INTRODUCTION

The plaintiff's burden in a product design case is an issue which has created a number of different approaches and a great deal of confusion among the courts. Throughout the past thirteen years, the Nebraska Supreme Court has also encountered difficulty in deciding which path to follow in the maze of products liability law. Recently, however, in *Nerud v. Haybuster Mfg., Inc.*, the court took a tentative step toward reducing the confusion surrounding a plaintiff's burden of proof within the theories of strict liability and negligence. This Note examines the court's decision in *Nerud* and its discussion of a design defect action in Nebraska within the framework of the following specific factors: the confusion surrounding the terms custom and state of the art; the different approaches under which courts have allowed evidence of practicable alternatives to enter into a strict liability analysis; the extent to which a plaintiff in a design defect action has an affirmative duty of offering evidence of a practicable alternative design; and the remaining difference, if any, between a plaintiff's evidentiary burden under a theory of negligence as opposed to strict liability.

FACTS AND HOLDING

On September 6, 1979, Frank Nerud's "Stack-Eze" Haystacking machine caught fire while in operation. Unable to douse the fire, Nerud watched his machine burn beyond repair. The next day, Nerud took delivery of an identical machine and immediately resumed stacking. A few hours later, the second machine was also destroyed beyond repair.

On September 11, 1981, Nerud filed two lawsuits against Haybuster and the seller, Bridgeport Manufacturing Company, Nerud claimed damages under the theories of warranty, negligence, and strict liability.
At trial, Nerud's expert witness testified that the machines contained both manufacturing\(^6\) and design defects.\(^7\) The expert witness contended that the fires were caused by impermissibly undersized shafts which placed a heavy load on bearings attached to the shafts, inducing them to fail prematurely. The failure of the bearings, in turn, caused the machine to generate a high degree of heat, igniting hay being gathered by the machine. The bearings which failed were in identical locations in both machines.\(^8\)

Nerud's expert witness also alleged that the use of four fixed bearings on the conveyor shaft constituted a design defect by creating a strong potential for bearing overload due to misalignment.\(^9\) Nerud also introduced evidence relating to the placement and adequacy of deflectors used to push the hay toward the center of the conveyor belt away from the bearings.\(^10\)

At trial, the court determined that Haybuster negligently designed the machines by placing the bearings in such a position that the hay ignited when the bearings failed. Judgment was entered for Nerud in both cases.\(^11\)

On appeal, the Nebraska Supreme Court reversed the decision.\(^12\) Writing for the court, Judge Caporale first dismissed Nerud's claim.

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6. The plaintiff specifically alleged a breach of express and implied warranties, negligent design, construction and dealer preparation, and strict liability for producing and marketing a defective product. 215 Neb. at 606, 340 N.W.2d at 371. A product is defectively manufactured if the product fails to perform as it was designed to perform or fails to perform as other products of the same kind. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][f][iii] (1984).

7. A design defect differs from a manufacturing defect in that there is no built-in standard of comparison. In the former situation, the plaintiff is attacking the adequacy of the design itself and the choices the manufacturer made in designing the product as it did. Henderson, Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 MINN. L. REV. 773, 774 (1979).

8. 215 Neb. at 606-07, 340 N.W.2d at 372. The design called for a 1.5 inch shaft to turn a 1.5 inch bearing. Nerud's expert witness testified he measured the shaft on both machines and found them to be .015 of an inch undersized. In the courtroom, however, Haybuster's expert witness measured the two shafts and found their measurements 1.5 and 1.4999 inches—which, according to industry custom, was not an impermissible deviation. \(\text{id.}\)

9. \(\text{id.}\) at 607, 340 N.W.2d at 372. Testimony was also given that because Haybuster had no layout drawings, its machines were designed by a trial and error method. \(\text{id.}\)

10. \(\text{id.}\) at 608, 340 N.W.2d at 372.

11. \(\text{id.}\) In the first suit, Nerud was awarded $7,400. The warranty claims against Bridgeport were barred by the statute of limitations. In the second case, judgment was entered against both Haybuster and Bridgeport for $11,200. Bridgeport was also given a judgment in the same amount against Haybuster. \(\text{id.}\) at 608, 340 N.W.2d at 372-73.

12. \(\text{id.}\) at 616, 340 N.W.2d at 376.

13. It should be noted that the case was tried before a five-member panel: White, Caporale, Brodkey, Blue, and Colwell. Two of the five, Colwell and Brodkey, were retired district court judges. Blue was a district court judge. A Nebraska statute provides that the supreme court is empowered to assign acting retired district court judges...
that the haystacking machines were defectively manufactured.\textsuperscript{14} In its allegation of a manufacturing defect, Nerud relied on the assumption that Haybuster used a smaller shaft than its design specifications required—an assumption the defendant later proved to be false.\textsuperscript{15} Therefore, the court held that Nerud failed to sustain his burden of proving that the manufactured product differed from Haybuster's design standards.\textsuperscript{16}

The court next addressed the issue of whether the "Stack-Eze" machines were defectively designed. The court stated that to prove that a product was negligently designed, the plaintiff must, by use of a risk/utility analysis, show that the machines presented an unreasonable risk of danger and that the manufacturer failed to exercise reasonable care in adopting the design.\textsuperscript{17} Applying the test to the facts of the case, the court held that absent evidence of a reasonable alternative design, Haybuster could not be found negligent in designing the machine.\textsuperscript{18}

In addressing the issue of design defect under a theory of strict liability, the court affirmed its prior holdings that in order to be actionable, a product must be in a defective condition, unreasonably dangerous.\textsuperscript{19} The court for the first time, however, defined "defective condition," stating that "a plaintiff, in order to prove a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer."\textsuperscript{20} Because Nerud failed to offer evidence of an alternative design, the court held that he had failed to show that the haystacking machines were defective.\textsuperscript{21}

**BACKGROUND**

*State of the Art*

The term "state of the art" has generally been defined as the level of scientific and technological know-how existing within a field at a given time.\textsuperscript{22} It has, however, been associated with other con-
cepts. These include the customary practices of an industry and the practicability or feasibility of an alternative design.

A manufacturer may, in a design case, be liable in negligence for failure to exercise reasonable care in the choice of a design. Relevant to the determination of a manufacturer's due care is the manufacturer's obligation to stay abreast of technological developments relating to the industry. Generally, courts have held that a defendant's compliance with industry custom is evidence of due care. However, few courts have held that adherence to industry custom is a complete defense in a negligence action or that a manufacturer's failure to adhere to industry standards constitutes negligence per se. Realistically, though, the manufacturer may be required to shoulder the burden of proving that its failure to follow industry custom was not a failure to exercise due care.

Although evidence of industry custom may be relevant as to the actual state of the art in an industry, it is clear that custom and state of the art are not synonymous. Most courts have differentiated between custom and state of the art; however, a point of confu-


26. See Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 427 N.Y.S.2d 1009, 1016 (1980) (stating that if a safer alternative design was within the state of the art, a plaintiff may argue that any deviation from that standard whatsoever is negligence).


31. See Hancock v. Paccar, Inc., 204 Neb. 468, 479, 283 N.W.2d 25, 35 (1979). (The court stated that "[w]hile the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art."). See also Owens v. Allis-Chalmers Corp., 414 Mich. 413, —, 326 N.W.2d 372, 375 (1982); O'Brien v. Muskin Corp., 94 N.J. 169, —, 463 A.2d 298, 305 (1983).

32. See Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192, 1197 (4th Cir. 1982); Page v. Barko Hydraulics, 673 F.2d 134, 138 (5th Cir. 1982).

33. O'Donnell, *supra* note 27, at 631. See also notes 31 and 32 *supra*. 
sion has arisen with regard to whether state of the art should be defined as technological capability\textsuperscript{34} or feasibility as defined in terms of cost and the overall utility of the product.\textsuperscript{35} Though conceptually distinct, both definitions serve as legitimate characterizations of state of the art.

State of the art evidence, if defined as the aggregate of product-related technical and scientific knowledge existing at a given time, is typically invoked by the defendant to show that within the current limits of knowledge available, it was impossible to design the product better.\textsuperscript{36} In this situation, the defendant argues that the relevant technology or knowledge did not allow a change in design and that the manufacturer should not be liable for a risk impossible to avert.\textsuperscript{37}

The other definition of state of the art involves not so much technological limitations placed on a manufacturer but, rather, considerations of "feasibility" which invariably depend on economic or product utility considerations.\textsuperscript{38} Typically, "feasibility" state of the art is raised by the defendant after a plaintiff has introduced evidence of what he argues is a practicable alternative design. The defendant argues not that the plaintiff's alternative was technologically impossible to achieve but either that the plaintiff's alternative was impracticable in terms of cost and diminished utility or that the

\textsuperscript{34} See note 22 supra.

\textsuperscript{35} A feasibility analysis typically involves the balancing of several factors which differ from court to court. Commonly used factors are given in a recent New York case: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product — that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design. Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 450 N.E.2d 204, 208-09, 463 N.Y.S.2d 398, 402-03 (1983).

\textsuperscript{36} Note, The State of the Art Defense in Strict Products Liability, 57 MARQ. L. REV. 649, 652 (1974). This approach is well-illustrated by the case of Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976). In Bruce, relatives of passengers who were killed in a 1970 airline crash sued Martin-Marietta, the manufacturer. The plane was built in 1952. \textit{Id.} at 444. The theory of liability was that defective seats broke upon impact and blocked exits from the plane after a fire broke out. \textit{Id.} When the defendant moved for summary judgment, the plaintiff relied on an affidavit by an airline crash investigator stating that seats available in 1970 would not have broken loose. \textit{Id.} at 446. The circuit court stated that a reasonable manufacturer could not be liable simply because safer seats existed 18 years after the plane was designed and sold; "a consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today." \textit{Id.} at 447. But see Friederichs v. Huebner, 110 Wis. 2d 581, 329 N.W.2d 890, 907-08 (1983). (Evidence of post-manufacture industry custom was both relevant and admissible circumstantial evidence from which the jury might conclude that an alternative was feasible for the entire industry in 1962).

\textsuperscript{37} Spradley, supra note 24, at 379.

\textsuperscript{38} See note 35 supra, for factors relevant in a feasibility analysis.
plaintiff introduced new hazards into the design. Thus, the manufacturer's position is that he should not be held liable for failing to alleviate a hazard when to do so would render his product impracticable to market.

Another difference separating custom from state of the art emanates from the significance that courts afford the two types of evidence. A manufacturer's adherence to custom is never conclusive proof of his non-liability, in that custom focuses primarily on what other manufacturers are doing. Thus, although custom of an industry may be evidence of an industry's state of the art, it is always possible that industry custom is not indicative of what could be done.

On the other hand, although a defendant's compliance with the state of the art is not generally recognized as a complete affirmative defense, as a practical matter, it has much the same effect. Unless a plaintiff is able to show that the defendant was negligent by placing a dangerous product on the market, a defendant's showing that nothing could conceivably have been done that would have prevented the injury will certainly be a major factor for a jury to consider in determining liability.

39. Spradley, supra note 24, at 347. This approach is exemplified by Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978). The Wilson case involved the crash of a Piper Cherokee aircraft. At issue was the use of a carburetor rather than a fuel injection system to move the gas-air mixture to the firing chamber. Id. at —, 577 P.2d at 1327. The plaintiffs demonstrated that carburetor icing was the proximate cause of the crash and that a fuel injection system was immune from this risk. Id. However, plaintiffs failed to offer any evidence as to the effect substitution of a fuel injection design would have had upon “the airplane’s cost, economy of operation, maintenance requirements, over-all performance, or safety in respects other than susceptibility to icing.” Id. The court was not satisfied that the jury could find that “the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product.” Id. Subsequently, Wilson has been interpreted as meaning that a plaintiff must adduce evidence that the safer alternative design was commercially available at the time the product was manufactured. See Appel v. Standex Int'l Corp., 620 Or. App. 208, —, 660 P.2d 686, 688 (1983).

40. This rule is well-illustrated by the famous case, The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), in which Judge Learned Hand stated: “[I]ndeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices.”

41. See Hancock v. Paccar Inc., 204 Neb. 468, 480, 283 N.W.2d 25, 35 (1979). “The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done.” Id.

42. Robb, supra note 25, at 7.

43. In the absence of an alternative design, in a negligent design action, the plaintiff must prove that the defendant failed to exercise due care in marketing his product because the risk inherent in his design outweighed the utility of its use. See notes 153-57 and accompanying text infra.

44. Spradley, supra note 24, at 380.
Practicable Alternatives In Negligence Actions

In design defect cases tried under a negligence theory, the plaintiff contends that the defendant failed to exercise care in designing the product. Like any negligence case, the court must determine whether the defendant has fallen below a legally defined standard of care—customarily the level of "reasonable care." Thus, in a negligence action, the focus of the inquiry is on the decision-making process of the manufacturer.

Design defects arise as a result of either a conscious or inadvertent decision by the manufacturer. When a design defect arises by an inadvertent decision, the manufacturer has failed to foresee all possible repercussions that the product could bring to potential users. In this situation, the only relevant factor for the factfinder's consideration is whether the manufacturer should have foreseen and protected against the risk which caused injury to the plaintiff.

The second category of design defects involves a conscious design choice. In this instance, the manufacturer has foreseen that there are risks of injuries associated with the eventual design but has concluded either that the risk of harm is minimal or that the steps required to avoid the risks are unnecessary. Thus, in a conscious design defect case, the plaintiff has the burden of showing not only that the manufacturer acted unreasonably in failing to protect but that the manufacturer was unreasonable by deciding not to protect.

In order to determine whether the manufacturer acted reasonably, the factfinder relies on a risk/utility test under which it considers a number of variables. Practicable alternatives is one of the variables to be analyzed and is raised by the plaintiff to show that al-

47. Henderson, supra note 46, at 1548-50.
49. Walkowiak, supra note 46, at 720; see also Dreisonstok v. Volkswagenwerk, 489 F.2d 1066, 1072 (4th Cir. 1974).
50. P. SHERMAN, supra note 48, at § 1.17.
51. See Gootee v. Colt Indus., Inc., 712 F.2d 1057, 1064 (6th Cir. 1983) (stating that "the evidence produced . . . raised a question of fact for the jury — if such a design change were feasible, whether the defendant was negligent in failing to implement it."); see also Phillips v. Kimwood Mach. Co., 269 Or. 485, —, 525 P.2d 1033, 1037 (1974) (stating that "in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did.").
52. Henderson, supra note 46, at 1549-53.
53. See note 35 supra for a list of variables relevant in a risk/utility analysis.
ternatives feasible in terms of cost, technical know-how, and function were available to the defendant. In other words, the plaintiff argues that alternative designs existed and should be a factor in proving the unreasonableness of the defendant's actions.

Although the Nebraska Supreme Court would seem to have adhered to the general proposition that the theories of negligence and strict liability are distinct, the court has failed to clarify upon which theory its products liability decisions are based. The foundation in Nebraska for a negligent design action was provided in the case of Friedrich v. Anderson.

In Friedrich, the court failed to state under which theory the case was decided. However, since the court relied heavily on Larsen v. General Motors Corp., an Eighth Circuit case decided under a negligence theory, it would seem that Friedrich was also grounded in negligence. The court in Friedrich held that a manufacturer had a duty to make the product reasonably safe, yet in directing a verdict for the defendant, the court failed to mention practicable alternatives as an element of the plaintiff's prima facie case.

Five years later, in Hancock v. Paccar Inc., the Nebraska Supreme Court gave its first hint that practicable alternatives might be an element of a plaintiff's prima facie case. Although labeled

55. See Hancock v. Paccar, Inc. 204 Neb. at 488, 283 N.W.2d at 39.
56. The court has been criticized for this non-clarity in the past. See Note, Friedrich II: Nebraska Takes a Closer Look at Automotive Design Defect, 59 NEB. L. REV. 538, 539-41 (1980).
57. 191 Neb. 724, 217 N.W.2d 831 (1974). In Friedrich, the driver of the car suffered injuries to his eyes when his head struck the gearshift lever after the initial collision. Id. at 725, 217 N.W.2d 833. See also Note, Products Liability — Application of Nebraska Law in Second Collision Design Defect Cases, 10 CREIGHTON L. REV. 198, 200 (1976).
58. 391 F.2d 495 (8th Cir. 1968).
59. Id. at 502.
60. Because Larsen was decided on a negligence theory, three commentators have concluded that the Friedrich decision was also grounded in negligence. See Note, supra note 57, at 203; Note, Products Liability — Crashworthiness — Nebraska Court Holds Automobile Manufacturer Has Duty to Protect Consumer Against Unreasonable Risk of Enhanced Injury From Second Collision, 8 CREIGHTON L. REV. 233, 240 (1977); Note, Second Impact Liability In Nebraska, 54 NEB. L. REV. 172, 180 (1975); cf. Note, Manufacturers' Liability for Design Defects, 56 NEB. L. REV. 422, 425-46 (1977) (stating that Friedrich holds that the criteria for determining design liability is the same under strict liability, negligence and warranty).
61. 191 Neb. at 731-32, 217 N.W.2d at 836.
62. 204 Neb. 468, 283 N.W.2d 25 (1979). In Hancock, a truck driver was killed when his rig struck a deer at 60 miles per hour. The impact bent the lightweight bumper into the wheel rendering the rig unsteerable. Id. at 471, 283 N.W.2d at 31.
Friedrich II by the court, the plaintiff's case was allowed to go to the jury, the plaintiff having adduced evidence of practicable alternatives which might have prevented the accident. The court stated that although the jury was not required to accept any of the suggested alternatives, the alternatives coupled with other evidence were sufficient to raise a question of fact as to the defendant's liability. Thus, by submitting evidence of practicable alternatives, Hancock was able to establish his prima facie case.

Practicable Alternatives in Strict Liability

In a design defect action brought under a negligence theory, the plaintiff must establish the existence of a defect in the product's design as well as a failure on the part of the manufacturer to exercise reasonable care so as to prevent the product from becoming defective. On the other hand, in a strict liability action, the defendant's exercise of due care is theoretically irrelevant. Realistically, however, a jury will treat evidence of practicable alternatives in a strict liability action essentially the same as in a negligence action. Thus, even though practicable alternatives are ostensibly offered as evidence that the defendant's design was defective, the evidence will inevitably be viewed in terms of what it says about the manufacturer's conduct.

Whether a court admits evidence of practicable alternatives within a feasibility analysis depends on a court's justification for applying strict liability. A few courts desiring a "strict" form of strict liability have rejected state of the art evidence because it relates to the reasonableness of the manufacturer's design. Conversely, a few

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63. Id. at 470, 283 N.W.2d at 30.
64. Id. at 490, 283 N.W.2d at 35.
65. Id.
67. Id. Thus, a plaintiff's submission of a feasible alternative design in a negligence action is used to prove that because another alternative existed, the defendant's product was defective and the defendant acted negligently in failing to adopt the alternative. In a strict liability action, the alternative design is theoretically offered solely as evidence that the defendant's design was defective. Id.
70. Spradley, supra note 24, at 412.
71. See Rucker v. Norfolk & W. Ry., 64 Ill. App. 3d 770, —, 381 N.E.2d 715, 724 (1978) (state of the art irrelevant to product design), rev'd on other grounds, 77 Ill. 2d 434, —, 396 N.E.2d 534, 538 (1979); Stanfield v. Medalist Indus., 34 Ill. App. 3d 635, —, 340 N.E.2d 276, 280 (1975); (state of the art is no defense in a strict products liability action); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, —, 266 N.E.2d 897, 902 (1971)
others have treated the inquiry in negligence and strict liability actions essentially the same, in either case focusing on the reasonableness of the manufacturer's design, and admitting evidence of practicable alternatives for the purpose of determining the due care of the defendant. Most courts, however, admitting the possibility of reasonableness considerations entering into a strict liability analysis, accept some form of state of the art evidence. Such acceptance is not for an evaluation of the manufacturer's conduct in reaching the particular design but rather for the stated purpose of assessing whether the product design has met the minimum legal standard. With these courts, the question then becomes how the legal definition of defective design allows for the admissibility of state of the art evidence. Courts, in fact, have adopted a number of different definitions of defective design. The following is a partial listing of these definitions and a discussion as to how they relate to the admissibility of evidence of practicable alternative designs.


73. See Vandall, supra note 45, at 72-79; Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 VAND. L. REV. 593, 600-01 (1980).


75. Robb, supra note 25, at 1617. Of the courts which have distinguished the theories of negligence and strict liability, the overwhelming majority are in agreement that in strict liability, the focus should be on the product, while in negligence, the focus is on the manufacturer's due care. See notes 76-102 and accompanying text infra.


77. Special Liability of Seller of Product for Physical Harm to User or Consumer
adopted the Restatement definition of a defective product generally hold that state of the art evidence helps to determine the expectations of the ordinary consumer.\textsuperscript{78}

Although the language of the Restatement test permeates the majority of the products liability cases, the consumer expectation test has engendered criticism from scholars\textsuperscript{79} and produced judicial decisions which are far from uniform. Some courts have held that section 402A imposes a two-pronged test, in that the product must be both defective and unreasonably dangerous.\textsuperscript{80} Other courts have rejected the "unreasonably dangerous" prong, holding that the plaintiff need prove only that the product is defective.\textsuperscript{81} Due to of this lack of agreement, other tests for design defects have emerged.\textsuperscript{82}

Nearly every product can theoretically be made safer; thus, product designers and factfinders are often presented with the necessity of determining what level of safety is appropriate for a particular design. Many courts have made this determination using some form of

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\textsuperscript{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.

\textsuperscript{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.

Restatement (Second) of Torts § 402A (1965).

\textsuperscript{78} See Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976); see also note 36 supra.

\textsuperscript{79} See Keeton, supra note 22, at 584-91. Professor Keeton criticizes the consumer expectation test for at least three reasons: 1) The test makes it virtually impossible for the plaintiff to recover as a result of harm suffered from an obvious design hazard or one about which the plaintiff had been adequately informed. \textit{Id.} at 584-85. 2) Conversely, Professor Keeton suggests situations where products clearly not defective would be found so under the consumer expectations test. \textit{Id.} at 590. 3) Finally, Keeton suggests that the test is based on a false assumption that the ordinary consumer knows what he is buying or what he expects in the way of safety features. \textit{Id.} at 591.

See also Birnbaum, supra note 73, at 611-15. Professor Birnbaum states that in some applications of the test, it is unclear whether the ordinary consumer is a hypothetical "reasonable man" or the actual plaintiff at bar. \textit{Id.} at 611.


\textsuperscript{81} Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152, 1154 (5th Cir. 1981) (product unreasonably dangerous if defective); Cassisi v. Maytag Co., 396 So. 2d 1140, 1144 (Fla. Dist. Ct. App. 1981) (noting that "[i]t appears that the terms defective and unreasonably dangerous are redundant.").

\textsuperscript{82} See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][f][iv] (1984); Birnbaum, supra note 73, at 600-01.
risk versus utility analysis. 83

Although numerous tests have been proposed for measuring the utility of a product against its risk, perhaps the best known balancing test has been that delineated by Professor Wade. Wade's test measures a number of variables to determine if the benefits of the challenged design outweigh the risk of its use. 84 One consideration in the analysis is the possibility of an alternative design within the existing state of the art, whether defined as technological capability 85 or feas-

83. Although a "pure" risk/utility analysis is not common, a few courts, rather than applying a risk/utility test to the hypothetical standards of the ordinary consumer, allow the jury to balance the risk of harm against the utility or social benefit of the product and determine which is greater. This approach was followed in the Texas case of Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

In its holding, the court defined a defective product as a product that is unreasonably dangerous as designed taking into consideration the utility of the product and the risk involved in its use. Id. at 847. In adopting this standard, the court agreed that the standards of the ordinary consumer or the reasonable manufacturer should not be used in a jury instruction. Instead, the court stated that the jury may be instructed that both parties should introduce elements of the balancing criteria using the following model instruction as a guideline. Id. at 849.

Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed? By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. Id. at 847 n.1. See also Lolis v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 63, 427 N.Y.S.2d 1009, 1014 (1980); Wilson v. Piper Aircraft Corp., 282 Or. 61, - , 571 P.2d 1322, 1325-26 (1978).

84. Professor Wade has suggested the following list of factors in determining whether a product is unreasonably dangerous:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of that injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.


85. See note 22 and accompanying text supra.
Because most courts are unwilling to allow a jury to impose liability if a safer practicable alternative is unavailable, the plaintiff's showing of a safer alternative is usually an integral part of a design defect case. By providing evidence of a safer alternative, the plaintiff introduces the issue of feasibility by raising a question of fact concerning the submitted alternative design.

An increasing number of courts have combined, in one form or another, the consumer expectations test with a risk/utility balancing analysis. Emerging from the criticism of the consumer expectations test, this approach seeks to combine the best of two concepts. Under a liberal application of the Restatement test, the factfinder is to rely on a fictitious notion of what degree of safety an ordinary consumer could expect. Under a combination consumer expectation risk/utility analysis, the question is what a reasonable consumer should expect in the way of safety determined by the use of various balancing factors.

The combination consumer expectation risk/utility test applies an analysis very similar to that of a "normal" risk/utility test in that both consider similar factors in order to reach some conclusion about the defectiveness of the manufacturer's product. Thus, as in a risk/utility analysis, courts routinely accept evidence of practicable alternatives as an integral part of proving the defendant's design "unreasonably dangerous."

Another alternative to the Restatement's consumer expectation test for defective design is the reasonably prudent manufacturer

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86. See note 24 and accompanying text supra.
87. See, e.g., Sutkowski v. Universal Marion Corp., 5 Ill. App. 313, 95 S.E.2d 497 (1972) (stating that "[t]he possible existence of alternative designs introduces the feature of feasibility since a manufacturer's product can hardly be faulted if safer alternatives are not feasible.").
88. See note 24 and accompanying text supra.
89. See note 39 and accompanying text supra.
91. Birnbaum, supra note 73, at 615.
92. Wade, supra note 66, at 557.
94. See note 93 supra. The general difference is that courts adopting a combination consumer expectation risk/utility test allow the factfinder to balance the utility of the product against its risk without the use of an external standard. Birnbaum, supra note 73, at 631.
95. See, e.g., Reed v. Tiffin Motor Homes, Inc., 697 F.2d at 1197 (holding that practicable alternatives within the state of the art are relevant in helping a jury make a determination of whether a product is unreasonably dangerous.)
test.96 Courts adopting this approach have acknowledged the negligence approach necessarily underlying a risk/utility analysis and have applied the test in cases decided under a theory of strict liability.97 The reasonably prudent manufacturer test differs from the traditional balancing test for negligence in only two small particulars: it assumes that the manufacturer had knowledge of the condition of its product without considering the issue of foreseeability,98 and it attempts to focus on the quality of the product rather than the conduct of the manufacturer.99

Because the reasonably prudent manufacturer test is based upon a modification of the traditional negligence approach,100 courts allow introduction of practicable alternatives as a means of establishing the dangerousness of the manufacturer's design, dispensing with the issue of foreseeability by assuming the manufacturer had knowledge of the dangerous propensities of his product.101 Evidence of practicable alternatives, therefore, is usually vitally important, for although imputed with knowledge of the condition of its product, a manufacturer's conduct will generally not be unreasonable simply because it has failed to adopt an impracticable design.102

The doctrine of strict tort liability was first adopted by the Nebraska Supreme Court in Kohler v. Ford Motor Co..103 In subsequent decisions, the court, although impliedly asserting its preference for the Restatement's consumer expectation rationale,104 failed to define

96. One author has defined this analysis as a pure negligence test. See Robb, supra note 25, at 18.

97. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16A[4][f][iv] (1984); Birnbaum, supra note 73, at 618.

98. Birnbaum, supra note 73, at 618-19; Wade, supra note 84, at 839-40.


100. Vandall, supra note 45, at 76.

101. See Robb, supra note 25, at 18.

102. See Suter v. San Angelo Foundry & Mach. Co., 81 N.J. at —, 406 A.2d at 150-51; see also Nichols v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980); Bolm v. Triumph Corp., 71 A.D.2d 429, 435, 422 N.Y.S.2d 969, 973-74 (1980). Courts which have adopted the reasonably prudent manufacturer test have done so not because it produces dissimilar results from the consumer expectations test, but because describing a defect in this manner preserves the familiar negligence tests and thought processes with which courts, lawyers and jurors customarily deal. Phillips v. Kimwood Mach. Co., 269 Or. at —, 525 P.2d at 1037.


the terms “defective product” and “unreasonably dangerous.” Finally, in the 1979 case of Hancock v. Paccar Inc., the court definitively accepted the Restatement test. Although declining to define a defective product, the court did define an unreasonably dangerous product as one which does not meet the expectations of the ordinary consumer.

Clearly, the court did not require the plaintiff in Hancock to submit evidence of practicable alternative designs. However, couched within the court's holding was the implication that by offering evidence of alternative designs, the plaintiff created questions of fact relating to the safety of the defendant's design. Thus, it would seem that a showing of some type of an alternative design was suggested by the Hancock court as a part of the plaintiff's prima facie case.

Burden of Proof Relating to Practical Alternatives Under a Strict Liability Theory

The relationship between the burden of proof and the submission of evidence of practical alternatives is a question which raises two points of inquiry. The first is whether evidence of practicable alternatives is relevant in a strict liability action; the second is how the admitted evidence of practicable alternatives affects the burden of proof as it applies to the parties.

As discussed earlier, only a few jurisdictions hold that evidence of practicable alternatives is irrelevant in a strict liability action. Most courts, through the application of one test or another, have in some way incorporated evidence of practicable alternatives into their strict liability analyses. Among courts which have accepted evidence of practicable alternatives, there are four possible viewpoints as to the allocation of the burden of proof.

The first view is that espoused in the California case of Barker v. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); see also Note, Strict Tort Liability in Nebraska: Recent Developments in Perspective, 12 Creighton L. Rev. 370 (1978).

105. 204 Neb. 468, 283 N.W.2d 25 (1979).
106. Id. at 475-76, 283 N.W.2d at 33.
107. Id. at 483-84, 283 N.W.2d at 37. The court defined the term “unreasonably dangerous” to mean that “the product had a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.” Id. (The Nebraska Supreme Court adopted the definition of unreasonably dangerous given by the Haybuster trial court.).
108. The court stated that because both the knowledge and material to make a safer bumper existed, the suggested alternatives submitted by the plaintiff created a question of fact which the jury had to resolve. Id. at 480, 283 N.W.2d at 35.
109. See note 71 and accompanying text supra.
110. See notes 73-102 and accompanying text supra.
Lull Engineering Co.' In Barker, the court adopted a disjunctive two-part test for design defects. Under this test, a design defect is held to exist:

1. if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or
2. if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

Although the first prong of the Barker test is no more than a variation of the consumer expectation approach, the second prong arguably provides the plaintiff with a less stringent method than the consumer expectations approach of establishing that the defendant's design is defective. Under the second prong, once the plaintiff shows that the defendant's design caused his injury, the burden of proof shifts to the defendant to establish that the benefits of the challenged design outweigh its inherent risk of danger. The California Supreme Court justified shifting the burden of proof to the defendant for two reasons: the manufacturer is privy to information and expertise unavailable to the plaintiff; and the shifted burden of proof significantly helps to differentiate the theories of strict liability and negligence.

The second view involves placing the burden of proof on the plaintiff and is demonstrated by Turner v. General Motors Corp. In Turner, the Texas Supreme Court discarded, in design defect cases, the standards of the ordinary consumer and the reasonably prudent manufacturer. Instead, the court adopted a "pure" risk/utility balancing test placing the burden on the plaintiff to prove, in light of relevant factors, that the defendant acted unreasonably by failing to adopt an alternative design. The factfinder may deter-

111. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
112. Id. at —, 573 P.2d at 454-55, 143 Cal. Rptr. at 236-37.
113. Id. at —, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.
114. See DEFINITION & PROOF, supra note 28, at 67.
116. 20 Cal. 3d at —, 573 P.2d at 455, 143 Cal. Rptr. at 237.
117. Id.
118. Id.
119. 584 S.W.2d 844 (Tex. 1979).
120. Id. at 847.
121. Id.
mine the defendant's design was unreasonably dangerous if, on balance, the risk of the product outweighed its utility.122

A third view is somewhat analogous to that supported by the Turner court. Under this approach, the plaintiff has the burden of proving, through a risk/utility analysis, that the defendant's product is defective.123 Unlike the Turner view, courts which have adopted this third view have retained the conceptual distinction between strict liability and negligence, i.e., that in negligence, the focus is on the conduct of the manufacturer while in strict liability, the focus is on the product.124 Although generally holding that the plaintiff's burden of proof will usually entail a showing of a practicable alternative, the failure to show practicable alternatives is not fatal to the plaintiff's case.125 Thus, because practicable alternatives are but one element in a risk/utility analysis, the plaintiff, in some cases, will be able to uphold his burden of proving that the risk of the defendant's product was greater than its utility without submitting an alternative design.126

Another alternative to the Barker and Turner views, and one closely paralleling the approach described above, is an approach by which the plaintiff has an initial burden of producing evidence that the risk of the defendant's product exceeded its utility.127 Once the plaintiff makes this prima facie showing and the court is satisfied that a question of fact exists, the court then instructs the jury to determine the defendant's liability not in terms of a risk/utility analysis but in terms of the legal standard for defective design adopted by that jurisdiction.128 This view can be supported by the case of Wilson v. Piper Aircraft Corp.129 Although Wilson has been cited for

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122. Id. at 847 & n.1.
124. See Roach v. Kononen, 269 Or. at —, 525 P.2d at 129.
125. See, e.g., Connor v. Skagit Corp., 99 Wash. 2d at —, 664 P.2d at 1212. (stating that only when the plaintiff limits his allegations to the existence of alternate designs does the plaintiff bear the burden of proving the feasibility of alternative designs.).
126. See notes 153-57 and accompanying text infra (stating that although the existence of an alternative design is an important part of a risk/utility analysis, it is only one factor out of many to be considered).
127. Under this view, the initial burden of producing evidence of the practicality of an alternative design can be as rigorous as a court mandates. Once the plaintiff meets this initial showing, however, his ultimate burden will necessarily be less than in a jurisdiction requiring the plaintiff to shoulder the burden of proof. See notes 136-42 and 179-86 and accompanying text infra.
128. Thus, the standard will vary depending on the jurisdiction. See note 76 supra.
129. 282 Or. 61, 577 P.2d 1322 (1978).
the proposition of placing the burden of proof on the plaintiff, other authorities and a careful reading of the case would seem to suggest otherwise.

Wilson involved the crash of a Piper Cherokee aircraft. At issue was the use of a carburetor rather than a fuel-injection system to move the gas-air mixture to the firing chamber. The plaintiffs submitted evidence that carburetor icing was the proximate cause of the crash, that a fuel-injection system would have greatly lessened this risk, and that at the time the airplane was manufactured, workable fuel-injection systems were available. Nevertheless, the court held that the evidence was insufficient to permit the jury to consider the liability of the defendant.

The court stated that in order to establish a prima facie case, a plaintiff must produce evidence that the design feature in question is a "defect." In rare instances, because of the uncomplicated nature of the product or dangerousness of the design in question, this may be determined by common knowledge of the court and jury, even though the plaintiff has submitted no evidence concerning the practicability of an alternative design. Most situations, however, require the plaintiff to show that an alternative design is both technologically feasible and practicable in terms of cost and other relevant factors. Since the plaintiffs failed to offer any evidence as to the effect substitution of a fuel-injection system would have had on "the airplane's cost, economy of operation, maintenance requirement, over-all performance, or safety in respects other than susceptibility to icing," the court was not satisfied that a jury could find that the suggested alternative was not only technologically feasible but also practicable in terms of cost and operation of the product. Thus, it appears that

131. Wilson v. Piper Aircraft Corp., 282 Or. 411, —, 579 P.2d 1287, 1287 (1978). "In our original opinion in this products liability case we held that a prima facie case of design defect must include evidence which would permit a finding that a safer design would have been practicable." (emphasis added). Id. See Walkowiak, supra note 46, at 727; Birnbaum, supra note 73, at 628-29.
132. 282 Or. at —, 577 P.2d at 1327.
133. Id. at —, 577 P.2d at 1327-28.
134. Id. at —, 577 P.2d at 1327.
135. Id. at —, 577 P.2d at 1327-28.
136. Id. at —, 577 P.2d at 1327.
137. Id. at —, 577 P.2d at 1328 n.5.
138. Id. at —, 577 P.2d at 1327. It is interesting to note that the Wilson court, like the Haybuster court, uses the word show when discussing the plaintiff's burden in a defective design case. See id. at —, 577 P.2d at 1326.
139. Id. at —, 577 P.2d at 1327.
140. Id. at —, 577 P.2d at 1326. The court stated that "[i]n Roach v. Kononen/Ford Motor Co. . . . 269 Or. at 464, 525 P.2d 125, and Phillips v. Kimwood Machine Co. . . . 269 Or. at 501, 525 P.2d 1033, we said that the court should balance the utility of the
the court's requirement of a practicable alternative design was simply a part of the plaintiff's _prima facie_ showing. Once the plaintiff offered evidence of a feasible alternative, the plaintiff had met his burden of production, and the jury would be allowed to determine the defendant's liability according to the reasonably prudent manufacturer test.

The Nebraska Supreme Court has never specifically delineated the extent of the plaintiff's burden with regard to practicable alternatives in a strict products liability action. In 1978, the Nebraska State Legislature adopted Nebraska Revised Statute § 25-21,182, expressly providing for a state of the art defense in a defective design or failure to warn case. Defining state of the art as "the best technology reasonably available at the time," the statute states that proof establishing that the product was in conformity with the prevailing state of the art shall be a defense.

Based as part of a comprehensive package of legislation designed to aid products liability defendants, the statute can best be viewed as an attempt to ensure that defendants in products liability actions are not precluded from introducing state of the art evidence as a means of establishing non-liability. Nevertheless, the statute does

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141. 282 Or. at --, 577 P.2d at 1326. In most cases, a showing that the risk of a product outweighed its utility will necessitate submission of a practicable alternative design. However, the _Wilson_ court expressly stated that it was not a requirement that a plaintiff must always submit evidence of a practicable alternative. _Id._ at --, 577 P.2d at 1328 n.5.

142. The court states that the weighing of the utility against the risk is for the court to decide in determining whether a case should be submitted to the jury. The jury is then to be instructed in terms of what a reasonably prudent manufacturer would have done had he known of the harmful characteristics of his product. _Id._ at --, 577 P.2d at 1327 n.3.

143. See notes 103-08 and accompanying text _supra_.

144. NEB. REV. STAT. § 25-21,182 (Reissue 1979). The statute states:

In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

(emphasis added).

145. _Id._


147. A few recent decisions have precluded the use of a state of the art defense in a strict products liability action. _See, e.g.,_ Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, --, 447 A.2d 539, 549 (1982) (state of the art in terms of the inability to discover dangers associated with a product at the time of manufacture and marketing may not be raised as a defense in a strict liability action). Elmore v. Owens-Illinois
make the showing of the state of the art a defense.

ANALYSIS

Prior to its decision in Haybuster, the Nebraska Supreme Court had failed to specifically set forth the plaintiff's burden in a products liability action under either a theory of strict liability or negligence. In Haybuster, however, the court attempted to specifically separate the theories of strict liability and negligence by delineating the extent of the plaintiff's burden under the respective theories.

With regard to a negligence action, the court made clear that the plaintiff's burden of proving that a product was negligently designed included adducing evidence of a safer practicable alternative. The court stressed the point in order to emphasize its concern that the manufacturer not become an insurer of its product's safety. Its concern, however, for eliminating "excessive" liability caused the court to lose sight of the essential focus of a negligence action — the due care of the manufacturer. Because of the improper focus, the court left unanswered a number of questions crucial to the resolution of a negligent design action.

The chief criticism of the court's discussion of a negligence action is that by failing to discuss the relationship that evidence of practicable alternatives bears to a risk/utility analysis, the court passed up an opportunity to distinguish, at least in conceptual terms, strict liability and negligence. In its discussion, the court failed to give any indication of how the application of a risk/utility test is used to resolve the issue of determining a defendant's due care. The court stated only that in a negligence action, a factor to be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs. By giving no indication of how the submission of evidence relates to the ultimate resolution of the defendant's liability, the court clouds any conceptual distinction it may have wished to retain between strict liability and negligence.

A second criticism of the court's negligence discussion is its insistence that the plaintiff adduce evidence of practicable alternative designs. By holding that the existence of safer alternatives is an essential part of the plaintiff's burden of proof, the court, arguably,

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148. See notes 55-65 and 103-08 and accompanying text supra.
149. 215 Neb. at 612-13, 340 N.W.2d at 374-75.
150. Id. at 613, 340 N.W.2d at 375.
151. See notes 45-54 and accompanying text supra.
152. 215 Neb. at 612-13, 340 N.W.2d at 374-75.
153. The court stated that "absent evidence that the risk could have been avoided
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has lost sight of the focus of a negligence analysis — the defendant's due care.154 The court correctly states that the existence of practicable alternative designs is an important factor in a risk/utility analysis.155 However, situations exist where the existence of alternative designs would not be needed to prove the defendant's failure to exercise reasonable care.

For instance, where a product has only a small degree of utility and is extremely dangerous, it seems absurd to suggest that the plaintiff cannot recover unless he is able to adduce evidence of a viable alternative design.156 If the plaintiff is able to prove, by the use of other balancing factors, that the defendant did not exercise reasonable care by marketing its product, then under a negligence inquiry, the defendant should be held liable.157

A final criticism of the court's negligence discussion relates to its failure to elucidate factors it considers important in a risk/utility analysis. The court's vagueness is perplexing, for trial courts will likely apply the Haybuster test to all defective design cases. A general discussion of factors the court feels should be balanced would seem essential to provide guidance for both trial judges and future litigators.

In the court's defense, Nerud offered virtually no evidence of a practicable alternative design, and the court, perhaps, wished to emphasize the importance of doing so in future litigation. The court may also have failed to delineate other risk/utility factors for fear of locking trial courts into an unwavering analysis, regardless of the facts.158 Nevertheless, one function of an appellate court is to educate practitioners in its jurisdiction, and the court should have more by adopting a reasonable alternative design, Nerud's case in negligence based upon a defective design must fail.” Id. at 613, 340 N.W.2d at 375.

154. See notes 45-54 and accompanying text supra.
155. 215 Neb. at 612-13, 340 N.W.2d at 375.
156. Although the court cites Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978) as standing for the proposition that a plaintiff must give evidence of an alternative design, the Wilson court clearly stated that the showing of a safer alternative is not always an essential part of the plaintiff's case. 282 Or. at —, 577 P.2d at 1328 n.5. See also Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, —, 424 N.E.2d 568, 582 (1981).
158. Courts which have adopted a risk/utility test generally have delineated specific factors to be weighed in a feasibility analysis. See Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, —, 450 N.E.2d 204, 209, 463 N.Y.S.2d 398, 403 (1983) (“Pertinent factors in the individual case, when evaluated as to whether or not they are applicable, should form the basis for charging the jury as to how it should evaluate the evidence in order to decide whether a product is not reasonably safe.”). Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). In Turner, although the Texas Supreme Court disapproved of the court of civil appeals' holding that the jury is to be instructed to balance specifically enumerated factors, the court set forth a model jury instruction to serve as a basis for the application of its risk/utility test. Id. at 847 n.1.
clearly delineated the plaintiff's burden in a negligence action.\textsuperscript{159}

In addition to its failure to state relevant factors in a risk/utility analysis, the court also neglected to clarify the use of practicable alternatives in a strict liability theory. Previously, in \textit{Hancock v. Pac-car Inc.},\textsuperscript{160} the court defined unreasonably dangerous in terms of consumer expectations.\textsuperscript{161} In \textit{Haybuster}, however, the court held that a plaintiff will be successful in proving that a product is in a defective condition only when he is able to show evidence of a safer alternative design.\textsuperscript{162} In some manner, therefore, the court injected the element of practicable alternatives into Nebraska's consumer expectation approach.

Because the court had previously adopted the \textit{Restatement} test of consumer expectations,\textsuperscript{163} it can be argued that the court brought the concept of practicable alternatives into a strict liability analysis through the consumer expectations approach. In other words, a product could be found actionable if the plaintiff demonstrates the existence of a safer alternative design and produces evidence showing the product was unreasonably dangerous.\textsuperscript{164}

It is likely, however, that when the court required a showing of practicable alternatives, it did so in the context of a risk/utility analysis. This would seem the more likely view for two reasons: (1) the concepts of practicable alternatives and risk/utility were inextricably bound together in the court's discussion of Nerud's negligence action, suggesting that the court viewed the two concepts as inseparable; and (2) the court cited \textit{Wilson v. Piper Aircraft Corp.},\textsuperscript{165} a case holding


\textsuperscript{160} 204 Neb. 468, 283 N.W.2d 25 (1979).

\textsuperscript{161} \textit{Id.} at 483-84, 283 N.W.2d at 37.

\textsuperscript{162} 215 Neb. at 612-13, 340 N.W.2d at 374-75.

\textsuperscript{163} \textit{See} notes 103-08 and accompanying text \textit{supra}.

\textsuperscript{164} It is plausible that after the \textit{Haybuster} decision, trial courts will continue to instruct juries according to the \textit{Restatement}'s consumer expectations test. Yet given the importance of practicable alternatives as a weighing factor in a risk/utility test, it is unlikely that the court has attempted to incorporate practicable alternatives in its test for defective design absent an application of some type of risk/utility analysis.

\textsuperscript{165} 282 Or. 61, 577 P.2d 1322 (1978). \textit{See also} note 156 supra. The court also cites \textit{International Harvester Corp. v. Hardin}, 264 Ark. 717, 574 S.W.2d 260 (1978), as standing for the proposition that a plaintiff must show there was a way the design could have been made safer. 215 Neb. at 614, 340 N.W.2d at 375. In 1979, however, theArkansas legislature passed the Arkansas Product Liability Act of 1979, Ark. Stat. Ann. §§ 34-2801 to-2807 (Supp. 1983), which has subsequently been interpreted by the Eighth Circuit as providing that "the existence, practicality, and technological feasibility of an alternative safe design are not necessary elements of the plaintiff's cause of action, but rather are merely factors that may be considered by the jury. . . ." \textit{French v. Grove Mfg. Co.}, 656 F.2d 295, 298 (8th Cir. 1981).
that practicable alternatives are an important part of a risk/utility analysis.\textsuperscript{166}

In assessing the status of a design defect action under strict liability after \textit{Haybuster}, it would seem, therefore, that Nebraska has joined those jurisdictions applying a combination consumer expectations risk/utility analysis.\textsuperscript{167} Yet, given the court's ambiguous discussion, no firm conclusion is possible. The court merely makes the broad statement that in order to show a design defect, the plaintiff "must show that there was some practicable way in which the product could have been made safer."\textsuperscript{168} Although reflecting a general policy decision, this statement is not much help to those who will apply the \textit{Haybuster} decision in future litigation. By failing to interpret the proper interaction of the risk/utility and consumer expectations tests, the court has neglected to provide a supporting methodology enabling a consistent application of the broad policy set forth.

Perhaps the most significant question left unanswered is the remaining difference, if any, between the theories of negligence and strict liability in a defective design case. On the surface, it would appear that after \textit{Haybuster}, the theories of negligence and strict liability are essentially the same with regard to the evidentiary showing required of the plaintiff. Under both theories, the plaintiff is required to submit evidence of safer alternative designs as part of the risk/utility analysis.\textsuperscript{169} Nothing in the court's opinion, moreover, suggests how cases brought under the respective theories are to be treated differently.

Yet, despite the apparent similarity between the two theories, a more in-depth examination of the court's holding reveals that, at the minimum, the court retains the view that the two theories are conceptually distinct. Approaching this argument at the outset turns upon an understanding of the three possible ways that courts, in design defect cases, have reconciled the theoretical distinction surrounding the presentation of evidence under strict liability and negligence.\textsuperscript{170}

As stated earlier, some courts have sought to segregate the theo-

\textsuperscript{166}. 282 Or. at —, 577 P.2d at 1325-28.

\textsuperscript{167}. One type of combination consumer expectation risk/utility test is that whereby the factfinder establishes what a reasonable consumer should expect in the way of safety determined by the use of various balancing factors. \textit{See} notes 90-95 and accompanying text \textit{supra}. It appears, however, that the Nebraska Supreme Court has decided to incorporate the tests of consumer expectations and risk/utility in a different fashion. \textit{See} notes 176-84 and accompanying text \textit{infra}.

\textsuperscript{168}. 215 Neb. at 614, 340 N.W.2d at 375.

\textsuperscript{169}. If interpreted in this way, the plaintiff would have the burden of introducing a feasible alternate design.

\textsuperscript{170}. \textit{See} notes 70-102 and accompanying text \textit{supra}. 
ries of strict liability and negligence. Any evidence relating to a negligence consideration, including evidence of practicable alternatives, is excluded from a strict liability case. Other courts have basically merged the two theories, admitting in strict liability cases evidence of practicable alternatives for the same purpose that such evidence is admitted in negligence cases determining the reasonableness of the manufacturer's actions. Most courts, however, have adopted a middle ground approach, retaining the conceptual distinction between the two theories, while at the same time, allowing evidence of practicable alternatives under both. The distinction is that in strict liability cases, evidence of practicable alternatives is admitted for the purpose of assessing the dangerousness of the manufacturer's product, whereas in a negligence case, it is admitted to assess the reasonableness of the manufacturer's actions.

It seems clear that the Nebraska Supreme Court in Haybuster adopted, or continued to adhere to, the middle ground approach. First, the court addressed the two theories in separate discussions, in no way suggesting that a pure negligence approach was being adopted. Second, and most important, the court adopted a combination consumer expectation risk/utility approach for strict liability cases. Under such an approach, evidence of practicable alternatives is admitted but only for the purpose of assessing the dangerousness of the manufacturer's product.

Assuming that the court has continued to recognize a conceptual distinction between negligence and strict liability in design defect cases, a question still exists as to whether the plaintiff's evidentiary burden differs under the two theories. Though evidence of practicable alternatives is to be admitted for different purposes under the respective theories, the result from the practitioner's standpoint does not appear to involve a significant distinction. For whatever the


172. See notes 66-75 and accompanying text supra.

173. See notes 66-75 and accompanying text supra.

174. Id.

175. See notes 66-69 and accompanying text supra.

176. See notes 167-68 and accompanying text supra.

177. See notes 90-95 and accompanying text supra.

178. Although the court states the general proposition that in strict liability the focus is on the product while in a negligence action, the focus is on the conduct of the manufacturer, 215 Neb. at 611, 340 N.W.2d at 374, this distinction, as a practical matter
purpose, the plaintiff is required to adduce evidence of practicable alternatives under both theories. If a meaningful distinction is to be made between the two theories, it will not hinge upon the nature of the evidence that the plaintiff is required to introduce.

Instead of distinguishing between the two theories on a theoretical level concerning the nature of the evidence that the plaintiff is required to show, an alternative would be to make the distinction on the basis of the burden that the plaintiff is required to meet. As discussed earlier, there are four alternative views in regard to the burden the plaintiff must bear in a strict liability defective design case.\textsuperscript{179} If the Nebraska Supreme Court intended to distinguish between the two theories in \textit{Haybuster}, it can be argued that the court has done so by requiring a plaintiff to shoulder the burden of proving that a practicable alternative exists in negligence, while requiring in strict liability only that a plaintiff produce evidence of the feasibility of alternate designs.\textsuperscript{180}

The arguments that the Nebraska Supreme Court did intend such a distinction in \textit{Haybuster} can be derived from the language used by the court in its discussion of strict liability as well as from the case relied upon as support for the court's assertion that practicable alternatives is now part of the plaintiff's evidentiary showing in strict liability defective design cases. In its negligence discussion, the court made clear that Nerud's negligence claim was unsuccessful because he failed to sustain his burden of \textit{proving} the existence of a feasible alternative design that could have been adopted.\textsuperscript{181} In its strict liability discussion, however, the court stated that in order to recover, the "plaintiff . . . must \textit{show} that there was some practicable way in which the product could have been made safer."\textsuperscript{182}

The court's use of the word "show" rather than "prove" when delineating the extent of the plaintiff's burden in strict liability cases is significant. It suggests that the court adopted the view that with regard to practicable alternatives in a strict liability action, the plaintiff is required only to produce evidence of the practicable alterna-

\textsuperscript{179} See notes 109-42 and accompanying text \textit{supra} (discussing the various burdens of proof).

\textsuperscript{180} An interpretation of \textit{Haybuster} in this light would not preclude attorneys from bringing design defect actions in negligence. If the plaintiff is able to establish a lack of due care on the part of the defendant manufacturer, he will want to establish this culpability before a jury.

\textsuperscript{181} "Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, Nerud's case in negligence based upon a defective design must fail." 215 Neb. at 613, 340 N.W.2d at 375.

\textsuperscript{182} \textit{Id.} at 614, 340 N.W.2d at 375 (emphasis added).
tives, not prove their feasibility.\textsuperscript{183}

The court's reliance on the \textit{Wilson} case further buttresses the view that it has imposed a burden of production on the plaintiff rather than a burden of proof. In \textit{Wilson}, the court also used the word "show" in describing the extent of the plaintiff's burden with regard to practicable alternatives.\textsuperscript{184} By focusing on practicable alternatives as an important part of the plaintiff's \textit{prima facie} showing, the \textit{Wilson} court was neither suggesting that the plaintiff carry the ultimate burden of proving the practicality of the alternative nor that the showing of a practicable alternative design is a prerequisite to proving the ultimate liability of the defendant.\textsuperscript{185} The court merely wanted to protect precedent which allowed trial judges latitude in deciding, by the use of risk/utility factors, whether the plaintiff introduced evidence sufficient to raise a question of fact as to the defectiveness of the defendant's design.\textsuperscript{186}

The Oregon Supreme Court first adopted its test for a defective design in another case cited by the \textit{Haybuster} court, \textit{Phillips v. Kimwood Machine Co.}\textsuperscript{187} Basing its discussion on an article by Professor Wade,\textsuperscript{188} the Oregon Supreme Court concluded that the risk/utility test is to be applied only by the court.\textsuperscript{189} The trial or appellate court judge uses the pertinent risk/utility factors to determine whether a case has been made out which can be submitted to the

\textsuperscript{183} In a typical negligence case, the plaintiff will have the burdens of 1) pleading the defendant's negligence; 2) producing evidence of that negligence; and 3) persuading the trier of fact of its existence. \textit{McCormick on Evidence} 785 (E. Cleary ed. 1972). Under this proposed strict liability approach, the plaintiff has the burden of producing evidence. This means that if evidence on the issue is not produced, an adverse ruling (generally a finding for the defendant or a directed verdict) will ensue. \textit{McCormick on Evidence} 983-84 (E. Cleary ed. 1984). Although this approach is different from the combination consumer-expectation risk/utility approach discussed previously, see notes 90-95 and accompanying text \textit{supra}, such an interpretation remains consistent with the Oregon cases cited by the \textit{Haybuster} court. See 215 Neb. at 613-15, 240 N.W.2d at 375.

\textsuperscript{184} 282 Or. at —, 577 P.2d at 1326.

\textsuperscript{185} \textit{Id.} at —, 577 P.2d 1328 n.5. The court stated:

If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, \textit{given the nature of the product and of the defects alleged}, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable.

\textit{Id.} (emphasis added).

\textsuperscript{186} The \textit{Wilson} court expressly stated that it was for the trial court to determine whether the plaintiff's evidence raised a sufficient question of fact as to the defendant's liability. \textit{Id.} at —, 577 P.2d at 1326.

\textsuperscript{187} 269 Or. 485, 525 P.2d 1033 (1974).

\textsuperscript{188} Wade, \textit{supra} note 84, at 830.

\textsuperscript{189} 269 Or. at —, —, 525 P.2d at 1035 n.2, 1040.
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190. If the court is satisfied that the plaintiff has raised a question of fact as to the defectiveness of the defendant's product, the issue is submitted to the jury for its determination under instructions as to what constitutes a "dangerously defective" product in that jurisdiction. In Oregon, the jury applies the standard of the reasonably prudent manufacturer.191

It is submitted that because of the language of the Haybuster decision, the court's reliance on Oregon precedent, and the desire of the Nebraska Supreme Court to separate the theories of strict liability and negligence, Nebraska has adopted a similar approach.192 In Nebraska, the trial court judge would use risk/utility balancing factors to determine if the plaintiff has raised a question of fact as to the existence of an alternative feasible design. If the judge is satisfied that the plaintiff has met this initial burden of production, the jury will then determine the defectiveness of the defendant's design using the previously adopted ordinary consumer test.193 The adoption of such an approach by the Nebraska Supreme Court would not only create a meaningful separation between the two theories but would eliminate the possibility of a manufacturer becoming an insurer of its product's safety.194

Apart from whether the Nebraska Supreme Court has in fact adopted such an approach, there are policy justifications favoring the adoption.195 A split burdens approach seems consistent with the equities of the situation. Although retaining a requirement that the

190. Id.
191. 282 Or. at --, 577 P.2d at 1327. The court stated that although the jury is to be instructed in terms of the reasonably prudent manufacturer, the questions which the court and jury must decide are related. Thus, evidence which is relevant to the court's weighing process under a risk/utility test will generally also be appropriate for the jury in determining whether the product is dangerously defective. Id. at --, 577 P.2d at 1326-27.
192. Although this hybrid of the combination consumer expectation- risk/utility test is different than that discussed earlier, see notes 90-95 and accompanying text supra, this interpretation would seem to more closely follow the inclinations of the Haybuster court.
193. See notes 103-08 and accompanying text supra.
194. Making the manufacturer an insurer of his product was a result the court wanted to avoid. 215 Neb. at 613, 340 N.W.2d at 375.
195. Though much of the evidence used to prove a case in negligence is applicable in strict liability, the two theories on paper involve a different inquiry. The issue in a negligence action is whether the manufacturer has exercised reasonable care. Thus, a balancing process evaluates the conduct of the manufacturer.

On the other hand, in a strict liability action, "fault" is theoretically irrelevant. Courts generally distinguish strict liability from negligence by stating that in strict liability, the focus is on the product rather than the manufacturer. Once a balancing process is employed, however, this artificial distinction between a manufacturer's product and his conduct breaks down. Without the addition of another artificial barrier, a strict liability action merely becomes an evaluation of the manufacturer's conduct
plaintiff adduce evidence of practicable alternatives, the approach also provides the plaintiff with less stringent requirements to prove that a product was defectively designed. Given the respective positions of the parties and the knowledge that the manufacturer has pertinent to the specific design adopted, it is only fair that the plaintiff need only produce evidence that his design is viable, not prove that it is feasible.

An interpretation of *Haybuster* in this manner also remains consistent with the Nebraska statute allocating a state of the art defense to the defendant. The statute defines state of the art as "the best technology reasonably available." The Nebraska Unicameral's use of the word "reasonably" leads to the conclusion that the definition of state of the art as used in the statute can best be interpreted as one not of technical capability, but of feasibility. Therefore, evidence of practicable alternatives will necessarily be used in the determination of the relevant state of the art.

The statute was most likely passed in response to case law from other jurisdictions which had precluded defendants from introducing state of the art evidence in products liability actions and not in regard to the determination of a plaintiff's *prima facie* case. Nevertheless, the statute expressly provides that state of the art shall be a defense. Thus, no matter what the motivation behind the statute, it seems clear that it makes the defendant's showing that it complied with feasibility state of the art an affirmative defense.

If the statute is interpreted as retaining state of the art as an affirmative defense, then the legislation and the *Haybuster* decision are easily reconciled. As discussed previously, under this approach, the burdens are separated in order to facilitate the distinction that the court wished to retain between the theories of strict liability and negligence. The plaintiff, consistent with his burden of production, must produce evidence of a practicable alternative sufficient to present a question of fact for the jury. Should the defendant wish to refute the evidence that the plaintiff submitted to prove the viability under the ruse of an evaluation of the product. See 2 L. Frumer & M. Friedman, *Products Liability* § 16A[4][f][iv] (1984).

The adoption of the split burdens approach would appear to be a solution to this problem. Although the distinction is also an artificial one, such a scheme is a justifiable compromise in light of the conceptual distinction which the court retains between the theories.

197. Id. (emphasis added).
198. See Robb, *supra* note 25, at 18 n.70.
199. See notes 143-47 and accompanying text *supra*.
201. See notes 192-95 and accompanying text *supra*.
202. Id.
of the alternative design, the defendant, in accord with an affirmative
defense, would have the burden of proving the impracticality of the
submitted alternative.

CONCLUSION

When the Haybuster court decided that a risk/utility test for de-
sign defects would be applied under either a theory of strict liability
or negligence, many important issues concerning the proper applica-
tion of the test emerged. Since the court offered virtually no gui-
dance for the application of this newly adopted test, it will be
necessary for the Nebraska Supreme Court to clarify its intentions in
subsequent cases. To date, only the inadequate skeletal frame of the
Haybuster decision exists as an instruction to future design defect
litigators.

One reading of the court's opinion can justifiably lead to the be-
lief that under either strict liability or negligence, the plaintiff has
the burden of proving the practicality of an alternative design.
Although plausible, such an interpretation fails to take into account
the court's separate discussion of strict liability and negligence and its
heavy reliance on Wilson v. Piper Aircraft Corp. This Note argues
for an alternative approach consistent with the language of the
court's holding.

The adoption of a split burdens approach would distinguish the
two theories by requiring a plaintiff in a strict liability design defect
action to merely produce evidence of the practicality of his proposed
design. Consistent with the court's concern that a manufacturer not
be the insurer of his product's safety, the trial court judge would
then, by the use of a risk/utility test, determine if the plaintiff's pro-
posed alternative has presented a question of fact sufficient to go to
the jury. If the judge believes that the plaintiff has raised a question
of fact concerning the feasibility of his alternative, then the jury will
be instructed to find the defendant's product defective if it had a pro-
pensity for causing physical harm beyond that which would be con-
templated by the ordinary user or consumer. During the submission
of evidence, should the defendant want to contest the feasibility of
the plaintiff's alternative, then the statute allocating a state of the art
defense to the defendant would be applicable. A showing by the de-
fendant that its product met the feasibility state of the art will not
preclude liability, but it will function as evidence of the non-defec-
tiveness of the product.

Although the development of a suitable test for a relatively nar-
row issue in the field of products liability is a difficult task, it is sur-
prising that the court did not develop a comprehensive set of
guidelines. Given the court's prior treatment of products liability actions, the Haybuster case would seem to have provided a good opportunity for clarification of a confusing issue. The approach adopted in this Note is a sound one given the limitations of the court's discussion. At any rate, the practitioner is urged to consider with care the complex issues which will certainly arise from this decision.

J. Bret Armatas—'86