Louisiana Law Review

Volume 42 | Number 4
Summer 1982

DeBattista v. Argonaut-Southwest Insurance Co.: The Meaning of "Unreasonable Danger" in Louisiana Products Liability

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DeBattista v. Argonaut-Southwest Insurance Co.: THE MEANING OF "UNREASONABLE DANGER" IN LOUISIANA PRODUCTS LIABILITY

The plaintiff contracted serum hepatitis following a blood transfusion she received in conjunction with surgery performed at Southern Baptist Hospital, and sued both the hospital and its blood bank, which had drawn and processed the blood. The district court dismissed the suit, finding no cause of action on an implied warranty in connection with the sale of blood, and no proof of negligence in the blood's preparation, storage, or infusion.[1] The Fourth Circuit Court of Appeal affirmed the dismissal based on its finding that the plaintiff failed to prove either that the blood was unwholesome or that it caused the plaintiff's disease.[2] The Louisiana Supreme Court reversed and entered judgment for the plaintiff. Although the supreme court affirmed the district court's finding of no negligence on the part of the hospital, it found the defendants strictly liable in tort, *holding* that blood contaminated with hepatitis virus is defective, *i.e.*, unreasonably dangerous to normal use. Additionally, the supreme court determined that "[t]he risks involved in receiving a transfusion of blood in this condition are certainly greater than a reasonable consumer would expect." *DeBattista v. Argonaut-Southwest Insurance Co.*, 403 So. 2d 26, 31 (La. 1981).

Products liability, a recent development of tort law, encompasses that class of cases involving the liability of the seller of a product for injury caused by defects in that product. Traditionally, individuals who were injured by manufactured products looked to the theories of negligence and implied warranties for their causes of action. However, neither theory was totally responsive to the needs of all plaintiffs.[3] The action on the breach of an implied warranty sounded in contract and required privity between the injured party and the party being sued. When the injured party was merely a user of the

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1. *See* DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26, 26 (La. 1981).

2. DeBattista v. Argonaut-Southwest Ins. Co., 385 So. 2d 518 (La. App. 4th Cir. 1980).

3. *See* Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); DiVello v. Gardner Mach. Co., 46 Ohio App. 161, 102 N.E.2d 289 (Ct. Com. Pleas 1951); Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980):

> Clearly, traditional negligence and warranty causes of action posed serious impediments to the injured consumer's ability to recover. Perhaps more importantly, the public policy goals undergirding the societal commitment to a notion of expansive manufacturer liability for defective products could not be effectively realized in view of the limitations inherent in the traditional causes of action.

See also Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Note, *Torts—Strict Liability of Manufacturers*, 23 LA. L. REV. 810 (1963); 63 AM. JUR. 2d *Products Liability* § 25 (1972); Annot., 17 A.L.R. 672, 674 (1922).

product, separated from the manufacturer by middlemen and the purchaser, he was unable to bring a warranty action.[4] However, the alternative action brought in negligence presented an equally formidable problem—the plaintiff had the burden of proving some *act* on the part of the manufacturer that fell below the standard of care owed the plaintiff.[5] Although the courts found ways to circumvent these problems, their methods were largely unsatisfactory, if only from a theoretical standpoint.[6]

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4. *See, e.g.*, Catlin v. Union Oil Co., 31 Cal. App. 597, 161 P. 29 (1916); Kusick v. Thorndike & Hix, 224 Mass. 413, 112 N.E. 1025 (1916); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913); Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913); Birnbaum, *supra* note 3; Krauskopf, *Products Liability*, 32 MO. L. REV. 459, 462 (1967): "The ultimate manufacturer was ordinarily the one best able to satisfy a judgment, but without privity between the injured party and the manufacturer supporting an action sounding in contract was impossible."

5. *See, e.g.*, Evans v. Travelers Ins. Co., 212 So. 2d 506 (La. App. 1st Cir. 1968); Birnbaum, *supra* note 3, at 595-96:

> [A] cause of action in negligence did not suddenly become a route without burdens .... The injured plaintiff still had the considerable evidentiary problem of proving that the manufacturer was, in fact, negligent. The doctrine of *res ipsa loquitur*, where applicable, offered some help, but the manufacturer could dispel the inference of negligence by advancing sufficient evidence to show that he exercised due care in the manufacture of the product and in the adoption of quality control measures. As Justice Traynor noted, '[a]n injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is.'

Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 676 (1963): "The principle obstacle to recovery, generally speaking, on a negligence theory is not the substantive law as to duty or causation but the unavailability of sufficient evidence of negligence to have the case submitted to the jury."; Krauskopf, *supra* note 4, at 459: "The obvious shortcoming of the negligence theory is the difficulty of proving lack of ordinary care. Negligence existing at the manufacturing level may be impossible to establish even with the aid of *res ipsa loquitur*."; Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 826 (1973):

> It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

6. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Madouras v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (K.C. Ct. App. 1936); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929); Birnbaum, *supra* note 3, at 594 [speaking of *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)]: "Linking the duty of due care to the contract doctrine of privity made the responsibility of the manufacturer to the user of the product essentially illusory." Also, *id.* at 595: "[I]n the leading case of *Henningsen v. Bloomfield Motors, Inc.* [32 N.J. 358,

In 1963 the California Supreme Court proposed a new theory of recovery in products liability cases with its decision in *Greenman v. Yuba Power Products, Inc.*,[7] which is generally regarded[8] as the fountainhead of strict liability in a products liability action. In *Greenman*, the state supreme court established that the manufacturer's liability for his defective products could be grounded in strict tort liability without resort to theories of negligence or breach of implied warranty. The court held 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."[9]

In response to the rapid developments in products liability law evidenced by and following *Greenman*, the drafters of the *Restatement (Second) of Torts* in 1965 addressed the liability of "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . ."[10] According to the comments to section 402(A),

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161 A.2d 69 (1960)], the New Jersey Supreme Court dispensed with the privity requirement . . . holding that the obligation of the manufacturer is not grounded in the law of sales, but upon the 'demands of social justice.' "; Prosser, *The Assault Upon the Citadel, (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960): "The most important of these [exceptions to the general rule of non-liability to persons not in privity] was that the seller of a chattel owed to any one who might be expected to use it a duty of reasonable care to make it safe . . . ."; Wade, *supra* note 3, at 6:

> [M]any courts have permitted a warranty action by the ultimate purchaser against the manufacturer by stretching various legal concepts out of shape in order to find privity present. Thus, they sometimes have treated the retailer as an agent of either the manufacturer or the purchaser; or they have spoken of assignment of the interest; they have treated the purchaser as a third party beneficiary of another contract. More frequently, they have spoken of the warranty as running with the chattel, much as a covenant runs with the land.

7. 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

8. *See, e.g.*, Harris v. Karri-On Campers, Inc., 640 F.2d 65 (7th Cir. 1981); Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980); Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979); McPhail v. Municipality of Culebra, 598 F.2d 603 (1st Cir. 1979); Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129 (9th Cir. 1977); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202 (10th Cir. 1977); Lovelace v. Astra Trading Corp., 439 F. Supp. 753 (S.D. Miss. 1977). *See generally*, Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239 (1975); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 9 (1965); Comment, *Manufacturer's Product Liability—Strict Liability—Tort or Contact?*, 43 B.U.L. REV. 576 (1963); Note, *Torts—Strict Liability of Manufacturers*, 23 LA. L. REV. 810 (1964); Note, *Torts-Products Liability—Strict Liability?* 28 MO. L. REV. 663 (1963).

9. 27 Cal. Rptr. at 700, 377 P.2d at 900.

10. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

the seller incurs liability when the product leaves his hands in a condition not contemplated by the ultimate consumer "which will be unreasonably dangerous to him."[11] The phrase "defective condition unreasonably dangerous" is defined in the comment to mean that the article sold must be dangerous to an extent beyond that which would be contemplated by "the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[12]

Just as *Greenman* and the *Restatement* are the predominant American common law authorities in the products liability field, so must *Weber v. Fidelity & Casualty Insurance Co.*[13] be considered the cornerstone of Louisiana products liability law.[14] In *Weber* the plaintiff's sons had sprayed an arsenic-based cattle dip manufactured by defendant's insured on their cattle, resulting in the death of some of the cattle and mild illness of the boys. The plaintiffs' uncontroverted testimony that the dip was mixed properly with water and that all other instructions were followed was accepted by the court as excluding all other reasonable hypotheses for the cattle deaths *except* that the dip, as manufactured, must have contained too much arsenic.[15] In view of this finding, the supreme court stated that the district

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(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

11. *Id.* comment (g).

12. *Id.* comment (i).

13. 259 La. 599, 250 So. 2d 754 (1971).

14. *See* Phillipe v. Browning Arms Co., 395 So. 2d 310 (La. 1981); Thornhill v. Black, Sivalls, & Bryson, Inc., 394 So. 2d 1189 (La. 1981); Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980); LoBrono v. Gene Ducote Volkswagen, Inc., 391 So. 2d 1360 (La. App. 4th Cir. 1981); Cobb v. Insured Lloyds, 387 So. 2d 13 (La. App. 3d Cir.), *writ denied*, 394 So. 2d 615 (La. 1980); Perkins v. American Mach. & Foundary Co., 385 So. 2d 492 (La. App. 1st Cir.), *writ denied*, 393 So. 2d 727 (La. 1980); Western Cas. & Sur. Co. v. Adams, 381 So. 2d 923 (La. App. 3d Cir. 1980); Hartford Fire Ins. Co. v. Maytag Co., 374 So. 2d 1269 (La. App. 3d Cir. 1979); Harris v. Bardwell, 373 So. 2d 777 (La. App. 2d Cir. 1979); Walter v. Valley, 363 So. 2d 1266 (La. App. 4th Cir. 1978); Ashley v. Nissan Motor Corp. in U.S.A., 321 So. 2d 868 (La. App. 1st Cir.), *writ denied*, 323 So. 2d 478 (La. 1975); Federal Ins. Co. v. Cinnater, 305 So. 2d 720 (La. App. 4th Cir. 1974); Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239 (1975). *See generally* Crawford, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Torts*, 40 LA. L. REV. 564 (1980); Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980).

15. 259 La. at 608-09, 250 So. 2d at 757-58.

and appellate courts had correctly found applicable the following legal principles:

> A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. However, *the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of the defect.*[16]

The supreme court further held that

> [i]f the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them.[17]

These two oft-quoted segments of then Justice Tate's opinion have formed the basis of the Louisiana products liability action.[18]

Subsequent Louisiana decisions have determined that the above quoted statements *define* a *defective* product—one "unreasonably dangerous to normal use"—and impute knowledge of the defect to the manufacturer, relieving the plaintiff of the burden of proving a sub-standard act on the part of the defendant manufacturer. However, the standards for determining "unreasonable danger" remain unclear. Less than one year before *DeBattista*, the supreme court addressed the issues relevant to determining the *Weber* "unreasonable danger" in *Hunt v. City Stores, Inc.*[19] In *Hunt* the court acknowledged that

16. 259 La. at 602-03, 250 So. 2d at 755 (emphasis added).

17. 259 La. at 603, 250 So. 2d at 746.

18. All delictual liability in Louisiana arises from Civil Code articles 2315-2324. Fault in Louisiana products liability cases is treated as delictual, but the Supreme Court has never expressly established articles 2315-2324 as the bases for the products liability action. *See, e.g.*, Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331 (La. 1978); Loescher v. Parr, 324 So. 2d 441 (La. 1975); Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971); Guilyot v. Del-Gulf Supply, Inc., 362 So. 2d 816 (La. App. 4th Cir. 1978); Atchison v. Archer-Daniels-Midland Co., 360 So. 2d 599 (La. App. 4th Cir. 1978); Leonard v. Albany Mach. & Supply Co., 339 So. 2d 458 (La. App. 1st Cir. 1976), *writ denied*, 341 So. 2d 419 (La. 1977); Dixon v. Gutnecht, 339 So. 2d 1285 (La. App. 1st Cir. 1976), *writ denied*, 342 So. 2d 673 (La. 1977); Amco Underwriters of Audubon Ins. Co. v. American Radiator & Standard Corp., 329 So. 2d 501 (La. App. 1st Cir. 1976).

19. 387 So. 2d 585 (La. 1980). The plaintiffs in *Hunt* brought suit against the defendant escalator manufacturer and others to recover for injuries sustained by the plaintiff's minor son when his shoe became caught between the escalator's moving tread and side wall. Though the *Hunt* analysis arose in the context of Civil Code article

"unreasonableness" was traditionally a standard by which to determine negligence, but also called it "fundamental to a finding of strict liability . . . . In both negligence and strict liability cases, the probability and magnitude of the risk are to be balanced against the utility of the thing." The court cited *Weber* and its definition of defect, saying that "[t]he focus is on the product itself and whether it is unreasonably dangerous to normal use,"[20] and held that "[w]hile the [product] was beneficial and convenient to [the defendant department store], the utility of its condition . . . was outweighed by the hazard to [this class of plaintiffs]."[21]

Hunt does not stand alone as recognizing a utility/risk balancing test[22] in determining an unreasonable danger. Louisiana appellate

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2317 concerning the liability of a custodian of a defective thing, it is still relevant to determination of fault in a products liability action, which is delictual in nature. This relevancy is evident in that *Loescher v. Parr*, 324 So. 2d 441 (La. 1975), in which the supreme court articulated the strict liability aspect of article 2317, was cited in the strict liability discussion in *Hunt* as the controlling interpretation of article 2317. In *DeBattista*, the court equated the standards set out in *Loescher* and *Weber* as "similar" rules of strict liability. 403 So. 2d at 30. Logically, then, if Civil Code articles 2315-2324 are the sole bases of delictual fault in Louisiana, the analysis of strict liability in *Hunt* is relevant to a treatment of strict liability in a products liability case.

20. 387 So. 2d at 589.

21. *Id.* at 588.

22. Recognized authorities have discussed this balancing test approach, which involves weighing several factors relating to both the product and the societal ramifications of a given judgment. Professor Wade has advanced a list of factors in his writings including

> 1) the usefulness of the product,
> 2) the likelihood and probable seriousness of injury from the product,
> 3) the availability of a safer substitute,
> 4) the manufacturer's ability to eliminate the danger without seriously impairing the product's usefulness,
> 5) the user's ability to avoid the danger through use of due care,
> 6) the common knowledge and expectations as to the danger the product presents,
> 7) the feasibility, on the part of the manufacturer, of spreading the loss through increased prices.

He contends that the determination of whether a product is unreasonably dangerous necessarily involves the use of a standard similar to that used in negligence, and that the standard must be the product of a weighing of factors. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965). Dean Page Keeton of the University of Texas School of Law writes that a product

> is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it is proved to be at the time of trial* outweighed the benefits of the way the product was so designed and marketed. Under the heading of benefits one would include anything that gives utility of some kind to the product; one would also include the infeasibility and additional cost of making a safer product.

Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973).

courts have applied a balancing test in previous transfusion/hepatitis cases. In *Juneau v. Interstate Blood Bank Inc.*[23] Judge Bertrand methodically considered the many bases the plaintiff presented for the defendants' liability. Regarding the plaintiff's strict liability argument based on *Weber*, the court noted that, "[t]he question must become what is 'unreasonably dangerous.'" It refused to find, as the plaintiff contended, that the fact that the plaintiff had contracted hepatitis made the blood "unreasonably dangerous," but stated that "[r]easonableness must be determined in light of the need for blood transfusions compared to the likelihood of contracting hepatitis from the transfusions."[24]

In *Martin v. Southern Baptist Hospital*[25] the Fourth Circuit Court of Appeal denied the plaintiffs' recovery by finding that the legislature in Louisiana Civil Code article 1764(B)[26]—dealing with implied warranties of merchantability—had already performed its own weighing of factors relevant to determination of liability for blood, and had classified blood as a "medical *service*," exempting it from the *product* warranties, because "public policy . . . recognizes the life-saving need for use of blood, vital in some cases. While the danger of contracting

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See also Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 359 (1974); Note, *Nichols v. Union Underwear Co. and the Meaning of "Unreasonably Dangerous,"* 69 KY. L.J. 419, 430-31 (1980).

23. 333 So. 2d 354 (La. App. 3d Cir.), *writ denied*, 337 So. 2d 220 (La. 1976). The relevant facts of *Juneau* are substantially the same as those of *DeBattista*.

24. *Id.* at 358.

25. 352 So. 2d 351 (La. App. 4th Cir. 1977), *writ denied*, 354 So. 2d 210 (La. 1978). The relevant facts of *Martin* are substantially the same as those of *DeBattista*.

26. LA. CIV. CODE art. 1764 provides, in pertinent part:

> [T]he implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter but shall be considered as medical services.

In *DeBattista*, the supreme court accused the courts of appeal of "disregarding the positive codal provisions under the pretext of pursuing their spirit" in applying Civil Code article 1764 to remove blood from the realm of products liability. 403 So. 2d at 33. Actually, the appellate courts seem to espouse the preferable theory. The legislative amendment of article 1764 classifying blood as a service and removing the actions based on implied warranties of merchantability and fitness was passed in 1968, before *Weber* and strict liability for products were part of Louisiana law. That amendment appears to have been an attempt to negate all causes of action that could arise concerning contaminated blood except the action in negligence. It is not an unreasonable interpretation of legislative intent for the appellate courts to assume that if strict liability had been available in 1968, the same policy reasons which compelled the legislature to remove all actions but negligence also would have led to the elimination of the strict liability action for blood.

hepatitis exists in blood transfusions, medical science . . . [has] not progressed to the point where effective, foolproof tests [have] been perfected to discern the presence of hepatitis."[27] Although the *Martin* decision did not turn on the application or interpretation of strict liability doctrine, it does represent appellate court recognition of utility/risk balancing (in this case by the legislature) in determining the existence of a defect.

It is apparent, therefore, that the state of the law in Louisiana at the time of the *DeBattista* decision was that the jurisprudence had defined a defect in terms of unreasonable danger, and that both the supreme court in *Hunt* and the appellate courts in the leading Louisiana transfusion/hepatitis decisions called for a balancing of the object's utility and its risks to determine "defect" or "unreasonable danger" in strict liability cases.

A cursory reading of the *DeBattista* opinion reveals that it is couched in the terminology of *Weber*. However, its actual effect is to change the Louisiana law of products liability established in that case. In *DeBattista*, the Louisiana Supreme Court to a large extent tracks a 1972 California Supreme Court opinion, *Cronin v. J.B.E. Olson Corp.*,[28] in fashioning a consumer-oriented test for defectiveness. A simultaneous reading of *Cronin* and *DeBattista* reveals similar organization and phraseology, though some important distinctions can be drawn.

The *Cronin* court analyzed the effect that the *Restatement (Second) of Torts* had had upon its decision made nine years earlier in *Greenman* and concluded that the presence of the *Restatement* terminology concerning "unreasonable danger" in California products liability law imposed a greater burden on plaintiff than that intended in *Greenman*, in that use of that language seemed a reversion to negligence as the basis for recovery. In an effort to clarify California law and maintain *Greenman*'s eased burden of proof for plaintiff, the *Cronin* court held that the plaintiff in any California products liability case need prove only defect, and not that the "defect" was "unreasonably dangerous," or that the product fell below the expectations of the "ordinary consumer."[29] The only suggestion the court

27. 352 So. 2d at 354.

28. 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). The *Cronin* case involved a products liability action brought by the driver of an assembled bread truck against the sales agent for the trucks. The driver sustained injuries when an aluminum safety hasp failed in a collision, allowing the bread racks to slide forward into the drivers compartment and strike the driver. Judgment was rendered for the plaintiff in the California Superior Court, and was affirmed by the state supreme court.

29. 104 Cal. Rptr. at 442, 501 P.2d at 1162: "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area

provided for determination of the existence of a defect was reference to the "cluster of useful precedents" mentioned in a footnote to the opinion.[30]

Unlike the California court in *Cronin*, the Louisiana Supreme Court in *DeBattista* elected to retain the requirement of an "unreasonable" risk as a condition to strict liability, stating that it is to be "carefully applied . . . with its true purpose in mind."[31] In order to implement a consumer-oriented approach in Louisiana products liability law, the Louisiana Supreme Court held that the product was "defective, *i.e.*, unreasonably dangerous to normal use. The risks involved in receiving a transfusion of blood in this condition are certainly greater than a reasonable consumer would expect."[32]

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pioneered by this court." The California Supreme Court recognized that use of the words "unreasonably dangerous" may prevent the seller from becoming an insurer of its products, but still rejected that phrase, reasoning that the same "protective end is attained by the necessity of proving that there was a defect in the manufacture or design of the product." 104 Cal. Rptr. at 442, 501 P.2d at 1162.

The *Cronin* court also expressly refused to differentiate between *design* defects and *manufacturing* defects. A *defect in design* may be generally defined as a *defect* (however *that* concept is defined) in a product that is manufactured precisely in accord with its designer's specifications. A *manufacturing defect*, on the other hand, is the result of a miscarriage in the manufacturing process which produces a result unintended by the product's designers. *See generally* Wade, *supra* note 5, and Fischer, *supra* note 22. The *Cronin* court saw such differentiation as a potential "battleground for clever counsel," and decided that "a distinction between manufacture and design defects is not tenable." 104 Cal. Rptr. at 443, 501 P.2d at 1163.

30. 104 Cal. Rptr. at 442 n.16, 501 P.2d at 1162 n.16: "We recognize, of course, the difficulties inherent in giving content to the defectiveness standard. However, as Justice Traynor notes, 'there is now a cluster of useful precedents to supersede the confusing decisions based on indiscriminate invocation of sales and warranty laws.'" At least one commentator, writing in 1973 immediately after the *Cronin* decision was rendered, correctly predicted that despite the "cluster of useful precedents," the *Cronin* decision was merely a rejection of the "unreasonably dangerous" standard which substituted "nothing in the place of that notion to give content to the term defective." Keeton, *supra* note 22, at 33. Keeton also correctly predicted the resultant confusion that *Cronin* would engender:

> It is submitted, contrary to what is asserted by the Supreme Court of California, that lawyers in trying to settle cases, and trial judges, juries and appellate courts in fulfilling their respective roles in the litigation process will experience great difficulty until some content can be given to the concept *defective* in those situations where it is alleged that the product as designed and marketed was defective.

Id. at 32.

31. 403 So. 2d. at 31. The only further explanation given by the opinion as to what this "true purpose" might be is the statement that "the words 'unreasonably dangerous' may serve the beneficial purpose of preventing the manufacturer from being treated as the insurer of its products." *Id.* However, this language merely is quoted from the *Cronin* opinion, 104 Cal. Rptr. at 442, 501 P.2d at 1162; no insight is provided as to how the phrase may be used to accomplish the stated end.

32. 403 So. 2d at 31.

Although *DeBattista* does not attempt to strip the word "defect" of all jurisprudential gloss, as the *Cronin* court did, the Louisiana Supreme Court does tread where the California court did not dare. After acknowledging Civil Code article 2315 and *Weber* as the bases for products liability fault in Louisiana,[33] the opinion discounts the defendant's argument that the utility of the instant product and the burden of preventing its alleged defect greatly outweigh the risk of harm it poses. The court specifically dismisses this balancing argument as a "misconstru[ction]" of the unreasonably dangerous limitation, stating that " '[u]nreasonably dangerous' means simply that the article which injured the plaintiff was dangerous to an extent beyond that which would be contemplated by an ordinary consumer."[34] The court *expressly*[35] refused to consider the balancing argument as a defense under the *Weber* "defect, *i.e.*, unreasonably dangerous" standard, and it *impliedly* rejected utility/risk balancing as a defense under the *DeBattista* "reasonable consumer expectation" standard by not recognizing the argument and disposing of it in light of the new standard. *A fortiori*, if a balancing argument is not available as a defense, it should also be unavailable to carry plaintiff's burden under the new "reasonable consumer expectation" test of defectiveness. To construe the court's words otherwise would have the absurd result that the plaintiff would be able to carry successfully his preponderance of the evidence burden with only the smallest showing that the product's risks outweigh its utility, because the defendant would be precluded (via *DeBattista*) from asserting *any* balancing argument. Therefore, one justifiably could read the *DeBattista* decision to hold that balancing the utility of the product and the risk it presents has no place in a Louisiana products liability action.

The court's refusal to entertain defendant's balancing argument may leave both the plaintiff and the defendant unable to litigate the issue of defect (regardless of the standard) on the basis of the product's values weighed against its potential harm. Such a reading of *DeBattista* may cause problems for Louisiana courts in determining the existence of product defects. Since the *DeBattista* opinion is so

33. 403 So. 2d at 29-30. This is the first instance of the supreme court tying together article 2315 and products liability fault. See note 18, *supra*.

34. 403 So. 2d at 30. This is the language of the RESTATEMENT (SECOND) OF TORTS. See discussion in text at notes 10-12, *supra*.

The *DeBattista* court stated its consumer-oriented standard in terms of both the "ordinary" consumer's expectations and those of the "reasonable" consumer. Presumably, this distinction is not a significant one; the court surely would concede that the ordinary consumer and the reasonable consumer are practically one and the same.

35. *Id.* The express refusal consisted of labeling the defendant's arguments as a misconstruction of "unreasonably dangerous."

similar to that of *Cronin*, examination of the California post-*Cronin* products liability decisions should provide an indication of the types of problems Louisiana courts can expect to face.

The decisions of the California appellate courts after *Cronin* demonstrate the usefulness of the balancing test approach in determining design defects in products liability cases. The *Cronin* court had rejected "unreasonably dangerous" because of its disapproval of that phrase's connotations of the negligence balancing test,[36] but the subsequent California decisions evaded the spirit of the *Cronin* holding and continued to apply balancing factors when determining the existence of a defect.

In *Self v. General Motors Corp.*,[37] the California appellate court simply renamed the former "unreasonably dangerous" concept, stating that "while defective design is an amorphous and elusive concept . . . its contours certainly include the notion of *excessive preventable danger*."[38] The court went on to acquiesce in the jury's consideration of traditional balancing factors in determining defectiveness:

> When an automobile's fuel tank has been located in a position relatively more hazardous than [other possible positions], when the added hazard of its location has been recognized by the industry, when the danger is well-known to the designers, and when the tank could have been readily relocated in a safer position, a jury could conclude that the location of the fuel tank made the design of the automobile defective.[39]

In *Self*, the jury was allowed to weigh those factors relating to the reasonableness of the existing design to determine if it entailed "excessive preventable danger." This approach is merely the court's way of retaining the "unreasonably dangerous" balancing test (*contra Cronin*) without retaining the words "unreasonably dangerous."

The California appellate court was more direct in its disregard for the *Cronin* pronouncements in *Buccery v. General Motors Corp.*[40]

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36. 104 Cal. Rptr. at 441-42, 501 P.2d at 1161-62: "The result of the [unreasonably dangerous] limitation . . . has not been merely to prevent the seller from becoming an insurer of his products . . . . Rather, it has burdened the injured plaintiff with proof of an element which rings of negligence."

37. 42 Cal. App. 3d 1, 116 Cal. Rptr. 575 (Dist. Ct. App. 1974). In *Self*, the plaintiff's car was struck by another, causing the plaintiff's gas tank to explode. He alleged defect in design in his suit against the manufacturer, claiming that the tank should have been located inside of protective crossbars in the car's frame, instead of being near a rear fender, protected only by a few sheets of metal.

38. 42 Cal. App. 3d at 6, 116 Cal. Rptr. at 578 (emphasis added).

39. 42 Cal. App. 3d at 6, 116 Cal. Rptr. at 578.

40. 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (Dist. Ct. App. 1976). The plaintiff was injured when his truck was struck from behind and his head snapped back, strik-

In that case, the trial court had improperly granted the defendant's motion for non-suit on other grounds. The appellate court reversed and remanded, holding that the plaintiff had introduced sufficient evidence of defect[41] and stated that "[s]ince the decision of our Supreme Court in *Cronin* . . . there has been considerable uncertainty as to the definition of a defective product."[42] The court quoted extensively from the *Self* opinion and cited other decisions dealing with design defects, concluding that

> [t]he foregoing authorities give us no comprehensive definition of a defective product or defective design. What they do teach, however, is that any product so designed that it causes injury when used or misused in a foreseeable fashion is defective if the design feature which caused the injury created a danger which was readily preventable through the employment of existing technology at a cost consonant with the economical use of the product.[43]

Both *Self* and *Buccery* are representative of the attitude adopted by California appellate courts after *Cronin*.[44] At least in the area of

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ing the window of the cab. He alleged that the absence of head restraints constituted a design defect.

41. The evidence referred to consisted of expert testimony to the effect that head restraints were an accepted safety device in the industry, that installation of head restraints presented no technical problems, and that the resulting increase in the cost of the car would be negligible. 60 Cal. App. 3d at 537, 132 Cal. Rptr. at 607.

42. 60 Cal. App. 3d at 543-44, 132 Cal. Rptr. at 611.

43. 60 Cal. App. 3d at 547, 132 Cal. Rptr. at 614.

44. *See also* Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745 (Dist. Ct. App. 1976). In that case, the plaintiff alleged that his injuries were aggravated by the defective design of the headlight molding of an automobile which struck him. Judgment was rendered for the defendant manufacturer and the plaintiff appealed, challenging the action of the trial court in defining "defect" in its jury instructions. In essence, the definition stated that a defect in design was a design that caused injury, given the finding of the existence of an alternative feasible design that would not have caused the injury. 55 Cal. App. 3d at 715, 127 Cal. Rptr. at 748. The appellate court upheld the trial court's judgment for defendant (and, thus, the trial court's definition), citing *Self*, and held that

> the reasonableness of an alternative design—whether the design can actually be produced, the materials for production are available, the costs are not prohibitive, etc.—is a factor to be considered in determining whether the design which was actually used can be characterized as defective. . . . An injured plaintiff has always had the burden to prove the existence of the defect. The reasonableness of alternative designs, where a design defect is claimed, is part of that burden.

55 Cal. App. 3d at 716, 127 Cal. Rptr. at 749. In *Hyman v. Gordon*, 35 Cal. App. 769, 111 Cal. Rptr. 262 (Dist. Ct. App. 1973), the plaintiff successfully sued a homebuilder for his defective design of a garage. The plaintiff's injury occurred when he was burned by overturned gasoline which was ignited by a defectively placed water heater. In overturning the lower court's non-suit of the plaintiff, the appellate court stated that

> [t]he determination of whether the [alleged defect] constituted a defective design,

design defects, the courts refused to accept the ambiguity of the *Cronin* standard, and chose to rely upon a weighing of the utility of the product in its allegedly "defective" condition against the magnitude of the risk if presented to consumers. As the cases demonstrate, this approach was not mere mutiny on behalf of the intermediate tribunal, but a well-reasoned adherence to the accepted method of determining a defect in light of various policy factors.

The post-*Cronin* undercurrent of revolt in California products liability culminated with the California Supreme Court once again taking up the issue of "defect" in *Barker v. Lull Engineering Co., Inc.*[45] The court purported to explain *Cronin*, yet, being six years older and many appellate decisions wiser, actually revised the standard previously taken in that case. In short, it was forced to recognize the confusion that it had caused by leaving defect undefined, especially in design defect cases.

The supreme court pinpointed the weakness of *Cronin* when it observed that resort to the numerous California precedents revealed a great variety of "injury producing deficiencies" (*i.e.*, defects).[46] Though, in *Cronin*, it had recommended that "the problem in defining defect might be alleviated by reference to the 'cluster of useful precedents,' "[47] the court realized that appellate decisions since *Cronin* had "wrestled" with the problem of defect, particularly in the context of design defects. It cited *Self, Buccery*,[48] and other decisions as examples, and admitted that "the concept of defect raises considerably more difficulties in the design defect context than it does in the manufacturing or production defect context."[49] To remedy the situation, the *Barker* court retreated from *Cronin's* homogeneous treatment of all defects, and bifurcated the standard in California. *Barker* held that the *Cronin* standard of simple "defect" was still intact as plaintiff's burden in manufacturing defect cases, but declared that in design defect cases it would be proper for the court to consider either the ordinary consumer's expectations *or* "that on balance the benefits of the challenged design outweigh the risk of danger in such design."[50]

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and the foreseeability of harm resulting therefrom, should have been left to the jury. It was for the jury to balance the likelihood of harm and the gravity of the harm as opposed to the burden of precautions which would effectively have avoided it.

35 Cal. App. at 773, 111 Cal. Rptr. at 265.

45. 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

46. 143 Cal. Rptr. 235, 573 P.2d at 453.

47. *Id.*

48. *Id.* The court also cited *Hyman* and *Baker*. See note 43, *supra*, and accompanying text.

49. 143 Cal. Rptr. at 235-36, 573 P.2d at 453-54.

50. 143 Cal. Rptr. at 234, 573 P.2d at 452. The court expressly yielded to the

The solution in *Barker* tends to suggest two steps toward clarifying products liability law which were not taken by the Louisiana Supreme Court in *DeBattista*. The first step is to recognize that not all products may be treated alike in determining what condition of the product constitutes a defect. The range of possible products, possible defects, and important social policy considerations which need be heeded are simply too complex to allow a single, all-purpose, comprehensive definition of defect.[51] The second step is to realize that a balancing test approach is vital in determining *design* defects. It is submitted that the major problem with the *DeBattista* decision is that it does not draw these distinctions.

In *DeBattista*, the court evidently is issuing a warning to suppliers and processors of blood that they are to be ultimately responsible for the harm done to their patients who contract hepatitis. Its decision is no doubt motivated by weighty and troublesome considerations of social policy regarding blood transfusions, upon which this note does not express an opinion, other than to submit that the result, and the holding of *DeBattista*, are (arguably)[52] acceptable *in a transfusion/hepatitis case*. However, by not limiting the pronouncement of *DeBattista* to cases involving blood transfusions, the court has allowed parties to present arguments using *DeBattista* as precedent in products liability cases involving "shampoos, deodorants, candy bars, toasters, automobiles, oil changes and other everyday commodities. . . ."[53] The social policy considerations which served as a source of

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appellate court's use of a utility/risk balancing test, stating that

> a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of 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.

143 Cal. Rptr. at 237, 573 P.2d at 455. It should be noted that the holding of the *Barker* court went even further and shifted the burden of proof from the plaintiff to the defendant. 143 Cal. Rptr. at 237, 573 P.2d at 455. The plaintiff's showing of proximate cause between his injury and the product's design will now shift to the defendant the burden of proving that the design was *not* defective "in light of the relevant factors." 143 Cal. Rptr. at 237, 573 P.2d at 455. Analysis of this facet of the *Barker* opinion is beyond the scope of this paper.

51. *See* Fisher, *supra* note 22, at 358:

> [D]evising one test of defectiveness to be applied uniformly to all products . . . makes strict liability a very crude instrument of social policy. . . . [T]he policies underlying strict liability can be frustrated in cases where countervailing considerations do not warrant its rejection. Likewise, strict liability can be imposed in unwarranted situations despite strong countervailing policies.

52. The Louisiana Legislature has acted to remove strict liability for blood transfusions. *See* 1981 La. Acts, No. 331, *adding* LA. R.S. 9:2797; 1981 La. Acts, No. 611, *adding* LA. CIV. CODE art. 2322.1.

53. 403 So. 2d at 34 (Blanche, J., dissenting).

motivation for the *DeBattista* decision are not present for these other products, and the use of a supreme court decision pregnant with these considerations is inappropriate in cases involving more mundane products. It is submitted, therefore, that the law fashioned in *DeBattista* should be restricted to blood transfusion cases, or possibly cases involving products with policy considerations similar to those for blood, such as drugs, vaccines, etc.

The second requirement for a healthy products liability law scheme suggested by the California Supreme Court in *Barker* is acknowledgment of the necessity of a balancing test approach in determining *design* defects. As it now stands, the *DeBattista* court's seemingly wholesale preclusion of the balancing approach to determining "unreasonableness" would preclude its use in design defect cases. A comprehensive statement concerning design defects and the tests used to determine such defects would help clarify products liability law in Louisiana. Drawing the distinction made in *Barker* also would allow Louisiana courts to restrict the application of *DeBattista* to appropriate factual situations, and retain the balancing approach of *Hunt* to determine design defects.

If any lesson is to be drawn from the California *Cronin/Barker* experience, it is that consideration of a product's utility, the magnitude of the risk it presents, and the burden of preventing that risk without impairing its utility (when possible) are all valuable factors in determining the existence of a defective product design. The Louisiana Supreme Court already has said as much, stating in *Langlois v. Allied Chemical Corp.*:

> The activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations.[54]

Taking the suggested steps could clarify Louisiana products liability law, and resolve the inconsistency of the *Hunt* and *DeBattista* opinions while preserving their integrity.

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54. 258 La. at 1084, 249 So. 2d at 140.