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What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability

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ARTICLES

What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability

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I. INTRODUCTION

One objective of this Symposium is to compare the Restatement of Torts in the United States with the products liability law of other countries. Toward that end, this article briefly describes the new Restatement (Third) of Torts (the new Restatement)¹ and the processes that led to its final approval and promulgation. Following this descriptive portion, the article advances the thesis that the new Restatement has much to offer by way of guidance to judges, legislators, and other policy-makers internationally. More specifically, this article argues 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. The products liability law being developed outside the United States appears too simplistic to these American observers to perform adequately in the long run. Significant adjustments will probably be required, and now is not too early to begin to anticipate what those adjustments will be.

Academic reactions to these substantive law developments in Europe and Japan have missed the point made in this Article in two important ways. First, most commentators have concluded that Europe and Japan have moved quite close to the American position by adopting strict liability in tort;² in reality, adoption of strict liability moves these jurisdictions further from the American position rather than closer.³ Second, non-American commentators have argued that differences in civil litigation procedures tend to dwarf differences in substance, thus implying that the substantive differences do not matter. The American civil litigation system, with its reliance on percentage contingent fees, extensive pretrial discovery, quixotic lay juries, and generous measures of recovery, is believed to explain the differences between the American products liability experience and any likely to occur in other countries. A legal system in which these uniquely American institutions are conspicuous by their absence, by clear implication, can get by quite nicely with a much simpler version of the underlying substantive text.⁴

This article argues that the foregoing reasoning is demonstrably flawed and may very well lead to unfortunate consequences. The word "unfortunate" does not imply anything approaching severe economic dislocation. As long as the traditional procedural constraints in other countries remain intact, products liability should not threaten the growth of industry or lead to economic recession. Thus, from a purely practical perspective, the majority of international commentators have probably gotten it right. But inadequate substantive standards in the form of overly simplistic rules of decision will present judges

1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

2. "[W]hen the European Community Directive has been fully implemented in the United Kingdom, the substantive law on product liability will be brought very much closer to the law in the United States, principally by the move from liability based on negligence to strict liability." The Right Honourable The Lord Griffiths et al., *Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 401 (1988). See also Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 705-17 (1995) (describing procedural and evidentiary constraints on litigation in Japan).

3. See, e.g., Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980). The one truly spectacular exception to the general observation in the text regarding non-American writers is Jane Stapleton, who clearly understands what is actually happening. See JANE STAPLETON, *PRODUCT LIABILITY* 235-36 (1994).

4. "[T]he position of the English consumer of defective products will remain significantly different from that of the American consumer. The reason for this is not so much that there will remain differences between the substantive laws on product liability, but that there are, and will remain, considerable differences in the systems into which those laws fit." The Lord Griffiths, *supra* note 2, at 401. See also Behrens & Raddock, *supra* note 2, at 705-17.

and lawyers with conceptual difficulties in trying to respond to products liability claims rationally, consistently, and fairly. Ultimately, a somewhat more sophisticated program of substantive law will be required to achieve these goals. When that time arrives, the new Restatement can play a helpful role in making the necessary adjustments. Indeed, international scholars are well advised to anticipate that adjustments will be necessary, and to consider making them sooner rather than later.

II. THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

A. *American Products Liability Law in the Period Preceding the New Restatement: 1960–Present*

Through the early 1960s, American products liability law struggled with three major issues: whether privity of contract between plaintiff and defendant should be required for tort remedies to be available;⁵ whether contract-based disclaimers of tort liability should be given effect;⁶ and whether strict liability should replace negligence as the predominant doctrinal basis of liability in tort.⁷ These struggles culminated in 1965 with the inclusion by the American Law Institute (ALI) of a landmark provision in the Restatement (Second) of Torts: Section 402A (the Restatement (Second)).⁸ The black letter of that section resolved the privity and strict liability issues in favor of claimants;⁹ an official comment to that section, supported by case law, disposed of disclaimers in similar fashion.¹⁰ By any measure, Section 402A must be deemed successful in influencing the subsequent development of American products liability law. Since the late 1960s, the consensus view in this country has been that commercial product sellers are subject to privity-free, nondisclaimable strict liability in tort for physical harm caused by product defects existing at the time of sale.¹¹

Concomitantly, with the benefit of hindsight, Section 402A must be deemed a failure with respect to the manner in which it defined—or rather, did not define—the concept of product defect. Indeed, that section of the Restatement (Second) proved downright mischievous in confusing some American courts about the interplay of defectiveness with product design and failure to warn. Because the black letter offered no guidance regarding these issues, the comments to Section 402A became the focus of judicial efforts to discern the intent of the drafters regarding product sellers' responsibilities for the generic risks presented by their products. Many courts strained to attribute meanings to snippets and phrases within certain comments that, upon sober reflection, should not have been read as

5. The demise of the privity rule is recounted in two landmark articles authored by the Reporter of the Restatement (Second) of Torts, Dean William Prosser. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). See also William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

6. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 87–95 (N.J. 1960).

7. See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962).

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

9. *Id.* § 402A(2)(b).

10. RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (“The consumer’s cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer’s hands.”).

11. See M. STUART MADDEN, PRODUCTS LIABILITY § 6.1 (2d ed. 1988). See also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a and § 18 (Proposed Final Draft 1997).

stating the framers' intent.¹² One should hesitate before blaming the drafters for incompetence in this regard. Almost all of the reported decisions prior to 1965 involved manufacturing defects.¹³ Claims based on allegedly defective design and failure to warn were just beginning to come to court in the mid- to late-1960s.¹⁴ But the fact remains that the failure of Section 402A to anticipate those developments proved to be its major shortcoming in the decades after its promulgation.

A concrete example illustrates clearly how the official comments to Section 402A came to have lives of their own. In Comment *i*, the drafters sought to explain why certain generically dangerous products, such as whiskey, cigarettes, and butter, are not necessarily defective merely because their consumption frequently causes personal injury.¹⁵ In doing so they observed that when such generically dangerous products contain harmful contaminants—when butter contains poisonous fish oil, for example—they are defective. But pure butter is not defective merely because it deposits cholesterol in arteries and thus causes heart attacks. As subsequent discussions make clear, these observations about butter remain true today.¹⁶ The important point here is that the drafters of Section 402A could not have intended to advance a viable test for generic defectiveness in making these observations. Indeed, they limited their hypothetical examples of defectiveness to manufacturing defects—e.g., butter contaminated with poisonous fish oil—and made no attempt to provide comprehensive direction about the very different, and difficult, issues of defective design and failure to warn.

Nevertheless, some American courts in the period from 1965 through the 1990s, confronting the need for a test by which to determine when product designs are defective, focused attention on a phrase in Comment *i*: “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer”¹⁷ These courts interpreted the phrase to provide a stand-alone legal standard by which to judge the defectiveness of product designs.¹⁸ The drafters of Comment *i* clearly intended the just-quoted phrase to apply only to manufacturing defects. In that context, disappointment of consumer expectations works passably well as a test for defect.¹⁹ But some American courts interpreted Comment *i* to provide an independent test for defective design. Had this strained interpretation proved harmless, no need would arise to mention it. But, as shall be demonstrated, “consumer expectations” has proven itself to be an abject failure as an independent test for defectiveness in classic design cases. And sufficient numbers of courts²⁰ and commentators²¹ in this country have given that test credence to cause the

12. One of our personal favorites is the so-called “heeding presumption” teased out of Comment *i*. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).

13. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

14. See generally James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

15. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

16. See *infra* note 44 and accompanying text.

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

18. For a description of how Comment *i* was misinterpreted see *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 249 (Miss. 1993).

19. Manufacturing defects invariably cause products to malfunction unexpectedly and dangerously, clearly disappointing expectations and often giving rise to tort claims. See cases cited *supra* note 13.

20. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 886 (Alaska 1979); *Ontai v. Straub Clinic and Hosp., Inc.*, 659 P.2d 734, 739 (Haw. 1983); *Lester v. Magic Chef, Inc.*, 641 P.2d 353, 361 (Kan. 1982); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 68 (Neb. 1987); *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988).

21. See, e.g., F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 485 (1977); John E. Montgomery & David G. Owen,

authors more than a few sleepless nights in drafting the new Restatement.²² In short, it is difficult to overstate the mischief that this misplaced interpretation of Comment *i* has caused in American products liability law.

B. The New Restatement: Why and How It Came to Be

From this brief description of legal developments in the time period preceding the new Restatement, it should be obvious that the major impetus for a new Restatement was to correct the deficiencies of the Restatement (Second) in connection with claims based on allegedly defective design and failure to warn. Two major aspects required attention: the differentiation of types of product defect and the articulation of a workable standard for design defect. The next section summarizes the substance of the relevant provisions of the new Restatement. The focus is on the background of the ALI and the five-year process by which the project went from inception to final approval.

The ALI, founded in 1923 by a distinguished group of judges, lawyers, and scholars, is a nonprofit organization whose objective is improving the American legal system.²³ The ALI co-sponsors continuing legal education programs and uniform state laws projects and promulgates Restatements of the law on a wide variety of topics. Restatements are formal summaries of what the law is, and less often, what it ought to be, in a majority of jurisdictions in this country.²⁴ They are not proposals for law reform but are rather statements, in blackletter rules and explanatory comments, of decisional law—the law used by most American courts in deciding cases. Members of the ALI meet annually in May to review developments in the law and to vote on various pending projects.

The Restatement (Third) of Torts: Products Liability began in May 1992, with the appointment of the authors of this article as Co-Reporters. Upon their appointment, the Reporters met with various committees of the ALI to consider the scope and content of the project. A group of twenty advisers were appointed to help the Reporters in their work. The advisers met as a group with the Reporters at least annually, in two day sessions, to consider the work in progress. In addition, the advisers counseled the Reporters on an individual, ongoing basis. A Members Consultative Group, numbering several hundred, also met with the Reporters at least once each year to discuss drafts. And, a Liaison Group, made up of delegates from various professional groups representing both plaintiffs and defendants, met with the Reporters on an annual basis. Finally, the Council of the ALI, an internal governing body whose approval is required before proposals can go before the

Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C. L. REV. 803, 812–24 (1976); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1302 (1974).

22. A number of law review articles, pointedly critical of our standard for design defects and strongly favoring an independent consumer expectations standard, were published during the Restatement project. See, e.g., Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group*, Restatement of Torts (Third): Products Liability, 61 TENN. L. REV. 1173 (1994); Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429 (1994); Harvey M. Grossman, *Categorical Liability: Why the Gates Should be Kept Closed*, 36 S. TEX. L. REV. 385 (1995); Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH. J. L. REFORM 215 (1997); Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J. L. REFORM 261 (1996).

23. THE AMERICAN LAW INSTITUTE (Nov. 1996) (pamphlet published by the ALI describing history of and operative guidelines for the Institute).

24. Howard Wechsler, *Restatements and Legal Change: Problems of Policy and the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 187–92 (1968).

Annual Meeting, met with the Reporters twice each year to consider drafts as they progressed.

Altogether, at least a dozen formal drafts, published in softcover and widely circulated among ALI members, were discussed, debated, criticized, and revised over the five-year life of the project.²⁵ The Reporters met with one group or another in formal sessions at least six times each year and presented drafts at Annual Meetings in 1994, 1995, 1996, and 1997.²⁶ Thousands of written suggestions were received and considered by the Reporters, and countless hours were spent in person and on the telephone discussing every conceivable aspect of the project. Reported appellate court decisions and statutes spanning a thirty-year period were examined, classified, and relied on as the basis for the black letter rules and supporting comments. All of this research is included in the finished form of extensive Reporters' Notes.²⁷

C. *The Substantive Content of the New Restatement*

The new Restatement: Products Liability contains four chapters. The first two set forth the rules of liability applicable to sellers and other commercial distributors of products.²⁸ The third addresses the liabilities of successors and apparent manufacturers.²⁹ The fourth contains provisions of general application, including causation, affirmative defenses, and definitions.³⁰

The first chapter, containing eight sections dealing with liability for harm caused by defects existing at time of sale, is of primary importance in this article. The first four sections³¹ apply to products generally, and the next four³² apply to special categories of products, including component parts, prescription products, food products, and used products. Section 1 sets out the general rule for defect-based liability:

25. (1) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 1, 1993); (2) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 1, 1993); (3) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 1A, 1994); (4) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, 1994); (5) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 2, 1994); (6) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 2, 1994); (7) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995); (8) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 3, 1995); (9) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 3, 1995); (10) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 3, 1996); (11) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft (Preliminary Version) 1996); (12) RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft 1997).

26. Each year the reporters met with a group of formal advisors, the Members Consultative Group, liaison groups from the American Bar Association (ABA), the Association of Trial Lawyers of America (ATLA), the Defense Research Institute (DRI), the Product Liability Advisory Council (PLAC), the American Law Institute Council, and the membership at the Annual Meeting.

27. Each section of the Products Liability Restatement is followed by a section entitled "Reporters' Notes." These notes reflect the research and the opinion of the reporters and does not bear the imprimatur of the ALI. It is solely the work of the reporters.

28. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-11 (1998).

29. *Id.* §§ 12-14.

30. *Id.* §§ 15-21.

31. *Id.* §§ 1-4.

32. *Id.* §§ 5-8.

§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.³³

Section 2 defines the three types of defects identified in Section 1:

§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings 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 seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.³⁴

Unquestionably, the most important contributions of the new Restatement are the definitions of defective design and failure to warn in Subsections 2(b) and (c). Indeed, the general definition of defective design proved to be the most exhaustively debated provision of the entire project. Its explicit reliance on the concept of reasonable safety, expressed in the context of proof that a safer, reasonable alternative design (RAD) was available at the time of sale, reflects the clear majority position in American law.³⁵

Comment *d* to Section 2 makes clear that the standard for defective designs rests on the same risk-utility concepts that form the basis of the negligence standard at common law.³⁶ (Indeed, this is the major aspect of the European Community's recent adoption of "strict liability" for all types of defect that moves the European Community further away from American law rather than closer to it).³⁷ The new Restatement recognizes three important circumstances in which a plaintiff with a design-defect claim is relieved of the necessity of proving a RAD. Section 3 allows the plaintiff to establish a defect by proving that the product in question malfunctioned dangerously, failing to perform its manifestly

33. *Id.* § 1.

34. *Id.* § 2.

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

36. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998). "[The] Standard [for defective design] is also used in administering the traditional reasonableness standard in negligence." See RESTATEMENT (SECOND) OF TORTS § 283 cmt. c.

37. See *supra* note 3 and accompanying text.

intended purpose.³⁸ When such a product malfunction occurs, Section 3 allows an inference of defect in much the same manner as *res ipsa loquitur* allows an inference of negligence at common law.³⁹ Section 4 allows the plaintiff to establish a defective design by showing that the design fails to conform to an applicable safety statute or regulation.⁴⁰

Assuming that a product has not malfunctioned and does not fail to conform to applicable safety regulations, the only other way in which its design could be found to be not reasonably safe, assuming a RAD could not be proven, would be when the design is so dangerous, and provides so little social utility, that reasonable persons would not distribute or consume the product in the first instance. In that unusual circumstance, the product would be deemed defective categorically, even though a safer alternative design was not available to serve as a substitute. Such a circumstance would arise only rarely; it would be necessary for the feature of the design that presents the risk of harm to be the very same feature upon which some persons, albeit unreasonably, place value. An example of such a categorically defective product, drawn from an actual decision,⁴¹ might be above-ground pools. Such pools presumably cannot be made safe for diving into head first, in part because the vinyl bottoms are very slippery. Thus, when a person dives in head first, expecting to brace the fall with outstretched hands, the diver's hands slip on the bottom, allowing the diver's head to strike the bottom. No other less slippery liner is technologically feasible. If one were ready to categorize above-ground pools with vinyl liners as products that are so dangerous that they should not be marketed at all, one could find them defectively dangerous even if safer above-ground pools were not technologically available.

The problem with accepting this form of "categorically defective design" in the new Restatement is that the overwhelming majority of American courts who have confronted it squarely have rejected it most emphatically. Although a number of courts have considered the possibility of imposing liability for categorically defective designs in dictum,⁴² only a small handful have actually done so.⁴³ Most American courts, when given the opportunity

38. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

39. *See id.* § 3 cmt. a.

40. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 (1998).

41. *See O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

42. *See Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n.5 (Or. 1978), where the court said:

As pointed out above, the court's task is to weigh the factors bearing on the utility and the magnitude of the risk and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. Our holding should not be interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury. There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable.

See also Armentrout v. FMC Corp., 842 P.2d 175, 185 n.8 (Colo. 1992) (en banc); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97 n.8 (Minn. 1987) ("Conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned." *Id.* at 97 n.8.); *Rix v. General Motors Corp.*, 723 P.2d 195, 201 (Mont. 1986).

43. *See O'Brien v. Muskin Corp.*, 463 So. 2d 298, 306 (N.J. 1983) (above-ground swimming pool with vinyl bottom may be defective based on risk-utility analysis even though no alternative design was feasible). *See also Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986) (court concluded that an asbestos

actually to impose categorical liability, have refused to do so.⁴⁴ When the issue arose in the course of deliberations on the new Restatement, it was decided to recognize the future

manufacturer can be held to a strict liability standard for a product that fails to meet risk-utility norms because the dangers created by its use, even if unforeseen at the time of manufacture, outweigh its utility. *Id.* at 114. But if a product does meet risk-utility norms on its own, and is only defective because there exists an alternative design, the manufacturer is held to a negligence-foreseeability standard. *Id.* at 115). A third state appellate court may have imposed liability on the theory that the overall danger of the product outweighs its benefits. In *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985), the court held that the manufacturers of cheap handguns—Saturday Night Specials—could be held liable for injuries suffered by innocent third parties at the hands of criminals. *Id.* at 1152–59. Although earlier in the opinion the court rejected liability based on risk-utility balancing, *id.* at 1149, the court's imposition of liability on manufacturers for injuries caused by cheap handguns appears to condemn them because the overall utility to society of this genre of firearm is too low to justify its continued marketing. *Id.* at 1158.

Each of these judicial attempts at imposing such liability has either been overturned or sharply curtailed by legislation. See LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991) (overruling *Halphen*); MD. CODE ANN., CRIM. LAW art. 27 § 36-1 (1990) (overruling *Kelley*); N.J. STAT. ANN. § 2A:58C-3(3) (West 1990) (limiting *O'Brien*).

44. For example of cases involving firearms see *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1273 (5th Cir. 1985), *reh'g denied*, 768 F.2d 1350 (applying Louisiana law); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533–34 (11th Cir. 1986) (applying Florida law); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988) (applying New Mexico law).

In *McCarthy v. Orin Corp.*, 119 F.3d 148 (2d Cir. 1997), a wrongful death action on behalf of victims who were killed in Colin Ferguson's highly publicized murderous shooting spree on the Long Island Railroad was brought against the manufacturer of the Black Talon bullets used by Ferguson. Black Talon ammunition incorporates a hollow point bullet that is designed to expand upon impact, exposing razor-sharp edges at a 90-degree angle to the bullet. The expansion dramatically increases the wounding power of the bullet. Plaintiffs argued that the bullets were defectively designed in that they caused more damage than would have been caused by an ordinary bullet. The heart of plaintiffs' claim of design defect was that Black Talon bullets fail the risk-utility test which is the governing test for defect in New York. In affirming the district court's granting of defendant's motion to dismiss, the court said:

The purpose of risk/utility analysis is to determine whether the risk of injury might have been reduced or avoided if the manufacturer had used a reasonable alternative design However, the risk of injury to be balanced with the utility is a risk not intended as the primary function of the product. Here, the primary function of the Black Talon bullets was to kill or cause serious injury. There is no reason to search for an alternative safer design where the product's sole utility is to kill and maim. Accordingly we hold that appellants have failed to state a cause of action under New York strict products liability law.

Id. at 155. See also *Downs v. R.T.S. Security, Inc.*, 670 So. 2d 434 (La. Ct. App. 1996).

For example of cases involving cigarettes see *Kotler v. American Tobacco Co.*, 731 F. Supp. 50, 52 (D. Mass.), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *cert. granted and judgment vacated*, 112 S.Ct. 3019 (1992), *on remand*, 981 F.2d 7 (1st Cir. 1992) (applying Massachusetts law); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 856 (D.N.H. 1988) (applying New Hampshire law). For a case involving mini-trail bikes, see *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660 (Wash. 1986) (*en banc*).

One jurisdiction that recognizes by legislation an action for an egregiously dangerous product has done so in a very limited context. See N.J. STAT. ANN. § 2A:58C-3(b) (West 1987), which provides that the obligation to establish a "practical and technically feasible alternative design" is not required when a court makes all of the following determinations based on clear and convincing evidence:

- (1) The product is egregiously unsafe or ultra-hazardous;
- (2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and
- (3) The product has little or no usefulness.

Appended to the legislation is an official commentary by the New Jersey Senate Judiciary Committee which indicates just how limited the exception was intended to be. The commentary notes: "It is intended that such a finding [under the exception] would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marketed for use by the young children, or of a product marketed for use in dangerous criminal activities." N.J. SENATE JUDICIARY COMMITTEE STATEMENT, No. 2805-L.1987, cl. 197 (N.J. 1987).

possibility (rather than any existing actuality) of a quite limited form of categorical liability in a comment to Section 2:

e. Design defects: possibility of manifestly unreasonable design. Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design. In large part the problem is one of how the range of relevant alternative designs is described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of Subsection (b). Toy guns unlikely to cause injury would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if the realism of the hard-pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the realism of the hard-pellet gun and thus its capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, and deem the capacity to cause injury an egregiously unacceptable quality in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product.⁴⁵

Comment *e* constrains categorical liability to instances in which the relevant dangers are great and the corresponding utilities are small. The Comment does not embrace, even as a possibility, the sort of liability described in the earlier above-ground pool case.

During the five year course of debate and deliberations on the Restatement project, assertions were repeatedly made to the effect that the drafters of Subsection 2(b) have overstated the role played by the RAD element in American products liability law. Proof of a RAD is not, it has been argued, an invariable requirement in cases involving allegedly defective product designs.⁴⁶ According to these vocal critics, a number of other legal tests for design defect, including an independent consumer expectations test, are recognized by American courts. Although these critics have been quite vocal, they have not been accurate. Careful examination of the judicial sources cited in support of these assertions show the assertions to be false. In almost every instance, the so-called “other, independent” tests for design defect turn out to be one or another of the exceptions to RAD built into the Restatement itself: product malfunction in Section 3;⁴⁷ regulatory violation in Section 4;⁴⁸ or judicial invocation of the limited “categorical liability” dictum in Comment *e* to Section

45. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (1998).

46. See sources cited *supra* note 22.

47. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

48. See *id.* § 4.

2.⁴⁹ A few American courts today recognize an independent consumer expectations test for defective design, but they constitute a very small minority.⁵⁰ A substantial majority of courts adopt the positions articulated in Sections 1 through 4 of the new Restatement, including the RAD requirement set forth in Subsection 2(b), as the primary tests for defect in classic design cases.

III. CONTEMPORANEOUS DEVELOPMENTS IN EUROPE AND JAPAN: ADOPTION OF A 1960S VERSION OF AMERICAN PRODUCTS LIABILITY LAW

The authors of this article confess to a lack of expertise about the nuances of European and Japanese products liability law. But we are confident that we have an adequate grasp of what is happening in terms of the “larger picture.” From the broader perspective, it seems clear that both Europe and Japan are, with respect to the core definitions of product defect, committing themselves to essentially the same position that this country committed itself to in 1965 in Section 402A of the Restatement (Second). If this assessment is accurate, and if one assumes that cases involving classic design claims are brought before European and Japanese courts,⁵¹ then many of the same conceptual problems that plagued American law from 1965 into the 1990s can be expected to plague products liability law in those countries in the years to come.

This section briefly describes the major international developments. Both the European and Japanese initiatives appear to replace previous negligence regimes with strict liability.⁵² Article 6 of the European Communities Directive defines the concept of defect that triggers liability as follows:

- (1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
 - (a) the presentation of the product;
 - (b) the use to which it could reasonably be expected that the product would be put;
 - (c) the time when the product was put into circulation.
- (2) A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.⁵³

Article 7 provides six bases for relieving the producer of liability, placing the burden of proof on the producer in each instance. These bases include lack of causation,⁵⁴ compliance with mandatory governmental regulation,⁵⁵ and scientific unknowability of the relevant risks at the time of distribution.⁵⁶ As scholarly commentators have observed, the

49. See *id.* § 2 cmt. e.

50. See cases cited *supra* note 20.

51. See *infra* text accompanying notes 58 and 74.

52. See The Lord Griffiths, *supra* note 2 and accompanying text; Sarumida, *infra* note 60.

53. Council Directive 85/364 of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, art. 6, 1985 O.J. (L 210) 29 [hereinafter Products Liability Directive].

54. See *id.* art. 7(b).

55. See *id.* art. 7(d).

56. See *id.* art. 7(e).

reliance of Article 6 on the “consumer expectations” standard reflects the influence of Comment *i* of Section 402A of the Restatement (Second).⁵⁷

Japan’s Product Liability Law, enacted in 1994, adopts a rule of strict liability and a definition of defect similar to those in the European Community Directive (EC Directive).⁵⁸ A recent commentary on the Japanese statute observes:

The most striking feature of the Product Liability Law is the imposition of liability against manufacturers and others for product-related harms without regard to fault. The new Law represents a major departure of traditional Japanese tort and contract principles. The core provision of the Product Liability Law, Article 3, provides: “The manufacturer or the like shall be liable for damages . . . caused by a defect of the product which is manufactured” This rule applies in any action involving a product that left the manufacturer’s control after July 1, 1995, the effective date of the Law. Like the American doctrine of strict product liability, the purpose of the Japanese Product Liability Law is to protect victims by relieving them from the legal burden of proving fault.

....

The Product Liability Law defines the term “defect” as “a lack of safety which ordinarily the product should provide, in consideration of the characteristics of the product, the use of the product which could ordinarily be expected, the time that the manufacturer . . . delivered the product, and other circumstances relating to the product.” Thus, Japan applies an objective “consumer’s expectation” test in determining whether a product is “defective” for the purposes of the Product Liability Law. In this respect, the Japanese definition of a defective product is consistent with U.S. law as found in Section 402A of the *Restatement (Second) of Torts*.⁵⁹

As the quoted commentary and others make clear,⁶⁰ Japan has opted for the 1965 version of American law governing design defects, as reflected in Comment *i* of the Restatement (Second).

IV. WHY ADOPTION OF A 1960S VERSION OF AMERICAN PRODUCTS LIABILITY LAW WILL PROVE EMBARRASSING IN THE LONGER RUN

A. *Eliminating Potential Sources of Distraction*

Before considering the merits of the decisions in the EC Directive and Japan’s Product Liability Law about strict liability and the definition of a defect, several preliminary points should be addressed. The first is for the authors to admit that characterizing these developments as the “adoption of a 1960s version of American law”

57. See generally Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT’L & COMP. L. REV. 227, 232–235 (1997).

58. See Seizōbutsu sekinen hō [Products Liability Act], Law No. 85 of 1994, art. 2, para. 2.

59. Behrens & Raddock, *supra* note 2, at 689–90, 696–97 (footnotes omitted).

60. See generally Hiroshi Sarumida, *Comparative Institutional Analysis of Product Safety Systems in the United States and Japan: Alternative Approaches to Create Incentives for Product Safety*, 29 CORNELL INT’L L.J. 79 (1996).

exaggerates the point to some extent. Obviously, the recent statutory changes in Japan and the European Community reflect many of the lessons “learned the hard way” in America in the past three decades. For example, the EC Directive contains definitions of “producer” consistent with developments in this country;⁶¹ the EC Directive contains a provision paralleling American rules about the admissibility of post-sale modifications;⁶² and the European Community rule governing the liability of manufacturers of component parts reflects, in part, developments in the United States.⁶³ Indeed, in several respects the EC Directive contains limitations on producer liability that, although imposed by statute in some American states, were deemed too radical for the new Restatement.⁶⁴ In similar fashion, the new Japanese statute contains provisions that reflect lessons learned from the American experience.⁶⁵

Notwithstanding these concessions, the premise of the discussion that follows is fundamentally valid. The self-proclaimed progression from negligence to strict liability in Europe and Japan is quintessentially 1960s American rhetoric. The movement in this country over the last three decades has been in quite the opposite direction.⁶⁶ The consumer expectations test for design defect is rooted in Comment *i* to Section 402A, promulgated in 1965; in this country, that test is thoroughly discredited today.⁶⁷

The datedness of the thinking reflected in the EC Directive (when judged by current American standards) is reflected in the language used to express the general rule governing a producer’s liability for scientifically unknowable risks. Subpart (e) of Article 7 states:

The producer shall not be liable as a result of this Directive if he proves:

- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.⁶⁸

Clearly, the drafters of the above language focused on manufacturing defects, whose existence can be discovered empirically in the same manner that one can discover that a cup of tea is near boiling temperature.⁶⁹ Design and warning defects, in contrast, require some sort of value judgment—as the following section makes clear, a risk-utility based judgment—regarding the reasonableness of the risks posed by the product.⁷⁰ One “discovers” risks, but one “evaluates” whether value-based rules render a product design

61. See Products Liability Directive, *supra* note 53, art. 3(1).

62. See *id.* art. 6(2).

63. See *id.* art. 7(f).

64. See *id.* arts. 11, 16(1).

65. See generally Behrens & Raddock, *supra* note 2.

66. See Birnbaum, *supra* note 3, at 593; David G. Owen, *Toward a Proper Test for Design Defectiveness: “Micro-Balancing” Costs and Benefits*, 75 TEX. L. REV. 1660 (1997).

67. See, e.g., Gary T. Schwartz, *Foreward Understanding Products Liability*, 67 CAL. L. REV. 435, 476 n.241 (1979) (absent express warranty consumer expectations are not concrete to serve as a standard for liability); “The [consumer expectation] test can be utilized to explain almost any result that a court or jury chooses to reach.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 699 (5th ed. 1984); “Few courts adhere closely to the letter of [S]ection 402A’s consumer expectations test in proving design defect. The test has proved unworkable . . .” Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1236 (1993); “[T]he deficiencies of the consumer expectation test are considerable.” John Neely Kennedy, *The Role of the Consumer Expectation Test Under Louisiana’s Products Liability Tort Doctrine*, 69 TUL. L. REV. 117, 143 (1994); STUART M. MADDEN, PRODUCTS LIABILITY § 6.23 (entitled “The Retreat of the Consumer Expectation Test”) (2d ed. 1994 Pocket Part).

68. Products Liability Directive, *supra* note 53, art. 7(e).

69. Manufacturing defects are physical departures from the intended design. They do not require any normative evaluation to determine.

70. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmts. c, d, and i (1998).

defective. To make sense in connection with design and warning based defects, the operative language in subpart (e) should read “the state of knowledge was not such as to allow the producer to *evaluate whether or not the product was defective*.” Another way to express the idea using “discovery” rhetoric would be the state of knowledge was not such as to allow the producer to discover “*the risks or means of avoiding those risks that are relevant to the evaluation of defectiveness*.” For the drafters of subpart (e) to talk of “discovering the defect” in connection with design and warnings unavoidably suggests to American observers that the drafters were focusing on Section 402A rather than developments in this country since 1965 to correct the deficiencies of that provision in dealing with design defects and failures to warn.

Another issue that should be put aside is the notion that the EC Directive uses the consumer expectations test for all types of product defects because it is too hard to anticipate every type of defect that may arise.⁷¹ Undoubtedly, this conclusion was warranted in the early 1960s in this country, when design and failure-to-warn litigation was in its infancy. But in the almost forty years since then, American courts have considered enough design and warning based claims to let the ALI define product defects in a more sophisticated and, as shall be demonstrated, workable manner. Basing the EC Directive’s definition of defect on a unitary, unworkable standard drawn from a now discredited Comment *i* to Section 402A is not only unfortunate, but avoidably so.

Moreover, the foregoing conclusion survives even taking into account that the EC Directive seeks to guide independent nation states organized in a loose confederation rather than, as in this country, Member States in a powerful federal union. It can be argued that, even if the definitions of “defect” in the new Restatement succeed, no legitimate basis exists for telling nation states how they should define “defect.” At the risk of appearing simplistic, the point of a “directive” is to direct, at least with regard to concepts as basic as definitions of “defect” in a products liability system. If the authors are correct that the structure of the new Restatement reflects pragmatic inevitability rather than policy driven political preference, then politics will play only a minor role in working out concepts of product defect under the EC Directive. Pragmatic concerns will inevitably drive a modern industrialized state’s system of products liability in tort to accept the organization of the defect concept reflected by recent developments in this country. To suggest that political considerations of state sovereignty justify members of the European Community adopting significantly different definitions of design defect is, to the authors, almost as misguided as to suggest that each Member State should be left to determine, for itself, the boiling point of water at sea level.

Another potential source of distraction that should be identified is the idea that a vague, undifferentiating standard for defect is acceptable, and even preferable, because courts will “work out the details” on a case-by-case basis. The point is not so much that member states should be left free to “do their own thing,” politically, but rather that courts in the Member States will, more or less in unison, “get it right” without guidance from the Directive. To some extent, of course, this assertion amounts to a truism, because courts will inevitably be required to fill in the interstices of even a comprehensive statutory framework. But the experience in the United States over the past forty years strongly suggests that courts—even fairly sophisticated courts that confront a substantial and steady caseload of design defect cases—may require thirty or forty years to “get it right.” Indeed, some probably never will, especially given the extent to which past mistakes haunt the

71. Vagueness in EC definition of “defect” judged to be “inherent in any attempt to formulate a test which is apt to cover all kinds of products and all sorts of defects.” The Lord Griffiths, *supra* note 2, at 380.

future under a vigorous tradition of *stare decisis*.⁷² As Reporters to the new Restatement, the authors can testify that that project drew on the collective experience of literally tens of thousands of appellate decisions in fifty-plus jurisdictions over thirty-plus years. No single American jurisdiction got it completely right; some, at least in the early going, got it remarkably wrong.⁷³ But the definitions of defect finally agreed upon in the new Restatement truly reflect the collective experience in this country. For the European Community (and Japan, and others that follow the European Community) to “leave it to the courts” is to overlook the obvious gains to be had from drawing on the American experience.

One final source of potential distraction deserves mention. At the conference in Austin, attended by the contributors to this Symposium, spokespersons from Europe and Canada observed that the only design-defect claims that reach their courts are of the sort covered by Section 3 of the new Restatement—claims based on product malfunction. They argued that Subsection 2(b), with its RAD requirement, is not needed in their countries and that disappointment of consumer expectations suffices as a standard for defective design. The reasons why this pattern has developed appear to be procedural, not substantive. In the presence of a “loser pays costs” rule, and in the absence of contingent fees, plaintiffs are significantly deterred from bringing a design claim other than one based on product malfunction.

The authors’ reactions to this observation are severalfold. First, on the reasonable assumption that the nature of the substantive rule affects the decision whether or not to bring a claim, it begs the question to respond to a suggested substantive change by pointing to prior experience under a different rule that may itself have discouraged claimants. Who knows but that all the talk in these countries about “pro-consumer reforms” might encourage greater boldness under a more coherent design standard? Moreover, who is to say whether law firms, as repeat players to whom a legal victory in a classic design case would have value in future cases, might not be willing to assist claimants in lowering the costs of bringing such actions?⁷⁴ And, finally, relatively wealthy claimants, or judgment-proof claimants, who suffer severe injuries might certainly bring claims in any event.

B. Why the Legal Standard for Defective Design Must Be Based on Risk-Utility Analysis Rather Than Consumer Expectations

The preceding discussion has repeatedly referred to what might be characterized as the “inexorable inevitability” of the definitions of defect included in the new Restatement.

72. See, for example, *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995), where the court applied the consumer expectations test in a design defect case. Plaintiff brought an action based on the implied warranty of merchantability. The court found that this contract-based standard embodied the consumers expectation test. The court held that “as long as that legislative source of authority exists, we are not free to merge the warranty cause of action with its tort-based sibling regardless of whether, as a matter of policy, the contract-based warranty claim *may fairly be regarded as a historical relic that no longer has any independent substantive value.*” *Id.* (emphasis added). Also see *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994), where California retreated from its long held belief that the consumer expectations test was a proper standard for liability in classic design defect cases. It limited the consumer expectations test to cases “in which the *everyday experience* of the product users permit a conclusion that the product design violated *minimum* safety assumptions” *Id.* at 308. The influence of *stare decisis* is evident. The cases covered by the limited consumer expectations test are traditional *res ipsa* cases. See *id.* at 308, n.3.

73. See *infra* note 87 and accompanying text.

74. We realize that ethical and professional standards constrain such tactics, but a firm could nevertheless take on an insolvent claimant with no realistic expectations of ever getting paid for time spent pursuing the claim.

The premise has been that, apart from replacing tort liability altogether with a radical scheme of no-fault compensation,⁷⁵ reasonable courts would eventually be driven to the conclusion that design defectiveness must be determined by the application of risk-utility analysis employing a RAD requirement. Now the authors must substantiate their claim in this regard. An article appeared in the May 1998 *Cornell Law Review* in which the authors expand upon this theme.⁷⁶ In that article, the authors conclude that the Restatement view regarding product design reflects a consensus in this country and that this consensus was inevitable when the alternative approaches are considered carefully.⁷⁷

1. Distinguishing Between Fairness-Based and Efficiency-Based Design Standards

Current thinking in this country and abroad recognizes two basic justifications for civil liability. One perspective justifies liability on instrumental, efficiency grounds: threats of liability create incentives for actors to invest in reasonable care, leading to more optimal allocations of scarce resources.⁷⁸ The other perspective justifies liability on non-instrumental, fairness grounds: liability is imposed to achieve corrective justice between the parties.⁷⁹ The instrumental standard for design defects most often recognized is reasonable design safety based on risk-utility analysis.⁸⁰ The non-instrumental standard most often applied by courts is reasonable consumer expectations.⁸¹ Under the expectations standard, consumers have a right to expect that products will not harm them unfairly. Although some courts and commentators conflate the two standards by concluding that consumers have a right to expect reasonably safe product designs,⁸² the standards reflect theoretically different perspectives when properly viewed. The main functional difference between them is the extent to which the consumer expectations test relies on intuition in its application.⁸³ Compared with consumer expectations, the reasonableness standard based on risk-utility

75. See, e.g., Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157 (1992).

76. See Henderson & Twerski, *supra* note 35.

77. See *id.* at 919–20.

78. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 206–11 (4th ed. 1992).

79. See, e.g., George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 1 (1992).

80. See, e.g., *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 184 (Mich. 1984); *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246 (Colo. 1987); *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993).

81. See cases cited *supra* note 20.

82. See, e.g., *Aller v. Rodgers Machinery Mfg. Co.*, 268 N.W.2d 830, 834–35 (Iowa 1978) (“The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.”); *Seattle-First Nat’l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) (“In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant . . .”).

83. See *Campbell v. General Motors Corp.*, 649 P.2d 224 (Cal. 1982). The court in applying the consumer expectations test in a design defect case noted that expert testimony was unnecessary to make out a prima facie case. See *id.* at 232–33. The court made it clear that the test was intuitive:

[I]t is difficult to conceive what testimony an “expert” could provide. The thrust of the first *Barker* test is that the product must meet the safety expectations of the general public as represented by the ordinary consumer, not the industry or a government agency. “[O]ne can hardly imagine what credentials a witness must possess before he can be certified as an expert on the issue of ordinary consumer expectations.”

Id. at 233 (second alteration in original) (citation omitted).

relies less on intuition and more on a balancing of the relative advantages and disadvantages of the defendant's design compared with an available, safer alternative design offered by the plaintiff.⁸⁴

2. Why the Consumer Expectations Test Is Inadequate in Determining Defectiveness in Classic Design Cases

The term "classic design cases" refers to the majority of design cases that do not involve product malfunctions, violations of safety regulations, or egregiously dangerous products. An example of a classic design case is one involving an industrial machine with exposed parts that injure an inattentive worker.⁸⁵ The victim argues that the machine should have been designed with safety features to prevent such accidents. The defendant argues that the risks can best (most fairly and cheaply) be avoided by the users exercising care. To resolve such a design dispute, the court must apply an objective standard regarding how much safety must be designed into industrial machinery. Common sense suggests that such machinery cannot be a deadly trap for the innocently unwary; at the same time, machinery cannot be designed to be fool-proof.⁸⁶ In classic design cases, some sort of accommodation must be reached.

84. See *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989). The court summarized the elements of a prima facie case of failure to provide adequate safety devices:

A prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device, and the severity of the injuries sustainable from such an accident. It *secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger*. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product.

Id. (emphasis added). See also *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978):

In a strict liability case alleging defective design, the plaintiff must first prove the existence of a "defective condition unreasonably dangerous to the user." In determining unreasonable danger, courts should consider factors such as social utility and desirability. The utility of the product must be evaluated from the point of view of the public as a whole, because a finding of liability for defective design could result in the removal of an entire product line from the market. Some products are so important that a manufacturer may avoid liability as a matter of law if he has given proper warnings. In weighing utility and desirability against danger, courts should also consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing cost. For example, liability may attach if the manufacturer did not take available and reasonable steps to lessen or eliminate the danger of even a significantly useful and desirable product.

Id. (citations omitted).

85. See, e.g., *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976).

86. See, e.g., *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759 (E.D. Pa. 1971):

It does not follow . . . that the manufacturer of every obviously defective or dangerous product owes an automatic duty to an injured party. Although a knife qualifies as an obviously dangerous instrumentality, a manufacturer need not guard against the danger that it presents. "[Nor is it] necessary to tell a zookeeper to keep his head out of the hippopotamus' mouth."

...

As indicated earlier, the consumer expectations test asks: how much safety does the reasonable consumer have a right to expect?⁸⁷ (In the case of industrial machinery, the consumer would presumably be the worker using the machine.) On any view, consumer expectations provide an incoherent standard with which to answer the question of: how much safety? For example, what is a court to do when it concludes that a design feature disappoints reasonable expectations of safety, but it is clear to the court that correcting the feature will introduce risks of a different sort, to a different group of consumers whose reasonable expectations will be disappointed by the new design?⁸⁸ Viewing each claim of design defect in isolation, consumer expectations would appear to allow both claims, notwithstanding that they are contradictory.

Equally troubling are those cases in which consumer expectations regarding product safety are—perhaps because the relevant risks are obvious—below the levels of safety of which reasonable design technology is capable. Even if reasonable consumers would want greater safety, and be willing to pay for it, they have no rational basis to expect it when the risks are obvious or the manufacturer has a bad reputation.⁸⁹ One response might be that consumers have a right to expect reasonable design safety, determined on the basis of risk-utility analysis.⁹⁰ But this response simply replaces consumer expectations as an independent test with the risk-utility test with which consumer expectations are here being contrasted.

In addition to these conceptual problems, it must be added that courts must be able to implement a test for design defectiveness, whatever its content. As earlier observed, the consumer expectations test relies heavily on intuition in its application.⁹¹ This reliance reflects the fact that the test is quite vague. Indeed, its vagueness approaches the level captured by the infamous dictum (in an altogether different substantive context): “I know it when I see it.”⁹² Vagueness of this magnitude undermines courts’ ability to make decisions at all. Both the Prosser and Keeton treatise⁹³ and, interestingly, a leading scholar writing from the British-Commonwealth perspective⁹⁴ recognize this substantial practical problem with the test.

The proper test of “unreasonable danger” is whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff *with* knowledge of the potential dangerous consequences

Id. (alteration in original) (citations omitted).

87. See, e.g., *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967).

88. In crashworthiness cases it is frequently argued that making an automobile safer for one type of collision—e.g., side-impact collision—will make it more dangerous for another type of collision—e.g., head-on collision. See, e.g., *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 958–59 (1981).

89. See *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 254 (Miss. 1993).

90. See cases cited *supra* note 82.

91. See *supra* note 83.

92. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (obscenity case).

93. W.P. KEETON ET AL., PROSSER AND KEETON ON TORTS, 699 (5th ed. 1984). As the Prosser and Keeton treatise observes: “The meaning [of the consumer expectations test] is ambiguous and the test is very difficult of application to discrete problems The test can be utilized to explain almost any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance” *Id.*

94. “By the early 1980s the inappropriate and unsupportable ‘consumer expectations’ test had been supplanted in most U.S. jurisdictions by an approach openly based on balancing a product’s costs and benefits—in other words, the balance between its risks and its utility.” Stapleton, *supra* note 3, at 236.

3. Why the Risk-Utility Standard with a Reasonable Alternative Design Requirement Is the Only Sensible Standard for Defect in Classic Design Cases

As observed earlier, the risk-utility standard for defective design relies less on intuition in its application than the consumer expectations standard does.⁹⁵ Of course, no legal rule can eliminate entirely the need for judicial discretion.⁹⁶ But compared with consumer expectations, risk-utility analysis more clearly identifies the factual data relevant to determination of design defectiveness. Comment *f* to Section 2 of the new Restatement includes among the relevant factors the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product.⁹⁷

The risk-utility standard also better deals with the necessity of making inter-personal trade-offs than a consumer expectations test. The perspective from which one engages in risk-utility analysis is the overall good of society.⁹⁸ Conduct is reasonable if it conforms to the way a person would behave who has a personal stake in all the interests put at risk by the actor's conduct.⁹⁹ By contrast, the notion of "expectations" clings more stubbornly to a selfish, personal perspective. By common experience, different persons with different backgrounds have different expectations.¹⁰⁰

Perhaps the greatest comparative advantage of the risk-utility approach is its greater manageability in court. This can be seen most clearly if one bears in mind that the version of risk-utility adopted by American courts requires the plaintiff in classic design cases¹⁰¹ to prove the availability to the manufacturer of a safer alternative design that could have been adopted as a close substitute for the design actually adopted.¹⁰² Rather than being required to assess the overall costs and benefits of the defendant's design, the court is asked to compare the actual design with the proposed alternative, assessing the marginal—typically relatively small—differences between them.

The comparative manageability of marginal, rather than aggregate, risk-utility analysis undoubtedly explains why American courts have refused to impose what was earlier referred to as "category liability"—declaring an entire category of products to be defective on the ground that a reasonable seller would not sell such products even if no safer substitute design is available.¹⁰³ Imposing design liability in this categorical manner would require aggregate, rather than marginal, risk-utility assessment. For example, rather

95. See *supra* note 84 and accompanying text.

96. See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

97. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (Proposed Final Draft 1997). This last reference to consumer expectations does not conflate the tests here being contrasted; expectations are merely a relevant factor in applying the risk-utility standard. "The factors [to be considered] include . . . the nature and strength of consumer expectations regarding the product." *Id.*

98. See generally POSNER, *supra* note 78, at 12–13.

99. That is, one posits a person who is equally and strongly concerned with both the accident-causing actor and the injury-suffering victim.

100. See Henderson & Twerski, *supra* note 35, at 881. "Is the ordinary consumer to be characterized as risk-averse or risk-preferring? Is the ordinary consumer willing to sacrifice aesthetics, economy, or ease of repair for greater safety?" *Id.*

101. See *supra* notes 38–39 and accompanying text.

102. See *supra* note 35.

103. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1300–08 (1991); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1675–76 (1997).

than determining whether an above-ground swimming pool could feasibly be designed with a non-slippery—and hence less risky—bottom,¹⁰⁴ the inquiry would be into the unmanageable issue of whether, in light of all of the relevant costs and benefits, unavoidably slippery bottomed above-ground pools “are good for America.”¹⁰⁵

V. CONCLUSION: IMPLICATIONS OF THE FOREGOING ANALYSIS FOR EUROPE AND JAPAN

If the foregoing analysis is valid, drafters of the EC Directive and the Product Liability Act in Japan have made a rather substantial mistake. Apparently believing that they were taking a page from the United States’ book by following Comment *i* to Section 402A of the Restatement (Second),¹⁰⁶ they have unfortunately adopted a page from American legal history that the new Restatement has properly relegated to the waste basket. As this article explains, the consumer expectations test for defect adopted recently in Europe and Japan has been thoroughly discredited in the United States as a way to decide classic product design cases. Adoption of this standard will not threaten the economic well-being of industrialized nations around the world. But if the American experience is any guide, judges in those countries applying that standard are going to face conceptual difficulties trying to make sense of it in “classic design cases.”

104. See *O’Brien v. Muskin Corp.*, 463 So. 2d 298, 306 (N.J. 1983).

105. See articles cited *supra* note 103. Interestingly, the “egregiously dangerous design” exception recognized as a possibility in Comment *e* to Section 2 of the new Restatement increases the manageability of category liability by substituting quantitative constraints for qualitative.

106. See *supra* notes 18–21 and accompanying text.