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The Value of Consumer Choice in Products Liability

Mark A. Geistfeld*

INTRODUCTION

Tort law has always recognized the principle expressed by the Latin maxim *volenti non fit injuria*, or “a person is not wronged by that to which he or she consents.”¹ The absence of consent is part of the prima facie case for tort liability, distinguishing tortious behavior from socially acceptable behavior.² “For example, consent turns trespass into a dinner party; a battery into a handshake; [or] a theft into a gift.”³

By removing informed choices from the ambit of liability, tort law allows individuals to structure their relationships in the manner that promotes their welfare as per the requirements of allocative efficiency.⁴ More fundamentally, “[t]o have the ability to create and dispel rights and duties [as a matter of informed, voluntary consent] is what it means to be an autonomous moral agent.”⁵ The role of consent within tort law derives from the value of individual autonomy or self-determination.⁶

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¹ BLACK’S LAW DICTIONARY 1605 (8th ed. 2004). Modern tort law originated with the writ of trespass, and allegations of wrongdoing under that writ “were thought to be inappropriate where the defendant had acted with the consent of the plaintiff.” D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 41-42 (1999). Thus, “[i]t is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing, no wrong is done.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 112 (5th ed. 1984).

² See KEETON ET AL., *supra* note 1, § 18, at 112 (explaining why *volenti non fit injuria* “goes to negate the existence of any tort in the first instance”); see also DAN B. DOBBS, THE LAW OF TORTS § 95, at 218 (2000) (“In many cases, consent is not a true affirmative defense [to an intentional tort] but instead marks a deficiency in the plaintiff’s prima facie case.”); *id.* § 212 (explaining why the prima facie case for negligence liability depends on the absence of consent).

³ Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996).

⁴ Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 9-11, 13, 15 (1960) (showing that when individuals have full information of all the relevant factors and do not incur any other costs in bargaining with others, voluntary agreements among right holders and duty holders will produce allocatively efficient outcomes).

⁵ Hurd, *supra* note 3, at 124. For purposes of legal analysis, a normative value such as individual autonomy is necessarily more fundamental than the instrumental objective of allocative efficiency. The computation of costs and benefits depends on how the legal system has specified the underlying legal entitlements. Consequently, neither allocative efficiency nor cost-benefit analysis can determine initial entitlements, making the substantive content of any legal rule dependent on normative justification in the first instance. See Mark A. Geistfeld, *Efficiency*,

Enabling individuals to make their own safety choices as a matter of self-determination is a value that tort law presumably also recognizes in product cases. In the typical product case, the individual right holder is a consumer, making the value of individual choice equivalent to the value of consumer choice. In light of the consumerist orientation of contemporary society, it would be astonishing to find that products liability does not fundamentally value consumer choice.

Nevertheless, the value of consumer choice in strict products liability is surprisingly unclear. Consider the liability rules governing defects of product design or warning, the most important categories of product defect.⁷ According to the *Restatement (Third) of Torts: Products Liability*, “[t]he emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products.”⁸ The optimal level of safety has no evident connection to the amount of safety that would be chosen by consumers, because “consumer expectations do not play a determinative role in determining defectiveness.”⁹ Whether a product is defective in these cases instead depends on “[a] broad range of factors,” including “the nature and strength of consumer expectations regarding the product.”¹⁰ In some cases, consumer expectations can be “ultimately determinative” of the liability question,¹¹ but it is not apparent why the liability rules exclusively rely on consumer choice in only these cases but not others.

The value of consumer choice in strict products liability becomes even harder to discern when considered in relation to assumption of risk, one of the liability-limiting doctrines based on the autonomy principle.¹² According to this doctrine, an individual right holder who voluntarily

Fairness, and the Economic Analysis of Tort Law, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 234, 234-35 (Mark D. White ed., 2009).

⁶ See DOBBS, *supra* note 2, § 95, at 217 (“The consent principle is general in its scope, firm in its acceptance, and central in its significance. It makes the plaintiff’s right of self-determination or autonomy the centerpiece of the law on intentional torts and to some extent other torts as well.”); Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906) (“The maxim *volenti non fit injuria* is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure.”). See generally MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS (2008) (showing how the value of autonomy or self-determination can explain the important doctrines of tort law).

⁷ Every product within a product line has the same design and warnings, and so a finding of defect in either respect implicates the entire product line, unlike the product-specific flaws of construction or manufacture that comprise the remaining category of defect.

⁸ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

⁹ *Id.* § 2 cmt. g.

¹⁰ *Id.* § 2 cmt. f.

¹¹ *Id.* § 2 cmt. g; see also *id.* §§ 7-8 (defining defect exclusively in terms of consumer expectations for food products and used products respectively).

¹² See, e.g., Bohlen, *supra* note 6, at 14 (“The doctrine of the so-called voluntary assumption of known risks is but one of the expressions of this fundamental idea; other exhibitions of it, differing only with the conditions to which the conception is applied, are the defenses of consent and of contributory negligence. None of these is identical with any other, none is derived from the other, all are derivatives from a common source.”).

chooses to face a known risk bears responsibility for her ensuing injuries, thereby reducing or eliminating the liability that others might incur with respect to the identical safety decision.¹³ In the ordinary tort case, the doctrine can eliminate liability under the distinctive rules of express and primary assumption of risk, while at least reducing liability under the rule of secondary assumption of risk.¹⁴ By contrast, the *Restatement (Third)*, like most jurisdictions, only recognizes secondary assumption of risk in product cases, and then treats such conduct as a form of contributory negligence that merely reduces the plaintiff's recovery within a system of comparative responsibility.¹⁵ Assumption of risk has no evident role in products liability, deepening the impression that this body of tort law undervalues individual choice.

The impression is misleading. Strict products liability appropriately values consumer choice. The value of consumer choice, however, is obscured by the way in which the *Restatement (Third)* has de-emphasized the importance of consumer expectations. Properly understood, the value of consumer choice not only justifies the liability rules in the *Restatement (Third)*, it also provides the key to understanding the important limitations of strict products liability, including those based on assumed risks.

As explained in Part I, a product seller typically incurs a tort duty only with respect to product attributes that frustrate the actual safety expectations of the ordinary consumer. Courts have long recognized that contractual remedies do not adequately protect uninformed consumers from the risk of product-caused physical harms, creating a safety problem that implicates the core concern of tort law. The rule of strict products liability accordingly addresses the safety problems stemming from consumers' uninformed product decisions. An exclusive focus on cases involving the absence of informed consumer choice creates the misleading appearance that consumer choice is largely irrelevant for products liability.

Part II then shows how strict products liability instantiates the value of consumer choice. A liability rule that is supposed to address the safety problems created by uninformed consumer choice should require

¹³ See GEISTFELD, *supra* note 6, at 307-09 (explaining why assumption of risk only applies to the same safety choice implicated by the plaintiff's prima facie case for liability). See generally Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 238 (1987) (explaining that assumption of risk should only apply when the plaintiff's "chosen course of action was based on a full and true preference, i.e., made with knowledge of all the alternatives that defendant had a duty to offer, including that alternative which plaintiff claims defendant tortiously failed to offer").

¹⁴ See *Fowler V. Harper et al.*, 4 HARPER, JAMES AND GRAY ON TORTS § 21.0, at 233 (3d ed. 2007).

¹⁵ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17(a), cmt. a (1998) (recognizing an affirmative defense only when "the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care," which encompasses assumption of risk only insofar as the plaintiff's choice to face the risk was unreasonable); *id.* § 18 (refusing to enforce oral or written contractual limitations of liability).

the amount of safety that would be chosen by consumers if they were fully informed. A fully informed consumer chooses the amount of product safety satisfying the risk-utility test. Consequently, the reasonable safety expectations of the ordinary consumer can be defined by the risk-utility test, a formulation of the liability rule that has been adopted by an increasing number of jurisdictions.¹⁶ This formulation does not simply convert consumer expectations into the risk-utility test, but instead relies on the value of consumer choice to justify the liability rule.

Part III concludes by showing how the value of consumer choice can explain the important limitations of strict products liability, including the affirmative defenses. Like the other rules of strict products liability, the limitations of liability can be squared with the old maxim that “No injury or wrong is done to one who consents.”

I. UNINFORMED CONSUMER CHOICE AS THE PREDICATE FOR STRICT PRODUCTS LIABILITY

The widely adopted rule of strict products liability law in section 402A of the *Restatement (Second) of Torts* is based on the tort doctrine of the implied warranty.¹⁷ “In its inception, breach of warranty was a tort. The . . . wrong was conceived to be a form of misrepresentation, in the nature of deceit”¹⁸ The misrepresentation stemmed from the manner in which the product frustrated the reasonable safety expectations of the purchaser; liability was strict in the sense that it did not require any culpable wrongdoing on the seller’s part. The rule of strict liability was instead justified by the purchaser’s lack of knowledge about the product attributes in question, creating a mismatch between the product’s actual qualities and the purchaser’s expectation of quality.

The paradigmatic example involves the sale of contaminated food, which for centuries has subjected sellers to liability under implied warranty.¹⁹ As the Texas Supreme Court has explained:

Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life. It is a well-known fact that articles of food are manufactured and placed in the channels of commerce, with the intention that they shall pass from hand to hand until they are finally used by some remote consumer. It is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. Since it has been packed and placed on the market as a

¹⁶ *E.g.*, *Mikolajczyk v. Ford Motor Co.*, No. 104983, 2008 WL 4603565, at *21-22 (Ill. Oct. 17, 2008).

¹⁷ RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965) (“There is nothing in this Section which would prevent any court from treating the rule stated as a matter of ‘warranty’ to the user or consumer.”).

¹⁸ William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943).

¹⁹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

food for human consumption, and marked as such, the purchaser usually eats it or causes it to be served to his family without the precaution of having it analyzed by a technician to ascertain whether or not it is suitable for human consumption. In fact, in most instances the only satisfactory examination that could be made would be only at the time and place of the processing of the food. It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.²⁰

The rule of strict liability governing the sale of contaminated food was extended by courts in the twentieth century to encompass other products.²¹ In adopting the rule of strict products liability, courts often relied on opinions authored by Justice Roger Traynor of the California Supreme Court.²² In his influential concurring opinion in *Escola v. Coca Cola Bottling Co.*, Traynor addressed the problem of uninformed consumer choice:

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark.²³

By emphasizing how consumers are unable to make informed product choices, Traynor adopted a rationale for tort liability that had been invoked by others. As one commentator had observed a few years earlier, “[e]mphasis upon the inability of the unspecialized consumer adequately to inspect or test merchandise is becoming increasingly common and seems to have recently influenced rapid developments in the scope of liability to the consumer.”²⁴

When interpreting the rule of strict products liability, courts have continued to recognize the problem of uninformed consumer choice:

In today’s world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very

²⁰ Jacob E. Decker & Sons v. Capps, 164 S.W.2d 828, 829 (Tex. 1942).

²¹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

²² See Mark A. Geistfeld, *Escola v. Coca Cola Bottling Co.: Strict Products Liability Unbound*, in TORTS STORIES 229, 235-43 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

²³ *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (citations omitted).

²⁴ Note, *The Marketing Structure and Judicial Protection of the Consumer*, 37 COLUM. L. REV. 77, 77 (1937) (citations omitted).

real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly.²⁵

The rule of strict products liability governs the designs of automobiles, for example, because “manufacturers of such complex products as motor vehicles invariably have greater access than do ordinary consumers to the information necessary to reach informed decisions concerning the efficacy of potential safety measures.”²⁶ Thus, one of the public policy rationales for the rule of strict products liability is that “the consumer does not have the ability to investigate for himself the soundness of the product.”²⁷

Tort liability can be justified in these terms because of the safety problems that are created when product sellers rationally respond to the safety decisions made by uninformed consumers. Consider a manufacturer’s decision about whether to install a costly safety device to eliminate an unreasonable product risk of which the ordinary consumer is unaware. By installing the safety device, the manufacturer increases the cost and the price of the product. Without the device, the product would expose consumers to the associated risk of injury. Unless consumers know about the risk, they will not be willing to pay for the safety device, leading them to purchase the lower priced product without the device. Why spend money on safety if one is unaware of the need to do so? Manufacturers will not tell consumers about these risks, as doing so would only increase consumer estimates of product cost and decrease sales. What is the point of advertising negative product attributes to the consumer? The process of price competition predictably forces manufacturers to forego these types of safety investments, resulting in unreasonably dangerous products. The ensuing safety problem both justifies the tort duty and explains why customary product safety practices can be unreasonably dangerous.²⁸

During the 1920s, for example, the president of the automobile manufacturer General Motors “insisted that the company could not make windshields with safety glass because doing so would harm the bottom line.”²⁹ The automobile manufacturers were simply responding to misinformed consumer demand. “G.M. believed that consumers weren’t prepared to pay more for cars with safety glass”³⁰ The same dynamic has occurred throughout the history of automotive safety. During the 1950s, “auto executives told Congress that making seat belts

²⁵ *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976) (quoting *Codling v. Paglia*, 298 N.E.2d 622, 627 (N.Y. 1973)).

²⁶ *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1247 (Colo. 1987).

²⁷ *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1143 (Mont. 1997) (quoting *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268, 273 (Mont. 1973)).

²⁸ For a more complete analysis, including other economic rationales for the tort duty, see MARK A. GEISTFELD, *PRINCIPLES OF PRODUCTS LIABILITY* 34-50 (2006).

²⁹ James Surowiecki, *Fuel for Thought*, *NEW YORKER*, July 23, 2007, at 25.

³⁰ *Id.*

compulsory would slash industry profits.”³¹ The industry had the same response to airbags. As the president of the Chrysler Motors lamented, “safety has really killed all our business.”³² Without the intervention of tort law or other forms of safety regulation, the market would have adopted customary practices (no safety glass, no seat belts, no airbags) that were unreasonably dangerous.

The growth of the economy and proliferation of products have also made it increasingly difficult for consumers to acquire information about product risk. Consumers now face a bewildering array of product choices. Over thirty thousand items are available in the typical supermarket.³³ Experience with a brand may provide the consumer with some knowledge, but even that is short-lived. For U.S. manufacturing firms that remain in operation over a manufacturing census period (every five years), almost two-thirds of the firms change their product mixes, with the product switches involving almost half of existing products.³⁴ The consumer’s ability to evaluate risk is then made even more difficult by the increased complexity of products. Who has the time, energy and desire to evaluate each and every one of these product risks, particularly given the range of other decisions we face on a daily basis?³⁵

Recognizing that consumers are simply unable to evaluate all product risks, courts and legislatures have adopted the rule of strict products liability. The associated tort duty places responsibility for the safety decision on the party most capable of making that decision on an informed basis—the manufacturer.³⁶

³¹ *Id.*

³² *Id.*

³³ GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 214 (2000).

³⁴ See Andrew B. Bernard et al., *Product Choice and Product Switching* 5-6 (Nat’l Bureau of Econ. Research, Working Paper No. 9789, 2003).

³⁵ See Xavier Gabaix et al., *The Allocation of Attention: Theory and Evidence* 2-3 (M.I.T. Dep’t of Econ., Working Paper No. 03-31, 2003) (analyzing “[a]ttention as a scarce economic resource” allocated by cost-benefit principles and providing empirical support that individuals act in this manner); see also BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004) (discussing the problem of “choice overload”); Josef Falkinger, *Limited Attention as a Scarce Resource in Information-Rich Economies*, 118 ECON. J. 1596 (2008) (analyzing how the limited attention of consumers affects competition in the marketplace).

³⁶ The manufacturer has greater technical expertise and can make one thorough investigation of the product, spreading that information cost among all consumers via a price increase. The associated cost per consumer will often be less than the average amount that each consumer would otherwise incur to investigate product safety on her own. Because information acquisition depends on a comparison of costs and benefits incurred by the decision maker, a reduction in costs should increase the total amount of information acquired, assuming there is no change in the benefits of the information.

A tort duty, moreover, is likely to increase the benefits of information for the decision maker. A seller owing a duty to all consumers considers the benefit of added information in terms of that group, whereas the individual consumer acquiring information only considers her private benefit. The benefit for the group will typically exceed the benefit for the individual consumer. Because information acquisition depends on the decision maker’s comparison of costs with benefits, an increase in benefits should increase the amount of information acquired, all else being equal.

II. STRICT PRODUCTS LIABILITY AS THE INSTANTIATION OF INFORMED CONSUMER CHOICE

As we have found, the tort duty is predicated on the conclusion that the ordinary consumer does not have sufficient information about product risks, causing her to undervalue product safety. Due to the process of price competition, these uninformed consumer choices give manufacturers an incentive to supply unreasonably dangerous products. These products are more dangerous than expected by the ordinary (misinformed) consumer, and so the resultant product-caused injuries frustrate consumer safety expectations. To address this safety problem, tort law overrides these misguided contractual choices (and customary product-safety practices more generally) by subjecting product sellers to a tort duty.

The *Restatement (Second)* rule of strict products liability applies to “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property.”³⁷ To be “unreasonably dangerous,” the product attribute “must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”³⁸ Such a product attribute frustrates the ordinary consumer’s actual expectations of product safety, the condition required for tort law to supplement the seller’s contractual obligations with a tort duty.

Because the tort duty is based on the product attribute frustrating the actual (misinformed) safety expectations of the ordinary consumer, the separate element of defect must be defined in some other manner. Otherwise, the existence of duty would necessarily establish the existence of defect, conflating the two elements into a single requirement.

The frustration of the ordinary consumer’s *actual* (misinformed) safety expectations creates the tort duty, and so the element of defect becomes a separate requirement when defined in terms of the ordinary consumer’s *reasonable* (well-informed) safety expectations. Having received a product with the amount of safety that she would have chosen if adequately informed of the relevant factors, the ordinary consumer could not reasonably expect some other amount of product safety. A product satisfying the well-informed or reasonable safety expectations of the ordinary consumer is not defective.³⁹

For other reasons why a tort duty would improve safety decisions in situations of high information costs, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 770-92 (1993).

³⁷ RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

³⁸ *Id.* § 402A cmt. i.

³⁹ See, e.g., *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1333 (Conn. 1997) (holding that for safety attributes that are not well understood by the ordinary consumer, “the inquiry

This definition of defect has a straightforward rationale. A liability rule formulated to address the safety problems created by uninformed consumer choice should require the amount of safety that would be chosen by consumers if they were fully informed. Fully informed consumers understand that products cannot always be made entirely safe for all uses.⁴⁰ Perfection typically is either not possible or unduly expensive. Some product risk is usually inevitable, and so the mere fact that a product causes an accident does not frustrate the consumer's reasonable safety expectations. The accident must instead be caused by a defect in the product, making the definition of defect dependent on the reason why the product attribute frustrates the safety expectations of the ordinary consumer.

According to the *Restatement (Third)*, “[p]roducts that malfunction due to manufacturing defects disappoint reasonable expectations of product performance,” thereby justifying strict liability.⁴¹ A manufacturing or construction defect departs from the product's intended design. In an effort to eliminate such defects, sellers adopt procedures or systems of quality control. Perfect quality control is not reasonably expected by the ordinary consumer for the same reason that perfect product safety is not a reasonable expectation. The complete elimination of product risk typically is not feasible or desirable. Consequently, the ordinary consumer only reasonably expects that the product has passed the appropriate tests of quality control. To enforce such an implied guarantee of product quality, the consumer can reasonably expect the seller to provide a guaranteed remedy for malfunctioning products. This guarantee makes the seller (strictly) liable for malfunctioning products, thereby creating the requisite financial incentive for reducing the incidence of these defects in a cost-effective manner.⁴²

In contrast to the rule governing construction or manufacturing defects, the *Restatement (Third)* eschews consumer expectations in favor of the risk-utility test to determine whether the product is defective

would then be whether a reasonable consumer would consider the product design unreasonably dangerous,” and providing citations to a number of other jurisdictions that have adopted this approach).

⁴⁰ See, e.g., *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 753 (Wis. 2001) (“Virtually no product is entirely safe for all consumers under all conditions, even when being used as intended. We presume that the ordinary consumer recognizes as much. Thus, when the ordinary consumer purchases or uses a product, we must assume that consumer contemplates there is at least some danger involved.”).

⁴¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

⁴² See GEISTFELD, *supra* note 28, at 30-31; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998) (“[I]mposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility.”).

because of design or an inadequate warning.⁴³ Doing so is unnecessary, if not counterproductive.

Excluding instances of bystander injuries (discussed in Part III.A), product cases only implicate consumer interests. Any tort burdens incurred by the manufacturer or other product sellers, including the cost of safety investments and liability for injury compensation, are passed on to the consumer in the form of higher prices.⁴⁴ Consequently, the risk-utility test in the *Restatement (Third)* is formulated entirely in terms of consumer interests: “[I]t is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry.”⁴⁵ Why would a risk-utility test that is limited to consumer interests ever require product designs or warnings that are not reasonably expected by the ordinary consumer?

Indeed, the consumer’s full set of interests is best protected by safety investments satisfying the cost-benefit version of the risk-utility test. For example, the *risk* of a car design without an airbag refers to the increased risk the consumer will suffer injury due to the absence of the airbag, a measure corresponding to the consumer’s injury costs that would be reduced or eliminated by the airbag. The *utility* of the design without an airbag involves any savings the consumer experiences by not having the airbag, an amount equal to the total cost of the airbag. Under the cost-benefit version of the risk-utility test, the car is defective for not having an airbag if the utility of the existing design is less than the increased risk posed by the design:

$$\begin{aligned} & \text{added utility of design without airbag} < \text{added risk of design without airbag} \\ & \text{total cost of airbag} < \text{injury costs eliminated by airbag} \end{aligned}$$

For safety investments satisfying this condition, consumer right holders incur a cost or burden that is less than the associated benefit they derive from the enhanced product safety (the reduction of expected injury costs). A product containing the cost-benefit amount of product safety promotes consumer welfare as reasonably expected by the ordinary consumer, thereby satisfying the seller’s tort obligation.⁴⁶

Proof that a product is defectively designed usually involves a comparison of the existing design to a proposed alternative. “While a manufacturer has a duty to design a product that is reasonably safe for its foreseeable use, it is not required to design the ‘best possible product,’

⁴³ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

⁴⁴ See GEISTFELD, *supra* note 28, at 38 n.7 (providing more rigorous support for this claim).

⁴⁵ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998).

⁴⁶ Cf. 63 AM. JUR. 2D *Products Liability* § 583 (2d ed. 1997) (“The reasonable expectation of the user or consumer is to be determined through consideration of a number of factors, including the relative cost of the product, the gravity of potential harm from a claimed defect, and the cost and feasibility of eliminating or minimizing risk.”).

and ‘proof that technology existed, which if implemented could feasibly have avoided a dangerous condition, does not alone establish a defect.’⁴⁷ Increased product safety typically increases product costs for the consumer due to increased price or decreased functionality. The safest possible product is not preferred by a well-informed consumer whenever the benefits of such safety for the consumer are outweighed by the resultant costs borne by the consumer. A design defect, therefore, is defined by reference to a reasonable alternative design.⁴⁸ By proving that there is a reasonable alternative to the existing product design—one that passes the risk-utility test in the usual case—the plaintiff in effect proves that the manufacturer failed to provide the design that would be chosen by well-informed consumers.⁴⁹

To further foster informed consumer choice, strict products liability obligates the seller to warn consumers of any unknown product risks that would be material to their decisions concerning the purchase or safe use of the product.⁵⁰ Insofar as the average or ordinary consumer is unaware of a risk, a warning to that effect allows her to make an informed risk-utility decision. The duty to warn is the most obvious instance in which strict products liability is formulated in terms of consumer choice, further confirming that this body of tort law strives to create outcomes that instantiate the value of informed consumer choice.

III. CONSUMER CHOICE AS A LIMITATION OF STRICT PRODUCTS LIABILITY

The value of consumer choice provides a compelling justification for strict products liability, and yet many reject this rationale on the ground that consumer choice places too great of a limit on tort liability. As a leading treatise explains:

The utility of the consumer expectations test is severely compromised when design dangers are obvious. Because consumers acquire their safety and danger expectations most directly from a product’s appearance, obvious dangers—such as the risk to human limbs from an unguarded power mower or industrial machine—are virtually always contemplated or expected by the user or consumer who thereby is necessarily unprotected by the consumer expectations

⁴⁷ *Robinson v. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 696 (8th Cir. 2007) (applying South Dakota law) (citing *Sexton ex rel. Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 336 (4th Cir. 1991)) (internal citation omitted).

⁴⁸ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 Reporters’ Note, cmt. d (1998).

⁴⁹ For cases in which the design prevents the product from performing its intended function, the plaintiff does not need to establish defect by reference to a reasonable alternative design. See *id.* § 3 cmt. b. By purchasing or using the product, the ordinary consumer reasonably expects that there is some design that would enable the product to perform its intended function. The proof of malfunction accordingly establishes the frustration of reasonable expectations, regardless of whether the plaintiff can identify a reasonable alternative design.

⁵⁰ See GEISTFELD, *supra* note 28, at 134-59 (explaining the duty to warn and showing how it fosters informed consumer decision making).

test, no matter how probable or severe the likely danger nor how easy or cheap the means of avoiding it. . . . And a pure consumer expectations test perniciously rewards manufacturers for failing to adopt cost-effective measures to remedy obviously unnecessary dangers to human life and limb. The failure of the consumer expectations test to deal adequately with the obvious danger problem profoundly weakens the usefulness of this test and effectively disqualifies it for principled use as the sole basis for determining defects in design.⁵¹

This characterization of consumer expectations mistakenly assumes that a consumer who is aware of a danger has necessarily made an informed safety choice about the matter. Awareness of risk is only one factor in the consumer's safety decision, and so consumer expectations are not satisfied simply because the danger is open or obvious. For an important class of safety decisions, however, consumer expectations are satisfied with respect to apparent risks, thereby explaining otherwise puzzling rules concerning important limitations of strict products liability. Rather than providing a reason to reject consumer expectations, the problem of known or obvious dangers further supports the conclusion that strict products liability appropriately values consumer choice.

A. Open or Obvious Dangers

The problem of open or obvious dangers is addressed by the patent-danger rule, which originated in cases involving a product malfunction that allegedly breached the implied warranty. According to this rule,

if the buyer has examined the goods and their defects are discovered, or so obvious that he could avoid discovery only by shutting his eyes as to what was evident, the warranty is ineffective. The reason is that he must understand that the seller is offering for sale what is before him, as it appears to be; and even express language, at least in any form other than an explicit reference to the defect itself, will not entitle him to expect anything different.⁵²

When the consumer knows of an open or obvious danger that the product might malfunction, the occurrence of such a malfunction does not frustrate consumer expectations of performance. Products breach the implied warranty "if they cannot be used."⁵³ Thus, "any latent condition, such as a pin inside of a loaf of bread, which would prevent purchase if it were known, is enough" to breach the warranty.⁵⁴ Having decided to purchase and then use the particular product despite its open or obvious danger of malfunction, the plaintiff cannot claim that the associated

⁵¹ DAVID G. OWEN, PRODUCTS LIABILITY LAW § 8.3, at 490-91 (2d ed. 2008) (footnotes omitted).

⁵² Prosser, *supra* note 18, at 153 (footnotes omitted).

⁵³ *Id.* at 132.

⁵⁴ *Id.* at 137 (footnote omitted).

defect would prevent purchase or use of that product as required by the allegation of liability, thereby barring recovery.

In these cases, the plaintiff made an informed safety decision that is identical to the decision implicated by the allegation of liability. In deciding to purchase the product, the plaintiff presumably figured out how much utility she would derive from the product use after subtracting the purchase price and other costs. She also knew of the defect that could cause the product to malfunction. Her purchase of the product, therefore, involved an informed decision that the total net utility of using the product exceeded the risk of malfunction. That risk-utility decision is inconsistent with the plaintiff's allegation that the product breached the implied warranty. According to the allegation of breach, this particular product should not have been sold, a condition that is satisfied only if the risk of malfunction *exceeds* the total net utility of product use. Because the plaintiff had already made an informed decision that the risk of malfunction is *less* than the total net utility of product use, a court that respects the value of consumer choice will bar the plaintiff's recovery.⁵⁵

This rationale for the patent-danger rule does not apply to most allegations of defective design involving open or obvious dangers. A consumer's decision of whether to purchase a product in light of a known danger of malfunction is fundamentally different from most safety decisions involving product design. Product malfunctions implicate the consumer's decision of whether to purchase or use the product at all. By contrast, the issue of defective design normally implicates a different decision. For example, if there were no automobiles equipped with airbags, consumers would still use these products. In deciding to use a car, the consumer presumably concluded that the total benefits of using the automobile outweigh its total costs. An informed risk-utility decision concerning an airbag, by contrast, compares the cost (or disutility) of the airbag with its safety benefit (or reduced risk of injury). The consumer's decision to use the automobile differs from the risk-utility decision implicated by the allegation of defective design. The court can value the

⁵⁵ Even if the plaintiff only used the product and did not purchase it, the value of consumer choice would still bar recovery. In products liability, the "consumer" includes both the purchaser and other expected users of the product. *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 80-81 (N.J. 1960) ("[T]he connotation of 'consumer' [is] broader than that of 'buyer.' He signifie[s] such a person, who, in the reasonable contemplation of the parties to the sale, might be expected to use the product."). Similarly, welfare economists typically evaluate consumer behavior in terms of households rather than individuals. *See, e.g.,* ROBIN BOADWAY & NEIL BRUCE, WELFARE ECONOMICS 8 (1984). The consumer can be conceptualized in this manner because the interests of such a product user are indistinguishable from those of the buyer. One who purchases a product presumably gives equal consideration to the welfare of those whom she expects to use the product, such as family members, friends, or employees. As a product user whose interests were adequately accounted for by the purchaser, the plaintiff only reasonably expects the amount of product safety that is acceptable to the buyer. *See* GEISTFELD, *supra* note 28, at 39 nn.9-10 (illustrating the point in the context of employer-employee relationships and analogizing the issue to the duty a landowner owes to licensees). Consequently, even if the plaintiff did not actually purchase the product, her role as consumer makes it appropriate to analyze the case as if she were the purchaser.

plaintiff's choice to use the product without barring her claim that this open or obvious danger constitutes a design defect.

The obvious absence of a safety device like an airbag also does not imply that the plaintiff or any other consumer had adequate knowledge of the risk-utility features of the device. Prior to the widespread adoption of airbags, how many consumers actually knew that they could be installed in cars or how they work? Even today, how many consumers truly know about the cost of an airbag, which includes not only the price of an airbag but also replacement costs and any increased injury costs created by the airbag, such as the risk posed to children? Indeed, "the ordinary consumer of an automobile simply has 'no idea' of how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards."⁵⁶ Without such knowledge, the consumer cannot make an informed risk-utility decision about the airbag or any other safety device that would eliminate an open or obvious danger posed by the automobile design.

The cost of acquiring and processing all of the risk-utility information can also induce the consumer to forego the evaluation altogether. Given the multitude of apparent risks that an individual confronts on a daily basis, does it make sense to evaluate each one with a full-blown risk-utility or cost-benefit analysis? At most, consumers will engage in a limited number of risk-utility decisions, even for open or obvious product risks.⁵⁷

Consistent with this reasoning, courts have long recognized that an open or obvious danger can frustrate consumer expectations in breach of the implied warranty:

The offer to sell "what you see" cannot charge the buyer with acceptance of what is not visible; and the question becomes one of whether the understanding that goods of merchantable quality are to be sold is destroyed merely by the fact that the buyer has inspected at all. . . . It is entirely possible that the seller may say, in effect, "Here are merchantable goods, of the kind and quality sold on the market; if you have doubts, you are free to examine them;" and after examination the buyer may say, in return, "They look alright; I will take them for what they appear to be, but for the rest I will rely upon your undertaking as to quality." Under such conditions, the warranty may of course still be implied, even where the buyer has made the fullest examination open to him, and certainly all the more readily where his inspection is only a hasty or partial one, or where he declines the opportunity and does not inspect at all.⁵⁸

To satisfy the implied warranty, products "must be marketable with their true character known."⁵⁹ Products have become increasingly complex, making it increasingly difficult for consumers to discern the

⁵⁶ *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994) (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978)).

⁵⁷ See *supra* note 35 and accompanying text.

⁵⁸ Prosser, *supra* note 18, at 154-55 (footnotes omitted).

⁵⁹ *Id.* at 128-29.

true character of apparent product risks. Are they inherent in the product or could they be eliminated by cost-effective changes in product design? “Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see.”⁶⁰ A consumer who is aware of an open or obvious danger can expect that such a risk is inherent in the product and cannot be eliminated by cost-effective safety investments. If such a risk could be eliminated in this manner and the seller failed to do so, the product design frustrates consumer expectations and subjects the seller to tort liability for the ensuing physical harms.

In the years leading up to the adoption of strict products liability, courts were increasingly willing to find that the implied warranty governed apparent dangers that had been inspected by the purchaser, turning these otherwise open or obvious dangers into latent defects not subject to the patent-danger rule:

[T]he emphasis has been shifted to the actual understanding of the parties, with the result that there has been a strong tendency to find a warranty as to latent defects even in the face of inspection. This has proved to be all the more necessary as goods have become more highly specialized, marketing processes more complex, and buyers more helpless to form any intelligent estimate of the character of the goods on the basis of their own examination or tests.⁶¹

These cases establish the important principle that if the consumer cannot make an “intelligent estimate” of all the relevant risk-utility factors, consumer expectations can be frustrated by risks that are otherwise open or obvious, subjecting the seller to tort liability. This principle was established by warranty cases that were all decided before the 1960s, making them part of the doctrinal foundation for the rule of strict products liability.⁶² This principle accordingly justifies the rule adopted by most courts that the plaintiff is not barred from recovery under strict products liability merely because the danger was apparent.⁶³

In order for consumer expectations to be satisfied, the consumer must have made the safety decision on the basis of good information about all of the risk-utility factors. As we have found, a well-informed consumer will choose to face only those risks that cannot be eliminated by cost-effective safety investments.⁶⁴ Consequently, consumer expectations are satisfied by risks that are “inherent in the product,

⁶⁰ Corbin v. Coleco Indus., Inc., 748 F.2d 411, 417-18 (7th Cir. 1984) (applying Illinois law).

⁶¹ Prosser, *supra* note 18, at 156 (footnotes omitted).

⁶² Compare RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965) (“There is nothing in this Section which would prevent any court from treating the rule stated as a matter of ‘warranty’ to the user or consumer.”), with Prosser, *supra* note 18, at 155-56 & nn.218-19 (explaining this principle and providing citations to warranty cases decided prior to 1943).

⁶³ See, e.g., Micallef v. Miehle Co., 348 N.E.2d 571, 576-77 (N.Y. 1976).

⁶⁴ See *supra* notes 45-46 and accompanying text.

completely within the cognition of a reasonable user, and incapable of being economically alleviated.”⁶⁵

Once the patent-danger rule has been formulated in these terms, it explains the otherwise puzzling line of cases in which the plaintiff claims that a product is defective no matter how it is designed. Such a claim effectively asserts that for the general category of comparable or substitute products, the design of each one is defective. Because any product within the category is alleged to be defectively designed and unreasonably dangerous, the product at issue in the suit is also defective and unreasonably dangerous, regardless of its particular design features. “American courts have avoided product category [liability] like the plague,”⁶⁶ although tort scholars have continued to question the rationale for doing so.⁶⁷ “After all, if strict liability attaches to products with unreasonably dangerous features how can it not reasonably attach to unreasonably dangerous products?”⁶⁸ The answer is supplied by consumer expectations. Categorical risks are inherent in the product, completely within the cognition of an ordinary user, and incapable of being economically alleviated, thereby satisfying the (properly formulated) patent-danger rule and explaining why courts routinely reject claims of categorical liability.

To see why, recall that the tort duty makes it reasonable for the consumer to assume that the product contains no manufacturing or construction flaws. By relying on the tort duty, the consumer can also assume that each product design within the category is reasonably safe. In effect, the tort duty guarantees the reasonable safety of all products within each category, enabling the ordinary consumer to focus on the risk-utility comparisons across product categories, such as that involved in comparing a standard automobile to a subcompact car. In making choices across product categories, the ordinary consumer also benefits from the duty to warn, which guarantees that the product warning provides the ordinary consumer with the material information required for informed safety decisions.⁶⁹ Once the information already held by the ordinary consumer is supplemented by the information provided by the product warning, she presumably is able to make an informed categorical

⁶⁵ *House v. Armour of Am., Inc.*, 929 P.2d 340, 344 (Utah 1996) (quoting *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1104 (10th Cir. 1991)).

⁶⁶ James A. Henderson, Jr. & Aaron D. Twerski, *A Fictional Tale of Unintended Consequences: A Response to Professor Wertheimer*, 70 BROOK. L. REV. 939, 945 (2005); see also 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, 1329 (1991) (“[M]ost courts that have considered product-category liability claims have rejected them out of hand. And of the very few decisions that have embraced the notion, each has been reversed by its respective state legislature.”).

⁶⁷ See generally Symposium, *Generic Products Liability*, 72 CHI.-KENT L. REV. 3 (1996).

⁶⁸ Carl T. Bogus, *The Third Revolution in Products Liability*, 72 CHI.-KENT L. REV. 3, 11 (1996).

⁶⁹ See *supra* note 50 and accompanying text.

choice. The ordinary consumer presumably then makes such a categorical risk-utility assessment in deciding whether to choose one product category over another (such as the subcompact over the standard-sized automobile), even if she forgoes more limited risk-utility evaluations involving particular safety devices (like an airbag, the steering mechanism, the braking system, and so on). Having made an informed categorical risk-utility decision, the ordinary consumer's actual expectations of safety are satisfied in that regard, thereby eliminating the seller's design duty with respect to any risk that is inherent in the product category.

The plaintiff, for example, cannot claim that a microbus is defectively designed for not having the safety features characteristic of a standard passenger vehicle.⁷⁰ Similarly, the plaintiff cannot claim that a bullet-proof vest is defectively designed merely because it does not provide the more extensive protection afforded by other styles that were available on the market.⁷¹ Having chosen a less safe alternative, the consumer does not expect the greater safety offered by a product configuration she decided not to purchase.

For the same reason, the consumer's informed choice of an optional safety feature can bar a claim of strict products liability:

The product is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product. In such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability.⁷²

Liability is limited in this manner in order to further the value of consumer choice. "Consumers are entitled to consider the risks and benefits of the different designs and choose among them."⁷³ These choices satisfy the actual safety expectations of the ordinary consumer, so the product is not "unreasonably dangerous" under the *Restatement (Second)* rule of strict products liability.⁷⁴

When applied in this manner,

⁷⁰ Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1069, 1073-75 (4th Cir. 1974) (applying Virginia law).

⁷¹ Linegar v. Armour of Am., Inc., 909 F.2d 1150, 1151-54 (8th Cir. 1990) (applying Missouri law).

⁷² Scarangella v. Thomas Built Buses, Inc., 717 N.E.2d 679, 683 (N.Y. 1999) (emphasis omitted).

⁷³ Hernandez v. Tokai Corp., 2 S.W.3d 251, 259 (Tex. 1999).

⁷⁴ See *supra* notes 37-39 and accompanying text.

the “unreasonably dangerous” requirement serves the useful function of balancing safety considerations against a policy which favors product diversity and consumer choice. Automobiles, and numerous other types of products, vary considerably in their safety features and characteristics. However, the law does not require that manufacturers produce only the safest product feasible in order to avoid being exposed to liability. Rather it requires them to avoid placing on the market products that are rendered “unreasonably dangerous” because of a defect in design or manufacture.⁷⁵

So construed, the “unreasonably dangerous” requirement serves its intended purpose of ensuring that product sellers are not subject to liability merely because the consumer was injured by a known risk that inheres in the product.⁷⁶ When the ordinary consumer has knowledge of those risks that are inherent in the product category—an informational requirement addressed by the seller’s duty to warn—then she is capable of making an informed categorical risk-utility decision, thereby precluding a claim of categorical liability.

The value of informed consumer choice justifies the widespread rejection of categorical liability, and yet the *Restatement (Third)* acknowledges the possibility of categorical liability for “manifestly unreasonable design” of products with “low social utility and [a] high degree of danger.”⁷⁷ How could any application of categorical liability be squared with consumer expectations? After all, if the ordinary consumer has made an informed categorical risk-utility decision, why should the seller be obliged to make the contrary decision? The answer involves an alternative rationale for categorical liability, one that shows why the value of consumer choice is not always a defensible reason for limiting liability.

⁷⁵ *Camacho v. Honda Motor Co.*, 701 P.2d 628, 632 (Colo. Ct. App. 1985), *rev’d on other grounds*, 741 P.2d 1240 (Colo. 1987).

⁷⁶ In discussing the “unreasonably dangerous” requirement in section 402A of the *Restatement (Second)*, the California Supreme Court has observed that:

a “defective condition” is one “not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” (Rest.2d Torts § 402A, com. g.) Comment i, defining “unreasonably dangerous,” states, “The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” Examples given in comment i make it clear that such innocuous products as sugar and butter, unless contaminated, would not give rise to a strict liability claim merely because the former may be harmful to a diabetic or the latter may aggravate the blood cholesterol level of a person with heart disease. *Presumably such dangers are squarely within the contemplation of the ordinary consumer.* Prosser, the reporter for the Restatement, suggests that the “unreasonably dangerous” qualification was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey and automobiles) would become “automatically responsible for all the harm that such things do in the world.”

Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972) (emphasis added) (quoting William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23. (1966)).

⁷⁷ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. e (1998).

The analysis so far has been confined to the *consumer*, a concept including the buyer and other users of the product.⁷⁸ Excluded are third parties or bystanders. When consumers face low information costs and have a choice among safety options, they are able to make informed safety choices that best promote their interests. In these cases, the rejection of categorical liability appropriately defers to consumer choice. Deference to consumer choice is not compelling, though, when third-party interests are at stake. Consumers who make safety decisions by reference to their own interests can make product choices that are unreasonably dangerous for bystanders.⁷⁹ In these cases, the value of consumer choice does not justify a limitation of liability, explaining why the *Restatement (Third)* and many courts could defensibly recognize that categorical liability is appropriate if the product has “low social utility” (for the consumer) that is outweighed by the “high degree of danger” (faced by the consumer *and* bystanders).

Except for these circumstances, the risk-utility decision is limited to consumer interests, and the value of consumer choice justifies the widespread rejection of categorical liability. The ordinary consumer can make an informed categorical risk-utility decision, with the satisfaction of consumer expectations negating categorical liability or otherwise being “ultimately determinative” of the risk-utility inquiry in the *Restatement (Third)*.⁸⁰ In contrast to the categorical risk-utility decision, consumers usually do not make informed risk-utility decisions about every other apparent risk posed by a product. Consumer expectations are not satisfied simply because a danger is open or obvious. When properly formulated in terms of consumer expectations, the patent-danger rule does not bar recovery for every apparent danger, but instead limits strict products liability only when doing so furthers the value of informed consumer choice.

B. *Assumed Risks*

The value of individual choice in tort law traditionally has been associated with the doctrine of assumed risks:

The assumed risk rule was sometimes expressed in terms of the maxim, *volenti non fit injuria* or under the name of incurred risk. However formulated, the essential idea was that the plaintiff assumed the risk whenever she expressly agreed to do so by contract or otherwise, and also when she impliedly did so by words or conduct. Courts began to think that conduct implied consent whenever the plaintiff had specific knowledge of the risk posed by the defendant’s negligence, appreciated its nature, and proceeded voluntarily to encounter it nonetheless. The Restatement and more modern theory added that the risk was

⁷⁸ See *supra* note 55.

⁷⁹ See GEISTFELD, *supra* note 28, at 252-59.

⁸⁰ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (1998).

assumed only if the plaintiff's conduct in encountering the risk manifested the plaintiff's willingness to accept responsibility for the risk.⁸¹

In product cases, plaintiffs cannot assume the risk expressly by contract. According to the *Restatement (Third)*, courts do not enforce contractual or express waivers of strict products liability because “[i]t is presumed that the ordinary product user or consumer lacks sufficient information and bargaining power to execute a fair contractual limitation of rights to recover.”⁸² A disclaimer operates against a tort duty, which in turn exists only when the ordinary consumer is unable to make an informed risk-utility decision about the safety matter in question.⁸³ An individual consumer like the plaintiff presumably has the characteristics of the ordinary consumer, and so the waiver question only arises when the plaintiff presumably lacks sufficient information about the risks. Insofar as there is no reliable way to determine whether the plaintiff differs from the ordinary (uninformed) consumer in this respect, the presumption cannot be rebutted; the court must conclude that the plaintiff did not have enough information to execute a fair contractual limitation of her right to recover.⁸⁴ Evidential limitations can explain why courts do not recognize contractual or express assumption of risk in product cases.

Courts can also refuse to enforce disclaimers for policy reasons. At the time of purchase, the consumer knows that the seller has completed its investments in product safety. Liability could not induce the seller to make any further safety investments, giving each consumer at the point of sale an incentive to waive liability in exchange for a reduction in product price. But because consumers will predictably act in this way, the resultant lack of liability would remove the financial incentive for product sellers to comply with the tort obligation in the first instance. Waivers, therefore, can yield unreasonably dangerous products when courts permit all consumers to waive liability.⁸⁵ A rule that permits only some consumers to waive liability, in turn, would then be unfair to those consumers who are foreclosed from that opportunity. These consumers would incur the full cost of ensuring that the seller complies with the tort duty, whereas those consumers who could waive liability would still be effectively protected by the tort duty—their products would be reasonably safe as required by the tort duty—but they would not have to incur the costs of enforcing that duty. To ensure that each consumer pays a fair share of the tort burden, courts can refuse to enforce

⁸¹ DOBBS, *supra* note 2, § 210 at 535 (footnotes omitted).

⁸² RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 18 cmt. a (1998).

⁸³ See *supra* notes 37-39 and accompanying text.

⁸⁴ Cf. GEISTFELD, *supra* note 28, at 236-37 (explaining why the plaintiff's experience with or expertise about the product does not reliably prove that she made an informed risk-utility decision to use the defective product).

⁸⁵ See generally Abraham L. Wickelgren, *The Inefficiency of Contractually-Based Liability With Rational Consumers*, 22 J. L. ECON. & ORG. 168 (2006).

contractual or express disclaimers of liability without denying the value of consumer choice.

Courts in product cases also do not explicitly recognize another formulation of the assumed risk rule, known as primary assumption of risk. Under this doctrine, a right holder's choice to engage in a risky activity, such as downhill skiing, makes her responsible for the risks inherent in the activity.⁸⁶ In these cases, the ordinary right holder (skier) has enough information to make an informed decision that the benefits of engaging in the activity (skiing) outweigh the inherent risks, thereby relieving the duty holder (a ski resort) of responsibility for those risks.⁸⁷ This defense does not have to be explicitly recognized in product cases because the identical principle justifies the rule against categorical liability. Rather than conclude that the consumer has primarily assumed the risk inherent in the activity (or the use of any product within the category), courts instead conclude that the product design satisfies consumer expectations and is not defective. As in the case of primary assumption of risk, the ordinary right holder (consumer) can make an informed decision that the benefits of engaging in the activity (or the utility of using the product) outweigh its inherent risks, relieving the duty holder (product seller) of responsibility for that particular safety decision. Strict products liability furthers the value of informed consumer choice in the manner required by the doctrine of primary assumption of risk, even though that formulation of the assumed risk rule is not expressly recognized as an affirmative defense.

The only remaining cases that implicate the assumed risk rule are those in which the defendant imposed a tortious risk on the plaintiff, who then had a choice of whether to continue to face the risk. To breach the duty under strict products liability, the defendant must have sold a defective product that was unreasonably dangerous. Even though the buyer did not know of the defect at the time of purchase (rendering the product "unreasonably dangerous" as per the *Restatement (Second)* rule of strict products liability), the plaintiff could subsequently gain knowledge of the defect. If the plaintiff then decided to use the product despite the known defect and was injured as a result, her tort claim against the seller would be governed by the doctrine known as secondary assumption of risk.⁸⁸

⁸⁶ *E.g.*, *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997) ("[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.").

⁸⁷ *See, e.g.*, *Sajkowski v. Young Men's Christian Ass'n of Greater New York*, 702 N.Y.S.2d 66, 67 (N.Y. App. Div. 2000) ("[I]f the risks of an activity are fully comprehended or perfectly obvious, one who participates in the activity is deemed to have consented to the risks. Furthermore, where the risk is open and obvious, the mere fact that the defendant could have provided safer conditions is irrelevant.") (citations omitted).

⁸⁸ *See, e.g.*, *Knight v. Jewett*, 834 P.2d 696, 703, 707-08 (Cal. 1992) (distinguishing primary and secondary assumption of risk in terms of whether the defendant breached a duty owed to the plaintiff).

These claims are barred by the value of informed consumer choice only when the plaintiff's choice to use the defective product was based on a risk-utility decision identical to the one implicated by the allegation of liability. This condition is not satisfied for the class of claims in question.

For example, assume the plaintiff discovers that an automobile is defectively designed for not containing an airbag. As previously discussed, the plaintiff's risk-utility decision to use the automobile fundamentally differs from the risk-utility decision implicated by her allegation that the design is defective for not including airbags.⁸⁹ A plaintiff who knows about a design defect and still uses the product has not made a risk-utility decision that is inconsistent with her allegation of liability, enabling the court to value the plaintiff's safety decision while still recognizing her liability claim.

Indeed, the plaintiff's decision to use the automobile without an airbag would be reasonable—the net benefits of using the car clearly outweigh the added risk posed by the absence of airbags. Under the assumed risk rule, “the plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to . . . exercise or protect a right or privilege of which the defendant has no right to deprive him.”⁹⁰ A product seller has no right to deprive a consumer of the right to use the product in a reasonable manner, and the only way the plaintiff can use the automobile requires him to face the risk posed by the absence of an airbag. The plaintiff's reasonable choice to use such a product with a known defect is not “voluntary” for purposes of the assumed risk rule, nor does the plaintiff's reasonable product use provide any other ground for reducing the seller's liability.

The same outcome occurs with respect to construction or manufacturing defects. This allegation of strict products liability implies that the defect renders the product unfit for sale, and so the allegation can be barred by the consumer's informed risk-utility choice to purchase the product with a known risk of malfunction.⁹¹ Unlike these cases, the present inquiry is limited to defects that the consumer discovered only after purchase. In deciding whether to use a product that has already been purchased, the consumer presumably compares the net utility of the particular use with the risk posed by that use. The decision to use the defective product does not incorporate the sunk cost of the purchase price, an obvious difference with the earlier purchase decision (made without knowledge of the defect) that is implicated by the allegation of liability. Once again, the plaintiff's informed choice to use the allegedly

⁸⁹ See *supra* notes 54-56 and accompanying text.

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 496E(2)(b) (1965).

⁹¹ See *supra* notes 52-56 and accompanying text.

defective product can be fully valued by a court that recognizes the plaintiff's allegation of liability.

For these reasons, the *Restatement (Second)* defensibly reduces the plaintiff's recovery for secondary assumption of risk only when the plaintiff "voluntarily and unreasonably proceed[s] to encounter a known danger."⁹² The plaintiff's choice does not bar recovery—the choice to use the product on a particular occasion is not inconsistent with the allegation of liability—and so the only reason for reducing the plaintiff's recovery involves instances in which her decision to use the product was unreasonable. Such a decision is merely a form of unreasonable conduct indistinguishable from other forms of contributory negligence. Secondary assumption of risk is also limited to cases of contributory negligence in the *Restatement (Third)*, which allows for a reduction of the plaintiff's damages only when "the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."⁹³ The plaintiff's choice regarding product use can provide a ground for reducing the seller's liability, but the reason does not stem from the value of informed consumer choice, thereby explaining why the plaintiff is not entirely barred from recovery.⁹⁴

CONCLUSION

The growth of products liability has been astounding, particularly when compared to the slowly evolving tort rules of the common law. In 1965, the rule of strict products liability was adopted by the American Law Institute in section 402A of the *Restatement (Second) of Torts*, and was then adopted by most states shortly thereafter. The dozen or so pages devoted to the problem of product defects in the *Restatement (Second)* subsequently led to a body of law requiring over three hundred pages of exposition in the *Restatement (Third) of Torts: Products Liability*, which was adopted by the American Law Institute in 1997.⁹⁵

⁹² RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

⁹³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17(a) (1998).

⁹⁴ Product misuse instead implicates an issue of fairness across consumers. The individual plaintiff's vindication of the tort right can also protect other consumers with respect to defects, like product design, that threaten other consumers in the market. The elimination of such defects works to the benefit of all right holders, but the damages award also increases the product price for all other consumers, including those who do not misuse the product. Whether the plaintiff's recovery should be reduced for product misuse, therefore, depends on how this benefit and burden should be fairly distributed across consumers. Consistent with this reasoning, "[a] major policy reason which courts articulate for accepting comparative responsibility is that allowing a victim's negligence to be irrelevant to her recovery is unduly unfair because it makes careful product users bear the costs created by the careless users of products." William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 OKLA. L. REV. 201, 242 (1994).

⁹⁵ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

A rapidly developing body of law cannot be simply restated, and the ongoing interplay between consumer expectations and the risk-utility test has proven to be a particularly hard problem. A number of courts have rejected the *Restatement (Third)*'s risk-utility test for defective product designs because it "fundamentally alter[s] the law of product liability in this state."⁹⁶ As the Maryland Court of Appeals explained, "[g]iven the controversy that continues to surround the risk-utility standard articulated for design defect cases in . . . the *Restatement (Third)*, we are reluctant at this point to cast aside our existing jurisprudence in favor of such an approach on any broad, general basis."⁹⁷ Although these decisions cast doubt on the overall approach adopted by the *Restatement (Third)*, they also provide important support for the *Restatement (Third)*. Having forcefully rejected the risk-utility test in the *Restatement (Third)*, most of these courts have then incorporated the risk-utility test into their existing jurisprudence of consumer expectations based on the *Restatement (Second)*.⁹⁸ Typically, the resultant liability rule is "in actuality, perfectly consistent with" the *Restatement (Third)*.⁹⁹ Why do courts flatly reject the risk-utility test in the *Restatement (Third)* and then immediately incorporate that test into the *Restatement (Second)* liability rule?

Perhaps these courts have become entangled in "rhetorical confusion [that] is largely unnecessary."¹⁰⁰ For reasons articulated here, courts could defensibly reject the basic approach of the *Restatement (Third)* while also adopting its liability rules. The *Restatement (Third)* has obscured the essential way in which strict products liability depends on consumer expectations, thereby creating the misleading impression that this body of law does not adequately value consumer choice.¹⁰¹ Rather than being confused about the liability rules, courts could rightly reject any approach that does not appropriately recognize the value of consumer choice in products liability.

The value of consumer choice is recognized by the *Restatement (Second)* rule of strict products liability—the textual source of contemporary products liability law. The rule has considerably evolved over a short period of time. Courts have applied it to different sets of circumstances, producing a larger number of distinct doctrines that are addressed by the *Restatement (Third)*. As the common origin of these varied doctrines, the *Restatement (Second)* rule of strict products liability

⁹⁶ *Mikolajczyk v. Ford Motor Co.*, No. 104983, 2008 WL 4603565, at *15 (Ill. Oct. 17, 2008); see also *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1334 (Conn. 1997) (describing controversy and rejecting the risk-utility test in the *Restatement (Third)*).

⁹⁷ *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1159 (Md. 2002).

⁹⁸ See, e.g., *Mikolajczyk*, 2008 WL 4603565, at *22.

⁹⁹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 Reporters' n. cmt. d at 72 (1998) (discussing *Potter*, 694 A.2d 1319).

¹⁰⁰ See James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 867 (1998).

¹⁰¹ See *supra* notes 7-16 and accompanying text.

ought to be substantively compatible with the liability rules in the *Restatement (Third)*. Case law that adopts the risk-utility test in the *Restatement (Third)*, for example, has often evolved from earlier decisions that defined consumer expectations in risk-utility terms.¹⁰² Like the risk-utility test, other important liability rules in the *Restatement (Third)* can be justified by the value of consumer choice.¹⁰³ The two *Restatements* can be squared in this fundamental respect, and so the de-emphasis of consumer expectations in the *Restatement (Third)* should not prevent courts from adopting its liability rules. The liability rules in the *Restatement (Third)* can be deemed a success, regardless of what one thinks about its rationale for products liability.

¹⁰² Compare *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 834-35 (Iowa 1978) (“The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.”) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)) (citation omitted), with *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002) (adopting the *Restatement (Third)*’s risk-utility test).

¹⁰³ See *supra* Part II (explaining why the value of informed consumer choice justifies the liability rules in the *Restatement (Third)* governing construction, design and warning defects); *supra* Part III (explaining why the value of informed consumer choice justifies the rules in the *Restatement (Third)* concerning categorical liability and the affirmative defenses).