Brooklyn Law Review

Volume 70 | Issue 3 Article 5

2005

A Fictional Tale of Unintended Consequences: A Response to Professor Wertheimer

James A. Henderson Jr.

Aaron D. Twerski

A Fictional Tale of Unintended Consequences

A RESPONSE TO PROFESSOR WERTHEIMER*

James A. Henderson, Jr.†
Aaron D. Twerski‡

Professor Wertheimer has provided a provocative article,[1] an ironic tale of unintended consequences. She claims that, prior to the Products Liability Restatement, American courts rejected the notion that manufacturers should be held liable for not designing or warning against unknowable product risks. In similar fashion, pre-Restatement case law insisted that design defect claims be judged by a negligence-like risk-utility balancing test. She acknowledges that the Restatement accurately reflects the law on both of these issues. But here is the rub. Wertheimer claims that the Restatement, by firmly taking the majority position on these issues, inadvertently served as a wake-up call to American courts, reminding them that they had abandoned the true religion of strict liability and had slipped back to negligence norms. This, she says, has resulted in a post-Restatement backlash with courts scurrying back to implement true strict liability. By accurately describing what courts had been doing, the Restatement is having exactly

† Frank B. Ingersoll Professor of Law, Cornell Law School. A.B. 1959, Princeton University; L.L.B. 1962, L.L.M. 1964, Harvard University

‡ Newell DeValpine Professor of Law, Brooklyn Law School. A.B. 1962, Beth Medrash Elyon Research Institute; B.S. 1970, University of Wisconsin-Milwaukee, J.D. 1965, Marquette University.

[1] *See* Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 891 (2005).

the opposite effect from what its supporters anticipated. Talk about unintended consequences!

We are gratified that Professor Wertheimer confirms that the Restatement captures the thrust of developing case law. That is what it is supposed to do. However, the rest of her story about a backlash taking place in the courts is pure fiction. Make no mistake—Professor Wertheimer would very much like such a palace revolt to occur. But it has not happened and will not take place in the future. The positions that Professor Wertheimer and a few others have advocated for years have, for good reason, been rejected by the overwhelming majority of courts and scholars.

I. IMPUTATION OF KNOWLEDGE OF UNKNOWABLE RISKS

The view that foreseeability of risk should be irrelevant as to whether a manufacturer should bear liability for defective design and failure to warn was the subject of short-lived but serious debate early in the products liability era.[2] However, when actually faced with the question of whether to hold a manufacturer liable for scientifically unknowable risks, court after court has said "No."[3] Wertheimer cites two cases to support her view that a revolt on this issue is afoot—one from Wisconsin[4] and the other from Montana.[5] Wisconsin has long been the lone star state in our products liability law, marching to its own, sometimes quite peculiar, drummer.[6] The Montana court acknowledges that it rejects both Section 402A and the Third Restatement.[7] On the other side of the issue, Wertheimer does admit in a footnote that Massachusetts, relying on the

---

[2] *See generally* Symposium, *The Passage of Time: The Implications of Product Liability*, 58 N.Y.U. L. REV. 733 (1983).

[3] For a comprehensive discussion of the development of the case law and academic commentary, see RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. m and reporters' notes at 101-07 (1998).

[4] Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 743-51 (Wis. 2001).

[5] Sternhagen v. Dow Co., 935 P.2d 1139, 1144-47 (Mont. 1997).

[6] *See, e.g.*, Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 360 N.W.2d 2, 12 (Wis. 1984) (finding that it was erroneous to instruct a jury in a crashworthiness case that in order to recover, a plaintiff must have suffered injuries over and above those that he would have sustained had the design not been defective). The Wisconsin view is contrary to section 16 of the Product Liability Restatement and is inconsistent with the majority of case law throughout the country. *See, e.g.*, Trull v. Volkswagen of Am., Inc., 761 A.2d 477, 481 (N.H. 2000). *See also* Greiten v. LaDow, 235 N.W.2d 677, 685 (Wis. 1975) ("[T]here may be recovery for the negligent design of a product even though it is not unreasonably dangerous in the 402A sense.") (erroneously labeled as concurring opinion since four members of a seven member court voted for the concurring opinion).

[7] *Sternhagen*, 935 P.2d at 1142, 1147.

Products Liability Restatement, recently reversed its earlier position applying strict liability without foreseeability.[8] But she does not tell the reader that in doing so the court said that it had been "among a distinct minority of States that applies a hindsight analysis to the duty to warn. . . . The goal of the law is to induce conduct that is capable of being performed. The goal is not advanced by imposing liability for failure to warn of risks that were not capable of being known."[9]

Professor David Owen in his excellent new hornbook on the law of Products Liability puts the issue nicely. He says that "but for a few rogue jurisdictions, American products liability law, like the law of most of Europe and Japan, no longer holds manufacturers responsible for unknowable product risks. The rise and fall of the duty to warn of unforeseeable hazards has played a decisive role in the more general rise and fall of 'strict' products liability in America . . . ."[10] A decision from a renegade jurisdiction and another from a court that rejects both the Second and Third Restatement do not constitute a revolt. They represent hardly a ripple in literally an ocean of authority to the contrary.

II. RISK-UTILITY V. CONSUMER EXPECTATIONS AS THE TEST FOR DEFECTIVE DESIGN

It is no surprise that Professor Wertheimer is a fan of the consumer expectations test and views the Restatement requirement that in most cases plaintiff must establish a reasonable alternative design as reneging on the promise of true strict liability. The support for her position is terribly thin. First, she argues that rejecting consumer expectations as an independent grounds for establishing liability in design defect cases was a clever method of insulating manufacturers from liability for unknowable risk. One would think that any fair application of the consumer expectations test would have pointed in the opposite direction. Consumers would be hard put to demonstrate an expectation that a product would protect against risks that were unknowable or would incorporate alternative designs that were not contemplated by any manufacturer at the time of sale. Indeed, a rather famous early

[8] Wertheimer, *supra* note 1, at 911 n.68 (citing Vassallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 910, 922-23 (Mass. 1992)).

[9] *Vassallo*, 696 N.E.2d at 922-23.

[10] DAVID G. OWEN, PRODUCTS LIABILITY LAW § 10.4, at 700 (2005).

consumer expectations case took that very position. In Bruce v. Martin-Marietta Corp.,[11] an airplane manufactured by the defendant crashed into a mountain, causing seats in the passenger cabin to break loose from their floor attachments and block the exit. More than half the passengers were trapped in the airplane and died in the ensuing fire. Although the seats conformed to existing standards when the plane had been manufactured seventeen years earlier, plaintiffs submitted affidavits from a recognized expert that airplane seats in common use on the date of the accident would have remained in place and thus would have allowed the passengers to escape. The court rejected the claim that a plane, sold seventeen years before the accident, failed to meet consumer expectations for safety. In upholding summary judgment for defendant, the Tenth Circuit said:

> A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today . . . . Plaintiffs have not shown that the ordinary consumer would expect a plane made in 1952 to have the safety features of one made in 1970.[12]

Returning to her thesis that courts that have faced the design defect issue post-Restatement have opted for the consumer expectations test, Professor Wertheimer trots out Wisconsin[13] and Kansas[14] as two states whose case law has soundly rejected the Restatement test. Neither Wisconsin nor Kansas represents a backlash to the Restatement. In our Reporters' Note to the Restatement, we discuss both the Wisconsin and Kansas case law and recognize that both follow the consumer expectations test.[15] It hardly comes as a surprise that these two states have continued their past allegiance to that test. They certainly do not support her thesis of a backlash. The new Restatement merely gave them a forum to express their strong allegiance to the minority view. Conspicuously absent from the Wertheimer article is citation to a whole host of decisions applying risk-utility balancing and/or the reasonable alternative design standard to design defect

---

[11] 544 F.2d 442, 447 (10th Cir. 1976) (applying Oklahoma law).

[12] *Id.* at 447.

[13] Werthemier, *supra* note 1, at 927-28, 929-31 (citing Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 742, 743-51, 754-55 (Wis. 2001)).

[14] Werthemier, *supra* note 1, at 931-35 (citing Delaney v. Deere & Co., 999 P.2d 930, 946 (Kan. 2000)).

[15] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d and reporters' notes at 67, 76 (1998).

litigation in the post-Restatement era.[16] In actual fact, these are the states that had been embracing a risk-utility approach to product design, and they have expressed no backlash sentiment whatever. Nor is Wertheimer's statement that the Restatement completely eliminates consumer expectations from the test for defective design accurate. Section 2, Comment *h* says quite clearly that consumer expectations "may substantially influence or even be ultimately determinative on risk-utility balancing."[17] Admittedly, several states allow a two-pronged test for defective design.[18] A plaintiff can establish liability under either consumer expectations or risk-utility. But, those cases make it clear that the consumer expectations test can work only when a product fails to perform its intended function.[19] When trade-offs have to be considered, risk-utility must be employed.[20] The Restatement does not disagree. It allows a plaintiff to draw an inference of defect when common sense indicates us that the injury would ordinarily occur as a result of product defect.[21] In short, risk-utility balancing is alive

[16] *See, e.g.*, Wankier v. Crown Equip. Co., 353 F.3d 862, 867 (10th Cir. 2003) (applying Utah law and requiring plaintiff to prove "safer, feasible alternative design"); Peck v. Bridgeport Machs., Inc., 237 F.3d 614, 619 (6th Cir. 2001) (applying Michigan law and upholding summary judgment for defendant due to plaintiff's failure to present sufficient evidence of reasonable alternative design); Cohen v. Winnebago Indus., Inc., 2000 WL 299459 at *4 (4th Cir. 2000) (applying South Carolina law and holding that "providing evidence of the existence of an alternative safer, feasible design *is* part of the plaintiff's product liability case under South Carolina law); Rypkema v. Time Mfg. Co., 263 F. Supp. 2d 687, 692 (S.D.N.Y. 2003) ("Under New York law, in a design defect case a plaintiff is required to prove the existence of a feasible alternative [design] which would have prevented the accident."); Jeter *ex rel*. Estate of Smith v. Brown & Williamson Tobacco Corp., 294 F. Supp. 2d 681, 686 (W.D. Pa. 2003) (requiring plaintiff to prove "a feasible alternative design"); Jones v. Nordictrack, Inc., 550 S.E.2d 101, 103-04 (Ga. 2001) (citing the Third Restatement § 2 and acknowledging that under risk-utility standards, "[t]he 'heart' of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safer feasible one."); Wright v. Brooke Group, Ltd., 652 N.W.2d 159, 169 (Iowa 2002) (adopting reasonable attempt in design standard for defective design).

[17] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. g (1998).

[18] *See, e.g.*, Soule v. General Motors Corp., 882 P.2d 298, 307-08 (Cal. 1994); Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1333-34 (Conn. 1997).

[19] *See, e.g.*, *Soule*, 882 P.2d at 307-08; *Chicago Pneumatic Tool*, 694 A.2d at 1333-34.

[20] *See, e.g.*, *Soule*, 882 P.2d at 307-08; *Chicago Pneumatic Tool*, 694 A.2d at 1333-34.

[21] Section 3 of the Third Restatement provides:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

and well. A true consumer expectations test remains as it was, the darling of a small minority of states.

III. CATEGORY LIABILITY

Wertheimer saves her guns for her long-standing concern, the rejection by the Restatement of category liability.[22] By requiring proof of a reasonable alternative design, the Restatement rejects the notion that courts should perform macro risk-utility balancing and declare products that cannot be made safer and whose warnings adequately portray risks attendant to their use to be defective. She says that the goal of requiring a reasonable alternative design was clearly retrogressive in that "[u]nder the [] Restatement, manufacturers would only be liable for products with curable dangers, and never for product designs that could not be changed to reduce or eliminate hazards."[23] We have two observations about her views. First, it is not true under the Restatement that courts are "never" to declare that a product category fails risk-utility norms. Section 2 Comment *e* specifically addresses the possibility of liability without establishing a reasonable alternative design when a product has low social utility and a high degree of danger.[24] Second, and

---

RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 3 (1998).

[22] *See* Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third* Restatement, 61 TENN. L. REV. 1429, 1442 (1994).

[23] Wertheimer, *supra* note 1, at 934.

[24] The text of comment e provides:

> *Design defects: possibility of manifestly unreasonable design.* Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of Subsection (b). Toy guns unlikely to cause injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping-pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the realism of the hard-pellet gun and thus its capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, and deem the capacity to cause

more important, we challenge Professor Wertheimer to find a case where a court has actually found liability based on her notion that the product creates more risk than utility when there was no way to make the product safer. What products would she include on her list? Certainly not productive machinery. How about SUV's or motorcycles? The authors will admit to a strong personal dislike for motorcycles. They are death traps on wheels. But, would any court consider, even for an instant, declaring these products to be defective because they disturb a jury's notion that they score too high on the misery scale? And why not alcoholic beverages? The societal toll taken by alcohol is mind-boggling. Is it because martinis are too deeply ingrained in our culture? That leaves only tobacco. But here, too, courts have not taken on the issue of cigarettes as a defective product. The cases have proceeded under either failure to warn or fraud and misrepresentation, not under the theory that cigarettes themselves are per se unreasonably dangerous.[25] For reasons that we have detailed elsewhere, American courts have avoided product category like the plague.[26] The Restatement reflected and continues to reflect the overwhelming consensus on this issue. There is no backlash. None whatsoever.

IV. THE RESTATEMENT IS NEITHER PRO-DEFENDANT NOR PRO-PLAINTIFF

Professor Wertheimer and a handful of other critics portray the Third Restatement as pro-defendant. We would urge them to read both the Restatement and the developing case law more carefully. A strong case can be made that plaintiffs have utilized the Restatement and the positions it espouses more successfully than defendants. Examples abound.

> injury an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.

RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e (1998).

[25] *See, e.g.*, Williams v. Phillip Morris, Inc., 48 P.3d 824, 49 (Or. Ct. App. 2002) (proceeding under fraud theory).

[26] 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, 1300-14 (1991).

(1) *Warnings Cannot Cure a Defective Design.* One of the unfortunate legacies of Restatement, Second, Comment *j* was that a product whose dangers are adequately warned against is not defective in design.[27] The authors and others found this position untenable. The Third Restatement puts this issue to rest. Section 2, Comment *l* says that "when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risk."[28] Several high-profile cases have taken this position much to the chagrin of manufacturers who sought to absolve themselves from liability because they had thoroughly warned against the dangers.[29]

(2) *An Inference of Defect May be Drawn Without Proof of Specific Defect.* Courts had questioned the applicability of the negligence res ipsa doctrine to strict liability cases.[30] The Restatement takes the position that res ipsa is fully analogous and that one can draw an inference of defect when the incident that harmed the plaintiff was of a kind that ordinarily occurs as a result of product defect.[31] Plaintiff need not establish whether the defect stemmed from design or from faulty manufacture and thus is not required to introduce a reasonable alternative design to establish a prima facie case of defect.[32] This is another provision in the Restatement upon which courts have relied to the great advantage of plaintiffs.[33]

---

[27] Section 402A, comment j provides:

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

[28] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. *l* (1998).

[29] Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334-37 (Tex. 1998); Rogers v. Ingersoll-Rand Co., 144 F.3d 841, 844-45 (D.C. Cir. 1998); Lewis v. American Cyanamid Co., 715 A.2d 967, 982 (N.J. 1998).

[30] Welge v. Planters Lifesavers Co., 17 F.3d 209, 211 (7th Cir. 1994) (applying Illinois law). The court held:

> The doctrine of res ipsa loquitur teaches that an accident that is unlikely to occur unless the defendant was negligent is itself circumstantial evidence that the defendant *was* negligent. The doctrine is not strictly applicable to a product liability case because unlike an ordinary accident case the defendant in a products case has parted with possession and control of the harmful object before the accident occurs.

Id.

[31] *See* text of § 3 *supra* note 21.

[32] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 3 cmt. b (1998).

[33] *See, e.g.*, Speller v. Sears, Roebuck & Co., 790 N.E.2d 252, 254-55 (N.Y. 2003); Myrlak v. Port Auth. of N.Y. & N.J., 723 A.2d 45, 57 (N.J. 1999).

(3) *Violation of Safety Statutes and Regulations is Dispositive for Plaintiffs; Compliance is Not Dispositive for Defendants.* Section 4 of the Third Restatement takes a one-sided position. Violation of statute or regulation renders a product defective. On the other hand, compliance with a statute or regulation is not dispositive. A defendant may introduce evidence of compliance but compliance does not preclude a finder of fact from a finding that a product is defective.

(4) *Product Distributors Owe Post-Sale Duties to Warn.* Section 10 of the Third Restatement sets forth the structure for the imposition of a post-sale failure to warn. Some courts have resisted recognizing a duty to warn of after-discovered risks when the product was not defective at time of sale.[34] Once again courts have relied on the factors set forth in Section 10 and will recognize a post-sale duty when the facts indicate that the factors have been met.[35] By creating a coherent structure the Restatement has allayed the fears that a post-sale duty to warn will result in unbridled liability.

(5) *Plaintiffs Receive the Benefit of the Doubt in Crashworthiness Cases.* For years courts debated whether a plaintiff who could not establish the amount of increased damages caused by a defect in an auto that rendered it uncrashworthy could recover from a defendant who caused some add-on injury to that which the plaintiff would otherwise have suffered.[36] Section 16 of the Restatement takes the position that once plaintiff has proved that a defect caused some increased harm but the full extent of the harm cannot be determined, the auto manufacturer is liable for the entirety of the damages. We are pleased that every court that has faced the issue post-Restatement has adopted Section 16.[37]

---

[34] *See, e.g.*, McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 429 (5th Cir. 2001) (applying Texas law); Modelski v. Navistar Int'l Transp. Corp., 707 N.E.2d 239 (Ill. App. Ct. 1999).

[35] *See, e.g.*, Lovick v. Wil-Rich, 588 N.W.2d 688, 693-96 (Iowa 1999) (adopting § 10); Lewis v. Ariens Co., 751 N.E.2d 862, 867 (Mass. 2001) (adopting § 10).

[36] For a review of the authority pro and con on this issue, see the RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 cmt. d and reporters' notes at 243-53 (1998).

[37] Gen. Motors Corp. v. Farnsworth, 965 P.2d 1209, 1219-20 (Alaska 1998); Lally v. Volkswagen Aktiengesellschaft, 698 N.E.2d 28, 36-37 (Mass. Application. Ct. 1998); Poliseno v. Gen. Motors Corp., 744 A.2d 679, 686 (N.J. Super. Ct. App. Div. 2000); Green v. Gen. Motors Corp., 709 A.2d 205, 214-16 (N.J. Super. Ct. App. Div. 1998); *cert. denied*, 718 A.2d 1210 (N.J. 1998); Trull v. Volkswagen of Am., Inc., 761 A.2d 477 (N.H. 2000).

The list goes on. In drafting the Restatement, we did not seek to trade off one issue against the other. We endeavored only to reflect the law as it was developing and to ask ourselves whether the result was fair. In a Restatement that has twenty-one sections and one hundred and thirty-three comments, it is not surprising that some courts will differ on one or another rule or comment. But the world is not as Professor Wertheimer would have her readers see it. As intriguing as her ironic tale of unintended consequences may be, it is an imaginative work of fiction.