 1076, 1079 (Alaska 1986).

155. *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984) (discussing a defense to strict liability based upon failure to warn of “hazards or dangers that would be readily recognized by the ordinary user of the product”) (citing *Patricia R. v. Sullivan*, 631 P.2d 91, 102 (Alaska 1981)). While the “open and obvious” danger may be a defense regarding the duty to warn, design issues may be problematic for the manufacturer of a patently dangerous product. In design defect cases, the “overwhelming majority of jurisdictions have held that the open and obvious nature of the danger does not preclude liability for design defects.” *Ogletree v. Navistar Int’l Transp. Corp.*, 500 S.E.2d 570, 571-72 (Ga. 1998). The Third Restatement rejects the “open and obvious” defense in design cases. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmt. d (1998). The more open and obvious the danger, the more one might expect a design to ameliorate that danger.

156. *Hiller v. Kawasaki Motors Corp.*, 671 P.2d 369, 372 (Alaska 1983).

The foregoing are the currently recognized affirmative defenses to a products liability claim. Of course, a manufacturer can always defend on the basis that its product was not manufactured defectively, that its warning was adequate, or argue that the benefits of a product design outweigh its risks, in addition to any causation defense.

IV. A COMPARISON OF KEY PROVISIONS OF THE THIRD RESTATEMENT WITH EXISTING ALASKA LAW

Early indications are that the Alaska courts will turn to the Third Restatement for guidance just as they did with the Second Restatement. For instance, the supreme court has discussed the Third Restatement section 16, comment a, relative to a “crashworthiness” claim.¹⁵⁷ Since there are several substantive discrepancies between some of the Third Restatement’s provisions and Alaska law, each Third Restatement provision must be closely scrutinized before it is applied or adopted. Before doing so, a brief synopsis of the structure of the Third Restatement is necessary.

Unlike the Second Restatement’s section 402A, the Third Restatement expressly categorizes the types of product defect theories into three distinct areas: (1) manufacturing defect, (2) design defect, and (3) inadequate warning or instruction defect.¹⁵⁸ In so doing, the Third Restatement section 2(a)–(c) complies with existing Alaska law. For example, the court in *Beck* explained that

[p]roducts may be defective for at least three reasons:

1. Flawed fabrication or construction (i.e., deviating from the condition intended by the manufacturer),
2. Improper design (i.e., conforming to the design intended by the manufacturer but producing unacceptable consequences), and
3. Misinformation or inadequate information about risks involved in using the product or about minimizing or avoiding harm from such risks.¹⁵⁹

Thus, from a global perspective, the Third Restatement and Alaska law rest on the same foundation. The discrepancies arise in the application of these principles.

157. *See* *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1212 & n.1 (Alaska 1998); *see also infra* notes 260-269 and accompanying text.

158. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a)–(c) (1998).

159. *Beck I*, 593 P.2d 871, 878 n.15 (Alaska 1979); *see also* *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992) (“A product may be defective because of a manufacturing defect, a defective design, or a failure to contain adequate warnings.”).

One of the more controversial modifications set forth in the Third Restatement is the complete rejection of the consumer expectation test in favor of the risk-benefit test, including the requirement that the plaintiff present evidence of a reasonable alternative design when alleging defective design under this test.¹⁶⁰ This requirement, and the abandonment of the consumer expectation test, is inconsistent with Alaska law.

Under Alaska law since *Beck I*, the fact-finder can find a product defective either

if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [the consumer expectation test] . . . or if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design [the risk-benefit test].¹⁶¹

Thus, Alaska law utilizes either the consumer expectation test or the risk-benefit test for proving design defect. To the extent the Third Restatement section 2(b), does not recognize the consumer expectation test,¹⁶² it is inconsistent with Alaska law.¹⁶³ The Alaska Supreme Court has affirmed the utility of the consumer expectation test in Alaska, and no new factors have appeared that the court did not already consider and that would merit a departure from its previous analysis.¹⁶⁴ Since Alaska law still recognizes the

160. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

161. *Farnsworth*, 965 P.2d at 1220 (quoting *Beck I*, 593 P.2d at 884) (emphasis added).

162. The Third Restatement Reporters note that "a small core of scholars have supported the consumer expectation test over the years, [but] a far greater number of scholars have sharply criticized the test as an independent general standard for design defect." James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 904 (1998).

163. Section 2(a) of the Third Restatement recognizes the consumer expectation test only for manufacturing defects, whereas Alaska law recognizes the consumer expectation test for design and manufacturing defect cases as well. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmts. c & g (1998).

164. See *Farnsworth*, 965 P.2d at 1209 (justifying the current utility of the consumer expectation test). The court explained:

We agree with the California Supreme Court that consumers can form reasonable and educated expectations about how certain products should perform. See *Soule v. General Motors Corp.*, 882 P.2d 298, 310 (Cal. 1994) (stating "we cannot accept GM's insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use. In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers."). . . .

consumer expectation test, adoption of the Third Restatement section 2(b) should be accompanied by the caveat that this section only partially reflects Alaska law.

The risk-benefit test, set forth as the sole test under section 2(b) of the Third Restatement, was the subject of substantial debate regarding whether the test required a plaintiff to prove the feasibility of a reasonable alternative design.¹⁶⁵ Unlike the Third Restatement, under Alaska law the availability of a reasonable alternative design does not dispose of the case. Rather, it is only one factor for the jury to consider:

we stated in *Beck* that the fact finder must consider *competing factors, including but not limited to*

the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, *the mechanical feasibility of a safer alternative design*, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.¹⁶⁶

The Third Restatement, in contrast to Alaska law, elevates the safer alternative design factor, with some exceptions,¹⁶⁷ as the *sine qua non* for product design defect.¹⁶⁸ Perhaps more importantly, the Third Restatement places the burden of proof on the plaintiff to establish a safer alternative design, whereas Alaska law requires only that the plaintiff prove that the design caused the injury.¹⁶⁹ Once the plaintiff's burden is satisfied, the burden of proof shifts to the defendant, requiring the trier of fact to decide "whether a defendant has met the burden of proving that the benefits of the design outweigh the risk."¹⁷⁰ This fairly dramatic difference between

In addition, our initial reasons for adopting the consumer expectation test are sound. In *Beck [I]*, we adopted the test as part of Alaska's product liability law partly because it "incorporates notions of the implied warranty of fitness for reasonable use, a primary concept in the evolution of strict products liability. . . ." The "implied warranty of fitness or merchantability requires that goods 'be fit for the ordinary purposes for which the goods are used.'"

Id. at 1221 (internal citation omitted).

165. See, e.g., Henderson & Twerski, *supra* note 162.

166. *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1196 (Alaska 1992) (quoting *Beck I*, 593 P.2d at 886) (emphasis added).

167. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. e (1998) (recognizing that a product design that reflects a high risk of injury combined with low social utility can be found defective even without any alternative design proof presented).

168. *Id.*

169. See *Shanks*, 835 P.2d at 1194.

170. *Id.* at 1196.

Alaska law and the Third Restatement traces its origins to the public policy standards identified above,¹⁷¹ alleviating the plaintiff from having to prove “fault” and placing the onus on the manufacturer to produce “the relevant complex and technical evidence” since the manufacturer “has the most access to and is the most familiar with such evidence.”¹⁷² Further, the Third Restatement approach glosses over the separate risk-utility test embraced in Alaska,¹⁷³ where “the product satisfies ordinary consumer expectations as to its general use but is still ‘defective’ in that its design exposes the user or bystander to ‘excessive preventable danger.’”¹⁷⁴ The Third Restatement does not appear to recognize this formulation of the risk-utility test and would be at odds with Alaska law in this respect.

Even under Alaska law, however, the process of weighing the risks and benefits of the design in question or establishing that the design in question exposes the consumer to “excessive preventable danger” usually requires some type of alternative to be presented. Although considerable controversy exists over this requirement’s theoretical underpinnings,¹⁷⁵ from a practical, trial and evidentiary perspective, proof of a safer alternative design would present a more persuasive and compelling case than one without such proof. Indeed, on examination,¹⁷⁶ most cases involve a plaintiff providing

171. See *supra* Part III.B. In adopting the *Barker* test for risk-utility, the court stated that the plaintiff must first prove “that the product’s design proximately caused [the] injury” and then, liability will be imposed if “the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.” *Shanks*, 835 P.2d at 1194 (citing *Beck I*, 593 P.2d 871, 886 (Alaska 1979), in turn citing *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 452 (Cal. 1978)).

172. *Beck I*, 593 P.2d at 886; see also *Dura Corp. v. Harned*, 703 P.2d 396, 406 (Alaska 1985).

173. See *Colt Indus. Operating Corp., Quincy Compressor Div. v. Frank W. Murphy Mfr.*, 822 P.2d 925, 929 (Alaska 1991) (providing the “two methods by which plaintiffs can prove strict liability on the ground that a product is defectively designed”: (1) that the risks outweigh the benefits or (2) that the design exposes the consumer to “excessive preventable danger”).

174. *Id.* (quoting *Beck I*, 593 P.2d at 885).

175. See generally *Henderson & Twerski*, *supra* note 162 (discussing the theoretical underpinnings of the safer alternative design requirement). These authors, who were also Reporters for the Third Restatement, address the criticism and controversy in some detail, ultimately concluding that the criticism is unwarranted.

176. See *id.* at 914-17 (conducting such an examination).

some proof of an alternative design,¹⁷⁷ thus, the controversy may be somewhat exaggerated. Although an Alaskan plaintiff could rest on the fact that the defendant is obligated, ultimately, to prove that the benefits of the product, as designed, outweigh the risks, this may not be a sound trial strategy.

The Third Restatement's alternative design requirement may have its greatest impact on products that are, by their very nature, dangerous, such as ammunition,¹⁷⁸ alcohol or tobacco.¹⁷⁹ The Third

177. See *Colt Indus.* 822 P.2d at 929. *Colt Industries* is a good example of what the plaintiff can do to prove defect without specifically pointing to a reasonable alternative design. In *Colt Industries*, the third-party plaintiff had an expert testify that the defendant's design for sealing a safety switch on a compressor for a sand-blaster was defective for three reasons: (1) the type of solder seals used by the manufacturer were unreliable and resulted in "cold joints" that were prone to leaks; (2) the combination of metals with different chemical properties resulted in "thermal cycling" leading to a propensity to fracture; and (3) the type of solder utilized melted too easily at low temperatures. See *id.* at 929. Here, the third-party plaintiff affirmatively set forth reasons why the design utilized by the component manufacturer was defective, and in essence, such evidence would allow the trier of fact to conclude that a safer design or manufacturing method was available. See *id.* at 931.

178. In *McCarthy v. Olin Corp.*, the majority affirmed the dismissal of a products liability suit against the manufacturer of hollow-point bullets for reasons mirroring the Third Restatement's position. 119 F.3d 148 (2nd Cir. 1997) Judge Calabresi voiced his dissent explaining both his preference for the consumer expectation test and his conclusion that the "talons" designed into the bullet created a fact question under the risk-benefit test. *Id.* at 170-75 (Calabresi, J., dissenting).

179. One writer points out the inadequacies of the Third Restatement relative to tobacco:

Cigarettes again present the drafters with a need to reconcile two equally persistent notions: that a product's true costs ought to be reflected in the market price, and that one ought not disrupt the relative economic tranquillity of those who make a product, the true costs of which overwhelm any putative benefits. . . . Eschewing the supposed ambiguity inherent in the phrase "defective condition unreasonably dangerous," the newest revision distinguishes between manufacturing, design, and warning defects, and announces, with respect to design defects, that there can be no liability short of the plaintiff establishing the existence of a reasonable alternative design. The draft elsewhere asserts that whiskey and cigarettes must be judged by the "reasonable alternative design" test making it clear that this version, like its predecessor, refuses to countenance the possibility that cigarettes in their intended state are defective. . . . Rather than legal doctrine influencing the behavior of those who produce and distribute products, it can be argued that concern about particular products—especially tobacco—has significantly influenced the development of the substantive law. The successful effort to ensure that a lethal product not reflect its true social costs may have contributed substantially to the incoherence which is at the heart of products liability doctrine. While tobacco is hardly the only product capable of causing damage

Restatement essentially immunizes these products since there is no alternative design that still intoxicates or kills as intended.¹⁸⁰ With these products, the dangerous nature of the product is the essence of the product: Alcohol intoxicates and is potentially addictive, and nicotine creates physiological changes and is also potentially addictive. Any alternative product that did not provide physiological changes would not be a true alternative. Thus, for these types of products, Alaska law currently would provide the trier of fact with other factors to consider instead of being limited solely to the Third Restatement's alternative design factor. Additionally, Alaska law could evaluate such a product on whether it has any real utility in light of the comparatively high risk of injury in determining whether it is defective, a prospect not as easily accomplished or possible under the Third Restatement.

There are four additional developments in both Alaska law and the Third Restatement that will be addressed here: (1) Alaska's rejection of the Second Restatement's "unreasonably dangerous" standard; (2) the Third Restatement's "not reasonably safe" standard compared to the Second Restatement's "unreasonably dangerous" standard; (3) the consumer expectation test for design defect in the Alaska and the rejection of that test in the Third Restatement; and (4) the expansion of comment k from the Second Restatement into section 6 of the Third Restatement and the conformity of section 6 with Alaska law.

A. Alaska's Rejection of the Second Restatement's "Unreasonably Dangerous" Standard

The Second Restatement required that a plaintiff prove a product was "unreasonably dangerous" before a defect could be found.¹⁸¹ Alaska was one of a few jurisdictions to expressly reject¹⁸²

when used as directed (the 1964 Restaters pointed to prescription drugs and alcohol as well), it may well be the only product which cannot be used safely, and has no apparent substantial utility beyond satisfying the craving created by its use.

Givelber, *supra* note 44, at 870-71.

180. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. c (1998) (stating that common and widely distributed products such as alcoholic beverages, tobacco, firearms and above-ground swimming pools may be found to be defective only upon proof that reasonable alternative designs could have been adopted and not simply because "they are considered socially undesirable by some segments of society").

181. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

182. *See Swenson Trucking & Excavating, Inc. v. Truckweld Equipment Co.*, 604 P.2d 1113, 1116 n.5 (Alaska 1980) ("We have rejected the requirement that

the “unreasonably dangerous” requirement.¹⁸³ As explained in *Butaud I*

[w]e thus announce that this court will follow the view taken by the California Supreme Court in *Greenman*, *Cronin* and *Luque*. . . .

In *Cronin*, the California Supreme Court opined that a plaintiff seeking recovery based on strict liability in tort *need not prove that the defect made the product “unreasonably dangerous” to the user or consumer. The court stated that having to prove the element of “unreasonably dangerous” as required by the Restatement places an added burden on the plaintiff not consonant with Greenman.*

Having the plaintiff prove not only that the product contained a defect, but also that the defect made the product “unreasonably dangerous,” would place a heavier burden on the plaintiff than that articulated in *Greenman*. It represents a step backwards in the development of products liability cases. The purpose of strict liability is to overcome the difficulty of proof inherent in negligent and warranty theories, thereby insuring that the costs of physical injuries are borne by those who market defective products.¹⁸⁴

Thus, Alaska law consistently held that a plaintiff need only prove a defect exists, not that the defect made the product unreasonably dangerous. In this regard, Alaska made a significant departure

the product be ‘unreasonably dangerous.’”); *Beck I*, 593 P.2d 871, 878-83 (Alaska 1979); *Cloud v. Kit Mfg. Co.*, 563 P.2d 248, 250 n. 2 (Alaska 1977).

183. Courts in other states have rejected the “unreasonably dangerous” formulation set forth in section 402(A). *See, e.g.*, *Hansen v. Sunnyside Products*, 65 Cal. Rptr. 2d 266, 275 (Cal. Ct. App. 1997) (“Contrary to plaintiffs’ contention, California has not rejected section 402A in its entirety but only its ‘unreasonably dangerous’ language.”); *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972); *Barker v. Lull Eng’g Co.*, 573 P.2d 443 (Cal. 1978); *McJunkin v. Kaufman & Broad Home Systems, Inc.*, 748 P.2d 910, 917 (Mont. 1987) (“The dual test propounded by the commentaries to section 402A . . . has been criticized as ‘vague and very imprecise.’ It is unfortunate perhaps that section 402A of the Restatement (Second) of Torts provides that as a basis for recovery it must be found that the product was both ‘defective’ and ‘unreasonably dangerous’ when as a matter of fact the term ‘unreasonably dangerous’ was meant only as a definition of defect. The phrase was not intended as setting forth two requirements but only one.”). Other courts “reject” the “rejection” of this standard. *See McBride v. Ford Motor Co.*, 673 P.2d 55, 64 (Idaho 1983) (“[W]e reject the *Cronin* case and its elimination of the ‘unreasonably dangerous’ proof requirement.”).

184. *Butaud I*, 543 P.2d 209, 213-14 (Alaska 1975) (emphasis added); *see also Beck I*, 593 P.2d at 878 (noting that the court previously “rejected the standard proposed by the Restatement (Second) of Torts that the plaintiff demonstrate that the product’s defect rendered it ‘unreasonably dangerous’”).

from the Second Restatement section 402A, which embodied the “unreasonably dangerous” standard as its primary threshold.

Certainly the reasons expressed by the Alaska Supreme Court in rejecting the unreasonably dangerous standard are sound. Moreover, the implication that one could design and market a “somewhat” dangerous product — as long as it was not “unreasonably dangerous” — is arguably a reckless policy that would not further better manufacturing processes or safer products. That a certain level of risk may be acceptable with products is true. Otherwise, were there to be no risk, people might drive tanks instead of cars made out of relatively flimsy sheet metal. Indeed, the essence of the risk-utility test weighs the product risk with its purported benefits. But the concept that there are acceptable levels of product danger may be pernicious. For example, would a product that killed or maimed 20% of the users be “unreasonably dangerous” but a product with a death rate of only 2% or 1% be acceptable or “reasonably dangerous”? The answer ultimately lies with the trier of fact, but by rejecting this standard and simply requiring a consumer to establish that the product is defective, the law in Alaska seeks to establish higher manufacturing and safety aspirations than would otherwise exist.

B. The Third Restatement’s “Reasonably Safe” Standard Versus The Second Restatement’s “Unreasonably Dangerous” Standard: Old Wine In A New Bottle

The Third Restatement sections 2(b) and 2(c) utilize a positive standard for design-based liability using the term “not reasonably safe” instead of section 402A’s use of the “unreasonably dangerous” standard.¹⁸⁵ This change reflects the drafters’ recognition that many courts choose to promote reasonable safety as opposed to simply imposing liability for unreasonable dangerousness. The key question for the Alaska courts, however, is whether the Third Restatement’s use of the term “not reasonably safe” comports with the Alaska Supreme Court’s rejection of the “unreasonably dangerous” standard from the Second Restatement’s section 402A. In other words, if the Third Restatement is merely changing the semantics from the Second Restatement without any change in substantive application, it stands to reason that this standard would likewise be rejected by the Alaska Supreme Court, at least if the

185. See Owen, *supra* note 6, at 776-77. By “positive,” it is meant that the terminology focuses on product safety rather than product danger. The language change can be seen as an attempt to comport with the policies giving rise to products liability, such as safer products. See *id.*

court intended to adhere to its reasoning in *Beck*, *Butaud* and their progeny.

The comment to sections 2(b) and 2(c) of the Third Restatement appears to recognize that the term “not reasonably safe” was “substituted” for the term “unreasonably dangerous.”¹⁸⁶ As a mere substitute, without any intended change in the substantive application, this part of the Third Restatement would conflict with Alaska precedent. By imposing the requirement that the plaintiff prove a product is not “reasonably safe,” the Third Restatement would require an evidentiary burden exceeding the existing Alaska standard that one need only prove a defect exists. In light of *Beck*’s holding that a plaintiff need not prove that a product was “unreasonably dangerous,” the question remains whether the Alaska courts should adopt sections 2(b) and 2(c)’s use of the term “not reasonably safe.”

In addition, one ALI consultant reasoned that both sections 2(b) and 2(c) actually contain negligence principles, not “strict products liability” principles, and thus use of the term “not *reasonably* safe” incorporates the reasonableness standard embedded in negligence principles.¹⁸⁷ If this is indeed the intended result of the Third Restatement, then the Alaska supreme court would need to evaluate whether it would join a doctrinal shift requiring it to abandon “strict liability” principles (to which it has steadfastly adhered) and instead apply negligence standards for design defect or warning/instruction defect. To date there has been no indication that the Alaska Supreme Court intends to merge negligence principles with products liability doctrine. Every statement directly addressing this issue has confirmed the court’s intent to distinguish between the doctrines.¹⁸⁸

186. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b)–(c) Reporters’ Note IVA (1998) (discussing Professor Wade’s suggestion to “substitute” the “not reasonably safe” terminology in the Third Restatement with the Second Restatement’s use of the “unreasonably dangerous” terminology).

187. See Owen, *supra* note 6, at 755-67.

188. See *Beck* I, 593 P.2d 881, 886 (Alaska 1979) (stating that “we intend no retreat from our holdings in *Clary* and *Butaud I*. Negligence concepts will not dilute the plaintiff’s case because the trier of fact will concentrate on the nature of the product in determining defectiveness rather than upon the conduct of the defendant”); *Bachner v. Pearson*, 479 P.2d 319, 329 (Alaska 1970) (noting that “the focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries”); *Patricia R. v. Sullivan*, 631 P.2d 91, 102 (Alaska 1981); *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1199 (Alaska 1992) (noting that “the policy underlying strict liability warrants preserving the distinction between the doctrines”).

On the other hand, the suggestion that section 2(b) should be interpreted to mean that “a product is ‘not reasonably safe’ because a ‘reasonable alternative design’ was available” could be construed to comport with risk-benefit analysis established in Alaska law.¹⁸⁹ Such a construction would not impose upon the plaintiff anything more than is already required under *Beck I*’s option of using the risk-utility test (and excluding for the moment the consumer expectation test).¹⁹⁰ In this manner, the court would not simply be substituting the “unreasonably dangerous” standard already rejected with a new formulation of the term. Moreover, it is possible to construe the term “not reasonably safe” as another formulation of the consumer expectation test in that a product can be deemed defective if it was “not reasonably safe” from a consumer expectation perspective. This construction is not persuasive, however, since it must bend both the Third Restatement and Alaska law to meet in the middle.

According to one ALI consultant, with the creation of the Third Restatement, the “Restatement slate . . . is now brushed clean.”¹⁹¹ If the Restatement slate is cleared, then one could interpret the Third Restatement in a manner to conform it to existing precedent, such as superimposing the reasoning in *Butaud I*¹⁹² to the application of sections 2(b) and 2(c). Yet such a reconciliation does not seem productive or necessary. Alaska law should stand or fall on the soundness of its reasoning — as should the Third Restatement. There is no need to harmonize that which is irreconcilable.

It can also be argued that sections 2(b) and 2(c) (design defect and warning/instruction defect) impose a burden on the plaintiff to prove and establish “fault,” i.e., to prove an “unreasonably safe” product thus constituting a defect. The imposition of this duty is at odds with the historical purpose of products liability — to eliminate “the necessity for plaintiffs to prove fault by manufacturers of defective products.”¹⁹³ The policy reasons¹⁹⁴ justifying the elimination

189. Owen, *supra* note 6, at 769.

190. 593 P.2d at 882-86.

191. Owen, *supra* note 6, at 777.

192. 543 P.2d 209 (reasoning that burden is on injured party to prove product defect but injured party need not prove awareness of defect or that defect made product unreasonably dangerous).

193. *Beck I*, 593 P.2d at 877.

194. See *supra* Part III.A. (discussing *Beck I*, 593 P.2d at 877-78; *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244, 247 (Alaska 1969) (following *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962) and discussing the “incentive to produce safer products” provided by liability for product defects).

of this burden exist today no less than they did when the Alaska Supreme Court first adopted products liability.¹⁹⁵ Since the law in Alaska is simply that the plaintiff must prove that a defect exists, and there is no requirement that such a defect render the product “unreasonably dangerous”¹⁹⁶ or “not reasonably safe,” it would be consistent for the Alaska Supreme Court to reject the “not reasonably safe” standard of the Third Restatement. If, on the other hand, the court intended a doctrinal change, then this standard could well be considered. However, since the court’s reasoning for rejecting the “unreasonably dangerous” standard has as much or more cogency today as it did in *Beck*, there is no reason for a doctrinal change. Accordingly, the Third Restatement’s requirement of establishing that the defect rendered the product “not reasonably safe” should be rejected in Alaska.

C. The Consumer Expectation Test in Alaska and the Third Restatement’s Rejection of the Test

As discussed above, Alaska has embraced the consumer expectation test. Indeed, Alaska has applied a modified consumer expectation test in the context of prescription medications, making it one of the only jurisdictions to do so.¹⁹⁷ Alaska’s endorsement of this theory of liability was exemplified in *General Motors Corp. v. Farnsworth*,¹⁹⁸ where the court responded to an argument that this test was not appropriate for complex design cases:

In addition, our initial reasons for adopting the consumer expectation test are sound. In *Beck [I]*, we adopted the test as part of Alaska’s product liability law partly because it “incorporates notions of the implied warranty of fitness for reasonable use, a primary concept in the evolution of strict products liability. . . .” The “implied warranty of fitness or merchantability requires that goods ‘be fit for the ordinary purposes for which the goods are used.’”¹⁹⁹

The Alaska Supreme Court has faced two direct challenges to the consumer expectation test, and each time it has reaffirmed its viability as a basis for products liability.²⁰⁰ This is particularly note-

195. See generally *Clary*, 454 P.2d 244 (adopting products liability doctrine in Alaska).

196. See *Beck I*, 593 P.2d at 878; *Butaud I*, 543 P.2d 209, 214 (Alaska 1975).

197. See *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194-98 (Alaska 1992).

198. 965 P.2d 1209 (Alaska 1998).

199. *Id.* at 1221 (quoting *Beck I*, 593 P.2d at 885 n.49 (in turn quoting ALASKA STAT. § 45.05.096(b)(3) (Michie 1996), now renumbered as ALASKA STAT. § 45.02.314(3) (LEXIS 1998))).

200. See *id.* at 1220-21 (“GM argues that the consumer expectation test does not make sense . . . [but] our initial reasons for adopting the consumer expectation

worthy in the context of the Third Restatement, which not only abandons the consumer expectation test altogether, but also imposes a general requirement that the plaintiff prove a “reasonable alternative design” under the risk-utility test.²⁰¹ So far, the courts have not fully embraced the “feasible alternative design” as the only source for product liability under the risk-benefit test.²⁰²

Although the Third Restatement rejects the consumer expectation test as a basis for establishing product design defect, it allows for its admissibility to help establish the foreseeability and risk of harm under the risk portion of the risk-benefit test.²⁰³ The commentary reasons that

[c]onsumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. . . . Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs,²⁰⁴ they may substantially influence or even be ultimately determinative on risk-utility balancing. . . .²⁰⁵

Other courts do not appear reluctant to part ways with the consumer expectation test.²⁰⁶ The Ninth Circuit, for instance, noted

test are sound.”); *Shanks*, 835 P.2d at 1195 (“[R]ather than completely discard an expectation prong, we believe one can be tailored to reflect the unique nature of prescription drugs and the role of the doctor in the decision to use a particular drug.”).

201. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998); Henderson & Twerski, *supra* note 162, at 908-09.

202. *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997). The Missouri Supreme Court rejected the Third Restatement provisions in this regard, and adhered to its prior law that essentially allows the parties to present evidence of consumer expectations, “to argue that the utility of a design outweighs its risks . . . or any other theory supported by the evidence.” *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999).

203. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (1998) (stating that consumer expectations do not constitute an independent standard for judging the defectiveness of product designs”).

204. The Third Restatement embraces the use of the consumer expectation test in the context of food products and used products, however. *Id.* The commentary explains that, for example, whether the presence of adulterated food constitutes a manufacturing defect “is best determined by focusing on reasonable consumer expectations.” *Id.* cmt. h.

205. *Id.* cmt. g.

206. The Alaska Supreme Court reviewed the status of other jurisdictions, and concluded that the determination of which states apply the consumer expectation test is under scholarly debate. See *Farnsworth*, 965 P.2d at 1220 n.15 (citing Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement*

in dicta its approval of the Third Restatement's rejection of the consumer expectation test, reasoning that the risk-utility approach is sufficient by itself to determine whether a product is defective.²⁰⁷ Unlike the Alaska Supreme Court in *Shanks* and *Farnsworth*, however, the Ninth Circuit did not conduct an extensive analysis of the consumer expectation test's origins in implied warranty theory, nor did it carefully consider the benefits of this test.²⁰⁸ Because the consumer expectation test was developed to address specific evidentiary and public policy concerns, one would expect a closer scrutiny of these rationales before this test is discarded.

Because of the Alaska Supreme Court's reliance on the consumer expectation test, it is not surprising, based on prior decisions, that the court would extend the test to apply to the area of design defects.²⁰⁹ Certainly the reasons set forth in the commentary to the

Project, 48 VAND. L. REV. 631, 666 (1995), and reasoning that "the cases repeatedly cited by the reporters leave considerable room for interpretation" and explaining that the author's independent review of fourteen of these cases revealed that only one to three provided strong support for the proposition that American courts predominantly rely on the risk-benefit test as opposed to the consumer expectation test") (also citing John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects — A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 556-57, 951-53 (1996), where the author conducted a survey concluding that nineteen jurisdictions "apply an ordinary consumer expectation test to design defect cases as an exclusive or independent and alternative measure of strict liability design defects").

207. See *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432 (9th Cir. 1995) (construing California law). "Under the proposed Restatement, the consumer expectation test no longer 'constitute[s] an independent standard for judging the defectiveness of product designs.'" *Id.* at 1441. Instead, the focus is on the reasonableness of the design and the plaintiff's ability to prove that a reasonable alternative design would have reduced foreseeable risks of harm. See *id.* "Although we need not, and do not, adopt the formulation of the Restatement (Third) at this time, it provides support for our holding that a focus on the design's benefits, risks, and feasible alternatives is a better approach to examining an alleged design defect." *Id.*

208. See *id.* at 1441; see also *Farnsworth*, 965 P.2d at 1221 ("In addition, our initial reasons for adopting the consumer expectation test are sound. . . . we adopted the test as part of Alaska's products liability law partly because it 'incorporates notions of the implied warranty of fitness for reasonable use, a primary concept in the evolution of strict products liability. . . .").

209. See generally *Beck I*, 593 P.2d 881 (Alaska 1979). The court in *Beck I* carefully addressed the role of consumer expectations in design defect cases, reasoning that "a product is defectively designed if it fails 'to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner' [thereby incorporating] notions of the implied warranty of fitness for

Third Restatement justifying the rejection of the consumer expectation test can be viewed as tautological. The expressed concern that the consumer expectation test does not “take into account whether the proposed alternative design could be implemented at reasonable cost”²¹⁰ in fact merges the consumer expectation test with the risk-utility test. This amounts to merging two separate doctrines and then justifying the dismissal of one on the basis that it does not consider the factors of the other. Without a complete disregard of Alaska precedent and a departure from the core policies supporting the adoption of products liability in Alaska, when addressing section 2 of the Third Restatement, the Alaska supreme court will most likely reject the portion of the Third Restatement that abandons the consumer expectation test. The court will also likely modify section 2 of the Third Restatement to include the consumer expectation test prior to adopting that section, as it did in *Butaud I* and *Shanks*.²¹¹ In this manner, the Alaska supreme court can retain the best of both doctrines.²¹²

With the issues discussed above in mind, it should be pointed out that there appear to be many subsections and comments to sections 2(a)–(d) that fit harmoniously within the products liability rubric established in Alaska. As discussed earlier, the general framework and principles of the Third Restatement conform to most of the general principles and framework established in Alaska, including the general breakdown of three categories for potential liability.²¹³ For example, subsection (d) focuses on violations of administrative, regulatory or statutory manufacturing standards and incorporates a per se liability approach to these cases.²¹⁴ This is congruent with Alaska law. Further, comment e to section 2 embraces the concept that products that combine high risk and marginal social utility may be defective even if there is no safer al-

reasonable use, a primary concept in the evolution of strict products liability . . . [which] eases the burden of proof on the plaintiff.” *Id.* at 885.

210. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (1998).

211. *Butaud I*, 543 P.2d 209 (Alaska 1975) (modifying the Second Restatement prior to adoption); *Shanks v. Upjohn Co.*, 835 P.2d 1189 (Alaska 1992) (also modifying the Second Restatement prior to adoption).

212. It should be noted that there is considerable dispute with the Third Restatement position rejecting the consumer expectation test. The test may be more widely followed than the Third Restatement is willing to concede. *See Shapo, supra* note 206, at 666 (arguing that the case law cited by the Third Restatement allows for extensive interpretation and concluding that as few as one to three of these cases provides real support for the Third Restatement position); *Vargo, supra* note 206, at 556-57.

213. *See supra* notes 157-159 and accompanying text.

214. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(d) (1998).

ternative design.²¹⁵ An example of this could be firecrackers (some might argue alcohol or tobacco as well, notwithstanding the Third Restatement's immunization of these products). This approach is also consistent with Alaska law. Other than the major discrepancies addresses by this Article, the remaining differences and issues to be adjudicated occur in the commentaries.

D. Prescription Drugs and Medical Devices: Section 6 of the Third Restatement Does Not Completely Conform With *Shanks*

As briefly discussed earlier, the court in *Shanks v. Upjohn Co.*²¹⁶ rejected comment k of the Second Restatement, which provides immunity from liability for drug manufacturers.²¹⁷ The *Shanks* court held that the risk-benefit test adopted in *Beck I* would apply to design defect claims involving prescription medications.²¹⁸ Section 6 of the Third Restatement addresses the liability of a "seller, or other distributor, for harm caused by defective prescription drugs or medical devices."²¹⁹ Section 6 defines manufacturing, warning and design defects for prescription drugs and medical devices, and incorporates the learned intermediary defense into these types of claims.²²⁰ For example, in a defective warning claim involving a prescription drug, the classic learned intermediary defense provides that "a prescription drug manufacturer satisfies the duty to warn if it provides adequate warnings to the prescribing physician."²²¹

The learned intermediary defense (as provided in comment k in the Second Restatement) was rejected in *Shanks*.²²² Instead, the court modified the consumer expectation test to include the reasonable expectations of the prescribing physician:

215. *See id.* § 2 cmt. e.

216. 835 P.2d 1189, 1195 (Alaska 1992). Other courts took the same approach. *See, e.g., Allison v. Merck & Co.*, 878 P.2d 948, 956 (Nev. 1994) ("This court rejects the idea of freeing drug manufacturers from liability for defective drugs simply because they claim that the drugs are reasonably or unavoidably dangerous.").

217. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965). Comment k provided that no liability should be imposed against drug manufacturers "merely because [they have] undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." *Id.* Comment k further provided that drug manufacturers or sellers should "not be held to strict liability for unfortunate consequences attending their use." *Id.*

218. *Shanks*, 835 P.2d at 1196-97.

219. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (1998).

220. *Id.* § 6(b)-(d).

221. *Shanks*, 835 P.2d at 1195 n.6.

222. *Id.* at 1202.

In a sense, prescribing doctors are the consumers of prescription drugs. It is the doctor's evaluation of the patient's condition and consideration of the available treatment alternatives which leads to the choice of a specific prescription drug product. Also, the doctor has ready access to the FDA-approved warning information contained in the package insert and the Physicians' Desk Reference. Thus it is the doctor's expectation, and not that of the patient, regarding the performance and safety of prescription drugs which is the relevant inquiry in the imposition of strict liability.²²³

Accordingly, to the extent section 6 of the Third Restatement incorporates the learned intermediary defense, it is in conflict with the holding in *Shanks*.²²⁴ Since the learned intermediary defense of the Third Restatement's section 6 stems from comment k of the Second Restatement, absent a turn-about by the Alaska Supreme Court, this part of the Third Restatement should not weave its way into Alaska law. Moreover, the court in *Shanks* viewed claims involving drugs or medical devices as essentially the same as other products in that no special immunity would be carved out for these products; rather, these products could be judged under a risk-utility analysis for design defect like any other product.²²⁵ This appears to be the view followed by other courts as well.²²⁶ The discussion regarding products liability for drugs or medical devices for design defect may not apply to claims of product warning or instruction defect, due to the possibility of federal preemption in this area.²²⁷

223. *Id.* at 1195.

224. *Id.*; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. e (1998).

225. 835 P.2d at 1198.

226. See *West v. Searle & Co.*, 806 S.W.2d 608, 611-13 (Ark. 1991) (applying the risk-utility test against a drug); *Allison v. Merck & Co.*, 878 P.2d 948, 954 (Nev. 1994) (utilizing the risk-utility test against a design defect claim of a drug). Some courts have taken a middle approach and evaluated a specific drug or device on a case-by-case basis to determine whether special immunity should apply. See, e.g., *Toner v. Lederle Labs.*, 732 P.2d 297, 308-09 (Idaho 1987) (determining that comment k would not automatically provide "blanket immunity" but evaluating drugs on a case-by-case method); *Savina v. Sterling Drug, Inc.*, 795 P.2d 915, 924 (Kan. 1990); *White v. Wyeth Labs.*, 533 N.E.2d 748, 752 (Ohio 1988).

227. Preemption may occur where specific warnings and instructions are mandated by the Food and Drug Administration. In product warning cases involving drugs or medical devices, the potential impact of federal regulation and federal preemption must be considered because state law products liability claims for defective warning may not be viable in this context. Section 6, comment b of the Third Restatement addresses the potential impact of federal preemption and bases its provision on the assumption that "the federal regulatory standard has not preempted the imposition of tort liability under state law." RESTATEMENT

The drafters of the Third Restatement set forth several reasons supporting the learned intermediary defense, including the concern “over the possible negative effects of judicially imposed liability on the cost and availability of valuable medical technology.”²²⁸ This very reason was considered and rejected by the court in *Shanks v. Upjohn Co.*²²⁹

While the social utility and value of prescription drugs as a class of products may exceed that of most other classes of products, we do not believe that this generalization warrants granting “the same protection from liability to those who gave us thalidomide as to the producers of penicillin.” Further, we find it speculative at best that restricting strict liability design defect claims against prescription drug manufacturers will serve the public interest by enhancing the availability and affordability of prescription drugs. . . . Finally, we find it consistent with the purposes underlying strict products liability that manufacturers should be deterred from marketing certain products and that the cost of the defense of strict products liability litigation and any resulting judgments should be borne by the manufacturer who is able to spread the cost through insurance and by charging more for its products.²³⁰

In short, contrary to section 6 of the Third Restatement and comment k of the Second Restatement, the Alaska Supreme Court found no persuasive basis to single out prescription drugs and

(THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. b (1998). The United States Supreme Court held in *Medtronic, Inc. v. Lohr* that federal preemption occurs only where the state requirement applies to a medical device and that requirement is “different from or in addition to” FDA requirements under the Medical Device Amendments Act of 1976 (amending the Federal Food, Drug and Cosmetic Act), 518 U.S. 470, 500 (1996); *see also* *Chambers v. Osteonics Corp.*, 109 F.3d 1243 (7th Cir. 1997). Accordingly, the relevant inquiry in any particular case is whether the state-based claim for product defect would impose a different or additional requirement than one already imposed by the FDA. Of course, if the FDA has not imposed a requirement governing an aspect of the product that is allegedly defective, then no preemption would apply. *See generally* *National Bank of Commerce of El Dorado v. Kimberly-Clark Corp.*, 38 F.3d 988 (8th Cir. 1994) (holding that Medical Device Amendment Act of 1976 only preempts claim for failure to warn because FDA only specifically regulated warning label of product, so design defect claim could proceed in state court).

228. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. b (1998).

229. 835 P.2d 1189, 1195 (Alaska 1992) (recognizing “that the threat of products liability litigation in general may impair the ability of drug manufacturers to obtain liability insurance and may cause beneficial drugs to be withdrawn from the market” but concluding that superior public policy considerations outweigh this concern).

230. *Id.* at 1195-96 (citations omitted).

medical devices for immunity from liability.²³¹ Concern over the availability of these products “has no greater relevance . . . than to other products having life-saving or life-bettering characteristics.”²³² Indeed, if prescription drugs or medical devices were singled out for special product treatment, it would only be a matter of time before the list would grow to add seatbelts, airbags, floatation devices, brakes, food and nutritional products, and any number of other products that are intended to save or improve lives. Although one can argue there is a normative difference between prescription drugs or medical devices in contrast to a car, oven or motorcycle (and the ALI did in fact so argue), a more comprehensive view recognizes that drug and medical device manufacturers produce products for profit, like other manufacturers, and should be subject to the same goal of manufacturing the safest product reasonably possible (as the court recognized in *Shanks*).²³³

Section 6 is problematic for other reasons as well.²³⁴ In complete opposition to *Shanks*, section 6(c) confers almost complete immunity from design defect claims for drug manufacturers.²³⁵ Rather than apply the risk-benefit test, the Third Restatement would impose liability only where there is absolutely no benefit to any member of a patient class.²³⁶ This would have the practical effect of immunizing most medications from products liability.²³⁷ How hard would it be to find just one physician to testify that the drug, with all of its debilitating effects or risks, is still better than the illness or death suffered by the patient? It would not be problematic at all. On this basis, a drug that poses substantial risks to many people and causes great harm would not be subject to liability if at least some people may gain benefits. Further, the goals of

231. *See id.*

232. *Id.* at 1196 (citing *Hill v. Searle Labs.*, 884 F.2d 1064, 1069 (8th Cir. 1989)).

233. *See id.* at 1197 (providing the risk-benefit analysis that should be undertaken in a prescription drug products liability case).

234. The related section 8(c), pertaining to medical device liability, has been similarly criticized. *See Jeffrey Winchester, Note, Section 8(c) of the Proposed Restatement (Third) of Torts: Is It Really What The Doctor Ordered?*, 82 CORNELL L. REV. 644 (1997).

235. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(c) (1998).

236. *Id.* § 6(c) cmt. a (noting that “the only prescription drugs and medical devices that are shouldered with design defect claims are those that provide no net benefit to any ascertainable patient class”).

237. Some type of liability could squeak by, such as liability for manufacturing defect if, for example, the manufacturer erroneously labeled the medication as containing 10 mg when in fact the medication contained twice that amount. Liability for defective warning, instruction or design, however, would likely be precluded.

products liability, including the development of safer and better medications and the allocation of risk among all manufacturers and consumers through risk spreading and insurance, would be thwarted. Arguably, the Third Restatement approach grants far too much deference to FDA oversight, oversight limited by political and budgetary considerations, at the expense of judicial remedies that have fewer limitations. The Alaska Supreme Court has expressed reservations in deferring to this governmental agency.²³⁸ Thus, in evaluating section 6, the courts in Alaska should use caution and tread carefully. This is one part of the Third Restatement that does not conform with existing policy or precedent.

E. Product Warning

Several sections of the Third Restatement mirror Alaska law and could be incorporated into Alaska precedent without legal contortion. For instance, Alaska law on defective warning establishes that where “the product as marketed posed a risk of injury to one who uses the product in a reasonably foreseeable manner and the product is marketed without adequate warnings of the risk, the product is defective.”²³⁹ As discussed above, once that is established, liability will be imposed unless “the defendant manufacturer can prove that the risk was scientifically unknowable at the time the product was distributed to the plaintiff.”²⁴⁰ To establish that a warning is defective or inadequate, the plaintiff must demonstrate that the warning did not “(1) clearly indicate the scope of the risk or danger posed by the product; (2) reasonably communicate the extent or seriousness of harm that could result from the risk or danger; and (3) [convey this information] in such a manner as to alert the reasonably prudent person.”²⁴¹

Importantly, a manufacturer cannot “warn away” its liability; “[w]here the most stringent warning does not protect the public, the defect itself must be eliminated if the manufacturer is to avoid

238. *See* *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1197 n.10 (Alaska 1992) (“[A] deferential standard of review is appropriate when directly reviewing an agency decision . . . [however] such deference in the face of allegations of serious injuries caused by FDA-approved drugs would amount to an abdication of judicial responsibility.”).

239. *Id.* at 1199 (citing *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984)).

240. *Id.* at 1200 (citing *Heritage v. Pioneer Brokerage & Sales, Inc.*, 604 P.2d 1059, 1063-64 (Alaska 1979); *Beck II*, 624 P.2d 790, 792 (Alaska 1981)).

241. *Id.* (citing *First Nat’l Bank of Albuquerque v. Nor-Am Agric. Prods., Inc.*, 537 P.2d 682, 691-93 (1975)).

liability.”²⁴² The Third Restatement section 2(c) comment i mirrors Alaska law in this respect, and provides that although manufacturers have the responsibility to warn to render a product safe, warnings are not a substitute for a safer design.²⁴³ Indeed, the Third Restatement rejects the Second Restatement’s recognition of any presumption or defense that assumes the consumer will read and follow the warning, concluding that “when a safer design can reasonably be implemented and risk can reasonably be designed out of a product, adoption of the safer design is required over a warning.”²⁴⁴ Accordingly, the absence of necessary warnings will render a product defective, but the ultimate focus in both the Third Restatement and Alaska law is not on warnings but rather on safer designs and safer products. Presumably the safest product would not need any warnings since it has been designed and manufactured in such a manner that no warnings are necessary. If the risk or danger associated with a product cannot be eliminated by better design, then appropriate warnings must be given to avoid liability. Even then, however, liability may not be avoided if even the most “stringent warning” would not eliminate the danger.²⁴⁵

The Third Restatement section 2(b) rejects the “open and obvious” defense to a design defect claim.²⁴⁶ This defense precluded liability where the risk of injury is patent and observable to the reasonably prudent consumer.²⁴⁷ Alaska, however, has previously recognized the “open and obvious” defense²⁴⁸ only in the context of a failure to warn theory, reasoning that it has “refused to impose strict liability based upon failure to warn of ‘hazards or dangers

242. *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 44 (Alaska 1979).

243. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i (1998); *see also* *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841 (D.C. Cir. 1998); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998).

244. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. 1 (1998).

245. *Sturm*, 594 P.2d at 44.

246. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d, illus. 3 (1998).

247. *See, e.g., Coast Catamaran Corp. v. Mann*, 321 S.E.2d 353, 356 (Ga. App. Ct. 1984) (“[I]f a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law’s demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof”); *In re Complaint of Diehl*, 610 F. Supp. 223, 227 (D. Idaho 1985) (affirming dismissal of claim for product defect relative to a sail boat with an aluminum mast that contacted an overhead power line and reasoning that it “was patently obvious that the aluminum mast incorporated in the design of the boat could and would readily conduct electricity”).

248. *Maddox v. River & Sea Marine, Inc.*, 925 P.2d 1033, 1038 (Alaska 1996).

that would be readily recognized by the ordinary user of the product.”²⁴⁹ It is critical to distinguish between this defense and the theory asserted by the plaintiff relative to the “obviousness defense.”²⁵⁰ While obviousness of danger may be a defense to a failure to warn claim, it is not a recognized defense to a design claim.²⁵¹ Indeed, if the danger is obvious, arguably a better design is all the more imperative, unless the product is inherently dangerous and cannot be made any safer. These are questions of fact under the risk-benefit test, however.

The Third Restatement’s provisions regarding “obviousness” relative to a failure to warn theory conform with existing Alaska law.²⁵² To establish a failure to warn claim, a plaintiff must prove that the manufacturer had a duty to warn of the dangers arising from a foreseeable use of the product and that the breach of that duty was the proximate cause of the plaintiff’s injuries.²⁵³ If the failure to warn is the proximate cause of the injury, then “the manufacturer is strictly liable unless the defendant manufacturer

249. *Id.* (citing *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984)). The court in *Prince* reiterated that “there is no duty to warn of hazards or dangers that would be readily recognized by the ordinary user of the product.” 685 P.2d at 88.

250. In *Prince*, for example, the plaintiff alleged “that the manufacturer failed to adequately warn of the difficulty of managing its parachute.” 685 P.2d at 85. He further claimed that “had [there] been a warning sewn into the Paradactyl, or if he had been told to read a manual which contained an adequate warning and had learned that the parachute was too advanced for him, he would never have used it.” *Id.* at 86. The plaintiff did not claim that the parachute itself was defectively designed or manufactured but instead pursued the theory that the “product, although faultlessly manufactured and designed, can be defective when placed in the consumers’ hands without first giving an adequate warning concerning the manner in which to safely use the product.” *Id.* at 87. The claim rested on the difficulty in managing that parachute, which was not “open and obvious” simply by looking at the product. One would have to use the product to learn of this problem.

251. *See Ogletree v. Navistar Int’l Transp. Corp.*, 500 S.E.2d 570, 571-72 (Ga. 1998) (reasoning that in design defect cases, the “overwhelming majority of jurisdictions have held that the open and obvious nature of the danger does not preclude liability for design defects”). The Third Restatement recognizes this position and rejects the “open and obvious” defense in design cases. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998).

252. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998).

253. *See Shanks v. Upjohn Co.*, 835 P.2d 1189, 1199-1200 (Alaska 1992) (“Under a strict liability failure to warn theory, if the plaintiff proves that the product as marketed posed a risk of injury to one who uses the product in a reasonably foreseeable manner and the product is marketed without adequate warnings of the risk, the product is defective.”).

can prove that the risk was scientifically unknowable at the time the product was distributed to the plaintiff.”²⁵⁴

A manufacturer need not provide a warning when “the danger, or [potentiality] of danger, is generally known and recognized.”²⁵⁵ Section 2, comment i of the Third Restatement provides that no duty exists to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users.²⁵⁶ Under Alaska law, whether a duty exists is a question of law,²⁵⁷ but the question whether a risk is obvious or generally known is a question of fact to be decided by the trier of fact.²⁵⁸ This is compatible with the Third Restatement approach.²⁵⁹

F. The Crashworthiness Doctrine

Another sub-category of products liability is safety products, particularly those products incorporated into vehicles. Referred to as “crashworthiness” cases, both the Third Restatement and Alaska law address this area.²⁶⁰ Alaska products liability law recognized the crashworthiness doctrine in *General Motors Corp. v. Farnsworth*.²⁶¹ The “crashworthiness doctrine,” also known as the “enhanced injury doctrine” or “second collision doctrine,” is a recent development in the area of products liability law, both nation-

254. *Id.* at 1200.

255. *Prince v. Parachutes, Inc.*, 685 P.2d 83, 88 (Alaska 1984) (quoting *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (“On the issue of duty to warn, however, the question to be put to the jury is whether “the danger, or potentially [sic] of danger, is generally known and recognized.”)).

256. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i (1998).

257. *See Parks Highway Enter. v. CEM Leasing, Inc.*, No. S-8593, 5236, 2000 WL 146849 at * 8 (Alaska Feb. 4, 2000).

258. *See Prince*, 685 P.2d at 88 (“Whether an ordinary parachutist would readily recognize that a Paradactyl should be used by experienced parachutists only is a question of fact on the record presented.”); *Broderick v. King’s Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991) (“Whether King’s Way knew or should have known of the danger that Gilman might sexually molest children left in her care is a question of fact.”).

259. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. j (1998) (“Where reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact.”).

260. *Id.* §§ 16 cmt. a., 17, 2 cmt. p (“[A]n automobile may be defectively designed so as to provide inadequate protection against harm in the event of a collision.”). *See generally* *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).

261. 965 P.2d 1209 (Alaska 1998).

ally²⁶² and in Alaska.²⁶³ This doctrine recognizes that a vehicle occupant may be injured, or the injuries enhanced, by the very product that was supposed to prevent or reduce injuries, such as a seatbelt or an airbag.²⁶⁴ In *Farnsworth*, for example, the occupant was seriously injured by “submarining” under a defectively designed seatbelt.²⁶⁵ The crashworthiness of a vehicle can be measured by the degree to which it protects the occupants from injury inside the vehicle during the “second collision.” The doctrine has been applied to cars, motorcycles, trucks, airplanes, helicopters and boats.²⁶⁶

The crashworthiness doctrine also acknowledges that injuries sustained in an accident may occur not only because of the initial impact of the vehicle, but also because of a subsequent impact by the occupant with the vehicle itself.²⁶⁷ Liability may be imposed for product defect if the occupant’s injuries were enhanced as a result of a design defect in the vehicle. A key departure under Alaska law is that a plaintiff may be able to prove a crashworthiness claim under the consumer expectation test,²⁶⁸ a theory unavailable under the Third Restatement. Contrary to the Third Restatement, the *Farnsworth* court stated:

GM buttresses its position by pointing out that the proposed new Restatement of Torts and the majority of states do not allow recovery under the consumer expectation test without also requiring that the product’s risks outweigh its benefits. . . .

262. One of the earliest cases in this area was *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968), where the court held that “a manufacturer is under a duty to use reasonable care in the design of its vehicles to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.”

263. See generally *Farnsworth*, 965 P.2d 1209. *Farnsworth* is the first Alaska case to directly address this issue.

264. See generally *Larsen*, 391 F.2d 495; see also *Farnsworth*, 965 P.2d at 1219 (noting that “a crashworthiness claim rests on the idea that a defect enhanced the plaintiff’s injuries”).

265. 965 P.2d at 1221. The court also conformed this doctrine to Alaska’s application of apportionment, allowing a defendant manufacturer to present evidence and prove that even if the safety product was defective and was a “substantial factor in causing” the consumer’s injuries, someone else’s conduct may have also caused the harm and fault should be apportioned because “it should be the proven wrongdoer who must bear the burden of limiting its liability.” *Id.* at 1220.

266. See Lory J. Kraut, *Crashworthiness, Strict Liability: On a Collision Course*, 57 DEF. COUNS. J. 150, 150 (1990).

267. See *Sumnicht v. Toyota Motor Sales USA, Inc.*, 360 N.W.2d 2, 7 (Wis. 1984) (noting that the plaintiff’s injury was not from the accident but “as a result of his impact with defective seats”).

268. See *Farnsworth*, 965 P.2d at 1221.

We agree with the California Supreme Court that consumers can form reasonable and educated expectations about how certain products should perform. . . . When a seat belt, designed to be an instrument of protection, becomes an instrument of life-threatening injury, a consumer is justified in concluding that it did not perform as safely as promised. A seat belt is a familiar product whose basic function is well understood by the general population.²⁶⁹

Accordingly, to the extent that the Third Restatement abandons the consumer expectation test in most categories, including crash-worthiness cases, it would not be persuasive authority in Alaska.

V. PRESERVING THE DOCTRINAL WALL BETWEEN PRODUCTS LIABILITY AND NEGLIGENCE

The Alaska Supreme Court has expressed a strong philosophical preference for keeping negligence theory out of, and distinct from, products liability theory. This is based on the underlying rationale supporting products liability, establishing that “greater efficiency and justice would be achieved by eliminating the necessity for plaintiffs to prove fault by manufacturers of defective products.”²⁷⁰ For example, in *Bachner v. Pearson*,²⁷¹ the court stated that “the focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries.”²⁷² Therefore, in *Bachner*, negligence principles had no application.²⁷³

Moreover, it was later deemed reversible error to include negligence concepts when instructing a jury.²⁷⁴ The court’s most recent review of this matter resulted in the court’s reaffirmation that “the policy underlying strict liability warrants preserving the distinction between the doctrines.”²⁷⁵ In *Beck I*, the court grappled with the problem of keeping products liability doctrine and negligence doctrines separate. It reached a solution utilizing a substantive shift in the burden of proof:

269. *See id.* at 1220-21 (stating “we cannot accept GM’s insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use. In particular circumstances, a product’s design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.”) (quoting *Soule v. General Motors Corp.*, 882 P.2d 298, 310 (Cal. 1994)).

270. *Beck I*, 593 P.2d 871, 877 (Alaska 1979).

271. 479 P.2d 319 (Alaska 1970).

272. *Id.* at 329.

273. *Id.*

274. *See Patricia R. v. Sullivan*, 631 P.2d 91, 102 (Alaska 1981).

275. *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1199 (Alaska 1992).

Although we believe that a balancing process is inevitable in certain design defect cases, we in no way intend to diminish our adherence to the goals of strict products liability. Therefore, we also agree with the position taken by *Barker* regarding the allocation of the burden of proof:

[I]nasmuch as . . . a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence. . . .

We hold that the plaintiff need only show that he was injured and that the injury was proximately caused by the product's design. The defendant may then avoid liability for a defectively designed product by proving . . . "on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."

Beck protests that adding further content to the meaning of product defectiveness will be a retreat to negligence concepts, will increase the plaintiff's burden of proof, and will create a distinction between manufacturing and design defects. As we have stated above, we intend no retreat from our holdings in *Clary* and *Butaud I*. Negligence concepts will not dilute the plaintiff's case because the trier of fact will concentrate on the nature of the product in determining defectiveness rather than upon the conduct of the defendant.²⁷⁶

Notwithstanding the court's reassurances and shift in the burden of proof, under the risk-utility test, it is doctrinally difficult to completely separate negligence principles from products liability analysis. One commentator reasoned that, notwithstanding the label of strict products liability, the "label was not entirely accurate because the actual reasoning being performed frequently (and, for fairness reasons, necessarily) focused on standard negligence issues such as reasonableness and foreseeability."²⁷⁷ Currently, Alaska requires the fact finder to consider the following factors:

276. *Beck I*, 593 P.2d at 885-86 (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455, 458 (Cal. 1978)).

277. David K. Geiger & Stephanie Copp Martinez, *Design and Warning Defect Claims Under Massachusetts Product Liability Law: Completing the Merger of Negligence and Warranty*, 43 BOSTON BAR J. 12, 13 (1999); see also *O'Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983) (discussing the overlap of negligence principles inherent within the risk-benefit test and reasoning that to the extent this test "implicates the reasonableness of the manufacturer's conduct, strict liability law continues to manifest that part of its heritage attributable to the law of negligence").

the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.²⁷⁸

As recognized in *Beck I*, there is an inherent and necessary task of weighing and balancing under this test. It appears that the trial courts, if they are to remain true to the teachings in *Beck I*, would carefully manage the jury through jury instructions that emphasized that the focus is on the product, not the manufacturer's conduct, even though the manufacturer's conduct will be in evidence.

The Third Restatement does away with the wall between products liability and negligence relative to the risk-utility test and takes the approach that, inherent in the process of determining whether one design has benefits that outweigh another, the jury will inevitably focus on the defendant's conduct²⁷⁹ and knowledge — the very factors products liability intended to avoid.²⁸⁰ In this regard, the Third Restatement is not compatible with Alaska law. If the Alaska courts adopt the Third Restatement requirement that the plaintiff prove a reasonable alternative design in order to prevail under a risk-utility analysis, then the wall between negligence and products liability would likely crumble in this area, and a substantial doctrinal shift would result, including burden of proof allocation. Because the Alaska Supreme Court has concluded that there is a distinct benefit in separating products liability principles from negligence concepts, any application of the Third Restatement, which often merges the two, must be closely reviewed.²⁸¹ In practical effect, language in the Third Restatement referring to "foreseeable risks"²⁸² or "reasonable instructions"²⁸³ and other negligence concepts may need to be reworded, if not redacted entirely, to conform with current Alaska law.

278. *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1196-97 (Alaska 1992) (quoting *Beck I*, 593 P.2d at 886 (in turn quoting *Barker*, 573 P.2d at 455)).

279. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998). Comment d provides that the Third Restatement approach "is also used in administering the traditional reasonableness standard in negligence." *Id.*

280. *See Dura Corp. v. Harned*, 703 P.2d 396, 411 (Alaska 1985) ("The focus of attention in strict liability cases is not on the conduct of the defendant, but rather on the existence of the defective product which causes injuries. Liability is attached, as a matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct.") (citing *Bachner v. Pearson*, 479 P.2d 319, 329 (Alaska 1970)).

281. *See Shanks*, 835 P.2d at 1199.

282. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

283. *See id.* § 2(c).

Alternatively, the Alaska Supreme Court could modify its position in this area, and recognize that the risk-utility test implicates the manufacturer's knowledge and conduct, at least to some degree, and compares that knowledge and conduct with what other manufacturers have done, or what experts in the area testify could be (and should be) done. While this modification would certainly constitute a step away from established products liability reasoning, and undercut some of the public policy goals giving rise to this doctrine, if the burden of proof allocation remained intact, the effect could be minimized. In light of the various public policy interests that are at issue, this is an area that will need careful attention in the future if it is to be changed.

VI. CONCLUSION

The Third Restatement embodies the next step in the evolution of products liability. Like its predecessor, section 402A of the Second Restatement, it will no doubt influence courts and establish a framework that many courts will utilize. The Alaska Supreme Court has demonstrated a pattern of critically and methodically evaluating many of the key provisions of the Second Restatement, resulting in only partial acceptance and sometimes outright rejection of Restatement positions.²⁸⁴ There is no reason to believe it will not, and should not, do so with the Third Restatement. In *General Motors Corp. v. Farnsworth*,²⁸⁵ the court compared its reasoning with selected portions of the Third Restatement, thus indicating that the Third Restatement may be well on its way as a part of Alaska law.

The courts in Alaska face unique circumstances and issues. From the trial courts up to the Alaska Supreme Court, the vitality of Alaska law is preserved by a careful review of the public policy giving rise to the various doctrines. Those provisions in the Third Restatement that conform with, uphold and further these policy considerations should have no problem being incorporated into Alaska precedent. Those provisions of the Third Restatement that conflict with the stated goals and purposes of Alaska products liability law should be, and probably will be, rejected. In the end, Alaska will in all likelihood adopt only portions of the Third Restatement, and implement a modified version of it, just as it did with the Second Restatement.

284. See *supra* notes 66-133 and accompanying text.

285. 965 P.2d 1209, 1219-20 (Alaska 1998) (referring to the Third Restatement, reasoning that "Alaska has explicitly adopted the Restatement's rules for apportioning injury in multiple tortfeasor cases," and comparing its prior holdings with the Third Restatement section 16 cmt. d).