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THE UNWORKABILITY OF COURT-MADE ENTERPRISE LIABILITY: A REPLY TO GEISTFELD

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In the Article to which Professor Geistfeld responds, we distinguish between two types of products liability without defect: across-the-board liability and product category liability.¹ Under the former, which most scholars would describe as true "enterprise liability,"² all products manufacturers and distributors are held strictly liable for all the harms their products cause regardless of whether the products are defective under traditional tests for defect.³ Under the latter system, strict defect-free liability would be imposed on a discrete and limited number of product categories, most likely chosen on the basis of a societal risk-utility analysis.⁴ We reject both forms of liability without defect for two reasons: first, they would not be workable in court; second, even if workable, they would generate destructive market distortions.⁵ Our concerns relating to

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¹ James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263 (1991) [hereinafter, *Closing the Frontier*].

² See, e.g., Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 Cornell L. Rev. 129, 136 n.31 (1990) (defining enterprise liability); James A. Henderson, *The Boundary Problems of Enterprise Liability*, 41 Md. L. Rev. 659 n.1 (1982) (describing enterprise liability); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985) (describing history and development of theory of enterprise liability). Professor Geistfeld agrees: "At the most basic level, enterprise liability holds manufacturers liable for all injuries caused by their products." See Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. Rev. 1157, 1159 (1992).

³ See *Closing the Frontier*, supra note 1, at 1276. Professor Geistfeld agrees with our definition: "[E]nterprise liability holds manufacturers liable for all injuries caused by their products. As such, the full costs of such injuries are incorporated into the product's price." See Geistfeld, supra note 2, at 1159.

⁴ See *Closing the Frontier*, supra note 1, at 1297. Good examples are cigarettes and alcoholic beverages.

⁵ Under traditional rules governing liability for product designs, most of the harm caused by product designs are borne by victims because most often they cannot show the designs to be defective. Any scheme which moves all product-caused costs to product sellers would increase product prices. As the prices of relatively risky new products rise, persons wishing to continue

the unworkability of enterprise liability center around the inadequacy of causation as a concept triggering liability. The shortcomings of causation as a focal point are particularly telling in connection with across-the-board enterprise liability. Fault—or in the products liability context, defect—is a major linchpin that holds tort law together. This is true because even causation cannot be determined coherently without reference back to the nature of the underlying, fault-based entitlement.⁶ Stated simply, actors are found to have caused harms that they have no legal privilege to cause.⁷

Professor Geistfeld does not disagree with us in this regard. He simply finds sufficient guidance for judicial decision where we find none. Two sources other than defect or fault combine, he asserts, to serve as substitute linchpins: the social objective of promoting product safety,⁸ and the limiting constraint of intended product use.⁹ His argument suggests that distributors should be strictly liable for product-related harm only when imposing liability would further the safety objective and when such harm flows from intended product use. Our criticisms of his suggestions are two-fold: first, if taken literally, this proposed alternative appears to make no sense; second, even when generously reinterpreted, Geistfeld's proposal reintroduces the very element of fault—namely, a judicially imposed cost-benefit standard—which enterprise liability purports to render unnecessary.

Our Article employs an admittedly slapstick hypothetical to illustrate the difficulties that courts would encounter in attempting to determine causation in an across-the-board strict enterprise liability system that has abandoned standards of reasonable care. After a heavy lunch of pasta and several beers, a drowsy consumer slips on a roller skate, falls down a flight of stairs, and winds up crashing his head through a TV screen.¹⁰ Here is Professor Geistfeld's reaction to our hypothetical:

Recognizing [a] link between manufacturer liability and product safety

to use and consume risky products would turn to substitutes. Products manufactured and distributed clandestinely would find new and expanding markets, undercutting existing commercial markets. Durable products would be used much longer, increasing risks and further undermining commercial markets. For some products, such as cigarettes and alcoholic beverages, enterprise liability could well be the equivalent of a judicial ban on their commercial sale and distribution. As such, the market distortions which may be induced by a scheme of enterprise liability are varied and far-reaching.

⁶ See *Closing the Frontier*, supra note 1, at 1281-82. Professor Geistfeld agrees. See Geistfeld, supra note 2, at 1163 ("Courts . . . have defined the normative component of the causation inquiry by reference to the policy considerations underlying the adoption of the liability rule for the conduct in question.").

⁷ See *Closing the Frontier*, supra note 1, at n.72.

⁸ See Geistfeld, supra note 2, at 1164-65.

⁹ See *id.* at 1165-66.

¹⁰ See *Closing the Frontier*, supra note 1, at 1280-81.

in turn provides the conceptual basis for limiting enterprise liability in a principled fashion.

Consider the television manufacturer in Henderson and Twerski's hypothetical. Do we want the screens on our TVs to be able to withstand the force of someone charging into them? . . . It is critical to understand that these are the incentives that manufacturers would face if they were liable for such risks. Whether such incentives lead to desirable outcomes depends upon the type of product safety that we are seeking to achieve by adopting enterprise liability.

For example, if our objective is to have products that are optimally safe when put to their intended use, then the risks for which a manufacturer is strictly liable should only be those that arise when the product is used as intended. An enterprise liability system based upon such a safety objective accordingly would not make television manufacturers strictly liable for injuries that occur when people charge into TVs or drop them on poodles.¹¹

A number of fundamental disagreements between our position and Professor Geistfeld's are readily apparent. Initially, we would suggest that Geistfeld's technique of focusing on safety objectives offers little; safety, as such, cannot serve as a normative baseline against which to determine causation because it begs the question of *how much* safety.¹² Professor Geistfeld clearly does not mean to endorse a "maximum safety regardless of cost" approach. Led by his concern for efficiency he parries the question of "how much safety?" with the answer of "optimal safety."¹³ Optimal safety means that in determining causation under a particular set of facts in any given case, the court should render whatever decision would yield optimal product safety. But how can a court decide optimal safety without applying some sort of social risk-utility calculus—either "fault," or "reasonableness," or "defect," or whatever one wishes to call it? Professor Geistfeld actually appears to agree with us in this regard:

A concept of product use that is derived from an objective based on product safety thus provides a principled test for proximate cause that limits manufacturer liability under enterprise liability. . . . The legal inquiry takes the product as manufactured and includes no consideration of whether the defendant-manufacturer should have acted differently in making the product. Whether the manufacturer is liable turns solely upon the issue of whether the plaintiff's injury was caused by that product when used as intended.¹⁴

¹¹ Geistfeld, *supra* note 2, at 1164.

¹² At several places early in his Essay, Professor Geistfeld appears to embrace safety, as such, as his objective. See *id.* at 1160-61, 1164-65.

¹³ *Id.* at 1160.

¹⁴ *Id.* at 1164-65.

By suggesting that courts apply a reasonableness filter in determining causation, Professor Geistfeld indicts the classic formulation of strict enterprise liability, which attempts to internalize *all* product-caused accident costs and allows the market to determine optimality rather than courts applying reasonableness tests such as risk-utility analysis.¹⁵ By suggesting that courts determine causation so as to achieve the objective of optimal product safety, Professor Geistfeld reintroduces the linchpin of reasonableness into his analysis of causation, bringing him full circle to our position that a reasonableness standard is necessary.

Another way to understand the inadequacy of this approach to enterprise liability is to reconsider Professor Geistfeld's reaction to our TV hypothetical. "Do we want the screens on our TVs to be able to withstand the force of someone charging into them? . . . [T]hese are the incentives that manufacturers would face if they were liable for such risks."¹⁶ Clearly Geistfeld would answer this question in the negative. In sharp contrast, we would answer his question with, "We might, depending on the circumstances."

Let us imagine that TV sets could come equipped with screens covering a wide range of relative shatterability. Imagine further that the TV screen in our hypothetical is at the "very prone to shatter" end of the spectrum. Is it as clear as Geistfeld suggests that an enterprise liability system would not want the prices of TV sets to reflect this relative shatterability—and hence their riskiness—thus aiding consumers in choosing optimally strong screens? The recurrent problem is coming up with a substitute linchpin to replace "fault" or "defect," and while Professor Geistfeld's proposal is not uniquely subject to this criticism, he is somewhat unique in denying so adamantly that it exists.

Professor Geistfeld's description of the incentives created by imposing liability on TV manufacturers to build super-strong TV screens is also misguided, and stems from an erroneous view of what enterprise liability is intended to do.¹⁷ Enterprise liability is strict liability. However, at least in theory, moving from a negligence-based system such as

¹⁵ See note 3 and accompanying text *supra*. Having made the point that enterprise liability will cause the costs of all injuries to be incorporated into the price of products, Professor Geistfeld continues that:

Relatively riskier products thus sell for relatively higher prices. The need to keep prices low in turn forces manufacturers to minimize product accident costs by making cost-effective investments in product safety. Enterprise liability therefore assures that imperfectly informed consumers who purchase the lowest priced brand nevertheless buy the brand that is optimally safe.

Geistfeld, *supra* note 2, at 1159.

¹⁶ *Id.* at 1164.

¹⁷ See *id.*

that currently employed in the area of manufacturer's design liability¹⁸ to a system of strict liability such as enterprise liability should not affect levels of design safety, but rather influence levels of product consumption.¹⁹ Properly conceptualized, strict enterprise liability thus has a "chips fall where they may" quality. Assuming that courts get their causation determinations correct, manufacturers would not redesign sets to withstand the impact beyond the point of optimal TV screen strength. By failing to acknowledge this dynamic, Professor Geistfeld's description makes clear that subconsciously he is thinking about *negligence* when he discusses judicial review of product designs under his "enterprise liability" system.²⁰

The "intended use" element of Professor Geistfeld's substitute for product defect is a familiar trap in the field of products liability law. Our courts in fact rejected this notion decades ago, extending sellers' responsibilities well beyond ensuring the product is "safe for intended use." Indeed, in many states, if a product fails to perform its intended use, the plaintiff need not even prove a specific defect in order to recover for her injuries.²¹ The operative term in our present system is "reasonably foreseeable use" rather than "intended use."²² For if the use to which the

¹⁸ Although courts talk of imposing "strict liability" on manufacturers for defective designs, in substance they are applying a negligence standard. See *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984) (noting underlying negligence calculus in risk-utility test); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 610 (1980) (noting role of negligence in strict liability); see generally James A. Henderson, Jr. & Aaron D. Twerski, *Products Liability: Problems and Process*, 609-12 (2d ed. 1992) (discussing basic precepts of strict liability).

¹⁹ See John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. Legal Stud. 323 (1973) (analyzing economic effects of liability rules).

²⁰ Under negligence, it is never in the enterprise's interest to be negligent—for in theory negligence is always cheaper to avoid than to incur.

²¹ The rule is commonly referred as that of "product malfunction." See Christopher H. Hall, *Annotation, Strict Products Liability: Product Malfunction or Occurrence of Accident or Evidence of Defect*, 65 A.L.R. 4th 346 (1988).

²² Early flirtations with the "intended use" doctrine as a governing standard for products liability were short lived. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972) (holding that products must be safe not only for intended use but also for reasonably foreseeable uses), modifying *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1962) (holding that a product is defective if "unsafe for its intended use"); see also *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1973) (stating that "abnormal" use of product which would bar plaintiff's recovery does not mean every instance of slight misuse, but instead uses so unusual one could not reasonably expect product to be so used); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 260 (R.I. 1971) (holding that the duty to give notice or warning of a design danger encompasses not only intended uses but also foreseeable uses, even if such uses are abnormal or unproven); see generally Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 Vand. L. Rev. 93, 95-107 (1972) (discussing how the defense of consumer's abnormal use requires determining whether such use was foreseeable).

Liability for reasonably foreseeable product misuse is so widely recognized in the modern era that citation to cases standing for that proposition would be endless. Indeed, it should be

product is being put is reasonably foreseeable, and the manufacturer could feasibly avoid accidents at socially acceptable costs, courts have concluded that the manufacturer owes a duty to design the product in such a way as to avoid those accidents. This approach is necessary if products liability is to achieve the goal of optimizing product safety. In this regard, it is not clear that Professor Geistfeld fully appreciates the implications of his proposed "intended use" retrenchment. Nowhere, for example, does he consider the externality problems associated with the negative effects on bystanders of highly foreseeable and dangerous, but admittedly unintended, product use.²³

Of course, Professor Geistfeld hedges this difficulty by including "reasonably foreseeable use" in his concept of "intended use." But the notion of "reasonably foreseeable use" relies on risk-utility notions of the sort imbedded in "fault" and "defect." Professor Geistfeld is thus stuck between something of a rock and a you-know-what. If he moves to reasonably foreseeable use, he reneges on enterprise liability's promise to avoid in-court risk-utility analysis. If he sticks with intended use, he sets our products liability system back to the Stone Age. While "intended use" may permit him to break intellectually from relying on objective principles of reasonableness, he cannot mean to suggest that we could actually live with the substantive implications of his proposed solution.²⁴

Another problem with intended use as a substitute for defect is determining what is or is not an "intended use." We spoke earlier of Professor Geistfeld's rejection of a "shatterable TV screen" claim, on the grounds that collisions were not a use intended by the distributor.²⁵ But if the plaintiff in our TV hypothetical had been watching TV and was

recognized that most product litigation today involves what can only be characterized as non-intended use situations. For the most part, in cases where products fail within their intended use, liability is easily established and rarely needs to be litigated. See J. Henderson & A. Twerski, *supra* note 18, at 22-23.

It is when products are tested at their design limits that accidents occur. In these cases it becomes necessary to establish a test for defect which asks not only what is the frequency of the foreseeable misuse and what are the envisaged consequences but also whether the costs of designing against such misuse is both technologically and economically feasible. This, of course, calls for risk-utility balancing.

²³ However, all of Professor Geistfeld's illustrations involve plaintiffs who used a product which injured them.

²⁴ Professor Geistfeld appears to appreciate the difficulties connected with intended use. In his text, he states, "The current products liability system has of course rejected an intended-use test for one of 'reasonably foreseeable use,' and it does seem more desirable to force manufacturers to make product-safety decisions by reference to reasonably foreseeable use rather than intended use." Geistfeld, *supra* note 2, at 1165 (footnote omitted). But we are at a loss to understand how, having made such a concession, he can continue to insist that such a modified, reasonableness-based approach to causation constitutes true enterprise liability. See note 3 and accompanying text *supra*.

²⁵ See Geistfeld, *supra* note 2, at 1164.

pushed into the screen by a playful dog, would not the TV have been put to its intended use? What if the plaintiff had been listening to the TV while walking down the stairs, instead of reading a book? Would the plaintiff in that case recover? We see no easy answers to these questions under Professor Geistfeld's approach, for he appears to reject imposing "breakable glass" costs on the TV manufacturer under any circumstance.²⁶

Another example may be useful. Consider a driver who runs his car into another car and suffers so-called "second collision" injuries from being thrown against an unyielding dashboard. If Professor Geistfeld is to remain consistent with his earlier application of intended use analysis in the TV set hypothetical, he must categorically deny a claim arising from an automobile second collision. After all, car collisions are no more intended than TV collisions. Yet nearly every American jurisdiction has recognized second-collision crashworthiness claims for many years.²⁷ Even if Geistfeld were to argue that some types of collisions were foreseeable and should be included within the category of "intended use," he would soon face the problem of deciding which collisions to include and which to exclude. Are collisions at 60 m.p.h., 70 m.p.h., 80 m.p.h., etc. within the ambit of "intended use?" We do not believe a court should accept self-serving testimony by a manufacturer's employees regarding their subjective intent; an objective test would instead appear to be necessary. Ultimately, Geistfeld would have to develop a governing principle to define the category of intended use, and this would inevitably bring him back to optimum safety which would require judicial application of a cost-benefit reasonableness standard.²⁸

One final point which Professor Geistfeld makes is worth comment. He argues at several places that the proximate cause inquiry has been manageable historically in connection with strict liability for ultrahazardous activities, and that this analogue illustrates the workability of a scheme of strict liability without product defect.²⁹ Proximate cause

²⁶ See text accompanying note 11 *supra*.

²⁷ For a recent listing of the states which have adopted the crashworthiness doctrine, see Barry Levenstam & Daryl J. Lapp, Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis, 38 DePaul L. Rev. 55, 61 n.33 (1988). The authors list only two states that at the time of the writing refused to allow recovery for injuries caused by the manufacturer's failure to reasonably design a car in a way such that it would minimize injuries in the event of a collision. *Id.* at 61 n.31. More recently in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 782 (W. Va. 1991) the court noted that the two holdout states, Mississippi and West Virginia, would allow a crashworthiness action. The rules have thus, for all practical purposes, become unanimous.

²⁸ We would introduce reasonableness in the test for defective design; Geistfeld introduces it in the test for causation. But either way, a system which employs concepts of reasonableness is not "enterprise liability".

²⁹ See Geistfeld, *supra* note 2, at 1163.

is certainly more manageable in the context of ultrahazardous activity, but this is because the criteria traditionally relied upon to identify which activities are ultrahazardous involve determinations of aggregate social risk-utility only slightly less finely tuned than the marginal risk-utility test associated with traditional negligence and defect-based liability.³⁰

From our analytical perspective, when Professor Geistfeld moves to his ultrahazardous activity analysis, he moves from across-the-board liability without defect to categorical liability without defect. His analogy may to some extent be apt in connection with the latter, because risk-utility criteria are used to identify the product categories appropriate for liability. However, it completely misses the mark in connection with the former. Across-the-board strict liability—which is what most scholars have in mind when they employ the term “enterprise liability”—involves no linchpin criteria whatever other than causation unguided by fault for deciding which products distributors are to be held liable. All product distributors are liable for all of the harms their products cause.³¹

Indeed, we make precisely this point in the Article to which Professor Geistfeld responds. At the outset of the discussion concerning implementation problems associated with categorical liability, we observe:

Recall that adoption of across-the-board strict liability, by eliminating the requirement of defect, would create significant problems for courts trying to resolve issues of contributory fault, useful product life, and causation. The elimination of the linchpin element of defectiveness would eliminate the baseline framework upon which intelligent analysis and resolution of these issues rest. Product-category liability, by retaining at least the categorical judgment of reasonableness if not the marginal judgment of defectiveness, would appear to supply at least some of the analytical framework missing in across-the-board liability without defect. For example, with respect to plaintiff’s contributory fault, the unreasonableness of the product category could be balanced more easily against the unreasonableness of the plaintiff’s conduct.³²

Does this mean that Professor Geistfeld’s ultrahazardous activity analogy can solve the workability problems associated with what we term “product category liability”? Having admitted above that categorical liability is less daunting than across-the-board enterprise liability, we nevertheless noted that:

First appearances, however, are likely to be deceiving. Having concluded that the product in question should never have been distributed

³⁰ See Restatement (Second) of Torts § 520 (1977). The criteria include the existence of a high degree of risk, the likelihood that the harm will be great, and the extent to which the activity’s value to the community is outweighed by its dangerous attributes. *Id.*

³¹ See note 3 *supra* (citing Geistfeld, *supra* note 2, at 1159).

³² Closing the Frontier, *supra* note 1, at 1301 (citations omitted).

in the first instance, some courts might be tempted to conclude that plaintiff's fault should play no role at all. Their reasoning would be that if the product had never been distributed, it could not have been the object of plaintiff's foolish, risky behavior. But eliminating plaintiff's fault is viewed by most courts and commentators as unwise.

For courts that sensibly decided to retain contributory fault, the tasks of assessing that fault and deciding when to count it against the plaintiff would be much more difficult than under traditional defect-based approaches to liability. The source of the difficulty inheres in the difference between a categorical versus marginal approach to product design. Under the traditional, marginal approach, the court undertakes a careful and precise evaluation of the particular design's reasonableness compared with feasible design alternatives. If adding a slightly different safety feature would have saved—and thus “forgiven”—the plaintiff's foolish inadvertence, then probably the plaintiff's foolishness should not count for much. But when the entire product category is condemned on risk-utility grounds and the court decides that it should not forgive, for that reason alone, all of the plaintiff's foolishness, the remaining question of “how much foolishness should this particular design forgive?” is begged rather than answered meaningfully by the categorical judgment of unreasonableness.³³

We raised similar points regarding useful safe life and proximate causation in our Article, and concluded that narrowing the focus from across-the-board to discrete product categories would eliminate some, but not all, of the associated difficulties.³⁴

In sum, we have suggested that across-the-board strict enterprise liability would be unworkable. This conclusion stems from our belief that numerous issues—chief among them causation—could not be worked out coherently once the linchpin of underlying entitlement—here, “defect”—is eliminated. Professor Geistfeld, in his response, suggests two substitute linchpins: first, the goal of optimal product safety, and second, intended product use. As we have shown, when he relies on the objective of optimal safety to allow courts to reach coherent judgments regarding causation, he reintroduces social risk utility into his test for liability, albeit under the heading of “causation” rather than “defect.” Traditional conceptions of enterprise liability build from the understanding that the market should determine optimal product safety levels rather than the courts. It should thus be clear by now that to make any sense of causation, Geistfeld has abandoned enterprise liability. His second substitute linchpin—that distributors are liable only when their products are being put to the uses intended by the distributors—would set back our liability system to the pre-§ 402(A) era. Even rendering the standard more sensi-

³³ *Id.* at 1301-02 (citations omitted).

³⁴ *See id.* at 1302.

ble by substituting “reasonably foreseeable uses” for “intended uses,” Professor Geistfeld slips back into the habit of letting risk-utility enter the analysis through the back door.

That leaves Professor Geistfeld with his analogy to ultrahazardous activities. But even granting the point, it must be recognized that the analogy bolsters only what we call category liability and not across-the-board enterprise liability. Because across-the-board is what most scholars have in mind when they speak of “enterprise liability,” his analogy is of quite limited value in this setting.

Finally, throughout this reply, we have spoken of his advocating an alternative approach to enterprise liability. He expressed his own reasons for doubting the advisability of such a system, chief of which were the high transaction costs an enterprise liability system would generate.³⁵ As such, his main disagreement with us is a narrow one relating to our assertion that enterprise liability *could not* work, not that it *should not* work.³⁶ His task was to demonstrate the inadequacy of our conclusion that court-made enterprise liability is inherently unworkable. An essential step in this endeavor requires proof that an alternative approach—here, one relying on optimal product safety and intended use—is workable. To the extent he fails to demonstrate a workable alternative scheme of enterprise liability—one which operates without court-applied cost-benefit analysis—our initial condemnation of enterprise liability remains unchallenged.

³⁵ See Geistfeld, *supra* note 2, at 1171-72.

³⁶ See *id.* at 1173.