Situating Bystanders Within Strict Products Liability

Mark A. Geistfeld

Follow this and additional works at: https://brooklynworks.brooklaw.edu/bjcfcl

Part of the Commercial Law Commons, and the Torts Commons

Recommended Citation
Available at: https://brooklynworks.brooklaw.edu/bjcfcl/vol18/iss1/2

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.
SITUATING BYSTANDERS WITHIN STRICT PRODUCTS LIABILITY

Mark A. Geistfeld

ABSTRACT

The largely neglected role of bystanders within products liability is reflected in the extensive scholarship of Professor Aaron Twerski—the rightly celebrated honoree of this symposium. Within Twerski’s vast body of impressive publications, his limited discussions of bystanders align with the widely held assumption that, aside from the problems they pose for the consumer expectations test, bystanders do not merit much attention within the context of products liability.

Bystander injuries are much more important than is commonly recognized; one must focus on them to adequately identify the conditions under which consumer-choice doctrines properly limit tort liability. Because the varied rules of strict products liability are designed to protect consumer expectations, recovery is barred when consumers make informed risk-utility choices concerning a product attribute and consequently do not have frustrated expectations about how the product will perform in this regard. The resultant consumerist version of the assumed-risk rule bars recovery for bystanders who do not voluntarily consent to the risk exposure. This limitation of liability is problematic only when the product choice pits the interests of consumers against bystanders, with consumers protecting themselves by selecting products that shift the risk of injury onto bystanders. In cases involving these types of risk-risk tradeoffs, the consumerist orientation of strict products liability is incapable of addressing a bystander’s claim that consumers should not be given the choice in question. According to critics, this inherent limitation of the consumer expectations test merits the wholesale rejection of strict products liability. However, strict products liability complements and does not displace the default rule of negligence liability, which provides the normatively appropriate rule for adjudicating these bystander claims. By clearly demarcating the role of consumer-choice doctrines, bystander injuries help to establish the important boundary between strict products liability and negligence liability.

By contrast, the negligence-based framework of the Restatement (Third) of Torts: Products Liability erases the differences between consumers and bystanders, yielding a normatively confused liability inquiry that erroneously specifies the conditions under which consumer-choice doctrines should limit liability. Rather than providing a reason to reject the consumer expectations...
test, bystander injuries help show why the consumerist orientation of strict products liability makes it a normatively distinct body of tort law that the Third Restatement mistakenly lumps together with ordinary negligence liability.

INTRODUCTION

The development of strict products liability has almost exclusively centered on consumers—the purchasers and users of products. This consumerist orientation is a consequence of the tort version of the implied warranty, which is the primary doctrinal rationale for the widely adopted rule of strict products liability in Section 402A of the Restatement (Second) of Torts.\(^1\) Whereas the contractual version of the implied warranty is based “on supposedly informed assent” of the contracting parties,\(^2\) the tort version is formulated to protect the safety expectations of consumers who do not have the requisite information for adequately protecting their interests by contracting.\(^3\) A liability rule that protects consumer expectations applies awkwardly to someone who does not purchase or use the product and typically gives it no consideration whatsoever—a bystander. The Second Restatement accordingly “expresses no opinion” on whether strict products liability applies “to harm to persons other than users or consumers.”\(^4\)

After courts adopted strict products liability, their “subsequent decisions have almost unanimously allowed recovery to foreseeable bystanders, including rescuers, for their injuries caused by defective products.”\(^5\) Courts had already held that the tort version of the implied warranty is not limited by the requirement of privity,\(^6\) and “the same precautions required to protect the buyer or user would generally do the same for the bystander.”\(^7\) Consequently, the “prevailing reason for the extension [was] the feeling that there is no essential difference between the injured user or consumer and the

---

1. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (AM. L. INST. 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,” as long as the court also recognizes “that the ‘warranty’ is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.”); see also id. (observing that “warranty in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach”); Commonwealth v. Johnson Insulation, 682 N.E.2d 1323, 1326 (Mass. 1997) (recognizing that the rule of strict products liability under the implied warranty “without most contractually based defenses” is “congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A”).


5. DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY, § 5:5 at 393–94 (3d ed. 2015).


7. Giberson v. Ford Motor Co., 504 S.W.2d 8, 12 (Mo. 1974).
injured bystander.”

By relying on this assumption, courts and commentators could focus exclusively on consumers to develop a framework for strict products liability without delving into the implications of extending its application to bystanders.

Bystanders subsequently factored into the ongoing debate about the competing merits of the consumer expectations and risk-utility tests for determining defects in product designs and warnings. In a controversial move that most courts so far have rejected, the Restatement (Third) of Torts jettisoned the consumer expectations framework of the Second Restatement in favor of a negligence-oriented liability regime based on the risk-utility test. Critics of the consumer expectations test argue that it can treat bystanders inequitably, whereas the risk-utility test in the Third Restatement “levels this playing field” by obligating “manufacturers to implement reasonably available safety features with regard to all foreseeable injured persons.”

This relative neglect of bystanders within products liability is reflected in the extensive scholarship of Professor Aaron Twerski—the rightly celebrated honoree of this symposium. In addition to serving as co-Reporter for the products liability provisions in the Third Restatement, Professor Twerski has authored numerous articles on products liability and tort law more broadly. Within this substantial body of scholarship, Twerski discusses bystanders in fourteen publications, many of which do not implicate products liability. Among those that do, none analyze extensively the role of bystanders within products liability. Some simply observe that courts had extended strict products liability to bystanders in the manner described above. Other discussions underscore another point mentioned above, highlighting the challenge of accommodating bystanders within the consumer expectations test. One related arresting observation flags a

---

8. *Id.* at 11.

9. For extensive discussion and defense of the judicial rejection of the Third Restatement’s framework for products liability, see Mark A. Geistfeld, *Strict Products Liability 2.0: The Triumph of Judicial Reasoning Over Mainstream Tort Theory*, 14 J. TORT L. 405 (2021) [hereinafter *Strict Products Liability 2.0*].


11. This is the result of a Westlaw search within the Journals and Secondary Sources database using the terms “atwerski” & “bystander.”


substantive problem, referencing a set of puzzling cases in which courts have applied the consumer expectations test to deny bystander claims “through operation of the patent danger rule” despite bystanders being “incapable of assuming risks” as a matter of law. These relatively limited discussions of bystanders within Twerski’s vast body of impressive scholarship align with the widely held assumption that bystanders do not merit much attention within the context of products liability, aside from the problems they pose for the consumer expectations test.

Bystander injuries are much more important than is commonly recognized; one must focus on them to adequately identify the conditions under which consumer-choice doctrines properly limit tort liability. Because the varied rules of strict products liability are designed to protect consumer expectations, recovery is barred when consumers make informed risk-utility choices concerning a product attribute and consequently do not have frustrated expectations about how the product will perform in this regard. The resultant consumerist version of the assumed-risk rule bars recovery for bystanders who do not voluntarily consent to the risk exposure. This limitation of liability is problematic only when the product choice pits the interests of consumers against bystanders, with consumers protecting themselves from injury by selecting products designed to shift the risk onto bystanders. In cases involving these risk-risk tradeoffs, the consumerist orientation of strict products liability is incapable of addressing a bystander’s claim that consumers should not be given the choice in question. However, strict products liability complements and does not displace the default rule of negligence liability, which provides the normatively appropriate rule for adjudicating these bystander claims. By clearly demarcating the role of consumer-choice doctrines, bystander injuries help to establish the important boundary between strict products liability and negligence liability.

By contrast, the negligence-based rules in the Restatement (Third) of Torts do not adequately distinguish between consumers and bystanders, yielding a normatively confused inquiry that fails to identify the proper circumstances under which consumer-choice doctrines should limit liability. Rather than providing a reason to reject strict products liability, bystander
injuries help to show why the consumerist orientation of strict products liability makes it a normatively distinct body of tort law that the Third Restatement mistakenly lumps together with ordinary negligence liability.

This argument is structured into five distinct parts, each of which analyzes the extension of strict products liability to bystanders and highlights different factors that come into play when courts consider such cases. Part I briefly describes the case law in which courts have extended strict products liability to bystanders based on the assumption that “the same precautions required to protect the buyer or user would generally do the same for the bystander.”

Part II then provides examples of consumer choices regarding motor vehicles that unduly privilege consumer safety at the expense of bystanders. Part III shows why the consumerist orientation of strict products liability inherently prevents bystanders from recovery based on the claim that consumers should not be permitted to make such an unreasonable choice. Part IV then explains why negligence liability supplies the normatively appropriate inquiry for addressing this category of bystander claims. Part V concludes by arguing that the two normatively distinct regimes of negligence and strict products liability provide greater doctrinal clarity as compared to the negligence-based framework housed within the Restatement (Third) of Torts. The reasoning is straightforward: Having erased all differences between consumers and bystanders, the Third Restatement is unable to identify the appropriate conditions under which consumer-choice doctrines ought to limit tort liability. To properly understand the law of products liability, one must recognize the unique roles of bystanders within both negligence and strict products liability.

I. THE EXTENSION OF STRICT PRODUCTS LIABILITY TO ENCOMPASS BYSTANDERS

When the American Law Institute adopted the rule of strict products liability in Section 402A of the Restatement (Second) of Torts, it did so without the case law support needed to extend the rule to bystanders:

Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers. . . . Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers’ pressure, and there is not the same demand for the protection of casual strangers. The Institute

expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.17

In one of the earliest cases to address whether bystanders could recover under strict products liability, the California Supreme Court allowed a bystander to recover damages from the manufacturer of an automobile equipped with a defective drive shaft, which caused the vehicle to crash into an oncoming automobile, driven by the plaintiff.18 The court observed that “[a]n automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers.”19 Because this defect posed a foreseeable threat to both consumers and bystanders, the court—like others that followed—concluded that there is no fundamental difference between the two groups, and so strict products liability should be extended to bystanders: “The public policy which protects the driver and passenger of the car should also protect the bystander. . . .”20

The rationale for this conclusion is implicit within the rule of strict products liability, which defines a “consumer” as including both the buyer and other users of the product.21 One who buys a product frequently contemplates that it will be used by others, such as family members and friends. In making the purchase decision, the buyer presumably considers the interests of these other users. The shared interests of the buyer and other users coincide for purposes of the purchasing decision, yielding a unitary conception of the consumer for purposes of the tort duty.22 So, too, consumers often make safety decisions that adequately account for bystander interests. For instance, consumers naturally take into account product risks that foreseeably threaten injury to family members or friends who are not using the product. In making decisions regarding product safety, consumers presumably give equal consideration to the welfare of these bystanders. These kinds of safety decisions explain why the “prevailing reason” courts have relied upon in extending strict products liability to bystanders is based on the “feeling that there is no essential difference between the injured user or consumer and the injured bystander.”23

As one court explained in a case of this type:

17. RESTATEMENT (SECOND) OF TORTS § 402A cmt. o (AM. L. INST. 1965).
19. Id. at 89.
20. Id.
21. RESTATEMENT (SECOND) OF TORTS § 402A cmt. l (AM. L. INST. 1965) (“It is not . . . necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser.”).
22. For a more extensive elaboration of this point, see GEISTFELD, supra note 3, at 42–43.
A user or consumer’s expectations regarding a product will often include safety expectations relating to bystanders. That is, users and consumers do not just have expectations regarding their own safety; they expect that a product will be reasonably safe for bystanders as well. Juries can certainly take this into account in their deliberations and evaluation of whether a product is unreasonably dangerous.\(^\text{24}\)

Having concluded that the interests of bystanders adequately factor into consumer decisions about product safety, the court decided that the consumer expectations test for determining product defects does not “impermissibly delegate[] the duty to make a product safe to the user or consumer.”\(^\text{25}\)

This formulation of the liability rule assumes the consumer’s safety decision always adequately accounts for the well-being of bystanders, whether they are family members, friends, or even strangers. The court defended this assumption on the ground that “[i]t is difficult to conceive of a situation where a product is dangerous to a bystander, yet poses no danger to a user or consumer.”\(^\text{26}\) In choosing to reduce such a product risk, the consumer’s safety decision will have the incidental effect of protecting bystanders, thereby eliminating any essential difference between the two parties—the same conclusion courts had previously reached in justifying the extension of strict products liability to protect bystanders.

II. CONFLICTS BETWEEN CONSUMERS AND BYSTANDERS

What if a product can be designed in a manner that imposes a risk of injury either on consumers or instead on bystanders, a risk-risk tradeoff that makes the two parties essentially different for purposes of the safety decision? Would the consumer expectations test for evaluating the product design impermissibly delegate the safety decision to the consumer, resulting in a product design that is safe for consumers but unreasonably dangerous for bystanders? Contrary to what courts have assumed, this type of safety decision is not fanciful for reasons made clear by motor vehicle crashes.

In a typical automobile accident, the product user (driver) injures someone else who is not using the product—a bystander, such as an occupant in another motor vehicle, a pedestrian, or a bicyclist on the roadway. Because these types of crashes are so common, issues involving motor vehicle safety usefully illustrate the conflicts that can arise between consumers and bystanders.

First, consider the typical weight of a motor vehicle. Recently, commercial haulers of newly manufactured automobiles lobbied Congress to pass a bill that would increase the tonnage of vehicles they can legally

\(^{24}\) Horst v. Deere & Co., 769 N.W.2d 536, 553 (Wis. 2009) (discussing the issue of defective design for case in which a father was riding a lawnmower in reverse and accidentally ran over his son who was playing in the yard).

\(^{25}\) Id.

\(^{26}\) Id. at 552.
transport on each journey. The impetus for reform stems from increasing consumer demand for heavier motor vehicles. Until 2015, sedans outsold sport utility vehicles (SUVs) in the national market. Since then, consumer demand has unwaveringly favored SUVs. By 2019, SUVs “made up 47.4 percent of U.S. sales in 2019 with sedans at 22.1 percent.” According to auto haulers, the shift to heavier vehicles justifies an increase in the legally allowable tonnage they can transport on public roads despite the consequences for the physical integrity of both the roadways and of those who use them.

The basic laws of physics dictate that as a vehicle’s weight increases, so does the potential lethality of a crash. “More mass means more energy in a crash, and it means more time to bring the vehicle to a stop.” The increased weight of a vehicle accordingly increases the likelihood of any type of crash (due to the added difficulty of stopping the vehicle) while also increasing the severity of collisions (due to the greater energy involved in the impact). Statistical data confirm the safety implications of these physical laws: “Over 4,700 people died in heavy truck collisions in the U.S. in 2021, around 10 percent of all road deaths.”

Largely motivated by the desire to protect themselves from the risk of being injured in a crash with an oncoming vehicle, consumers increasingly opt to purchase SUVs. But when “drivers shift from cars to light trucks or SUVs, each crash involving fatalities of light-truck or SUV occupants that is prevented comes at a cost of at least 4.3 additional crashes that involve deaths of car occupants, pedestrians, bicyclists, or motorcyclists.” In 2003, while justifying federal regulatory action to address this safety problem, the head of the National Highway Traffic Safety Administration summed up the nature of these consumer choices: “The theory that I’m going to protect myself and my family even if it costs other people’s lives has been the operative incentive for the design of these vehicles, and that’s just wrong.”

The ongoing shift towards SUVs and other heavy vehicles fully illustrates how consumers can choose product designs that protect themselves at the expense of bystanders, but the safety problem is not limited to the weight of motor vehicles. The federal government published a study in 1999

29. Id.
30. Zipper, supra note 27 (quoting Kristin Poland, the deputy director of the National Transportation Safety Board’s Office of Highway Safety).
31. Id.
concluding that SUVs were designed in a manner that caused nearly 1,000 “unnecessary deaths a year in other vehicles.” 34 In crashes involving sedans, the design of these “SUVs impose excessive collision damage because the height differential creates a mismatch between their structures and the protective structures of vehicles with lower ride-heights.” 35 This design mismatch prioritizes the safety of the driver and occupants of the more dominant vehicle over those in the smaller overridden vehicle.

Motor vehicle crashes often pit the safety interests of consumers against those of bystanders—an ongoing problem that could be perpetuated further by the advent of autonomous vehicles. The process of “teaching” an autonomous vehicle’s operating system how to drive requires programmers to run the software through myriad traffic simulations and specify the “correct action” or desired outcome for each situation. 36 The machine-learning algorithm in the operating system then employs statistical analysis to determine the optimal course of action to achieve the desired outcomes. 37 What constitutes the “correct action” for situations in which the autonomous vehicle will inevitably crash and could injure either passengers (consumers) or other road users (bystanders)? How should the vehicle’s operating system be instructed to execute actions that can protect one party at the expense of another?

Not surprisingly, this issue has attracted a great deal of public attention.

Never in the history of humanity have we allowed a machine to autonomously decide who should live and who should die, in a fraction of a second, without real-time supervision. We are going to cross that bridge any time now, and it will not happen in a distant theatre of military operations; it will happen in that most mundane aspect of our lives, everyday transportation. Before we allow our cars to make ethical decisions, we need to have a global conversation to express our preferences to the companies that will design moral algorithms, and to the policymakers that will regulate them. 38

Discussions about this safety decision are commonly framed in terms of the moral dilemma known as the “trolley problem.” 39 The dilemma revolves

---


36. For an accessible description of how the operating system of an autonomous vehicle is trained on machine learning that employs statistical analysis, see generally Hod Lipson & Melba Kurman, Driverless: Intelligent Cars and the Road Ahead (2016).

37. Id.


around whether an individual should intervene to prevent a runaway trolley car from crashing into a group of people when doing so would cause the certain death of just one person.40 The same dilemma confronts those who program or design the operating system of an autonomous vehicle. How should they define the “correct action” for situations in which the operating system must choose between injuring occupants of the vehicle or instead injuring bystanders?

A study involving millions of people from 233 countries around the world found the strongest preferences for safety decisions that spare the most lives in a crash, even if doing so kills the vehicle’s occupants.41 In a similar vein, a separate study arrived at comparable findings: Participants approved of designs that would sacrifice the occupants of an autonomous vehicle to save others.42 However, these participants also indicated a reluctance to ride in such vehicles and a reduced willingness to purchase one as a result.43 Individuals apparently have widely shared beliefs about the ethically correct decision in autonomous vehicle scenarios. Yet, if given the choice, many, if not most, will demand autonomous vehicles that favor their own protection over that of strangers.

To the extent courts have considered this matter, their conclusion that “there is no essential difference between the injured user or consumer and the injured bystander”44 is belied by the bevy of motor vehicle safety decisions that pit the interests of consumers against those of bystanders. To fully understand how strict products liability applies to bystanders, we must consider cases in which consumers choose their own safety over the lives and limbs of others.

III. THE INHERENT LIMITATION OF STRICT PRODUCTS LIABILITY IN BYSTANDER CASES

For cases in which the interests of consumers and bystanders conflict, courts have used consumer-choice doctrines to dismiss bystander claims based on strict products liability. The Section 402A rule of strict products

40. The original formulation of this problem involved the driver of the trolley, whose role is fully analogous to the driver of an autonomous vehicle (the operating system). See Philippa Foot, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (1978). The trolley problem has since been reformulated such that it involves a more difficult question of whether a bystander should intervene to prevent the trolley from crashing into five workers by triggering a switch to redirect the trolley onto a different track that would surely kill one worker instead. See Judith Jarvis Thomson, The Trolley Problem, 94 Yale L.J. 1395, 1397–99 (1985). This version of the trolley problem is not implicated by the programming of an autonomous vehicle because those who code the operating system create the risk and are effectively drivers rather than mere bystanders.
41. Awad et al., supra note 38, at 59–60 (also finding strong preferences for saving humans over animals and saving the young over the elderly).
43. Id.
44. Giberson v. Ford Motor Co., 504 S.W.2d 8, 11 (Mo. 1974).
liability applies only to defective products that are also “unreasonably
dangerous” or more dangerous than the ordinary consumer would expect
based on ordinary knowledge common to the community. This
“unreasonably dangerous” requirement serves as the element of duty within
the tort claim, asking whether the ordinary consumer faces an informational
contracting problem that justifies the tort duty. By implication, when the
ordinary consumer does make an informed risk-utility choice, the associated
product attribute is not “unreasonably dangerous,” thereby eliminating the
manufacturer’s tort duty with respect to that particular risk-utility decision.
Strict products liability formulates duty in a manner that forecloses liability
in cases of informed consumer choice.

According to William Prosser, the Reporter for the Second Restatement,
the “unreasonably dangerous” requirement in Section 402A was
“undoubtedly” added to preclude liability based solely on a product’s
inherent dangers, which he illustrated with automobiles, butter, drugs, and
whiskey. As the California Supreme Court subsequently observed,
 “[p]resumably such dangers are squarely within the contemplation of the
ordinary consumer.”

A plaintiff, for example, cannot establish liability by relying on the
inherent risk and utility of a microbus to prove that a standard passenger
vehicle is a reasonable alternative design. Both types of vehicles were
commercially available when the microbus that injured the plaintiff was
purchased. In selecting the microbus over an ordinary sedan, the ordinary
consumer could make an informed risk-utility choice. Consumers know the
utility they would derive by using one type of vehicle rather than the other.
By relying on common knowledge of the inherent dangers and any product
warnings of the remaining risks for each of the two categories, consumers
can adequately compare the risk characteristics of microbuses and ordinary
sedans. Having chosen the microbus, ordinary consumers possessing
ordinary knowledge common to the community do not expect the vehicle to
perform like a standard passenger vehicle they decided not to purchase. This
attribute of the product design is not “unreasonably dangerous,” thereby
eliminating the tort duty and foreclosing a plaintiff from recovering on the
ground that the microbus is defectively designed because a standard
passenger vehicle is the reasonable alternative.

45. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1965).
46. See Geistfeld, supra note 3, at 45–52; see also supra notes 2–3 and accompanying text
(explaining that the tort duty is formulated to protect the safety expectations of imperfectly informed
consumers).
47. William L. Prosser, Strict Liability to the Consumer in California, 18 HASTINGS L. J. 9, 23
(1966).
50. See, e.g., Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1180 (9th Cir. 1997) (holding as a
matter of law that a pickup truck need not be designed to incorporate protective seats and “occupant
This limitation of liability underscores the importance of informed consumer choice within products liability. The tort duty protects uninformed consumers by obligating sellers to provide the amount of product safety that consumers would choose if they were well-informed of the relevant risk-utility factors.51 Consequently, when the ordinary consumer can make an informed risk-utility choice (microbus instead of a standard passenger vehicle), the rationale for the duty prevents a plaintiff from establishing liability on the ground that the manufacturer was obligated to make the identical risk-utility decision in a contrary manner (standard passenger vehicle instead of a microbus). In denying such claims of categorical liability, courts recognize that they are protecting consumer choice: “Consumers are entitled to consider the risks and benefits of different designs and choose among them.”52 Deeming an entire category (of microbuses) inherently defective would unjustifiably limit informed consumer choice and be tantamount to a “judicial ban on the product.”53

The “unreasonably dangerous” requirement bars recovery for the same reasons the patent-defect rule forecloses liability under the tort version of the implied warranty.54 Neither doctrine limits liability merely because a risk is patently obvious—knowledge of danger or risk is substantively different from knowledge of defect, which requires knowledge of both the risk and the cost or disutility of eliminating that risk by redesigning the product. Instead, both the “unreasonably dangerous” requirement and the patent-defect rule negate the tort duty only when the ordinary consumer can make an informed risk-utility choice identical to the one embodied in the plaintiff’s alleged defect.55

Both doctrines accordingly apply the tort duty to the safety decisions made by uninformed consumers, including those who were aware of the risk but did not know it could be eliminated by a reasonable redesign of the product. So, too, both doctrines also negate the duty and bar recovery when consumers have made informed safety decisions, such as when they knowingly chose and used a product with a known defect when a non-defective version was commercially available. By formulating the tort duty in this manner, the “unreasonably dangerous” requirement in strict products

---

51. See generally Mark A. Geistfeld, The Value of Consumer Choice in Products Liability, 74 BROOK. L. REV. 781 (2009) (demonstrating why the tort duty addressing the safety problems created by uninformed consumer choice requires the amount of safety that would be chosen by consumers if they were fully informed).
54. See GEISTFELD, supra note 3, at 57–64.
55. See id.
liability restates the patent-defect rule and helps to instantiate the value of informed consumer choice within this body of tort law.

For these same reasons, the “unreasonably dangerous” requirement can bar recovery when applied to bystanders who obviously did not participate in any product choices or assume the associated risks. For instance, in the first reported case involving the allegation that the design of an SUV created an unreasonable override risk for occupants of other vehicles, the court affirmed the dismissal of the plaintiff’s claim because the “law does not impose an obligation on automobile manufacturers to make homogeneous vehicles.”

Instead, it allows for a diverse range of designs—such as ordinary sedans, microbuses, and SUVs—each catering to the specific demands of consumers who prefer the distinct and “unique features” of each type of vehicle.

Even when the tort duty exists, the liability inquiry is still framed exclusively in terms of consumer interests. For example, in a lawsuit filed against the manufacturer of the ammonium nitrate fertilizer used by terrorists in the horrific 1995 bombing of a federal building in Oklahoma City, Oklahoma, the plaintiffs alleged that the fertilizer was defectively designed because it did not contain an inexpensive chemical agent that would have neutralized the fertilizer’s explosive properties. The ordinary consumer with ordinary knowledge in the community would not know about this safety problem, thereby establishing duty. Nevertheless, the court summarily dismissed the plaintiffs’ claim, holding that they could not prove the fertilizer “was less safe than would be expected by a farmer.” After all, the ordinary consumer who purchases fertilizer for agricultural purposes would not reasonably expect to be protected from the risk that terrorists might use it to blow up public buildings. As for the terrorists, the fertilizer performed just as they expected it to, leading one of the judges in the case to observe that, under the circumstances, the consumer expectations test “just does not make sense.”

Although this problem inheres within the consumer expectations test, courts have arrived at the same basic outcome when applying the risk-utility test. In one case, the plaintiffs sought recovery for the numerous individuals badly wounded or killed by the “Black Talon” hollow-point bullets Colin Ferguson used during a shooting rampage on the Long Island Railroad. Upon impact, a hollow-point bullet creates razor-sharp edges at a ninety-degree angle to the bullet, substantially increasing its wounding power. The

57. Id.
58. Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613, 624 (10th Cir. 1998).
59. Id.
plaintiffs claimed the design of the hollow-point bullet was defective, with the alleged reasonable alternative design being an “ordinary” bullet. In summarily dismissing these claims, the federal appellate court concluded that “[t]here is no reason to search for an alternative safer design where the product’s sole utility is to kill and maim.”62 In this view, the utility of killing and maiming is not diminished by the risk that the victims will be innocent bystanders.

In dissent, Judge Guido Calabresi argued that the design of the hollow-point bullets, when compared to ordinary bullets, could be defective for having a low social utility.63 He posited that this reduced social utility could be outweighed by the great danger the hollow-point bullets pose for others, particularly when compared to the risks associated with ordinary bullets.64 As Calabresi’s analysis makes clear, the plaintiffs were essentially asserting a claim of categorical liability based on a comparison of the inherent utilities and risks of two different product categories: hollow-point bullets and ordinary bullets. In dismissing the plaintiffs’ claim, the majority had accordingly barred claims of categorical liability as a matter of law—the same ruling courts made in the aforementioned cases involving microbuses and chemical fertilizer. In his dissenting opinion, however, Calabresi never argued that the majority’s ruling had wrongly invoked a consumer-choice doctrine to limit liability in a case involving bystanders who were essentially arguing that consumers should not be given such a choice.

This same doctrine is poised to shield the manufacturers of autonomous vehicles from strict products liability for designing their operating systems to protect passengers at the undue expense of bystanders. So long as the manufacturers provide an adequate warning about the tradeoff, consumers presumably will purchase this version or design of the product precisely because it protects them instead of others. The ordinary consumer, in making such a choice, will have conducted an informed risk-utility assessment (always protect occupants at the expense of bystanders) identical to the risk-utility decision implicated by the allegation of defective design (occupants should not always be protected at the expense of bystanders). This informed consumer choice means that the design of the operating system would not be “unreasonably dangerous” for purposes of strict products liability, thereby negating the manufacturer’s duty with respect to this particular risk-utility decision and barring bystanders from establishing liability on the ground that the operating system is defective because it overly protects consumers at the undue expense of bystanders.

Although the problem of bystander injuries suggests otherwise, strict products liability is limited by consumer-choice doctrines like the

62. Id. at 155.
63. Id. at 173–74 (Calabresi, J., dissenting).
64. Id.
“unreasonably dangerous” requirement for good reasons. The varied doctrines of strict products liability account for the broader setting in which consumers and manufacturers interact via a chain of contracts extending from the manufacturer through the various sellers in the supply chain and ultimately to the consumer. Because the liability rules function within a contractual context, the tort duty is properly limited to cases in which uninformed consumers cannot adequately safeguard their interests by contracting. This attribute of the tort duty necessarily bars a claim of strict products liability when consumers make informed product choices, even when those choices expose bystanders to excessive risk. Confronted by such a claim, a court would either dismiss it summarily as a form of categorical liability or otherwise conclude that the design did not defy consumer expectations—a limitation of liability that fosters consumer choice across product categories.65

IV. NEGLIGENCE LIABILITY AND THE PROTECTION OF Bystanders

The problem of bystander injuries helps to explain why the rule of strict products liability is formulated to complement, rather than supplant, related negligence rules. Instead of being placed into the chapter dealing with other rules of strict liability, the Section 402A rule of strict products liability in the Second Restatement is

inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here . . . does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.66

When contextualized in this manner, strict products liability does not have to fairly resolve bystander claims across all cases—that task is instead handled by negligence liability.

Section 402A bases strict products liability on the tort version of the implied warranty, thereby obligating manufacturers to produce products that satisfy the safety expectations of the ordinary consumer with adequate information about the risk-utility attributes in question. This formulation is inherently limited to consumer interests, making it inapposite for cases in which the interests of consumers and bystanders conflict. In such instances, tort liability is properly based on the ordinary negligence rule: “An actor whose negligence causes personal injury or physical harm to the property of another can be held liable in tort regardless of whether the negligence occurs in the performance of a contract between the parties.”67 Instead of protecting

---

65. For more extensive discussion, see Geistfeld, supra note 3, at 130–40.
consumer expectations, the negligence duty of reasonable care requires the contracting parties to perform their obligations in a manner that is reasonably safe for individuals who are not party to the transaction.

For example, the negligence rule offers clear guidance on how a manufacturer must design an autonomous vehicle to protect bystanders. As an individual who would be foreseeably threatened by operation of the vehicle, a bystander is encompassed within the manufacturer’s duty to exercise reasonable care in designing the operating system. To satisfy this obligation, the manufacturer must give “impartial consideration” to bystanders, treating their interests no differently from its own in satisfying consumer demand for the product. The negligence rule accordingly obligates the manufacturer to program or teach an autonomous vehicle’s operating system to treat consumers and bystanders equally when determining the correct course of action.

In designing the operating system of an autonomous vehicle, the manufacturer must make decisions regarding the allocation of crash risk between the vehicle’s occupants (consumers) and bystanders. For such a risk-risk tradeoff, the requirement of equal treatment implies that the operating system must instruct the autonomous vehicle to minimize overall harm across both consumers and bystanders. A design that instead always protects occupants at the expense of bystanders would clearly fail the risk-utility test formulated as a rule of negligence law. Tort law requires an “impartial consideration” of consumers and bystanders, thereby rendering irrelevant any private utility that consumers might derive from the unequal treatment of bystanders. The only social value of this design involves its protection of consumers, which, in turn, creates greater and, therefore, unjustifiably high danger for bystanders. By adopting a consumer-centric design, the manufacturer would create an unreasonable risk of harm for bystanders that is subject to ordinary negligence liability, whereas the informed consumer choice about the matter would negate the tort duty under the rule of strict products liability.

By implication, the negligence rule can also function as a form of categorical liability, unlike the rule of strict products liability. For example,

---

68. Restatement (Second) of Torts § 283 cmt. e (Am. L. Inst. 1934) (“The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires not only that the actor give to the respective interests concerned the value which the law attaches to them, but also that he give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.”).

69. The calculus of reasonable care depends on “the value which the law attaches” to the “respective interests” of consumers and bystanders, “free from the natural tendency” of a consumer “to prefer his own interests to those of others.” Id.

70. See supra notes 64-65 and accompanying text.
in the previously discussed case involving the enhanced wounding capabilities of Black Talon hollow-point bullets, Judge Calabresi argued that
the manufacturer could be negligent because “it is certainly possible that a
fact-finder would conclude that any benefit that comes from marketing and
selling bullets with this additional destructive feature to private citizens is
outweighed by their potential for significant harm.”

Although Calabresi was discussing negligence liability, he subsequently explained why these
same facts could permit the plaintiffs to prove that the hollow-point design is
defective under the risk-utility test: “[A]s discussed above, it cannot be said
as a matter of law (especially by a federal court) that the benefits of the Black
Talon outweigh its risks.”

If a jury were to find that hollow-point bullets fail the risk-utility test and are inherently defective no matter how designed, it would be on the ground that the category of ordinary bullets is the reasonable alternative design.

As is true for any other product design, the utility and risk of the Black Talon hollow-point bullets should be assessed in relation to the next best alternative for consumers—ordinary bullets. If hollow-point bullets have a low social utility in comparison to ordinary bullets, and if they also create a high amount of danger as compared to ordinary bullets, then it would follow that any type of hollow-point bullet, irrespective of its specific design, would be defective—ordinary bullets would necessarily be the reasonable alternative in all cases. The category of hollow point bullets would be excessively dangerous or inherently defective and should be driven from the market.

As a matter of strict products liability, by contrast, the design of the Black Talon hollow-point bullet, when considered in relation to an ordinary bullet, is not “unreasonably dangerous” for purposes of Section 402A. Both types of bullets were commercially available. In choosing the Black Talon bullet over an ordinary bullet, the ordinary consumer made an adequately informed risk-utility choice about the matter and did not expect the Black Talon bullet to perform like an ordinary bullet. The Black Talon bullet is not “unreasonably dangerous” in this regard, thereby preventing a plaintiff from establishing liability on the ground that the manufacturer was obligated to make the identical risk-utility decision in a contrary manner (choosing the risk-utility characteristics of the ordinary bullet over a hollow-point bullet). Establishing liability on this basis would render the entire category of hollow-point bullets inherently defective no matter how designed—an unjustifiable limitation of informed consumer choice within the normative framework of strict products liability.

72. Id. at 172–73.
73. See supra notes 51–56 and accompanying text.
In roundly rejecting claims of categorical liability, courts have emphasized the importance of protecting consumer choice while still maintaining that this type of liability might be appropriate in certain cases.\textsuperscript{74} The problem of bystander injuries explains this reasoning. Having ruled that categorical liability is inappropriate in cases involving consumers whose informed choices ought to be respected, courts can still coherently recognize that categorical liability might be appropriate in some cases—those involving bystanders who are essentially claiming that consumers should not be given the choice in question.

The problem of bystander injuries explains why the Section 402A rule of strict products liability complements negligence liability and does not displace it.\textsuperscript{75} Courts can justifiably limit strict products liability with consumer-choice doctrines, given how the complementary negligence rule ensures that bystanders are treated reasonably whenever conflicts arise between the interests of consumers and bystanders.

V. NORMATIVE CONFUSION IN THE THIRD RESTATEMENT

A focus on bystander injuries sheds new light on the liability framework in the \textit{Restatement (Third) of Torts: Products Liability}. It adopts a negligence-based formulation of the risk-utility test, which specifies the normatively appropriate liability inquiry for evaluating product designs that allegedly protect consumers by imposing unreasonable risks on bystanders: “Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence.”\textsuperscript{76} When formulated as a negligence rule, the risk-utility test encompasses the “foreseeable risks of harm” faced by bystanders, thereby obligating manufacturers to consider equally the interests of bystanders and consumers when designing products.\textsuperscript{77} Consequently, as one judge correctly observed, the Third Restatement “takes a more progressive view, and far more realistic approach” for resolving the design-defect claims brought by bystanders when compared to strict products liability.\textsuperscript{78}

By eliminating any differences between bystanders and consumers, the Third Restatement rejects the consumerist orientation of strict products

\textsuperscript{74} Compare Hernandez v. Tokai Corp., 2 S.W.3d 251, 259 (Tex. 1999) (“Consumers are entitled to consider the risks and benefits of different designs and choose among them.”), \textit{with Restatement (Third) of Torts: Prods. Liab.} § 2 cmt. e (Am. L. Inst. 1998) (“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.”).

\textsuperscript{75} See \textit{Restatement (Second) of Torts} § 402A cmt. a (Am. L. Inst. 1965).

\textsuperscript{76} \textit{Restatement (Third) of Torts: Prods. Liab.} § 2 cmt. d (Am. L. Inst. 1998).

\textsuperscript{77} Id.

\textsuperscript{78} Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 54, 60 (3d Cir. 2009).
liability and its reliance on the consumer expectations test: “[C]onsumer expectations do not constitute an independent standard for judging the defectiveness of product designs.” A design that fully satisfies consumer expectations can still be defective under the negligence-based risk-utility test in the Third Restatement.

However, fully incorporating bystanders into the framework of products liability comes at a substantial cost. Product cases are normatively different from ordinary negligence cases. The Third Restatement masks that normative difference by erasing the distinction between bystanders and consumers, resulting in a normatively confused body of liability rules that do not correctly identify the conditions under which consumer-choice doctrines ought to limit liability.

A. NEGLIGENCE, STRICT PRODUCTS LIABILITY, AND THE RISK-UTILITY TEST

According to the Restatement (Third) of Torts, its set of liability rules constitutes “an almost total overhaul of the Restatement (Second) as it concerns the liability of commercial sellers of products.” This new framework has not been adopted by most courts, including those that have otherwise approved particular rules within the Third Restatement. As the Supreme Court of Florida explained in 2015, “various courts have criticized” the “discussion of strict products liability” in the Third Restatement, “emphasizing that it ‘goes beyond the law’ because ‘[r]ather than simply taking a photograph of the law of the field,’ [it] attempts to create a framework for strict products liability.” Like most other courts that have addressed this issue, the Florida court rejected the “new approach” of the Third Restatement because it “is inconsistent with the rationale behind the adoption of strict products liability.”

The Restatement (Second) of Torts Section 402A rule of strict products liability is based on the implied warranty of merchantable quality, a tort doctrine formulated to protect consumer expectations of safe product performance. By rejecting the consumerist orientation of strict products liability, the Third Restatement rejects the warranty rationale rooted in the protection of consumer expectations and replaces it with a negligence rationale that does not distinguish between consumers and bystanders.

The emergence of the risk-utility test for evaluating product designs and warnings would seem to justify the Third Restatement’s reformulation of products liability. Numerous courts have observed that the risk-utility test is
functionally equivalent to the negligence standard of reasonable care. Relying on these cases, the Third Restatement formulates the risk-utility test as a rule of negligence liability that excludes consumer expectations “as an independent standard for judging” the issue of defect. Having largely rejected the consumer expectations framework of the Second Restatement, the Third Restatement also “explicitly abandons the doctrine of ‘strict’ products liability for design and warning defects, which comprise the bulk of products liability litigation.” Instead, the Third Restatement deems strict products liability to be nothing more than a “rhetorical preference” for describing the liability rule, a preference that purportedly “perpetuates confusion” regarding the substantive basis of liability being strict when, in fact, it is a negligence rule.

In rejecting the liability framework of the Third Restatement, courts are effectively adopting the position that the risk-utility test is best justified by the consumerist orientation of the implied warranty rather than by the ordinary tort rule of negligence. To be sure, the risk-utility test is not in Section 402A, but that omission is an artifact of the restated case law and is not an inherent attribute of strict products liability. The risk-utility test can be derived from the implied warranty rationale in Section 402A, justifying the decision of courts to incorporate that test into the framework of strict products liability.

The rule of strict products liability in Section 402A of the Second Restatement restated the case law involving products like contaminated food and exploding soda bottles that did not minimally perform one of their ordinary functions. Such malfunctions frustrate consumer expectations in violation of the implied warranty. By basing liability on this monolithic concept of defect, Section 402A did not need to draw finer distinctions about the more particularized types of defects that might trigger a malfunction, whether of manufacture, construction, or design. The malfunction itself frustrates consumer expectations that the product is minimally capable of performing one of its ordinary functions, subjecting the manufacturer and other commercial distributors of the defective product to strict tort liability.

For the remaining cases in which products do not malfunction, any defects must involve the product design, instructions about safe use, or warnings of inherent dangers. Because these defects are not defined by

---

84. See Owen & Davis, supra note 5, § 5:6, at 412 (“Many courts have pointed to the functional equivalence of strict tort liability and negligence in both warning cases and design cases.”).

85. Restatement (Third) of Torts: Products Liability § 2 cmt. g (Am. L. Inst. 1998) (discussing defective design); see also id. at cmt. d (observing that the risk-utility test relies on the approach that “is also used in administering the traditional reasonableness standard in negligence”).

86. Owen & Davis, supra note 5, § 5:1 at 367.

87. Restatement (Third) of Torts: Products Liability § 1 cmt. a (Am. L. Inst. 1998).

product malfunctions, they are not adequately addressed by the consumer expectations test in the Second Restatement. To solve this problem, most courts incorporated a new liability rule—the risk-utility test—into the framework of strict products liability.\(^9\)

The tort version of the implied warranty shows why courts could incorporate the risk-utility test into strict products liability. The implied warranty requires sellers to provide products that consumers would have purchased or used if they knew the “true character” of the product.\(^10\) Consumers who know a product’s “true character” are well-informed about all the risk-utility attributes relevant to its safe performance. Knowledgeable consumers would choose a product-safety attribute only if it would make them better off as compared to the next best alternative. When wholly defined in terms of consumer interests, the risk-utility test identifies product configurations of this type by requiring manufacturers to include in their products any safety attribute that would reduce risk (and, as a result, injury costs for consumers) by more than it would reduce the utility consumers derive from the product (such as by raising the product’s price or by diminishing its functionality).\(^11\) The ordinary consumer could not reasonably expect more from the product seller, so product designs and warnings that pass the risk-utility test also satisfy consumer expectations and the seller’s related obligation under the tort version of the implied warranty.\(^12\)

Formulated in this manner, the theory of the implied warranty within strict products liability is “one of policy” that “partakes of the nature” of both contract and tort.\(^3\) Its tort duty is rooted in the public policy underpinning contract law—that the common law should legally enforce product contracts in a manner that adequately protects consumer expectations. Contract law, however, assumes the contracting parties are adequately informed, preventing it from adequately protecting the safety expectations of imperfectly informed consumers. In furtherance of the common-law policy seeking to protect the expectations of these consumers, tort law solves the contracting problem by obligating sellers to supply the amount of product safety consumers would demand if they were reasonably well-informed and knew the “true character” of the product.

Hence, the risk-utility test can be derived from the implied warranty; it is not necessarily a form of negligence liability, as many courts and

---

89. See e.g., Barker v. Lull Eng’g Co., 573 P.2d 443, 455–56 (Cal. 1978).
90. William L. Prosser, The Implied Warranty of Merchantable Quality, 27 MINN. L. REV. 117, 128–29 (1943); see also id. at 136–37 (“[A]ny latent condition, such as a pin inside a loaf of bread, which would prevent the purchase it if were known, is enough.”).
91. See Geistfeld, supra note 3, at 52–57.
92. Cf. House v. Armour of Am., Inc., 929 P.2d 340, 344 (Utah 1996) (holding that consumer expectations are satisfied by risks that are “inherent in the product, completely within the cognition of a reasonable user, and incapable of being economically alleviated”).
93. Prosser, supra note 90, at 124 (identifying this theory as informing the implied warranty alongside of the theory of “pure contract” or the alternative “tort theory”).
commentators assume. The risk-utility test, therefore, can either be incorporated into the warranty-based strict products liability framework of the Second Restatement, or it can instead undergird the negligence-based framework of the Third Restatement. Having framed the difference between the two Restatements in this manner, we are now in a position to see why the choice between their liability frameworks hinges significantly on how they treat bystanders in relation to consumers.

**B. Reasons for Treating Bystanders Differently from Consumers**

As we have found, the consumerist orientation of strict products liability and the complementary reasonable-person negligence standard combine to fairly treat bystanders across the normatively different types of product cases—those in which the interests of consumers and bystanders either coincide (strict products liability)\(^4\) or those in which they conflict (negligence liability).\(^5\) By contrast, the negligence-based risk-utility test in the Third Restatement encompasses both consumers and any bystanders who are foreseeably threatened by the product risk in question. Erasing the distinction between consumers and bystanders eliminates the consumerist orientation of the risk-utility test and prevents the Third Restatement from clearly identifying the conditions in which consumer-choice doctrines should defeat tort liability.

Recall that the ordinary consumer’s adequately informed risk-utility choice of one safety option over another negates the associated duty with respect to that particular risk-utility decision.\(^6\) Consumer expectations are not frustrated by the risk-utility performance in question, and thus, the product, in this respect, is not “unreasonably dangerous” for purposes of strict products liability.\(^7\) This independent requirement within the Section 402A rule of strict products liability forecloses liability and renders irrelevant the plaintiff’s claim that the product is defective for failing the risk-utility test.

To be sure, this consumer-choice doctrine unfairly limits liability when the interests of consumers and bystanders conflict. However, the complementary rule of negligence liability fully redresses this unfairness by basing the relevant safety decision on the reasonable-person standard rather than on consumer expectations. If the reasonable person would conclude that consumers should not be given the choice in question because of the

\(^4\) See supra Part I.

\(^5\) See supra Part IV.

\(^6\) See supra notes 45–50 and accompanying text.

\(^7\) Recall that the Section 402A rule of strict products liability applies only to defective products that are also “unreasonably dangerous” or more dangerous than the ordinary consumer would expect based on ordinary knowledge common to the community. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. I (Am. L. Inst. 1965). For more extended discussion of the “unreasonably dangerous” requirement, see supra Part III.
unreasonable danger it poses to bystanders, then the associated consumer-choice doctrine, which limits strict products liability, does not apply to the negligence claim.

By lumping consumers and bystanders together, the Third Restatement is unable to draw the foregoing distinctions. The relevance of consumer choice is confusingly embedded within its requirement that the plaintiff must prove the existing design is defective by identifying a reasonable alternative design that passes the risk-utility test.\(^8\) The varied rules ultimately implicate categorical liability and the associated limitation of liability based on informed consumer choice, but the Third Restatement cannot properly address these issues after having rejected the consumerist orientation of strict products liability.

In making a claim of categorical liability, the plaintiff alleges that the inherent dangers of the product category in relation to its inherent utility render all products within the entire category inherently defective, regardless of their particular design. A finding of categorical liability would drive all these products from the market. In these cases, the Third Restatement endorses the conclusion “generally” reached by courts “that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.”\(^9\) The Third Restatement accordingly requires that for “common and widely distributed products,” the plaintiff must prove a defect of design by identifying a reasonable alternative design within the same category, “even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all.”\(^10\) Of course, plaintiffs who can prove that a design is defective in relation to a reasonable alternative design within the same product category will generally litigate the case on this basis. But if plaintiffs cannot identify such a reasonable alternative design, they cannot recover under the Third Restatement on a claim of categorical liability for “common and widely distributed products.”\(^11\)

Nevertheless, because so many courts still maintain that categorical liability might be appropriate in certain cases,\(^12\) the Third Restatement

\(^8\) Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am. L. Inst. 1998).

\(^9\) Id. at cmt. d.

\(^10\) Id. For example, one court applied the Third Restatement’s rule to an injured consumer’s claim that the entire category of trampolines is defective no matter how designed and concluded that such liability is not appropriate because trampolines are a “common and widely distributed” product. Parish v. Jumpking, Inc., 719 N.W.2d 540, 543–46 (Iowa 2006) (quoting Restatement (Third) of Torts: Prods. Liab. § 2(b) cmt. e).

\(^11\) Parish, 719 N.W.2d at 545.

\(^12\) Restatement (Third) of Torts: Prods. Liab. § 2 cmt. e (Am. L. Inst. 1998) (“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.”).
recognizes that a plaintiff can establish categorical liability for products that are not “common and widely distributed” as long as this product “category” has “low social utility and a high degree of danger.” This formulation of categorical liability does not distinguish between consumers and bystanders and therefore does not limit liability to the appropriate cases of bystander injury—those in which the interests of consumers and bystanders conflict. By failing to recognize that the viability of categorical liability turns on a normative difference between consumers and bystanders, the Third Restatement adopts a wrongly specified rule for reasons the consumerist orientation of strict products liability makes clear.

Under the consumer expectations test, the relevant inquiry asks whether the ordinary consumer made an informed choice based on the same risk-utility factors implicated by the plaintiff’s allegation of defect. This risk-utility inquiry does not require courts to solve the perplexing problem of what constitutes one product “category” as compared to another. When the ordinary consumer makes an adequately informed risk-utility choice, the product, in this respect, is not “unreasonably dangerous” for purposes of strict products liability, thereby foreclosing liability regardless of whether the chosen option comprises a distinct product “category” or whether the product is “commonly and widely distributed.”

In a case involving injured consumers, the fact of informed consumer choice is sufficient to defeat a claim of categorical liability in a manner that the Third Restatement misses entirely. Not only does the Third Restatement unnecessarily complicate the inquiry through its reliance on a vague conception of a product “category,” it permits injured consumers to recover on a claim of categorical liability if the product is not “widely and commonly distributed” and has “low social utility and a high degree of danger.” Indeed, the Third Restatement illustrates its formulation of categorical liability with a product that injures a consumer, fully underscoring its failure to root the doctrine in informed consumer choice.

For reasons the default tort rule of negligence liability makes clear, the rule concerning categorical liability in the Third Restatement is similarly misguided in cases involving bystanders. As illustrated by the SUVs with designs that create an excessive risk of collision damage or autonomous vehicles programmed to protect occupants at the expense of bystanders, a product can be “commonly and widely distributed” and yet be unreasonably

103. Id. cmts. d and e.
104. See In re DePuy Othopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., 888 F.3d 753, 766 (5th Cir. 2018) (recognizing that whether a risk-utility claim of defective design involves categorical liability depends on “thorny questions of identity and definition” of product categories that are “practically impossible to settle in the abstract” outside of “select instances” like a “proposal to add two additional wheels to a motorcycle”).
106. Id. at cmt. e, illus. 5 (using an exploding cigar that caused serious burns to the smoker’s face as an example of a product that could be subject to categorical liability).
dangerous for bystanders.\textsuperscript{107} The Third Restatement rejects categorical
liability in these cases simply because so many consumers purchase and use
these products, effectively allowing informed consumer choice to limit the
rights of bystanders whose safety interests conflict with those of consumers.
The Third Restatement then compounds this error by foreclosing bystanders
from proceeding under a claim of negligence liability rather than strict
products liability.\textsuperscript{108}

The rationale for categorical liability would be transparent if the Third
Restatement recognized the normative distinction between the negligence-
based, reasonable-person formulation of the risk-utility test and the
consumerist version of the risk-utility test derived from the implied warranty
and now enforced as a rule of strict products liability. Strict products liability
is appropriately limited by consumer-choice doctrines, unlike negligence
liability in cases involving a conflict between the interests of consumers and
bystanders. By failing to recognize this difference, the Third Restatement
unnecessarily introduces normative confusion into products liability law that
further extends to other issues dependent on consumer expectations,
including the proper specification of a product malfunction and identification
of the appropriate causal rule applicable to cases of defective product
warnings.\textsuperscript{109}

**CONCLUSION**

Products liability refers to the entire set of legal rules governing a
commercial distributor’s responsibility for product-caused injuries, including
strict products liability, negligence liability, the contractual version of the
implied warranty, its tort counterpart, and other related rules of warranty and
tort law.\textsuperscript{110} Each of these different liability rules addresses a particular type
of problem and accordingly differs in terms of the elements required to
establish a prima facie case. Strict products liability disentangles the tort
version of the implied warranty from its contractual counterpart and provides
a specialized set of tort rules formulated to protect the safety expectations of
consumers who do not have enough information to adequately protect their
interests through contracting. This consumerist orientation protects
bystanders only insofar as their interests coincide with consumers.\textsuperscript{111}
However, the associated limitations of strict products liability stem from its

\textsuperscript{107} See supra Part II.

\textsuperscript{108} See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. \textsection 2 cmt. n (AM. L. INST. 1998)
(“Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on
a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury
under different labels, whether ‘strict liability,’ ‘negligence,’ or ‘implied warranty of
merchantability,’ would generate confusion and may well result in inconsistent verdicts.”).

\textsuperscript{109} See Geistfeld, Strict Products Liability 2.0, supra note 9, at 441–48.

\textsuperscript{110} See BLACK’S LAW DICTIONARY, “Products Liability” (11th ed. 2019).

\textsuperscript{111} See supra Part I.
specialized nature and do not otherwise justify a wholesale rejection of that liability framework, particularly since the complementary negligence rule fairly protects bystanders whose interests conflict with consumers.\footnote{See supra Part IV.}

For example, antitrust law, corporation law, insurance law, and labor law also govern contractual relationships, but it does not follow that the inherent limitations of these specialized fields justify their merger into a more general doctrinal category. Each regulates the free market or private ordering more generally to address a particular type of contracting problem, such as agreements to fix prices or to engage in other anticompetitive practices. Strict products liability is no different, with the contracting problem stemming from the inability of poorly informed consumers to choose reasonably safe products within unregulated product markets. Strict products liability rectifies this market failure by placing on commercial distributors the obligation to provide products that consumers would purchase or use if they were well-informed and knew the “true character” of the product attributes in question. As is true for other specialized doctrines of antitrust law, corporation law, and the like, the narrow focus of strict products liability inherently limits the types of problems it addresses. The limited focus of a specialized body of law does not necessarily justify its merger into a more general category, which, in this instance, involves the wholesale incorporation of strict products liability into negligence liability.

In contrast to the consumerist orientation of strict products liability, the more generalized reasonable-person standard in negligence liability does not distinguish bystanders from consumers. The relevance of consumer choice is masked within this framework, whereas the narrower focus of the implied warranty on consumer interests frames the liability inquiry in the normatively appropriate manner. Situating bystanders within this consumer-oriented inquiry shows why the regime of strict products liability has a decisive analytic advantage over the negligence-based framework of the \textit{Restatement (Third) of Torts} in identifying the conditions under which informed consumer choice should limit tort liability. Rather than posing an intractable problem for the consumer expectations test, bystander injuries help to reveal the normative structure and associated appeal of strict products liability.