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Strict Liability for Defective Product Design

THE QUEST FOR A WELL-ORDERED REGIME

Larry S. Stewart[†]

I. INTRODUCTION

Restatement (Third) Torts: Products Liability (hereafter "*Restatement (Third)*") was an ambitious effort to codify and update thirty years of products liability development and evolution. It sought to describe a "well-ordered" set of rules to guide courts and practitioners, but given the highly politicized nature of the subject, doing so was not without controversy, and success has been elusive. Whether the new Restatement will ultimately be judged a success depends in large part on how success is defined, and, while that outcome may still await future developments, some conclusions can already be drawn.

For one, the new Restatement has resulted in focusing attention on many issues and setting an agenda for debate and discussion. For another, it has already served to clarify and improve some aspects of products liability law. For example, while the core provisions of section 2(b) were and remain highly controversial, within that section are rules that bring welcomed improvements such as the comment d provision, which states that "open and obvious" dangers do not necessarily preclude liability[1] and other rules that are already finding judicial approval such as the comment *l* provision that a warning is not a substitute for a safer design, and when a safer design can reasonably be implemented, it is the seller's duty to do so rather than merely warning of the risk.[2] In addition, section 11, post-sale failure to recall, forges new but needed ground, and section 18, dealing with disclaimers and other contractual exculpations, states an obvious rule in a concise, direct way.[3]

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[1] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmts. g, *l* (1998).

[2] Kampen v. Am. Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998); Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998).

[3] *Restatement Third* also leaves open the question of whether direct-to-consumer mass marketing of prescription drugs and medical devices should obviate the learned intermediary rule. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. e (1998). For recent developments in that

It is, however, a much different picture for what is arguably the most important part of the project: the core provisions for design defect claims.[4] Those provisions, contained in section 2(b), proposed sweeping new changes that would (1) restrict design defect claims to a negligence based, risk/benefit regime in which proof of an alternative design would be mandated,[5] (2) abolish 402A strict liability and relegate its consumer expectation test to only a factor for consideration in the risk/benefit regime, and (3) prevent alternative pleading of any other theory of liability. In effect, *Restatement (Third)* would create a new "reasonable alternative design" test for the vast majority of defective design claims.

Born in controversy and at odds with the original rationales for and concepts of strict liability, many viewed those core provisions as anti-consumer. And, as critics predicted, in the ensuing decade, those provisions have been largely rejected by the courts, with findings that they go "beyond the law," set the bar for recovery too high, and would amount to regression in the law.

This Article will explore the development of the *Restatement (Third)*, how the design defect proposals veered off course, why the core provisions for design defect claims have been rejected, and what should be the guiding principles and normative rules in a well-ordered strict liability design defect regime with appropriate conceptual foundations.

II. PRODUCTS LIABILITY FOR DESIGN DEFECTS

Modern products liability law sprang from wide-spread dissatisfaction with the glacial progress and often unsuccessful results of negligence claims for product defects. While privity limitations had been largely eliminated by the 1960s,[6] liability remained elusive because of "contract" limitations and defenses, and often insurmountable proof requirements concerning what went wrong and how manufacturers failed to act reasonably. As a result, critics argued that new rules were needed, which would recognize that products sellers[7] bore special responsibility

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regard, see *Perez v. Wyeth Laboratories*, 734 A.2d 1245 (N.J. 1999) and *State ex rel. Johnson & Johnson Corporation v. Karl*, 647 S.E.2d 899 (W. Va. 2007).

[4] By the early 1980s, claims of unsafe design came to predominate products liability litigation. Aside from the sheer number of such claims, each commands special attention because a single case can implicate an entire product line.

[5] Under *Restatement (Third)*, there are some situations in which proof of an alternative design is not required. They are manifestly unreasonable design cases under section 2(b) comment e; circumstantial evidence cases under section 3; statutory violations under section 4; food product cases under section 7; and failure-to-recall cases under section 11. For most cases, however, proof of an alternative design would be a requisite element.

[6] *E.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (Ct. App. N.Y. 1916) (recognizing negligence actions); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (rejecting privity and recognizing implied warranty).

[7] Products liability laws apply to all in the chain of distribution, including designers, manufacturers, wholesalers, distributors, and retailers, even if they do not have physical possession of the product. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1, cmt. c (1998); *e.g.*, Riveria v.

to consumers because they implicitly represented that their products are safe; the public has a right to expect that reputable setters will stand behind their products; and the burden of injuries should be placed upon those who market the products, rather than the users of those products.[8]

Beginning with *Greenman v. Yuba Power Products, Inc.*[9] and the adoption shortly thereafter of *Restatement (Second) Torts* section 402A, "strict liability" for product defects came to replace negligence as the primary basis for products liability. Section 402A avoided the inherent proof problems of negligence by providing for liability even though the seller "has exercised all possible care in the preparation and sale of his product."[10] Under strict liability, sellers are liable for harms caused by products that are "in a defective condition unreasonably dangerous," that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ."[11] In the lexicon of products liability law, this came to be known as the "consumer expectations" test. As such, it mirrored implied warranty of sales law stripped of its contractual limitations and defenses. Thus, after 402A, if a product malfunctioned, sellers were liable for both the loss of the product as well as any injuries resulting from the malfunction.

The cost of rendering the product reasonably safe was not a factor in the liability equation. The manufacturer could either design out the defect or it had to bear the burden of resulting injuries. Liability did not exist, however, for all product defects. Section 402A recognized that there are some products that science and art cannot make completely safe but which still have utility. For those "unavoidably unsafe" products, comment k provided a defense to a seller who markets "an apparently useful and desirable product, [even though it is] attended with a known but apparently reasonable risk" as long as the seller provides "proper directions and warning."[12]

Under 402A there was no distinction between manufacturing and design defects. *Greenman* itself involved a design defect,[13] and the language of 402A clearly covers both types of defect. Indeed, the inclusion of comment k underscores that design defects were included since otherwise there would be no purpose for an "unavoidably unsafe" product defense.

Baby Trend, Inc., 914 So. 2d 1102 (Fla. App. 2005). For ease of reference, the terms "seller" and "manufacturer" as appropriate will be generally used in this Article.

[8] *E.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

[9] 377 P.2d 897, 901 (Cal. 1963).

[10] RESTATEMENT (SECOND) OF TORTS § 402A (2)(a) (1963).

[11] *Id.* § 402A (2)(a) cmt. i; *see also id.* § 402A (2)(a) cmt. g ("Defective condition. The rule . . . applies only where the product is . . . in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.").

[12] *Id.* § 420(a) cmt. k.

[13] *Greenman*, 377 P.2d at 899-90.

While 402A swept the land, the idea that product defectiveness could be determined on the basis of what an ordinary consumer would expect did not meet with universal acceptance. Some believed that defectiveness should be anchored in traditional negligence concepts, a proposition championed by Dean John Wade in his article "On the Nature of Strict Tort Liability for Products."[14] Dean Wade argued for nullification of strict liability for all product defects, both manufacturing and design. He proposed instead that liability for defective products be based only on the reasonableness of the marketing decision under a reasonably prudent seller standard. Because his conceptual analysis utilized a number of risk/benefit factors, this approach came to be known as the "risk/benefit" test. That is, however, somewhat of a misnomer since Dean Wade did not advocate using the risk/benefit factors as a test of design defect. His proposal was only that the jury issue in such cases should be simply whether the defendant acted as a reasonably prudent marketer.[15]

By the 1980s, what began as an academic debate became partisan as manufacturing interests began advocating that design defects should only be decided under a risk/benefit test.[16] Their argument was that while the consumer expectation test was appropriate for manufacturing defect claims where consumers would expect that products were built according to design, it was meaningless for design defects since consumers could not know all the considerations involved in arriving at a particular product design. According to manufacturers, the only appropriate way to evaluate design defect claims was by a cost-benefit analysis that weighs the risks and benefits of the design. This was, however, different from the simple negligence standard that had been proposed by Dean Wade. What the manufacturing industry sought was an express risk/benefit test whereby juries would have to make a cost- benefit analysis to determine liability.[17]

This approach stood strict liability on its head by taking what was an affirmative defense under 402A for "unavoidably unsafe"

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[14] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973). There were earlier iterations of Dean Wade's article but this is the one commonly cited as the origin of the risk/benefit test.

[15] *Id.* at 839-40.

[16] Industry interests were coordinated by the Products Liability Advisory Council (PLAC). According to its web site, PLAC was formed in the early 1980s and consists of over 130 corporate members representing a broad cross-section of product manufacturers and several hundred products liability defense attorneys that advocate for changes in products liability laws to favor manufacturers, principally through coordinating efforts across jurisdictions and filing amicus briefs. For an overview of cases tracing PLAC's role, see Larry S. Stewart, *Courts Overrule ALI "Consensus" On Products*, TRIAL MAG., Nov. 2003, at 18.

[17] This position is somewhat paradoxical since Defendants, such as Ford Motor (the Pinto car), the former A. H. Robbins (the Dalkon Shield), the asbestos industry, and McDonald's (hot coffee), who knowingly make similar assessments and used them as a basis for not investing in product safety, have been subject to distain by juries in the form of significant punitive damage awards.

products and making it the basis of a liability regime in which products would be presumptively safe unless plaintiffs carried the burden of proving that the risks inherent in the product outweighed its benefits. Conceptually, the risk/benefit approach rejected corrective justice for a law and economics theory by which product sellers would be liable only when the risks of the product, on balance, outweighed the benefits of having the product on the market.

Much confusion resulted in the ensuing arguments over the proper rule for design defect claims. Many courts did not seem to appreciate or chose to ignore the conceptual difference between strict liability and a negligence-based, risk/benefit theory. Resulting decisions were a hodge-podge of rules, ranging from the "consumer expectation" test to the "risk/benefit" test, with various hybrid combinations that conflated aspects of the two doctrines.[18] The hybrid systems, however, lack the conceptual basis for applying rules, which are necessarily invoked in products liability cases. That lack of conceptual foundation led to confusing, inconsistent, and conflicting results.

Nowhere is this more evident than in the recent decision of the Illinois Supreme Court in *Mikolajczyk v. Ford Motor Co.*[19] There, in attempting to reconcile the consumer expectation and risk/benefit tests in a *strict liability* context, the court nonsensically concluded that "[t]hese two tests . . . are not *theories of* liability; they are *methods of proof* by which a plaintiff "may demonstrate" that the element of unreasonable dangerousness is met."[20] As the *Mikolajczyk* decision painfully demonstrates, conflating the two tests ultimately leads to doctrinal collapse.[21] Unfortunately, in the development of *Restatement (Third)* the conceptual differences between strict liability and risk/benefit were ignored. Indeed, under *Restatement (Third)* strict liability for design defect ceased to exist, becoming just a label for what is a negligence based, risk/benefit concept.

III. THE NEW RESTATEMENT

In 1991 the American Law Institute undertook to draft a comprehensive new restatement of products liability law. That project proposed that products liability claims be divided into manufacturing defects, design defects, and failure to warn cases, a concept that closely paralleled the Products Liability Advisory Council ("PLAC") agenda. For manufacturing defects, the proposed new Restatement acknowledged the basic rationales for modern products liability law and urged

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[18] John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects: A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

[19] No. 104983, 2008 WL 4603565 (Ill. Oct. 17, 2008).

[20] *Id.* at *20.

[21] *See supra* notes 17-18 and accompanying text; *see infra* note 43 and accompanying text.

continuance of a strict liability regime but with the twist that injured consumers could only bring a single claim, thus foreclosing the possibility of an alternative or independent claim for negligence.

For design defects, the new Restatement also followed the PLAC agenda. According to the new Restatement, the policy rationales for strict liability were not applicable to design defect cases and a different concept of responsibility was needed. As related in the new Restatement, consumer expectations of safe design were allegedly too difficult to discern because consumers cannot know all the considerations involved in product design and the focus of liability instead should be on the "trade-offs" in product design and requiring consumers to bear responsibility for proper product use.[22] This change would be accomplished by restricting design defect cases to a single negligence based, "risk-utility balancing" claim that required proof of an alternative design.[23] Injured consumers would no longer have the option to bring alternative claims for both strict liability and negligence, could no longer bring design defect claims under 402A strict liability and its consumer expectation test, and, in most cases, experts would be required to present an alternative design for the product.

While evidence of alternative design potentials was a common element of many products liability cases, especially when the defendant's own records or conduct supplied the proof, there was little jurisprudential support for mandating it as a requisite element of a claim. And, the mere fact that plaintiffs presented such evidence does not justify making it a mandatory requirement. Indeed, even Dean Wade only considered it one of many other considerations in his analytical discussion.[24] But, by elevating proof of an alternative design to a mandatory element, the new Restatement created a new "reasonable alternative design" test for most design defect cases that would undermine strict liability rationales.

The policy rationale for the new design defect liability was suspect, but that was lost in a highly controversial claim that the design defect proposals of the new Restatement, including proof of an alternative design, constituted the majority rule in the United States.[25] "Majority rules" are powerful because they relieve the necessity for policy analysis by invoking *stare decisis*. But the products liability

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[22] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. A (1998).

[23] *Id.* § 2(b).

[24] Wade, *supra* note 14, at 837 (referring to the "manufacturers ability to eliminate the unsafe character of the product without impairing its usefulness"). Making alternative design proof mandatory, however, opens the door to foreclosing claims under the guise of *Daubert* "gate keeping." The results in just the first six years following *Daubert* are striking. Challenges to expert testimony increased by 50%, summary judgments based on the exclusion of expert testimony increased by over 100%, and 90% of those summary judgments were against the plaintiffs. Of those cases, 24% were products liability claims. L. DIXON & B. GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (RAND 2001).

[25] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) Reporters' Note, cmt. b (1998).

decisions were a conglomeration of results that defied any majority rule,[26] and there was no support for a contention that courts had rejected the basic rationales of modern products liability law in design defect claims. Many commentators saw these design defect proposals as nothing more than a thinly disguised "tort reform" agenda.[27]

As far as a new focus on manufacturer expectations is concerned, allowing design "trade-offs" to trump product safety undermines the basic purpose of modern products liability law. Rather than making products presumptively safe, as they would be in an unqualified risk/benefit regime, the focus of products liability law should remain on encouraging the design, production, and marketing of safe products. And, shifting the cost of injuries to consumers to incentivize them to take precautions would saddle them with the burden of discovering product risks, which are or should be known to but are often not disclosed by product sellers. This approach is contrary to established precedent, which provides that consumers are not negligent in failing to discover product defects or guard against the possibility of their existence.[28]

The deliberations over these proposals and their rationales were some of the most contentious in ALI history. Although the proposals were ultimately adopted by the ALI, many believed that the core provisions of section 2(b) were fundamentally flawed, a conclusion that was in significant part based on the rejection of the strict liability policy rationales for design defect claims.

IV. POLICY RATIONALES

Public policy rationales are the foundations upon which the legal rules rest. In the case of products liability, the original policy rationales that led to the adoption of strict liability were the ameliorative societal

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[26] The "counting" of Florida illustrates the flaws in the majority rule claim. In the Reporters' Notes for *Restatement (Third)* it is claimed that *Radiation Technology, Inc. v. Ware Const. Co*., 445 So. 2d 329 (Fla. 1983), is "the leading case in Florida" and, in it, Florida adopted the risk/benefit test for design defect cases and implicitly required proof of an alternative design. RESTATEMENT (THIRD) OF TORTS: PROBS. LIAB. § 2(b) Reporters' Note, cmt. d (1998). There are, however, no such holdings in *Radiation Technology*, and it is far from being the leading Florida decision.

[27] *See, e.g.*, Douglas E. Schmidt et al., *A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability*, 21 WM. MITCHELL L. REV. 411, 412-13, 419-20 (1995) (collecting numerous articles stating that section 2(b) is "a vehicle for social reform" rather than a restatement of the existing law); Marshall S. Shapo, *A New Legislation: Remarks on the Draft Restatement of Products Liability*, 30 U. MICH. J.L. REFORM 215, 218 (1997) (Section 2(b) is not a description of existing law, but the invention of drafters who acted as "a sounding board for essentially political discussion."); 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, 261-65 (1997) (Section 2(b) is "a wish list from manufacturing America" in which "[m]essy and awkward concepts such as precedent, policy, and case accuracy have been brushed aside for the purpose of tort reform.").

[28] RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1963); *e.g.*, West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80, 89 (Fla. 1976).

effects of risk spreading, litigation efficiencies resulting from simpler liability rules, deterrence of unsafe practices, and consumer expectations about the fitness and safety of products. But *Restatement (Third)* took a different tact for design defects. It found those rationales unsatisfactory and opted instead for a rationale based on "manufacture expectations" that a reasonably designed product will still carry some risk that cannot be designed out of the product at reasonable cost, and that product users should bear some of the risk of product design.[29]

Dismissal of the strict liability rationales for design defects does not, however, survive analysis. Spreading the risk of product injuries through seller liability continues to best serve societal goals, a point *Restatement (Third)* acknowledges in the case of manufacturing defects but dismisses for design defects. But the applicability of this rationale does not vary with the cause of the product defect. If risk-spreading is a valid liability rationale, there is no principled reason why it does not also support strict liability for design defects. Indeed, risk spreading would probably be more efficient in a strict liability regime for design defects since, most likely, there would be greater liability for product injuries.

Deterrence of unsafe practices, whether in a manufacturing or design context, is even more important now in an era of rapidly changing technology, deregulation, and underfunding of regulatory agencies than it was in the 1960s. The *Restatement (Third)* recognizes that fact for manufacturing defects by continuing strict liability rather than shifting to a fault-based regime under which sellers might escape liability. But, when it came to design defects, *Restatement (Third)* glossed over deterrence by arguing that too much deterrence would result in "excessively sacrificing product features," and its different liability regime was "fair" because it would result in incentives to cause "consumers to engage in safe use and consumption of products."[30] Those arguments, however, simultaneously overstate and understate the case for dismissal of a deterrence rationale. They overstate the case because the former argument applies with equal force to manufacturing defects. Excessive quality control can affect product features just as excessive design. They understate the case because the latter argument would also apply to manufacturing defects and is, in any event, already addressed by product misuse and comparative negligence defenses. Indeed, legal "incentives" for consumer safety would probably add nothing since product users already have substantial personal incentives to avoid injury.

The reality is that shifting to a negligence-based, risk/benefit regime for design defect claims would seriously undermine deterrence. Gone would be incentives to produce products that are safe for foreseeable uses, since sellers would only have to design to a standard

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[29] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

[30] *Id.*

whereby benefits outweighed risks, and, when sued for a defective design, they could take refuge in the opinions of compliant experts and the inherent difficulties of proving an alternative design. If injury deterrence is a valid liability rationale, it applies with equal justification to both manufacturing and design defects.

Litigation efficiencies would also be seriously undermined by a "reasonable alternative design" test regime. Strict liability was conceived to avoid the perils of negligence-based liability. *Restatement (Third)* would not only revive those risks but would make them more onerous since injured consumers would have to prove a previously unknown form of negligence: that the sellers' conduct was negligent and that the seller could have adopted an alternative design.[31] Litigation in such a regime would be more expensive, more extensive, and would result in far fewer consumer awards.

The reasons for dismissal of the consumer expectations rationale for design defects are equally unavailing, a point foreshadowed by the contradictions and obvious unease in *Restatement (Third)*'s dismissal of consumer expectations. In the same comment, *Restatement (Third)* states that "consumer expectations do not play a determinative role in determining defectiveness" but a few lines later concedes that consumer expectations "may substantially influence or even be ultimately determinative on risk-utility balancing."[32] And, its criticism of consumer expectations as unworkable is undermined by the implicit invocation of consumer expectations as the foundation for comment e "manifestly unreasonable" designs and section 3 inferences of product defect. Moreover, the criticism of consumer expectations is further weakened by its express retention as the defect test for food and used products in sections 7 and 8. Indeed, when it is to their tactical advantage, defendants have no conceptual compunction about advocating a consumer expectations test.[33]

Restatement (Third)'s principal criticism, that discerning consumer expectations about product design is too difficult, is unpersuasive when compared to the use of other legal tests, such as negligence concepts, which are routinely applied in myriad complex cases like those arising from professional malpractice. Nor are products too complex for consumers to understand. It is not necessary for a

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[31] Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 751-52 (Wis. 2001). ("[Section] 2(b) increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional—and considerable—element of proof to the negligence standard.").

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

[33] Tobacco defendants have consistently argued for a "consumer expectations" test so they can defend on the historical record of tobacco dangers. *E.g.*, Wright v. Brooke Group Ltd., 652 N.W.2d 159 (Iowa 2002). And, it is not uncommon for defendants to claim that a risk/benefit test should not apply to design defect claims involving "simple" products to pave the way for an argument that the claim should fail because the danger was open and obvious. *E.g.*, Mikolajczyk v. Ford Motor Co., No. 104983, 2008 WL 4603565 (Ill. Oct. 17, 2008).

consumer to appreciate all the details or intricacies of a product to have an expectation of safety.[34] With modern marketing and advertising, there are virtually no products for which consumers cannot have an expectation of safety. If consumer expectations are sufficiently discernable that they can be "ultimately determinative" in one context, then there is no principled reason why they are not also sufficiently discernable to guide strict liability for design defects. Beyond this argument, there is a salutary benefit from a degree of unpredictability in the consumer expectations test that encourages sellers to err on the side of safer designs.[35]

In the end, dismissal of this and the other policy rationales as support for a strict liability design defect regime just does not add up. Shifting to a "manufacturer expectations" rationale and a more easily defended risk/benefit regime would enviably lead to less liability. Lost would be the fundamental purpose of strict liability—to relieve injured consumers of having to prove negligence, the societal purposes of deterrence of unsafe practices, and of having the cost of injuries borne by the manufacturers rather than consumers, who are ordinarily powerless to protect themselves.

V. JUDICIAL HISTORY

The dismissal of modern products liability rationales for design defect cases was a harbinger for what followed in the courts. The case was not made that courts had rejected those rationales or were even open to their modification. Nor was any case made that design defect liability needed to be restricted.[36] With no compelling rationales for section 2(b) and serious questions about its support from case law, it was not surprising that before the ink was dry, the design defect provisions of *Restatement (Third)* were in trouble and have now been largely rejected.

While still only in draft form, the Georgia Supreme Court[37] refused to mandate proof of an alternative design and the Supreme

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[34] *Green*, 629 N.W.2d at 742-43 ("These standards are straightforward and may be applied even in "complex" cases. . . . As we have explained, juries are always called upon to make decisions based on complex facts in many kinds of litigation. . . . The problems presented in products liability jury trials would appear no more insurmountable that similar problems in other areas of the law. For these reasons, we reject the notion that the consumer-contemplation test cannot be applied in cases involving technical or mechanical matters.") (citations and quotations omitted).

[35] Implicit in the argument that consumer expectations are too difficult to discern is a distrust of the jury process—that even if appropriately instructed, juries are unable to handle such a task. A moment's thought, however, exposes the biased elitism of such paternalistic thinking. Jurors are routinely entrusted with decisions involving myriad complex factual situations, huge financial implications, and life or death consequences, and they perform their duty with admirable dedication.

[36] Products liability claims already represent only an infinitesimally small percentage of tort litigation. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS, 2007: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 6 (2008) (reporting that according to the most recent data, products liability cases amount to only 4% of new tort cases).

[37] Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994).

Courts of California and Connecticut[38] rejected section 2(b). The decision of the Connecticut Court in *Potter v. Chicago Pneumatic* was stunning, coming just days after final passage of *Restatement (Third)*. The *Potter* court boldly questioned the scholarship underlining section 2(b), concluding it was wrong. The court independently reviewed the law and found "that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design" and that such a requirement "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration."[39] *Potter* also rejected the core principle that the consumer expectation test should not apply in design defect cases but ultimately adopted a "modified" consumer expectation test under which the test to be applied would depend on whether a product is "complex."[40]

After *Potter*, the Supreme Courts of Missouri, Kansas, Oregon, Wisconsin, New Hampshire, and the Maryland Court of Appeals all refused to adopt section 2(b).[41] Against this parade of decisions, only Iowa has expressly adopted section 2(b), and it did so in a tobacco claim in which the plaintiff urged its adoption to prevent the defendant from relying on consumer expectations.[42]

One should note, however, the recent, bizarre, convoluted decision of the Illinois Supreme Court in *Mikolajczyk v. Ford Motor Co.*[43] While expressly refusing to adopt section 2(b)[44] or to require proof of an alternative design,[45] the court reversed a plaintiff's verdict for failure to give a jury instruction that relegated consumer expectations to an element in a risk/benefit test that appeared to require proof of an alternative design.[46] While the *Mikolajczyk* court acknowledged that both the consumer expectations and risk/benefit tests were established Illinois

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[38] Carlin v. Superior Court, 920 P.2d 1347 (Cal. 1996); Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319 (Conn. 1997).

[39] *Potter*, 694 A.2d at 1331-32.

[40] *Potter* failed to provide guidance for how to determine when a product was "complex," which only creates new uncertainties and litigation issues. As noted in *Green*, the so-called "complex design" is a false paradigm that does nothing to further a well-ordered regime. 629 N.W.2d 727, 742 (Wis. 2001).

[41] Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 64-65 (Mo. 1999); Delaney v. Deere & Co., 999 P.2d 930 (Kan. 2000); McCathern v. Toyota Motor Corp., 23 P.3d 320 (Or. 2001); Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727 (Wis. 2001); Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178 (N.H. 2001); Halliday v. Sturm, Ruger & Co., 792 A.2d 1145 (Md. 2002).

[42] Wright v. Brooke Group Ltd., 652 N.W.2d 159, 162, 169 (Iowa 2002). Texas and Tennessee courts have also affirmatively used section 2(b) but those courts were constrained to do so because they were interpreting tort reform legislation which already contained a risk/benefit test and, in the case of the Texas, a proof of alternative design requirement. Ray v. Bic Corp., 925 S.W.2d 527, 533 (Tenn. 1996); Hernandez v. Tokai Corp., 2 S.W.3d 251, 256-57 (Tex. 1999).

[43] No. 104983, 2008 WL 4603565 (Ill. Oct. 17, 2008).

[44] *Id.* at *16.

[45] *Id.*

[46] *Id.* at *30.

law,[47] it used misguided conclusions that the two tests are not theories of liability and that parties are entitled to have juries instructed on their theory of the case[48] to hold that a section 2(b) type instruction must be given whenever the defendant elects to offer risk/benefit proof. In other words, under *Mikolajczyk* the *defendant* is allowed to dictate the type of claim that a plaintiff can submit to the jury. This muddled, unprincipled reasoning amounts to doctrinal collapse from which any conclusion could follow.

The other decisions rejecting section 2(b) are remarkable because they bluntly state that the *Restatement (Third)* "goes beyond the law"[49] and sets the bar too high.[50] They recognize that *Restatement (Third)* would unduly restrict remedies, elevate defendant protectionism over consumer interests, and return to a pre-*Restatement (Second)* era where meritorious claims frequently went without redress.[51] And appending a mandatory requirement of proof of an alternative design, as *Restatement (Third)* seeks to do, would only compound that effect.[52] On a more basic level, these cases reflect a failure of acceptable rationale for the core provisions of section 2(b) and unwillingness on the part of courts to abandon the original products liability rationales.[53] In addition, these cases make it clear that whatever one made of the pre-*Restatement (Third)* "weight of authority" and to whatever extent it is relevant to a well-ordered design defect liability regime, it is no longer debatable that the core provisions of section 2(b) are not the majority rule today.

VI. GUIDING PRINCIPLES AND NORMATIVE RULES FOR DESIGN DEFECT CLAIMS

In many jurisdictions, common law rules for products liability claims have been constrained by waves of "tort reform" enactments.

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[47] *Id.* at *22.

[48] It is without question that strict liability and negligence are theories of liability, not different types of evidence. Moreover, the idea that a defendant can dictate the theory of liability under which the case is to be decided is without foundation in American jurisprudence. Hopefully, this embarrassing opinion will soon be corrected.

[49] Delaney v. Deere & Co., 999 P.2d 930, 946 (Kan. 2000).

[50] Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1332 (Conn. 1997); Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 751 (Wis. 2001).

[51] Even under *Restatement (Second)*, products liability claims were extremely difficult with favorable state court outcomes in the country's most populous counties of just 40.5% and in federal courts of just 26.8%. Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 386-87 (1999).

[52] While *Restatement (Third)* would not require production of a prototype to establish an alternative design, that provision does not ameliorate the burden of this new requirement. Nor does it lessen that burden to provide that expert testimony would not be necessary in "obvious" cases and that, in any event, a plaintiff "is not required to establish with particularity the costs and benefits associated with adoption of the suggested design," RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998), since most cases are not "obvious" and dispensing with an economic analysis still leaves the base requirement of alternative design intact.

[53] Carlin v. Superior Court, 920 P.2d 1347, 1349 (Cal. 1996); *Potter*, 694 A.2d at 1340; *Green*, 629 N.W.2d at 749, 752.

Where courts still play significant roles in the development of products liability law, normative rules for design defect claims have been elusive but that need not be the case. There are clear choices available, grounded in the different regimes of strict liability and negligence. Each choice is conceptually different and focuses on different aspects of product commerce. Strict liability addresses the product itself, how safe it is, and how it is used, while negligence concerns the marketing decisions that lead to the product being offered for sale or use. Each informs important aspects of products liability and both should be available to injured consumers who seek redress for harm from product injuries.[54] In addition, each informs other aspects of products liability law in ways that can affect the choice between a strict liability or negligence regime.

A. Strict Liability

Strict liability should hold sellers liable for product designs that are unreasonably dangerous, regardless of whether the product seller exercised all possible care in the preparation and sale of the product. This liability standard is consistent with the rationales for modern products liability law, especially consumer expectations of product safety and fitness that exist in the absence of disclosure or warnings of danger, which often do not occur or are carefully camouflaged for marketing considerations. Indeed, as *Restatement (Third)* acknowledges, safety and performance expectations can be readily created by the ways in which products are portrayed in modern advertising campaigns.[55] In much the same fashion, safety and fitness expectations can also be created by the absence of information about product dangers. Holding product sellers to such a standard is conceptually consistent with the obligation of sellers to test product designs since consumers can reasonably expect that product testing will be done, and its results will be accounted for in the product that is offered for sale and use. Indeed, it is a basic tenet of products liability law that consumers have the right to assume that products are safe and do not have to guard against product defects or the possibility of their existence.

Strict products liability is also consistent with parallel, implied warranty liability for harm to the product itself. There is no principled reason why the results should be different simply because the harm was

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[54] Under 402A, injured consumers had the option of bringing either a strict liability or negligence claim, or both claims in a single action. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1963) ("The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved."); *see, e.g.*, Ford Motor Co. v. Hill, 404 So. 2d 1049, 1052 (Fla. 1981) ("If so choosing . . . a plaintiff may also proceed in negligence."). While in most cases strict liability will be the theory of choice, in some instances as with, for example, products with sordid safety histories, cases with clear, compelling evidence, and products with publicly known risk histories, negligent marketing may be the best choice for an injured user.

[55] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998).

to a person rather than the product. In either case, because the manufacturer stands to economically benefit from the distribution and sale of the product, it should be obligated to produce a reasonably safe product, and, in the case of malfunction, should provide redress for all harm, whether to the product or to a user.[56]

Restatement (Third), however, decrees that product design (when it causes personal injury) can only be approached through the lens of a cost-benefit analysis.[57] But that denigrates product safety to a subsidiary role in which product sellers could escape liability for unsafe products if consumers were unable to marshal proof of alternative designs or prove sufficiently overweighing risks. Such a rule puts consumers at risk of becoming guinea pigs for field-testing new products with no effective remedy when the tests go array.

The *Restatement (Third)*'s "alternative design test" is not the only way that designs can be evaluated. As 402A recognized, the foundation of liability rules can be found in foreseeable product uses, including foreseeable misuses. For those uses, consumers should have a right to expect there will be a zone of safety within which users and by-standers will be reasonably free from product harm. Thus, the proper degree of safety for a product should be set by its foreseeable use, and sellers, who produce products that cause injury when being used in a foreseeable way, should be liable for the resulting harm.

In section 3, *Restatement (Third)* comes close to this standard for design defects. Nominally based on res ipsa loquitur, that section recognizes an inference of product defect when the "product fails to perform its manifestly intended function . . . ." a proposition that is, according to *Restatement (Third)*, as "well-formed" as the consumer expectations that apply in food and used products.[58] Although not specifically mentioned, section 3 is necessarily based on consumer expectations since manifestly intended product functions are grounded in what consumers expect about the features, functions, and safety of the product. However, in its single-minded but confusing effort to abolish consumer expectations for design defect claims, *Restatement (Third)* glosses over that fact.[59] Ultimately, section 3 falls short because, as noted, the res ipsa inference is normally used only when the product is lost or destroyed, and the plaintiff is required to prove that the harm was not caused by other factors, including the conduct of others, proof that

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[56] As noted in *Restatement Third*, implied warranty and strict liability are substantively identical. *Id.* § 2 cmts. n, r.

[57] *Id.* § 2 cmt. d.

[58] *Id.* § 3 cmt. b. By its terms, section 3 is applicable to both manufacturing and design defects. As noted in *Restatement Third*, both res ipsa loquitur and strict liability perform similar functions by "allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof." *Id.* § 2 cmt. a.

[59] As noted herein, while claiming that consumer expectations cannot be the "test" for product design, *Restatement Third* recognizes that consumer safety expectations can be the determinative factor in design evaluation. *See supra* note 32 and accompanying text.

would not be necessary under 402A. Nevertheless, section 3 signals the way in which design defect liability should be described.

Foreseeable uses need to be distinguished from foreseeable risks. Negligence liability is contained by foreseeable risks so that actors are only required to take precautions against risks that are foreseeable. Product strict liability, which holds sellers liable even though exercising all possible care, is not limited to foreseeable risks and encompasses all risks arising from unreasonably dangerous products.[60] *Restatement (Third)*, however, rejects holding manufacturers liable for unforeseen risks because, it argues, any increased investment in safety that would be fostered is a matter of "guesswork."[61] But if it is "guesswork," than it equally cannot be said that an increased scope of liability would not produce a higher level of safety vigilance. In any event, this argument ignores the historical record of the ameliorative impact of strict liability litigation on product safety. Using foreseeable risks to limit defect design liability will necessarily undermine that effect. The ultimate result would be defendant protectionism at the expense of product safety.

As a basis for design evaluation, or for any other purpose, foreseeable product uses may be established in many ways. Some will be obvious from the nature of the product, others may be created by the way a seller portrays the product, still others may be discerned from industry experience, and others may be informed by the testing process. But regardless of the source, if a product design permits injury when the product is being used in a foreseeable way, liability for the resulting harm should follow. Thus, it does not necessarily follow that the only way a product design can be evaluated is by comparison with an alternative design or under a risk/benefit test. Consumer expectations about safety for foreseeable uses, as informed by product portrayal, can form a rational, reasonable basis for liability determinations.

Adopting this test for design defects would eliminate any need to specify whether a claim was based on a manufacturing or design defect since in either case the test would be the same.[62] As noted in *Restatement (Third)*, at times the cause of a defect is not clear[63] and, in those instances, a plaintiff is at risk of making the wrong choice or of having to make alternative claims, which might appear to a jury as implausible or indecisive. That is the very type of result that *Restatement (Second)* sought to eliminate by the adoption of 402A liability.

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[60] Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 745-46 (Wis. 2001). The obligation of product sellers is to discover and design risks out of their products or, if unable to do so, provide appropriate warning of them.

[61] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

[62] *E.g.*, Ford Motor Co. v. Hill, 404 So. 2d 1049 (Fla. 1981); McConnell v. Union Carbide Corp., 937 So. 2d 148 (Fla. Dist. Ct. App. 2006).

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

B. Negligence

Negligence, on the other hand, should hold sellers liable for marketing a product when a reasonably prudent seller would decline to do so. Unlike strict liability, negligence does not depend on a finding of product defectiveness or inherent danger.[64] It is sufficient that negligent conduct creates an unreasonable risk of harm to users of the product and foreseeable by-standers. From a conceptual standpoint, the analysis is one of reasonableness based on the risks of injury from the product versus the benefits afforded by the product, but the ultimate liability issue is one of prudent conduct. The inquiry is whether in marketing the product the seller created an unreasonable risk of injury due to the condition of the product.

C. Related Issues in Alternate Liability Regimes

Products liability cases do not always arise in factual scenarios that neatly fit either a strict liability or negligence claim. And, because of the way these different theories impact other aspects of products liability law, it is sometimes important to be able to bring a case based on one or the other theory, or even under alternative theories. Therefore, both liability theories should be available to injured product users and foreseeable by-standers as alternate liability theories, and courts should avoid hybrid regimes that conflate strict liability and negligence. One way to do so is to be cognizant of how these theories impact related product liability issues.

1. Obligation to Test Product Designs

Product sellers cannot feign ignorance of risks. As correctly noted in *Restatement (Third)*, manufacturers have an obligation to test product designs, are charged with the knowledge such testing would impart, and, where feasible, must adopt safer designs over warning of risk.[65]

In properly ordered regimes, whether a product was adequately tested or the manufacturer responded in a proper manner to the testing results should not be an issue in strict liability claims since liability exists for unreasonably dangerous designs regardless of the manufacturer's care. Even if a manufacturer appropriately tested its product, it matters not in strict liability if the product still was unreasonably dangerous for foreseeable uses. On the other hand, a manufacturer's marketing decision

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[64] Early decisions used the "inherently dangerous" nature of some products to justify liability. Under modern concepts that is no longer necessary and characterizing products as "inherently dangerous" adds nothing to the analysis. *E.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); Radiation Tech. Inc. v. Ware Const. Co., 445 So. 2d 329, 331 (Fla. 1983).

[65] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmts. *l*, m (1998).

should be informed by the results of proper testing, whether it was done, and, what it revealed, which could be most relevant to a negligence claim. Thus, product testing issues have significantly different roles and conflating liability regimes can lead to confusion and serious conceptual problems in hybrid liability regimes.

2. Product Warnings and Disclaimers

Warnings should alert users to inherent risks or dangers of products. Disclaimers seek to avoid liability by "contractual" limitations. The latter are unavailing in modern products liability law.[66] On the other hand, product warnings are a common feature of product marketing, reflecting the fact that in many instances it may not be commercially feasible to design a completely safe product and the common acceptance that when there is a residual risk of danger, the seller is obligated to warn of that risk. But how that obligation translates into products liability law has been a somewhat muddled picture.

Restatement (Third) treats failure to warn or the inadequacy of warnings as a product defect.[67] Under that approach, plaintiffs generally must prove that a warning was required and that either the seller failed to provide one or the warning that was provided was inadequate.[68] But, in describing the rules that should apply in design defect contexts, *Restatement (Third)* presents contradictory positions. On the one hand, it states that warnings are not a substitute for safe design and, where "a safer design can reasonably be implemented, . . . adoption of the safer design is required over a warning that [would lead to] a significant residuum of such risks."[69] On the other hand, it recognizes warnings as a factor that can be considered in liability determinations.[70]

In part, *Restatement (Third)* has it correct. Products liability law's goal of elimination of product defects would be achieved in part by limiting the role of warnings so that they cannot be used as a substitute for safe design, an all too common impulse on the part of some manufacturers. *Restatement (Third)* has it wrong, however, when it unqualifiedly allows warnings to be taken into account in evaluating design liability. Under those circumstances, warnings would become substitutes for safe design since they could offset product risks or even dictate a reasonable design finding. *Restatement (Second)* was closer to the mark when it recognized that liability should only be constrained if a product was "useful and desirable" and the seller provided "proper

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[66] *Id.* § 18.

[67] *Id.* § 2(b) cmt. i.

[68] The rules for warning claims are set forth in *Restatement (Third)* section 2(c). They are not, however, the focus of this Article and are referenced herein only insofar as they relate to design defect claims.

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

[70] *Id.* § 2 cmt. f.

directions and warning."[71] Neither Restatement, however, goes far enough because they do not explain how warnings should work in a well-ordered design defect regime.

Since it is the obligation of manufacturers in the first instance to produce safe products, warnings should only relieve liability for product design when the manufacturer demonstrates that product dangers could not have been reasonably designed out of the product and that the product was "useful and desirable." This two-pronged test requires examination of the rigor and validity of the design process and a demonstration that the product served a useful purpose. The burden should be on the manufacturer to justify the use of warnings by making this showing since it controls the design process, has better information than injured consumers, and presumably has better technical knowledge.

This obligation becomes more muddled when it comes to so-called open and obvious risks.[72] *Restatement (Third)* accepts the traditional view that warning of obvious risks is unnecessary because the existence of such risks constitutes "notice" of their presence and a further warning would serve no useful purpose.[73] This rule, however, has it backwards. It is focused on individual users (and when they might successfully bring a failure to warn claim), rather than when a warning must be given to fulfill the obligation that is owed to the entire user population. In terms of providing warnings, it matters not whether a particular member of the user population required a warning; the warning must be provided if any segment of the user population needs it.

The rule is also wrong to the extent that it implies that "obviousness" can be determined simply from the nature of the product. That concept is wrongheaded because "obviousness" of risk is not a static quality but one that will vary with the capabilities of the user population. What might be obvious to a narrow, experienced user population might become less obvious or unobvious when the population expands to include less capable members. Since the seller's obligation to warn runs to all foreseeable users, the obligation to warn must be measured by the least capable in that population. In addition, some product users may not have real alternatives to using dangerous products, and in those circumstances, a warning may make the difference. It may also be foreseeable that users will ignore, be inattentive of, or be distracted from a risk,[74] in which case warnings should be required. "Obviousness" is therefore a nuanced concept and not all cases of patent danger should automatically foreclose an obligation to warn of danger. In the final analysis, rather than a blanket rule that looks only to the nature of the defect, if after all reasonable efforts to provide a safe design a

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[71] RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k (1963).

[72] *See* Part VI.E for discussion of the "open and obvious" defense.

[73] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) cmt. j (1998).

[74] Delaney v. Deere & Co., 999 P.2d 930, 939, 942 (Kan. 2000).

product still contains inherent risk, the product seller should be required to warn against those risks if there is a reasonable chance that a warning can contribute to risk avoidance for any foreseeable user group, for any foreseeable use. The inquiry would then focus on the real point of strict liability—that is, whether, had a warning been given or been given in a more adequate manner, it would have contributed to avoiding or lessening the plaintiff's injuries.

Once a defendant establishes prima facie that warnings were warranted and given, the consumer could then contest the adequacy and reasonableness of the warnings. Contesting the warnings would not, however, be appropriate if it was demonstrated that the product user would have used the product even if warned in a proper and appropriate manner.

In properly ordered regimes, warnings should thus play significantly different roles in strict liability and negligence claims. For strict liability, warnings should be an affirmative defense with the burden on the manufacturer to establish that warnings were an appropriate way to address product safety and that the warning it provided accomplished that purpose. For negligent actions, the burden would be on the plaintiff to establish that the product seller failed to provide a warning sufficient to reduce or avoid foreseeable risks of harm from the product.[75] This is another instance of where serious conceptual problems exist about how these concepts apply in hybrid liability regimes.

3. Open and Obvious Defects

Restatement (Third) has it right on the so-called "open and obvious" defect defense.[76] As explained, the fact that a design-related risk is open and obvious bears on the issue of defectiveness and negligence but does not necessarily preclude liability.[77] It is, after all, product sellers who are best placed to know and understand how a product can be made safe, and no blanket rule should absolve them of that obligation. To hold otherwise could encourage marketing of products with open and obvious defects, rather than utilizing a rigorous design protocol to develop a safe product. It would therefore be counterproductive and imprudent to preclude liability merely because the risk was open and obvious. Pursuant to modern concepts of risk allocation, the obviousness of a product risk should only be a factor to be considered in assessing responsibility.

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[75] In either case, comparative negligence is also a defense to products liability claims if based on grounds other than the failure of the user to discover the defect or guard against the possibility of its existence. *E.g.*, West v. Caterpillar Tractor Co., 336 So. 2d 80, 89-90 (Fla. 1976).

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

[77] *Id.* § 2 cmt. d.

4. Alternative Designs; Industry Practice; State of the Art

Evidence of alternative product designs should be relevant to both strict liability and negligence claims. For the former it can inform the issue of whether inherent risks could have been designed out of the product; for the latter it can inform the issue of whether it was prudent to market the product as designed. In neither case, however, should such evidence be required since there are many other ways to establish the unreasonable danger of a design or carelessness in marketing a product.

Alternative designs may represent industry practice, which is sometimes confused with "state of the art." It is generally accepted that industry practice is simply the range of practices found within an industry on any given subject and may represent a measure of what a prudent seller would or would not do. As such, it has no bearing on strict liability since such liability is independent of the care exercised and allowing industry practice to denominate product design would be tantamount to allowing an industry to set its own liability parameters. On the other hand, compliance with or failure to follow industry practices can bear on the reasonableness of marketing a product under a negligence claim. This is another instance where serious questions of application can arise in a hybrid liability regime.

"State of the art" differs from industry practice (although it could be, but rarely is, coextensive with industry practice). State of the art generally is the most advanced state of technology at any given point in time. Sellers generally contend that they cannot be held to product designs that do not reflect the "state of the art" at the time the product was designed and manufactured. While it is a truism that sellers cannot be required to use technology that did not exist, the fact that a particular design had not yet been adopted by any manufacturer should be immaterial as long as it was technologically feasible at the time the product was designed and built. On the other hand, sellers should be held to the expert standard of knowledge that was available to the relevant industry at the time the product was designed and produced, and failure to apply that knowledge can be relevant in negligent design cases.

5. Inferences of Defect and Negligence

It is commonly accepted that when products fail in normal usage, an inference arises that the failure was due to product defect or seller negligence.[78] The rule does not require identification of a specific defect or determination of whether it was a manufacturing or design defect.[79] Often the inference arises when the product has been lost or destroyed, but the rule is not restricted to those circumstances. The rule is also often

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[78] *Id.* § 3.

[79] *E.g.*, Cassisi v. Maytag Co., 396 So. 2d 1140, 1153 (Fla. Dist. Ct. App. 1981).

explained as a substitute for (missing) proof of a specific defect but, to give full effect, it should not be so limited and should apply even where there is proof of a specific defect. Otherwise, a deserving plaintiff could be prejudiced by trying to develop proof of a specific defect, which a defendant could then use to negate an inference of liability.

This rule should not, however, be a simple inference to merely establish a prima facie case. Were that its sole function, it would "disappear" once dispositive motions were denied and plaintiffs would be left with no evidence for the jury to consider. To achieve its intended purpose, this inference must remain in the case for jury consideration, a point alluded to but not specifically delineated in *Restatement (Third)*.[80]

VII. CONCLUSION

Restatement (Third) missed the mark for normative rules in a well-ordered design defect regime. Intended or not, it has been seen as rolling back decades of progress and returning to an era of defendant protectionism. To establish normative rules, renewed efforts that build upon the modern rationales of strict liability are necessary. When approached in this manner, it is possible to define a just set of rules that encourage the design and sale of reasonably safe products and, at the same time, properly limit liability.

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[80] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. b (1998) ("Section 3 allows the trier of fact to draw the inference . . . ."); *e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 439-40 (Cal. 1944); *see also* FED. R. EVID. 301.