James A. HENDERSON, Jr., Aaron D. TWERSKI, *Products Liability. Problems and Process*, 6th ed., Aspen Publishers, 2008, pages 292-295.

In Rhode Island v. Lead Industries Ass'n, R.I Super. Ct., No. 99-5226, (Mar. 9, 2006), lead paint suppliers were held responsible for creating a public nuisance because of lead paint in Rhode Island public buildings. Under an abatement plan filed September 14, 2007, by the state attorney general, the defendants would have to spend approximately $2.4 billion in abatement costs. The case is on appeal.

Which is it to be? Reasonable Alternative Design? Consumer Expectations? Risk-Utility-Based Category Liability? Public nuisance? All of the above?

I. SPECIAL DUTY PROBLEMS IN DESIGN LITIGATION

Having examined the potential standards for prosecuting a design defect case, we now examine a set of issues that raise the question of whether the law may decide that, for well-defined policy reasons, the issue of design defect should not be decided by the courts, but rather should be deferred to other decision-makers. Such a deferral may result in a finding of no liability for defective design or in a finding that the violation of a standard already set in stone and beyond debate renders a product defective in design. For lack of a better word, we borrow from the duty terminology of tort law to describe the issues raised in this section.

1. Whether and to What Extent Should Courts Defer to Markets on a Case-by-Case Basis?

Linegar v. Armour of America, Inc.
909 F.2d 1150 (8th Cir. 1990)

BOWMAN, Circuit Judge.

. . . Armour of America, Inc. (Armour) appeals a judgment based on a jury verdict in favor of the widow and children of Jimmy Linegar, a Missouri State Highway Patrol trooper who was killed in the line of duty. The jury found that the bullet-resistant vest manufactured by Armour and worn by Linegar at the time of the murder was defectively designed, and it awarded his family $1.5 million in damages. We reverse.

On April 15, 1985, as part of a routine traffic check, Linegar stopped a van with Nevada license plates near Branson, Missouri. The van's driver produced an Oregon operator's license bearing the name Matthew Mark Samuels. Linegar ascertained from the Patrol dispatcher that the name was an alias for David Tate, for whom there was an outstanding warrant on a weapons charge. Linegar did not believe the driver matched the description the dispatcher gave him for Tate, so he decided to investigate further.

A fellow trooper, Allen Hines, who was working the spot check with Linegar, then approached the passenger's side of the van while Linegar approached the driver's side. After a moment of questioning, Linegar asked the driver to step out of the van. The driver, who was in fact David Tate, brandished an automatic weapon and fired at the troopers first from inside and then from outside the van. By the time Tate stopped firing, Hines had been wounded by three shots and Linegar, whose body had been penetrated by six bullets, lay dead or dying. None of the shots that hit the contour-style,

concealable protective vest Linegar was wearing — there were five such shots — penetrated the vest or caused injury. The wounds Linegar suffered all were caused by shots that struck parts of his body not protected by the vest.

The Missouri State Highway Patrol issued the vest to Linegar when he joined the Patrol in 1981. The vest was one of a lot of various sizes of the same style vest the Patrol purchased in 1979 directly from Armour. The contour style was one of several different styles then on the market. It provided more protection to the sides of the body than the style featuring rectangular panels in front and back, but not as much protection as a wrap-around style. The front and back panels of the contour vest, held together with Velcro closures under the arms, did not meet at the sides of the wearer's body, leaving an area along the sides of the body under the arms exposed when the vest was worn. This feature of the vest was obvious to the Patrol when it selected this vest as standard issue for its troopers and could only have been obvious to any trooper who chose to wear it. The bullet that proved fatal to Linegar entered between his seventh and eighth ribs, approximately three-and-one-fourth inches down from his armpit, and pierced his heart.

The theory upon which Linegar's widow and children sought and won recovery from Armour was strict liability in tort based on a design defect in the vest. . . .

The parties agree that Missouri substantive law controls in this diversity case. Under Missouri products liability law, plaintiff potentially had available to her three theories of recovery: negligence, strict liability, and breach of warranty. . . .

To recover under a theory of strict liability in tort for defective design, Missouri law requires that a party prove the following elements:

> (1) [the] defendant sold the product in the course of its business;
> (2) the product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use;
> (3) the product was used in a manner reasonably anticipated;
> (4) [the] plaintiff was damaged as a direct result of such defective condition as existed when the product was sold. . . .

While there is some dispute between the parties over various of the elements, we predicate our reversal on the dearth of plaintiff's evidence of element (2). We conclude that, as a matter of law, the contour vest Trooper Linegar was wearing when he was murdered was not defective and unreasonably dangerous.

Under the Missouri law of strict liability in tort for defective design, before a plaintiff can recover from the seller or manufacturer he must show that "the design renders the product unreasonably dangerous." Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 377 (Mo. 1986) (en banc). Ordinarily, that will be a jury question, and "the concept of unreasonable danger, which is determinative of whether a product is defective in a design case, is presented to the jury as an ultimate issue without further definition," id. at 378, as it was here. In this case, however, there was simply no evidence that the vest's design made it unreasonably dangerous, and the District Court should have declared that, as a matter of law, the vest was not defective, and directed a verdict or granted judgment for Armour notwithstanding the verdict. *See* Racer v. Utterman, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981) ("Unless a court can say as a matter of law that the product is not unreasonably dangerous the question is one for the jury."), *cert. denied*, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 42 (1982).

The Missouri cases leave the meaning of the phrase "unreasonably dangerous" largely a matter of common sense, the court's or the jury's. The Missouri Supreme Court has stated, however, that a product is defectively designed if it "creates an unreasonable risk of danger to the consumer or user when put to normal use." *Nesselrode*, 707 S.W.2d at 375. Among the factors to be considered are "the conditions and circumstances that will foreseeably attend the use of the product." Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 836 (Mo. Ct. App. 1984). The conditions under which a bullet-resistant vest will be called upon to perform its intended function most assuredly will be dangerous, indeed life-threatening, and Armour surely knew that. It defies logic, however, to suggest that Armour reasonably should have anticipated that anyone would wear its vest for protection of areas of the body that the vest obviously did not cover. . . .

The judgment of the District Court is reversed. The District Court shall enter a final judgment in favor of *Armour*.

We have no difficulty in concluding as a matter of law that the product at issue here was neither defective nor unreasonably dangerous. Trooper Linegar's protective vest performed precisely as expected and stopped all of the bullets that hit it. No part of the vest nor any malfunction of the vest caused Linegar's injuries. *See Richardson*, 741 S.W.2d at 754 ("The cases uniformly hold that the doctrine of strict liability under the doctrine of 402A is not applicable unless there is some malfunction due to an improper or inadequate design or defect in manufacturing."). The vest was designed to prevent the penetration of bullets where there was coverage, and it did so; the amount of coverage was the buyer's choice. The Missouri Highway Patrol could have chosen to buy, and Armour could have sold the Patrol, a vest with more coverage; no one contests that. But it is not the place of courts or juries to set specifications as to the parts of the body a bullet-resistant garment must cover. A manufacturer is not obliged to market only one version of a product, that being the very safest design possible. If that were so, automobile manufacturers could not offer consumers sports cars, convertibles, jeeps, or compact cars. All boaters would have to buy full life vests instead of choosing a ski belt or even a flotation cushion. Personal safety devices, in particular, require personal choices, and it is beyond the province of courts and juries to act as legislators and preordain those choices.

In this case, there obviously were trade-offs to be made. A contour vest like the one here in question permits the wearer more flexibility and mobility and allows better heat dissipation and sweat evaporation, and thus is more likely to be worn than a more confining vest. It is less expensive than styles of vests providing more complete coverage. If manufacturers like Armour are threatened with economically devastating litigation if they market any vest style except that offering maximum coverage, they may decide, since one can always argue that more coverage is possible, to get out of the business altogether. Or they may continue to market the vest style that, according to the latest lawsuit, affords the "best" coverage. Officers who find the "safest" style confining or uncomfortable will either wear it at risk to their mobility or opt not to wear it at all. *See* Transcript Vol. II at 333 (testimony of Missouri Highway Patrol Trooper Don Phillips that he continued to wear the Armour contour-style vest with his summer uniform, even though the Patrol had issued him a wrap-around vest). Law enforcement agencies trying to work within the confines of a budget may be forced to purchase fewer vests or none at all. How "safe" are those possibilities? "The core concern in strict tort liability law is safety." *Nesselrode*, 707 S.W.2d at 375. We are firmly convinced that to allow this verdict to stand would run counter to

the law's purpose of promoting the development of safe and useful products, and would have an especially pernicious effect on the development and marketing of equipment designed to make the always-dangerous work of law enforcement Officers a little safer.

The death of Jimmy Linegar by the hand of a depraved killer was a tragic event. We keenly feel the loss that this young trooper's family has suffered, and our sympathies go out to them. But we cannot allow recovery from a blameless defendant on the basis of sympathy for the plaintiffs. To hold Armour liable for Linegar's death would cast it in the role of insurer for anyone shot while wearing an Armour vest, regardless of whether any shots penetrated the vest. That a manufacturer may be cast in such a role has been soundly rejected by courts applying Missouri law. . . .

The judgment of the District Court is reversed. The District Court shall enter a final judgment in favor of Armour.

Scarangella v. Thomas Built Buses, Inc.
717 N.E.2d 679 (N.Y. 1999)

LEVINE, J.

A school bus being operated in reverse by a co-employee struck and severely injured plaintiff Concetta Scarangella, a school bus driver for third-party defendant Huntington Coach Corp., Inc. The accident occurred in Huntington's bus parking yard on September 26, 1988. The vehicle was one of ten new school buses that defendant Thomas Built Buses, Inc., sold Huntington in 1988. At that time, Thomas offered buyers as an optional safety feature a back-up alarm that would automatically sound when a driver shifted the bus into reverse gear, but Huntington chose not to purchase this optional equipment.

After plaintiff and her husband commenced this action for negligence, breach of warranty and products liability, Thomas made a motion to preclude plaintiff from submitting to the jury her claim that the lack of a back-up alarm was a design defect. In support of its motion, Thomas submitted a memorandum of law and excerpts from the deposition of Huntington's President and Chief Operating Officer, Kevin Clifford.

According to Clifford's deposition testimony, Huntington owned and operated 190 school buses and had 300 employees. Clifford had worked for the company for over 30 years and had been a president of the New York State School Bus Owners Association. Clifford explained that he was aware that the backup alarms were available but made a considered decision not to purchase them. He opted against the alarm because "it screams" when a bus is put in reverse gear, and he intended to park the buses at a bus yard in the middle of a residential neighborhood where his company had been experiencing problems with neighbors concerning noise pollution. When the buses were being parked in the bus yard, there "had to be a tremendous amount of backing up," and Clifford believed it was unnecessary to equip all 100 buses in the lot with the "screaming" alarms. Instead, Clifford instructed the drivers to be cautious and to use the bus's ordinary horn before backing up.

In response to Thomas's motion, plaintiff proffered no specific evidence. She based her design defect claim entirely on the proposition that, because a school bus driver always has a substantial blind spot when operating the vehicle in reverse, a school bus must invariably be equipped with an automatically engaged back-up alarm. Supreme Court concluded that there was no triable issue of fact on this design defect claim.