

TORTS

ANIMAL TRESPASS

INTRODUCTION

When Mr. Jacobson's bull jumped the fence into Mr. Fuchser's pasture, it was not, in the annals of bovine history, an act which rivaled that of Mrs. O'Leary's cow or even that of the cow that jumped over the moon. However, the bull's case, *Fuchser v. Jacobson*,¹ reached the Nebraska Supreme Court, and the court's decision reveals a history of animal trespass law peculiar to Nebraska and other western range states.²

The growth and development of ranching and agriculture in Nebraska has dictated the approach Nebraska has taken to animal trespass law. The dual nature of Nebraska as a farming and ranching state³ is today reflected in the animal trespass statute.⁴

The principal issues presented in *Fuchser* are whether enclosed pastureland is "cultivated land" within the meaning of the animal trespass statute,⁵ and the proper measure of damages for crossbreeding of a purebred cow by a trespassing bull.⁶

This article will trace the development of animal trespass law in Nebraska from the days of the open range to the present. The principal case will be analyzed with regard to its position in the history under the present statutory scheme, as well as the proper measure of damages for animal trespass which results in misbreeding of a purebred animal.

FACTS

In May 1977, the defendant's Angus bull was discovered in plaintiff's pasture. One of plaintiff's purebred Hereford cows was in heat at the time and the amorous bull was observed seeking her favors. Following the normal term of pregnancy, a white-faced

1. 205 Neb. 786, 200 N.W.2d 449 (1980) (in briefs before the court, plaintiff's name is spelled Fuscher).

2. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 76 at 497 (4th ed. 1971).

3. See generally NEB. DEPT. OF AGRICULTURE, NEBRASKA 1979 PRELIMINARY COUNTY ESTIMATES AND STATE AGRICULTURAL DATA (May 1978).

4. See NEB. REV. STAT. §§ 45-401, -408 (Reissue 1978) which requires the presence of "cultivated land" before liability will be imposed for animal trespass.

5. 205 Neb. at 788, 290 N.W.2d at 450-51. NEB. REV. STAT. §§ 54-401 to -408 (Reissue 1978). "Cultivated land" is a precondition to recovery for animal trespass. It is defined as planted forest and fruit trees, as well as cropland, and land with a plowed perimeter.

6. 205 Neb. at 791, 290 N.W.2d at 452.

black calf was born, unquestionably a crossbreed.⁷ The plaintiff's pasture, adjacent to defendant's pasture, is located in Sheridan County, Nebraska. It was fenced and planted in wheat grass.⁸ The plaintiff demonstrated by expert testimony that the cow was devalued as a result of the breeding by defendant's bull and that the resultant calf was valueless as a breeder or a 4-H project calf.⁹ The Small Claims Court of Sheridan County awarded damages for the loss in value of the cow to the plaintiff. The District Court affirmed on appeal and raised the amount of damages awarded. The Nebraska Supreme Court affirmed.¹⁰

BACKGROUND

The common law imposed strict liability on the owner for the trespass of his animals.¹¹ The duty to fence in the beast rested squarely on the owner, regardless of the type of land involved.¹² This position stemmed from ancient English law which stated: "I am the trespasser with my beasts."¹³ Today in America, the common law position is the majority position.¹⁴

There are two minority positions. Louisiana follows the French rule which creates a presumption that the owner is at fault, which is rebuttable by a showing of no negligence.¹⁵ This position has evolved to hold the owner to a high degree of care and is therefore now close to the common law position.¹⁶ The second position developed from the fencing laws of the western range states,¹⁷ and

7. *Id.* at 787, 290 N.W.2d at 450.

8. *Id.* at 788, 290 N.W.2d at 450.

9. Brief for Appellee, No. 42602, at 14, *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980). The expert testified that the cow was worth \$700 to \$1,200 before breeding and \$300 - \$400 afterwards.

10. 205 Neb. at 786-87, 290 N.W.2d at 450.

11. *Cox v. Burbridge*, 13 C.B. (N.S.) 430, 438, 143 Eng. Rep. 171, 174 (C.P. 1863); W. PROSSER, *supra* note 2, at § 76.

12. *Raziano v. V.T. James & Co.*, 57 So. 2d 251, 254 (La. 1952).

13. W. PROSSER, *supra* note 2, at § 76, *citing* 12 Hen. VII, *Keilwey* 36, 72 Eng. Rep. 153, 156 (K.B. 1688); 11 NOTRE DAME LAW., 234, 234 (1935), 13 WYO. L. REV. 136, 136 (1958).

14. RESTATEMENT (SECOND) OF TORTS § 504 (1), Comment 6 (1977); *see, e.g.*, *Barnes v. Pleasanton*, — Del. —, 73 A.2d 787, 789-90 (1950); *Benefiel v. Pure Oil Co.*, 322 Ill. App. 5, 7, 53 N.E.2d 726, 727 (1941); *Johnson v. Robinson*, 11 Mich. App. 707, —, 162 N.W.2d 161, 163 (1968); *Raub v. Kinney*, 17 N.J. Misc. 19, 19, 3 A.2d 866, 866 (1938); *Pusak v. Slobodnik*, 43 Pa. Co. 601, 601 (J.P. 1915).

15. *See generally* Note, 19 LA. L. REV. 733, 736 (1959). The animal owner must demonstrate that he was "without the slightest fault" in the trespass.

16. *Id.* at 737.

17. *See, e.g.*, the current fencing statutes of Wyoming and Montana: MONT. REV. CODE ANN. §§ 46-1401 through -1414 (Smith, 1961); WYO. STAT. ANNOT. §§ 11-28-101 through -108 (1977); Each state has its particular requirements for what constitutes a legal fence.

placed the burden on the landowner to fence out trespassing animals.¹⁸

In order to understand why the duty was transferred to the landowner in the western states, the history of the cattle industry must be examined.¹⁹ In the mid-nineteenth century the western plains were discovered to have native grasses excellent for cattle grazing but the land was rather dry for farming.²⁰ During that time ranchers brought cattle to states like Nebraska, Kansas, Wyoming, Colorado and Montana. The number of cattle in these states increased dramatically.²¹ The ranchers allowed the animals to graze freely on land not owned by them.²² Thus it is easy to comprehend that local custom was ill-fit by the strict liability of the common law and a new duty was imposed on the farmer.²³ The duty imposed on the landowner was to erect a "sufficient fence" to protect from animal trespass.²⁴

Local needs were served by these statutes until the late 1800's when farmers began to move to the plains in greater numbers. Development of more sophisticated irrigation techniques and homestead incentives brought the farmer westward.²⁵

Conflicts soon developed between the ranchers and the farmers.²⁶ The farmers, anxious to protect the crops and reluctant to

18. *Garcia v. Sumrall*, 58 Ariz. 526, —, 121 P.2d 640, 644-45 (1942); *Bolten v. Gates*, 105 Colo. 571, —, 100 P.2d 145, 146 (1940); *Dunbar v. Emigh*, 117 Mont. 287, —, 158 P.2d 311, 313 (1945); *Stewart v. Oberholzer*, 57 N.M. 253, —, 258 P.2d 369, 370 (1953).

19. For a case which considers the development of the cattle industry in determining the inapplicability of the common law to Nebraska, see *Delaney v. Errickson*, 10 Neb. 492, 495, 6 N.W. 600, 601 (1880).

20. J. SCHLEBECKER, *CATTLE RAISING ON THE PLAINS 1900-1961* 3, 5-6 (1963).

21. *Id.* at 6. The statistics for these states between 1860 and 1880 are astonishing.

State	Cattle 1860	Cattle 1880
Nebraska	37,197	1,113,247
Colorado	None	791,492
Kansas	93,455	1,533,133
Wyoming	None	521,213
Montana	None	428,279

22. *Id.* at 7.

23. *Delaney v. Errickson*, 10 Neb. 492, 495, 6 N.W. 600, 601 (1880). Other ranching-state courts also abandoned the common law rule. See, e.g., *Morris v. Fraker*, 5 Colo. 425, 428-29 (1880); *Pace v. Potter*, 85 Tex. 473, 476-77, 22 S.W. 300, 301 (1893).

24. *Delaney v. Errickson*, 10 Neb. 492, 497, 6 N.W. 600, 602 (1880). This case discusses the 1860 act regulating enclosures and partition fences. Similar laws were in existence in other states. See e.g., WYO. REV. STAT. §§ 44182-44194 (1887); MONT. CODES ANNOT. §§ 3250-3259 (1895). The requirements of height, width, and materials which constitute a sufficient fence are outlined in the statutes.

25. J. SCHLEBECKER, *supra* note 20, at 3, 7.

26. *Id.* at 7. Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 179 (1967).

bear the cost of fencing, sought a return to common law.²⁷ The ranchers argued that the duty to restrain their cattle would be too great a burden.²⁸ Such was the situation in Nebraska in the 1870's and 1880's.²⁹

Nebraska responded by replacing the duty to fence with a "cultivated lands" requirement,³⁰ later modified to require a plowed strip perimeter.³¹

This requirement resulted in the presence of "crops, fruit trees, hedges or a plowed strip" being a statutory precondition to recovery for animal trespass from the rancher.³² Of course, the presence of a legal fence was sufficient to impose liabilities on the rancher whether or not the land was cultivated.³³ Another element of the Nebraska statutory scheme, known as a herd law,³⁴ prohibited owners from allowing their animals to run at large. However, the herd law excepted certain designated counties, where this provision was not to be effective. Moreover, the entire statute could be rejected by community vote.³⁵ Other western states also enacted such statutes.³⁶

Further judicial and legislative action reduced the burdens placed on farmers. For example, intentional driving of cattle onto the land of another was actionable despite the lack of a fence or cultivation.³⁷ Similarly, landowners were under no duty to make their premises safe for wandering cattle, even where livestock were not trespassers under the law.³⁸ In Nebraska, a duty was also imposed to restrain all male animals,³⁹ however, strict liability for

27. Scott, *supra* note 26, at 180.

28. See *Delaney v. Errickson*, 10 Neb. 492, 494-95, 6 N.W. 600, 601 (1880).

29. *Id.* at 495-96. 6 N.W. at 601. A glimpse into the situation is given by the large number of petitions filed with the legislature requesting or rejecting fence law change. 8 NEB. SENATE J. 512 (1871).

30. 1871 Neb. Laws, §§ 1 & 8, at 120-22.

31. 1881 Neb. Laws, § 1, at 64-65.

32. *Fiene v. Robertson*, 184 Neb. 668, 669, 171 N.W.2d 179, 181 (1969); *Brown v. Sylvester*, 37 Neb. 870, 871-72, 56 N.W. 709, 709-10 (1893).

33. See NEB. REV. STAT. § 54-408 (Reissue 1978). Another state adopted this position by judicial construction where a plowed strip, not a fence, was present. The strip was found to impose liability on the rancher even in the absence of a statute. *Dorman v. Erie*, 63 Mont. 579, 582, 584, 208 P. 908, 908, 910 (1922).

34. Scott, *supra* note 26, at 180.

35. 1871 Neb. Laws, §§ 9-10, at 122.

36. See, e.g., N. DAK. REV. CODES, §§ 1550-1565 (1895); 8 TEX. GEN. LAWS 1131 (1876).

37. *Lazurus v. Phelps*, 152 U.S. 81, 85, 87 (1894); *Dunbar v. Emigh*, 117 Mont. 287, —, 158 P.2d 311, 313 (1945); *Angus Cattle Co. v. McLeod*, 98 Neb. 108, 110, 152 N.W. 322, 323 (1915); *Meyers v. Menter*, 63 Neb. 427, 428, 88 N.W. 662, 663 (1902).

38. *Garrettson v. Avery*, 26 Wyo. 53, —, 176 P. 433, 437 (1918); 10 TEX. L. REV. 97 (1931).

39. See 1879 Neb. Laws, § 4, at 68.

trespass of male animals was not imposed.⁴⁰

The law of animal trespass in newly developing regions had thus, in its abrogation of the uncomplicated common law rule, become a system with many rules for many situations. As such, absurd distinctions were likely to arise.⁴¹

Today the approach to animal trespass in Nebraska remains essentially the same as in 1871. However, no exceptions for certain counties or option for community repeal remain.⁴² Owner liability attaches for any animal trespass on cultivated land⁴³ and for intentional animal trespass on any land.⁴⁴ Liability does not, however, attach for accidental trespass on uncultivated land.⁴⁵ It is evidence of negligence should a male animal run free.⁴⁶

This history demonstrates that as many states became more settled the common law rule was gradually reinstated, and in Nebraska, the current treatment appears to be an almost full circle return to the common law.⁴⁷

ANALYSIS

The current statute,⁴⁸ and *Fuchser*, indicates that while Nebraska is close to a full return to the common law imposition of strict liability, situations remain in which strict liability will not be imposed. For example, the statute specifies that accidental trespass on uncultivated land imposes no liability on the owner, pro-

40. 205 Neb. at 790, 290 N.W.2d at 452. A male animal running loose is evidence of negligence.

41. 5 CAN. B. REV. 146, 147 (1927). The defendant's cattle had wandered onto adjoining land. She was found privileged to retrieve them, as it was not a trespass under Saskatchewan law. A short time later, her turkey wandered onto the same property. The defendant's retrieval was held actionable trespass since turkey was not a protected trespass. The poet wrote:

The judges considered the case with some care, and decided the plaintiff had got what was fair; But, in doing so, shifted the ground of the battle to what happened when Mrs. M went for her cattle. They held that her right to recapture was clear and that she could go fetch them with nothing to fear; But there they encountered a point that was murky, could Mrs. McKee go after her turkey? Two judges said 'No', so far as this goes, And they held that defendant had 'broken the close'.

Id.

42. See NEB. REV. STAT. §§ 54-304 to -306, -401, -408 (Reissue 1978).

43. *Id.* § 54-401 to -402. This, of course, includes fenced land.

44. *Id.* § 54-305 to -306.

45. See *id.* at § 54-401.

46. *Id.* § 54-304.

47. W. PROSSER, *supra* note 2, at § 76; 38 N.D.L. REV. 344, 344-46 (1962). For a tracing of Iowa's abandonment of, and return to the common law, see S. KIMBALL, HISTORICAL APPROACH TO THE LEGAL SYSTEM 331-34 (1966).

48. NEB. REV. STAT. §§ 54-304 to -306, -408 (Reissue 1978).

vided no fence exists.⁴⁹ *Fuchser* tells us that the question of no liability is still viable. First, the court defined the exempt "uncultivated land" as wild prairie land. Second, the court discussed whether fenced pastureland is also "uncultivated land."⁵⁰ This leads to the conclusion that Nebraska continues to allow exceptions to the common law of animal trespass based on the nature of the terrain involved.

The argument of defendant in *Fuchser* that a fence was not sufficient to free the owner from the statutory requirement of a plowed perimeter,⁵¹ is misplaced against the historical background of fencing and herd laws. The cultivated lands requirement was instituted to ease the burden of fencing on the farmer.⁵² This statute was meant to operate only where a fence was not present.⁵³ Therefore, either a fence or a plowed perimeter surrounding uncultivated land, would be sufficient to impose trespass liability onto the animal owner. The court rejected defendant's argument and imposed liability on him.⁵⁴

Fuchser indicates that an owner of a trespassing animal can successfully argue that he is not liable under the present statute. The court states that an animal trespass onto wild prairie land without a fence or plowed strip imposes no liability on the animal owner.⁵⁵ Nebraska thus retains a degree of flexibility in its approach to animal trespass accommodating the diverse agricultural nature of the state.⁵⁶

49. *Id.* at § 54-401.

50. 205 Neb. at 789-90, 290 N.W.2d at 451.

51. *Id.* at 789, 290 N.W.2d at 451; NEB. REV. STAT. § 54-408 (Reissue 1978).

52. Scott, *supra* note 26, at 180.

53. See *Brown v. Sylvester*, 37 Neb. 870, 871, 56 N.W. 709, 709-10 (1893).

54. 205 Neb. at 790, 290 N.W.2d at 451.

55. *Id.* at 789, 290 N.W. 2d at 451.

56. In the western parts of the state, ranching and pastureland dominate the economy. Sheridan county, in northwestern Nebraska, has 680 farms and 141,000 cattle. NEBRASKA AGRICULTURAL STATISTICS, *supra* note 3, at 3, 53. Owners of large herds graze them on enormous tracts of land. It is in this type of county that the issue of no liability would be most successful. However, the chances of such a finding would be slim due to the nature of the modern range as settled and closed. See Note, 13 WYO. L. REV. 136, 139 (1958). See generally J. SCHLEBECKER, *supra* note 21, at 156-57. In the eastern portion of Nebraska, a position akin to the common law applies. *Fiene v. Robertson*, 184 Neb. 668, 669-70, 171 N.W.2d 179, 181 (1969) (this case arose in eastern Nebraska). Here, farms and feedlots dominate the local economy. For example, in Lancaster county, there are 1,460 farms and 36,800 cattle. NEBRASKA AGRICULTURAL STATISTICS, *supra* note 3, at 4, 54. These figures indicate farms smaller in area, with smaller cattle herds. Thus, eastern Nebraska is comparatively settled while western Nebraska is more open and populated with many grazing cattle.

MEASURE OF DAMAGES

The measure of damages used in *Fuchser* was the difference between the cow's value before and after impregnation.⁵⁷ While this has been widely accepted as the general measure,⁵⁸ it has been criticized.⁵⁹

While the general measure would seem to cover any loss in value suffered as a result of the crossbreeding, the cases adopting it do not always award full compensation.⁶⁰ The possible losses suffered as a result of ill-breeding are: loss of a year's breeding time,⁶¹ loss in value as a result of physical injury to the cow by untimely breeding,⁶² loss in value due to the difference between the purebred and mongrel calf,⁶³ and the difference in value if the cow is sold pregnant with purebred calf or with mongrel calf.⁶⁴

The cases adopting the general rule tend to allow recovery based solely on loss of a breeding year,⁶⁵ which is only one component of the actual loss suffered. Some cases allow additional recovery based on the loss in value of the calf,⁶⁶ although this has been suggested as the sole proper measure, particularly when no physical injury is suffered by the cow.⁶⁷ Difference in value if sold pregnant, while a proper measure of value loss, would be an alternative rather than an additional measure to the loss of a year's breeding time.⁶⁸ It would appear that the plaintiff should plead and prove

57. 205 Neb. at 791, 290 N.W.2d at 452.

58. *Madison v. Hood*, 207 Iowa 495, 499, 223 N.W. 178, 180 (1929); *Burleigh & Jackson v. Hines*, 124 Iowa 199, 202-03, 99 N.W. 723, 724 (1904); *Hall v. Umiker*, 87 S.D. 362, —, 209 N.W. 2d 361, 363 (1973); *Annot.*, 79 A.L.R. 2d 677, 708-09 (1961).

59. *Hall v. Umiker*, 87 S.D. 362, —, 209 N.W.2d 361, 363 (1973) (dissenting opinion); *Note, Liability for Harm Caused By Livestock*, 34 IOWA L. REV. 318, 327 (1949) [hereinafter cited as *Liability for Harm*].

60. *Liability for Harm*, *supra* note 59, at 327-28.

61. *Madison v. Hood*, 207 Iowa 495, 501, 223 N.W. 178, 180 (1929); *Burleigh & Jackson v. Hines*, 124 Iowa 199, 203, 99 N.W. 723, 724 (1904); *Hall v. Umiker*, 87 S.D. 367, —, 209 N.W.2d 361, 363 (1973).

62. *Mathews v. Langhofer*, 110 Kan. 36, 38-39, 202 P. 634, 636 (1921). The Court awarded both the injury measure and loss of purebred calf measure.

63. *Belau v. Buss*, 48 S.D. 595, —, 205 N.W. 669, 669-70 (1925); *Kopplin v. Quade*, 145 Wis. 454, 456, 130 N.W. 511, 512 (1911). The humor of the situation was not lost on the judge. The case is worth reading for its artful humor.

64. Interview with Mr. Kendrick Berg, Secretary of American Shorthorn Ass'n, in Omaha, Nebraska. (June 20, 1980) (interview on file in Creighton Law Review Offices). Mr. Berg suggested this as a possible compensatory measure. A purebred cow does not suffer loss in value due to a loss of pedigree when cross-bred. *Id.*

65. See note 61 and accompanying text *supra*.

66. See note 63 and accompanying text *supra*.

67. *Hall v. Umiker*, 87 S.D. 362, —, 209 N.W.2d 361, 363-64 (1973) (dissenting opinion).

68. See note 64 and accompanying text *supra*. This damage measure is an alternative as it provides compensation for loss in year's purebred breeding time due to pregnancy with a mongrel calf.

all his losses in order to be fully compensated for both diminution in value of the cow and loss of anticipated value of a purebred calf.⁶⁹ Otherwise, he will receive just the general measure of damage which tends to include just the former loss of value.⁷⁰

However, pleading and proving total loss does not guarantee that a court will be convinced that it should allow recovery beyond that which would be gained by the single facet approach.⁷¹ In *Fuchser* the plaintiff proved both loss of value to the cow and the loss suffered as a result of the mongrel calf,⁷² but based its measure of loss solely on reduction in value of the cow, if sold pregnant.⁷³

It could be argued that the plaintiff was undercompensated for his loss. He had not only lost valuable breeding time but was left with an inferior end product. The plaintiff should have been permitted to recover for both losses.⁷⁴

CONCLUSION

The Nebraska position on animal trespass has evolved from an abrogation of the common law rule to an almost total reinstatement of it. This development parallels the settlement of the range. Today, Nebraska's status as both a farming and ranching state controls the approach taken to animal trespass. In densely settled farming areas a common law type liability is imposed on the animal owner. In areas of wild prairie lands where large herds of cattle graze, liability will be imposed only if the land owner has fenced or plowed his land. Thus, the present statute allows liability to be imposed dependent upon the agricultural nature of the community.

In a situation where a purebred cow is crossbred by a trespassing bull, damages measuring the loss in value before and after the breeding are awarded. What constitutes such loss is viewed differently. Plaintiff should plead and prove all loss to cow and calf resultant from the ill-breeding in order to obtain full compensation for his loss. However, it may be difficult to persuade a court to award such damages, even with sufficient proof.

69. See *Kopplin v. Quade*, 145 Wis. 454, 456-57, 130 N.W. 511, 511 (1911).

70. *Liability for Harm*, supra note 60, at 327-28.

71. See, e.g., *Hall v. Umiker*, 87 S.D. 362, —, 209 N.W.2d 361, 361-63 (1973).

72. Brief for Appellee, No. 42602, at 14, *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980).

73. 205 Neb. at 791, 290 N.W.2d at 452.

74. *Liability for Harm*, supra note 59, at 328.

PRODUCTS LIABILITY

INTRODUCTION

In *Hancock v. Paccar, Inc.*⁷⁵ the Nebraska Supreme Court expanded upon a previous holding that a design defect which enhances, but does not cause an injury gives rise to a valid cause of action in which the injured person can recover against the manufacturer.⁷⁶ Thus, in Nebraska, an automobile manufacturer is under a duty⁷⁷ to manufacture vehicles which are crashworthy.⁷⁸

This survey article will demonstrate the necessary elements for a prima facie case against a manufacturer for a defect which enhances injury under current Nebraska case law and statutes.⁷⁹ Of particular interest is the court's recent definition of unreasonable risk in *Hancock*.⁸⁰ Available defenses in such an action will also be discussed.

FACTS OF THE CASE

The plaintiff's husband was driving a 1969 cab-over tractor manufactured by the defendant. On the interstate near Waco, Nebraska, plaintiff's vehicle struck a deer. The impact of the collision bent the aluminum bumper into a wedge which forced the front wheel into a locked position. The truck ran off the highway into a guardrail and the plaintiff's husband was killed.⁸¹

The plaintiff's complaint included both a negligence count which alleged improper material use, inadequate design, and failure to test; and a strict liability count which complained of failure to inspect and to design a product reasonably fit for the intended for foreseeable use.⁸²

At trial the plaintiff demonstrated, through expert testimony, the current use and availability of alternative bumpers which were safer and economically reasonable. This evidence was sufficient to raise two questions of fact: whether the defendant's failure to use the alternative bumper designs was a negligent creation of unrea-

75. 204 Neb. 468, 283 N.W.2d 25 (1979).

76. *Friedrich v. Anderson*, 191 Neb. 724, 731-32, 217 N.W.2d 831, 836 (1974).

77. *Id.* at 731-32, 217 N.W.2d at 836.

78. Crashworthiness is defined as providing the maximum practicable degree of occupant protection. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 6.05(14) (1980).

79. NEB. REV. STAT. § 25-21,180 (Cum. Supp. 1978). Such an action in strict tort is available only against a manufacturer, not a seller, unless the seller is also the manufacturer. *Id.*

80. See notes 139-159 and accompanying text *infra*.

81. 204 Neb. at 471, 283 N.W.2d at 31.

82. *Id.* at 471-72, 283 N.W.2d at 31.

sonable risk; and whether the defendant's failure to use the alternative designs created a product defect which presented an unreasonable risk for which he should be held strictly liable.⁸³ The jury returned a verdict in favor of the plaintiff, answering these questions in the affirmative.⁸⁴

BACKGROUND

Negligence and Strict Liability in Products Liability: The Requisite Elements

The general procedure in products liability cases is to seek recovery under both negligence and strict liability counts.⁸⁵ In Nebraska, the negligence rule is well-settled regarding the necessary elements for recovery of damages for injury caused by a product defect against a manufacturer. These elements are duty, failure to exercise the requisite standard of care, and a causal relationship between the injury and that failure.⁸⁶ A manufacturer is under a duty to use reasonable care in the manufacture of a product to avoid unreasonable risk of substantial bodily harm as a result of intended or foreseeable use.⁸⁷ Once the duty has been established, the plaintiff must demonstrate that the manufacturer did not use the reasonable care required by the circumstances. In addition to proving the defendant's failure to attain the requisite standard of care, the plaintiff must establish that this failure resulted in an unreasonable risk which caused him harm.⁸⁸ The causal relationship must be one of proximate cause, that is, "but for" defendant's actions, plaintiff would not have been injured.⁸⁹

The prima facie negligence case differs slightly from a strict liability theory. Strict liability imposes liability on the manufacturer for placing a defective and unreasonably dangerous product on the market, despite the fact that the manufacturer had exercised all possible care.⁹⁰ Thus, an unreasonably dangerous condition, whether or not caused by negligence, which results in injury,

83. *Id.* at 478, 480, 283 N.W.2d at 34-35.

84. *Id.* at 472, 283 N.W.2d at 31.

85. *See* Jiminez v. Sears, Roebuck & Co., 4 Cal.3d 379, 381, 482 P.2d 681, 683, 93 Cal. Rptr. 769, 771, 52 A.L.R.2d 92, 95 (1971).

86. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 30 (4th ed. 1971).

87. *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 826-27, 104 N.W.2d 431, 444 (1960); *Colvin v. Powell & Co.*, 163 Neb. 112, 120-21, 77 N.W.2d 900, 908 (1956).

88. *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 826-27, 104 N.W.2d 431, 444 (1960); *see* *Shupe v. County of Antelope*, 157 Neb. 374, 382-83, 59 N.W.2d 710, 716 (1953). *See* text accompanying notes 111-115 *infra* for a discussion of the elements required to prove the failure of a standard of care.

89. W. PROSSER, *supra* note 86, at § 41.

90. *Id.* at § 75.

is sufficient to impose manufacturer liability.⁹¹

Nebraska has adopted this position with regard to a defect which is the proximate cause of injury.⁹² In a jurisdiction which imposes the duty to place safe products on the market, the plaintiff must, in order to get his strict liability case to the jury, demonstrate the defect's unreasonable risk, and the causal relationship between the injury and defect.⁹³

Defect Which Enhances Injury

The injury, death of the plaintiff's husband, was enhanced, not initially caused, by the product's defect. The collision with the deer was the proximate cause of the accident. Upon impact, the bumper formed a wedge which locked the wheels forcing the vehicle off the road. The plaintiff sought recovery only for the enhancement of the injury attributable to the defective bumper.⁹⁴

The first question in such an enhancement, or crashworthiness, situation under both a negligence and a strict liability theory is whether the manufacturer has a duty to make a crashworthy vehicle. Existence of such a duty as a matter of law is the first element in the prima facie case.⁹⁵

There are two views on the imposition of duty when the injury enhancing defect is not also the proximate cause of the initial injury. The expansive majority position,⁹⁶ represented by *Larsen v. General Motors Corp.*,⁹⁷ extends the duty to protect consumers from unreasonable risk of enhancement of injury by a defect.⁹⁸ The rationale behind this is that a collision is a foreseeable event and the consumer must be protected from the unreasonable consequences of such an occurrence.⁹⁹

91. RESTATEMENT (SECOND) OF TORTS § 402A, Comment a (1965).

92. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 436, 191 N.W.2d 601, 606-07 (1971).

93. See W. PROSSER, *supra* note 86, at § 103.

94. 204 Neb. at 47, 283 N.W.2d at 31. Enhancement bears a close relationship to crashworthiness. See note 78 *supra*.

95. W. PROSSER, *supra* note 86, at §§ 30 & 53; see *Friedrich v. Anderson*, 191 Neb. 724, 726-27, 217 N.W.2d 831, 833-34 (1974).

96. See, e.g., *Huff v. White Motor Corp.*, 565 F.2d 104, 108, 110-11 (7th Cir. 1977); *Polk v. Ford Motor Co.*, 529 F.2d 259, 266 (8th Cir. 1976); *Passwaters v. General Motor Corp.*, 454 F.2d 1270, 1274 (8th Cir. 1972) (Iowa law); *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1072-73 (E.D. Pa. 1969); *Farmer v. International Harvester Co.*, 97 Idaho 742, —, 553 P.2d 1306, 1315 (1976); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, —, 321 A.2d 737, 744 (1974); *Mickle v. Blackmon*, 252 S.C. 202, —, 166 S.E.2d 173, 186 42 A.L.R.3d 525, 541 (1969), *aff'd*, 255 S.C. 136, —, 177 S.E.2d 548, 550 (1970). See Annot., 42 A.L.R.3d 560 (1972 & Supp. 1979); 1 L. FRUMER & M. FRIEDMAN, *supra* note 79, at § 7.01(3) n. 20.4.

97. 391 F.2d 495 (8th Cir. 1968) (Mich. law applied).

98. *Id.* at 503; Annot., 43 A.L.R.3d 560, 567 (1972).

99. *Larsen v. General Motors Corp.* 391 F.2d 495, 502 (8th Cir. 1968); *Dyson v.*

The restrictive view is exemplified by *Evans v. General Motors Corp.*¹⁰⁰ which refused to extend such a duty.¹⁰¹ The following rationales have been relied upon in decisions which take this view: the defect is not the proximate cause of the initial injury;¹⁰² a collision is not a foreseeable misuse;¹⁰³ a manufacturer should not be made an insurer of consumer safety;¹⁰⁴ and a collision is an obvious danger from which protection is not owed.¹⁰⁵

In 1974, Nebraska adopted the expansive view with the decision of *Friedrich v. Anderson*.¹⁰⁶ The duty to protect from a product defect which unreasonably enhances an injury now exists as a matter of law in Nebraska in negligence and strict liability cases.¹⁰⁷

In a jurisdiction which imposes the duty to make a vehicle crashworthy, the plaintiff must demonstrate, in both negligence and strict liability, a causal relationship between the defect and injury enhancement.¹⁰⁸ The causal link is that "but for" the product defect, and without intervening cause, the plaintiff's injuries would have been less severe.¹⁰⁹

As in cases where the manufacturer's negligence is the proximate cause of the injury, the next element in negligent enhancement cases is the demonstration of a failure of a standard of care which results in the creation of unreasonable risk.¹¹⁰ This can be

General Motors, 298 F. Supp. 1064, 1072-73 (E.D.Pa. 1969); *Mickle v. Blackmon*, 252 S.C. 202, —, 166 S.E.2d 173, 187 (1969).

100. 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966) (Ind. law)

101. *Id.* at 825; Annot., 42 A.L.R. 3d 560, 567-68 (1972). The same court later adopted the expansive position in *Huff v. White Motor Corp.*, 565 F.2d 104, 108 (7th Cir. 1977) (Ind. law).

102. *Ford Motor Co. v. Simpson*, 233 So.2d 797, 798 (Miss. 1970).

103. *Evans v. General Motors Corp.*, 359 F.2d 822, 825 (7th Cir. 1966); *see Schemel v. General Motors Corp.*, 261 F. Supp. 134, 135-36 (S.D. Ind. 1966), *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

104. *Shumard v. General Motors Corp.*, 270 F. Supp. 311, 314-15 (S.D. Ohio 1967).

105. *Evans v. General Motors Corp.*, 359 F.2d 822, 824 (7th Cir. 1966); *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445, 447 (M.D.N.C. 1977). The dichotomy presented by *Evans* and *Larsen* has been discussed often; *see, e.g.*, *Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1067-68 (E.D. Pa. 1969); *Mickle v. Blackmon*, 252 S.C. 202, —, 166 S.E.2d 173, 185-86 (1969); 33 ALBANY L. REV. 238, 238-39 (1968); 28 MD. L. REV. 386, 391 (1968); 54 NEB. L. REV. 172, 173-75; 118 U. PA. L. REV. 299 (1969).

106. *Friedrich v. Anderson*, 191 Neb. 724, 731-32, 217 N.W.2d 831, 836 (1974). The rationale for this decision has been discussed elsewhere. 8 CREIGHTON L. REV. 233, 239-41 (1974); 54 NEB. L. REV. 172, 175-77 (1975).

107. *Friedrich v. Anderson*, 191 Neb. 724, 731-32, 217 N.W.2d 831, 836 (1974). The Eighth Circuit applied such a duty in ascertaining Nebraska law. *Melia v. Ford Motor Co.*, 534 F.2d 795, 801 (8th Cir. 1976); *see* 10 CREIGHTON L. REV. 198 (1976).

108. *Frerichs v. Eastern Neb. Pub. Power Dist.*, 154 Neb. 777, 782, 49 N.W.2d 619, 622 (1951).

109. *Coyle v. Stopak*, 165 Neb. 594, 606, 86 N.W.2d 758, 768 (1957); W. PROSSER, *supra* note 86, at § 41.

110. RESTATEMENT (SECOND) OF TORTS § 395 (1965).

shown either by proof of the manufacturer's deviation from industry norm,¹¹¹ by expert testimony of the degree of risk presented by the defect¹¹² or by a demonstration that risk prevention was a relatively inexpensive alternative compared to the gravity of the harm.¹¹³ Any of these manners of proof standing alone may be sufficient to submit the question of negligence to the jury, provided an issue of fact has been raised. Whether the plaintiff has presented sufficient proof to establish the manufacturer's failure of a standard of care is determined by the court.¹¹⁴ Therefore, the court may, within its discretion, reject any of the aforementioned means of proof or accept only one or two of them as evidence of negligence.¹¹⁵

On the other hand, to prove this element in strict liability, it must be demonstrated that there was a defect which created an unreasonable risk of injury.¹¹⁶ This defect must have existed when the product left the manufacturer.¹¹⁷ Strict liability seeks to impose liability without proof of negligence as a matter of public policy and therefore seeks to impose a lighter burden of proof upon the plaintiff.¹¹⁸ In strict products liability cases, the plaintiff need not demonstrate the manufacturer's failure to meet a standard of care, but only the existence of a defect which created an unreasonable risk.¹¹⁹ He must further prove that the defect existed when it left the manufacturer and that it caused injury to the plaintiff.¹²⁰

111. *Frankel v. Styer*, 386 F.2d 151, 152 (3d Cir. 1967) (failure to install safety release as was industry custom); see W. PROSSER, *supra* note 86, at § 33.

112. *Ryan v. Zweck-Wollenberg Co.*, 266 Wisc. 630, —, 64 N.W.2d 226, 229 (1954) (expert testified as to conduction of electricity in appliance, demonstrating negligence). 1 L. FRUMER & M. FREIDMAN, *supra* note 79, at § 12.03(2) (b); 52 IOWA L. REV. 953, 963 (1967).

113. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). This is Judge Learned Hand's approach and the Restatement position. The cost of making safe is balanced against the gravity of the harm. RESTATEMENT (SECOND) OF TORTS § 291 (1965). See *Dreisonstak v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1072-73 (4th Cir. 1974); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L. REV. 816, 818 (1962) (cited in *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (1968)).

114. See W. PROSSER, *supra* note 86, at § 37.

115. See *Montgomery and Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 830 (1976).

116. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

117. RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965). Unreasonable risk as defined in *Hancock* is discussed later in this article. See text accompanying notes 139-159 *infra*.

118. See *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, —, 377 P.2d 897, 901 27 Cal. Rptr. 697, 701 (1963).

119. *Id.*

120. RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

DEFENSES

In all types of products liability cases, there are several defenses available to the manufacturer. In negligence, the full range of negligence defenses is available, including contributory negligence and assumption of risk.¹²¹ In Nebraska, all available defenses may be used in negligence.¹²²

In strict liability, the defenses available include a special type of the users' assumption of risk,¹²³ the state of the art in the product's field,¹²⁴ obviousness of defect to the user,¹²⁵ and the user's alternation or misuse of the product.¹²⁶ The Nebraska Supreme Court has adopted the Restatement position with regard to a special assumption of risk in strict liability and has permitted the use of the alteration and misuse of a product defenses as well.¹²⁷

ANALYSIS

The Current Prima Facie Case: Negligence

The *Hancock* decision and the recent products liability statute¹²⁸ expand and refine the products liability area as viewed in *Friedrich*, particularly in regard to a definition of an unreasonable risk creation necessary to impose strict liability. Indeed, the court refers to *Hancock* as *Freidrich II*.¹²⁹

In *Hancock*, the negligence count reached the jury. The duty to make a vehicle crashworthy had already been imposed in *Fried-*

121. W. PROSSER, *supra* note 86, at §§ 103 & 670.

122. NEB. REV. STAT. § 25-1151 (Reissue 1979) (Nebraska has a comparative negligence statute).

123. This is defined as the user's voluntarily and unreasonably proceeding to encounter a known danger. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

124. State of the art is that which is within the scope of knowledge and experience with regard to safety features at the time of manufacture; see *Maxted v. Pacific Car & Foundry Co.*, 527 P.2d 832, 836 (1972); *Karasik, State of the Art or Science: Is It a Defense to Products Liability*, 60 ILL. B.J. 348, 350 (1972).

125. 1 L. FRUMER & M. FRIEDMAN, *supra* note 78, at § 12A.02(3). Some obvious conditions impose no duty to protect, *i.e.*, knives, axes; see *e.g.* *Fisher v. Johnson Milk Co.*, 383 Mich. 158, —, 174 N.W.2d 752, 754 (1970) (no duty to protect when it is obvious that milk bottles in wire containers could break).

126. W. PROSSER, *supra* note 87, at § 102. The defective condition must exist when the product left the manufacturer; see *Garibaldi, Defenses to Products Liability Cases*, 48 CHI. KENT L. REV. 1, 8-10 (1971).

127. *Hawkins Const. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973). In *Hancock*, further light was shed on Nebraska's position on obviousness of defect and state of the art. See notes 160-174 and accompanying text *infra*.

128. NEB. REV. STAT. §§ 25-21,180 to -21,182 (Cum. Supp. 1978).

129. 204 Neb. at 471, 283 N.W.2d at 31.

*rich*¹³⁰ as a matter of law and the plaintiff had established a breach of this duty. The plaintiff demonstrated an unreasonable risk by a showing of available, reasonable and safer alternatives.¹³¹ In addition, by means of expert testimony, the plaintiff had demonstrated causation sufficient to create a question of fact for the jury.¹³²

The result in *Hancock*, a finding of manufacturer liability, differs from *Friedrich* where, although the duty to make crashworthy was imposed, summary judgment was granted for the *Friedrich* defendant. In *Friedrich*, the plaintiff was injured when his eye hit a small gear shift knob as a result of a collision. The plaintiff attempted to demonstrate a failure of a standard of care by proof of an alternative which was safer, reasonable, and inexpensive. By demonstrating the failure to use an alternative knob size, the plaintiff hoped to demonstrate that an unreasonable risk had been presented.¹³³

The difference in the cases rests on the court's acceptance in *Hancock* of proof of alternative measures as proof of negligence. The *Friedrich* plaintiff was not successful in getting his negligence case before the jury by relying on a demonstration of the existence of a safer, reasonable, alternative design.¹³⁴ *Friedrich* implies that unreasonable risk in negligence cases is demonstrated by deviation from an industry norm and/or by expert testimony of the harm presented, rather than proof of alternatives.¹³⁵ *Hancock*, however, accepted proof of reasonable, economic, alternative bumpers as an indication of negligent creation of unreasonable risk.¹³⁶

130. *Friedrich v. Anderson*, 191 Neb. 724, 731-32, 217 N.W.2d 831, 836 (1974). The court further justified its position in *Friedrich* by finding that collision with a deer is foreseeable. 204 Neb. at 478, 283 N.W.2d at 34.

131. 204 Neb. at 480, 283 N.W.2d at 35.

132. *Id.* at 478, 283 N.W.2d at 34.

133. 191 Neb. at 725, 217 N.W.2d at 833. The larger knob was used in cars purchased under G.S.A. guidelines. The G.S.A. supplies standards for government-purchased vehicles. Such proof is allowable despite the exclusionary rule of subsequent remedial measures as it shows feasibility of alternatives. *Sutkowski v. Universal Marion Corp.*, 5 Ill. App.3d 313, —, 281 N.E.2d 749, 752 (1972); see 8 CREIGHTON L. REV. 233, 245 (1974).

134. *Friedrich v. Anderson*, 191 Neb. 724, 726, 217 N.W.2d 831, 833 (1974). The court appears to have rejected the cost-balanced-against-benefit test, which usually creates a jury question upon proof of alternatives which are reasonable and safer. See RESTATEMENT (SECOND) OF TORTS § 291, Comment b, at 55 (1965); 8 CREIGHTON L. REV. 233, 247 (1974).

135. See 8 CREIGHTON L. REV. 233, 247 (1974).

136. 204 Neb. at 480, 283 N.W.2d at 35. This is the Restatement position with regard to unreasonable risk in negligence. RESTATEMENT (SECOND) OF TORTS § 291 (1965). *Hancock* appears to allow the jury to infer negligent creation of unreasonable risk from proof of manufacturers' failure to use reasonable safer alternatives. 204 Neb. at 472, 283 N.W.2d at 35.

Strict Liability

Friedrich was not decided on the basis of a strict liability count, therefore, *Hancock* interprets the *Friedrich* duty¹³⁷ with regard to the strict liability elements for the first time. As noted, strict liability requires proof of a defect which presents an unreasonable risk and proof of causation after duty is imposed.¹³⁸ In *Hancock*, Nebraska adopted a definition of unreasonable risk in strict liability.¹³⁹

The requirement of unreasonable risk was first made part of the products liability case in the Restatement, and was set forth to protect manufacturers from certain types of claims.¹⁴⁰ Different approaches to the definition of unreasonable risk have been used by the courts. California and New Jersey do not require plaintiff to prove unreasonable risk.¹⁴¹ This was motivated by a desire to reduce the burden of proof on the plaintiff, as these courts felt that proof of unreasonable risk in strict liability created an unnecessary burden on plaintiff.¹⁴² This approach does require proof of product defect, a standard as yet undefined¹⁴³ in these jurisdictions.

A second approach, the cost-benefit analysis,¹⁴⁴ has been applied in some cases,¹⁴⁵ despite the fact that it is primarily a proof criteria for negligence.¹⁴⁶ Upon sufficient proof of reasonable alternatives the question of unreasonable risk is submitted to the

137. *Friedrich v. Anderson*, 191 Neb. 724, 731-32, 217 N.W.2d 831, 836 (1974).

138. See note 91 and accompanying text *supra*.

139. 204 Neb. at 484, 283 N.W.2d at 37.

140. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, at 352 (1965). The rationale behind the requirement of unreasonable risk is that it forecloses liability for products with inherent possibility for harm. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132, 501 P.2d 1153, 1161, 104 Cal. Rptr. 433, 441 (1972); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

141. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 134-35, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 442-43 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, —, 304 A.2d 562, 564-65 (1973).

142. *Id.*

143. It is not clear as to what plaintiff must prove with regard to defect. See 61 CAL. L. REV. 656, 660 (1973); 6 CREIGHTON L. REV. 434, 445 (1973); 11 DUQUESNE L. REV. 726, 732 (1973); 42 FORDHAM L. REV. 943, 947-48 (1974); 49 WASH. L. REV. 231, 247-50 (1973). The indefiniteness of this approach makes a comparison with other approaches to consumer expectations unfeasible. However, an attempt was made by these courts to create a burden of proof in keeping with the rationale of strict liability.

144. See note 113 and accompanying text *supra*.

145. *La Garza v. Kroger Co.*, 275 F. Supp. 373, 379 (W.D. Pa. 1967); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 331, 154 N.W.2d 488 495 (1967); see *Montgomery & Owen*, *supra* note 115, at 832-33.

146. W. PROSSER, *supra* note 86, § 99 at 661.

jury.¹⁴⁷

The third approach is the Restatement position¹⁴⁸ and could be called the consumer expectation approach.¹⁴⁹ This is the position adopted in *Hancock*,¹⁵⁰ and it requires that unreasonable risk of harm be beyond the contemplation of the ordinary user or consumer at time of purchase.¹⁵¹

Analyzed from a burden of proof perspective, the consumer expectations approach places a heavier burden on the plaintiff than do the other approaches. He must prove what is beyond consumer expectations by means of expert testimony of the degree of harm, variation from industry norms, or the availability of reasonable alternatives.¹⁵² This is very much like the burden of proof in negligence where plaintiff uses such evidence to demonstrate unreasonable risk which resulted from a failure to satisfy the standard of care.¹⁵³ Considering the fact that strict liability was designed to impose liability without proof of negligence,¹⁵⁴ the consumer expectations approach contradicts this rationale.¹⁵⁵

Compared with the cost-benefit approach, which only requires proof of one of the negligence elements, the consumer expectations approach is a heavier burden.¹⁵⁶ In *Hancock*, although the court accepted proof of reasonable alternatives alone to create a jury question of unreasonable risk,¹⁵⁷ its express holding of the consumer expectations approach¹⁵⁸ gives it greater latitude with regard to what constitutes sufficient proof. A plaintiff must also be prepared to offer evidence of deviation from norms and expert testimony of risk.¹⁵⁹

147. See note 134 *supra*.

148. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, at 352 (1965).

149. See, e.g., *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, —, 179 N.W.2d 64, 69 (1970); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362-63 (Okla. 1974); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, —, 230 N.W.2d 794, 798-99 (1975).

150. 204 Neb. at 484, 283 N.W.2d at 37.

151. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, at 352 (1965).

152. See notes 112-115 and accompanying text *supra*.

153. *Id.*

154. See generally W. PROSSER, *supra* note 86, § 75 at 494.

155. *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1275 (E.D. Pa. 1975). The court said that this strict liability unreasonable risk requirement "rings in negligence" and that requiring unreasonable risk proof is tantamount to imposing a negligence standard of proof; see 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(g) (1980).

156. See notes 111-115 and accompanying text *supra*. The cost-benefit approach, however, also thwarts the purpose of strict liability since it is negligence proof.

157. 204 Neb. at 478, 480, 283 N.W.2d at 34, 35.

158. *Id.*

159. See notes 152-154 and accompanying text *supra*.

DEFENSES

In *Hancock*, the court examined two defenses in light of its position on unreasonable risk. First, the defendant claimed its practices conformed to the state of the art.¹⁶⁰ Nebraska accepts the definition of state of the art to be not whether other manufacturers are doing more, but whether reasonable, economic alternatives are available.¹⁶¹ In this jurisdiction, which finds evidence of reasonable alternatives an indication of negligent creation of unreasonable risk, a manufacturer cannot successfully obtain summary judgment by showing that other manufacturers are doing the same once the plaintiff has tendered proof of reasonable alternatives.¹⁶² However, what others are doing may be considered by the jury. This is the position taken in *Hancock*.¹⁶³

Under the present products liability statute, the state of the art is defined as the generally recognized and prevailing technology at the time.¹⁶⁴ The statute tells us that conformity with such technology at the time of the first sale is a sufficient defense.¹⁶⁵ Under the statute, a manufacturer is more likely to raise a successful defense, than under the *Hancock* approach. *Hancock* does not allow the defense if reasonable alternatives are proven to be available, even if the manufacturer has complied with prevailing industry practice.¹⁶⁶

The second defense argued in *Hancock* was obviousness of defect to the product user. If a dangerous condition is easily perceived, expected or inherent in a product, it is not an unreasonable risk and therefore not a basis for recovery.¹⁶⁷ In *Hancock*, the defendant attempted to use this defense by showing that had the plaintiff thought about the bumper he would have been aware of its potential dangers.¹⁶⁸ The defendant also argued that the plaintiff must show his lack of knowledge of the defect.¹⁶⁹

The court rejected the defendant's second grounds of defense by holding that the plaintiff is not required to surmise and anticipate all the possible defects.¹⁷⁰ The plaintiff is required simply to

160. 204 Neb. at 479, 283 N.W.2d at 34-35.

161. *Id.* at 480, 283 N.W.2d at 35.

162. See W. PROSSER, *supra* note 86, at § 33.

163. *Id.* at 479-80, 283 N.W.2d at 35.

164. NEB. REV. STAT. § 25-21,182 (Cum. Supp. 1978). This statute was not applicable in *Hancock* since the cause accrued prior to its enactment.

165. *Id.*

166. 204 Neb. at 484, 283 N.W.2d at 37.

167. See note 125 and accompanying text *supra*.

168. 204 Neb. at 483-84, 283 N.W.2d at 36-37.

169. *Id.* at 484-85, 283 N.W.2d at 37.

170. *Id.* at 483, 283 N.W.2d at 36.

possess the ordinary knowledge of the typical user class.¹⁷¹ Only knowledge of obvious or inherent product dangers will be attributed to this class.¹⁷² The court found the weakness in the bumper was not an obvious or inherent defect of which the typical user class would be aware.¹⁷³

The court also held that a plaintiff is not required to prove lack of knowledge of a defect. This is an affirmative defense, whose burden properly rests on the defendant.¹⁷⁴

CONCLUSION

In *Hancock*, the Nebraska Supreme Court applied, for the first time, the duty to make crashworthy vehicles to a strict liability count. In defining the unreasonable risk presentation necessary to impose strict liability, the court has chosen the consumer expectation approach. The approach seems to provide no lighter burden of proof for the plaintiff as he is required to prove the same things in negligence as in strict liability.

This approach, while the heaviest burden among the strict liability approaches, leaves some flexibility to the court in choosing what proof satisfies the unreasonable risk requirement. Therefore, the court can ease the burden on the plaintiff in strict liability. However, a plaintiff must be prepared to demonstrate his case by the full consumer expectations approach, rather than relying on a judicially created alleviation of that burden.

Mary C. Gilbride—'82

171. *Id.* at 484, 283 N.W.2d at 37.

172. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i, at 352 (1965).

173. 204 Neb. at 484, 283 N.W.2d at 37.

174. 204 Neb. at 485-86, 283 N.W.2d at 38 (held this to be a general rule of evidence).