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AN ECONOMIC ANALYSIS OF MONTANA PRODUCTS LIABILITY

Daniel Jones*

In adopting a strict liability regime for products liability, the Montana Supreme Court stated, “strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product.” The Court’s de facto policy statement brings into question whether products liability is effective or even desirable as applied in Montana. Although the efficacy of legal regimes is often analyzed in the context of procedural justice, substantive justice, equity, truth, or other similar concepts, the purpose of this article is to use a more objective standard—economic analysis. An economic analysis of the law aims to determine whether laws promote rational behavior in pursuit of consistent ends by efficient means. Montana products liability law has aspects that result in both efficient and inefficient outcomes. Courts have construed the statutory and common law schemes such that the product liability rules promote rational behavior and efficient outcomes because they direct liability to the party who has the best ability to avoid the injury. But the affirmative defenses to Montana products liability claims do not promote rational behavior and have the potential to result in perverse incentives for both manufacturers and consumers.

Part I of this article discusses why efficiency is an appropriate standard by which to analyze behavior for a negligence and strict liability legal regime. Negligence is included in the analysis because the economic model for strict liability is partially based on the negligence model, and Montana products liability uses aspects of both. In Part II, a basic economic model for both negligence and strict liability will be introduced and explained. In Part III, the models will be applied to the current products liability regime in Montana to determine whether the Montana rules result in, or have the potential to result in, efficient outcomes. Part IV of this article will summarize the findings and conclude that while most aspects of Montana’s prod-

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3. Cooter & Ulen, supra n. 2, at 347.
ucts liability regime have the potential to lead to efficient outcomes, the affirmative defenses do not.

I. Economic Efficiency

Perhaps the most famous insertion of economic analysis into law came from Judge Learned Hand who stated, "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [sic] less than PL." While he was referring to negligence as opposed to strict liability, negligence is still a useful place to begin because the strict liability model builds off the negligence model.

Judge Learned Hand was attempting to create a framework for analyzing whether the acts of an individual constitute negligence based on the costs individual actors were imposing on themselves and others; that is, if the cost of the potential injury was far greater than what it would cost to avoid the danger, the potential tortfeasor should incur the burden of avoiding the injury. From Judge Hand’s perspective, liability should accrue to the tortfeasor when the tortfeasor fails to properly account for the negative external costs, PL, his actions will impose on others. Alternatively, if the tortfeasor internalizes those costs by taking additional precautions (i.e., B>PL), he will not be liable for any injuries caused by his actions. The purpose of this framework was to determine when it was appropriate to force tortfeasors to recognize the external costs of their actions and to hold them liable when they imposed the external costs on others. From an economic perspective, a negligence legal regime is necessary because rational, self-interested decision-makers will account for only the personal costs of their actions. Such myopic behavior would leave the rest of society bearing the burden of tortfeasors’ acts. Negligence law, therefore, attempts to prescribe a level of precaution that all actors must adhere to if they wish to escape liability.

From an economic point of view, negligence law attempts to shift the burden of the negative externality caused by the tortfeasor’s actions from the victim to the tortfeasor if the tortfeasor’s actions are not within the legally mandated level of precaution. In other words, the tortfeasor must exhibit an appropriate amount of self-control to avoid liability. The question then becomes, what is the appropriate level of precaution, or what is the efficiency-promoting level of precaution? The appropriate level of pre-

5. Id.
7. Id.
8. Id.
caution is that which minimizes the total costs to all of society for any act. 9
The level of precaution that minimizes total social costs would presumably
lead to the most consistent and rational behavior. 10 In terms of strict liaibil-
ity, the same cost-minimizing outcome is desirable. 11 Therefore, the deter-
minative factor in establishing whether a legal regime results in efficient
outcomes is the level of precaution imposed by the regime. I now turn to
how the appropriate level of precaution is determined and who bears the
burden of costs associated with precaution.

II. AN ECONOMIC MODEL

The strict liability economic model is based on the negligence model.
Therefore, the negligence standard will be defined first. When the rights
of one individual are violated by another, the violated individual forcibly bears
some costs of the violator’s actions. The violated party is subject to the
negative external costs created by the violator, and the violator is subject
only to the costs incurred in taking precaution. Therefore, there are two
general types of costs: the costs the tortfeasor can recognize (internal/pre-
caution costs) and the costs imposed on other people as a result of the
tortfeasor’s actions (external/accident costs). 12 The “external costs” are the
accident costs borne by the plaintiff and any other member of society af-
fected by the tortfeasor’s actions. “Internal costs” are primarily the costs
associated with the level of precaution incorporated by the tortfeasor. The
sum of the internal costs and external costs are the total costs imposed upon
society, or “social costs.” 13 Efficiency dictates that the rules of tort liability
should be structured so as to minimize the sum of precaution (internal
costs) plus accident costs (external costs). 14 Put simply, the efficiency stan-
dard attempts to minimize the total social costs. The social cost function is
the mathematical function that embodies the sum of the total social cost, the
minimization of which establishes the efficient amount of precaution. 15

The tortfeasor’s precautionary costs change as a function of the
tortfeasor’s self-prescribed level of precaution. These costs could include
the cost of driving slower instead of faster, the cost of keeping commercial
coffee at a lower temperature, 16 or the cost of constructing a taller outfield
fence. 17 The precautionary cost is a function of the acts the tortfeasor is

10. This article assumes that people are rational.
11. Cooter & Ulen, supra n. 2, at 368.
12. Id. at 348.
13. Id. at 349.
14. Id. at 347.
15. Id. at 348–349.
taking. The amount of precaution, $x$, multiplied by the incremental cost of precaution, $w$, determines the tortfeasor's total precautionary costs.$^{18}$ For example, each additional foot the tortfeasor raises the outfield fence has an incremental cost. By multiplying the additional feet that the fence was raised by the cost per foot, you get the total cost of precaution, $wx$. An important quality of the cost of precaution, $w$, is that it is an increasing linear function.$^{19}$ As $w$ or $x$ increases, the total cost of precaution increases. It is assumed that the cost of precaution is determined exclusive of any negative external costs imposed on society. Put differently, the tortfeasor is only interested in the costs imposed upon him.$^{20}$

The social cost function also includes the external costs imposed on others by the tortfeasor.$^{21}$ It is important to note that external costs are expressed as a probability. For example, an accident does not occur every time an individual backs up his car without looking behind the car; therefore, the cost of that accident is best represented as a function of the probability of the tortfeasor causing the accident. More precisely, the cost of the negative externality will be the costs imposed on others, $A$, multiplied by the probability of those costs being imposed given the amount of precaution that is used by the tortfeasor, $p(x)$.$^{22}$ The expected accident cost, or external cost, is $p(x)A$.$^{23}$ The external costs include all costs that are imposed because of the tortfeasor’s actions, including administration costs and injury costs. For example, if the tortfeasor increases the height of the outfield fence by 50 feet, the probability of an accident occurring, $p(x)$, decreases. Therefore, the total expected accident cost, $p(x)A$, will decrease.$^{24}$ An important quality of the total expected accident cost is that it is a decreasing function of $x$, and the function is decreasing at a decreasing rate.$^{25}$ For example, the function $p(x)A$ behaves in the following fashion: raising the outfield fence by an initial five feet decreases the probability of an accident by 10%. The next five feet the fence is raised decreases the probability of an accident occurring by only 8%. The next five would result in only a 3% decrease, and so on until an additional five-foot increase would result in the probability of an accident remaining the same. In other words, at some

19. Id. at 348.
20. Id.
21. Id.
22. Id. at 349.
23. Id.
24. By way of example, if the $p(x_1)$ is 50% and $p(x_2)$ is 25%, where $x_1$ represents a fence height of 10 feet and $x_2$ represents a fence with a height of 12 feet, then, assuming an accident cost, $A$, of $100, the expected accident cost with the level of precaution of $x_1$ is $50 and the expected accident cost with the level of precaution of $x_2$ is $25.
point, it is utterly impossible to knock the cricket ball over the fence and knock out a little old lady.\textsuperscript{26}

The reason that the expected accident cost is used, as opposed to the actual accident cost, is that negligence or strict liability should be proscriptive. A rational individual should be able to determine whether the level of precaution she chooses to use imposes an inefficient negative externality on society, especially in the case of a manufacturer or seller of goods. The efficient level of precaution should be as calculable as possible. This is especially useful for product manufacturers because a particular product will be placed in the market many times over. Being able to predict the expected accident cost at each level of precaution should inform producers how much precaution is necessary to avoid having the total social cost imposed or how much precaution is necessary to avoid liability.\textsuperscript{27}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{social_cost_function.png}
\caption{The Social Cost Function}
\end{figure}

The social costs function, $SC$, is the sum of the private costs incurred by the tortfeasor and the potential accident costs imposed on society, $SC = wx + p(x)A$.\textsuperscript{28} The level of precaution, $x$, that minimizes the social costs function is the efficient level of precaution (denoted "$x^*$" in Figure 1).\textsuperscript{29} If the courts desire socially efficient outcomes, the negligence rule should dic-

\textsuperscript{26} Bolton, [1951] AC. 850, [1951] 1 All ER 1078.
\textsuperscript{27} Cooter & Ulen, supra n. 2, at 358.
\textsuperscript{28} Id. at 348.
\textsuperscript{29} Id. at 349.
tate that when the tortfeasor takes a level of precaution less than the efficient level, courts will impose the external costs on the tortfeasor.\textsuperscript{30} This imposition of cost informs the tortfeasor that it is cheaper to take more precaution and avoid the imposition of costs than to try to impose those costs on society by choosing a non-minimizing level of precaution. Mathematically stated, when \( x \) is above or equal to the mandated level, the tortfeasor will only be required to pay \( w_x \). However, if \( x \) falls below the mandated level of precaution, the tortfeasor will be required to pay \( w_x \) in addition to the accident costs.\textsuperscript{31} The tortfeasor should continue to expend money on precaution until the marginal cost of precaution \( w \) is equal to the reduction in expected accident costs \( P'(x)A \).\textsuperscript{32} Thus, the negligence regime should dictate a level of precaution that, if not adhered to, gives rise to the imposition of liability.

As a final note on negligence, it is important to keep in mind that either party can act negligently. Under the various forms of the negligence rule, all parties to an accident will have an incentive to produce an efficient amount of precaution.\textsuperscript{33} Those parties who fail to produce sufficient amounts of precaution will bear the burden of the resulting social costs of the accident.\textsuperscript{34} Therefore, both parties have the burden of producing an efficient level of precaution. The notion that more than one party has the ability to avoid danger is pivotal in determining whether a negligence standard or strict liability standard should be applied. For example, the little old lady can climb to the top of the negligently short fence and then be hit in the head with the cricket ball. Both parties acted negligently, and both parties are subject to a separate negligence analysis. The situations in which efficiency requires both parties to take precaution against accidents are those of bilateral precaution.\textsuperscript{35} In contrast to bilateral precaution, unilateral precaution incidents are those in which only one party can produce the efficient amount of precaution.\textsuperscript{36} In order to create incentives that direct individuals to act rationally and consistently, situations of unilateral precaution must be controlled by strict liability regimes.\textsuperscript{37} In contrast, situations of bilateral precaution create an incentive for both parties to use the efficient amount of precaution and a negligence standard is appropriate.\textsuperscript{38} As the

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Cooter & Ulen, supra n. 2, at 365.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\end{itemize}
negligence rule for bilateral precaution has been explored, I now turn to
incidents of unilateral precaution and strict liability.

As the focus of this article turns to strict liability, it is important to
keep in mind that the economic goal of strict liability is the same as that of
negligence: minimizing social costs.\(^\text{39}\) Again, this is effectuated by reduc-
ing the internal costs incurred by the tortfeasor and the external costs im-
posed on the injured party. The practical difference between negligence
and strict liability arises in liability apportionment that results from an indi-
vidual being injured.

A strict liability regime imposes liability solely on the tortfeasor, with-
out regard to the level of precaution used by the tortfeasor.\(^\text{40}\) Framed in the
language of unilateral precaution, application of strict liability is appro-
priate when one party could have used the efficient amount of precaution. If
efficiency requires only one party to act, strict liability does \textit{not} impose a
legal standard of care, \(x\), as negligence does, that releases the tortfeasor
from liability.\(^\text{41}\) In other words, if the plaintiff is injured, the defendant is
liable no matter what. However, where only one party can efficiently deter
the injury, the strict liability regime still results in the lowest social costs.\(^\text{42}\)

If strict liability does not impose a legal standard of care, what level of
precaution will a manufacturer choose? The social costs curve is a convex
curve, which is caused by \(w x\) having a positive slope and \(p(x)A\) having a
negative slope.\(^\text{43}\) As long as the manufacturer is forced to internalize the
external costs its actions impose upon society, the manufacturer will have
an incentive to minimize both the expected accident costs and its internal
precaution costs. This is so because the social costs curve, the sum of the
expected accident costs and the internal precaution costs, is convex and has
a minimum value. Therefore, the incentive for the manufacturer is to pro-
duce the amount of precaution, \(x\), that minimizes the social costs function.\(^\text{44}\)
An interesting result of this rule is that the potential victim has no incentive
to exhibit precaution against injuries subject to a strict liability rule.\(^\text{45}\)

Efficiency is achieved when the appropriate legal standard is applied.
If either party can efficiently avoid harm, the smallest burden imposed on
all of society can be reached through application of a negligence standard.
On the other hand, assuming the situation dictates that only one party could
have caused the injury to be averted, a strict liability standard will lead to

\(^{39}\) Cooter & Ulen, \textit{supra} n. 2, at 372.
\(^{40}\) Id. at 370.
\(^{41}\) Id.
\(^{42}\) Id. at 365.
\(^{43}\) Id. at 350.
\(^{44}\) This analysis assumes that the manufacturer is a profit-seeking/loss-avoiding entity.
\(^{45}\) Cooter & Ulen, \textit{supra} n. 2, at 364–365.
the most efficient results. What is the indicator as to which standard a court is applying? If the court weighs the method and intensity of actual use of the product against that which a reasonable consumer would have done in a similar situation, we know the court is applying a bilateral precaution model. If the court applies a unilateral precaution model, the level of precaution is inconsequential and the court will impose strict liability without regard to either parties’ actions. I now analyze how the Montana Supreme Court has approached products liability and whether it appears to have applied the appropriate legal standard.

III. Application of the Economic Models

Strict liability was adopted by the Montana Supreme Court in Brandenburger v. Toyota Motor Sales, U.S.A., Inc. in which the Court applied the Restatement (Second) of Torts § 402A. That Restatement provided:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

As was noted in the introduction, the Court stated, “the doctrine of strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product.” The Court’s initial rationale for adopting strict liability does not appear to have comprehended the difference between situations of unilateral precaution and bilateral precaution. Regardless, Montana’s whole-hearted adoption of the Restatement, the codification of the same at Mont. Code Ann. §27-1-719, and the subsequent case law provide fertile ground to analyze the application of products liability in Montana. The foregoing economic models will be used to analyze the three general categories of the Montana products liability regime: design defect, manufacturing defect, and failure to warn. Thereafter, the affirmative defenses of misuse and assumption of the risk will be critiqued using the same models.

46. Brandenburger, 513 P.2d at 272 (adopting Restatement (Second) of Torts § 402A (1965)).
47. Restatement (Second) of Torts § 402A.
48. Brandenburger, 513 P.2d at 273 (citing Lechuga, 567 P.2d at 261 (Jacobsen, J., concurring)).
In order to establish a prima facie case in strict liability, the plaintiff must show that the product caused the injury and that the injury occurred because the product was defective and unreasonably dangerous. Montana's strict liability statute states that "a person who sells a product in a defective condition unreasonably dangerous to a user or consumer or to the property of a user or consumer is liable for physical harm caused by the product . . . ." As interpreted by the Montana Supreme Court, the statute does not create a dual standard for products liability (both defective and unreasonably dangerous). Instead, it only requires that the plaintiff establish that the product was defective. Put simply, a "defective product" and an "unreasonably dangerous product" mean the same thing; there is only one standard, without regard to whether the standard is stated as "defective and unreasonably dangerous" or as any other derivation.

There are two characteristics of the statute that must be mentioned before an in-depth analysis. First, just as the Court adopted the Restatement (Second) of Torts § 402A, the Legislature adopted the Court's common law rule. Thus, the interpretations of the Restatement prior to the codification of the Montana products liability regime are just as persuasive, all else being equal, as those interpretations made after the codification. Second, strict liability will not be imposed under the terms of the statute until the plaintiff establishes that the product was "in a defective condition unreasonably dangerous." Depending on whether the plaintiff is claiming design defect, manufacturing defect, or failure to warn, what constitutes a defective product that is unreasonably dangerous will vary. Considering the purpose of this article is to determine whether strict liability for products liability in Montana is efficient, the economic analysis will focus on what constitutes a defective product.

A. Design Defects

In Montana a design defect case can be presented in one of two ways: one can claim that the specifications upon which the product was based were defective, or one can claim that the consumer's expectations were violated as a result of the defect. Regardless of the manner in which the
case is framed, the resolution depends on whether an alternative product design should have been used.\textsuperscript{59} If the manufacturer should have used an alternative design, the manufacturer will be subject to strict liability.\textsuperscript{60} Both the alternative design and consumer expectation standards deserve separate analysis.

1. Alternative Design

In \textit{Rix v. General Motors Corp.}, the Court identified a series of factors that would need to be balanced in order to determine whether a product was defective.\textsuperscript{61} In \textit{Rix}, the plaintiff was injured when he was hit by a General Motors Corporation ("GMC") truck.\textsuperscript{62} The truck had been equipped with a water tank after GMC had sold it to an automobile dealer.\textsuperscript{63} The parties stipulated that a brake failure caused the collision.\textsuperscript{64} GMC manufactured trucks of the same model with one of two types of brake systems: a single brake system and a dual brake system, the latter providing more braking power than the former.\textsuperscript{65} The dual brake system was only equipped on trucks when the purchaser elected to have it attached at an additional cost.\textsuperscript{66} The plaintiff claimed that if the dual brake system had been equipped, the accident would not have been as severe or it would not have occurred.\textsuperscript{67} For that reason, the plaintiff asserted that the dual brake system should have been mandated.\textsuperscript{68} In essence, the plaintiff argued the single brake system design was defective because a better system—the dual brake system—existed when the product was placed in the stream of commerce. Prior to this case, the Court had yet to articulate a clear set of criteria to analyze alternative design cases. Here, however, the Court held that various factors must be balanced by the jury to determine whether the manufacturer should be subject to strict liability.\textsuperscript{69} The Court added that not all factors would be necessary in every case and that the jury should consider alternative and additional factors as different facts and circumstances dictated.\textsuperscript{70} The factors the Court found most applicable (hereinafter the \textit{Rix Test}) for the case at hand were:

\begin{itemize}
  \item \textsuperscript{59} \textit{Rix}, 723 P.2d at 201.
  \item \textsuperscript{60} \textit{Id.}
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} \textit{Id.} at 197.
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} \textit{Rix}, 723 P.2d at 198.
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} \textit{Id.}
  \item \textsuperscript{69} \textit{Id.} at 201.
  \item \textsuperscript{70} \textit{Id.}
\end{itemize}
(a) The reasonable probability that the product as originally designed would cause serious harm to the claimant.

(b) Consideration of the reasonable probability of harm from the use of the original product as compared to the reasonable probability of harm from the use of the product with the alternative design.

(c) The technological feasibility of an alternative design that would have prevented claimant's harm.

(d) The relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design.

(e) The time reasonably required to implement the alternative design.71

The Court remanded the case to determine whether, under the foregoing factors, the product was "unreasonably dangerous because a safer alternative design was available to the manufacturer."72

Although this case was remanded, it illustrates how the Court applies its strict liability standard. There was no question that the plaintiff had been injured.73 If the case were decided in terms of strict liability, plainly interpreted, the plaintiff should have recovered immediately; instead, the Court adopted a different rule.74 First, according to the five Rix factors, a jury determines whether the product was defective and unreasonably dangerous.75 If the product is defective and unreasonably dangerous, the Court applies strict liability.76

Interestingly, it appears there is a contradiction in the standards used to prosecute a design defect case. Products liability cases have long been lauded for applying a pure strict liability standard; but, the above factors appear to insert a reasonableness standard in determining whether the product was defective and unreasonably dangerous. How does one reconcile the commingling of the two standards? Giving due consideration to the differences between bilateral precaution and unilateral precaution, the answer becomes clear. The Court is trying to determine, in essence, who could have avoided the injury.

Design defect cases usually involve durable products.77 For example, a consumer purchases a snowmobile, a durable product, and understands that it is meant to drive on snow. Once the products are in the hands of the consumer, the probability of an accident depends upon the method and in-
tensity of use of the durable product. 78 These products are typically marketed with a particular purpose that is partially dictated by price. A snowmobile is not designed to drive on water, and, if it were, it would be markedly more expensive. When consumers use products in a manner the manufacturer could not reasonably foresee and bring a claim that an alternative design—presumably one that would have accommodated the manner in which the product was used—should have been used, the Court will look to the reasonableness of the design relative to the intended use in determining whether the product was defective and unreasonably dangerous. 79 If the snowmobile consumer claims that a water accommodating design should have been used in manufacturing the snowmobile, the Court will determine whether the manufacturer was reasonable in not using an alternative design that could have adapted the product to that method and intensity of use. In other words, the issue is whether the manufacturer was in the best position to avoid the injury, given the facts and circumstances surrounding the sale of the product, or was the plaintiff remiss in using the product without a sufficient level of precaution? The Court does not blindly inquire as to whether the product caused the injury but instead adopts a two-step process: Was the design reasonable and, if not, should the manufacturer be subject to strict liability? 80

Although it appears that two diametrically opposed standards are being applied—negligence and strict liability—the two-step analysis the Court has used is likely to lead to efficient outcomes. The determination as to whether the product was defective and unreasonably dangerous is rightfully subject to a negligence standard. In terms of the social cost function for the manufacturer, the first element of the Rix Test listed above, (a), represents p(x)A. The Court would like to know the probability of an injury occurring with the original design or original level of precaution. Presumably, the Court will not ignore the method and intensity of use for which that product was designed and marketed. Additionally, the Court is consciously changing the level of precaution, x. The Court wants to know what the alternative levels of precaution could be, or in the terminology of the Court, what proposed alternative designs exist. But the Court is also asking, how would the consumer have used the product at each level of available precaution? This analysis is done to determine if each party is capable of producing an efficient level of precaution, given that the consumer's level of precaution is dependent upon the manufacturer's.

The Court also inquires as to the costs of producing the different levels of precaution. Factor (d) of the Rix Test asks what the cost of production

78. Id.
79. Rix, 723 P.2d at 201–202.
would have been in terms of dollars, while more interestingly, factor(e) of the Rix Test asks what the cost of the product would be in terms of time.\textsuperscript{81} As was noted above, price to some degree dictates the terms of use; the consumer should have known that he was buying the low-end version as opposed to the all-purpose version, i.e., a Ford Escort versus a tank.

Notably absent from the five Rix Test factors is the cost of the injury. This, however, will be addressed later in the court proceedings as the severity of injury is a question of fact for the jury.\textsuperscript{82} The degree of damage caused by the tortfeasor has nothing to do with the determination of who had the burden to avoid injury or who failed to use reasonable care.

It is important to note that the alternative design analysis is not limited to whether the manufacturer could have produced a different product.\textsuperscript{83} The Court wants to know if the product could have elicited the appropriate amount of precaution from the consumer.\textsuperscript{84} If the product could not have elicited sufficient precaution, the manufacturer will be subject to strict liability.\textsuperscript{85} Again, from an economics perspective, the Court’s analysis has the potential to lead to an efficient solution because the Court recognizes that the pivotal determination is whether both the manufacturer and consumer could have prevented the accident. For example, if a consumer brought a claim for design defect against a wrench manufacturer because the wrench injured the consumer while the consumer was using the wrench as a hammer, the burden would be on the consumer to establish that it was unreasonable for the wrench manufacturer to design the wrench in such a way that it could not be operated safely as a hammer.\textsuperscript{86} In the manufacturer’s defense, it would need to establish that the alternative design would have been cost prohibitive for the typical consumer.\textsuperscript{87} It is always possible to make a product safer; the question in a design defect case is whether it was more efficient for the consumer to use a hammer instead of a wrench.\textsuperscript{88}

Thus, the Court is implicitly asking lawyers to analyze the problem in terms of the social cost function. Presumably, if the product could not have elicited the appropriate amount of precaution, the product will be deemed defective and unreasonably dangerous. That determination would then lead to the application of strict liability because the consumer could not have avoided the injury. On its face, the Montana alternative design claim ap-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} \textit{Rix}, 723 P.2d at 202.
\item \textsuperscript{82} 25A C.J.S. \textit{Damages} § 343 (2009).
\item \textsuperscript{83} \textit{Rix}, 723 P.2d at 200.
\item \textsuperscript{84} \textit{Id.} at 201 (citing Unif. Prod. Liab. Act § 104B (1979)).
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at 201–202.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Cooter} & \textit{Ulen}, supra n. 2, at 365.
\end{itemize}
\end{footnotesize}
pears to be efficient—or at least has the potential to lead to efficient outcomes. Actual application of the rule, however, may have varying results.

2. Consumer Expectations

Instead of an alternative design inquiry, a court could determine if the product was in a defective condition because it was unreasonably dangerous. Under the unreasonably dangerous standard, a court compares the actual outcome with that of what the consumer expected the outcome to be. While the Montana Supreme Court has furnished decisions using both standards, it has yet to establish when one standard will be applied over the other.

The Court in *McAlpine v. Rhone-Poulenc Ag Company* held the determination of whether a product is unreasonably dangerous is based on “proving that it is ‘capable of causing injury to the user beyond that which would be expected by the ordinary user.’” There, the plaintiffs asserted that the herbicide produced by the defendant caused severe crop damage that could not have been foreseen by the plaintiffs nor any other ordinary consumer. The defendants admitted that the herbicide had a propensity to cause damage under the conditions the plaintiffs experienced and admitted the herbicide was in fact the cause of the crop damage experienced by the plaintiffs. The issue presented to the Court was whether the language “defective condition unreasonably dangerous” could be misleading for a juror. Although the Court did not directly address the application of consumer expectations, comparing the Court’s dicta on consumer expectations with the rule in *Rix* reveals that strict liability is not applied unless the plaintiff establishes the product was in a defective condition with respect to the method and intensity of use of an ordinary user.

In terms of economics, the Court is asking whether the injury could have been avoided by the consumer. If the reasonable consumer would have expected the outcome, then the reasonable consumer would have avoided it. Again, the Court is implicitly making the determination of whether the manner in which the product was consumed should have dictated unilateral precaution or bilateral precaution. If the injury caused by the product was outside the average consumer’s expectations, the Court imposes strict liability because the manufacturer would have been the only party in a position to avoid the injury. But if the jury finds that an ordinary

89. *McAlpine*, 16 P.3d at 1059.
90. *Id.* (citations omitted).
91. *Id.* at 1056.
92. *Id.* at 1057.
93. *Id.*
consumer should have expected the type of injury caused by the product, the Court will not impose strict liability as consumers have an obligation to avoid injury in instances of bilateral precaution. If the Court were to hold otherwise, it would essentially be imposing absolute liability, and that is not the Court’s intent. “If the manufacturer were liable for any and every injury that could have been avoided by a different design, consumers would have less incentive either to take care or to alter their activity level, for they would know they would be compensated for their injury.”

As a result, the Court will apparently make a determination that the product is in a defective condition unreasonably dangerous when the expected accident costs, \( p(x)A \), are substantially greater than the internal costs the manufacturer incurred, \( wx \). There is a prima facie question of fact as to whether the situation was that of bilateral precaution. If a court does not find that strict liability should be applied, the consumer acted unreasonably in incurring an injury because the manufacturer has internalized the external costs of the product. Alternatively, if a court determines that strict liability should be imposed, the court is implicitly stating that the manufacturer, and only the manufacturer, should have taken greater precaution and decreased \( p(x) \). As can be seen by the rule adopted by the Court in McAlpine, the determination of whether the product is in a defective condition unreasonably dangerous is made by inquiring what the ordinary consumer would expect the product to do. If the Court adheres to this standard, the rule has the potential to lead to efficient outcomes, as it properly distinguishes between situations of bilateral and unilateral precaution.

B. Manufacturing Defect

The second category of products liability is manufacturing defect. Manufacturing defect varies significantly from design defect in that “a defectively manufactured product is flawed because it is misconstructed without regard to whether the intended design of the manufacturer was safe or not.” Whereas a defectively designed product was made in conformity with the specified plans of the manufacturer, the manufacturing defect results “from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction.” “The consumer can do nothing at a reasonable cost, in the short or the long

94. Id. at 1059.
96. Landes & Posner, supra n. 77, at 554.
97. McAlpine, 16 P. 3d at 1059.
98. Rix, 723 P.2d at 200 (citing Caprara v. Chrysler Corp., 417 N.E.2d 545, 552 (1981)).
99. McJunkin, 748 P.2d at 918 (citing Rix, 723 P.2d at 200).
run, to prevent the accident." If consumers cannot prevent manufacturing defect accidents, manufacturers should have a propensity to settle out of court. As evidence of this, relatively few manufacturing defect cases are brought to court or appealed, and accordingly, few cases discuss the rule in detail.

For example, in Wood v. Old Trapper Taxi, the defendants purchased a ham radio tower from James Kozora, who had transported the tower from Ohio to Helena. Kozora had purchased the tower in a used condition from the manufacturer. The defendants hired the plaintiff to construct the tower; during construction, the plaintiff was injured when the tower collapsed. The plaintiff alleged that the collapse was due to the failure of one of the legs. The plaintiff further alleged that the failed leg was reinforced by the manufacturer, at its facility, with a welded piece of plumbing pipe. The district court entered summary judgment in favor of the defendant manufacturer, finding that because the failed leg was no longer available and the expert testimony conflicted as to whether a defect existed, the plaintiffs "were unable to prove that the tower was defective when it left the defendants' control." On appeal, the Court held the central question was "whether the product [was] flawed due to improper construction" in terms of the manufacturing defect claim. Because of the conflicting testimony and evidence regarding whether the leg alterations were made by the manufacturer, the Court reversed summary judgment and remanded the case for trial. The Court's analysis was focused on whether there was a defect in the product when it left the hands of the manufacturer, for if there was, the defendant would be subject to strict liability.

Strict liability for manufacturing defect is a straightforward proposition in Montana. The Court defines manufacturing defects as "imperfections that inevitably occur in a typically small percentage of products of a given design as a result of the fallibility of the manufacturing process." The Court does not make a determination as to whether the consumer could

100. Id. at 555.
101. Id. at 564.
104. Id.
105. Id. at 1377–1378.
106. Id. at 1378.
107. Id.
108. Id.
110. Id. at 1381.
111. Id. at 1379.
112. Id. at 1379–1380 (citing Rix, 723 P.2d 195).
have avoided the injury, nor is there any discussion involving the method or intensity of use. Instead, the Court only wants to know if the product was flawed. This indicates the Court is not applying the bilateral precaution model. In cases of manufacturing defect, the party in the best position to avert injury is the manufacturer. The Montana Supreme Court's application of strict liability should result in efficient outcomes.

C. Failure to Warn

A third manner in which a product can be deemed defective and unreasonably dangerous is when the manufacturer fails to warn the consumer of a danger. The Court has held that, "A failure to warn of an injury causing risk associated with use of a technically pure and fit product can render such product unreasonably dangerous." Thus, just as with a manufacturing defect, the design can be reasonable and, as in an alternative design case, the product can be built exactly to specification. In such case, if the manufacturer fails to warn the consumer about a potentially hazardous danger, the product will be deemed defective. The basic idea is that if there is a potential hazard that the reasonable consumer would not expect, the producer may have a duty to warn the consumer. If the manufacturer breaches its duty to warn, the product will be deemed defective and unreasonably dangerous, thus invoking strict liability.

In Wise v. Ford Motor Co., the plaintiff drove his Ford Escort into a mechanical car wash and when the spray of water from one of the pressurized water jets hit the driver's side window, the window exploded into the car and injured the plaintiff. Plaintiff presented evidence during trial that Ford Motor Company knew that windows in the 1981-1990 Escort could explode when exposed to sudden pressure changes, the likes of which occur in mechanical car washes, and "deliberately decided not to warn consumers of this danger." The plaintiff used this evidence as the basis for his failure to warn claim; that is, there was a danger of exploding windows that he could not have reasonably foreseen and the manufacturer knew of the danger.

113. Id. at 1382.
114. Brown, 576 P.2d at 719 (citing Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968)).
115. Wise, 943 P.2d at 1314.
116. Restatement (Second) of Torts § 402A cmt. j.
118. Wise, 943 P.2d at 1312.
119. Id. at 1314.
120. Id.
The Court acknowledged that Ford knew its windows had the potential to occasionally break in car washes, but the Court upheld the jury verdict that found the costs associated with warning the user would outweigh the benefit derived by the user of the window design.121 The Court stated, “Although Wise presented evidence that Ford knew that its Escort windows occasionally broke in car washes, both experts [for both the plaintiff and defendant] testified that a warning was inappropriate for this type of risk.”122 In essence, the Court agreed with the testimony of the defendant’s expert who could not see how a warning “would have done an awful lot of good.”123

Thus, Wise shows that while the manufacturer has a duty to warn of potentially dangerous products, that duty is subject to a reasonableness standard.124 The Court will weigh a series of case-specific factors, including whether the danger was open and obvious125 and what the prevailing industry standards were126 in determining whether a warning was warranted.127 This suggests that when information is not readily attainable by the consumer—or is only attainable by exerting great effort—and the potential harm is significant—the duty to warn falls to the party who can act more easily to avoid the harm. In the case of products with potentially harmful ingredients, for example, that party is the manufacturer because without a warning (an ingredient list) each consumer would need to perform a chemical analysis on the products in order to determine if the product contained any potentially harmful ingredients.128

Further promoting efficient outcomes, Restatement (Second) of Torts § 402A assures defendants that where a warning is given, it can be reasonably assumed that it will be read and heeded.129 Here again, the duty is placed on the individual who can most efficiently avoid injury. Once the consumer is provided with the necessary information, the burden of liability for harm is shifted from the manufacturer to the consumer.

Finally, the Montana Pattern Jury Instructions state the rule: “the defendant sold the product in a defective condition because of a failure to adequately warn of those dangers which would not be readily recognized by the ordinary user of the product.”130 Liability revolves around the availabil-

121. Id. at 1315.
122. Id.
123. Id.
124. Wise, 943 P.2d at 1314.
126. Id. at 718.
128. Restatement (Second) of Torts § 402A cmt. b.
129. Id. at § 402A cmt. j.
ity of pertinent information—that is, information that would enable the consumer to avoid injury from dangers that the consumer would not readily recognize. The information’s importance is a function of the cost of the information and the potential harm from which the information will protect the consumer. It is evident, therefore, that the Court is applying a bilateral precaution model.

Wood and snippets of strict liability history illustrate that the jury must consider whether the danger necessitated a warning. This question of fact, in turn, is based upon what a reasonable person would be able to deduce from the product. Stated in the form of the social cost function explained above, the amount of information provided would be \( x \) and the potential of harm, \( p(x) \), given the amount of information provided, \( A \), is \( p(x)A \). The duty to warn will be determined by weighing the information costs, \( w \), associated with identifying the danger and the potential injury to the user with and without the warning. Once again, when \( p(x)A \) is greater than \( wx \), the producer has the responsibility to provide further warnings.

In Wise, the Court upheld the jury’s determination, based on the testimony of the defendant, that adding a warning would have provided the consumer with little to no additional protection from the potential injury. It would have thus been unreasonable to require the defendant to warn of a danger when the warning would have been of no beneficial use to the consumer. As a result, the Court determined that an additional unit of \( x \), which is costly for the manufacturer, would not have significantly decreased the probability of an injury, \( p(x) \), thereby making additional warnings unreasonable.

While the common law in Montana is fairly sparse as to failure to warn (or at least as to the application of the rule), it appears that Montana’s interpretation of failure to warn has the potential to create efficient outcomes. The determination of whether the product was unreasonably dangerous is the condition precedent to applying strict liability. The question as to whether the manufacturer needs to warn is similar to that of an alternative design inquiry in that it subjects manufacturers to a reasonableness standard. The manufacturer will be subject to strict liability upon determining the need for a warning and the failure to warn. In economic terms, once it has been determined that the manufacturer could have avoided the accident at the lowest cost, the manufacturer will be held strictly liable to the extent of the total social costs.

132. Wise, 943 P.2d at 1314.
133. Id. at 1312.
D. Affirmative Defenses

A defendant has two affirmative defenses to products liability in Montana: misuse of a product and assumption of the risk. Both defenses are based on the idea that the consumer had the ability and opportunity to avoid the risk of injury at the lowest cost. Whereas alternative design, manufacturing defect, and failure to warn claims appear to have the necessary framework to result in efficient outcomes, the affirmative defenses appear to have a relatively low probability of reaching the same result. Furthermore, the Montana Legislature would be well served to do away with both affirmative defenses as a result of the Court’s interpretation of these rules. The affirmative defense of misuse of a product will first be analyzed, followed then by an analysis of assumption of the risk.

1. Misuse of a Product

In Lutz v. National Crane Corp., the plaintiff’s husband, Lutz, died from injuries incurred while working with a crane. Lutz and his supervisor were instructed to retrieve a load of pipes that had spilled off of a semi-trailer. The pipes had rolled into a position such that they were below overhead power lines. Lutz was aware he would be electrocuted if the power lines came in contact with the crane cable he used to retrieve the pipes. After selecting only the pipes he and his co-worker believed could be removed safely, Lutz positioned the crane above the pipes so that the cable of the crane could drag the pipes up the incline to the road. The cable of the crane nonetheless came into contact with the power line and Lutz was fatally electrocuted.

Lutz’s estate brought a products liability claim against the manufacturer of the crane alleging “that the crane—absent an insulated link—was defectively designed and unreasonably dangerous.” The defendant raised the affirmative defense of misuse of the product, arguing that Lutz had “used the crane in an improper manner by sideloading, or dragging the load, from beneath the power lines.” It was undisputed that Lutz used the side-loading method. The defense claimed that Lutz’s misuse of the

136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Lutz, 884 P.2d at 457.
142. Id. at 458.
143. Id.
product was the sole cause of the accident because the accident would not have occurred had he operated the equipment in the appropriate manner. The defense, in essence, asserted that a manufacturer should not be liable for any unintended use that was not reasonably foreseeable. The Court agreed with the defendant's characterization of when the affirmative defense of misuse is available; the Court disagreed, however, as to the definition of "unreasonable misuse." The Court reasoned that the legislature must have used the terms "unreasonable" and "misuse" purposefully. The Court held that when the misuse was reasonable, the affirmative defense could not be asserted. The Court then stated that when "the manufacturer reasonably foresees that its product can be misused in a certain fashion—that is, the offending misuse is 'reasonable'—then the manufacturer does not have the benefit of a defense which exonerates or mitigates its breach of duty and its wrongful conduct in failing to design out or guard against the defect." Based upon the fact that the defendant admitted that sideloading was a reasonably foreseeable misuse, it was not allowed to rely on the defense of unreasonable misuse.

To assert the affirmative defense of misuse of a product, a defendant must establish three elements: first, that the injured party unreasonably misused the product; second, that the misuse was not reasonably foreseeable by the manufacturer; and third, that the misuse caused the injury. Notably, the essential inquiry under the second element is whether the use was reasonably foreseeable by the manufacturer and not whether the use was "abnormal or unintended." Because a manufacturer can reasonably foresee a near infinite number of unreasonable misuses of its products, it will rarely be able to use the affirmative defense of misuse.

Particularly troubling with the analysis adopted by the Court is the redundancy it causes within the products liability framework. The first element for a determination that a product is defective and unreasonably dangerous in an alternative design case is a determination of "the reasonable probability that the product as originally designed would cause serious harm to the claimant." Such a determination necessarily involves evidence of whether the manufacturer could reasonably foresee the types of

144. Id.
145. Id.
146. Id. at 459.
148. Id. at 460.
149. Id.
150. Id.
151. Id. at 459 (citing Hart-Albin, 870 P.2d at 53–54).
153. Rix, 723 P.2d at 201.
use or misuse at question. The *Lutz* holding therefore creates a redundancy in analysis between whether a product is defective and whether the affirmative defense of misuse is applicable.

In addition, as to failure to warn, the Montana Pattern Jury Instructions suggest that a product is defective and unreasonably dangerous if the manufacturer has failed to “adequately warn of those dangers which would not be readily recognized by the ordinary user of the product.” Here again, the failure to warn analysis includes a determination of whether the manufacturer could reasonably foresee the type of use or misuse in question. The redundancy in the analysis of the standards indicates that the efficacy of the misuse affirmative defense as a separate standard is questionable. In fact, that very argument has been addressed by the *Restatement (Third) of Torts: Products Liability* § 2: “It follows that misuse, modification, and alteration are not discrete legal issues. Rather, when relevant, they are aspects of the concepts of defect, causation, and plaintiff’s fault.”

The foreseeability analysis has the potential to confuse juries because it requires a jury to apply the same criteria for both alternative design/failure to warn and misuse and it distorts the jury’s proper role of shifting the burden of liability to the party that could have most efficiently avoided the injury. As to the latter, the foreseeability requirement shifts a disproportionate amount of the focus onto the actions or knowledge of the defendant. The critical question is which party should bear the burden of liability so as to achieve an efficient outcome? From an economic point of view, that question can only be answered by asking what the defendant could foresee and whether the additional precaution necessary to avoid the foreseeable misuse would have resulted in a lower total social cost.

An example illustrating the problem created by the focus on reasonable foreseeability is found in *Hart-Albin Co. v. McLees Inc.* There, the defense provided an example that using a lawnmower as a hedge trimmer would constitute using something other than for its intended purpose. In this example, the defense would not be able to establish the lawnmower was misused if the manufacturer had so much as contemplated the use. Again, as was noted in *Lutz*, the question is not whether the use was abnormal. The defendant would need to establish that it could not have reasonably foreseen this type of misuse. For example, the defendant would be barred from using the affirmative defense of misuse for any danger of which it has warned the consumer. The question should not be whether the misuse was foreseeable but whether the misuse was reasonable. This would allow a

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157. *Id.* at 53.
jury to weigh the actions and subsequent costs of both parties and make a
decisions based upon who had the ability to avoid the danger. Instead, be-
cause of the misuse statute in Montana, the focus is on the defendant's
knowledge, even if the consumer/plaintiff could have easily avoided the
injury. This may result in unintended outcomes.

In sum, the misuse defense as interpreted in Lutz has the potential to
result in inefficient outcomes for two reasons. First, the analysis of misuse
invites an unnecessary redundancy that can only serve to confuse the trier
of fact. The analysis as to whether a particular use or misuse was reasona-
bly foreseeable by the manufacturer will be made for alternative design and
failure to warn claims. Requiring a jury to revisit the same analysis at the
affirmative defense level may suggest that each analysis of foreseeability
and reasonableness should be different.

Second, the rule rewards unnecessary risks taken by the consumer and
creates a perverse incentive for manufacturers. Consumers will not have an
incentive to take due care where it is relatively more efficient for them to do
so because any misuse that is reasonably foreseeable by the manufacturer
may result in strict liability. Furthermore, if we assume that manufacturers
can foresee most uses of their products, most uses of the products will nec-
essarily be misuses. Additionally, manufacturers may be induced to pro-
duce the “idiot proof” product at a significant cost to the consumer or be-
come knowingly ignorant of potential dangers. An example of such a
product could be a Ford Escort reinforced with the safety features of a tank
as a result of the manufacturer foreseeing that a window could explode if it
came into contact with a high pressure stream of water. As a result, because
the current law does not dictate that the party who can more efficiently
avoid the accident be held liable for such inaction, Montana has created an
inefficient rule that has the potential of spawning irrational behavior.
Whether the incentives are perverse or the rule is confusing, the results of
the rule will still be inefficient in terms of an economic analysis.

2. Assumption of the Risk

The second affirmative defense, assumption of the risk, is founded in
the consumer's observations of the dangers inherent in the product. In
order to establish assumption of the risk statutorily, the defendant must
prove two elements: first, that the consumer discovered the defect, or the
defect was open and obvious and, second, that the consumer unreasonably
made use of the product. The Court, however, requires more than what

159. Lutz, 884 P.2d at 461.
is statutorily mandated, and as a result, the rule does not promote efficient levels of precaution.

_Lutz_ explains the application, both statutorily and under common law, of Montana’s assumption of the risk doctrine. As to the first element, the Court determined that for plaintiffs to have assumed the risk, they must have had subjective knowledge of the defect. In order for the plaintiff to satisfy the first statutory element, there must be evidence that the injured party was actually aware of the danger posed by the defective product. The Court is interested in “what the particular plaintiff sees, knows, understands and appreciates.” In _Lutz_, the Court found that in order for the affirmative defense to bar recovery, the plaintiff had to have personal knowledge that if the crane’s cable came in contact with a power line he would suffer serious injury or death. The knowledge requirement is not that of a reasonable person exposed to similar circumstances; instead, it is what the injured party actually knew.

As to the second element, unreasonably making use of a product, the Court interpreted unreasonable use in an interesting way. The Court borrowed from its previous interpretation of “unreasonably misused” in interpreting unreasonable use. In a convoluted and incoherent fashion, the Court reasoned that if a misuse is reasonably foreseeable, the misuse is reasonable. The Court concluded that “Since ... sideloading was a foreseeable, and, hence, reasonable, though improper, use of the crane, the second part of the defense of assumption of risk could not, as a matter of law, be proven under the statute ...” In other words, if a use is foreseeable it is reasonable whether or not it was a misuse. Thus, in Montana, if the use of a product results in the consumer being injured, and that use was foreseeable by the manufacturer, then the affirmative defenses of assumption of the risk and misuse will be foreclosed. The most troubling aspect of this conclusion is that the Court finds a perfect correlation between foreseeability and reasonableness.

 Appropriately, and surprisingly, the Montana Pattern Jury Instructions differ from the _Lutz_ decision even though the _Lutz_ rule has never been overturned. The Montana Pattern Jury Instructions provide:

Assumption of risk is a defense to a strict liability claim. In order to establish assumption of risk, the defendant must prove:

161. _Lutz_, 884 P.2d at 461.
162. _Id._ (citing _Krueger v. Gen. Motors Corp._, 783 P.2d 1340, 1347 (Mont. 1989)).
163. _Id._ (citing _Krueger_., 783 P.2d at 1347).
164. _Id._
165. _Id._
166. _Id._ at 462.
First, that the defect was open and obvious or the plaintiff discovered the product defect; Second, that even though the defect was open and obvious, or the plaintiff discovered the defect, the plaintiff unreasonably made use of the product; and Third, that the plaintiff was injured as a result of the use. Notably, there is no language inquiring into whether the defendant reasonably foresaw the use of its product. For purposes of an efficiency analysis the difference is important. The assumption of the risk defense is meant to waive liability when consumers unreasonably ignore their own ability to avoid the risk. Under the Lutz rule, the affirmative defense is eviscerated because of the foreseeability rule. For example, Ford can foresee that its Mustangs will be used in drag racing. Under the Lutz rule, any accidents caused because the Mustang was defective as a drag racer could not be defended under assumption of the risk because Ford can foresee that its cars will be used in drag racing. Under the interpretation in Lutz, if drag racing is foreseeable, it is also reasonable, and if it is reasonable, the defendant cannot invoke assumption of the risk.

The same two issues arise under assumption of the risk as arose under misuse: the Court is forcing the jury to undergo a redundant analysis, and the Court is too focused on the defendant’s ability to foresee the misuse. As assumption of the risk is currently interpreted, a consumer is not required to take a minimum level of precaution. An economic analysis would require a prima facie determination of which party was in the best position to avoid the danger instead of inquiring into what the defendant foresaw at the exclusion of investigating the reasonableness of all the parties’ actions.

The Lutz rule creates a perverse incentive. The incentives for the “idiot proof” product and the knowingly ignorant manufacturer are equally present under the assumption of the risk affirmative defense as they are under the misuse affirmative defense. On a practical level, Why would producers offer their wares to Montana when they can be liable for any foreseeable use of its articles of commerce? The rules of alternative design and failure to warn do have the ability to act as “reasonableness filters” that allow defendants to argue the reasonableness of their choices without having to resort to the affirmative defenses. The Montana Pattern Jury Instructions seem to have ignored this anomaly in the common law. Under the rule as written in the Instructions, the affirmative defense seems to be more efficient.

The second problem is the redundancy of analysis. Once again, what the manufacturer knew in terms of how its product would be used is analyzed twice. As was noted in misuse, a determination of what the defendant/manufacturer could have reasonably foreseen should be placed in alternative design or failure to warn. As the affirmative defense of assumption

of the risk has been interpreted, it cannot lead to efficient results because the consumer will not be required to provide an efficient level of precaution. Stated differently, the consumer will not have to exert a reasonable amount of precaution.

IV. Conclusion

The Montana Supreme Court in Brandenburger adopted the products liability regime in an attempt to place liability on the party responsible for the injury occurring.\(^{168}\) The present day application of strict liability in torts would perhaps disappoint the Brandenburger Court because liability does not automatically accrue to the manufacturer. The determination of whether a product is defective currently has the potential to shift the burden of liability onto the consumer or the manufacturer depending upon their respective abilities to avoid the injury. The party that can most easily avoid the injury must do so if it desires to avoid liability under Montana's interpretation of products liability. As a result, alternative design, manufacturing defect, and failure to warn have the potential to result in efficient outcomes.

But there are two glaring exceptions to Montana's exemplary analysis and application of strict liability: misuse and assumption of the risk. These two rules do little more than automatically shift liability onto the defendant. The defendant is thereby forced to rely on the analysis of whether or not a product is defective by way of alternative design, manufacturing defect, or failure to warn. The affirmative defense rules give consumers no incentive to take an appropriate amount of precaution, and give manufacturers an incentive to produce an excessive amount of precaution or to turn a blind eye to possible misuses of their products.

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168. Brandenburger, 513 P.2d at 273 (citing Lechuga, 467 P.2d at 261 (Jacobsen, J., concurring)).