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## Products Liability: Why the European Union Doesn't Need the Restatement (Third)

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# NOTES

## Products Liability

### WHY THE EUROPEAN UNION DOESN'T NEED THE RESTATEMENT (THIRD)\*

#### I. INTRODUCTION

In 1999, shortly after completing their work on the Restatement (Third) of Torts: Products Liability (Restatement),<sup>1</sup> Professors Jim Henderson and Aaron Twerski published an article arguing that “recent substantive law developments in Europe, Japan, and elsewhere, taken at face value, suggest that the lessons learned the hard way in the United States have in certain important aspects been lost on the international legal community.”<sup>2</sup> The article focused on what the authors saw as the “potential sources of distraction”<sup>3</sup> that exist in current European<sup>4</sup> and Japanese<sup>5</sup> substantive law, and predicted that “[s]ignificant adjustments will probably be required”<sup>6</sup> before lawyers and judges can “respond to products

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<sup>1</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter RESTATEMENT (THIRD)].

<sup>2</sup> James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L. L.J. 1, 2 (1999).

<sup>3</sup> *Id.* at 12-20.

<sup>4</sup> See Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 [hereinafter EU Directive].

<sup>5</sup> Japanese law is beyond the scope of this Note.

<sup>6</sup> Henderson & Twerski, *supra* note 2, at 2. Interestingly, in the sixteen years between the adoption of the EU Directive and the Commission's most recent survey asking member states and other interested parties about changes they would

liability claims rationally, consistently and fairly.” Professors Henderson and Twerski then suggested that the Restatement could “play a helpful role in making the necessary adjustments.”<sup>8</sup>

This Note seeks to do more than take recent substantive developments in European Union (EU)<sup>9</sup> products liability law “at face value.”<sup>10</sup> Instead, it seeks to delve deeper by focusing on EU products liability law through the lens of recent developments in Germany’s domestic products liability law, particularly since the implementation of the Product Liability Act,<sup>11</sup> whereby German legislators brought their domestic products liability law into compliance with EU law as presented to member states in the form of the Products Liability Directive (EU Directive).<sup>12</sup> Specifically, this Note analyzes how German law defines “defect” and how it assigns liability in products liability suits – two of the “potential sources of distraction”<sup>13</sup> that Professors Henderson and Twerski predicted would necessitate a closer examination of the Restatement before EU products liability law could be fairly and rationally implemented. It argues that, in the area of how defects are defined, substantive developments in German products liability law have been almost identical to the

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like to see made, not one significant change has been made or even seriously considered. In fact, instead of focusing on changing the Directive’s broad definition of “defect” or assigning liability on grounds other than strict liability, the only change that has been seriously considered is extending the statute of limitations for products that are intended for long-term use or consumption. Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(00)893 final at 20-21 [hereinafter Commission Report].

<sup>7</sup> Henderson & Twerski, *supra* note 2, at 3.

<sup>8</sup> *Id.*

<sup>9</sup> On November 1, 1993, with the ratification of the Treaty on the European Union, the European Community (EC), also known as the European Economic Community (EEC), was officially placed under the broader umbrella organization known as the European Union (EU). TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1997 O.J. (C 340) 145, *as amended* by TREATY OF AMSTERDAM, Oct. 2, 1997, O.J. (C 340) 1 (1997). For purposes of consistency, and to avoid confusion, this Note will refer only to the European Union (EU).

<sup>10</sup> Henderson & Twerski, *supra* note 2, at 2.

<sup>11</sup> Gesetz über die Haftung für fehlerhafte Produkte (Produkthaftungsgesetz) v. 15.12.1989 (BGBl. I S.2198) [hereinafter Product Liability Act]. For an excellent English translation of the Product Liability Act, presented alongside the original German text, see WILLIAM C. HOFFMAN & SUSANNE HILL-ARNING, GUIDE TO PRODUCT LIABILITY IN EUROPE 154-61 (1994). Alternatively, see Germany: Law Concerning Liability for Defective Products, 32 I.L.M. 1369 (Sandra N. Hurd & Frances E. Zollers, trans. 1993).

<sup>12</sup> EU Directive, *supra* note 4.

<sup>13</sup> Henderson & Twerski, *supra* note 2, at 12.

developments in the United States, thereby eliminating the need to look to the Restatement for innovative and unique solutions. Additionally, when it comes to assigning liability, this Note argues that while there are obvious similarities in the development of U.S. and German law, German substantive law, in conjunction with German procedure, will prove a more valuable guide than the Restatement. Ultimately, this Note concludes that, because of the strong similarities between the Restatement and German products liability law, and because of the nexus between German substantive law and procedure, German products liability law can provide the Commission<sup>14</sup> with a comprehensive guide that rivals the Restatement should the Commission find it necessary to make any “significant adjustments”<sup>15</sup> to EU products liability law.

In order to better illuminate the similarities and differences between U.S. and German products liability law, this Note initially describes the current state of each country’s substantive law. Part II focuses on the main sources of U.S. and German products liability law. Part III examines how defective products are defined. Part IV explores how liability is assigned. Part V then compares and contrasts the two countries’ approaches to products liability law in light of fundamental procedural differences. Finally, Part VI concludes that at least when it comes to defining defects and assigning liability, German products liability law provides the Commission with as much substantive guidance as the Restatement, and does so with a framework better suited to the civil law tradition of the majority of EU member states.<sup>16</sup>

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<sup>14</sup> The Commission is the European Union’s executive body. As such it is responsible for “implementing the European legislation (directives, regulations, decisions), budget and programmes adopted by Parliament and the Council.” See European Commission, at [http://www.europa.eu.int/institutions/comm/print\\_index\\_en.htm](http://www.europa.eu.int/institutions/comm/print_index_en.htm) (last visited Feb. 2, 2004).

<sup>15</sup> Henderson & Twerski, *supra* note 2, at 2.

<sup>16</sup> While the developments in domestic German law can be confusing because of the dual system through which it has evolved, discussed *infra* Part II.B, substantive German law can rival, or even surpass, the Restatement (Third) as a guide to future changes in EU products liability law. It can provide the Commission with an internal, versus external, solution to any shortcomings it discovers in the EU Directive. The advantages of an internal solution extend to most stages of development. Not only does the basic legal framework exist, but it has been adopted and applied under conditions that are largely similar to those that already exist throughout most of the EU. (Thirteen of the fifteen EU member states have civil law systems, as do the ten candidate countries that are expected to join in June 2004. Ireland and the United Kingdom, with the exception of Scotland, are the only two EU member states with common law systems.). Additionally, there exists an exhaustive collection of scholarly writings by some of the very scholars who will play an integral role in the law’s

## II. SOURCES OF PRODUCTS LIABILITY LAW

One obvious difference between the two legal systems is the fact that the United States has a common law system, while Germany has a civil law system.<sup>17</sup> As such, the primary sources of legal authority in each country are very different. In the United States, attorneys, judges, and scholars generally look to case law as the primary authority on common law issues. In Germany, as in other civil law countries, it is the civil code that carries the most weight.<sup>18</sup> However, although in theory each system gives greater weight to a different source of authority, in practice neither system relies exclusively on a single source. In the United States, scholarly works and treatises are at times cited by courts as sources of authority.<sup>19</sup> Similarly, in Germany, case law can have a dramatic influence on the manner in which the civil code is interpreted and enforced.<sup>20</sup> The remainder of this section discusses the main sources of U.S. and German products liability law, focusing on the historical development of each source.

### A. *Restatement (Third) of Torts: Products Liability*

One series of treatises that have a special place in the U.S. legal system are the Restatements. They are produced by the American Law Institute (ALI), a private organization whose members are prominent legal practitioners, judges and

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development; a number of German judges, who are largely responsible for interpreting EU law on a domestic level, are already familiar with the strengths, weaknesses and minutiae of the existing law. Additionally, although procedural rules in most EU countries would prevent the same thing from happening, the horror with which many Europeans view the huge monetary awards handed down by some U.S. juries would make an internal, more familiar solution more palatable to a broader spectrum of EU citizens.

<sup>17</sup> NIGEL G. FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 3 (3d ed. 2002).

<sup>18</sup> *Id.* at 5-7.

<sup>19</sup> For example, since the first Restatement was published in 1932, Restatements have been cited in 161,486 cases, 929 of which were at the Supreme Court level. See AMERICAN LAW INSTITUTE, 2004 ANNUAL REPORT (2004), available at [http://www.ali.org/ali/AM04\\_07-RestatementCitations04.pdf](http://www.ali.org/ali/AM04_07-RestatementCitations04.pdf).

<sup>20</sup> "The BGB is today enveloped by thick layers of case law which anybody who wishes to apply the law has to be thoroughly familiar with." Reinhard Zimmerman, *An Introduction to German Legal Culture*, in *INTRODUCTION TO GERMAN LAW* 1, 16 (Werner F. Ebke & Matthew W. Finkin eds., 1996). "[U]nusually for a civil law country, [case law] provides the most guidance" in the area of German products liability law. Richard Best, *A Comparison of Civil Liability for Defective Products in the United Kingdom and Germany*, 3 *GERMAN L.J.*, at para. 41 (2002), available at <http://www.germanlawjournal.com/article.php?id=144>.

academics.<sup>21</sup> Organized in 1923, ALI's bylaws state that the organization's purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."<sup>22</sup> ALI does this by adopting and publishing treatises that consist of statements of the "blackletter" law, accompanied by comments and illustrations derived largely from recent developments in case law. These texts are the result of exhaustive analysis and often passionate debate.<sup>23</sup> Because they are sources of secondary authority, they are not binding on common law courts; however, they have unquestioned influence in both resolving ongoing debates and predicting future legal trends within the United States.<sup>24</sup>

In the area of products liability law, the Restatements (Second)<sup>25</sup> and (Third)<sup>26</sup> have monitored and evaluated the

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<sup>21</sup> See American Law Institute, *About The American Law Institute*, at <http://www.ali.org/ali/thisali.htm> (last visited Apr. 8, 2004).

<sup>22</sup> See AMERICAN LAW INSTITUTE, BYLAWS OF THE AMERICAN LAW INSTITUTE (1994), available at <http://www.ali.org/ali/BYLAWS2001.htm>. In Europe, the Vienna-based European Centre of Tort and Insurance Law (ECTIL) is grappling with similar issues and has a similar purpose. Instead of "Restatements," ECTIL's focus is on drafting "Principles of European Tort Law" with the aim of creating a "foundation for discussing a future harmonization of the law of tort in the European Union, above all with respect to a possible codification of European Private Law." See ECTIL, *Introduction*, at para. 3, at <http://www.ectil.org/content/ectilintro2.htm> (last visited Feb. 2, 2004). Additionally, ECTIL intends its "Principles" to "form a stimulus for both academics and practitioners" and possibly even act as "a guide for national legal systems, thereby leading to gradual harmonization." *Id.* In addition to leading European scholars, ECTIL also counts the U.S.-based scholars Dan B. Dobbs and the late Gary T. Schwartz among its members. The most recent volume in the "Principles" series, UNIFICATION OF TORT LAW: STRICT LIABILITY (B.A. Koch & H. Koziol eds., 2002), examines "the common grounds of strict liability in the various legal systems" and "provides the academic and the practitioner with the fundamental issues of strict liability in the countries covered." *Id.* at back cover.

<sup>23</sup> For a more detailed discussion of the Restatement drafting procedures, see American Law Institute, *About the American Law Institute*, at <http://www.ali.org/ali/thisali.htm> (last visited Apr. 8, 2004).

<sup>24</sup> An interesting question, and one without an easy answer, is whether Restatements merely summarize the current state of the law and present it in an easily accessible format, or whether they actually influence the development of the law in a similar manner and to a similar degree as do scholarly writings in civil law countries. While it is difficult to deduce their real impact, because ALI tracks and records the cumulative number of published cases citing various Restatements, it is possible to get a sense of their far-reaching influence. In its 2004 Annual Report, ALI reported that as of March 1, 2004, the Restatement of Torts had been cited in a total of 67,336 cases, 306 of which were at the Supreme Court level. See AMERICAN LAW INSTITUTE, *supra* note 19.

<sup>25</sup> RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter RESTATEMENT (SECOND)].

<sup>26</sup> RESTATEMENT (THIRD), *supra* note 1.

evolution of U.S. case law since the mid-1940s.<sup>27</sup> However, the first case in a series of decisions that eventually eliminated the hurdles posed by negligence and contract law, and lead to the development of what we now call “products liability” law, came down decades earlier. In 1916, Judge Cardozo’s decision in *MacPherson v. Buick Motor Co.*<sup>28</sup> “substantially abolished the privity rule for negligence cases.”<sup>29</sup> While Cardozo’s decision in *MacPherson*<sup>30</sup> greatly reduced the plaintiff’s elemental burden, other hurdles remained. Plaintiffs may have been freed from the privity requirement, but they could still only recover against manufacturers “for negligence, . . . [and] negligence of a manufacturer . . . remained difficult to prove.”<sup>31</sup> To avoid the difficult, if not impossible, task of proving a manufacturer’s negligence, plaintiffs “sometimes sued for breach of express warranty,”<sup>32</sup> which “would have made the manufacturer liable in contract without proof of fault.”<sup>33</sup> Unfortunately, few manufacturers expressly guaranteed that the use of their products would not result in injury.<sup>34</sup> As a result, consumers began to urge “that the sale of goods *implied* a warranty.”<sup>35</sup> Eventually, the Uniform Sales Act and the Uniform Commercial Code both adopted rules that codified an implied warranty of merchantability, thereby relieving plaintiffs of the burden of showing that manufacturers had breached an explicit warranty to produce a reasonably safe product.<sup>36</sup> As a result, plaintiffs could proceed without having to prove fault, which is still a requirement under negligence; however, they were again

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<sup>27</sup> RESTATEMENT (SECOND) OF TORTS § 402A (Cumm. Supp. 2002).

<sup>28</sup> 217 N.Y. 382, 111 N.E. 1050 (1916). The plaintiff in this case was injured when the wheel of his new car collapsed. Because the plaintiff had purchased the car from a retailer, not the manufacturer, he did not have privity with the manufacturer. The privity rule was originally established in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch. Pl. 1842), and, as a result, for over 150 years courts held that “a negligent manufacturer was definitely *not* subject to liability for a defective product when the injured victim was not the person who had purchased the product.” DAN B. DOBBS, *THE LAW OF TORTS* § 353, 973 (2000). Nevertheless, Judge Cardozo rejected this long-standing requirement and permitted the plaintiff to proceed with the suit, reasoning that, if the manufacturer “is negligent, where danger is to be foreseen, a liability will follow.” *MacPherson*, 217 N.Y. at 390, 111 N.E. at 1053.

<sup>29</sup> DOBBS, *supra* note 28, § 353 at 973.

<sup>30</sup> *MacPherson*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>31</sup> DOBBS, *supra* note 28, § 353 at 973.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See UNIF. SALES ACT § 15, U.L.A. app. I, at 8 (1968); U.C.C. § 2-314 (1998).

confronted by a privity requirement that still existed for warranty-based claims.

By the end of the first half of the twentieth century, wide-spread acceptance of the *MacPherson* decision had removed the privity requirement for plaintiffs seeking to bring suits in negligence, but plaintiffs still had to show fault. Similarly, wide-spread acceptance of uniform sales codes had lead to the statutory creation of an implied warranty of merchantability that relieved plaintiffs in contract-based suits of the burden of showing that an express breach of warranty had been violated. Nevertheless, absent an exception, the privity requirement remained. Then, in 1960, the decision in *Henningsen v. Bloomfield Motors, Inc.*<sup>37</sup> ushered in what many now view as a new era of U.S. products liability law. In *Henningsen*, despite the existence of a contractual disclaimer of any implied or express warranties, the court held that “[n]either the absence of privity nor the presence of contractual limitations on the manufacturer’s responsibility would bar the claim.”<sup>38</sup> However, while this marked the beginning of a new, plaintiff-friendly era of products liability law, courts and plaintiffs continued to face the lingering problem of contractual privity, which continued to be a hurdle when a plaintiff brought a breach of warranty suit. Finally, in the 1963 case *Greenman v. Yuba Power Products, Inc.*,<sup>39</sup> Justice Traynor eliminated the privity problem. He held that manufacturers of defective products were strictly liable not as a matter of contract law, but rather as a matter of tort law.<sup>40</sup> Justice Traynor’s use of strict liability in conjunction with defective products quickly caught on and by the mid-1960s was formally incorporated<sup>41</sup> into section 402A of the Restatement (Second).<sup>42</sup>

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<sup>37</sup> 161 A.2d 69 (N.J. 1960). The plaintiff in this case was injured after an accident that occurred when the car’s steering malfunctioned. The car was so badly damaged it was impossible to tell exactly whether “any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident.” *Id.* at 75. The case was brought under both negligence and implied warranty, but “the negligence counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issues of implied warranty of merchantability.” *Id.* at 73.

<sup>38</sup> DOBBS, *supra* note 28, § 353 at 974.

<sup>39</sup> 377 P.2d 897 (Cal. 1963). The plaintiff in this case was seriously injured when a piece of wood he was lathing on one of the defendant’s combination power tools suddenly broke free and struck him in the head. *Id.* at 898.

<sup>40</sup> DOBBS, *supra* note 28, § 353 at 974.

<sup>41</sup> *Id.*

<sup>42</sup> RESTATEMENT (SECOND), *supra* note 25, § 402A.



After over thirty years of intervening case law that at times lead to astronomical damage awards, the Restatement (Third) set forth a much more refined analysis of U.S. products liability law. And it is this Restatement, the accumulation of almost a century's worth of "lessons learned the hard way,"<sup>43</sup> that Professors Henderson and Twerski recommend as the source to which the Commission should look when it considers making substantive changes to EU products liability law.

## B. *Bürgerliches Gesetzbuch / German Civil Code*

Because Germany is a civil law country, statutes are the primary source of law.<sup>44</sup> German law is largely codified in the *Bürgerliches Gesetzbuch* (BGB).<sup>45</sup> The BGB is the "most important source of [German] private law,"<sup>46</sup> and "[m]ountains of literature have been compiled on every detail."<sup>47</sup> One of the sections that has been documented, analyzed, and debated in minute detail is Section 823.<sup>48</sup> The "catch-all provision for tort claims, [and] the leading tort provision in and outside of the products liability field,"<sup>49</sup> Section 823 comprises two paragraphs that at first glance are misleadingly simple.<sup>50</sup> Yet, because they

<sup>43</sup> Henderson & Twerski, *supra* note 2, at 2.

<sup>44</sup> In Germany, the generally accepted hierarchy of written law is the *Grundgesetz* (Basic Law or Constitution); *Bundesgesetze* (federal statutes and codes) of which the *Bürgerliches Gesetzbuch* ("BGB") (Civil Code) is the central codification; *Rechtsverordnungen* (delegated statutory decrees); *Satzungen* (bylaws of federal organs); and, to a limited degree, statutes and regulations at the *Länder* (provincial state) level. FOSTER & SULE, *supra* note 17, at 36.

<sup>45</sup> In an excellent example of the German love of both symbolism and precision, the BGB originally took effect on January 1, 1900. Zimmerman, *supra* note 20, at 6-7. Viewing that day as the beginning of a symbolic new era, the headline of the *Deutsche Juristenzeitung*, a legal newspaper, read "Ein Volk. Ein Reich. Ein Recht." (One People. One Empire. One Law.). *Id.* at 7. On January 1, 2002, a dramatic revision of the BGB, in the form of the Act on the Modernization of the Law of Obligations, took effect. Hans Schulte-Nölke, *The New German Law of Obligations: An Introduction*, at <http://www.iuscomp.org/gla/literature/schulte-noelke.htm> (last visited Jan. 22, 2004). Despite the broad scope of the reforms, many of the basic *Delikt* (tort) provisions, including Section 823, the key section for German tort and products liability law, were left untouched.

<sup>46</sup> HOWARD D. FISHER, *THE GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE* 27 (3d ed. 2002).

<sup>47</sup> Zimmerman, *supra* note 20, at 7.

<sup>48</sup> § 823 BGB. For a comprehensive English-language survey of German tort law, see BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE* (4th ed. 2002).

<sup>49</sup> Manfred Wandt, *German Approaches to Product Liability*, 34 *TEX. INT'L. L.J.* 71, 73 (1999).

<sup>50</sup> The two paragraphs of Section 832 read as:

provide different grounds for assigning liability, Section 823's two paragraphs have led to an intricate system of parallel but not necessarily mutually exclusive remedies.

The first paragraph of Section 823 (Paragraph I) is a general provision that a litigant may invoke when one of the enumerated absolute rights is violated.<sup>51</sup> These absolute rights include one's life, body, health, freedom, property, or other right, the violation of which entitles the injured party to compensation.<sup>52</sup> Section 823's second paragraph (Paragraph II) also entitles an injured party to compensation.<sup>53</sup> However, unlike Paragraph I, it does not include a list of enumerated rights; rather, the right to compensation depends upon the violation of a *Schutzgesetz* (protective law) that has been specifically enacted for the protection of others.<sup>54</sup> As a result of the BGB's distinction between these two very different grounds for assigning liability, German products liability law has a decidedly two-pronged approach.<sup>55</sup>

A person who willfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.

The same obligation attaches to a person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer.

§ 823 BGB, translated in MARKESINIS & UNBERATH, *supra* note 43, at 14.

<sup>51</sup> § 823 I BGB, translated in MARKESINIS & UNBERATH, *supra* note 48, at 14.

<sup>52</sup> *Id.*

<sup>53</sup> § 823 II BGB, translated in MARKESINIS & UNBERATH, *supra* note 48, at 14.

<sup>54</sup> *Id.*

<sup>55</sup> Traditionally, § 823 I BGB has been the leading provision through which German plaintiffs brought tort claims. However, the ever-increasing number of statutes that have been introduced for the protection of others have given new impetus to § 823 II BGB. See, e.g., Product Liability Act, *supra* note 11; Gesetz über den Verkehr mit Arzneimitteln (Arzneimittelgesetz) v. 24.8.1976 (BGBl. I S.2445) in der Fassung der Bekanntmachung v. 19.10.1994 (BGBl. I S.3018), zuletzt geändert durch Ges. v. 25.2.1998 (BGBl. I S.374) [hereinafter Pharmaceutical Products Act]. See also MARKESINIS & UNBERATH, *supra* note 48, at 43.

Calling it a "fatal error," German legal scholars were deriding the two-prong approach as early as 1889.

There thus exist two systems ruled by completely different spirits: a system of the general civil law that contains the 'pure' private law, and a mass of special laws in which a private law, tarnished by and blended with public law, governs . . . . What a fatal abyss opens before us! What a schism between the spirit of the normal administration of justice and the administrative jurisdiction that is being extended further and further! What a . . . danger of stagnation and degeneration of jurisprudence.

ARTHUR TAYLOR VON MEHREN & JAMES RUSSEL GORDLEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 693 (2d ed. 1977) (quoting O. GIERKE, DIE SOCIALE AUFGABE DES PRIVATRECHTS 16-17 (1889)).

Paragraph I was first successfully pressed into use as a provision under which one could seek relief for products liability claims in 1968, when the *Bundesgerichtshof* (Federal Supreme Court), made its landmark decision in the *Fowl Pest Case*.<sup>56</sup> Previously, products liability actions brought under Paragraph I failed because the plaintiff inevitably could not prove the defendant's fault.<sup>57</sup> However, the Court in the *Fowl Pest Case* for the first time reversed the burden of proof, in large part because it could not find an adequate remedy under any of the consumer protection theories scholars had developed using the BGB's contractual and quasi-contractual provisions.<sup>58</sup>

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<sup>56</sup> BGHZ 51, 91 (Hühnerpest) [hereinafter *Fowl Pest Case*]. For an English translation, see MARKESINIS & UNBERATH, *supra* note 48, at 555-64. For an alternative translation, presented side-by-side with the original German text, see RAYMOND YOUNGS, SOURCEBOOK ON GERMAN LAW 439-67 (2d ed. 2002).

The plaintiff in the *Fowl Pest Case*, a chicken farmer, brought suit when fowl pest (Newcastle Disease) broke out on her farm just days after her chickens were inoculated using the defendants' vaccine. As a result, more than 4,000 chickens died and an additional 100 had to be slaughtered. Fowl pest also broke out on three other farms where chickens had been inoculated with vaccine from the same batch. The Court found that the defendants' vaccine manufacturing process lacked adequate assurances for the uniform production of the vaccine and allowed for an unacceptably high possibility of human error. BGHZ 51, 91.

<sup>57</sup> Klaus Vieweg, *The Law of Torts*, in INTRODUCTION TO GERMAN LAW 197, 217 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

<sup>58</sup> BGHZ 51, 91. Before reversing the burden of proof to allow recovery under §823 I BGB, the Court rejected recovery under a variety of theories, including § 278 BGB's contract-based claim of *Drittschadensliquidation* (damage suffered by third persons); the theoretical *Haftung des Warenherstellers* (strict liability for manufacturers without reference to fault); warranty; social contract; an "attempt to derive a producer's liability from the general rule in § 242 BGB"; and, finally, "a special quasi-contractual relation between the manufacturer and user, resting on a statute and developed from the notion of confidence." MARKESINIS & UNBERATH, *supra* note 48, at 555-64.

Standing alone, the Court's dismissal of these other theories in favor of a reversal of the burden of proof to allow recovery under § 823 I BGB was groundbreaking. It was all the more radical because the plaintiff had also brought suit, and had already met the lesser burden of proof, under § 823 II BGB and the Pharmaceutical Products Act, *supra* note 55. Despite this, and in a move that revolutionized German products liability law as much as Justice Traynor's holding in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), the Court also declared that the reversal of the burden of proof that was mandated by the Pharmaceutical Products Act "would . . . also apply if the plaintiff could here base a claim for damages only on § 823 I BGB. In that case also it would be for the defendant to exonerate itself." MARKESINIS & UNBERATH, *supra* note 48, at 561. The Court acknowledged that under § 823 I BGB the plaintiff must normally show not only the causal connection between the harm she suffered and the actions of the defendant, but also the defendant's fault. However, the Court then proceeded with analysis that is very similar to the common-law concept of *res ipsa loquitur*, defined *infra* note 152, whereby it recognized that modern manufacturing methods make it practically impossible for a plaintiff to show at exactly what point the manufacturer was negligent. As a result, the Court concluded that, "if the unknown cause lies within the scope of the producer, it is also within the scope of his risks. In that case it is

Instead of requiring the plaintiff to show that the negligence of the vaccine producers harmed her, the court required the defendant-manufacturers to show that their negligence did not cause the plaintiff's harm.<sup>59</sup> Like the chain of U.S. cases culminating in *Henningsen*<sup>60</sup> and *Greenman*,<sup>61</sup> the *Fowl Pest Case*<sup>62</sup> ushered in a new era of German products liability law. By recognizing the practical impossibility of proving negligence when confronted with modern manufacturing methods, the Court shifted the burden of proof to the party who could best meet that burden, thereby greatly increasing the likelihood that plaintiffs could establish a prima facie case.

Unlike plaintiffs bringing claims under Paragraph I, those who were able to bring claims under Paragraph II benefited from an automatic reversal of the burden of proof as early as 1838.<sup>63</sup> However, as mentioned above, unlike claims brought under Paragraph I, Paragraph II may only be invoked upon the violation of a protective statute. The *Produkthaftungsgesetz* (Product Liability Act)<sup>64</sup> is the protective statute most relevant here. Adopted in 1989 in conjunction

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appropriate and expected of him that the risk of not being able to prove his innocence should lie with him." MARKESINIS & UNBERATH, *supra* note 48, at 562.

<sup>59</sup> BGHZ 51, 91. The Court did not, however, want the decision to be construed as an introduction of strict liability under § 823 I BGB and went on to clarify:

The reversal of the burden of allegation and proof ordered in these provisions does not always proceed from a presumption of fault in the doer of damage. It rests in the main on the thought that the doer is in a better position than the injured party to throw light on the events relevant to the charge of negligence, so that it is just to impose on him the risk of being unable to do so.

MARKESINIS & UNBERATH, *supra* note 48, at 562, 563.

<sup>60</sup> 161 A.2d 69 (N.J. 1960).

<sup>61</sup> 377 P.2d 897 (Cal. 1963).

<sup>62</sup> BGHZ 51, 91.

<sup>63</sup> MARKESINIS & UNBERATH, *supra* note 48, at 724. In the first of what would become an ever-increasing number of protective statutes, section 35 of the 1838 *Preußisches Eisenbahngesetz* (Prussian Railways Act) imposed "strict liability for harm to persons or property 'resulting from carriage on the railway.'" *Id.* In 1978, after a series of evolutionary revisions that include the *Reichshaftpflichtgesetz* (Imperial Insurance Act of 1871), the 1838 statute took its most recent form as the *Haftpflichtgesetz* (Strict Liability Act). *Id.* Intended to protect people from many of the hazards associated with living in a modern, industrial society, today the Strict Liability Act is one of Germany's leading protective statutes. *See id.* at 25.

<sup>64</sup> Product Liability Act, *supra* note 11. The Product Liability Act took effect on January 1, 1990, exactly ninety years after the enactment of the BGB. *Id.* § 19.

Another very important products liability statute under Paragraph II is the Pharmaceutical Products Act, *supra* note 55. Unfortunately, it is an exceedingly complicated and technical piece of legislation and an in-depth analysis is beyond the scope of this Note. However, where it is practical, brief discussions of relevant elements have been integrated into the footnotes.

with the E.U.'s Product Liability Directive,<sup>65</sup> the text of the Product Liability Act "follows [that of] the E.U. Directive very closely."<sup>66</sup>

The protective statutes that provide remedies under Paragraph II generally do not replace or usurp causes of action brought under Paragraph I. For example, domestic versions of the E.U. Directive "take the form of an extension of or a supplement to the individual [country's] product liability rules, . . . so that the [country's] rules remain in force without change."<sup>67</sup> To this end, both the E.U. Directive<sup>68</sup> and the Product Liability Act<sup>69</sup> specifically provide that an injured party's rights under alternative domestic laws are not affected.

Together, Paragraphs I and II of Section 823 are the main sources of German products liability law. And it is from this wellspring – instead of the Restatement – that the Commission can draw when it seeks guidance concerning the future development of E.U. products liability law.

### III. DEFINING PRODUCT DEFECTS

With that background set, this Part will discuss how product defects are defined under the Restatement and the BGB, respectively. The first section will highlight the differences between the Restatement (Third) and its predecessor, the Restatement (Second), while the second section will focus on the differences between Paragraphs I and II of Section 823.

<sup>65</sup> EU Directive, *supra* note 4.

<sup>66</sup> HOFFMAN & HILL-ARNING, *supra* note 11, at 27.

<sup>67</sup> Michael Christiani Havemann, *The EC Directive on Product Liability: Its Background, Aims and System*, in *PRODUCT LIABILITY: PREVENTION, PRACTICE AND PROCESS IN EUROPE AND THE UNITED STATES* 17, 18 (Rudolph Hulsenbek & Dennis Campbell eds., 1989).

<sup>68</sup> EU Directive, *supra* note 4, art. 13. It must be noted, however, that while plaintiffs may bring suit based on multiple grounds, to be successful they must be able to independently establish the elements of each claim. Plaintiffs cannot use the outcome of one claim as the foundation for another. Peter Borer, *Bringt uns die EG-Richtlinie zur Produkthaftung "amerikanische Verhältnisse"?*, in *US AND EEC PRODUCT LIABILITY: ISSUES AND TRENDS* 105, 123 (Roger Zäch ed., 1989). Similarly, the Restatement also specifically provides for the pursuit of alternative grounds for recovery, as long as the grounds for each are independently established. *RESTATEMENT (THIRD)*, *supra* note 1, § 1 cmt. A, § 2 cmt. n.

<sup>69</sup> Product Liability Act, *supra* note 11, § 15(2). The Pharmaceutical Products Act also specifically provides German plaintiffs with an alternative, not exclusive, cause of action. *Pharmaceutical Products Act*, *supra* note 55, § 91. It should be noted, however, that the Product Liability Act cannot be used as an alternative cause of action for pharmaceutical-related claims. *Product Liability Act*, *supra* note 11, § 15(1).

## A. *Restatement (Third) of Torts: Products Liability*

Perhaps the most obvious difference between the Restatement (Third) and its predecessor is the specificity with which the Restatement (Third) defines the concept of a product defect.<sup>70</sup> The Restatement (Second)<sup>71</sup> simply states that liability extends to “[o]ne who sells any product in a defective condition unreasonably dangerous to the user.”<sup>72</sup> By contrast, the Restatement (Third) devotes an entire section, replete with eighteen comments and twenty illustrations, to discussing three specific “categories of product defect”: manufacturing, design, and warning.<sup>73</sup> Each is examined in turn.

### 1. Manufacturing Defects

Manufacturing defects affect individual product units and arise when a “product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”<sup>74</sup> The rule is fairly self-explanatory and, when compared to the depth with which they discussed design and warning defects, the Reporters wasted little ink offering further clarification or illustrations on this point.<sup>75</sup>

<sup>70</sup> Many of the innumerable changes in U.S. products liability law that took place in the thirty-three years between publication of the Restatement (Second) and Restatement (Third) are beyond the scope of this Note. However, the final supplement to the Restatement (Second) and the Reporters’ Notes in the Restatement (Third) provide excellent documentation of the most important cases and commentaries.

<sup>71</sup> RESTATEMENT (SECOND), *supra* note 25.

<sup>72</sup> *Id.* § 402A. It is not until comment g that there is any discussion of what is meant by “[d]efective condition,” and even then, instead of a definition, the reader is simply presented with the language of the rule itself. *Id.* § 402A cmt. g (clarifying that the plaintiff has the burden of proving that “the product was in a defective condition at the time it left the hands” of the manufacturer). Comment h provides some additional clarification by specifying that liability does not extend to injuries arising from the “abnormal handling” of a product that is “safe for normal handling and consumption.” *Id.* § 402A cmt. h. Additionally, comment h recognizes that it is not only harmful ingredients that can make a product defective, but that defects can also arise in the context of packaging, pre-sale deterioration, and the presence of foreign objects. *Id.* § 402A cmt. h (explaining that a “defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to the presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed”).

<sup>73</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 (Categories of Product Defect).

<sup>74</sup> *Id.* § 2(a). For a discussion of the liability-related aspects of manufacturing defects see *infra* Part IV.A.1.

<sup>75</sup> Interestingly, the illustrations that relate specifically to manufacturing defects are based on a fact pattern that is almost identical to the best-known chain of German manufacturing defect cases. The two illustrations that accompany comment c

It should be noted that when the Restatement (Second) was drafted in the early 1960s, U.S. products liability law and the Restatement (Second) focused almost exclusively on manufacturing defects.<sup>76</sup> As a result, the law surrounding this type of defect is fairly settled.<sup>77</sup>

## 2. Design Defects

Design defects affect an entire line of products and arise when “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”<sup>78</sup> The Restatement (Third) distinguishes between manufacturing and design defects by observing that, whereas manufacturing defects arise when an individual product unit fails to meet the manufacturer’s own design specifications, design defects arise when an entire product line “meets the manufacturer’s design specifications but raises the question whether the specifications themselves create unreasonable risks.”<sup>79</sup>

Unlike the law surrounding manufacturing defects, the Restatement (Third) acknowledges that the law surrounding design defects is far from settled.<sup>80</sup> The general requirement that plaintiffs prove the existence of a “reasonable alternative design”<sup>81</sup> has added to the confusion surrounding design defects.

are based on an exploding bottle of Champaign. RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. c, illus. 1 and 2. The leading German cases, known as the “*Soft Drink Bottle Cases*,” are based on glass bottles containing carbonated beverages that suddenly exploded. *See infra* note 100.

<sup>76</sup> *See* RESTATEMENT (SECOND), *supra* note 25, § 402A cmt. b (highlighting the well-established common-law tradition of holding “those engaged in the business of selling food intended for human consumption” liable for supplying “corrupt’ food and drink”); *id.* § 402A cmt. h (focusing on hallmarks of manufacturing defects such as the inclusion of “harmful ingredients, not characteristic of the product itself” and packaging that is “weak, or cracked, or jagged at the edges”); *id.* § 402A cmt. i (providing examples of products that are “unreasonably dangerous,” such as “bad whiskey, containing a dangerous amount of fusel oil,” “tobacco containing something like marijuana,” and “butter contaminated with poisonous fish oil”).

<sup>77</sup> *See generally* RESTATEMENT (THIRD), *supra* note 1, § 2 Reporters’ Note, cmt. c (cataloging case law, statutes and scholarly commentary discussing manufacturing defects).

<sup>78</sup> *Id.* § 2(b).

<sup>79</sup> *Id.* § 2 cmt. d.

<sup>80</sup> *Id.* § 2 Reporters’ Note, cmt. d (acknowledging that the complex array of case law, statutes and scholarly commentary requires a special presentation format for what is, “by far the longest Reporters’ Note to any Comment in this Restatement”).

<sup>81</sup> *Id.* § 2(b).

Additionally, there is a distinct overlap between design and warning defects.<sup>82</sup> These details are discussed in greater detail below, in conjunction with the risk-utility analysis used to establish liability.<sup>83</sup>

### 3. Warning Defects

Although the comments to the Restatement (Second) briefly discuss the necessity of use-specific warnings and instructions,<sup>84</sup> warning defects themselves were not officially defined until the Restatement (Third).<sup>85</sup> That treatise defines instruction or warning defects<sup>86</sup> as those arising when “the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the [manufacturer], and the omission of the instructions or warnings renders the product not reasonably safe.”<sup>87</sup>

According to one of the Reporters’ Notes, the law surrounding the duty to provide warnings is “so widely recognized that extensive citation is unnecessary.”<sup>88</sup> However, the fact that there is no simple formula for enumerating what constitutes effective and adequate instructions and warnings means that a variety of factors come into play when assigning liability.<sup>89</sup> A discussion of these factors can be found below in conjunction with the risk-utility standard by which liability is assigned for warning defects.<sup>90</sup>

<sup>82</sup> For further discussion about the overlap between design and warning defects when assigning liability, see *infra* Part IV.A.2.

<sup>83</sup> See *infra* Part IV.A.2.

<sup>84</sup> RESTATEMENT (SECOND), *supra* note 25, § 402A cmt. h (acknowledging that a manufacturer “may be required to give adequate warning of the danger[s]” that arise from a particular use) and cmt. j (acknowledging, in the context of ingestible products, that a manufacturer may be required to “give directions or warning, on the container, as to its use” in order to prevent a product from being “unreasonably dangerous”).

<sup>85</sup> RESTATEMENT (THIRD), *supra* note 1, § 2(c).

<sup>86</sup> Although this Note discusses them under the general heading of warning defects, the reader should note the distinction between instructions and warnings. According to comment i, “[i]nstructions inform persons how to use and consume products safely” while “[w]arnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.” *Id.* § 2 cmt. i.

<sup>87</sup> *Id.* § 2(c).

<sup>88</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 Reporters’ Note cmt. i.

<sup>89</sup> *Id.* § 2 cmt. i.

<sup>90</sup> See *infra* Part IV.A.2.



## B. *Bürgerliches Gesetzbuch / German Civil Code*

Because of the dual system that has developed as a result of Section 823's two distinct bases for assigning liability, under German law there are two different approaches to defining what constitutes a *Fehler* (defect). First, similar to the approach adopted by the Restatement (Third), under Paragraph I of Section 823 the German courts have developed three different categories of product defects. In contrast, under Paragraph II the definition of a defect depends on the particular statute.<sup>91</sup> The Product Liability Act does not distinguish between different categories of defect; instead, it relies on a context-influenced, expectation-based definition.<sup>92</sup>

### 1. Section 823 I BGB

Unlike the U.S. law, and unusual even in German tort law, products liability cases brought under Paragraph I of Section 823 require the plaintiff to show that the manufacturer breached a *Verkehrssicherungspflicht* (duty of care).<sup>93</sup> This is because unlawful conduct by a manufacturer generally does not directly constitute a violation of one of Paragraph I's enumerated rights, namely, life, body, health, or property.<sup>94</sup> Manufacturers do, however, produce and sell goods, "an activity that is generally capable of causing danger to the public."<sup>95</sup> This potential for causing danger to the general public led to the creation, by both the courts and legal scholars, of a number of duties of care, the breach of which can result in a violation of one of the absolute rights enumerated in Paragraph I. These duties of care generally fall into three main categories: *Fabrikations-, Konstruktions- and Instruktionspflichten* (manufacturing, design, and instruction/warning duties).<sup>96</sup> A

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<sup>91</sup> For a brief discussion of how defects are defined under the Pharmaceutical Products Act, see *infra* note 117.

<sup>92</sup> Product Liability Act, *supra* note 11, § 3.

<sup>93</sup> Vieweg, *supra* note 57, at 218.

<sup>94</sup> *Id.* Generally, no one's rights are violated and no one is injured simply because a manufacturer produces a defective product.

<sup>95</sup> *Id.* It is the combination of a manufacturer producing a defective product and placing that defective product on the market that generally results in the violation of someone's rights.

<sup>96</sup> *Id.* Two additional categories have also been recognized – the *Produktbeobachtungspflicht* (duty to monitor for defects) and the *Rückrufspflicht* (duty to recall). *Id.* Both of these duties can be viewed as extensions of the duty to warn. The duty to monitor requires manufacturers to watch for new or newly-discovered defects

manufacturer becomes liable when, as the result of the breach of one of these duties of care, one of the absolute rights enumerated in Paragraph I is violated. In the twenty-two years between the landmark decision in the *Fowl Pest Case*<sup>97</sup> and the introduction of the Product Liability Act,<sup>98</sup> German courts and legal scholars used these three duties of care as the premises for identifying and developing three distinct categories of defect.<sup>99</sup> Essentially the same three categories as those enumerated in the Restatement (Third), they are discussed individually below.

### a. *Herstellungsfehlern*/Manufacturing Defects

*Herstellungs-* or *Fabrikationsfehlern*, which are essentially manufacturing defects, were the first category of defect recognized by the German courts.<sup>100</sup> They occur when

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based on technological and scientific developments. *Id.* at 221. In addition to monitoring developments, manufacturers are required to warn consumers of the newly discovered potential danger and, if the danger is large enough, manufacturers have a duty to recall the product. *Id.* at 221.

<sup>97</sup> BGHZ 51, 91.

<sup>98</sup> Product Liability Act, *supra* note 11.

<sup>99</sup> Vieweg, *supra* note 57, at 218.

<sup>100</sup> The leading German products liability case, the *Fowl Pest Case*, BGHZ 51, 91, is a manufacturing defect case. However, the best-known series of cases in this area is commonly known as the *Limonadenflaschen-Fälle* (*Soft Drink Bottle Cases*). In one commonly cited case from this series, BGHZ 104, 323, translated in MARKESINIS & UNBERATH, *supra* note 48, at 571-79, the plaintiff was a three-year-old child who was severely injured when a glass bottle, containing a carbonated soft drink and placed on the market by the defendants, exploded near his face. *Mehrwegflaschen* (reusable glass bottles) are very common in Germany. The bottles are made of relatively thick glass and are returned by customers after use. The manufacturer then washes and tests them for defects, after which the bottles are refilled and redistributed for sale. Because the state of technology could not completely eliminate the possibility of bottle explosions, the Court found that there was no design defect. Instead, it recognized the existence of a manufacturing defect and found that the manufacturer had a duty to prevent any individually defective bottles from leaving the factory. The Court also found that this duty extended to ensuring that bottles leaving the factory could withstand normal and foreseeable handling. This duty was breached when the soft drink manufacturer failed to prevent distribution of individual bottles that were either dangerous at the time they were placed into circulation or were unable to withstand the rigors of normal and foreseeable handling. Vieweg, *supra* note 57, at 219.

Another case in this series provides an excellent example of the two-prong approach that has developed as a result of the differences in Section 823's two paragraphs. See BGHZ 129, 353, translated in MARKESINIS & UNBERATH, *supra* note 48, at 584-89. Yet another, NJW 8, 528, discusses the different burdens of proof faced by the plaintiff and defendant-manufacturer and reexamines the conditions under which the burden of proof should be shifted to the manufacturer.

These cases are based on fact patterns that are remarkably similar to the illustrations provided for manufacturing defects in the Restatement (Third). See

individual product units, occasionally referred to as *Ausreißer* (runaways),<sup>101</sup> have a defect that is the result of either human error or some kind of technical defect involving the equipment that is used in the manufacturing process.<sup>102</sup> These defects make the individual product unit less safe than others within the same product line.<sup>103</sup> Because, as in the United States, manufacturing defects were the first category of defect that courts recognized, this is currently a relatively quiet area of German products liability law.<sup>104</sup>

### b. *Konstruktionsfehlern*/Design Defects

Unlike manufacturing defects that affect individual product units, *Konstruktionsfehlern* (design defects) affect an entire product line.<sup>105</sup> The characteristics that define German design defects are almost identical to those presented by the Restatement. Whereas manufacturing defects occur when there is some kind of deviation from the intended design, design defects occur because the design itself is somehow defective. As a result, every product in the line must be considered not "safe for ordinary use."<sup>106</sup>

As in the United States, there is a distinct overlap between design defects and warning defects, discussed below.<sup>107</sup> Because of this overlap it is sometimes possible for manufacturers to limit their liability by using instructions or warnings to limit what can be considered the product's "ordinary use," thereby compensating for what may actually be

RESTATEMENT (THIRD), *supra* note 1, § 2 Reporters' Note, cmt. c, illus. 1 and 2. See also *supra* note 75.

<sup>101</sup> Vieweg, *supra* note 57, at 219.

<sup>102</sup> Günter Schlegelmilch, *Anwendungsfälle des § 823 Abs. 1 BGB*, in *DER HAFTPFLICHTPROZESS* 477, 478 para. 274 (Günter Schlegelmilch ed., 23rd ed. 2001). Defects that are the result of human error are unavoidable. *Id.* It is precisely for this reason that manufacturers have a duty to inspect their products before placing them on the market. *Id.* at 479.

<sup>103</sup> Vieweg, *supra* note 57, at 218.

<sup>104</sup> Wandt, *supra* note 49, at 76. For a discussion of the liability-related aspects of manufacturing defects, see *infra* Part IV.B.1.a.

<sup>105</sup> Vieweg, *supra* note 57, at 218-19. Although the *Fowl Pest Case*, BGHZ 51, 91, addressed only manufacturing defects, the German courts have "extended the new rule to apply also to cases of defective design (see BGHZ 67, 359, 362)." MARKESINIS & UNBERATH, *supra* note 48, at 99. "For interesting illustrations raised by the problem of defective design see: BGH VersR 1960, 1095; VersR 1967, 498; VersR 1972, 559; NJW 1990, 906." *Id.* at 100.

<sup>106</sup> Vieweg, *supra* note 57, at 218. For a discussion of the liability-related aspects of design defects, see *infra* Part IV.B.1.b.

<sup>107</sup> See *infra* Part III.B.1.c.

a design defect.<sup>108</sup> Because design defects are a “newer” field, this is currently a fairly active area of German products liability law.<sup>109</sup>

### c. *Instruktionsfehlern*/Warning Defects

Currently the “fastest evolving field in German products liability law,”<sup>110</sup> *Instruktionsfehlern* (warning/instruction defects) constitute the third main category of defects recognized by the German courts.<sup>111</sup> Consumers have a general duty to “use products as a reasonably prudent person would do under the circumstances.”<sup>112</sup> However, where the “average consumer”<sup>113</sup> cannot be expected to have the knowledge necessary to protect himself from use-related harm, a reciprocal duty exists in the

<sup>108</sup> Vieweg, *supra* note 57, at 218. It must be noted, however, that warnings cannot replace the duty to manufacture nondefective products. Wandt, *supra* note 49, at 49.

<sup>109</sup> Wandt, *supra* note 49, at 76.

<sup>110</sup> *Id.* at 77.

<sup>111</sup> An early case focused on the specificity of the warnings a manufacturer is required to include with a potentially dangerous product. The plaintiff in the case lost her arm after an anaesthetic, which was intended only for intravenous injection, was injected into an artery. The Court held that “[i]t has been recognised for a long time by the practice of the courts that it is the duty of a manufacturer . . . to give an effective warning of specific dangers emanating from a product brought on the market.” BGHZ 59, 172, *translated in* MARKESINIS & UNBERATH, *supra* note 48, at 564-68.

Currently, the best-known series of cases to specifically address warning defects is commonly referred to as the *Kindertee-Fälle* (*Baby Tea Cases*). These cases involve plaintiffs whose baby teeth were seriously damaged as the result of prolonged sucking on sweetened tea that was marketed as suitable for babies and small children. The plaintiffs claimed that the tea, which was sold in small bottles that were “especially designed for continuous sucking” and had been “recommended . . . as a good night drink for children,” lacked adequate warnings about the danger of tooth decay. Vieweg, *supra* note 57, at 221. The earliest cases in this series dealt with the adequacy of warnings about use-related risks and warnings placed next to the instructions for preparation, BGHZ 116, 60, while a later case dealt more specifically with the adequacy of warnings that were visually separate from the instructions for preparation, NJW 48, 1286. Wandt, *supra* note 49, at 77.

The Markesinis treatise contains a translation of one of the more recent *Baby Tea Cases*, but its focus is on the applicability of the statute of limitations where the plaintiff does not know the identity of alternative defendants. See MARKESINIS & UNBERATH, *supra* note 48, at 589-92.

<sup>112</sup> Wandt, *supra* note 49, at 77.

<sup>113</sup> The degree of knowledge imputed to the “average consumer” depends on the “expected sophistication” of that user. In other words, different standards apply to products the manufacturer expects will be used by experts and those expected to be used by children. Wandt, *supra* note 49, at 77. Where the product is intended for use by *Fachleute* (experts), the manufacturer’s duty to warn does not extend to dangers that lie within the scope of their knowledge. Schlegelmilch, *supra* note 102, at 479 para. 277. Additionally, where it can be shown that a particular plaintiff knew of the dangers, breach of the duty to warn is irrelevant. *Id.*

manufacturer.<sup>114</sup> As a result, manufacturers must provide consumers with information and warnings that are "linked to the intended use of the product."<sup>115</sup> Manufacturers must also warn consumers about potential dangers arising from unintended but foreseeable uses.<sup>116</sup>

## 2. Section 823 II BGB

Because Paragraph II of Section 823 provides a remedy for the violation of a variety of protective statutes, there is no set definition of what constitutes a defect.<sup>117</sup> It varies depending on the statute in question, the majority of which focus on the violation of some standard of care, not on defective products.<sup>118</sup>

When analyzing the Product Liability Act, it is important to remember that the focus of the statute is not product defects, but rather product safety.<sup>119</sup> It is not concerned with contract-based merchantability claims or with a product's

<sup>114</sup> Hans-Joachim Mertens, *Unerlaubte Handlungen*, in 5 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 823 BGB, 1554 para. 284 (Peter Ulmer ed., 3d ed. 1997).

<sup>115</sup> MARKESINIS & UNBERATH, *supra* note 48, at 101. It was the breach of this duty that gave rise to the *Baby Tea Cases*.

Manufacturers may satisfy the duty to warn by providing a *Kundendienst* (customer service center) staffed by carefully selected, educated and supervised employees. Schlegelmilch, *supra* note 102, at 480 para. 277. It must be noted, however, that any harm that occurs as a result of customer contact with the service center also falls within the realm of manufacturer liability, even though the product has long-since been manufactured. *Id.*

<sup>116</sup> Vieweg, *supra* note 57, at 220. For a discussion of the liability-related aspects of warning defects, see *infra* Part IV.B.1.b.

<sup>117</sup> The Pharmaceutical Products Act does not specifically define what constitutes a defect. Instead, manufacturers are liable for "harmful results that go beyond those which current medical opinion regards as acceptable." MARKESINIS & UNBERATH, *supra* note 48, at 102. These harmful results must be linked to the product's development or manufacturing, and the harm must have arisen despite the plaintiff's compliance with dosage and other relevant instructions. Schlegelmilch, *supra* note 102, at 505 para. 354. Additionally, manufacturers are liable for harmful results that arise because of inadequate warnings and instructions. INGEBORG SCHWENZER, DIE UMSETZUNG DER EG-RICHTLINIE ZUR PRODUKT-HAFTPFLICHT IN DER BUNDESREPUBLIK DEUTSCHLAND 7 (1991).

<sup>118</sup> In addition to the Product Liability Act and the Pharmaceutical Products Act, other protective statutes for which damages may be recovered under Paragraph II include the *Strassenverkehrsgesetz* (Road Traffic Act), the *Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren* (Act Relating to the Peaceful Use of Nuclear Energy and the Protection Against its Dangers), better known as the Nuclear Energy Act, the *Luftverkehrsgesetz* (Air Traffic Act), the *Wasserhaushaltsgesetz* (Water Supply Act), and the *Haftpflichtgesetz* (Strict Liability Act). MARKESINIS & UNBERATH, *supra* note 48, at 715-16.

<sup>119</sup> ANDREW GEDDES, PRODUCT AND SERVICE LIABILITY IN THE EEC: THE NEW STRICT LIABILITY REGIME 21-22 (1992).

fitness for the purpose.<sup>120</sup> Nor is it concerned with specific duties of care. As a result, instead of recognizing different categories of defect, the Product Liability Act defines a defective product as one that “does not provide the *safety* which, considering all circumstances, may be expected.”<sup>121</sup> Accordingly, a defect can be due to “a property of the product which it could be reasonably expected not to have, as well as a property which the product does not have but which it could be reasonably expected to have.”<sup>122</sup>

This “notion of defect is very broad”<sup>123</sup> and can encompass design, manufacturing, and warning defects.<sup>124</sup> However, one must remember that the definition relates to the “safety of the product and not only its unfitness for an ordinary purpose.”<sup>125</sup> Because “it relates to consumer expectations in general and does not include the expectations of the individual consumer that the manufacturer has no reason to know,” the concept of what constitutes a defect “remains an objective one.”<sup>126</sup> Additionally, the Product Liability Act specifies that the

<sup>120</sup> *Id.*

<sup>121</sup> Product Liability Act, *supra* note 11, § 3 (emphasis added).

<sup>122</sup> Havemann, *supra* note 67, at 23. Interestingly, this definition is similar to the Restatement (Second)’s “definition” of what constitutes a defect. See *supra* note 67 and accompanying text.

<sup>123</sup> Thierry M. Bourgoignie, *Product Liability: Old Arguments for a New Debate?*, 1986 EUR. CONSUMER L.J. 6, 11.

<sup>124</sup> Schlegelmilch, *supra* note 102, at 501 para. 328. It should be noted, however, that this broad definition is not broad enough to encompass a manufacturer’s post-manufacturing *Produktbeobachtungspflicht* (duty to monitor for defects), discussed *supra* note 96. SCHWENZER, *supra* note 117, at 11.

For an interesting comparative discussion about how defects are defined in the U.K. and Germany, see Best, *supra* note 20, at para. 41.

<sup>125</sup> Bourgoignie, *supra* note 123.

<sup>126</sup> *Id.* The “consumer expectation test” has long been a thorn in the side of many U.S. products liability scholars and the inclusion of a similar test in the EU Directive must be the cause of great concern to those same scholars. The reference, in comment i of the Restatement (Second) § 402A, to a product that is “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,” RESTATEMENT (SECOND), *supra* note 25, § 402A cmt. i, was the seed from which a forest of passionate debates grew about the fairness and effectiveness of basing the definition of a defect on the expectations of the consumer. The inclusion in the Restatement (Third) of a very specific definition of what constitutes a “defect” was intended to bring an end to the on-going debate about using the consumer expectation test as the sole basis for analyzing whether a product is defective. It must be noted, however, that although the furor surrounding the consumer expectation test has been less intense in recent years, its supporters have not been completely silenced. This is due in large part to two key developments. First, the Restatement (Third) did not completely eliminate the consumer expectation test; rather, it specifically included it as a relevant, but not dispositive factor to be considered in determining whether a product’s design is defective. RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. g. Second,

level of safety one can expect must be considered in light of *all* of the circumstances.<sup>127</sup>

Because the Commission wanted this evaluation to "take place on the basis of general objective criteria . . . regardless of what the consumer (subjectively) expected,"<sup>128</sup> the Product Liability Act expressly includes the "circumstances" to be considered when assessing the level of "safety which . . . may be expected."<sup>129</sup> They include the product's complete presentation, the product's intended use, and when the product was placed on the market.<sup>130</sup>

Under the Product Liability Act, a product defect may arise because of a product's "presentation."<sup>131</sup> In addition to encompassing warning defects, the "presentation" aspect of the Product Liability Act also includes every activity by which a product is presented to the general public and the consumer.<sup>132</sup> To be relevant, however, the presentation must have been made either by the manufacturer or an authorized third party, and must go specifically to a consumer's safety expectations.<sup>133</sup> Activities that go to safety expectations include those that both lower and raise consumer expectations. Safety expectations can be lowered by warnings about risks related to "improper use . . . foreseeable imprudent use . . . [and] foreseeable misuse" of a product.<sup>134</sup> Additionally, a producer can raise consumers' safety

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despite the Restatement (Third)'s rejection of a product's design being declared defective solely because it fails to meet consumer expectations, a small minority of courts, namely Connecticut and Kansas, have explicitly retained the consumer expectation test as the means by which they analyze design defects. See *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1330 (Conn. 1997) (retaining the consumer expectation test because it "is now well established in Connecticut strict products liability decisions"); *Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000) (summarizing that in Kansas, "whether a design defect in a product exists is determined using the consumer expectations test").

<sup>127</sup> Product Liability Act, *supra* note 11, § 3.

<sup>128</sup> Havemann, *supra* note 67, at 23.

<sup>129</sup> Product Liability Act, *supra* note 11, § 3(a)-(c). The inclusion of specific circumstances that are to be considered when evaluating whether or not a product meets consumers' safety expectations indicates that the "lessons learned the hard way," Henderson & Twerski, *supra* note 2, at 2, have not been completely lost on the Commission.

<sup>130</sup> Product Liability Act, *supra* note 11, § 3(a)-(c).

<sup>131</sup> *Id.* § 3(1)(a).

<sup>132</sup> Wandt, *supra* note 49, at 84 (citing HANS JOSEF KULLMAN & BERNHARD PFISTER, *PRODUZENTEN-HAFTUNG* § 3604, at 9 (1997)).

<sup>133</sup> *Id.*

<sup>134</sup> Wandt, *supra* note 49, at 84 (citing CLAUDIUS TASCHNER & EDWIN FRIETSCH, *PRODUKTHAFTUNGS-GESETZ UND EG-PRODUKTHAFTUNGSRICHTLINIE* § 3 Rz. 31, 43 (2d ed. 1990)). See BGHZ 116, 60 (67); BGHZ 106, 273 (283).

expectations by using advertising that specifically describes the product, its purpose, or particular safety characteristics; by guaranteeing particular qualities; or by giving product-specific advice and instructions.<sup>135</sup> The Product Liability Act also focuses on the product's reasonably expected use. "In cases where the producer can expect some atypical use of the product, he must . . . design the product in such a way that it cannot cause damage."<sup>136</sup> Additionally, the Product Liability Act emphasizes the point in time when the product was placed on the market.<sup>137</sup> "This means that the norms at the time [the product was put on the market] will apply and the fact that safety norms have subsequently been tightened, or better production methods have been discovered, does not imply that the producer must revoke all older products."<sup>138</sup> Essentially, a product cannot be deemed defective simply because a better product is subsequently placed on the market<sup>139</sup> since it is the "product's physical state *at the time when it was put into circulation* that determines the evaluation."<sup>140</sup> Additionally, this focus on the product's safety at the time it was placed on the market generally implies that consumers are not entitled to expect the same level of safety from older and probably more worn products that they can expect from new ones.

It is interesting to note how similar each country's three categories of defect are, not only with respect to the definitions, but in the manner they developed. Additionally, although it does not specifically define the concept of a defect, one should note that the Product Liability Act provides much more guidance for assessing whether one exists than did Restatement (Second) § 402A.

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It should be noted that, although consumer expectations can be lowered in regard to the use to which a product may be put, section 14 of the Product Liability Act prevents manufacturers from limiting their liability through instructions or warnings. Product Liability Act, *supra* note 11, § 14.

<sup>135</sup> Wandt, *supra* note 49, at 84 (citing Friedrich Graf von Westphalen, *Das deutsche Produkthaftungs-gesetz*, in 2 PRODUKTHAFTUNGSBUCH § 62 Rz. 50 (Friedrich Graf von Westphalen et al eds., 1991)).

<sup>136</sup> Havemann, *supra* note 67, at 24. No one would expect the manufacturer of a chair to be held liable when someone, in order to reach something high, stands on the chair and falls after losing his balance. The manufacturer knows that the chair can be dangerous when so used, but he also knows that no consumer expects him to design and produce a chair that cannot tip over when someone stands on it. This would mean the chair was no longer a chair. Schlegelmilch, *supra* note 102, at 499 para. 312.

<sup>137</sup> Product Liability Act, *supra* note 11, § 9(1)(c).

<sup>138</sup> Havemann, *supra* note 67, at 25.

<sup>139</sup> Product Liability Act, *supra* note 11, § 2.

<sup>140</sup> Havemann, *supra* note 67, at 25 (emphasis added).



#### IV. ASSIGNING LIABILITY

The law in both countries recognizes the existence of different kinds of defects, which raises questions about how to assign liability. This section discusses how liability is assigned and who bears the burden of proof depending on the type of defect identified.

##### A. *Restatement (Third) Torts: Products Liability*

The Restatement recognizes the utility and appropriateness of assigning liability regardless of fault.<sup>141</sup> However, unlike the Restatement (Second),<sup>142</sup> the Restatement (Third) expressly limits the use of strict liability to cases involving manufacturing defects.<sup>143</sup> Liability for design and warning defects, as discussed below,<sup>144</sup> is subject to a risk-utility analysis similar to the reasonableness standard used to assign liability in negligence cases.<sup>145</sup>

##### 1. Strict Liability

In the civil context, the applicability of strict instead of fault-based liability has been justified on a number of different grounds.<sup>146</sup> One school of thought generally focuses on the safety benefits of strict liability, while another generally focuses on the fairness aspects of holding certain parties strictly liable.<sup>147</sup> In the context of products liability, the Restatement (Third) recognizes that the use of strict liability for manufacturing

<sup>141</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. a.

<sup>142</sup> RESTATEMENT (SECOND), *supra* note 25, § 402A(2)(a) (providing for across the board assignment of liability even though the manufacturer "has exercised all possible care").

<sup>143</sup> RESTATEMENT (THIRD), *supra* note 1, § 2(a) (providing for assignment of liability for manufacturing defects "even though all possible care was exercised in the preparation and marketing of the product").

<sup>144</sup> See *infra* Part IV.A.2.

<sup>145</sup> *Id.* § 2(b) (requiring evidence of a "reasonable alternative design" before liability can be assigned for design defects); *id.* § 2(c) (requiring evidence that "foreseeable risks" could be "reduced or avoided by the provision of reasonable instructions or warning" before liability can be assigned for warning defects).

<sup>146</sup> DOBBS, *supra* note 28, § 353 (including theories based on economic considerations such as compensation, loss spreading and enterprise liability, as well as those based on deterrence/safety, manufacturer representation, nonreciprocal risk, and procedural simplification).

<sup>147</sup> *Id.*

defects generally “foster[s] several objectives.”<sup>148</sup> The Restatement (Third) also recognizes the validity of a number of arguments in favor of strict liability, including the argument that strict liability “encourages greater investment in product safety.”<sup>149</sup> It also notes that strict liability “discourages the consumption of defective products”<sup>150</sup> because it causes the purchase price to more accurately reflect the cost of defects. Additionally, the Restatement (Third) acknowledges that by eliminating the plaintiff’s burden of showing fault, “strict liability reduces the transaction costs involved in litigating that issue.”<sup>151</sup>

However, the Restatement (Third) also acknowledges the validity of a number of other schools of thought favoring strict liability. It concedes that the often difficult or impossible task of proving a manufacturer’s negligence justifies strict liability in a way comparable to the justification behind the concept of *res ipsa loquitur*.<sup>152</sup> The Restatement (Third) recognizes that the burden of paying for the cost of unavoidable injuries resulting from manufacturing defects should be borne by all consumers through price increases.<sup>153</sup> Finally, it acknowledges that specifically in the context of manufacturing defects, malfunctions “disappoint reasonable expectations of product performance,” which further justifies the use of strict liability in conjunction with them.<sup>154</sup>

Crucially, unlike its predecessor, the Restatement (Third) specifically limits strict liability to manufacturing defects. Very early in its discussion of the liability of manufacturers of defective products, the Restatement (Third) focuses on the developmental history of products liability law and, in particular, on the historical association between manufacturing defects and strict liability.<sup>155</sup> It explains that there is a nexus between strict liability and manufacturing

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<sup>148</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. a.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Res ipsa loquitur* (“the thing speaks for itself”) is an exception to the general rule requiring plaintiffs to provide evidence of the defendant’s conduct. DOBBS, *supra* note 28, § 154, at 370. It is the theory by which common-law courts acknowledge that the “plaintiff’s injury and the immediate events surrounding it can by themselves show negligence, even though the plaintiff is unable to prove any specific act that was unreasonably dangerous.” *Id.*

<sup>153</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. a.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 1 cmt. a.

defects because they are the point at which "the concept of implied warranty, in which negligence is not required, [merges] with the tort concept of negligence, in which contractual privity is not required."<sup>156</sup> At the same time, it also specifies that, while strict liability is an appropriate standard upon which to base liability for manufacturing defects, liability for design and warning defects is "predicated on a different concept of responsibility," and therefore strict liability is not an appropriate standard by which to assign liability for those types of defects.<sup>157</sup>

## 2. Risk-Utility

The Restatement (Third) recognizes and discusses in detail the need to use a standard other than strict liability when assigning liability for design and warning defects.<sup>158</sup> It argues that because "[p]roducts are not generically defective merely because they are dangerous," liability for design and warning defects should depend on a balancing test.<sup>159</sup> The risk-utility test, the balancing test preferred by the Restatement (Third), first examines the monetary cost of increasing safety by, for example, redesigning the product, eliminating desirable features or including additional warnings.<sup>160</sup> It then balances those costs against the degree of risk faced by the consumer.<sup>161</sup> Additionally, it recognizes that the consumer must bear some of the burden of protecting against possible harm because it

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<sup>156</sup> *Id.* This is essentially the Court's reasoning in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

<sup>157</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. a.

<sup>158</sup> *Id.* Because it brings with it burdens of proof similar to those required for traditional negligence, there are those who strongly disagree with the Restatement (Third)'s reintroduction of the risk-utility standard as the test by which liability for design and warning defects is assigned. For a detailed presentation of cases from jurisdictions that apply the consumer expectations test to design defect cases without requiring proof of a reasonable alternative design, see *id.* § 2 Reporters' Note, cmt. d(II)(d). For an extensive presentation of the views of U.S. legal scholars about the consumer expectations test, both before and after proposed drafts of the Restatement (Third) were made public, see *id.* § 2 Reporters' Note, cmt. d(III)(a)-(b).

<sup>159</sup> *Id.* § 2 cmt. a.

<sup>160</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. a. In the end, it is almost always the consumer who pays the costs associated with both safe and dangerous products. Consumers of safer products pay for increased safety levels when manufacturers spread the cost of additional safety measures by marginally increasing the price of each unit. At the same time, consumers who are injured by dangerous products are forced to pay, both figuratively and literally, the cost of lower levels of safety in the form of physical injury, medical expenses, lost wages, etc.

<sup>161</sup> *Id.*

may be impossible for the manufacturer to eliminate all risks at a reasonable cost.<sup>162</sup> The Restatement (Third) goes on to recognize that, in order for the risk-utility analysis to be “fair and efficient,” it must take place in light of the “knowledge of risks and risk avoidance techniques reasonably attainable at the time of distribution.”<sup>163</sup> As such, manufacturers are only liable for risks that are reasonably foreseeable.<sup>164</sup>

The Restatement (Third) adopted a “reasonableness standard” as the standard by which the defectiveness of a product’s design should be judged.<sup>165</sup> Under this standard, there are two predicate elements to liability. The first is the existence of a reasonable alternative design.<sup>166</sup> The second necessary element is evidence that the manufacturer’s failure to adopt the alternative design “rendered the product not reasonably safe.”<sup>167</sup> As is the case under the traditional negligence standard, it is from the perspective of the ubiquitous “reasonable person” that the reasonableness of the alternative design, when compared to the existing design, is to be evaluated.<sup>168</sup>

The Restatement (Third) recognizes a number of factors to be considered when determining the reasonableness of a proposed alternative design and whether its omission makes the product not reasonably safe. These factors include the “magnitude and probability of the foreseeable risks of harm,” the instructions and warnings that accompany the product, and the “nature and strength of consumer expectations regarding the product, including expectations arising from the product portrayal and marketing.”<sup>169</sup> Additional consideration may be given to the benefits and disadvantages of the proposed alternative design, including the impact it would have on production costs,<sup>170</sup> the range of consumer choice, and the effect

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. d.

<sup>166</sup> *Id.* Section 2, comment b, discusses the possibility of alternatives to the plaintiff’s presentation of a reasonable alternative design as evidence of a design defect. *Id.* § 2 cmt. b. These alternatives are beyond the scope of this Note.

<sup>167</sup> *Id.* § 2 cmt. d.

<sup>168</sup> *Id.*

<sup>169</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. f.

<sup>170</sup> The fact that “the imposition of liability would have a negative impact on corporate earnings or would reduce employment in a given industry” is not a factor to be considered when deciding the reasonableness of an alternative design. *Id.*

the proposed alternative design would have on "product longevity, maintenance, repair and esthetics."<sup>171</sup> Essentially, "[s]ufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted."<sup>172</sup> However, because the product's overall safety must be considered, if adopting the proposed alternative design would have reduced the risk of the plaintiff's particular harm but would simultaneously have introduced equal or greater risks to other consumers, adopting the proposed alternative design cannot be considered reasonable.<sup>173</sup>

The Restatement (Third) explicitly states that "consumer expectations do not constitute an *independent* standard for judging the defectiveness of product designs."<sup>174</sup> And, after recognizing the reliance of some courts on derivations of the consumer expectation test when evaluating the defectiveness of a product's design,<sup>175</sup> it goes on to reiterate that "consumer expectations do not play a determinative role in determining defectiveness."<sup>176</sup> However, the Restatement (Third) then acknowledges that, in practice, consumer expectations do influence a consumer's perception of risks and do relate to the "foreseeability and frequency of the risks of harm, both of which are relevant" to the definition of design defects.<sup>177</sup> As a result, the Restatement (Third) ultimately concedes that, while consumer expectations should not be used as an independent basis for establishing the defectiveness of a product design, such expectations "may substantially influence or even be ultimately determinative on risk-utility balancing in

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. g (emphasis added). For a brief discussion of the rise and fall of the consumer expectation test, see *supra* note 126.

<sup>175</sup> Among the judicial derivations of the consumer expectation test, the Restatement (Third) recognizes the use of "reasonable consumer expectations" as the equivalent of "proof of a reasonable, safer design." RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. g. Other courts allow the "inference of defect" to be "drawn when the incident is of a kind that ordinarily would occur as the result of product defect" on the grounds that "products that fail when put to their manifestly intended use disappoint reasonable consumer expectations." *Id.*

<sup>176</sup> *Id.* Comment h, however, recognizes that consumer expectations do play a "special role" in determining whether food products and second-hand products are defective, thereby allowing consumer expectations to play a key role when analyzing whether these categories of product are defective. *Id.* at cmt. h.

<sup>177</sup> *Id.* § 2 cmt. g.

judging whether the omission of a proposed alternative design renders the product not reasonably safe.”<sup>178</sup>

The Restatement (Third) also recognizes that there are times when a manufacturer will be able to show that the product was, at the time it was sold, the safest on the market. While this is not conclusive, it does strengthen the manufacturer’s claim that an alternative design could not have been practically adopted. Thus, the Restatement (Third) recognizes that a manufacturer may introduce evidence of “industry practice that bears on whether the omission of an alternative design rendered the product not reasonably safe[.]”<sup>179</sup> However, while it may be admissible, evidence of compliance with industry practice is “not necessarily dispositive.”<sup>180</sup> As is the case when a product meets consumer expectations, conformance with industry practice is not, on its own, the standard for determining whether a product is reasonably safe.

The Restatement (Third) also predicates liability for warning defects upon risk-utility analysis.<sup>181</sup> It explains that the burden of proof associated with warning defects requires the plaintiff to show that the manufacturer failed to provide adequate warnings or instructions.<sup>182</sup> And while this is fundamentally the same analysis used to assign liability for design defects, given the multiplicity of circumstances under which warnings could be considered defective, the Restatement (Third) concedes that setting forth a concise set of criteria is very difficult.<sup>183</sup>

The Restatement (Third) emphasizes that manufacturers “must provide reasonable instructions and warnings about risks of injury posed by products.”<sup>184</sup> The scope of adequate warnings extends to the “inherent risks that reasonably foreseeable product users and consumers would

<sup>178</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. g. However, it should be noted that, even where the danger is open and obvious, thereby belying any arguments that consumer expectations did not take it into account, it is possible for the plaintiff to show that an alternative design should have been adopted. *Id.*

<sup>179</sup> *Id.* § 2 cmt. d.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* § 2 cmt. i.

<sup>182</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. i.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Where there is no warning many courts have been “willing to presume or infer that the plaintiff would have heeded a warning.” DOBBS, *supra* note 28, § 367 at 1016.

reasonably deem material or significant in deciding whether to use or consume the product.<sup>185</sup> Because it is by definition impossible to warn against specific unforeseeable risks, when such an event arises the burden lies with the plaintiff to show that the manufacturer knew or should have known of the risk, and therefore should be charged with having to warn against it.<sup>186</sup> As for warning about obvious risks, the Restatement (Third) acknowledges both the logical irony of requiring warnings under such circumstances and the fact that “[w]arning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety.”<sup>187</sup> Additionally, the Restatement (Third) recognizes that the existence of an obvious danger may go to the question of whether there is a design defect.<sup>188</sup>

Essentially, the standard for assigning liability for warning defects turns on whatever constitutes a reasonable warning under the circumstances.<sup>189</sup> In addition to what constitutes the proper scope of the warning, other factors that the Restatement (Third) suggests include “content and comprehensibility, intensity of expression, and the characteristics of expected user groups.”<sup>190</sup>

## B. *Bürgerliches Gesetzbuch / German Civil Code*

In principle, Paragraphs I and II of Section 823 approach the issue of liability from opposite ends of the spectrum. Under the BGB, tort and therefore products liability law is fault based; strict liability exists only where it is statutorily created. As a result, in theory, plaintiffs bringing suit under Paragraph I must prove fault, whereas liability exists without regard to fault for plaintiffs who use Paragraph II to bring suit under the Product Liability Act or most of the other protective statutes.<sup>191</sup> In practice, however, this distinction is not set in stone.

<sup>185</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. i.

<sup>186</sup> *Id.* § 2 cmt. m.

<sup>187</sup> *Id.* § 2 cmt. j.

<sup>188</sup> *Id.* § 2 cmt. j. There can be significant areas of overlap between design and warning defects. See discussion *supra* Part III.A.2-3. This is particularly true with regard to assigning liability.

<sup>189</sup> *Id.* § 2 cmt. i.

<sup>190</sup> RESTATEMENT (THIRD), *supra* note 1, § 2 cmt. i.

<sup>191</sup> For a brief discussion of how liability is assigned under the Pharmaceutical Products Act, see *infra* note 240.

## 1. Section 823 I BGB

## a. Strict Liability

“German law is basically dominated by the principle of fault liability (so-called ‘*Verschuldensprinzip*’) whereas strict liability is regarded as the exception”<sup>192</sup> and is “generally found in special statutes outside the BGB.”<sup>193</sup> Despite indications during the late-nineteenth century that the German legislature considered moving away from a purely fault-based system of liability, “the Code refused to be moved from the principle that liability for fault was the only acceptable basis for any obligation to compensate the victim.”<sup>194</sup> As a result of this tension, the BGB continues to be a stronghold for fault-based liability into which the legislature infrequently trespasses to introduce specific but limited instances of strict liability.<sup>195</sup> The legislature is usually prompted to act when a specific lawful activity carries great risk and potential for injury to the public.<sup>196</sup> Additionally, since 1908 the “German courts have held the imposition of strict liability to be a matter for the legislature and not for the judiciary.”<sup>197</sup> Thus, the combination of the BGB’s general culpability requirements, the legislature’s hesitancy to enact strict liability statutes, and the judiciary’s abdication of responsibility for the judicial expansion of the concept has resulted in a limited number of situations in which pure strict liability exists.<sup>198</sup>

Notwithstanding the BGB’s fault-based focus, in recent years the German courts have made dramatic inroads into easing the burden on plaintiffs seeking to bring products liability claims under Paragraph I of Section 823, particularly in the area of manufacturing defects. Beginning in the late 1960s, as a result of the *Fowl Pest Case*,<sup>199</sup> German courts shifted the burden of proof in the context of Paragraph I from the plaintiff to the manufacturer, who must rebut the

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<sup>192</sup> Jörg Fedtke & Ulrich Magnus, *Germany, in UNIFICATION OF TORT LAW: STRICT LIABILITY* 147 (B.A. Koch & H. Kozoil eds., 2002).

<sup>193</sup> *Id.* at 152.

<sup>194</sup> MARKESINIS & UNBERATH, *supra* note 48, at 714.

<sup>195</sup> *Id.* at 714-15.

<sup>196</sup> FOSTER & SULE, *supra* note 17, at 275.

<sup>197</sup> Vieweg, *supra* note 57, at 214.

<sup>198</sup> For a short list of the best-known German strict liability statutes, see *supra* note 118.

<sup>199</sup> BGHZ 51, 91.



presumption of fault.<sup>200</sup> Adopted in large part because of the "special features of product liability and in particular the victim's *de facto* inability to know what was happening in the manufacturer's enterprise," today's standard for assigning liability in manufacturing defect cases is one that "greatly approximates the strict tort liability that is imposed by American courts."<sup>201</sup>

In the case of manufacturing defects, the plaintiff bears only the burden of demonstrating that the injury "emanated from the area of the producer's organization and the risks attendant on it, and that [the injury] resulted from an objective defect"<sup>202</sup> of the product which made it unsuitable to be put into circulation.<sup>203</sup> Once the plaintiff demonstrates this, the courts shift the burden to the manufacturer and, except in cases where evidence indicates that the defect may have arisen after the product was placed on the market, the shift is automatic.<sup>204</sup> Essentially, once the plaintiff shows that he was injured by the manufacturer's defective product, the burden of proof is strict liability in everything but name.<sup>205</sup>

### b. Negligence

As mentioned earlier, under the BGB German tort law is fault based in principle. Bringing a suit under Paragraph I of Section 823 is essentially bringing a suit under the negligence standard.<sup>206</sup> As a result, the general requirement is that fault must be shown before a court will assign liability. Additionally, Paragraph I requires the plaintiff to demonstrate the existence of a causal link between the defendant's conduct and the plaintiff's harm.<sup>207</sup> This means that the plaintiff must show that

<sup>200</sup> MARKESINIS & UNBERATH, *supra* note 48, at 98.

<sup>201</sup> *Id.* at 98-99. As discussed in the text accompanying *supra* note 39, strict tort liability did not exist in this context in the U.S. until *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

<sup>202</sup> An "objective defect" is a deviation from the manufacturer's intended design. Wandt, *supra* note 49, at 79.

<sup>203</sup> MARKESINIS & UNBERATH, *supra* note 48, at 99.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* Theoretically, in situations where the manufacturing process is not fully automated, it is possible for the manufacturer of an individually defective product to escape liability under section 831, which largely deals with the negligent supervision of employees. MARKESINIS & UNBERATH, *supra* note 48, at 99. However, in order to do so the manufacturer must "name every individual involved in the manufacturing process and prove his 'innocence.'" *Id.*

<sup>206</sup> Wandt, *supra* note 49, at 73.

<sup>207</sup> Vieweg, *supra* note 57, at 200.

the defendant's conduct constituted a negligent or intentional act or omission that resulted in an unlawful violation of an enumerated or other right or interest.<sup>208</sup> In the context of product liability suits this is usually done by showing that the manufacturer breached one of the three key duties of care.<sup>209</sup>

Case law has extended the concept of shifting the burden of proof, which originally applied only to manufacturing defects, to include design defects.<sup>210</sup> However, because the plaintiff's burden is higher in design defect cases than those involving manufacturing defects, the shift is less automatic.<sup>211</sup> As a result, although the courts have eased the plaintiff's burden, the applicable standard for analyzing design defects remains closer to negligence than to strict liability.

In order to establish a *prima facie* case and trigger the shift in a design defect case, the plaintiff must satisfy two requirements. First, as was the case with manufacturing defects, the plaintiff must show that the product was defective "in the sense that the defective design was avoidable given the existing scientific and technical knowledge."<sup>212</sup> This includes showing that the "product was unsafe by virtue of matters lying within the producer's sphere of influence."<sup>213</sup> The concept of what makes a product "unsafe" is based on the product having "objective defects . . . in the sense that the defective design was avoidable according to existing scientific and technical knowledge."<sup>214</sup> Additionally, manufacturers may be liable for harm arising from reasonably foreseeable misuse,<sup>215</sup> although liability does not generally extend to harm resulting from intentional abuse of a product.<sup>216</sup>

The second requirement is more difficult to satisfy and is the reason German courts are generally more hesitant when shifting the burden in design defect cases. In addition to showing that the product had an objective defect, the plaintiff must convince the court that the "design was defective in a way

<sup>208</sup> *Id.*

<sup>209</sup> See discussion *supra* Part III.B.1.

<sup>210</sup> MARKESINIS & UNBERATH, *supra* note 48, at 99. See generally BGHZ 67, 359.

<sup>211</sup> *Id.* at 99-100.

<sup>212</sup> *Id.* at 100. This is very similar to the alternative design requirement in U.S. design defect cases. See discussion *supra* Part IV.A.2.

<sup>213</sup> Vieweg, *supra* note 57, at 218.

<sup>214</sup> *Id.*

<sup>215</sup> MARKESINIS & UNBERATH, *supra* note 48, at 100.

<sup>216</sup> Vieweg, *supra* note 57, at 218.

that it created an unreasonably great risk of danger.<sup>217</sup> Once the plaintiff meets these two requirements, the courts shift the burden from the plaintiff to the manufacturer.<sup>218</sup> As a result of this shift and in order to escape liability, the manufacturer must prove there was no breach of duty.<sup>219</sup>

Instead of specifically focusing on the existence of a reasonable alternative design, as does the Restatement (Third), the legal issues in German design defect cases tend to center around whether the design complies with current state-of-the-art safety standards.<sup>220</sup> A plethora of regulatory bodies and legal institutions such as DIN (German Institute for Standardization) and TÜV (Technical Inspection Organization) bombard manufacturers with rules and standards that establish minimum safety and technical standards for everything from nuclear power plants to envelopes.<sup>221</sup> Additionally, the *Gerätesicherheitsgesetz* (Act on the Safety of Technical Equipment),<sup>222</sup> requires “technical equipment”<sup>223</sup> to comply with “generally recognised technical rules and principles,”<sup>224</sup> a broad term for which there is no official legal definition. However, while compliance with these standards and regulations will strengthen a manufacturer’s case, under

<sup>217</sup> MARKESINIS & UNBERATH, *supra* note 48, at 100. One German scholar neatly summed up the difference between a product that can simply be dangerous, as opposed to one that is unreasonably so, by observing that a pencil cannot be considered unnecessarily dangerous merely because another can be injured by it. Schlegelmilch, *supra* note 102, at 499 para. 312.

<sup>218</sup> Vieweg, *supra* note 57, at 218.

<sup>219</sup> *Id.*

<sup>220</sup> Wandt, *supra* note 49, at 76.

<sup>221</sup> MARKESINIS & UNBERATH, *supra* note 48, at 100. The *Deutsches Institut für Normung* (DIN) (German Institute for Standardization) and *Technischer Überwachungsverein* (TÜV) (Technical Inspection Organization) are two of Germany’s best-known standard-setting institutions. In addition to setting safety standards in Germany, the standards set by both institutions are recognized throughout the world. The German government has recognized DIN “as the national standards body and [it] represents German interests at international and European level.” See *Deutsches Institut für Normung, About DIN*, at <http://www2.din.de/index.php?lang=en> (last visited Mar. 23, 2004). TÜV is a German-based, world-wide organization of independent inspectors whose name and activities have become “synonymous with public safety, quality, and environmental protection.” See TÜV America, *About TÜV: History and Background*, at <http://www.tuvam.com/aboutus/history.cfm> (last visited Mar. 23, 2004).

<sup>222</sup> *Gerätesicherheitsgesetz*, v. 24.6.68 (BGBl. I S.717), *as amended*, v. 18.2.86 (BGBl. I S.265).

<sup>223</sup> “Technical equipment” is widely interpreted as encompassing everything from sports and safety equipment (e.g., mask, helmets, belts) to household appliances, factory equipment, and even toys. MARKESINIS & UNBERATH, *supra* note 48, at 100.

<sup>224</sup> *Gerätesicherheitsgesetz*, *supra* note 222, § 3; MARKESINIS & UNBERATH, *supra* note 48, at 100.

Paragraph I compliance alone may not constitute a defense if “actual technical developments have already surpassed these standards.”<sup>225</sup>

Additionally, when considering design defects, the court may also “weigh carefully whether an alternative design would be economically feasible and to what extent it would reduce the risk of [the harm] occurring.”<sup>226</sup> In situations where the product is very inexpensive, the manufacturer may be able to show that the product’s low price makes a safer design impossible,<sup>227</sup> while more expensive products may be held to a higher standard of safety.<sup>228</sup> This, combined with the focus on what is technologically feasible, bears a striking resemblance to the reasonable alternative design test that is the focus of the Restatement (Third)’s analysis for design defects.

Negligence is also the applicable standard by which to analyze warning defects. However, unlike manufacturing and design defects, where the courts have willingly shifted the burden of proof from the plaintiff to the manufacturer, they have been less quick to do so where warning defects are involved.<sup>229</sup> This hesitancy to shift the burden is due in large part to the nature of warning defects themselves and the fact that plaintiffs bringing a suit based on warning defects are generally not at the same *Beweisnot* (evidentiary disadvantage) as those seeking to bring suits based on design or manufacturing defects.<sup>230</sup> In warning defect cases the key piece of evidence is often simply the presence, or absence, and the scope of the warnings or instructions. As a result, because plaintiffs do not normally require access to manufacturing facilities or other aspects of the manufacturing and design process that are typically closed to the public, the courts view the negligence standard as reasonable. Accordingly, they are less quick to shift the burden of proof.

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<sup>225</sup> Wandt, *supra* note 49, at 76-77. This is similar to the U.S. concept of custom. In contrast, under the Product Liability Act, compliance with mandatory regulations may provide a defense if a defect is the result of compliance with mandatory standards. Product Liability Act, *supra* note 11, § 1(2)(4). See *infra* note 240 for a brief discussion on the limitations that have been placed on this defense.

<sup>226</sup> MARKESINIS & UNBERATH, *supra* note 48, at 100.

<sup>227</sup> Wandt, *supra* note 49, at 79.

<sup>228</sup> *Id.* at 77.

<sup>229</sup> THOMAS WINKELMANN, *PRODUKTHAFTUNG BEI INTERNATIONALER UNTERNEHMENSKOOPERATION* 62-63 (1991).

<sup>230</sup> *Id.*

As discussed above,<sup>231</sup> in relation to the definition of warning defects, the manufacturer's duty to warn extends not only to harm that may arise in conjunction with the product's intended use, but may also extend to warning about the risks associated with an unintended but foreseeable use.<sup>232</sup> Recent developments require not only the inclusion of adequate information about a product's inherent risks, but manufacturers must also ensure that warnings "emphasize important information about the risks related to the product and the functional relationship" between its use and possible injuries.<sup>233</sup>

The scope of what constitutes adequate warnings derives from a variety of factors, including the "expected sophistication of the user,"<sup>234</sup> the right that is likely to be violated (such as life, body, health), and the degree of danger. The less sophisticated the user, the more protected the right, and the greater the danger, the broader the required scope.<sup>235</sup> Adequate warnings must be clear and specific as to concrete risks, and the text itself must be obvious enough to ensure that consumers will read, take seriously, follow, and to a large extent continue to act in accordance with those warnings.<sup>236</sup> Once a German court finds that the manufacturer has breached the duty to warn, there is a rebuttable presumption that the warning, had it been provided, would have been heeded.<sup>237</sup> Adequate warnings cannot, however, replace the duty to produce products that are not defective.<sup>238</sup> Therefore, a manufacturer cannot use warnings as an attempt to escape liability if a product "does not comply with the *Basissicherheit*

<sup>231</sup> See discussion *supra* Part III.B.1.c.

<sup>232</sup> Vieweg, *supra* note 57, at 220. For example, when the manufacturer of an industrial solvent is aware that some people are inhaling solvent fumes to get high, the manufacturer has a duty to warn of "sniffing" related dangers. Schlegelmilch, *supra* note 102, at 490-91 para. 293. Where the manufacturer has complied with the duty to warn about risks associated with misuse of the product, his liability does not extend to injuries suffered as a result of such misuse. *Id.* Additionally, the duty to warn does not extend to risks arising from misuse that is not even remotely related to the product's intended use. *Id.*

<sup>233</sup> Wandt, *supra* note 49, at 77.

<sup>234</sup> *Id.*

<sup>235</sup> MARKESINIS & UNBERATH, *supra* note 48, at 101.

<sup>236</sup> Schlegelmilch, *supra* note 102, at 490 para. 292.

<sup>237</sup> Vieweg, *supra* note 57, at 221. If, however, the court finds that the manufacturer provided adequate warnings, but the consumer failed to read or observe those warnings, the manufacturer is not liable for the resulting injuries. Schlegelmilch, *supra* note 102, at 490 para. 292.

<sup>238</sup> Wandt, *supra* note 49, at 77.

(basic safety standard) expected by the consumer and the public at large."<sup>239</sup>

## 2. Section 823 II BGB

As is the case with many of the protective statutes that may provide a cause of action under Paragraph II of Section 823,<sup>240</sup> the Product Liability Act does not follow the BGB's traditional, fault-based notion of liability. Accordingly, under the Product Liability Act, once a plaintiff establishes a *prima facie* case, the manufacturer of a defective product is held strictly liable.<sup>241</sup> Fault plays no role in the analysis and to escape liability the manufacturer has the burden of showing either that the product falls within one of the specified exceptions<sup>242</sup> or the existence of any of the exonerating defenses contained throughout the Product Liability Act itself.

In order to establish a *prima facie* case, the plaintiff must meet her burden of proof as set out in the statute.<sup>243</sup> The plaintiff must show the existence of three fairly standard elements. First, the plaintiff must show the existence of a defect.<sup>244</sup> Second, the plaintiff must show the existence of damages.<sup>245</sup> Finally, the plaintiff must establish a causal link between the defect and the damages.<sup>246</sup> Once the plaintiff has made out a *prima facie* case, the Product Liability Act automatically shifts the burden of proof to the manufacturer.<sup>247</sup> This is an improvement over the usual burden of proof

<sup>239</sup> *Id.* at 78.

<sup>240</sup> The Pharmaceutical Products Act is a true strict liability statute. SCHWENZER, *supra* note 117, at 7. Although development risks are a valid defense under Paragraph I of Section 823, there is no such provision in the Pharmaceutical Products Act. As a result, because there is no development risk defense, manufacturers are liable for harm even if it could not have been prevented according to the current state of technology and scientific research. SCHWENZER, *supra* note 117, at 7. The plaintiff bears the burden of demonstrating compliance with manufacturer-provided warnings and instructions and for demonstrating that it was the manufacturer's product that caused the harm. Wandt, *supra* note 49, at 90. Otherwise the burden lies with the manufacturer.

<sup>241</sup> Product Liability Act, *supra* note 11, § 1(1). Under the Product Liability Act, the plaintiff's burden of proof is somewhat lower than is required under Paragraph I. SCHWENZER, *supra* note 117, at 13.

<sup>242</sup> Product Liability Act, *supra* note 11, § 1(2).

<sup>243</sup> *Id.* § 1(4).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Product Liability Act, *supra* note 11, § 1(4).

plaintiffs face under Paragraph I, especially in the case of warning defects.<sup>248</sup>

Under the Product Liability Act manufacturers can escape liability by showing either the applicability of one of the five enumerated exceptions or the existence of specific exonerating circumstances.<sup>249</sup> The enumerated exceptions<sup>250</sup> eliminate liability for damage caused by: (1) defective products that the manufacturer did not place on the market;<sup>251</sup> (2) products with defects that did not exist at the time the product was placed on the market;<sup>252</sup> (3) products that were neither manufactured to be sold or otherwise distributed nor manufactured or sold as part of manufacturer's business;<sup>253</sup> (4) products that were in compliance with mandatory legal standards at the time they were placed on the market;<sup>254</sup> and (5) products with a defect that was undetectable based on the state of the art at the time the product was placed on the market.<sup>255</sup>

<sup>248</sup> SCHWENZER, *supra* note 117, at 13-14.

<sup>249</sup> According to one scholar, none of the enumerated exceptions included in the Product Liability Act are exceptional enough to warrant serious discussion. *Id.* at 12.

<sup>250</sup> Product Liability Act, *supra* note 11, § 1(2). An additional exception specifically exempts component manufacturers from liability for damage that was caused not by the component, but by defective construction or instructions by the manufacturer of the product into which the component was incorporated. *Id.* § 1(3).

<sup>251</sup> *Id.* § 1(2)(1). This could happen, for example, when a product is stolen and is placed on the market by someone other than the manufacturer, or when someone is testing a product and, without the manufacturer's permission, gives it to an unauthorized person. Schlegelmilch, *supra* note 97, at 497 para. 301.

<sup>252</sup> Product Liability Act, *supra* note 11, § 1(2)(2). "If it is unclear when the product became defective, the dispute will be decided by weighing the circumstances." Wandt, *supra* note 49, at 89. The manufacturer may, however, be held liable under Paragraph I if the defect appears after the product is placed on the market and the manufacturer breaches the duty to monitor and recall. Schlegelmilch, *supra* note 102, at 497 para. 302.

<sup>253</sup> Product Liability Act, *supra* note 11, § 1(2)(3). This eventuality will generally be covered by the first exception, namely that the manufacturer did not place the product on the market. Schlegelmilch, *supra* note 102, at 497 para. 303.

<sup>254</sup> Product Liability Act, *supra* note 11, § 1(2)(4). It should be noted that this exception is not a complete defense. Wandt, *supra* note 49, at 87. Additionally, this defense is "limited by the narrow meaning of detailed mandatory rules," and the requirements for this defense are not met by the "DIN or other privately issued industry rules, which only give recommendations for a safety standard." *Id.*

<sup>255</sup> Product Liability Act, *supra* note 11, § 1(2)(5). Although member states had the option of holding manufacturers liable for so-called development risks, the German legislature was one of the driving forces behind the inclusion of this defense. SCHWENZER, *supra* note 117, at 12-13. Therefore, it should come as no surprise that they chose to include it in the Product Liability Act. *Id.* Except for the Pharmaceutical Products Act, which does not provide for use of the development risk defense, this is a generally accepted defense in German tort law. *Id.* at 13. Additionally, it must be noted that the development risk defense is only applicable to design defects. Schlegelmilch,

Additionally, manufacturers may reduce or escape liability by showing the existence of exonerating circumstances. The specific exonerating circumstances that allow a manufacturer to escape liability appear throughout the Product Liability Act. However, it should be noted that, as in the United States, liability cannot be waived or limited in advance, even if the parties contractually agree to do so.<sup>256</sup> Under the Product Liability Act, the contributory negligence of the injured party may reduce and in some cases eliminate the manufacturer's liability,<sup>257</sup> but not where the damage is caused by both the defective product and the acts of a third party.<sup>258</sup> Among the other exonerating circumstances that the Product Liability Act specifically includes are two statutes of limitation. The first, referred to as a "prescription period,"<sup>259</sup> requires plaintiffs to bring suit within three years of learning of the damage, the existence of a defect and the identity of the responsible party.<sup>260</sup> The prescription period, which is tolled during settlement negotiations,<sup>261</sup> also applies if the plaintiff should have but failed to discover the damage, defect, and identity within that same period.<sup>262</sup> The Product Liability Act also includes a second statute of limitation, known as the "liability period."<sup>263</sup> Although based on different criteria, the liability period also sets an expiration date for claims brought under the Product Liability Act. It provides that a manufacturer's liability expires ten years after the product was placed onto the market.<sup>264</sup> The ten-year liability period is tolled

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*supra* note 102, at 497 para. 305. It can never be used to escape liability for manufacturing defects, even when such defects are technically unavoidable. *Id.*

<sup>256</sup> Product Liability Act, *supra* note 11, § 14.

<sup>257</sup> *Id.* § 6(1).

<sup>258</sup> *Id.* § 6(2).

<sup>259</sup> Commission Report, *supra* note 6, at 20-21.

<sup>260</sup> Product Liability Act, *supra* note 11, § 12(1). Under section 852 the statute of limitations for general tort cases, including those brought under Paragraph I of section 823, is "three years from the time the injured party discovers the damage and the tortfeasor. Regardless of the victim's knowledge, the absolute cut-off period is 30 years." Vieweg, *supra* note 57, at 226.

<sup>261</sup> Product Liability Act, *supra* note 11, § 12(2).

<sup>262</sup> *Id.* § 12(1).

<sup>263</sup> Commission Report, *supra* note 6, at 20-21.

<sup>264</sup> Product Liability Act, *supra* note 11, § 13(1). In its Green Paper issued in advance of its report on the application of the Product Liability Directive, the EU Commission explored the possibility of extending the liability period with regard to particular product sectors such as pharmaceuticals, agricultural products, foodstuffs and other products intended for long-term use or consumption because of the possibility of latent injuries first appearing many years after the product is placed on the market. Commission Report, *supra* note 6, at 20-21.



when a suit is pending,<sup>265</sup> after a final judgment has been handed down, or once the parties have agreed to a binding settlement.<sup>266</sup> Additionally, to ensure that the Product Liability Act is not applied retroactively, liability does not extend to products placed on the market before January 1, 1990, the date the statute took effect.<sup>267</sup>

## V. ANALYSIS

There is, admittedly, a striking similarity between the Product Liability Act and the Restatement (Second) when it comes to the vagueness with which defects are defined. This is due in large part to the fact that each focuses on consumer safety rather than defective products. As a result of this focus, both the Product Liability Act and the Restatement (Second) hold manufacturers strictly liable for the harm caused by their defective products; fault plays no role in the analysis. For these reasons it is not difficult to understand why Professors Henderson and Twerski bemoaned the fact that “the lessons learned the hard way in the United States have in certain important aspects been lost on the international legal community.”<sup>268</sup>

There are, however, substantive differences between the Product Liability Act and the Restatement (Second) that indicate that these lessons have not been completely lost on the Commission. The first is the inclusion of specific circumstances that must be considered when determining whether, because it “does not provide the safety which a person is entitled to expect, taking all circumstances into account,”<sup>269</sup> a product is defective. This indicates that those who drafted the EU

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Green Papers are communications on a specific policy area that are published by the Commission as a means of initiating a European-wide process of consultation and debate. See Europa: Gateway to the European Union, *Glossary: Green Paper*, at <http://europa.eu.int/scadplus/leg/en/cig/g4000g.htm> (last visited Mar. 24, 2004). Generally addressed to parties, organizations and individuals who have a special interest in the topic at hand, Green Papers can provide impetus for both changes in current legislation and proposals for subsequent legislation. *Id.* Concrete proposals resulting from a Green Paper are often presented as official proposals in the form of a White Paper. See Europa: Gateway to the European Union, *Glossary: White Paper*, at <http://europa.eu.int/scadplus/leg/en/cig/g4000w.htm> (last visited Mar. 24, 2004).

<sup>265</sup> Product Liability Act, *supra* note 11, § 13(1).

<sup>266</sup> *Id.* § 13(2).

<sup>267</sup> *Id.* § 16.

<sup>268</sup> Henderson & Twerski, *supra* note 2, at 2.

<sup>269</sup> Product Liability Act, *supra* note 11, § 3(1).

Directive were aware of the difficulties that arose in the United States as a result of an undefined, very subjective consumer expectation test and, as a result, sought to ensure that their test was an objective one. The second difference indicating an awareness of the difficulties associated with the Restatement (Second), in particular holding manufacturers strictly liable, is evidenced by the inclusion of specific defenses<sup>270</sup> and exonerating circumstances,<sup>271</sup> as discussed above, by which manufacturers may escape liability. In addition to these restrictions on an otherwise broad provision, the Product Liability Act also includes a number of procedural limitations on both the statute's applicability and on the amount of damages that may be awarded.

These procedural limitations take a variety of forms. For instance, liability for property damage is limited to property that "by its nature is ordinarily intended for private use or consumption and was mainly so used."<sup>272</sup> Additionally, in the case of property damage there is a deductible of €500<sup>273</sup> that must be absorbed by the plaintiff.<sup>274</sup> Another limitation includes a cap on the producer's total liability under the Product Liability Act.<sup>275</sup> This total liability cap, set at €85 million, applies where personal injuries are "caused by a product or by identical products with the same defect."<sup>276</sup> Finally, recovery for

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<sup>270</sup> See *id.* § 1(2).

<sup>271</sup> See *id.* §§ 6, 12, 13, 16.

<sup>272</sup> *Id.* § 1(1).

<sup>273</sup> On March 30, 2004, €1.00 bought \$1.21. At this exchange rate, €500 was worth approximately \$607. See Economist, *Full Converter*, at <http://www.economist.com/markets/currency> (last visited Mar. 30, 2004). Legislative changes adjusted this amount from DM1,125 to €500 in accordance with the introduction of the common currency on January 1, 2002. See *Zweites Gesetz zur Änderung schadenersatzrechtlicher Vorschriften (Schadensrechtänderungsgesetz)*, v. 19.7.2002 (BGBl. I S.2674), art. 9, para. 3.

<sup>274</sup> Product Liability Act, *supra* note 11, § 11 (as amended by the *Schadensrechtänderungsgesetz*, *supra* note 273). A perfect example of the complications caused by the German legal system's dual approach to tort law, this deductible may be recovered if the plaintiff can show negligence under Paragraph I. SCHWENZER, *supra* note 111, at 22-23. In both the U.K. and the Netherlands, this deductible acts more like a minimum threshold plaintiffs must reach before they can bring suit. *Id.* And, under those versions of the EU Directive, once the threshold has been met, the full amount may be recovered. *Id.*

<sup>275</sup> Product Liability Act, *supra* note 11, § 10.

<sup>276</sup> *Id.* § 10 (amended by *Schadensrechtänderungsgesetz*, *supra* note 273). On March 30, 2004, €1.00 bought \$1.21. At this exchange rate €85 million was worth approximately \$103.2 million. See Economist, *Full Converter*, *supra* note 273. This cap was seen by some as a necessary measure required to compensate for the expansion of liability. SCHWENZER, *supra* note 117, at 18. However, some think that the legislature

personal injury was originally limited to the cost of treatment and financial loss caused by temporary or permanent loss of earning capacity.<sup>277</sup> As with most protective statutes, *Schmerzensgeld* (damages for pain and suffering) could not be recovered without an independent showing of fault under Paragraph I of Section 823. However, in a radical alteration of long-standing public policy that required a showing of fault before such damages could be awarded, the German legislature recently amended a number of protective statutes, including the Product Liability Act, to allow for recovery of damages for pain and suffering without an independent showing of fault.<sup>278</sup>

While the above restrictions and limitations may not be the same solutions reached by the U.S. legal system, to date they seem to be working. There has not been an explosion of products liability claims with astronomical damage awards, as there was in the United States during the 1980s and 1990s. Nor, as discussed below, has there been a great clamor for changes in the way defects are defined and liability is assigned.<sup>279</sup>

Additionally, should the Commission decide that the safeguards incorporated into the Products Liability Act no longer provide stability and predictability, it need not cross the Atlantic for a competent and comprehensive guide to products liability law. The other prong of German products liability law, as developed under Paragraph I of Section 823, can provide the Commission with guidance that is substantially similar to that provided by the Restatement (Third). When one views this source in conjunction with German procedure, it may indeed prove to be a more appropriate source than the Restatement (Third) for further development of European law.

Both the German courts under Paragraph I and the Restatement recognize the same three categories of defects. Additionally, the definitions of the categories and the methods by which liability is assigned for each category are surprisingly similar. Manufacturing defects, the first category to be recognized in both the United States and Germany, arise when individual product units depart from their intended design. As is the case in the United States, in Germany the focus is not on

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may have exceeded its mandate by including in the cap damages caused by a single product. *Id.* at 19.

<sup>277</sup> Product Liability Act, *supra* note 11, § 8.

<sup>278</sup> See Schadensrechtänderungsgesetz, *supra* note 273.

<sup>279</sup> See *infra* Part VI.

how such defects can be avoided. This is due in large part to the fact that manufacturing defects are often unavoidable either because of the current state of technology or because human error is itself unavoidable. Instead, the focus in both countries is on having safeguards in place that prevent products with manufacturing defects from reaching the market. Where these safeguards fail the manufacturer will be held liable.

When it comes to assigning liability for manufacturing defects the Restatement (Third) simply holds manufacturers strictly liable. Because the German courts are, in theory, prevented from applying strict liability where it is not prescribed by a statute, they are technically required to find fault before they can shift the burden of proof to the manufacturer. In reality, once a plaintiff establishes a prima facie case, the German courts shift the burden almost without hesitation. Only where there is evidence that the defect arose after the product was out of the manufacturer's realm of control is the shift less than automatic. Essentially, in Germany, as in the United States, manufacturers are strictly liable for manufacturing defects.

Whereas manufacturing defects, as treated under Paragraph I of Section 823 and defined by the Restatement (Third), are almost mirror images, the similarities between the manner in which the two systems analyze design defects is less obvious. This does not, however, mean that they are not substantially similar. In both Germany and the United States, design defects are defined as defects that affect entire product lines. They arise not when an individual product unit deviates from its intended design, but when the product's design itself is somehow defective. When assigning liability for design defects, the Restatement (Third) focuses on defects that arise because of the manufacturer's failure to incorporate a reasonable alternative design, while the German focus is on defects that were avoidable given the current state of technology. Although there are differences between these two standards, because the cost of the product is also an important factor in the German analysis, the differences are more procedural than substantive. While the Restatement (Third) requires evidence of an alternative design, German plaintiffs must show that the defect was objectively avoidable according to existing technological and scientific knowledge. While the Restatement (Third) requires a showing that the manufacturer's failure to adopt the alternative design made the product unreasonably

unsafe, the German analysis extends to include the economic practicalities of incorporating an alternative design that is technologically feasible, and also considers the extent to which the alternative design would reduce the risk presented by the current design. In short, before liability can be assigned, both the Restatement (Third) and the German courts rely on an objective risk-utility test that focuses on alternatives to the current design.

The similarities also extend to the third category of defects – warning defects. In both countries warning defects arise when a manufacturer fails to provide consumers with warnings or instructions that adequately convey the risks related to the use and foreseeable misuse of the product. There is not, either under Paragraph I of Section 823 or in the Restatement (Third), an exact formula for what constitutes adequate or reasonable instructions, but analysis of warning defects in both countries focuses on a variety of factors ranging from the expectations and characteristics of the average consumer, to the obviousness and severity of the risks associated with the product. Essentially, both the Restatement (Third) and the German courts expect warnings and instructions to be comprehensive enough to ensure that the target consumer will be aware of the risks associated with the product's intended use as well as those associated with its reasonably foreseeable misuse. Additionally, in both the United States and Germany, those warnings and instructions must be simple enough for the consumer to understand, obvious enough that the consumer will read them and reasonable enough that it is likely that the consumer will follow them should he decide to use the product. In short, neither the Restatement (Third) nor the German courts can enumerate exactly what it is that makes warnings and instructions adequate, but they both know it when they see it.

Although there may be differences in the nuances relating to each of these three categories, in principle they are substantively very similar. As a result, the Commission should not feel compelled to seek guidance from the Restatement simply because the United States has been on a products liability roller coaster since the mid-1960s. While the Restatement may speak with the authority of those who have learned these lessons the hard way, that should in no way diminish the valuable lessons that can be learned from those who have learned their lessons in a less harsh environment.

Additionally, it is the job of the Commission to develop laws that will be applied within the context of almost exclusively civil law systems. The fact that German products liability law, which developed under traditional civil law principles as espoused by the BGB, has a proven track record of functioning in conjunction with civil law procedure should make it all the more appealing. In contrast, the principles espoused by the Restatement have developed under a very different procedural system. With this in mind, there are many scholars, particularly in Europe, who believe that it is the U.S. procedural law – not substantive law – that has been at the root of many of the hard lessons that provided much of the material for the Restatement (Third).<sup>280</sup>

As discussed above in conjunction with the Product Liability Act, the Commission saw fit to include a number of procedural limitations on both the applicability of and amount of damages recoverable under the statute. Similar procedural limitations have been placed on non-statutory law such as Paragraph I of Section 823. And it is very possibly the existence of these procedural limits that have allowed the German law, although substantially very similar to the Restatement, to develop without being subjected to many of the extremes that have marked the development of U.S. products liability law.

There are five basic procedural differences that significantly influence German product liability law.<sup>281</sup> First, unlike U.S. attorneys, German attorneys cannot work on a contingency-fee basis.<sup>282</sup> They are required to remain within both the high and low end of client billing as provided by a government-issued billing schedule.<sup>283</sup> As a result, German attorneys are not motivated by the prospect of receiving a percentage of large damage awards.<sup>284</sup> Second, German procedure severely limits both the duration and scope of discovery and largely places the process in the hands of the

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<sup>280</sup> An example of an excellent discussion of why, from the German perspective, the combination of German procedural law and “American-style” substantive products liability law will not result in a “products liability crisis,” see Borer, *supra* note 68, at 105.

<sup>281</sup> What follows is a very brief discussion of some of the major differences in German and U.S. legal procedure. Unfortunately, a more in depth analysis is beyond the scope of this Note.

<sup>282</sup> Borer, *supra* note 68, at 130-32.

<sup>283</sup> *Id.*

<sup>284</sup> Borer, *supra* note 68, at 130-32.

judge.<sup>285</sup> By contrast, U.S. procedure allows for exhaustive discovery and judges are rarely involved in a capacity more invasive than that of supervisor.<sup>286</sup> This has a definite and dramatic impact on not only the amount of information parties can collect, but also the time in which they have to do it.<sup>287</sup> Third, German procedure makes the judge, or a panel of judges, both the finder of law and the finder of fact.<sup>288</sup> U.S. procedure usually places the parties before a jury. As a result, the ability of German plaintiffs to play “the sympathy card” is severely restricted. Additionally, while juries are instructed to focus only on the issue at hand, judges often include larger policy issues in their reasoning. Fourth, German procedure operates on a “loser pays” system while U.S. procedure generally requires each party to pay its own legal costs.<sup>289</sup> This often discourages German plaintiffs from coming forward with anything other than very strong claims and allows German defendants to effectively intimidate potential plaintiffs with the threat of having to pay exorbitant court costs should they lose.<sup>290</sup> Finally, unlike U.S. procedure, German procedure does not recognize punitive damages.<sup>291</sup> This, in combination with the disparity between the U.S. and German social safety nets – in the United States soaring medical expenses can easily bankrupt a plaintiff, while in Germany most medical and disability costs are automatically covered by social service agencies – means that many potential German plaintiffs view the possible benefits of bringing a products liability suit as being far outweighed by the risks involved.<sup>292</sup>

Because most of EU member states have a civil law tradition, they have similar procedural restrictions.<sup>293</sup> Substantive German products liability law, as it developed under Paragraph I of Section 823, also developed under these procedural conditions. Because it so closely resembles the law as presented in the Restatement (Third) and because it will be applied in conditions that are very similar to those in

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<sup>285</sup> *Id.* at 133-36.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 136-39.

<sup>289</sup> Borer, *supra* note 68, at 136-39.

<sup>290</sup> *Id.* at 139-40.

<sup>291</sup> *Id.* at 141-46.

<sup>292</sup> *Id.*

<sup>293</sup> See JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 125-62, 1014, 1020, 1022, 1026-27 (1994).

Germany, the Commission should look to German law when seeking guidance for future substantive changes to EU products liability law.

## VI. CONCLUSION

In January 2001, the Commission issued its Report on the Application of Directive 85/374 on Liability for Defective Products.<sup>294</sup> Despite having presented a Green Paper<sup>295</sup> soliciting comments from throughout the EU, based on the feedback it received the Commission concluded that it “would be premature to envisage any changes to the current liability system under” the EU Directive.<sup>296</sup> However, should the Commission ever decide that EU products liability law needs to undergo “significant adjustments,” it will not be necessary to look as far afield as the Restatement (Third). German products liability law, at least in the areas of defining product defects and assigning liability, can provide the Commission with substantive guidance that is very similar to the law as set forth in the Restatement (Third). Additionally, because the German substantive law has developed within the procedural confines of a civil law system, it may be easier to adapt to fit the EU’s procedural requirements than would be the Restatement’s common-law based standards.

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<sup>294</sup> Commission Report, *supra* note 6.

<sup>295</sup> For the definition of a Green Paper, see *supra* note 264.

<sup>296</sup> Commission Report, *supra* note 6, at 28.

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