

DISTINGUISHED LECTURERS SERIES ARTICLE

CALABRESI'S RAZOR: A SHORT CUT TO RESPONSIBILITY

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I. INTRODUCTION

Once upon a time, there lived a man named William of Ockham. He was a philosopher, and was so brilliant that his fundamental discovery today retains the same vitality that it had when he first put words to it. This discovery, called Ockham's Razor, is the proposition that the simplest solution for a phenomenon is usually the correct one.¹ This common sense principle is even more applicable in the legal realm than in the scientific. Because Judge Calabresi, for me, personifies the application of common sense to the intersection between social policies and legal principles, I have taken the liberty of naming the application of Ockham to the law after him.²

One of the ideas that I perpetually stress to my students is the importance of common sense. Common sense stands as the axiom behind Ockham. In the examination taking process, if one reasons one's way to a conclusion, and that conclusion makes no sense whatsoever, then there is something wrong with the reasoning pro-

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1. See 8 THE NEW ENCYCLOPEDIA BRITANNICA 867 (15th ed. 1993).

2. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

cess.³ The law should make sense. When it does not, then it should be changed.

This article contends that the law applicable to manufacturers of products and to Health Maintenance Organizations (HMOs) has ceased to make sense. When originally adopted, strict products liability uniformly applied to all products, and was both consistent and sensible. It has been eviscerated by those who apparently believe that exempting manufacturers from responsibility for their products somehow makes the costs of the injuries caused by those products vanish. Now a welter of exceptions and individualized rules, strict products liability bears more resemblance to a piece of Swiss cheese than to a social policy. Conversely, the law applicable to HMOs began not with the extension of liability to HMOs, but with an exemption from liability. HMOs found themselves in the happy position (for them) of exemption from the negligence rules applicable to all other entities.⁴ This never made sense. Broad recognition of the fact that treating HMOs differently from other entities was a mistake has led to piecemeal, reactive, and chaotic efforts to undo the original, wrongheaded exemptions.⁵ The result is a series of holes surrounded by cheese — not very different from the cheese riddled with holes that products liability has become. Instead of cheese with holes or holes with cheese, we should have just plain cheese, espe-

3. Similarly, Karl Llewellyn asserts that “where the reason stops, there stops the rule.” K. N. LLEWELLYN, *THE BRAMBLE BUSH* 158 (Oceana Publications 1975) (3d ed. 1960).

4. The corporate practice of medicine doctrine, for example, has provided a shield for HMOs. This doctrine, which was originally developed to ensure that only doctors treated patients, has ironically served as a defense argument against HMO liability, on the theory that doctors, not HMOs, practice medicine. For a general discussion of the doctrine, see Michael A. Dowell, *The Corporate Practice of Medicine Doctrine Must Go*, 10 *HEALTHSPAN* 7, 8 (1994).

The corporate practice of medicine doctrine allows HMOs to escape liability for medical malpractice by arguing that they were not making treatment decisions. Although most states prohibit the corporate practice of medicine, most states have also legislated that HMOs are not considered to be practicing medicine. See Sara Mars, *The Corporate Practice of Medicine: A Call for Action*, 7 *HEALTH MATRIX* 241, 281 (1997) (compiling a list of relevant legislation); see also N.J. STAT. ANN. § 26:2J-25(c)–(d) (West 1996); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 60 (Mo. 1989).

5. Many of these reactive and piecemeal reforms take the form of legislative intervention. Most of the legislation is aimed at key areas of consumer protection such as access to emergency care, access to specialists, quality of care, grievance procedures, and HMO information disclosure. See *33 States Adopt HMO Bills with Consumer Protections*, WASH. HEALTH WK., July 29, 1996, available in 1996 WL 8886742.

cially when we start to have more holes than cheese.

Both strict products liability and HMO law would profit from the application of Calabresi's Razor. Neither strict products liability nor HMO law needs to be complex or messy.⁶ If the razor of responsibility were applied consistently, manufacturers would pay for the harm their defective products cause, and HMOs would be compelled to make more careful and patient-oriented decisions. It is the release from responsibility that causes trouble. Tort law seeks to make everyone responsible for their actions. HMOs and manufacturers of products should be no exception.

The above comments focus on the substantive features of strict products liability and HMO law. The processes of creating exceptions to strict products liability and engaging in piecemeal response to immunity have, however, brought additional problems.⁷ The piecemeal approach to riddling strict products liability with exceptions encourages litigation because it gives all manufacturers the hope that they will get off the hook if they keep on litigating for long enough.⁸ The piecemeal approach to compelling HMOs to accept re-

6. The Honorable Guido Calabresi referred to the chaos generated when simple rules are fragmented as "splitting." According to Judge Calabresi:

A major change in tort law in the last thirty years (a change as important as the coming of insurance was seventy years ago) is the fact that we no longer are governed solely by "all or nothing" rules. Dramatically, since the coming of comparative negligence, we split damages all the time and in all sorts of ways. We are splitting between faulty and non-faulty behavior that combine to cause injury, for example. Someday we may even be splitting proximate cause, saying, yes, there is proximate cause, but it is only somewhat proximate, so the plaintiff should get part, but not all, of the damages suffered. The whole nineteenth-century notion that recovery is an all or nothing thing is disappearing. Moreover, the increasing use of liability rules is another example of this very phenomenon because liability rules produce splits [and] allow for forms of splitting that are remarkably complicated.

Guido Calabresi, *Remarks: The Simple Virtues of the Cathedral*, 106 YALE L.J. 2201, 2206 (1997).

7. In the case of HMOs, the piecemeal response takes the form of legislatures trying to statutorily micro-manage the minimum standards of care and behavior of HMOs. In the first six months of 1996, 33 states enacted consumer protection laws related to managed care, and at least 1000 more were introduced. Specifically, 9 states passed laws to address access to emergency care, 18 states mandated that HMOs provide direct access to obstetrician/gynecologists, and 25 states set standards for maternity lengths of stay. See *33 States Adopt HMO Bills with Consumer Protections*, *supra* note 5.

8. The history of tobacco litigation is a prime example. Such suits have been long, expensive, and unsuccessful. See generally JOHN F. VARGO & J.D. LEE, *CIPOLLONE V. LIGGETT GROUP, INC.: U.S. SUPREME COURT OPENS THE DOOR TO TOBACCO LAWSUITS* 1 (1992).

sponsibility for their decisions likewise encourages both plaintiffs and defendants to litigate, the former because they might prevail and the latter in an effort to preserve their special status.⁹ Thus, both approaches mandate the excessive expenditure of resources in the process of deciding whether the particular defendants should be held responsible for their actions.¹⁰ Neither approach serves the goal of predictability that is so important to the legal system in general and to societal or private insurance in particular. Neither approach serves tort goals, which include responsible conduct,¹¹ cost spreading,¹² and simple fairness. In short, the law should not be designed in a manner that provides manufacturers and HMOs with a positive

9. There are those who might argue that holding HMOs to a reasonableness standard would release a flood of litigation. One response to this assertion is that there already is a flood, of both litigation and legislative activity. In any event, litigation directed against HMOs is already on the rise. See Louise Kertesz, *Data Signal Managed-Care Suits on Rise*, MOD. HEALTHCARE, May 20, 1996, at 17. Patients are increasingly willing to challenge HMOs in court. See Edward Felsenthal, *When HMOs Say No to Coverage, More Patients Are Taking Them to Court*, WALL ST. J., May 17, 1996, at B1.

10. While this is true in the litigation process itself, it is also evident in legislative attempts at tort reform.

The kind of reform that occurs in our legislatures with respect to tort law is usually the result of a funny kind of alliance between two types of repeat players: the plaintiffs' lawyers, on one side, and the categories that give rise to defendants in tort law—the injurer categories—on the other. They both have certain interests, which are quite different from the interests of the person who is injured and from a general societal interest in reducing the costs of administering tort law. Potential defendants primarily seek to reduce their exposure to lawsuits and damages. The defendants would also benefit from a reduction in administrative costs, but their lawyers, who also are often their lobbyists, would not. The plaintiffs' lawyers, on the other hand, are interested in something that will give rise to large amounts of damages every once in a while. . . . They do not care at all about reducing the costs of administering the system, since often their fees constitute those very costs.

Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 863–64 (1996).

11. See *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1042 (Or. 1974) (en banc) (suggesting that “the imposition of liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give”).

12. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961). Judge Calabresi argues that “the loss should be placed on the party which is most likely to cause the burden to be reflected in the price.” *Id.* Holding the manufacturer liable thus has nothing to do with fault, but is rather based on the premise that the manufacturer can most easily alter the product's price to distribute these costs. *But see* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 449, 451 (1993) (contending that imposing liability on a faultless party for another's injury is an inequitable policy decision that favors the injured party's interests at the faultless party's expense).

incentive to drag out litigation. The absence of certainty makes it cheaper to litigate than to compensate.

This is where Calabresi's Razor comes in. The simpler standards of strict products liability and HMO responsibility for their decisions serve tort goals. These standards also provide the predictability craved by the insurance industry, and place the costs of actions on the actors, where they belong. All of the problems generated by specialized standards, whether exempting certain manufacturers from responsibility for their products or whole industries from responsibility for their decisions, could be solved by simply reinstating responsibility.

If manufacturers were held responsible for the injuries caused by their products, and knew that they would be, the incentive for endless litigation would dissipate. They could raise their prices to reflect their products' real costs, and would have a strong incentive to compensate injured consumers without the endless litigation the system currently spawns. HMOs would have a powerful incentive to make their decisions more carefully, and to allow the doctors who practice with them to exercise the medical judgment they were trained to use.¹³ The state legislatures that are currently engaged in setting medical standards, an activity for which they are not qualified but in which they have been compelled to engage, could return to normalcy.¹⁴

Perhaps most importantly, however, no one should be exempt from responsibility for injuries they cause. Few corporations, freed from the constraint that accompanies the threat of liability, will take responsibility on their own. Evidence that non-responsibility is generally a bad idea may be found in some of the consequences of

13. The concern that HMOs would interfere with medical judgment is not new. Indeed, the corporate practice of medicine doctrine evolved in part because of the fear that corporate decisionmaking would replace the medical judgement of the physician. See generally Jeffrey F. Chase-Lubitz, Note, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 VAND. L. REV. 445, 448-50 (1987) (discussing how leaders of the medical profession feared that if physicians were permitted to work for corporations, corporations would ultimately control the doctors); John Fairhall, *Clash of Titans: Doctors, HMOs, Insurers on Health Care*, BALTIMORE SUN, July 3, 1994, at E1 (discussing AMA lobbying and advertising efforts to depict managed care as undermining medical decisionmaking).

14. The federal government has also been active in regulating HMOs. See Spencer Rich, *Managed Care, Once an Elixir, Goes Under Legislative Knife: Cost-Cutting Focus Feared Harmful to Patients*, WASH. POST, Sept. 25, 1996, at A1 (discussing legislation requiring certain minimum standards of care).

creating exceptions to strict products liability and of granting immunity to HMOs. Cigarette manufacturers, able to avoid liability for many years, cannot now be categorized as upstanding members of the corporate community. There is a widespread perception that HMOs, immune from suit, have placed profits ahead of patient care as a priority. In short, something is wrong.

II. THE FRAGMENTATION OF STRICT PRODUCTS LIABILITY

Back at the beginnings of legal time, tort law was developed to encourage those injured by others to resort to the courts instead of indulging in self-help. In order to accomplish this goal, those who were injured had to be able to recover from those who injured them, once the injured had shown that the perpetrators were responsible for their injuries.¹⁵ Thus, tort law is based on the fundamental proposition that all persons in society should pay their own way.¹⁶

The concept of negligence represents an early corruption of this concept of responsibility, because it exempted the non-negligent from liability for the injuries they caused.¹⁷ In a way, the problem

15. The only way to make sure that recovery results is to disallow the absence of negligence as a defense. See Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 3 (1970).

16. According to Professors Prosser and Wade, there are four major purposes of tort law:

- (1) to provide a peaceful means for adjusting the rights of parties who might otherwise "take the law into their own hands";
- (2) to deter wrongful conduct;
- (3) to encourage socially responsible behavior; and,
- (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury.

WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 1 (9th ed. 1994).

17. As negligence came to be part of tort law, tort law became widely accepted as a means of regulating conduct by forcing those who were at fault to compensate those they injured. See 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 12.1, at 744 (1956); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1226-27 & n.28 (1993) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77-80 (Little, Brown & Co. 1923) (1881)). This view was heavily influenced by the laissez-faire philosophy of the industrial revolution, in which the encouragement of business activity took center stage over compensation to individuals. See HARPER & JAMES, *supra*, § 12.3, at 752; Davis, *supra*, at 1226 n.28. As a result, the belief that fault was a prerequisite to tort liability prevailed. See HARPER & JAMES, *supra*, § 12.1, at 744; e.g., *Ives v. South Buffalo Ry.*, 94 N.E. 431, 439-41 (N.Y. 1911) (ruling that a worker's compensation statute imposing liability without fault was unconstitutional).

lies with exempting non-negligent manufacturers from liability for their defective products in the first place.

One of the corollaries to the idea that the tort system was designed to replace self-help is that recovery had to result, whether the person responsible had been negligent or not.¹⁸ If one wants the legal system to replace self-help, then it must completely replace self-help and not leave a certain percentage of those injured without a legal argument to support compensation.

In this sense, requiring that a plaintiff prove negligence on the part of the defendant was a limitation on the original concept of tort recovery. Strict liability, however, remained the rule in some areas.¹⁹ The development of strict products liability in the mid-twentieth century represented a return to the older rules, pursuant to which liability followed those responsible for a product or act, without reference to negligence.²⁰

18. "The foundation of tort law is absolute liability. Before 1300, the plaintiff merely had to prove that the defendant was a cause of his injury in order to prevail. Fault was not required." FRANK J. VANDALL & ELLEN WERTHEIMER, *TORTS: CASES AND PROBLEMS* 1 (1997).

19. For a classic case involving abnormally dangerous activities, see *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (H.L. 1868) (appeal taken from Ex. Ch.). For dangerous animals, see *Filburn v. People's Palace & Aquarium Co.*, 25 Q.B.D. 258 (C.A. 1890) (involving a plaintiff attacked by a charging elephant).

20. As had come to be the case for tort law generally, prior to the adoption of strict products liability, fault was required for liability for products. See, e.g., *Goullon v. Ford Motor Co.*, 44 F.2d 310, 312 (6th Cir. 1930) (plaintiff alleging negligent manufacture of tractor steering wheel); *Richenbacher v. California Packing Corp.*, 145 N.E. 281, 282 (Mass. 1924) (plaintiff alleging negligent placement of glass in spinach can).

By the 1950s, however, a significant body of scholarship and case law had developed, criticizing the requirement of fault in product-based cases. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); HARPER & JAMES, *supra* note 17, § 12.4, at 752–58; Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361–70 (1951); Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923–27 (1957). Requiring that the plaintiff prove fault meant that tort law could not meet the goal of compensating the injured. See HARPER & JAMES, *supra* note 17, § 12.4, at 754–55. In the area of product-related injuries, James specifically advocated a strict liability system to accomplish the goal of compensating injured consumers and bystanders. See *id.* § 28.15, at 1569; see also James, *supra*, at 923–24, 927.

Arguments such as those raised by Professor James suggesting the need for alternatives to fault-based liability gained wider acceptance throughout the 1950s and were joined with the contention that the manufacturer of a product should be accountable for the harm that the product causes. See WILLIAM L. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 84, at 506 (2d ed. 1955) (indicating that "social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer"). Indeed, Dean Prosser, the Reporter to the Restatement (Second) of Torts that would later codify

Strict products liability is based upon the concept of responsibility.²¹ If one designs, produces, and markets a product, one should remain responsible for the injuries caused by that product even after

strict products liability in tort, concluded by 1960 that the principle of liability based solely upon fault was “out of date in this day and generation.” William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960).

21. The RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) summarizes many of the policy elements behind strict products liability:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Id.

Strict products liability is based on the idea that the manufacturer of a product should pay for any injuries caused in the context of reasonable use of that product, even in the absence of manufacturer negligence. The theory is that payment for such injuries should be treated as a cost of doing business; otherwise, a manufacturer who earns a profit on a product, but does not have to pay the costs it generates, receives a windfall.

In addition to making economic sense, strict products liability is just plain fair. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1084 (1972) (distributional considerations make application of strict liability easier). The doctrine represents a societal decision that as between the two innocent parties—the non-negligent manufacturer and the consumer—the manufacturer should bear the costs of injuries inflicted by its products. “The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1963). “[T]he reasons for strict liability are to shift the loss from the consumer to the seller and . . . the loss should be borne by the person who created it.” Frank J. Vandall, “*Design Defect*” in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 83 n.183 (1982) (citing *Greenman*).

purchase, and even in the absence of manufacturer negligence.²² There is nothing particularly revolutionary about this. If your dog escapes from your yard, you are likely to be liable for any damage it may cause while loose, even though you were not negligent in allowing its escape. It may not be your fault, but it is your dog. Moreover, tort law is, at its base, about moving the costs of accidents between parties.²³ Strict products liability, which is merely one manifestation of tort law, is about the same thing.

When courts first adopted strict products liability and Section 402A of the Second Restatement,²⁴ the doctrine was straightfor

22. A requirement of manufacturer negligence would seriously interfere with the goals of strict products liability. Strict products liability compels manufacturers to stand behind their products and would be ill served if the absence of negligence could operate as a defense. See Ellen Wertheimer, *Pandora's Humidor: Tobacco Producer Liability in Tort*, 24 N. KY. L. REV. 397, 399–402 (1997) [hereinafter Wertheimer, *Pandora's Humidor*] (arguing that manufacturers should pay for the injuries that their products cause). The focus of strict products liability is to compel those who create risk to compensate those who are injured by it. If neither the manufacturer nor the consumer has been negligent, the question becomes one of fairness. See Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1185 (1992) [hereinafter Wertheimer, *Unknowable Dangers*] (discussing the fairness goal of strict products liability). Professor Frank Vandall pointed out that “the reasons for strict liability are to shift the loss from the consumer to the seller and . . . the loss should be borne by the person who created it.” Vandall, *supra* note 21, at 83.

Another goal of strict products liability is cost spreading. Like fairness, this goal is ill served by limiting liability to negligence. See 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 13.2, at 132–33 n.7 (2d ed. 1986). The producer is the entity best able to distribute the cost and risk to the general public by means of pricing and insurance. See MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* 28–35 (1995) (elaborating factors involved in the “insurance rationale” for tort liability).

A third goal of strict products liability is to provide an incentive to manufacturers to provide the safest product possible. In *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1042 (Or. 1974) (en banc), the court stated that “the imposition of [strict products] liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give.” See generally Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1257–63 (1996) (discussing social costs and product safety in the context of regulatory compliance). This goal is perhaps the least strong argument for strict products liability, as negligence serves an incentive role as well.

23. Justice Traynor identified risk distribution as a primary justification for strict liability in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944).

24. Strict products liability predated Section 402A. See *Greenman*, 377 P.2d at 901 (stating that “to establish the manufacturer's liability it was sufficient that the plaintiff proved that he was injured while using the [product] . . . in a way it was intended to be used [and] as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] . . . unsafe for its intended use”).

Section 402A of the Restatement (Second) of Torts provides, in relevant part:

ward and uniformly applicable to all products.²⁵ There are three basic types of defect: mismanufacture, design defect, and failure to warn.²⁶ Strict products liability doctrine as originally formulated applied equally to all defects, so a fortiori it applied equally to all three types of defect.²⁷ Courts tested a product by whether it passed or failed a risk-utility test.²⁸ If it passed, it was not defective, and the manufacturer was not liable. If it failed, it was defective and the manufacturer was liable for the injuries the product caused.²⁹ Noth-

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property
- (2) The rule stated in Subsection (1) applies although
- (a) the seller has exercised all possible care in the preparation and sale of his product

RESTATEMENT (SECOND) OF TORTS § 402A(1)–(2) (1965).

25. It is significant that the *Greenman* court neither specified nor cared whether the defect in the product was one in design or manufacture. See *Greenman*, 337 P.2d at 901. What mattered was that the product was dangerous when used as intended, not the type of defect. Nor does Section 402A mandate different standards for different types of defect. The overwhelming majority of jurisdictions have adopted Section 402A for products liability cases. See WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 717 (9th ed. 1994).

26. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

27. See *Phipps v. General Motors Corp.*, 363 A.2d 955, 959 (Md. 1976) (stating that “[i]n those cases where the defect is a result of an error in the manufacturing process, that is where the product is in a condition not intended by the seller, there is less difficulty applying the defectiveness test of Section 402A” (citation omitted)). This is significant because the court views defects as a general category and not as differing depending upon the type of defect alleged.

28. Many jurisdictions employ a risk-utility or cost-benefit test to determine whether a product is defective. See, e.g., *Hunt v. City Stores, Inc.*, 387 So. 2d 585, 589 (La. 1980) (adopting the risk-utility test); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 306 (N.J. 1983) (adopting the risk-utility test).

For a general discussion of the risk-utility test, see Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1109–13 (1991); Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 93 (1986) (citing *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545 (N.J. 1982)); Marc Z. Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 SETON HALL L. REV. 623, 626–32 (1987); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573, 590 (1990); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998) (listing factors that may be considered in determining the reasonableness of an alternative design); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837–38 (1973).

Interestingly, the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, at 19, apparently adopts a risk-utility balancing test when it points out that “Subsection [2](b) adopts a reasonableness (‘risk-utility balancing’) test as the standard for judging the defectiveness of product designs.”

29. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 879 (Alaska 1979) (stating

ing in either the Second Restatement or in the early cases³⁰ gave any notice that strict products liability would rapidly become the byzantine maze that it now is.

Courts and scholars uniformly greeted strict products liability with enthusiasm as the straightforward proposition that manufacturers should be liable for the injuries caused by their defective products.³¹ Once the principle of liability for defective products was established, the next priority was to figure out a test which would enable courts and juries to decide which dangerous products were also defective and which were not.³² Courts generally elected some form of a balancing test: If the dangers of the product outweighed its utility, the product was defective. This test was performed on the product, and manufacturer knowledge about the product and its

that “[a] product must be defective as marketed if liability is to attach”); *see also* *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 881 (Ariz. 1985) (quoting *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036 (Or. 1974) (“To impose liability there has to be something about the article which makes it dangerously defective without regard for whether the manufacturer was or was not at fault.”)); *Phipps v. General Motors Corp.*, 363 A.2d 955, 958 (Md. 1976) (en banc) (“Although the plaintiff need not prove any specific act of negligence on the part of the seller . . . proof of a defect . . . must still be presented.”).

30. *See Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974) (en banc); *see also Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

31. Well, almost uniformly. *See James A. Henderson Jr., Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845, 850 (1983) (stating that “[i]n substance . . . I am proposing a negligence test for design defect cases The plaintiff should be required to show that his loss was unavoidable . . . by an alternative design.”).

32. Some products, of course, are dangerous but not defective. Danger is a factual attribute; defect is a legal one. Dangerous products that pass any applicable risk-utility test are not defective, and their manufacturers will not be liable for the injuries they cause. Examples of such products include many vaccines and other prescription drugs. Manufacturers of such products should be able to avoid liability because their products are not defective, not because their products happen to be prescription pharmaceuticals.

Courts have developed various tests to allow them to decide which dangerous products are also defective. *See, e.g., Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883–85 (Alaska 1979) (using the risk-utility analysis); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) (en banc) (using the consumer expectation test). Each method inevitably involves some form of cost-benefit test. *See Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978) (conducting the cost-benefit test with the consumer expectations test); Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973) (suggesting that “there is no way to avoid a risk-benefit analysis in passing upon designs”).

Recently, the Supreme Court of Connecticut reestablished the use of the consumer expectation test. *See Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1333 (Conn. 1997) (explaining that the consumer expectation test applies generally to determine design defect, but in special instances, the modified consumer expectation test is used, in which risk and utility are balanced).

dangerous proclivities was, quite simply, irrelevant.³³ Indeed, the irrelevance of manufacturer knowledge about product dangers was key in the development of strict products liability.³⁴ If manufacturer knowledge is relevant, then the theory of liability shifts its focus from the product to the manufacturer and inevitably becomes an inquiry about manufacturer conduct. This is antithetical to the entire concept behind strict products liability.

As stated above, courts originally treated strict products liability as the unified doctrine it was intended to be. The tests for defect applied whatever the nature of the alleged defect, whether one in manufacture, design, or warning.³⁵ Strict products liability began its decline when the courts began to separate the types of defect and develop different rules to apply to each one.

The easiest branch of strict products liability with which to deal, and the least corrupted today, is mismanufacture.³⁶ Before

33. See *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 549 (Haw. 1987) (determining that “[t]he issue of whether the seller knew or reasonably should have known of the dangers inherent in his or her product is irrelevant to the issue of liability” (citation omitted)).

A manufacturer is held liable if the product in question is defective; a product is defective when its costs outweigh its benefits. See *Phillips*, 525 P.2d at 1039. The distinction between such a balancing test and a negligence inquiry is that the test focuses on the nature of the product rather than the reasonableness of the manufacturer's behavior. See *id.* at 1037; see also *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 880–81 (Ariz. 1985) (en banc).

34. See 4 U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 109 (1977) (suggesting: “It is by now well recognized that the difference between negligence and strict liability in design defect cases is that the element of scienter — knowledge of the dangerous propensities of the product — is imputed to the manufacturer when strict liability is applied.” (footnote omitted)).

35. As discussed below, the doctrine of *res ipsa loquitur* evolved into strict products liability for mismanufactured products long before strict products liability was explicitly developed. This fact defuses the argument made by some scholars that Section 402A was intended to apply only to mismanufacture cases. See George L. Priest, *Strict Products Liability: The Original Intent*, 39 DEF. L.J. 279, 293–94 (1990) (arguing Section 402A intended to apply to mismanufacture cases only). If this argument were correct, Section 402A would have been unnecessary, because such strict liability already existed. Moreover, had Section 402A been intended only for mismanufactured products, it would have been easy for the drafters to say so. Finally, sections such as comments j and k, which deal with defects other than those in manufacture, would have been unnecessary if Section 402A was intended only for mismanufacture cases. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. j–k (1965).

36. Commentators are comfortable with the idea that a mismanufactured product is “unreasonably dangerous as a matter of law and this [is] true of virtually any fabrication or construction defect.” Keeton, *supra* note 32, at 35, 39. The consensus seems to be that holding manufacturers strictly liable for mismanufactured products is neither unfair nor

Section 402A, the doctrine of *res ipsa loquitur* was applied to mismanufactured products, and the mismanufacture itself was the only evidence of negligence the plaintiff needed.³⁷ In this context, the transformation of the negligence concept of *res ipsa loquitur* into strict products liability represented a semantic development, not a substantive one.³⁸ The fact that courts had a pre-existing comfort level with imposing liability without fault (through *res ipsa loquitur*) has meant that the law applicable to mismanufactured products has remained strict.

Unlike liability for mismanufactured products, which has remained strict, the law applicable to design defects has changed, almost uniformly for the worse. Exceptions have made the originally straightforward balancing test much more complex. These exceptions take one of two forms. The first type of exception depends upon the nature of the product. In these cases, the courts have decided to exempt the product or type of product under discussion from Section 402A coverage altogether. This has happened with prescription drugs.³⁹ This exemption is particularly baffling because it seems so unnecessary. Strict products liability was never intended to lead to liability for all dangerous products, only for dangerous and defective ones. A dangerous pharmaceutical is not necessarily defective; it is only defective if its dangers outweigh its benefits. If the drug's benefits outweigh the risks attendant upon its use, then it is not defec-

inappropriate, even when the manufacturer was non-negligent in failing to discover the flaw. See David G. Owen, *Musings on Modern Products Liability Law: A Foreword*, 17 SETON HALL L. REV. 505, 511 (1987) (asserting that "manufacturers are strictly accountable for manufacturing flaws, the principal products liability context in which true 'strict' liability is plainly appropriate" (footnote omitted)).

37. Technically, *res ipsa loquitur* is a negligence doctrine. To prevail under this doctrine, a plaintiff must show that the accident would not have occurred in the absence of negligence. In fact, however, the doctrine had evolved into a form of strict liability, pursuant to which a manufacturer that sold a product that differed from the rest of the product line would be liable. What made this a form of strict liability was that the exercise of due care in the production or inspection process could not act as a defense. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (applying *res ipsa loquitur* and concluding that a plaintiff need not prove negligence because bottles do not ordinarily explode).

38. See *id.* at 439 (stating that the bottle must have been defective or else it would not have exploded). It is highly significant that the majority, which applied the negligence concept of *res ipsa loquitur*, and the concurrence, which advocated adopting strict products liability, reached the same result. See *id.* at 439–40.

39. See, e.g., *Brown v. Superior Court*, 751 P.2d 470, 480 (Cal. 1988) (holding that Section 402A does not apply to prescription drugs).

tive and the manufacturer should not be held liable under Section 402A. If, on the other hand, the drug's dangers outweigh its usefulness, then there should be no barrier to liability. Moreover, there is no textual support for an exemption for prescription drugs anywhere in either Section 402A or the comments to Section 402A. Courts routinely quote comment k as mandating such an exemption.⁴⁰ Even if the comments are given the force of law, however, this comment says no such thing. Comment k deals with reasonably dangerous products, i.e. products which have a high level of usefulness but which are also dangerous.⁴¹ It does not exempt from Section 402A those products which are not reasonably dangerous; it merely states that products may be dangerous but not defective.⁴²

The second exception develops when the courts change the nature of the standard for determining whether a product is defective in a way that seriously impairs strict products liability doctrine with respect to all design (and warning) defects. This has happened in cases where the courts have ruled that the plaintiff must show an alternative feasible design in order to recover.⁴³

40. See, e.g., *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1125–26 (9th Cir. 1994) (stating that comment k to Section 402A provides an exception for prescription drugs); *Hill v. Searle Lab.*, 884 F.2d 1064, 1067–68 (8th Cir. 1989) (stating that all prescription drugs fall under comment k).

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

42. See *id.*

43. See *Habecker v. Clark Equip. Co.*, 942 F.2d 210, 215 (3d Cir. 1991) (reasoning that “[l]iability is imposed on a manufacturer . . . for a design defect because an alternative, *feasible*, safer design would have lessened or eliminated the injury plaintiff suffered. If no such alternative feasible design existed when the product was manufactured, then the design cannot be said to be ‘defective’” (emphasis added)).

Some courts have denied recovery when the plaintiff was unable to establish the existence of an alternative feasible design. See, e.g., *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990), *vacated*, 505 U.S. 1215 (1992), *aff’d on reh’g* 981 F.2d 7 (1st Cir. 1992) (confronting the problem of liability for cigarette manufacture). In *Kotler*, the court proclaimed that “[i]t is illogical to say that a product is defective . . . when ‘defect’ has historically been measured in reference to the availability, or at least the feasibility of safer alternatives [T]he existence of a safer alternative design is a *sine qua non* for the imposition of liability.” *Kotler*, 926 F.2d at 1225; see also *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485, 488–89 (E.D. Pa.) (cigarettes), *aff’d without op.*, 856 F.2d 184 (3d Cir. 1988); *Kelley v. R.G. Indus.*, 497 A.2d 1143, 1148 (Md. 1985) (handgun); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417, 421 (Pa. Super. Ct. 1990) (cigarettes); cf. *O’Brien v. Muskin Corp.*, 463 A.2d 298, 306 (N.J. 1983) (stating that a plaintiff need not show alternative feasible design to recover in a design defect case).

The alternative feasible design must both eliminate the relevant danger and pass a risk-utility test. See, e.g., *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1326 (Or.

Section 402A does not require an alternative feasible design. Indeed, it is counterintuitive to require one: If an alternative feasible design is required for liability, those products which cannot be made safer, but which also fail any applicable risk-utility test, will automatically be exempt from Section 402A coverage. The products which fall into this category are those that combine danger and disutility to a high degree. Manufacturers cannot be sued for the injuries caused by these products because the products cannot be made safer. Section 402A nowhere requires such a result, pursuant to which the most useless and dangerous products will be exempt from its coverage.

Strict products liability has also been generally impaired in cases where the courts have ruled that a product cannot be defective unless the product's dangers were foreseeable.⁴⁴ This serves to leave the costs on non-negligent plaintiffs, instead of moving them to non-negligent manufacturers, when neither party knew or could have known about the danger. Strict products liability stands for the proposition that, as between two non-negligent parties, the manufacturer, who is, after all, responsible for the defective product's existence, should pay for the injuries it caused. Restricting liability to knowable dangers betrays this fundamental concept.

The law applicable to mismanufactured products has remained strict. The law applicable to design defects has not. Perhaps the least strict form of products liability that remains, however, is the law applicable to warning defects. One of the changes in standards which has particularly undercut the warning defect concept is the requirement that the product's dangers be foreseeable at the time of manufacture. This change, which has meant that failure to warn has been transformed from a type of defect into a negligence theory, is particularly lethal to strict products liability because it eliminates the focus on the product. Section 402A was designed to examine

1978) (en banc) (holding plaintiff's proposed alternative feasible design must itself pass a risk-utility test); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporter's note to cmt. d (1998) (noting that "whether a proffered design is a reasonable alternative can be determined only after a comparison of the relative advantages and disadvantages of the competing designs, utilizing the various factors for risk-utility balancing set forth in the Comment").

44. See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 550, 557 (Cal. 1991) (en banc); *Feldman v. Lederle Lab.*, 479 A.2d 374, 386 (N.J. 1984). For a general discussion of this issue, see Wertheimer, *Unknowable Dangers*, *supra* note 22.

products, not manufacturer thought processes. The focus should be on the product's actual design, and not on what the manufacturer thought he or she was designing.

This knowability requirement has no textual mandate. If it did, those courts which used an imputation of knowledge standard to differentiate strict products liability from negligence based liability surely would have noticed it.⁴⁵ One can conclude that comment j contains such a mandate only by murdering the language of that comment. Some courts quote comment j as saying:

Where the product contains an ingredient . . . whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.⁴⁶

Comment j in fact says:

Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known . . . the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.⁴⁷

An examination of the text of the comment reveals that comment j deals with the foreseeability of allergic reactions to products, not with the foreseeability of hazards created by the product's design.⁴⁸ The latter quotation is a far cry from the former.⁴⁹ It is significant that courts were able to demonstrate that Section 402A applied to knowable dangers only by the clever and misleading use of

45. See *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1037–38 (Or. 1974) (en banc). The court in *Phillips* imputed knowledge of the danger to the manufacturer to differentiate strict products liability from negligence-based liability. See *id.* The imputation was not limited to knowable information.

46. *Feldman*, 479 A.2d at 386.

47. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

48. See *id.*

49. See *Feldman*, 479 A.2d at 386, for an example of the creative use of comment j.

ellipticals.

The above discussion has focused on how the courts have handled strict products liability, which was originally conceived and executed as a matter of common law. There is, however, another source of activity and further threat to strict products liability: legislative activity.⁵⁰ Lobbying has proven to be an effective weapon for major manufacturers. Legislative activity in this arena is inevitably reactive and specific. It adds considerably to the tangle.

The fragmentation of strict products liability law has had several effects. One has been substantive. Many products that are defective because they fail the applicable cost-benefit tests are not ruled defective today. As a result, manufacturers are exempted from responsibility for these defective products. Although the products are defective under any test devised for making this decision, they are exempt from Section 402A because they are prescription drugs, or because they cannot be made safer, or because the manufacturer could not have known of the danger he or she was creating. This, of course, defeats the purpose of strict products liability altogether. The costs do not go away simply because the manufacturer does not have to pay them. Strict products liability law was designed to shift the costs from the injured consumer onto the manufacturer. The exemptions listed above shift them back.

The other major effect has been procedural. The fact that courts are so ready to exempt products or to change the law applicable to products generally means that defendants should never give up. Instead of settling a case, or even resolving it before it starts, manufacturers have a strong incentive to keep fighting. This defeats the purpose of strict products liability just as effectively as the changes in the standards themselves. Strict products liability was designed to compensate consumers injured by defective products, and, as we all know, justice delayed is justice denied. The lack of

50. A number of state statutes require that the plaintiff show the availability of an alternative feasible design to prevail. *See, e.g.*, LA. REV. STAT. ANN. § 9:2800.56(1) (West 1997) (requiring plaintiff prove alternative feasible design for product at time of sale); N.J. STAT. ANN. § 2A:58C-3(a)(1) (West 1997) (mandating no liability if no practical and technically feasible alternative design existed at the time the product left control of the manufacturer); OHIO REV. CODE ANN. § 2307.75(F) (Anderson 1991) (stating that a product is not defective if no practical and technically feasible design was available at the time the product left the manufacturer's control, "unless the manufacturer acted unreasonably in introducing the product into trade or commerce").

certainty created by judicial willingness to give in to corporate arguments is itself an evil because it encourages defendants to drag out their cases as long as possible. This evil is found not in the number of lawsuits filed, but rather in how long the lawsuits last and how much attorney time they devour.

Certainly, manufacturers found Section 402A burdensome. But it does not follow from this that the burden is unfair. Nor is there any evidence that strict products liability has failed in its goal of making products safer. Indeed, there is some evidence, which will be discussed below, that those industries that have been exempted from strict products liability have in fact acted irresponsibly, and that those who face the threat of liability have not.⁵¹

In the absence of strict products liability, those injured by products are left carrying the injuries caused by defective products. The question is upon whom the load should fall. Under strict products liability, it should fall on the party who designed, executed, advertised, and sold the product. No compelling argument exists for putting it anywhere else. Exempting manufacturers from responsibility for their defective products by requiring negligence for liability to follow proved to be a mistake. Strict products liability, designed to correct this mistake, has now been eviscerated. It needs repair.

III. THE PIECEMEAL APPROACH TO HEALTH MAINTENANCE ORGANIZATIONS

As stated above, strict products liability began with the principle, one which follows from tort doctrine generally, that manufacturers should be responsible for the products they design, produce, and/or sell. What makes this principle follow from tort doctrine is the basis for tort doctrine itself: the idea that all members of society should be responsible for compensating those they injure.⁵² In brief, tort doctrine requires that those who cause injury to others, whether through negligence or defective products, should pay for the injuries they have caused. The basic idea is not one of negligence; rather it is one of responsibility, dependent on the policy that those who are injured should be compensated by those who cause injury to them.

51. *See infra* Part IV.

52. In strict products liability, of course, the concept of defect replaced the element of negligence.

HMO liability (or non-liability) began at the opposite end of the spectrum from strict products liability: with the idea that HMOs should not be liable to their patients, even for unreasonable conduct.⁵³ An exception to the general rule of liability for negligent conduct was created for them. Experience has proven this unacceptable.⁵⁴ Not surprisingly, HMOs, like all other entities, need the incentive of tort liability to encourage them to act reasonably.⁵⁵ Providing such an incentive to all participants in society is, indeed, one of the moving forces behind the adoption of a negligence standard in the first place. There is some evidence, which will be discussed below, that HMOs have in fact failed to act reasonably in the absence of the tort incentive.

The level of concern about HMO conduct clearly demonstrates the lack of wisdom in placing them above the law. Instead of eliminating the exemption, however, the courts and legislatures have resorted to a piecemeal attack.⁵⁶ This has led to the same network of rules and regulations that has been created in the realm of strict products liability, albeit approached from the other direction. It has also produced the same incentive for endless litigation and legislative activity.⁵⁷ A simple rule that would hold HMOs to the same

53. See, e.g., N.J. STAT. ANN. § 26:2J-25(c)-(d) (West 1996); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 61 (Mo. 1989) (en banc). HMOs have also been shielded from state lawsuits by federal law, particularly ERISA. See Frank Bass, *Texas Lawmakers Set to Prescribe New Pro-Patient Rules for HMOs*, WALL ST. J., Nov. 27, 1996, at T1 (discussing how state claims were frequently preempted by ERISA).

54. "[T]he shield of near immunity now provided [to HMOs] by ERISA simply cannot be justified." *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 63 (D. Mass. 1997) (footnote omitted).

55. In discussing the consequences of an HMO's failure to authorize inpatient psychiatric treatment, the *Andrews-Clarke* court reflected:

Perhaps even more disturbing than the perverse outcome [of immunity] generated by ERISA in this particular case is the fact that, in the current health care system, the misconduct alleged by [the plaintiff] may not be atypical. . . . Although the advent of managed care has eliminated many of the excesses that plagued the traditional fee-for-service system and has, at least temporarily, stabilized the growth of health care costs, it has also spawned a whole new set of potential abuses. In contrast to the old system, in which doctors had incentives to provide too much care, under managed care, the incentives are to provide as little treatment as possible.

Id. at 60.

56. See *id.* at 63 (rejecting the idea that the potential for "over-deterrence" and the threat to "legitimate cost containment efforts" cannot justify immunity from tort liability).

57. See *id.* at 61 (noting that "[i]n 1997 alone, state legislatures across the country

standards as everyone else would surely be both more fair and more efficient.

Interestingly, the history of HMO non-liability should prove to those who doubt the efficacy of — or even the need for — tort law that tort law is a vital part of our social and legal systems. The current furor over HMO decisionmaking demonstrates the extent to which HMOs, unaccountable in tort for their actions, have failed to regulate themselves in a manner that society could live with.⁵⁸ The application of general tort principles to HMOs might well have kept this from happening.

HMOs, exempt from liability — responsibility — for their decisions, failed to adhere to a non-negligent standard of care. In this, they showed themselves to be only human in needing an incentive for appropriate conduct.⁵⁹ What has happened, however, is that a hodgepodge of regulations, statutes, and standards has been haphazardly thrown at the problem. “As a matter of public policy, such piecemeal reforms are inadequate because they target the symptoms while ignoring the underlying pathology — the incentives for undercare which now pervade America's health care system.”⁶⁰ What enables HMOs to provide “undercare” is, of course, their immunity from liability for doing so.⁶¹

have introduced approximately 1000 bills regulating managed care”).

58. *See id.* at 52–60 (providing a detailed discussion of the problems HMO immunity has caused).

Pennsylvania has responded to HMO abuses by prohibiting insurance companies from requiring that mastectomies be performed on an outpatient basis. *See* 40 PA. CONS. STAT. ANN. § 764d (West Supp. 1998). The statute also requires that insurance carriers that cover mastectomies also cover reconstructive surgery. *See id.* If HMOs and medical insurance companies were capable of self-governance, surely such legislative activity would be unnecessary.

59. *See, e.g.,* David R. Olmos, *43 HMOs Fined for Ignoring Consumer Law*, L.A. TIMES, Jan. 22, 1997, at D1.

60. *Andrews-Clarke*, 984 F. Supp. at 60 n.58. For a detailed discussion of an HMO system that invites undercare, see *Boyd v. Albert Einstein Medical Center*, 547 A.2d 1229 (Pa. Super. Ct. 1988), which held that HMO liability may be predicated upon ostensible agency theory.

61. The question of ERISA preemption is highly complex, and courts differ on its resolution. *Compare Pappas v. United States Healthcare Sys. of Pa., Inc.*, 675 A.2d 711, 715 (Pa. Super. Ct. 1996) (holding that ERISA does not preempt a cause of action against an HMO for negligent refusal of treatment), *with Anderson v. Humana, Inc.*, 24 F.3d 889, 891 (7th Cir. 1994) (holding that ERISA applies to representations about medical benefits packages), *and Kearney v. U.S. Healthcare, Inc.*, 859 F. Supp. 182, 184–88 (E.D. Pa. 1994) (holding that ERISA preempts a claim of HMO negligence, but does not preempt a claim of vicarious liability).

As with strict products liability, the principles of which have been obscured, if not defeated, by a mass of largely ad hoc exceptions, HMO regulation has become a complete mess. Also, as with strict products liability, this mess has created its own problems of endless litigation and incomprehensible rules. The original exemption from liability has proven to be a mistake. Trying to fix this mistake by allowing a web of reactive, ad hoc rules to develop, instead of simply undoing the original error, is highly inefficient. HMOs should simply be treated as all other entities: They should be held responsible for their decisions. If those decisions fall below a reasonable standard of care, HMOs should be liable.⁶²

Exempting HMOs from liability for their own negligent conduct has failed.⁶³ While the exemption gave the HMOs their start in life,

62. The standard of care might be a "reasonable HMO" standard, with the proviso that, as with other entities, HMOs themselves do not get to set the standard. See *The T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737, 740 (2d Cir. 1932), in which Judge Learned Hand uttered the classic pronouncement: "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may be unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages."

Thus, it would not be a defense to a denial of treatment that "other HMOs would have done the same." *Darling v. Charleston Community Mem'l Hosp.*, 211 N.E.2d 253, 257 (Ill. 1965) (stating that "custom should never be conclusive" and citing *The T.J. Hooper*).

63. Numerous HMO horror stories, while admittedly anecdotal, confirm this statement. See, e.g., *A Botched Diagnosis, A Patient's Death and One Dermatologist's Legal Crusade*, S. FLA. BUS. J. (Miami, Fla.), July 4, 1997, at 18 (reporting one physician's outrage after a patient died because his oncologist could not secure a referral from the patient's primary care physician); Randy Diamond, *Joint Health Panel Hears Stories of HMO Horrors*, THE RECORD (N. N.J.), Mar. 4, 1997, at A3 (recounting the story of a woman who needed a complex brain operation and her HMO's refusal to allow her to use a qualified surgeon, and after relenting on the surgeon issue, her HMO's refusal to pay for any more than two days of hospitalization after the surgery or rehabilitation); *If the HMO Tied the Doctor's Hands, It Should Be Liable for Malpractice*, BUFFALO NEWS, Aug. 11, 1997, at B2 (discussing the death of a kidney patient after his HMO refused to pay for an expensive bone marrow transplant in spite of the fact that his HMO physician and three others recommended the transplant); Tom Kelly, *Welcome to Managed Care: "Take 2 Aspirin and Call Me After the Holiday,"* SUN-SENTINEL (Ft. Lauderdale, Fla.), Sept. 12, 1997, at 15A (recounting the story of man who rode a taxi 40 miles to the office of his primary care physician after a nearby orthopedic surgeon refused to treat him for a broken ankle because the man was not referred by his primary care physician); Paul Krawzak, *Managed Care Hearings End with HMO Horror Stories*, STATE J.-REG. (Springfield, Ill.), Oct. 23, 1997, at 14 (discussing a case in which a woman in the midst of a miscarriage might have died had she complied with her HMO's rules and obtained approval before seeking help from a nonnetwork provider); Michael LaSalandra, *Legislative Panel Hears About Ups and Downs of HMO Care*, BOSTON HERALD, Apr. 8,

as it was intended to do, it has clearly outlived its usefulness, as the web of corrective actions by courts and legislatures has proven. Originally intended to allow HMOs to develop, the exemption is no longer necessary to secure their future. Removing their exemption may change HMO practices. But it would be a change for the better.

There are those who would argue that HMOs would not survive the transition to liability. This argument is specious for two reasons. First, this transition is already occurring anyway, albeit in an inefficient and disruptive manner. HMOs do not seem to be flagging in the face of this change. Indeed, a general, wholesale transition to a negligence standard might well save them money over the current piecemeal and litigation-encouraging approach. Second, experience has shown that entities, at one time exempt from liability for negligence, can readily withstand being held to the standard applicable to others.

One example of such an entity is the charitable organization. Originally, charities were exempt from the threat of liability for their own negligence. That exemption has been eliminated as both unfair to those injured⁶⁴ and unnecessary to the well-being of the charities themselves.⁶⁵ It is possible that HMOs, the development of

1997, at 11 (recounting how a neurologist was dropped by an HMO after she appealed its decision to send a man home from the hospital the day after he emerged from a coma); *Managed Care Faces Scrutiny by Congress*, OMAHA WORLD-HERALD, Apr. 16, 1997, at 16 (recounting story of a diabetic woman who lost her transplanted kidney because her HMO was slow to approve drug treatment); Alex Pham, *Public Anxiety Threatens Health of Managed Care Industry*, BOSTON GLOBE, June 12, 1997, at C1 (describing how an 18-year-old girl died from a rare form of cancer when her HMO refused to refer her to a specialist for leg pains so severe that she was unable to walk, and then refused to authorize treatment for the cancer that had caused the pain); Jane Bryant Quinn, *Here's a Personal Horror Story of the Inefficiency of an HMO*, BUFFALO NEWS, Dec. 6, 1997, at A9 (recounting one woman's four-and-one-half-month quest to obtain a blood test, which culminated in a diagnosis from the physician's receptionist); Alex Rodriguez, *Council Panel Hears HMO Horror Stories: Proposed Law Would Impose Reforms Within City*, CHICAGO SUN-TIMES, Apr. 9, 1997, at 24 (describing how an HMO refused to pay a \$1500 emergency room bill for its insured, who, upon awakening at 4:00 a.m. with a 104-degree fever, called her HMO and was put on hold for 30 minutes before being told to "go to the nearest emergency room").

64. See *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957) (stating "[h]ospitals should, in short, shoulder the responsibilities borne by everyone else").

65. See, e.g., *Albritton v. Neighborhood Ctrs. Ass'n for Child Dev.*, 466 N.E.2d 867, 872 (Ohio 1984) (abolishing the doctrine of charitable immunity in Ohio). One reason for this action is that charities, like all other entities, should be responsible for their acts, and tort law is the primary means of enforcing this. Additionally, charities can purchase insurance, just like any other entity.

which apparently needed encouragement and governmental subsidy,⁶⁶ might at one time have needed the exemption. They are now thoroughly on their feet, and no longer need (if they ever did) to be exempted from liability for their own negligence in order to survive. As with charities, such an exemption is both unfair to those injured and unnecessary to the survival of HMOs.⁶⁷ It also, as with hospitals generally, fails to accord with reality. HMOs seek clients, advertising intensively at the workplace for members. Courts came to recognize that hospitals, not just doctors, practice medicine.⁶⁸ Surely HMOs do as well.

IV. CONCLUSION: CIGARETTES AND HMOS

Tort law provides a crucial tool to use in regulating conduct and providing compensation. When strict products liability developed, it was based upon the premise that manufacturers who design, produce, market, and profit from products should pay for the injuries caused by their products as a cost of doing business. This is simply a variant of the idea that one is responsible for the injuries one causes, whether negligently or not. If your product (or your dog) causes injury to another, you should pay for that injury, irrespective of negligence. It is, after all, your product (or your dog).

The 1990s have seen an enormous increase in product safety. Clearly, manufacturers of many products have been made to feel

66. Exempting HMOs from liability did not, of course, make the costs of the injuries they inflicted go away. Someone had to pay them. To the extent that the someone was a governmental body compelled to cover costs that the HMO refused to pay, the HMOs received governmental subsidies.

67. It is perhaps worth noting that tort law, at least partly in response to charitable immunity and, later, independent contractor defenses, developed a welter of doctrines designed to provide plaintiffs with defendants to sue for negligence in cases where the plaintiffs could not sue the hospitals. *See, e.g.*, *Ravi v. Williams*, 536 So. 2d 1374 (Ala. 1988) (applying the borrowed servant rule); *Truhitte v. French Hosp.*, 180 Cal. Rptr. 152 (Cal. Ct. App. 1982) (discussing the efficacy of the captain of the ship doctrine in the charitable immunity era). The *Truhitte* court remarked that the impetus for the captain of the ship doctrine was "the need to assure plaintiffs a source of recovery for malpractice at a time when many hospitals enjoyed charitable immunity." *Truhitte*, 180 Cal. Rptr. at 160.

68. Courts have developed various doctrines to hold hospitals vicariously liable for the actions of those practicing within their walls, including the ostensible agency test and the inherent function test, partly in response to the fact that the idea that hospitals do not practice medicine became discordant with reality. *See, e.g.*, *Slavik v. Parkway Hosp.*, 242 A.D.2d 376, 376 (N.Y. App. Div. 1997) (in context of hospital advertising).

that they should stand behind their products. In the 1970s, automobile manufacturers fought tooth and nail against the requirement that they install airbags in their vehicles. In the 1990s, they compete for safety ratings. Anyone who has dealt with the changes in products for babies and children has seen staggering modifications in such items as playpens, walkers, and car seats. While strict products liability may not have caused manufacturers to develop their enhanced consciousness of safety issues, it seems clear that manufacturers have been compelled by the threat of liability to take a greater interest in protecting themselves through developing safer products.

The increase in product safety has occurred with respect to those products to which strict products liability doctrine has been applied. Some proof of a causal link between the threat of liability and enhanced product safety may be found in the current battle over cigarette manufacturer liability. Cigarette manufacturers have never been successfully sued under strict products liability, because they have been able to persuade the courts and many scholars that the absence of an alternative feasible design should protect them from having to pay for the injuries their products have caused.⁶⁹ They have thus been able to produce and market their product without the restraints that the threat of strict products liability might

69. Two of the most important protectors of cigarette manufacturers are Professors Henderson and Twerski, the Reporters responsible for the Third Restatement. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991) (stating that "American products liability law has reached a point from which further meaningful development is not only socially undesirable but also institutionally unworkable").

With respect to the alternative feasible design issue, it is worth noting that smoking causes nondisease related deaths as well as lung cancer and the other ailments for which cigarettes are responsible. Cigarettes cause approximately one-quarter of all fire deaths in the U.S., many of which victimize children and innocent bystanders. See *Tobacco Giants Snuff out Fire-Safe Cigarettes*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Jan. 5, 1998, at 2D.

Ironically, there may be an alternative feasible design that would reduce the fire risk. Cigarette companies have warded off these arguments, however:

tobacco companies, claiming fire-safe [cigarettes] would not be commercially feasible, have repeatedly overpowered or outflanked such efforts. And the way they have done it, secret documents and interviews show, is a textbook example of a powerful industry using its wealth and ingenuity to stave off regulation . . . by bankrolling in-house scientists [and] shift[ing] the fire resistance burden to manufacturers of everything from mattresses and furniture to pajamas.

Id.

have caused them to develop.⁷⁰ They have further been able to avoid negligence-based liability on the theory that smokers deserve what they get.⁷¹

The exemption of cigarette manufacturers has had nothing but harmful effects in addition to the obvious one of leaving the injured uncompensated.⁷² Because they did not fear liability, cigarette manufacturers were under no pressure to develop appropriate warnings to place on their product nor to act responsibly in other respects. The price of cigarettes was maintained at an artificially low level because manufacturers did not need to pass the real costs of their product on to the consumers of that product. The low cost of cigarettes in turn encourages smoking.⁷³ The combination of low price and inadequate warnings, a combination fostered by non-liability, operates to persuade additional persons, kept in ignorance of the consequences, to begin the habit. Current settlement negotiations cannot replace the benefits to society of holding manufacturers liable.⁷⁴

70. The history of suits filed against tobacco companies has been discouraging, to say the least. See Leila B. Boulton, Comment, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U. L. REV. 643 (1987) (recounting the history of tobacco litigation and its lack of success); see also Bruce A. Levin, *The Liability of Tobacco Companies—Should Their Ashes Be Kicked?*, 29 ARIZ. L. REV. 195 (1987).

The ability of cigarette manufacturers to avoid liability is not only based on substantive arguments, but also upon procedural violations. For example, a Minnesota judge ordered Brown & Williamson Tobacco to “pay a \$100,000 penalty for flagrant violations of pretrial discovery orders.” Henry Weinstein, *Judge Imposes \$100,000 Fine on Tobacco Company Litigation*, L.A. TIMES, Dec. 31, 1997, at D1; see also Peter S. Canellos, *Tobacco Lawyers' Role: Counsel or Coverup?*, BOSTON GLOBE, Dec. 28, 1997, at A1 (discussing how counsel may have violated the crime-fraud exception to attorney-client privilege).

71. See, e.g., *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230 (N.D. Ohio 1993) (disallowing a recovery by the plaintiff because “[t]he dangers posed by tobacco smoking have long been within the ordinary knowledge common to the community”).

72. The economic costs of smoking are staggering. In the mid-1980s, for example, cigarette smoking generated \$22 billion each year in health-related costs and \$43 billion each year in lost productivity. See Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 94 (1986). In the mid-1990s, smoking was responsible for between 4.2% and 11.5% of all health care costs in the United States. See Paul Cotton, *Smokers May Pay, But Not Their Own Way*, 271 JAMA 644, 644 (1994).

73. See David Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1256–57 (1994) (observing that the “low prices [of cigarettes] may encourage excessive use” (footnote omitted)).

74. Even the most recent version of the “national tobacco deal” provides cigarette manufacturers with a certain level of immunity.

In the settlement reached last June 20, a group of trial lawyers and state at-

The exemption of cigarette manufacturers from liability has allowed that industry a level of irresponsibility that is only now becoming public.⁷⁵ As the perception that this exemption is unjustified increases in strength, a piecemeal approach to correcting what was an error in the first place has been taken. This piecemeal approach, which is extremely unlikely to prove successful, is both too little and too late. Society would have been better off if cigarette manufacturers had been held responsible for their product from the start. Exempting cigarette manufacturers has spawned massive litigation in the search for alternative theories on which to base liability, all of which would have been unnecessary had cigarette manufacturers been held accountable for their product in the first place.⁷⁶

Like charitable organizations, HMOs at their outset received some protection from tort liability. Also like charitable organizations, HMOs, now well-established, no longer need this protection. Like any other entity which need not worry about tort liability for its actions, HMOs have become something of a juggernaut. In the absence of action to abolish the exemption — action which may require legislative response depending upon the nature of the initial

torneys general promised broad legal protections to the industry in return for a host of public health initiatives and \$368.5 billion over 25 years. In return, future group lawsuits against the industry would be banned, as would punitive damages.

John Schwartz & Ceci Connolly, *Nicotine Conspiracy Alleged*, WASH. POST, Jan. 8, 1998, at A1.

75. See, e.g., Alix M. Freedman & Amy Stevens, *Tar Wars: Philip Morris Is Putting TV Journalism on Trial in Its Suit Against ABC*, WALL ST. J., May 23, 1995, at A1 (reporting on the lawsuit triggered by ABC Television's report that Philip Morris "spiked" its tobacco with extra nicotine); Susan B. Garland, *A Big Stink over Nicotine*, BUS. WK., Jan. 19, 1998, at 36 (reporting the Justice Department's criminal investigation of Brown & Williamson Tobacco Company for its alleged efforts to develop a high-nicotine cigarette). Recently uncovered memos reveal that R.J. Reynolds Tobacco sought for decades to reverse declining sales by aggressively targeting those as young as 14 years old through their Joe Camel cartoon advertising campaign. See John Mintz & Sandra Torry, *RJR Sought Young Teen Smokers, Memos Show*, PHILA. INQUIRER, Jan. 15, 1998, at A1 (stating that the 81 documents contrast with the company's repeated public declarations that it does not target young people).

76. Products liability promotes the economic goal of compelling manufacturers to pay the true costs of the products they make. Failure to impose such liability allows the manufacturer a windfall. Someone must absorb the cost; the cost of the injuries does not go away when the manufacturer escapes liability. In the case of tobacco products, that someone is society as a whole. See Wertheimer, *Pandora's Humidor*, *supra* note 22, at 408 (discussing products liability and tobacco companies).

immunity — the law applicable to HMOs is beginning to resemble the litigation inspired by the effort to find a theory of liability against cigarette manufacturers that courts will accept.⁷⁷

Exempting HMOs from normal standards of care has caused another set of repercussions in the legislative world. In order to replace the tort rules they so cavalierly discarded, legislatures are now enacting individual medical standards into law.⁷⁸ This is staggeringly inefficient, because there is no end to the number of medical decisions that are made many times each day. It is unnecessary, because general tort standards of care, if applied to HMOs, would take care of the problems which have arisen. It is, finally, just plain silly to spend the amount of time and energy on individualized standards of care, when the problem could be solved by simply leaving the tort system alone.

Immunity from liability is clearly a bad idea. Corporations need an incentive for responsible conduct. Removing the incentive that tort law was designed to provide has allowed both cigarette manufacturers and HMOs to give profits priority over responsibility. There is surely room for liability without forcing either kind of entity into bankruptcy. But, what if holding HMOs and cigarette manufacturers responsible for their decisions and product, respectively, forces them out of business? In other words, what if people stop smoking when the price of cigarettes rises to reflect their true cost, or HMOs become too expensive to be practical when their decisions must be reasonable? Those who oppose liability for cigarette manufacturers support the view that cigarette manufacturers (and smokers) should not pay the costs of their product, and those who oppose liability for HMOs seem to find that unreasonable medical decisionmaking is acceptable. But, if either entity cannot survive tort liability, it might provide evidence that HMOs and cigarettes were a bad idea in the first place. The cost of having them is too high if they cannot support themselves at the same time as they pay

77. For an example of the complexity of the litigation spawned by exempting HMOs from responsibility for their actions, see *Estate of Frappier v. Wishnov*, 678 So. 2d 884 (Fla. Dist. Ct. App. 1996) (applying ERISA preemption of HMO liability).

78. See Tom Phillip, *Piecemeal HMO Reforms Miss Doctors' Expanded Role*, SACRAMENTO BEE, May 19, 1997, at A1 (quoting Emery Dowell, a retired nonprofit health care lobbyist: "The legislature is really missing the mark This business of dealing with perceived HMO abuses one diagnosis at a time, we just get ourselves tied into the silliest knots you ever saw.").

for the injuries they cause. The harm they produce may be greater than the benefit they confer. But we will only find this out if they first must pay their own way.