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M. Stuart Madden
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PRODUCTS LIABILITY, PRODUCTS FOR USE BY ADULTS, AND INJURED CHILDREN: BACK TO THE FUTURE

M. STUART MADDEN*

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* Charles A. Frueauff Research Professor, Pace University School of Law. Most recently, Professor Madden is co-author, with Professor Gerry Boston, of ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS AND PROBLEMS. The author expresses his appreciation to James Wittstein, Matthew Ross, and Mrs. Delores Vohnout for their assistance.

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I. INTRODUCTION

An issue that has vexed judicial and scholarly authors of tort law is the significance, if any, of assigning the victim's, or protagonist's, status as a child. Several rules in tort have manifest solicitude towards the victim's infant status, together with the presumptive childhood limitations upon dexterity and judgment.

One such tort rule, applicable in a variety of instances to a land owner's or occupier's duties when the presence of children is predictable, recognizes that "[w]here a duty of care is owed, the likelihood of the presence of children has great bearing on the decision whether or not conduct is reasonable."¹ Similarly, in matters of attractive nuisance, a heightened duty has been imposed upon a land owner or possessor who

knows, or should know, that young children habitually frequent the vicinity of a . . . dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children.²

One court's expression of the amplified duty provides that "there is a duty upon the owner . . . to remedy the condition or otherwise protect the children from injury" Elsewhere in tort doctrine, the *Restatement (Second) of Torts* recognizes, and makes special provisions for, the immaturity of children. Specifically, the *Restatement* provides that "[i]f the actor

1. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.5, at 159 (2d ed. 1986) (citing *Terranella v. Union Bldg. & Constr. Co.*, 70 A.2d 753, 756 (N.J. 1950) ("Where, as here, the obligation exists primarily in relation to groups of young children, that in itself is one of the concomitant circumstances to be weighed.")).

2. *Kahn v. James Burton Co.*, 126 N.E.2d 836, 842 (Ill. 1955).

3. *Id.* *Kahn* is discussed in *Dallas v. Granite City Steel Co.*, 211 N.E.2d 907 (Ill. App. Ct. 1965), in which the court states "the general rule that infants have no greater right than adults to go upon the land of others, and that their minority, of itself, imposes no burden on the occupier of land to expect them, or to prepare for their safety." 211 N.E.2d at 911.

See also RESTATEMENT (SECOND) OF TORTS § 339 (1965) (setting forth a rule for landowners' responsibilities for what is commonly called an attractive nuisance).

is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."⁴ A harmonious latitude is found in weighing a child's *contributory* negligence. The general rule for a child between the ages of seven and fourteen is that, though the child "is required to exercise due care for his own safety under the circumstances[,] . . . the care required is to be measured 'by that ordinarily exercised under similar circumstances by children of the same age, knowledge, judgment, and experience.'"⁵

Lamentably, notwithstanding these and other tort rules of either general or particular applicability, in other areas of tort law, including many products liability decisions, consideration of a child's inherent limitations in judgment and cognition is too often merely an afterthought. For example, in negligence theory, an actor's duty is defined as extending to those whom an adult of reasonable vigilance would perceive would be injured should the actor act without due care.⁶ In matters of primary negligence, in which the objective reasonable person standard is used,⁷ a child utilizing an "adult" mechanism is held, without regard to his or her age, judgment, or dexterity, to a standard of adult prudence.⁸

4. RESTATEMENT (SECOND) OF TORTS § 283A (1965).

The *First Restatement of Torts* applied "a lower standard of care in cases involving the primary negligence of young children." *McHale v. Watson*, 115 C.L.R. 199, 207 (Austl. 1966). RESTATEMENT (SECOND) OF TORTS § 283 (1965):

(a) Children who are so young as to be manifestly incapable of exercising any of the qualities necessary to the perception of risk. This group would comprise babies and children of very tender years and instead of formulating a standard of care for them it suffices to say that they are incapable of negligence.

(b) Infants who, although they have not yet attained majority, are capable as adults of foreseeing the probable consequences of their actions. In view of the capabilities of this class the standard of care required of them is the same as that required of adults.

(c) Children who come between the extremes indicated in the above categories and whose capacities are infinitely various. The standard of care required of these children is that which is reasonable to expect of children of like age, intelligence and experience.

5. *Smith v. AMLI Realty Co.*, 614 N.E.2d 618, 621 (Ind. Ct. App. 1993) (reversing summary judgment for the defendant in an action involving a nine-year-old's injuries when experimenting with a "Universal" exercise machine) (quoting *Baller v. Corle*, 490 N.E.2d 382 (Ind. Ct. App. 1986)).

6. *E.g.*, *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

7. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

8. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 181 (5th ed. 1984), in which the authors reference the "generally accepted" rule that whenever a child, whether as plaintiff or as defendant, engages in an activity which is normally one for adults only, such as driving an automobile or flying an airplane, the public interest and the public safety require that any consequences due to the child's own incapacity shall fall upon him rather than the innocent victim, and that the child must be held to the adult standard, without any allowance for his age.

The intent of this short Article is to assess the decisional law concerning children injured in the course of using or misusing products intended for use by adults and the recent American Law Institute initiatives to craft a *Restatement (Third) of Torts: Products Liability*, insofar as that work affects such claims by children.⁹ No substantial attention will be devoted to childhood injuries involving toys,¹⁰ or to injuries caused by exposure to or contact with, as distinct from the use of, such products.¹¹

Strict products liability under *Restatement (Second) of Torts* section 402A has had a thirty-year run in which it has influenced vast and progressive change in products liability jurisprudence. It is anomalous, therefore, that section 402A of the *Restatement (Second) of Torts* has so poorly served its corrective justice¹² and instrumentalist¹³ objectives in the above-described categories of injuries to

Id. (footnote omitted).

9. Some discussion is devoted to the many decisions involving swimming pools, both of the sunken and the above-ground variety. *See* discussion *infra* at Part III(C)-(D). Obviously, pools are not sold or purchased primarily for use by children. Nonetheless, as will be seen, the swimming pool cases contain reasoning similar to that contained in the clear infant use of adult product cases, i.e., discussion of claims of latent defects and defenses that the risks were open and obvious, and not, in any event, greater than would be expected by a reasonable consumer. As the doctrines developed in the pool cases are part of the scope of this Article, they are discussed.

10. *See, e.g.,* First Nat'l Bank v. Regent Sports Corp., 619 F. Supp. 820 (N.D. Ill. 1985) (regarding child's injury by lawn dart), *aff'd in part, rev'd in part*, 803 F.2d 1431 (7th Cir. 1986); Landrine v. Mego Corp., 464 N.Y.S.2d 516 (N.Y. App. Div. 1983) (discussing a suit brought on behalf of an infant who died after ingesting a balloon affixed to a doll that simulated the blowing of bubble gum bubbles).

11. *E.g.,* Lease v. International Harvester Co., 529 N.E.2d 57 (Ill. App. Ct. 1988) (affirming directed verdict for manufacturer in action brought on behalf of two-and-one-half-year-old child injured by a power riding lawnmower on which the alleged defect was lack of blade shutoff that would engage when mower was in reverse).

This Article will not explore the question of whether successful prosecution of claims brought on behalf of children will simply invite third-party complaints against the parents for negligent supervision. Where colorably supported by the facts of an individual injury, the parent third-party defendants may have a defense of parental immunity. *See, e.g.,* Brunner v. Hutchinson Div., Lear-Siegler, Inc., 770 F. Supp. 517 (D.S.D. 1991) (involving a grain auger manufacturer's indemnification claim against the parents of a two-and-one-half-year-old child whose right hand was amputated when it came into contact with the moving auger). Granting the parent's motion for summary judgment on the third-party complaint, the federal trial court explained:

[T]his Court prefers to adopt the more modern approach of the *Restatement (Second) of Torts* § 895(g) (1977), which simply recognizes that in limited circumstances a parent is privileged from liability with respect to certain causes of action. Among those causes of action for which a parent is privileged is a claim for negligent supervision
Brunner, 770 F. Supp. at 518.

12. *See generally* JULES L. COLEMAN, RISKS AND WRONGS 303-05, 432-35 (1992) [hereinafter COLEMAN] (introducing the concept of corrective justice).

13. *See generally id.*, at 203-04; *cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS

children. Despite the sincere hopes of its authors and the American Law Institute that the *Restatement (Second) of Torts* section 402A would put the restorative burden of placing an unreasonably dangerous product in commerce where it should be—at the door of the manufacturer—section 402A has failed to protect, perhaps, its most vulnerable constituency, the inquisitive and often incautious child.

Hope, however, lies both before and behind today's litigant of claims involving childhood injury arising from use of or exposure to products intended for adults. The venerable products liability count of negligent design permits, and the anticipated products liability *Restatement* explicitly provides for, a risk-utility regimen that measures the individual and societal benefits of a product, the product's capacity for foreseeable harm, and the burden of producing a product of like utility in a less hazardous form.¹⁴ These risk-utility analyses avoid the quagmire of evaluation under the "consumer expectations" test of *Restatement (Second) of Torts* section 402A.¹⁵ The risk-utility tests available under a count in negligent design and the proposed *Restatement* also serve to lessen the impact of the defense that there is no duty to design against product risks that are "patent" or "open and obvious" from the product's appearance.¹⁶ The discussion to follow will illustrate that in jurisdictions permitting litigation of a negligent design claim in conjunction with a claim in strict products liability for defective design, a child claimant's count alleging negligence in design may in fact prove less precarious than the parallel count in section 402A.¹⁷

II. PRODUCTS LIABILITY UNDER NEGLIGENCE AND RESTATEMENT (SECOND) OF TORTS SECTION 402A

A. Generally

For children using adult devices, the principal arguments employed for avoiding liability have been that (1) the product was not "dangerous to an extent

LIABILITY § 2, cmt. a, at 11 (Council Draft No. 1A, 1994) [hereinafter Council Draft 1A] ("[T]ort law serves the instrumental function of creating safety initiatives.").

14. E.g., Council Draft 1A, *supra* note 13, § 2 cmt. d, at 28. This comment illustrates the considerations properly involved in determining "whether an alternative design is reasonable and whether its omission renders a product not reasonably safe" as including "without limitation, the magnitude of foreseeable risks of harm, the nature and strength of consumer expectations, the effects on costs of production, the effects of the alternative design on product function, the relative advantages and disadvantages of proposed safety features, product longevity, maintenance and repair, esthetics, and marketability."

Id. Cf. *Griggs v. BIC Corp.*, 981 F.2d 1429, 1435-36 (3d Cir. 1992) (interpreting risk-utility analysis under plaintiff's negligent design count).

15. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i (1965).

16. Council Draft 1A, *supra* note 13, Reporters' Notes to § 2 cmt. c, at 149-51.

17. Moreover, plaintiffs' counsel may anticipate the future benefits expected to be conferred by the *Restatement (Third) of Torts: Products Liability* and its expected risk-utility standard for design defect. See Council Draft 1A, *supra* note 13, § 2(b), at 9.

beyond that which would be contemplated by the ordinary [person];"¹⁸ (2) the risks posed by the product were open and obvious;¹⁹ (3) the child was not a foreseeable user of the product; and (4) the child's behavior constituted an unforeseeable misuse of the product, thus breaking the proximate causal link between design and injury.²⁰

Concededly, some childhood injuries require the conclusion that the cost and other burdens of the injury should remain with the injured child and not shift to the manufacturer, seller, or other third party.²¹ For example, childhood misuse may break the causal connection between a manufacturer's design or warning and the injury when the appearance or promotion of the product does not by itself attract the risky behavior.²² A few commonplace products are unlikely to trigger liability in the absence of some bizarre or malevolent concatenation of events. As one court stated:

Toothpicks like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law

18. *Lamkin v. Towner*, 563 N.E.2d 449, 458 (Ill. 1990) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)). *Lamkin* is one of a multitude of suits that have been brought against manufacturers of screen windows and like window coverings that have failed to prevent childhood falls. See, e.g., *Drager v. Aluminum Indus.*, 495 N.W.2d 879 (Minn. Ct. App. 1993).

19. E.g., *First Nat'l Bank v. Regent Sports Corp.*, 803 F.2d 1431 (7th Cir.) (holding the dangers of the lawn dart to be inherently obvious under Illinois law), *aff'd in part, rev'd in part*, 878 F.2d 384 (1986).

20. E.g., *Drager*, 495 N.W.2d 879. Affirming summary judgment for a window screen manufacturer following severe injuries to a child who fell from a window, the court stated: "The window screen manufacturer had no duty to design a screen which would prevent appellant's fall. We also conclude that the relationship between appellant's injury and [the] manufacturer's failure to warn is too remote to impose liability as a matter of law." *Id.* at 885-86.

21. For example, in *Kempes v. Dunlop Tire & Rubber Corp.*, 548 N.E.2d 644 (Ill. App. Ct. 1989), eight-year-old Matthew Kempes cut open a golf ball manufactured by defendant. After passing the tightly-wrapped rubber bands, plaintiff pierced the center of the ball, loosing a squirt that injured his eye severely. The center of the gold ball at the time was made of a paste that contained "bentonite clay, water, barium sulfate, zinc, glycerin and methyl salicylate." *Id.* at 645.

22. See *Brawner v. Liberty Indus.*, 573 S.W.2d 376 (Mo. Ct. App. 1978). *Brawner* involved injuries sustained by a seven-year-old child who, with a friend the same age, removed the lid from a gasoline storage container, which then ignited. The court stated: "We have found no case, nor have we been cited to one, where a product made for adult use is deemed defective and unreasonably dangerous solely because it has not been made child-proof." *Id.* at 378.

in such cases is not to shift the loss from the careless user to a blameless manufacturer or supplier.²³

This Article takes the position that such manufacturer immunity from liability, limited by logic and cultural necessity to a circumscribed set of common products, has been unfairly and unnecessarily extended far beyond its original precincts, barring liability for a wide variety of product-caused harms.

*B. The Manufacturer's Design and Warning Obligation
Regarding Foreseeable Product Misuse*

1. Generally

Generally, the product manufacturer's informational obligation (the duty to provide adequate warnings and instructions), and its design obligation, extend beyond creating or adopting designs for, and providing cautionary information concerning, the pristine, intended use of the product. The design and informational duties require that the manufacturer contemplate product uses that, while not intended, are foreseeable.²⁴

2. Design Duty

For example, in *McCormack v. Hanksraft Co.*,²⁵ a case involving severe injuries to a child who tipped over a vaporizer and was scalded with near-boiling water, the Minnesota Supreme Court, while recognizing that "the primary, intended use of the vaporizer was for the treatment of children's colds and croup,"²⁶ held nevertheless that the "defendant failed to exercise reasonable care . . . to guard against the reasonably foreseeable danger that a child would tip the unit over when it was in use and be seriously burned by coming in contact with the scalding water"²⁷

23. *Killeen v. Harmon Grain Prods., Inc.*, 413 N.E.2d 767, 770 (Mass. App. Ct. 1980) (citations omitted), *quoted in* *Griggs v. BIC Corp.*, 786 F. Supp. 1203, 1204-05 (M.D. Pa. 1992), *aff'd in part, rev'd in part*, 981 F.2d 1429 (3d Cir. 1992).

24. See 1 M. STUART MADDEN, PRODUCTS LIABILITY § 10.6 (2d ed. 1988 & Supp. 1994) [hereinafter MADDEN]; see also *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352 (Minn. Ct. App. 1991), where the court states:

[A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.

Id. at 356 (quoting *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 624 (Minn. 1984)).

25. 154 N.W.2d 488 (Minn. 1967).

26. *Id.* at 497.

27. *Id.* *Hanksraft* is employed as an illustration for the proposition by the authors

The reader appreciating the logic of *Hankscraft* might suppose it would be fairly and widely applicable to various other settings in which a child's failure to understand fully the risks posed by a product inadvertently triggers a hazardous incident. However, the opposite conclusion is too often reached. For example, and in counterpoint to the reasoning of *Hankscraft*, numerous decisions exculpate manufacturers of poorly-designed products on the grounds that the manufacturer of a product for adult use has no duty to make it "child-proof."²⁸ Consider *Adams v. Perry Furniture Co.*,²⁹ a suit brought by the personal representatives of the estates of minor children who perished in a mattress fire started by disposable butane lighters manufactured by the BIC Corporation. Affirming in part the lower court's grant of summary judgment for the lighter manufacturer, the Michigan Court of Appeals concluded:

The parties do not dispute that it is foreseeable that children will handle lighters and might injure themselves in doing so. However, we are not persuaded that the risk of this danger imposes a duty upon the manufacturer to make it child-resistant in light of the fact that the product is intended to be sold to adults.³⁰

3. Duty to Warn

a. Causation and the Heeding Presumption

How is the infant plaintiff to prove a causal connection between the absence of a warning, or an inadequate warning, when frequently the child cannot yet read? In addition, even when the child can read, the behavioral premise of most claims of inadequate warnings regarding childhood use is that a child's reasoning and judgment is insufficiently developed to permit a mature, and, in hindsight, reasonably safe decision to encounter the risk. The answer to this question is that substantial decisional support exists for the proposition that it is sufficient that the parent or guardian offer evidence that had an adequate warning been given to the responsible adult, it would

of the *Restatement (Third) of Torts: Products Liability*. See Council Draft 1A, *supra* note 13, § 2 cmt. d, illus. 5, at 30-32.

28. *E.g.*, *Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1043-44 (W.D. Okla. 1989) (crock-pot); *Rhodes v. R.G. Indus.* 325 S.E.2d 465, 466 (Ga. Ct. App. 1984) (handgun); *Brawner v. Liberty Indus.*, 573 S.W.2d 376, 377-78 (Mo. Ct. App. 1978) (gasoline container); see also *Curtis v. Universal Match Co.*, 778 F. Supp. 1421, 1427 (E.D. Tenn. 1991) (collecting above authority), *aff'd*, 966 F.2d 1451 (6th Cir. 1992).

29. 497 N.W.2d 514 (Mich. Ct. App. 1993), *appeal denied*, 519 N.W.2d 860 (Mich. 1994).

30. *Id.* at 520. The symbiosis between (1) the intended user or intended purchaser rationale for denying childhood injury claims, and (2) the interpretation of the consumer expectations test of the comments to § 402A, which evaluate only the expectations of adults as to adult (and not childhood) misadventures, is discussed *infra* in Part IV(A)-(B).

have been read and heeded, and measures would have been taken to insulate the child from the hazard.³¹

This "heeding presumption" was explained by the Fifth Circuit in *Reyes v. Wyeth Laboratories*.³² The court stated, "Where a consumer, whose injury the manufacturer should have reasonably foreseen, is injured by a product sold without a required warning, a rebuttable presumption will arise that the consumer would have read any warning provided by the manufacturer, and acted so as to minimize the risks."³³ The presumption is not confined in its applicability to child injury contexts, and has been found applicable to products liability cases involving a myriad of products, ranging from asbestos³⁴ to swimming pool trampolines.³⁵

Illustrative of the application of the heeding presumption in the context of a child's recreational injury is *Nissen Trampoline Co. v. Terre Haute First National Bank*,³⁶ which involved a circular trampoline, thirty-six inches in diameter, marketed for use as a swimming pool accessory.³⁷ The thirteen-year-old plaintiff suffered a leg injury, ultimately requiring amputation, when his foot slipped through the cables attaching the jumping platform to the trampoline frame, causing him to fall and become suspended from the frame.³⁸ Evidence at trial showed that prior to marketing the product, Nissen had conducted tests demonstrating the potential for mishaps of the type that befell plaintiff.³⁹ The Indiana appellate court found that Nissen's failure to provide a warning about a known risk was sufficient to

31. *E.g.*, *Emery v. Federated Foods, Inc.*, 863 P.2d 426 (Mont. 1993). In *Emery*, which involved a two-and-one-half-year-old girl's injury from choking upon a marshmallow, the Montana Supreme Court noted approvingly the mother's affidavit, in which she stated "if I had been warned of the risk . . . , I would not have purchased them at all. . . . I usually read labels on food products prior to buying them. I always take note of warnings on labels about risks to children." *Id.* at 432. "At a minimum," the court concluded, "this evidence raises a genuine issue of material fact regarding causation." *Id.*

32. 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

33. *Id.* at 128, *cited with approval in* *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1381-82 (Okla. 1974).

34. *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993) ("[U]se of the heeding presumption provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings.").

35. *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826 (Ind. App. 1975) (using the heeding presumption "would . . . discourage those manufacturers who would rather risk liability than provide a warning which would impair the marketability of the product."), *superseded on other grounds*, 358 N.E.2d 974 (Ind. 1976).

36. *Id.*

37. The advertisements read, in part, that the Aqua Diver was "twice as much fun as an old-fashioned diving board at half the cost." *Id.* at 821.

38. *Id.*

39. *Id.* at 822.

support a finding of a defective condition.⁴⁰ The court then adopted the "heeding" presumption, stating that

the law should supply the presumption that an adequate warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation. We find such an approach to be meritorious, workable, and desirable.

Placing the burden of rebutting the presumption of causation on the manufacturer in failure to warn cases is not inconsistent with the policies behind strict liability. It would encourage manufacturers to provide safe products and to warn of the known dangers in the use of the product which might cause injury. Such a presumption would also discourage those manufacturers who would rather risk liability than provide a warning which would impair the marketability of the product.⁴¹

The key to the operation of the duty to warn and the invocation of its concomitant heeding presumption is that an adult product with which children may have contact must contain warnings and instructions advising adults on the special risks to children that the product may create. A separate obligation to provide cautionary information concerning childhood risks should obtain even when, as in the case of baby oil,⁴² the product poses no measurable risks to adults.

b. The "Open and Obvious" Rule: Simple Tools

The durable tort rule that the manufacturer need not provide warnings or instructions regarding product risks that are open and obvious was presented plainly by the Michigan Supreme Court in *Glittenberg v. Doughboy Recreational Industries*.⁴³ The court stated: "The manufacturer of a simple product has no duty to warn of the product's potentially dangerous conditions or characteristics that are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence."⁴⁴ Throughout the nation, decisions

40. *Id.* at 825.

41. *Id.* at 826-27 (footnotes omitted).

42. *E.g.*, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1343 (Wash. 1991) (holding manufacturer responsible for child's cardiac arrest and brain damage due to aspiration of manufacturer's popular baby oil).

43. 491 N.W.2d 208, 210 (Minn. 1992).

44. *Id.* In *Carlson v. BIC Corp.*, 840 F. Supp. 457 (E.D. Mich. 1993), a suit arising from the death of children in a fire started by a child playing with a disposable lighter, the court identified *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957), as an early decision employing the "simple tool" exception to a warning obligation. 840 F. Supp. at 460. In *Jamieson*, which involved an elastic band employed as an exerciser, the D.C. Circuit explained: "A manufacturer cannot manufacture a knife that

that hold there is no duty to warn of "open and obvious dangers" so state only for the otherwise nondefective product. For example, in *Glittenberg*, which involved injuries sustained by a child in using an above ground pool, the Michigan court wrote that the "open and obvious" rationale applies only to instances in which "the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the use of the product."⁴⁵

In *Carlson v. BIC Corp.*,⁴⁶ a Michigan federal trial court applied *Glittenberg* to claims brought on behalf of three children who died in a fire allegedly caused by their playful use of one of defendant's disposable lighters. The evidence suggested that one of the child decedents had secured the lighter from the top of the refrigerator in their mobile home.⁴⁷ In employing the "open and obvious" or "simple tool" rule, the trial court explained initially that the rule's application to a manufacturer's warnings obligations required an evidential focus upon (1) "the typical user's perception and knowledge," and (2) "whether the condition that creates the danger associated with the product's use (i.e. the flame which is produced by a 'roll and press' operation) is 'fully apparent, widely known, commonly recognized and anticipated by the ordinary user.'"⁴⁸ In the court's words:

The disposable lighter in the instant case falls within the criteria relied upon in *Glittenberg*. There is no claim that defendant's disposable lighter possesses characteristics and features which are not readily apparent or easily discernable upon casual inspection. Indeed, it would be difficult to conceive of a device with more universally known or readily apparent characteristics. In addition, unlike highly mechanized and difficult to operate products that Michigan courts have deemed to be "complex," the defendant's hand-held lighter merely requires the user to spin a small wheel with the thumb while simultaneously depressing a button to emit fuel. This "roll and press" operation consists of a rudimentary design which cannot be characterized as being complex or highly mechanized. In

will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require [manufacturers] to warn of such common dangers." 247 F.2d at 26.

A part of the courts' reluctance to depart from decisional authority reflecting no leniency for childhood limitations in perception, judgment, and motor skills, derives from the perceptible gravitational pull of the general tort rule of nonrescue. For example, Michigan decisional law came to recognize the duty to warn in products liability matters as "an exception to the general rule of non rescue, imposing an obligation on sellers to transmit safety-related information if they know or should know that the buyer or user is unaware of that information." *Glittenberg*, 491 N.W.2d at 211.

45. 491 N.W.2d at 213 (quoting 3 AMERICAN LAW OF PRODUCTS LIABILITY, 3D, § 33:25 (1993)).

46. 840 F. Supp. at 457.

47. *Id.* at 459.

48. *Id.* (quoting *Glittenberg*, 491 N.W.2d at 213).

short this Court finds that defendant's hand-held lighter is a "simple tool."⁴⁹

In retrospect, it is seen that the key to the decision in *Carlson* was the plaintiffs' failure to plead and prove that in the context of the advertising, marketing, and substantial diversion of these products into the hands of children, children as a class became ordinary, if not typical, users of the product. The stakes in this designation were, for the *Carlson* court, outcome dispositive, as evidenced by the court's conclusion:

Plaintiffs in the instant case do not contend that young children are the typical or ordinary users of defendant's lighters, but merely that they are "foreseeable misusers." Therefore, the children's subjective knowledge (or lack thereof) of the harm that the lighter could cause is irrelevant to the question of whether the dangers was "open and obvious." This Court holds that when the inquiry is properly focused on the typical users of disposable lighters (i.e. adults) there can be no dispute that the danger presented by a disposable lighter (i.e. that fire will be produced when the roller is depressed) is "open and obvious."⁵⁰

c. The Limitations of the Open and Obvious Rule

The underlying premise of the open and obvious rule is that a warning should be provided where a manufacturer has superior knowledge of a product risk, but no such duty exists where "the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product."⁵¹ This cultural and cognitive assumption is precarious as applied to adults, and is nakedly inapplicable to children.

The limitations of applying the "open and obvious" rule to children were best stated by Professor Jerry J. Phillips in these words: "The assumption that children will expose themselves to danger in ways that a reasonable adult would not precludes the manufacturer's reliance on the obviousness of the product's danger to the child plaintiff."⁵² Additionally, the latent

49. 840 F. Supp. at 461. In the omitted footnote, the court listed several products that Michigan courts have held to be "complex," including "a highly mechanized log-splitter powered by a gasoline engine and requiring two persons to operate," a "large mechanical baling machine," and an "elaborate automated bottle-labelling machine which required continuous maintenance." *Id.* at 461 n.1.

50. *Id.* at 461 (citations omitted).

51. *Glittenberg*, 491 N.W.2d at 213 (quoting 3 AMERICAN LAW OF PRODUCTS LIABILITY, 3D § 33:25 (1993)).

52. Jerry J. Phillips, *Products Liability for Personal Injury to Minors*, 56 VA. L. REV. 1223, 1225 (1970). Professor Phillips concluded: "[E]ven the best of educational efforts cannot be expected to change the essential nature of children, and, unless we are prepared to ignore this fact, in many instances better product design presents the only realistic means available for protecting children against injury." *Id.* at 1240-41 (footnote omitted). *See*

nature of a potential harm may often require the conclusion that the risk cannot fairly be called "obvious." For example, in *Keller v. Welles Department Store*,⁵³ which involved injury to a two-year-old child who played with a gasoline container in proximity to the home's gas furnace and hot water heater, the court distinguished the obviousness of the danger associated with a gasoline container from that of a self-latching swimming pool gate.⁵⁴ Contrasting the two dangers, the court said: "While the defect in the gasoline can was not concealed, this court is unable to conclude, as a matter of law, that the absence of a child-proof cap was an obvious as opposed to a latent condition."⁵⁵

The limitations of the "simple tool" component of the open and obvious evaluation are likewise apparent. It is by no means a matter of judicial notice as to what constitutes a simple tool and what does not. For example, in *Bondie v. BIC Corp.*,⁵⁶ a federal trial court in Michigan held that the open and obvious rule should be applied only to simple tools. In ruling against the manufacturer, the court permitted the inference that the disposable butane lighter was not a simple tool.⁵⁷ Nevertheless, within a year, the same district court in another BIC butane lighter suit applied the open and obvious rule and held that BIC had no duty to "child-proof" its lighter because "[a] disposable, butane lighter is unquestionably a simple tool."⁵⁸

III. THEMATIC FRUSTRATION IN CHILDHOOD INJURY DECISIONS

A. Generally

Decisions in some jurisdictions have been markedly progressive in resisting the dismissal of child injury claims on the basis that the risks were "obvious." For example, in *Emery v. Federated Foods, Inc.*,⁵⁹ which involved a marshmallow that became lodged in a two-and-a-half-year-old boy's windpipe and caused brain-damaging anoxia before his mother was able to force its expulsion, the Supreme Court of Montana reversed the trial

generally April A. Caso, Note, *Unreasonably Dangerous Products From a Child's Perspective: A Proposal For a Reasonable Child Consumer Expectation Test*, 20 RUTGERS L.J. 433 (1989).

53. 276 N.W.2d 319 (Wis. Ct. App. 1978).

54. See *id.* at 322.

55. *Id.* at 323.

56. 739 F. Supp. 346 (E.D. Mich. 1990).

57. *Id.* at 350 n.4.

58. *Kirk v. Hanes Corp.*, 771 F. Supp. 856, 858 (E.D. Mich. 1991), *aff'd*, 16 F.3d 705 (6th Cir. 1994).

59. 863 P.2d 426 (Mont. 1993).

court's grant of summary judgment to the wholesale and retail sellers of the marshmallows.⁶⁰ The child's mother, alleging that the marshmallows were defective for want of a warning about the dangers of childhood aspiration, had filed a suit under the theories of strict products liability and implied warranty.⁶¹ The trial court apparently relied upon comments j and i to section 402A of the *Restatement (Second) of Torts*, and concluded that "a seller is not required to warn with respect to products which are only dangerous when consumed in excessive quantities if that danger is generally known and recognized."⁶²

The Montana Supreme Court rejected the reasoning of the trial court and noted that a technically pure product can be rendered dangerously defective "if purchasers and likely users have been misinformed or inadequately informed about either the risks or the dangers involved in the use of the product or how to avoid or minimize the harmful consequences from such risk."⁶³ The court quoted at length from the affidavit of one of plaintiff's two experts, Dr. Loube, who explained that significant choking risks are posed by foods that, like the marshmallow, expand upon entry into a moist area such as the human breathing apparatus.⁶⁴ Plaintiff's second expert, a Dr. Dingus, stated that without an appropriate warning, a reasonable parent might not recognize these risks to small children.⁶⁵ The court concluded that summary judgment had been granted erroneously, as genuine issues of

60. *Id.* at 428-29.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 432. In Dr. Loube's words:

Food items are often particularly dangerous in that they change their characteristics and consistency when they are soaked with the liquid secretions that are present in the breathing tubes of the lungs. These secretions usually cause some swelling of the food so that it further obstructs the breathing passage.

.....
A marshmallow is a particularly hazardous confection as a risk of aspiration in children under the age of three. It is sweet and, therefore, has a great deal of appeal to small children. It appears soft and innocuous to parents and does not present the same apparent risk that might be perceived by a parent when considering a piece of hard candy or a jelly bean.

.....
An aspirated piece of marshmallow can be very difficult to dislodge. Because it continues to expand after entering the airway it can efficiently obstruct a large breathing passage, perhaps even the trachea (the main breathing tube). An aspirated marshmallow fragment might not be reachable with a finger and could be difficult to dislodge with a Heimlich maneuver.

Id.

65. *Id.*

material fact regarding the necessity of a warning had been advanced by plaintiffs below.⁶⁶

In some suits a party's failure to prove that the product causing a child's injury was unreasonably dangerous has not precluded recovery when the facts of the case support a characterization of the product as a dangerous instrumentality, and, therefore, an element of an attractive nuisance claim. For example, in *Smith v. AMLI Realty Co.*,⁶⁷ a nine-year-old child visiting his father's apartment agreed to cooperate in a "trick" that another child had learned to perform on a Universal Weight Machine in the weight room of the apartment complex. By misadventure, seventy pounds in exercise weights fell upon the visiting child's hand, crushing and lacerating two fingers.⁶⁸ Although the court concluded that the Universal Machine was not "unreasonably dangerous" within the meaning of Indiana products liability law, it nonetheless observed that such a conclusion did not preclude pursuit of a claim in attractive nuisance,⁶⁹ offering this analogy:

Under the product liability act then, an instrument may be "dangerous" as that term is commonly understood, yet not be "unreasonably dangerous" for purposes of strict liability under the act. For instance, a loaded gun may not be "unreasonably dangerous" for product liability purposes as long as it functions properly, i.e. it hurls a projectile at a target. However, the same gun left within the reach of children is a "dangerous instrument" and the person previously possessing the gun is negligent for making it easily accessible to those who cannot comprehend the full magnitude of its destructive capabilities.⁷⁰

B. The Disposable Lighter Cases

*Curtis v. Universal Match Corp.*⁷¹ is representative of the first generation of disposable lighter injury cases, many involving injuries to children, and few resulting in findings of manufacturer liability. In *Curtis*, the infant plaintiff was injured after his brother, then three years and nine months old, set fire to his diaper, using a disposable butane cigarette lighter manufactured by defendant Feudor.⁷² The fire occurred in the back seat of the father's automobile, where the parent had left the children while visiting a friend.⁷³ Applying Tennessee's Products Liability Act,⁷⁴ which contains

66. *Id.* at 433.

67. 614 N.E.2d 618 (Ind. Ct. App. 1993).

68. *Id.*

69. *Id.* at 623.

70. *Id.* at 622.

71. 778 F. Supp. 1421 (E.D. Tenn. 1991).

72. *Id.* at 1424.

73. *Id.*

74. TENN. CODE ANN. §§ 29-28-101 through -108 (1980 & Supp. 1993).

a "consumer expectations" test of product defect,⁷⁵ the court's preliminary conclusion was:

In a products liability action involving a minor plaintiff who is injured by a product designed for use by adults, the question of whether a product is unreasonably dangerous is premised upon the contemplation of an ordinary adult consumer rather than the viewpoint of the minor child. In the present case, the intended and ordinary consumer of a cigarette lighter is an adult, and such lighters are obviously designed exclusively for use by adults.⁷⁶

Plaintiff's claim of inadequate warning, premised upon the lighter's simple statement "KEEP OUT OF REACH OF CHILDREN," was, in turn, vitiated by testimony of plaintiff's mother that she had repeatedly advised plaintiff's father to stop leaving his lighter in plain view of the children.⁷⁷

The varying substantive causes of action pursued by plaintiffs and the alternative bases of disposition selected by the courts have muddled any perceptible teaching of the disposable lighter decisions. Even suits resulting in reversals of summary judgments granted to lighter manufacturers and other sellers do not necessarily provide coherent encouragement to those urging a special duty of care or informational obligation on the part of manufacturers or sellers. For example, in *Glover v. BIC Corp.*,⁷⁸ an appeal of an action brought on behalf of an adult decedent who perished in a fire allegedly caused by the failure of a disposable lighter to extinguish fully following use, the Court of Appeals for the Ninth Circuit affirmed the federal trial court's denial of plaintiff's claims of design defect and failure to provide adequate warnings, but remanded on the issues of defective manufacturing and breach of the standard of care.⁷⁹

On the legal issue of the manufacturer's duty to decedent, the Ninth Circuit stated that under Oregon law,

[t]o establish a duty, the plaintiff need only prove facts which establish either the existence of a statute, status or relationship, or, in the absence of one of these,

75. TENN. CODE ANN. § 29-28-102(8) (1980 & Supp. 1993).

76. *Curtis*, 778 F. Supp. at 1425 (citations omitted). Unencumbered by tort doctrine, the Consumer Product Safety Commission published a Final Rule, under the Consumer Product Safety Act, on July 12, 1993, that "requires disposable and novelty lighters . . . to meet specified requirements for child resistance." Safety Standards for Cigarette Lighters, 58 Fed. Reg. 37,557 (1993) (to be codified at 16 C.F.R. § 1210). The Commission's Summary of its Final Rule continues: "The requirements are intended to reduce the risk of injuries and deaths that occur from fires started by children under the age of 5 playing with cigarette lighters." *Id.*

77. 778 F. Supp. at 1425-26.

78. 6 F.3d 1318 (9th Cir.), *superseding* 987 F.2d 1410 (1993), *amended per denial of reh'g and reh'g en banc*.

79. *Id.* at 1332. The probative quality of this decision is affected by the finding that the decedent's blood alcohol level at the time of the accident was .35. See *id.* at 1321.

conduct by the defendant which "unreasonably created a foreseeable risk to a protectable interest of the kind of harm that befell the plaintiff."⁸⁰

Here, in the setting of an injury claim brought on behalf of an adult user, a finding of a "manufacturer/user relationship" sufficient to "creat[e] a legal duty in BIC" is straightforward.⁸¹ From this identified duty, the court proceeded to find issues for the jury on the grounds of BIC's continued sale of lighters that failed to meet ASTM standards and its failure to change either the design or the method of manufacture after being put on notice that some lighters failed to extinguish.⁸²

In *Campbell v. BIC Corp.*,⁸³ a New York trial court evaluated a manufacturer's motion to dismiss a claim based on injuries sustained when a six-year-old boy ignited a lighter beneath his shirt. The manufacturer relied on section 402A which provides, in the court's words, that "a manufacturer does not owe a plaintiff a duty of care unless its product was in a condition not reasonably contemplated by the ultimate consumer and was being used for the purposes and in the manner normally intended."⁸⁴ Specifically, the manufacturer argued that because "[s]ection 402A recognizes that a manufacturer is not an insurer for every injury that may arise from the use of its product," the plaintiff was by definition incapable of arguing that the lighter was in a condition not reasonably contemplated by the ultimate consumer because (1) "the use of [defendant's] lighter by a child is not a normally intended use;" and (2) the "risks associated with a lighter are open and obvious."⁸⁵

Although the court ultimately dismissed plaintiff's complaint on statute of limitations grounds, it turned aside defendant's arguments as to both plaintiff's claims in negligence and in strict products liability,⁸⁶ stating that under New

80. *Id.* at 1325.

81. *Id.*

82. *Id.* In the court's words:

Glover produced expert testimony which showed: (1) no reasonable lighter manufacturer would sell a lighter which failed to meet the ASTM standards for extinguishment; (2) BIC continued to sell some lighters between 1981 and 1985 which failed to meet the ASTM standards; (3) BIC knew that such lighters could set someone on fire; (4) BIC knew the brass chips could cause the lighter to fail to extinguish; (5) BIC was on notice that some lighters had continued to burn and had injured persons; and (6) BIC failed to change the design of the lighter during the time in question, and failed to change the method of manufacturing which created the brass debris problem until 1986. We hold this evidence is sufficient to affirm the court's submission of the negligence claim to the jury.

Id.

83. 586 N.Y.S.2d 871 (N.Y. Sup. Ct. 1992).

84. *Id.* at 873. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

85. *Campbell*, 586 N.Y.S.2d at 873.

86. *Id.* ("The Court will also deny the motion as to plaintiff's negligence cause of action since in a design defect case there is almost no difference between a negligence cause

York law "a manufacturer *also* has a duty to design its product so that it avoids an unreasonable risk of harm when it is being used for an unintended but foreseeable use."⁸⁷ Creating a structure of corrective justice hewn entirely from concepts of reasonable foreseeability, the New York trial court explained: "Because the lighters manufactured by defendant are commonly used and kept about the home, it is reasonably foreseeable that children will have access to them and will try to use them. Thus, the Court finds that defendant did owe plaintiff a duty of care."⁸⁸

The highest courts in jurisdictions employing a consumer expectation standard of defect routinely turn to evaluation of foreseeability and the feasibility of alternative designs in measuring a manufacturer's design obligations to child users of ostensibly adult products. For example, in *Bean v. BIC Corp.*,⁸⁹ the Alabama Supreme Court, after noting that under Alabama law "'Defective' is interpreted to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety,"⁹⁰ observed that "[t]he scope of a manufacturer's legal duty . . . depends upon two factors: (1) the foreseeability of the danger; and (2) the feasibility of an alternative design that adverts that danger."⁹¹ Interpreting the issue before it to be "whether a manufacturer will *ever* have a duty to make a product intended to be used by adults safer by designing and manufacturing the product to deter or discourage use by children unable to appreciate the risks involved in use of the product,"⁹² the court stated:

Because BIC conceded that "it is feasible to design a more child-resistant lighter and also foreseeable that a child may come in contact with the lighter" . . . [w]e decline to make the sweeping and decisive pronouncement that a manufacturer of a product that it intends to be used by adults never has a duty to make the product safer by making it child-resistant when the dangers are foreseeable and prevention of the danger is feasible.⁹³

C. The Above-Ground Pool Cases

Some decisions involving both childhood and adult injuries from diving or sliding into above-ground pools indicate that an aesthetic suggestion, by liner

of action and one sounding in strict products liability.") (citations omitted).

87. *Id.* (emphasis added) (citations omitted).

88. *Id.* The court continued: "The law of the other jurisdictions cited by defendant does not affect this finding as it is not comparable to New York's. Nor does defendant's invocation of the 'open and obvious' doctrine because in New York that is simply another factor that is considered in determining the reasonable care exercised by the parties." *Id.* (citations omitted).

89. 597 So. 2d 1350 (Ala. 1992).

90. *Id.* at 1352 (quoting *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 133 (Ala. 1976)).

91. *Id.*

92. *Id.*

93. *Id.*

color or otherwise, that the pool is sufficiently deep to permit diving creates an issue of fact as to whether a child plaintiff's diving constituted conduct of sufficient recklessness as to render it an unforeseeable superseding event. For example, in *Amatulli v. Delhi Construction Co.*,⁹⁴ the New York Court of Appeals reviewed, among other issues, the denial of a pool distributor's motion for summary judgment in a suit brought on behalf of a sixteen-year-old boy who was injured while diving into an above-ground pool that had been installed partially below ground.⁹⁵ This unorthodox installation, which had the effect of letting the pool appear deeper than it actually was, was done at the suggestion of the pool distributor.⁹⁶ Affirming the lower courts' denial of summary judgment as to the distributor and to the homeowner, the Court of Appeals implicitly endorsed the plaintiff's argument that the installation

contributed to the creation of the illusion that the pool was of a depth sufficient for diving; that although he was aware of shallowness around the edges of the pool, it appeared to be deep enough toward the center[;] . . . [such that] it cannot be said as a matter of law, on this record, that "only one [legal] conclusion may be drawn from the established facts" or that his conduct in diving into this pool under the circumstances was "reckless conduct," constituting an unforeseeable superseding event such as would absolve these defendants of liability.⁹⁷

The body of authority holding that the conventional above-ground or below-ground pool is neither unreasonably dangerous nor defective⁹⁸ must be doctrinally assigned elsewhere if there is to be a consistent thesis for childhood recovery from adult product harms. One court distinguished the swimming pool cases from cases involving injuries caused by failure to child-proof a cap to a gasoline can in this way:

It is common knowledge that children are attracted to swimming pools and that precautions must therefore be taken. The danger to a young child from a swimming pool is obvious. The hazards to a child arising from a gasoline can without a childproof cap are not so readily apparent. A child is not so clearly

94. 571 N.E.2d 645 (N.Y. 1991).

95. *Id.* at 647. In the court's words, "The pool was four feet deep, and was designed, manufactured and marketed for installation above ground. However, it was installed with two feet of the pool sunken into the ground and a deck built partially around the pool which gave it the appearance of an in-ground pool." *Id.*

96. *Id.* at 650 ("[T]he submissions demonstrate, without contradiction, that the Susis [the homeowners] had the pool installed, upon the advice of the distributor, Brothers, in a manner that concealed its true depth and gave it the appearance of being an in-ground pool.").

97. *Id.* (citations omitted). The Court of Appeals concluded: "These factual issues raise questions for resolution by the jury and summary judgment [for the homeowners and the distributor] was properly denied." *Id.*

98. See, e.g., *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208 (Mich. 1992); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794 (Wis. 1975).

attracted to this product that an adult would immediately be put on guard to take precautions for the child's safety.⁹⁹

D. The Disposable Lighter and Swimming Pool Cases In Perspective

Special qualities of the factual and legal issues raised by the swimming pool cases and the disposable butane lighter cases preclude their use as a basis for a just doctrine of products liability for children injured by everyday adult products. With regard to swimming pools, two considerations stand out. First, as suggested by Judge Bode in *Keller v. Welles Department Store*,¹⁰⁰ the hazards of immersion in a swimming pool of a child unable to swim are so apparent to adults, who respond routinely with precautionary measures, that it is hard to visualize a setting in which the risk of infant drowning in a swimming pool could be characterized as latent. In contrast, the risks posed to a child by playful contact with items that may be found on any given day in a living room (a lighter) or in a garage (a gasoline container without a flame arrester) are, if not altogether latent, at least subtle.

Additionally, and still regarding swimming pools, the risks inherent in diving are inseparable from those of drowning. The cultural memory, and consequent awareness, of these two risks reach back past recorded time. A swimming pool is sufficiently similar to other bodies of water that the Reporter's Notes to *Restatement (Second) of Torts* section 339 conclude that maintenance of an artificial body of water should not be considered an attractive nuisance.¹⁰¹

The conclusion of several courts that disposable butane lighters are open and obvious hazards, and not dangerous beyond the expectations of the ordinary consumer, is likewise not surprising in view of the societal acceptance, beginning with the safety match, of ambulatory fire worship. In terms of cultural acceptance, and a widespread perception of social utility, it is but a short step from safety matches to disposable lighters.

The fact that lighters are often indiscriminately sold, in conjunction with the fact that their color and design often take the appearance of a toy, has of course contributed to both the rapid acceleration of injuries to children

99. *Keller v. Welles Dep't Store*, 276 N.W.2d 319, 323 (Wis. Ct. App. 1979) (citing *McWilliams v. Guzinski*, 237 N.W.2d 437, 439 (Wis. 1976) (holding that "an insufficiently guarded swimming pool maintained in a residential area may be inherently dangerous to a child four years of age.")).

100. *Id.* at 319.

101. See RESTATEMENT (SECOND) OF TORTS § 339 cmt. j., illus. 6 (1965):

A has on his land a small artificial pond in which, to A's knowledge, children of the neighborhood frequently trespass and swim. A takes no precautions of any kind. B, a boy ten years old who cannot swim, trespasses on A's land, enters the pond, and is drowned. A is not liable to B.

Id.

and the outpouring of litigation against several manufacturers. Fortunately, the disposable lighter's hour in the limelight has nearly run, as the Consumer Product Safety Commission child resistance performance regulations affect all disposable and novelty lighters manufactured or imported on or after July 12, 1994.¹⁰² The injuries caused by these lighters will, in retrospect, seem a tragic but fleeting products liability anomaly—and a spasm in the final throes of the consumer expectations test under *Restatement (Second) of Torts* section 402A.

IV. THE RETREAT OF THE "CONSUMER EXPECTATIONS" TEST AND THE "OPEN AND OBVIOUS" RULE

A. *The Consumer Expectations Test*

The "consumer expectations" test of defective condition¹⁰³ and unreasonable danger¹⁰⁴ has been roundly criticized.¹⁰⁵ Illustrative of its special harshness and illogic when applied to some infant injuries is *Kelley v. Rival Manufacturing Co.*,¹⁰⁶ in which the parents of Jonathan Kelley, an 11-month-old child, brought suit against Rival Manufacturing Co. after a slow cooker partially filled with heated beans fell upon him while he was in his walker.¹⁰⁷ The federal trial court, applying Oklahoma law, rejected the plaintiff's claim, explaining its application of the consumer expectations test in the following manner: "In manufacturers products' liability actions involving minor plaintiffs, the question of whether a product is unreasonably dangerous is not premised on the viewpoint of the minor child, but rather is based upon the contemplation of the parent consumer who purchased the product."¹⁰⁸

Reassuringly, however, courts and legislatures throughout the country have increasingly abandoned exclusive resort to a consumer expectations standard, and adopted, *de jure* or *de facto*, a risk-utility approach.¹⁰⁹

102. See Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557 (1993) (to be codified at 16 C.F.R. § 1210).

103. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) ("The rule stated in this section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.").

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

105. Council Draft 1A, *supra* note 13, § 2 cmt. c, at 137.

106. 704 F. Supp. 1039 (W.D. Okla. 1989).

107. *Id.* at 1041-42.

108. *Id.* at 1043 (citing *Bellote v. Zayre Corp.*, 531 F.2d 1100, 1103 (1st Cir. 1976)).

109. In *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 255 (Miss. 1993), the

Although several states doggedly retain the consumer expectations test for what constitutes an "unreasonably dangerous" condition,¹¹⁰ many of these have not precluded consideration of child resistancy as a design obligation in products the manufacturer knows are diverted to childhood play.

As an example, Oklahoma has adopted the test for what constitutes an "unreasonably dangerous" product condition that requires a product be shown to be dangerous to an extent beyond what would be expected by an ordinary consumer.¹¹¹ The Oklahoma decision of *Steele v. Daisy Manufacturing Co.*,¹¹² arising from accidental injuries to a child shot by a friend with an air rifle, came to the appellate court on appeal of the trial court's grant of summary judgment.¹¹³ In addition to their claim that the manufacturer had failed to provide adequate warnings on the air rifle, plaintiffs claimed that the rifle "failed to incorporate technologically feasible safeguards to prevent accidental shootings."¹¹⁴ The appellate court noted that at trial evidence on the design claim included the following risk-utility testimony:

Plaintiffs submitted deposition testimony of Daisy's own engineer, as well as their own experts, who stated that it would have been economically feasible to have incorporated an automatic trigger safety device on the rifle. He stated accidental discharge was a risk associated with a high velocity gun. A former Daisy engineer testified he had presented to the company the possibility of an automatic trigger safety being used. He believed it should be used. [Another plaintiff's expert] testified it was his opinion an air gun with the power of the Daisy 880 that was intended to be used by youth should be equipped with an automatic safety. He also

Mississippi Supreme Court turned away from the consumer expectation rationale to adopt a risk-utility theory of defect and recovery, commenting that "[a]round the country, the test generally employed to determine liability for products defects is the 'risk-utility' test"

See also Council Draft 1A, *supra* note 13, § 101 cmt. g, at 137 ("An overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases. They may . . . talk as though consumer expectations operate independent of notions of reasonableness, but in fact they rely on risk-utility balancing in determining whether designs are defective or defendants have failed adequately to warn."); cf. James A. Henderson Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973), in which the author argues, among other things, the preferability of application of the consumer expectations test, as appropriately inhibiting judicial evaluation of designs themselves.

110. For example, in the recent Nebraska decision, *Kudlacek v. FIAT*, 509 N.W.2d 603, 610 (Neb. 1994), the court states: "'Unreasonably dangerous' means that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics." (citations omitted).

111. *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988).

112. 743 P.2d 1107 (Okla. Ct. App. 1987).

113. *Id.*

114. *Id.* at 1108.

criticized the gun because the safety could not be activated until the gun was cocked.¹¹⁵

As the discussion later in this Article reveals, the authors of the *Restatement (Third) of Torts: Products Liability* have recognized the justice and rationality of admitting risk-utility analysis in the adjudication of design defect cases, and have proposed that a consumer's reasonable expectations of a product's safety be only one of multiple factors considered in evaluating a product's reasonable safety.¹¹⁶

B. The Open and Obvious Rule

It is accepted that a manufacturer's duty to warn of risks is not confined to risks from intended uses of the product, but extends as well to foreseeable misuses. For example, in *Trivino v. Jamesway Corp.*,¹¹⁷ which involved the ignition of a child's Halloween costume crafted from cosmetic cotton-rayon puffs glued to a pajama costume exterior, the court stated: "While we agree that plaintiff's use of the cotton puffs was a misuse in the sense that it was outside the scope of the apparent purpose for which the puffs were manufactured, we cannot agree that plaintiff's misuse was unforeseeable as a matter of law."¹¹⁸

Particularly where risks to children are foreseeable, the adequacy of a warning has generally been held to be a question of fact for the jury. Consider the Arizona appellate opinion in *Shaw v. Petersen*,¹¹⁹ a parents' suit against a swimming pool owner arising from the injuries of a 19-month-old child. The court states correctly that "there may be a duty to take precautions with respect to those of tender years which would not be necessary in the case of adults."¹²⁰ A manufacturer's duty, the court

115. *Id.* at 1109.

116. Council Draft 1A, *supra* note 13, § 2, Reporters' Note to cmt. c, at 137, 139. An overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases. They may, from time to time, talk as though consumer expectations operate independent by notions of reasonableness, but in fact they rely on risk-utility balancing in determining whether designs are defective or defendants have failed adequately to warn.

....

Scholarly commentary agrees overwhelmingly with the above-cited decisions and the risk-utility approach adopted therein. See, e.g., MADDEN, [*supra* note 24, at] 297 ("In applying § 402A to an action based on defective product design, the crucial question is whether the product is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.").

117. 539 N.Y.S.2d 123 (N.Y. App. Div. 1989).

118. *Id.* at 124.

119. 821 P.2d 220 (Ariz. Ct. App. 1991).

120. *Id.* at 222 (quoting *Shannon v. Butler Homes, Inc.*, 428 P.2d 990, 995 (Ariz.

concluded, may include the duty to "conside[r] the capacity of the child to appreciate the full extent of risk involved."¹²¹

Also noteworthy in this connection are the statements in *Williams v. Beechnut Nutrition Corp.*¹²² that "the inherent danger posed by a [baby bottle] glass container, while obvious to an adult, is not cognizable by a [three-year-old] child;" and *Keller v. Welles Department Store*,¹²³ a suit arising from burn injury caused by juvenile playing with a gasoline can, where the court was "unable to conclude, as a matter of law, that the absence of a child-proof cap was an obvious as opposed to a latent condition."¹²⁴

The clear trend of national products liability authority favors abandonment of exclusive resort to the open and obvious defense in design cases.¹²⁵ For example, in *Bean v. BIC Corp.*,¹²⁶ the Alabama Supreme Court held that as the open and obvious issue related to the manufacturer's affirmative defenses of assumption of the risk, the product's defectiveness, and causation, it was necessary to submit it to the jury.¹²⁷ In *Bean*, plaintiffs maintained that the spare warning "keep out of the reach of children" was inadequate.¹²⁸ In the court's words:

[T]he Beans argue that the warnings were inadequate because they (1) failed to warn about the attractiveness of lighters to small children, (2) failed to warn that small children could easily operate the lighters, and (3) failed to warn of the serious danger of fires started by small children playing with lighters. The Beans argue that BIC failed to show the absence of a genuine issue of material fact to be determined by the jury. We agree.¹²⁹

1967) (en banc)).

121. *Id.* at 222-23 (citations omitted). The court stated further: "The characteristics of children are proper matters for consideration in determining what is ordinary care with respect to them, and there may be a duty to take precautions with respect to those of tender years which would not be necessary in the case of adults[.]" that may create a duty to "conside[r] the ability of the child to appreciate the risk involved." *Id.* at 223.

122. 229 Cal. Rptr. 605, 607 (Cal. Ct. App. 1986).

123. 276 N.W.2d 319 (Wis. Ct. App. 1978).

124. *Id.* at 323.

125. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, at 19 (Council Draft No. 1, 1993) [hereinafter Council Draft 1].

126. 597 So. 2d 1350 (Ala. 1992). See *supra* notes 89-93 and accompanying text.

127. 597 So. 2d at 1353.

128. *Id.*

129. *Id.* Much of the conflicting authority is readily distinguishable. For example, in *Adams v. Perry Furniture Co.*, 497 N.W.2d 514 (Mich. Ct. App. 1993), an intermediate appellate opinion, the issue on review was whether a lighter manufacturer had a duty to make the lighter "childproof." In contrast, the question asked by this Article is whether the manufacturer has a design duty to make the product child-resistant.

C. The Restatement (Third) of Torts: Products Liability

1. Generally

In May of 1992, the American Law Institute's Council decided to begin a *Restatement (Third) of Torts* and to make its first initiative a *Restatement of Products Liability*. On April 20, 1993, the Reporters for this project, Professors Aaron D. Twerski of Brooklyn Law School, and James A. Henderson Jr. of Cornell Law School, published their "Preliminary Draft Number No. 1" of the products liability component.¹³⁰ After a late spring and summer of energetic exchange with lawyers, jurists, and teachers both within the Institute and beyond, the Reporters published "Council Draft No. 1"¹³¹ for presentation to the sixty-one-member ALI Council.¹³² The subjects of Council Draft No. 1 were "Product Defectiveness," "Causation," and "Affirmative Defenses." On January 4, 1994 the Reporters issued their Council Draft 1A, which was reviewed by the Council March 4, 1994.¹³³

2. Defective Design

As pertinent to the issue of children injured in the use of products intended for adults, section 101 of the Preliminary Draft proposed that a case for design defect liability would be established "if the foreseeable risks of harm presented by the product could have been reduced by the adoption of a reasonable, *safer* design."¹³⁴ The Council Draft was changed to read, "if the foreseeable risks of harm presented by the product could have been reduced by the adoption of a reasonable, *alternative* design."¹³⁵ Explain-

130. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 1, 1993) [hereinafter Preliminary Draft 1].

131. See Council Draft 1, *supra* note 125.

132. *Id.* This draft of the products liability *Restatement* was preceded by a Preliminary Draft on April 20, 1993. It is worthwhile describing the role that both a Preliminary Draft and a Council Draft play in the maturation of an eventual *Restatement of the Law*. The preliminary draft of a potential *Restatement* regarding any subject is, in every sense, preliminary. It represents the work, synthesis, and approach of its authors, and is exclusively the work of the Reporters. It is the first of many stages of an eventual *Restatement*.

In the months following the April 1993 draft's distribution, the Reporters and the ALI undertook a commendable effort to invite and consider views of a wide spectrum of the practicing bar, law professors and members of the judiciary. On the basis of these comments, Professors Henderson and Twerski prepared Council Draft No. 1.

133. Council Draft 1A, *supra* note 13. A Tentative Draft that incorporated final Council wishes was submitted to the May, 1994 ALI Meeting. At this writing, consideration is scheduled for a Council Draft No. 2. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 2, 1994).

134. Preliminary Draft 1, *supra* note 130, at 7.

135. Council Draft 1, *supra* note 125, at 1.

ing the revision, the Reporters stated that "reasonable alternative design" is the phrase most frequently used by the courts,¹³⁶ and that the use of the term "safer" would be redundant, for "if the alternative design reduces the foreseeable risks of the harm posed by the product, it is by definition 'safer.'"¹³⁷ Finally, the Reporters noted that "the design offered by the plaintiff must be a 'reasonable alternative' to the design in question."¹³⁸ Although "[t]he proffered design may be safer[, it] . . . may not be a 'reasonable alternative.'"¹³⁹

The Reporters emphasized that the consumer expectations test is "explicitly abandoned as an independent test for determining defect."¹⁴⁰ In their words, the test for design defect properly employs "a risk-utility balancing to determine defectiveness in the context of design."¹⁴¹ This test is "the standard for judging the defectiveness of product designs" and obligates the "plaintiff [to] prove that the seller or a predecessor in the distributive chain failed to adopt a reasonable alternative design that would, at acceptable cost, have reduced the foreseeable risks of harm posed by the product."¹⁴²

A risk-utility balancing test is then unmistakably the *Restatement's* test for determining the reasonableness of a "reasonable alternative design." Council Draft No. 1 discusses more fully the restrictions of "reasonable alternative design" than had the Preliminary Draft, emphasizing that any

136. *Id.* at i, 78 (quoting *Beech v. Outboard Marine Corp.*, 584 So. 2d 447, 450 (Ala. 1991) ("In order to prove defectiveness, the plaintiff must prove that a safer, practical alternative design was available to the manufacturer at the time it manufactured the [product]")) (citations omitted); *Hull v. Eaton Corp.*, 825 F.2d 448, 454 (D.C. Cir. 1987) ("We believe that the District of Columbia would follow the risk/utility balancing test referred to by the Maryland courts. Under that test a manufacturer is strictly liable for damage caused by his product if there was a feasible way to design a safer product and an ordinary consumer would conclude that the manufacturer ought to have used that alternative design.")).

137. Council Draft 1, *supra* note 125, at i.

138. *Id.*

139. *Id.* at ii. See *id.* § 101 cmt. h ("Design defect: Reasonable Alternative Design").

140. Council Draft 1, *supra* note 125, at 28. However, the Reporters state that "the nature and strength of consumer expectations," *inter alia*, may be considered when deciding the reasonableness of a product design. *Id.* at 22.

141. *Id.* at 16-17, 54 cmt. g (citing *Hull v. Eaton Corp.*, 825 F.2d 448 (D.C. Cir. 1987); *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976); *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329 (Fla. 1983); *Back v. Wickes Corp.*, 378 N.E.2d 964 (Mass. 1978); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983)).

142. Council Draft 1, *supra* note 125, at 16. The Reporters add that "[s]cholarly commentary agrees overwhelmingly with . . . the risk utility approach." *Id.* See, e.g., MADDEN, *supra* note 24, at 297, quoted in Council Draft 1, *supra* note 125, at 57 ("In applying [section] 402A to an action based on defective product design, the crucial question is whether the product is unreasonably dangerous as designed, taking into consideration utility of the product and the risk involved in its use.").

proposed alternative design must consider the cost of designing the alternative and whether an alternative design would provide greater overall safety.¹⁴³

Directly germane to the proof burden of many infant injury claims, the Reporters proposed that liability standards reject the "open and obvious" or "patent danger" rule as a total bar to a design defect claim, relegating "obviousness" to the role of "one factor among many to consider as to whether a product design meets risk-utility norms."¹⁴⁴

In contrast, the Reporters state that there is no duty to warn about obvious dangers. Explaining the compatibility of a rule that obviousness is no automatic bar to a design defect claim with one that preserves it as an excuse from informational obligations, Professors Henderson and Twerski cite their own earlier commentary to this effect:

[T]he argument for abandoning the patent danger rule in warning cases, simply because the rule has been abandoned in design cases, makes no sense. In a design case, the obviousness of the danger does not necessarily preclude the possibility that an alternative design could reduce the risk cost-effectively. By contrast, assuming that some risks are patently obvious, the obviousness of a product-related risk invariably serves the same function as a warning that the risk is present. Thus nothing is to be

143. See generally Council Draft 1, *supra* note 125, § 101 cmt. h, at 77. The Reporters continue by explaining: "It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also introduce into the product other dangers of equal or greater magnitude. Such an alternative design could not be considered to be reasonable." *Id.* at 22. The Reporters cite, *inter alia*, *Husky Indus., Inc. v. Black*, 434 So. 2d 988 (Fla. Dist. Ct. App. 1983), for the proposition that after consideration of the monetary and nonmonetary costs, a manufacturer may have "no obligation to provide the safest design available or provide for the ultimate in safety." Council Draft 1, *supra* note 125, at 90.

Cost and consumer preference may be considered as well. An alternative design may provide greater safety, "but only by substantially increasing the monetary cost of the product or by significantly reducing its attractiveness to consumers by decreasing the benefits of use and consumption." *Id.* at 21.

144. Council Draft 1, *supra* note 125, at 69. A majority of the courts have rejected the "open and obvious" or "patent danger" rule. *Id.* cmt. g, at 69-70, (citing *Byrns v. Riddel, Inc.*, 550 P.2d 1065, 1068 (Ariz. 1976); *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979); *Pike v. Frank G. Hough Co.*, 467 P.2d 229 (Cal. 1970); *Besse v. Deere & Co.*, 604 N.E.2d 998 (Ill. App. Ct. 1992), *appeal denied*, 612 N.E.2d 511 (1993); *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976)). However, the obviousness of the danger may be one factor in deciding whether a product is defectively designed. Council Draft 1, *supra* note 125, at 69, 71. See also *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1075-76 (4th Cir. 1974) (The obviousness of the risk of injury in a microbus without front-end engine protection was an important factor in directing verdict for defendant on design defect.).

gained by adding a warning of the danger already telegraphed by the product itself.¹⁴⁵

3. Informational Defects (Instructions and Warnings)

Section 101(b)(3) of Council Draft No. 1 adopts a reasonableness test in judging the adequacy of warnings similar to that of the reasonableness test of section 101(b)(2) for design defects.¹⁴⁶ This Draft emphasizes the difficulty of applying this standard in the context of failure to instruct or warn, recognizing, *inter alia*, that the effectiveness of a warning may be reduced by (1) excessive warnings, increasing the likelihood that they are ignored; (2) an inappropriate degree of intensity with which the warnings are transmitted; or (3) the inclusion of "trivial or far-fetched risks."¹⁴⁷

Liability for design defect and failure to warn claims will attach only where the product has been put to a reasonably foreseeable use. Council Draft No. 1 made one substantive change here from the Preliminary Draft treatment. The Preliminary Draft took the position that if the use of a product (excluding prescription drugs and toxic products) is a foreseeable one, then the manufacturer is charged with the knowledge of risks arising therefrom. Recognizing that imputing knowledge in all cases of harm resulting from defendant's product has little judicial and scholarly support,¹⁴⁸ Council Draft No. 1 places upon plaintiff the burden of showing that the risks of harm were known or should have been known at the time of manufacture.¹⁴⁹ However, the Reporters make an exception in the case of mechanical products, providing that if plaintiff establishes that a mechanical product was put to a reasonably foreseeable use, it is not necessary for the plaintiff to prove that the seller knew or should have known of the risks that would arise from such foreseeable use.¹⁵⁰

145. James A. Henderson Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 282 (1990). See also Council Draft 1, *supra* note 125, at 98.

146. See Council Draft 1, *supra* note 125, at 1.

147. *Id.* at 28-29. The Reporters add: "Striking the appropriate balance is essential." *Id.* at 29.

148. *Id.* at 105. The Reporters cite the observation of Dean John Wade: "I think there is no longer any particular value in using the assumed-knowledge language." *Id.* at 104-05 (citing John W. Wade, *On the Effect of Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 764 (1983)).

149. *Id.* at 106.

150. *Id.* at 101. The Reporters explain: "We see no good reason to burden plaintiffs with proving the foreseeability of risks arising from foreseeable uses of mechanical products. The reality is that, almost by definition, once the use [of a mechanical product] is foreseeable, the risks which attend such use are foreseeable." *Id.*

*D. For Products Attractive to or Normally Accessible to Children,
Considerations of Child Resistancy Are Properly
a Part of the Manufacturer's Design Obligation.*

The question presented by this Article is: Where a consumer product is (1) by nature attractive to children and (2) made for use in or near household living quarters, does the manufacturer have a duty to adopt reasonable design alternatives to lessen the likelihood of injurious childhood use? The doctrinal evaluation of a manufacturer's design duties regarding hazards to children from use of its product should not be distracted by description of the issue as one of the presence or absence of a duty to "childproof" a product. Apart from a small number of infant items, which are regulated for the most part by the Consumer Product Safety Commission, there is no duty to make a "childproof" product any more than there is a duty to make a "foolproof" product.

While some courts reviewing claims brought on behalf of children injured by products intended for adults have rejected "foreseeability" as the primary duty-determining factor,¹⁵¹ many recent decisions nevertheless find such a foreseeability-based duty. Recall that in *Campbell v. BIC Corp.*,¹⁵² a suit brought on behalf of a six-year-old for burn injuries suffered after playing with a disposable butane lighter, the New York trial court stated: "[A] manufacturer also has the duty to design its product so that it avoids an unreasonable risk of harm when it is being used for an unintended but foreseeable use."¹⁵³

Similarly, in *Todd v. Societe BIC*,¹⁵⁴ also involving a BIC lighter, the Court of Appeals, applying Illinois law providing for a "consumer contemplation" test, reversed the trial court's grant of summary judgment, noting that Illinois' consumer contemplation standard permits weighing "the benefits of the challenged design" against "the risk of danger inherent in

151. *E.g.*, *Kirk v. Hanes Corp.*, 16 F.3d 705 (6th Cir. 1994) (a disposable butane lighter case). In *Kirk* the Sixth Circuit stated, "In the present case, the district court held, as a matter of law, that even though 'injuries due to unsupervised children playing with the lighter may be foreseeable, such risks are not unreasonable.' Therefore, the district court concluded, Bic's failure to 'child-proof' its lighters was not actionable under Michigan law. We agree." *Id.* at 707 (citations omitted).

152. 586 N.Y.S.2d 871 (N.Y. Sup. Ct. 1992).

153. *Id.* at 873 (dismissed on statute of limitations grounds) (citations omitted):
Requiring reasonable design measures to avoid foreseeable injury to children is indicated here where the foreseeable risks are those of serious injury or death to numerous children each year, while the burden is that of adopting a relatively simple child resistant design—a precautionary measure that Appellant concedes was feasible at the time of Appellee's accident.

Id.

154. 991 F.2d 1334, 1340 (7th Cir. 1993).

such design.”¹⁵⁵ The court explained, “The district court should have permitted a jury to consider children, as possible foreseeable users, under the consumer contemplation test.”¹⁵⁶

A particularly effective invocation of the standard of reasonable foreseeability is found in the Missouri Appellate opinion in *Strothkamp v. Chesebrough-Pond's, Inc.*,¹⁵⁷ in which plaintiffs-appellants appealed the trial court's judgment n.o.v. following an award of actual and punitive damages to a five-year-old who severely injured his ear using appellee's Q-Tips brand cotton swabs. Reversing in part, and remanding for a new trial on actual damages, the court explained:

Where the prudent manufacturer would foresee that a condition or propensity of the product is likely not to be fully known and appreciated by those using it, . . . the duty of care requires a warning.

. . . .
The duty to provide safety features similarly focuses on foreseeability . . . [and depends upon] whether Chesebrough should anticipate that failing to provide child resistant packaging would cause harm to a child.

There was substantial evidence to support finding a duty to utilize child resistant packaging.¹⁵⁸

E. The Attributes of a Standard of Reasonable Foreseeability of Risk

With regard to children injured by contact with products intended for adults, the incongruity between modern products liability cases determined under section 402A and those tried on a negligence count is nowhere more clearly revealed than in *Griggs v. BIC Corp.*,¹⁵⁹ a strict liability and negligence suit brought on behalf of an 11-month-old child injured when his three-year-old stepbrother ignited his bedding with defendant's lighter. Among other factual allegations summoned in support of the parent's claim that the manufacturer had a duty to “child-proof” such a product, the trial court noted:

(1) annually there has been a high incidence of child related fires which result from playing with butane lighters; (2) children are attracted to the lighters because they are small and colorful; (3) children are able to produce a flame with the lighters; and (4) it is feasible and inexpensive to

155. *Id.* at 1338.

156. *Id.* at 1340.

157. No. 60645, 1993 WL 79239 (Mo. Ct. App. March 23, 1993).

158. *Id.* at *5 (citations omitted). See also *Steele v. Daisy Mfg. Co.*, 743 P.2d 1107 (Okla. Ct. App. 1987) (countenancing expert testimony as to the economic feasibility of an automatic trigger safety in a suit arising from accidental injuries to a child shot by a friend with an air rifle).

159. 981 F.2d 1429 (3d Cir.), *aff'g in part and rev'g in part* 786 F. Supp. 1203 (M.D. Pa. 1992).

manufacture lighters designed with child-proof safety devices which would not impede use by adults.¹⁶⁰

The trial judge nevertheless granted the manufacturer's motion for summary judgment, observing that "a product is capable of causing injury when in the hands of an unsupervised child does not, of itself, render the product defective or unreasonably dangerous."¹⁶¹

Affirming as to summary judgment on the strict liability count, the Third Circuit reversed and remanded the trial court's entry of judgment on plaintiff's negligence count. Conceding that foreseeability plays no proper role in a strict liability design claim as interpreted by Pennsylvania courts, the appellate court found that in preserving the claim of negligent design, the Pennsylvania Supreme Court had deliberately retained a preserve for issues of foreseeability through the agency of risk-utility analysis. This found, the Third Circuit continued:

The classic model for analyzing this aspect of negligence law is the risk-utility form of analysis, which balances "the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect and the expedience of the course pursued."¹⁶²

Applying this rubric to the facts of record, the court referenced the 1988 Consumer Product Safety Commission Advance Notice of Proposed Rulemaking concerning disposable lighters,¹⁶³ which catalogued the hundreds of persons injured each year in fires started by children playing with lighters, and found that the Commission's Notice constituted a showing of the gravity of the harm, as well as the social value of an alternative design in terms of enhanced safety for persons and their property. "These statistics suggest further," the court continued, "that the likelihood of the occurrence of harm is sufficiently substantial to generate a duty of precaution"¹⁶⁴ Weighing further the risk-utility inquiry into "the social value of the interest which the actor is seeking to advance,"¹⁶⁵ the court noted cryptically that "[t]he only interest BIC can be seeking to advance by not child-proofing its lighter is one of cost and its own economic health."¹⁶⁶ Reversing and remanding on the count of negligent

160. *Griggs*, 786 F. Supp. at 1204.

161. *Id.*

162. 981 F.2d at 1435-36.

163. 53 Fed. Reg. 6833 (1988).

164. 981 F.2d at 1436.

165. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984)).

166. *Id.* The court continued:

design, the Third Circuit sent a clear signal to the trial court with these words:

On balance, the high social value placed on the safety of people and property threatened by childplay fires, the high gravity of risk, the considerable probability of risk, and the likelihood of a reasonably available alternative may outweigh BIC's interest in producing its lighters without childproofing features. In such circumstances, the risk of omission would be unreasonable.¹⁶⁷

In *Keller*, the Wisconsin appellate court created a "safe as was reasonably possible" standard for gauging a manufacturer's design obligations.¹⁶⁸ In that suit, the court heard the appeal of a products suit brought following the injury of a two-year-old boy who was badly burned after playing with a filled gasoline container near the basement gas furnace and hot water heater. The defendants cited *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*,¹⁶⁹ in which a young boy was denied recovery for injuries following access to a swimming pool equipped with a retractable ladder that had been left in the down position. The court in *Keller* saw the gasoline can scenario as distinguishable, reasoning that while "the *Vincer* court concluded that the swimming pool could not have been defective for failure to have the suggested gate because it had a retractable ladder which rendered the pool 'as safe as it possibly could be,'" ¹⁷⁰ the gasoline can played with by the two toddlers in *Keller* "was not as safe as was reasonably possible since the cap was not designed in such a way as to prevent young children from removing it."¹⁷¹

Recognizing the role that foreseeability properly plays in design defect claims, the appeals court explained the risk-utility approach that it favored:

Equipping the gasoline can with a child-proof cap would have rendered the can substantially safer and entailed only a nominal additional cost. The practical value of such a cap may readily be seen since gasoline cans, while not intended to be used by children unable to appreciate the attendant

A manufacturer's economic health is undeniably valuable to society for many reasons, including the bearing it has on the employment of workers, the payment of taxes, and the availability of a socially useful product. Because BIC has also conceded the feasibility of childproofing the lighter for purposes of its summary judgment motion, it presumably had economic alternatives, unless childproofing the lighter would impair the lighter's usefulness or make it too expensive to maintain its marketability.

Id.

167. *Id.* at 1437.

168. 276 N.W.2d 319, 322 (Wis. Ct. App. 1979).

169. 230 N.W.2d 794 (Wis. 1975).

170. 276 N.W.2d at 322 (quoting *Vincer*, 230 N.W.2d at 798).

171. *Id.*

dangers of gasoline, are customarily stored in places accessible to children.¹⁷²

The operation of a standard of reasonable foreseeability for design or warning claims arising from childhood injuries by adult products can also be seen clearly through the lens of three decisions: (1) the Fourth Circuit opinion in *Spruill v. Boyle-Midway, Inc.*;¹⁷³ (2) the Maryland Court of Appeals decision in *Moran v. Faberge, Inc.*;¹⁷⁴ and (3) the Eighth Circuit Court of Appeals holding in *Laney v. Coleman Co.*¹⁷⁵

In *Spruill*, where a fourteen-month-old child died after ingesting cherry-red furniture polish, the court, finding in favor of plaintiff's failure to warn claim, stated that the manufacturer "must also be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonably foreseeable risks of the use of his product in such an environment."¹⁷⁶

In *Moran*, plaintiffs, two teenagers playing in a basement family room hypothesized that a candle could be made "scented" by adding drops of Faberge's Tigress cologne.¹⁷⁷ As one did so, the resulting "burst of fire" badly burned the other. Stating that the litigation before it cast the question "[W]hen does the responsibility to warn arise?,"¹⁷⁸ the Maryland Court of Appeals answered the question in the following manner:

[W]e think that in the products liability domain a duty to warn is imposed on a manufacturer if the item it produces has an inherent and hidden danger about which the producer knows, or should know, could be a substantial factor in bringing injury to an individual or his property when the manufacturer's product comes near to or in contact with the elements which are present normally in the environment where the product can reasonably be expected to be brought or used.¹⁷⁹

The court explained that it was not holding that Faberge should have foreseen that a teenager would pour Faberge over a source of ignition. Rather, "it was only necessary that it be foreseeable to the producer that its product, while in its normal environment, might be brought near a catalyst, likely to be found in that environment, which can untie the chattel's inherent danger."¹⁸⁰

172. *Id.*

173. 308 F.2d 79 (4th Cir. 1962).

174. 332 A.2d 11 (Md. 1975).

175. 758 F.2d 1299 (8th Cir. 1985).

176. 308 F.2d at 83-84.

177. 332 A.2d at 13.

178. *Id.* at 15.

179. *Id.* at 20 (citations omitted).

180. *Id.* The court described the following and more prosaic scenario in which an alcohol-based cologne might ignite:

In *Laney*, plaintiffs recovered a large compensatory award from The Coleman Company following an accident in which several children used a fuel can distributed by defendant to fuel a fire they had started in a pile of leaves.¹⁸¹ The fire followed the fuel stream back to the can and, in what is known as a "flashback," caused an explosion and a splattering of the ignited fuel.¹⁸²

In their claim for design defect under *Restatement (Second) of Torts* section 402A, the plaintiffs' principle contention was that the fuel can was defective for want of a "flashback arrester," a device that could be placed at the end of a fuel can nozzle to prevent reintroduction of flame into the can.¹⁸³ At trial, experts testified that it would cost between one-and-one-half cents to fifty cents, plus installation cost, to install the device on each can.¹⁸⁴ Turning to Coleman's argument that recovery should be barred because the manufacturer "did not reasonably anticipate that its fuel can would be used by children or that its fuel can would be used near a fire,"¹⁸⁵ the Eighth Circuit responded initially that "[t]he issue is not what use Coleman intended for its product but what use of the product objectively was foreseeable."¹⁸⁶ Reviewing the record, the court concluded:

The jury apparently concluded that it was reasonably foreseeable to Coleman that its fuel cans would fall into the hands of children and would be used near sources of heat. Neither Coleman's arguments nor our review of the record convinces us that this conclusion by the jury should be reversed as a matter of law.¹⁸⁷

A manufacturer may be relieved of responsibility for plaintiff's injury only where plaintiff's conduct is so unforeseeable as to constitute the sole legal cause of his injuries. The courts that have permitted these children's products liability claims to go before a jury have commonly reiterated that foreseeability does not require that the particular circumstances of an accident be foreseeable, but rather that an accident of the type that occurred was objectively reasonable to expect.¹⁸⁸ For example, in *Kriz v.*

For example, while seated at a dressing table, a woman might strike a match to light a cigarette close enough to the top of the open cologne bottle so as to cause an explosion, or that while seated in a similar manner she might turn suddenly and accidentally bump the bottle of cologne with her elbow, splashing some cologne on a burning candle placed on the vanity.

Id.

181. *Laney*, 758 F.2d at 1301 & n.1.

182. *Id.* at 1301.

183. *Id.* at 1301 & n.1.

184. *Id.*

185. *Id.* at 1302.

186. *Id.*

187. *Id.* (footnote omitted).

188. *E.g.*, *Yassin v. Certified Grocers*, 502 N.E.2d 315 (Ill. App. Ct. 1986) (child's

Schum,¹⁸⁹ a suit brought by a swimmer rendered a paraplegic after a head first slide down a pool slide into an above-ground pool, the New York Court of Appeals held that the swimmer's conduct in sliding into pool of unknown depth was not an unforeseeable superseding cause.¹⁹⁰

The evidence in *Kriz* enjoyed striking parallels with that coming before many courts hearing disposable butane lighter claims. The *Kriz* court noted that the above-ground pool industry was well aware of the common use of head-first belly dives,¹⁹¹ just as the mini-lighter industry has known of the routine diversion of its lighters to children. The plaintiff's use of the slide, sliding into the pool, was the expected use, just as the ignition of the butane lighter by children constitutes the lighter's expected use. Lastly, the above-ground pool industry's knowledge of CPSC-required labels cautioning against headfirst sliding permitted the inference of industry knowledge of the prevalence of this practice,¹⁹² just as the disposable butane lighter industry's development of a warning label and its design, albeit tardy, of a genuinely child resistant lighter evinces its knowledge, and the manifest foreseeability of, childhood use of the product. Thus, the adequacy of a warning presents a question of fact for the jury, particularly where risks to children are foreseeable.

VI. CONCLUSION

In the development of products liability law, the failure to reconcile childhood status with principles of fairness and corrective justice has been particularly telling. The weight of products liability doctrine has been virtually Edwardian in its reluctance to recognize children's rights and special vulnerabilities. More than any other constituency, children injured by products intended for adult use have been disserved by often exclusive, and always mechanistic, application of the consumer expectations standard. It is only tardily that products liability law has moved to recognize the special concerns of childhood injuries caused by use of adult products. In the instances of the disposable butane lighter litigation and the swimming pool litigation, the forthcoming elimination of the former risk¹⁹³ and the cultural armistice with the latter make the decisions in these lawsuits ill-suited as root-stock for general approaches to products liability for other adult products that result in harm to children.

At this time, absent favorable precedent in a plaintiff's jurisdiction under *Restatement (Second) of Torts* section 402A on comparable facts, the

injury caused by placing hand in grocery store meat tenderizer).

189. 549 N.E.2d 1155 (N.Y. 1989).

190. *Id.* at 1160.

191. *Id.*

192. *Id.*

193. Consumer Product Safety Commission Final Rule, 16 C.F.R. § 1210 (1993).

claimant may be best served by taking one step forward and two steps back. By one step forward is meant that the *Restatement (Third) of Torts: Products Liability* may be anticipated to provide theories of recovery and systems of proof and defense that neutralize most of the harsh effects of the consumer expectations test and the open and obvious defense. In their stead the Reporters promote exclusive resort to a risk-utility evaluation, fortified by concepts of reasonable foreseeability, which increases the likelihood of liability for manufacturers who put into household use products nominally intended for adults, but which foreseeably invite misadventure with children. By two steps back it is meant that from the *Restatement of Products Liability*, moving two steps back through *Restatement (Second) of Torts* section 402A to the venerable causes of action of negligent failure to warn and negligent failure to design a reasonably safe product, plaintiffs' counsel again finds a harbor safe from the consumer expectations test and the open and obvious defense.¹⁹⁴

194. The Third Circuit decision in *Griggs* makes it clear that even where a strict products liability claim that a product should be made childproof fails in strict products liability, it may succeed where injuries to children were foreseeable and a safer alternative design was feasible. *Griggs v. BIC Corp.*, 981 F.2d 1429 (3d Cir. 1992).