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INTRODUCTION

The threshold issue in American products liability litigation is whether the product was defective at the time it left the manufacturer's control.[1] Traditionally, courts and scholars define "defect" in three functional categories: manufacturing defects, design defects and marketing defects.[2] American products liability doctrine employs two major tests to determine whether a "defect" exists: the seller-oriented risk-utility test and the buyer-oriented consumer expectations test.[3] The Draft

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[1] *See, e.g.*, David Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); *see also* Phillips v. Kimwood Machine Co., 525 P.2d 1033, 1035 (Ore. 1974) ("Courts continue to flounder while attempting to determine how one decides whether a product is in a defective condition unreasonably dangerous to the user."). *Cf.* Denny v. Ford Motor Co., 662 N.E.2d 730, 740 (N.Y. 1995) (Simons, J., dissenting: "[T]he word 'defect' has no clear legal meaning.").

[2] A manufacturing defect is "an abnormality of a condition that was unintended, and makes the product more dangerous than it would have been as intended." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 695 (5th ed. 1984). A design defect occurs when the product is manufactured according to the intended design, but the design poses unintended, unreasonable dangers. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1543 (1973) [hereinafter Henderson, *Judicial Review*]. Professor Keeton describes marketing defect in terms of failure to warn: "A manufacturer or other seller is subject to liability for failing to warn or adequately to warn about a risk or hazard inherent in the way a product is designed . . . ." KEETON ET AL., *supra*, § 96, at 685.

[3] *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1532–33 (1992) [hereinafter Henderson & Twerski, *A Proposed Revision*]. The risk-utility and consumer expectations tests are alternative tests for determining strict liability for defective products under § 402A of the Restatement 2d of Torts. *See* Sperry-New Holland v. Prestage, 617 So.2d 248, 252 (Miss. 1993). The Supreme Court of Mississippi compared the two tests as follows:

> [I]n a "consumer expectations" analysis, for a plaintiff to recover, the defect in a product which causes his injuries must not be one which the plaintiff, as an ordinary consumer,

of the Restatement Third of Torts: Products Liability, like some American jurisdictions, rejects the "consumer expectations" test as an independent standard in defective warning and design cases.[4] Ironically, this limitation of the use of the consumer expectations test in American products liability doctrine[5] coincides with the European Community's[6]

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would know to be unreasonably dangerous to him. In other words, if the plaintiff, applying the knowledge of an ordinary consumer, sees a danger and can appreciate that danger, then he cannot recover for any injury resulting from that appreciated danger. . . . In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product.

Id. at 254.

[4] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 3, 1996); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Preliminary Draft No. 1, 1993) [hereinafter RESTATEMENT DRAFT]. On September 17, 1993, the reporters, Professors James Henderson and Aaron Twerski, released Council Draft No. 1, which differs slightly from Preliminary Draft No. 1. *Compare* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Council Draft No. 1, 1993) *with* RESTATEMENT DRAFT, *supra*. Tentative Drafts Nos. 2 and 3 were prepared for submission to the members of the American Law Institute at its annual meetings on May 16–19, 1995 and May 14–17, 1996, respectively. Tentative Drafts remain tentative until the final publication is authorized. The bylaws of the American Law Institute provide that: "Publication of any work as representing the Institute's position requires authorization by the membership and approval by the Council." AMERICAN LAW INSTITUTE, 73RD ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE: PROCEEDINGS 1996, at 554 (1997).

Professor Marshall Shapo refers to the Restatement Third approach to the consumer expectations test as "[A] lamentable defect in the reporters' analysis. . . ." Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 665 (1995) [hereinafter Shapo, *In Search of the Law*]. Essentially, the Restatement Third approach concludes that the risk-utility test is the main approach for determining product defectiveness. The reporters argue that "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs." RESTATEMENT (THIRD) OF TORTS, cmt. f; RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (Tentative Draft No. 1, 1994). This leaves the consumer expectations test available in manufacturing defect cases, such as contaminated food. *See* RESTATEMENT DRAFT, *supra*, § 3. The reporters conclude that unlike defective design or defective marketing cases, defective manufacture cases require a finding that the product fails "to function as a reasonable person could expect it to function." *Id.* At least four commentators have concluded that the reporters' position that most jurisdictions reject the consumer expectations test, except in manufacturing defect cases, is simply inaccurate. *See* Roland F. Banks & Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 415–20 (1993); Howard F. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173, 1173–76 (1994); Shapo, *In Search of the Law*, *supra*, at 666; 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, 518–19 (1996).

[5] RESTATEMENT DRAFT, *supra* note 4, §§ 101, 103.

[6] The European Community (EC) became the European Union (EU) when the Treaty on European Union, otherwise known as the Maastricht Treaty, came into force in November, 1993.

adoption of the consumer-oriented test for European strict products liability cases.[7]

This article analyzes these contemporary developments. First, it considers the implications of the European Union's (EU) Council Directive No. 85/374 (European Directive) for American products liability law. It then analyses the consumer expectations test in light of the purpose of products liability law. Reconsideration of the consumer expectations test suggests that, properly constructed and applied, the consumer-oriented test promotes considerations of safety, equity, and efficiency.

I. THE EUROPEAN DIRECTIVE AND AMERICAN PRODUCTS LIABILITY LAW

A. *Strict Liability and Consumer Expectations*

As the EU moves toward implementation of strict liability for defective products, American products liability law is reevaluating its legal and social significance.[8] Like most laws, strict products liability embodies a codification of social policy.[9] As between the manufacturer who brings the product to market and the buyer who uses it as intended, who is more responsible for the product? Who is in the better financial position to pay for product injuries? Strict liability theory places these costs on the manufacturer even though he or she is without fault or

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See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992). For purposes of consistency, both the European Union and the pre-Maastricht Treaty European Community will be referred to as the European Union.

[7] *See* Council Directive 85/374 of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, arts. 1, 6(1), 28 O.J. (L 210) 29, 30–31 [hereinafter 1985 European Directive]. On July 25, 1985, the EU adopted a uniform products liability directive. *See id.*; *see generally* Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L. L.J. 279 (1993); Jean Stapleton, *Products Liability Reform—Real or Illusory?*, 6 OX. J. LEG. STUD. 392 (1986).

[8] *See, e.g.*, David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743 (1996) [hereinafter Owen, *Defectiveness Restated*]; William Powers, Jr., *A Modest Proposal To Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639 (1991); Angela C. Rushton, *Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389 (1996); Shapo, *In Search of the Law*, *supra* note 4.

[9] *See, e.g.*, VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY (1995); Fleming James, Jr., *Products Liability (Pt. II: Manufacturers)*, 34 TEX. L. REV. 192, 227–28 (1955); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461 (1985) [hereinafter Priest, *The Invention*].

liability under traditional negligence or warranty concepts.[10] Even the non-negligent manufacturer is morally responsible since he or she designed, tested and manufactured the product; he or she placed it into the marketplace.[11] From an economic point of view, strict liability makes two assumptions. First, the manufacturer made a profit from a particular product, and on all similar products sold.[12] Second, if the manufacturer pays for the damages caused by his or her product, he or she can pass the costs on to the consuming public through higher prices.[13] Spreading the cost created by a relatively small number of defective products across the cost of all units sold should result in only minor price increases to the consuming public.[14]

Strict products liability is designed to promote both safety and fairness.[15] In fact, the original purpose for adopting strict products liability was to relieve the injured consumer from the enormous burdens of proving either negligence or the overly technical requirements of warranty.[16] The primary rationale behind this doctrine is that, since the manufacturer profits from product sales, he or she should pay for any damage caused by that product.[17] Paying for accidents becomes a cost of doing business.[18] In theory, only products which generate profits

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[10] *See* Priest, *The Invention*, *supra* note 9, at 505; *see also* George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989) [hereinafter Priest, *Original Intent*]. For a critique of Priest's analysis, *see* David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEG. STUD. 529 (1989) [hereinafter Owen, *Intellectual Development*]; Gary Schwartz, *The Beginning and the Possible End of the Rise of Modern Tort Law*, 26 GA. L. REV. 601 (1992).

[11] *See, e.g.*, John Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988).

[12] *See* John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809–10 (1976).

[13] *Id.*; *see also* MARK C. RAHDERT, COVERING ACCIDENT COSTS 72, 75–77 (1995).

[14] *See* Montgomery & Owen, *supra* note 12, at 808–10. Critiques of the traditional policy arguments include Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Priest, *The Invention*, *supra* note 9; Alan Schwartz, *Products Liability and Judicial Wealth Redistributions*, 51 IND. L.J. 558 (1976).

[15] *See, e.g.*, Phipps v. General Motors Corp., 363 A.2d 955 (Md. 1976); *see generally* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973) [hereinafter Wade, *On the Nature of Strict Liability*].

[16] *See* Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 459–61 (1979).

[17] *See, e.g.*, Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

[18] *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) ("The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne

after all true production costs, including safety costs, are paid will remain on the market.[19] Under a true strict liability regime, recovery depends neither on manufacturer fault nor negligence, but on the manufacturer's responsibility for the product which caused "injury."[20] In this sense, the manufacturer bears ultimate responsibility for product safety.[21]

Criticizing strict liability doctrine for failing, in an efficient way, to produce safe products ignores the issue of moral responsibility.[22] Admittedly, strict liability may make manufacturers more careful, thereby creating safer products.[23] Such product safety, however, complements the predominate goal: assuring that manufacturers pay the actual costs of product injuries.[24] The only significant inquiry for strict liability analysis is who should pay these costs.[25] Clearly, accident costs not paid by the manufacturer necessarily fall on the injured party.[26] As between the manufacturer, who places the defective product on the market, and the injured party, the manufacturer should bear the immediate, direct financial responsibility.[27] Ultimately, consumers as a whole underwrite the cost of product injury in the loss-spreading price increases passed on to them by the manufacturer.[28] As a result, the market price of a

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by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."); W. Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 35 (1973) ("A fourth and perhaps major reason ordinarily given for strict liability in this area is that those engaged in the manufacturing enterprise can serve effectively as risk distributors accepting responsibility for accident losses attributable to the dangerousness of products as a cost of doing business.").

[19] *See* Richard Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 209–12 (1973). *Cf.* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

[20] *See generally* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

[21] *See, e.g.*, *Greenman*, 377 P.2d at 900; McCormack v. Hankscraft Co., 154 N.W.2d 488 (Minn. 1967); *see generally* Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988) [hereinafter Schwartz, *Proposals for Reform*].

[22] *See generally* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993) [hereinafter Owen, *Moral Foundations*].

[23] *See* Wade, *On the Nature of Strict Liability*, *supra* note 15, at 866; *see also* GUIDO CALABRESI, THE COST OF ACCIDENTS 73 (1970).

[24] *See, e.g.*, David G. Owen, *Musings on Modern Products Liability Law: A Foreword*, 17 SETON HALL L. REV. 505 (1987).

[25] *See* Owen, *Moral Foundations*, *supra* note 22, at 429–30 (1993).

[26] *See* Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 375 (1965).

[27] *See, e.g.*, Gary Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

[28] *See, e.g.*, Traynor, *supra* note 26, at 366.

product reflects the true cost of that product, including accident costs.[29]

Examination of the historical underpinnings of strict products liability reveals that the original § 402A possesses a decidedly pro-consumer orientation.[30] Strict liability for defective products was intended to relieve the injured consumer from the burdensome requirements of proving either negligence or breach of warranty.[31] Historically, the consumer expectations test is the natural, logical result of strict products liability as the extension of implied warranty law.[32] Recognition of the protection of reasonable consumer product safety expectations essentially dictates the adoption of the consumer expectations test.[33]

B. *The European Directive and the Consumer Expectations Test*

The European approach to consumer expectations owes much to American products liability doctrine. In turn, it can be a corrective reminder that reasonable consumer expectations have a central position in products liability analysis. In part, the European Directive resulted from the demand for product safety following the thalidomide tragedy in Europe during the 1960s.[34] An additional reason for its implementation was the need to harmonize the differing national rules for products liability for economic reasons. A single strict liability

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[29] *See, e.g.*, David Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681 (1980) [hereinafter Owen, *Rethinking the Policies*].

[30] *See generally* Priest, *Original Intent*, *supra* note 10.

[31] *See* Priest, *The Invention*, *supra* note 9, at 508–09. *Cf.* Owen, *Intellectual Development*, *supra* note 10.

[32] *See* Fischer, *supra* note 1, at 348.

> Many courts have used consumer expectations as a criteria for defining defect. If a consumer reasonably expects a product to be safe to use for a purpose, the product is defective if it does not meet those expectations. The consumer expectations test is natural since strict liability in tort developed from the law of warranty. The law of implied warranty is vitally concerned with protecting justified expectations since this is a fundamental policy of the law of contracts.

Id.

[33] *See* Michael D. Bernacchi, *A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration*, 47 U. CIN. L. REV. 43, 49–50 (1978); F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 467–84 (1978); John Neely Kennedy, *The Role of the Consumer Expectation Test Under Louisiana's Products Liability Tort Doctrine*, 69 TUL. L. REV. 117, 139–42 (1994).

[34] *See* Ferdinando Albanese & Louis F. Del Duca, *Developments in European Product Liability*, 5 DICK. J. INT'L. L. 193, 193–94 (1987); Kathleen M. Nilles, Note, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT'L. L. & COM. 155 (1986).

regime would place all twelve Member States on an equal footing, eliminating the risk that consumers would receive differing amounts of protection or that producers in Member States having stricter regimes would be financially disadvantaged.[35]

Before the European Directive, the products liability laws of the individual Member States varied greatly. Greece, Italy, Portugal and Spain maintained traditional negligence systems with the plaintiff retaining the traditional burden of proof.[36] Denmark, Germany, the Netherlands, Ireland and the United Kingdom had a presumption of liability shifting the burden of proof to the defendant, which resembled strict liability.[37] Belgium, Greece and Luxembourg had absolute strict liability regimes.[38]

Implementation of the European Directive by the Member States was slow and uneven. For example, Germany eventually enacted the Product Liability Act of 15 December 1989.[39] It took some time for Germany to transform the European Directive because the German Government considered existing German law to have already met, if not exceeded, the goals of the European Directive.[40] German courts had imposed strict liability for defective products by reversing the burden of proof in the famous *Fowl Pest*[41] case.[42]

Article 6 of the European Directive provides:

> 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; [and]
> (c) the time when the product was put into circulation.

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[35] *See* Heinz J. Dielmann, *The European Economic Community's Council Directive on Product Liability*, 20 INT'L. LAW. 1391, 1391 (1986).

[36] *See generally* Albanese & Del Duca, *supra* note 34; Anita Bernstein & Paul Fanning, *Heirs of Leonardo: Cultural Obstacles to Strict Products Liability in Italy*, 27 VAND. J. TRANSNAT'L L. 1 (1994); Nadine E. Roddy, *Strict Product Liability in Europe: The EEC and the Directive on Defective Products*, 12 PROD. LIAB. TRENDS 97 (1987).

[37] *See generally* Lord Griffiths et al., *English Product Liability Law*, 62 TUL. L. REV. 353 (1988).

[38] *See* Frank A. Orban, III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L. & COMP. L. 342, 344 (1978); *see generally* HARRY DULINTER TEBBENS, INTERNATIONAL PRODUCT LIABILITY (1979).

[39] Produkthaftungsgesetz (ProdHaftG), v.1989 (Bundesgesetzblatt, Teil I [BGBl. I] S.2198) (F.R.G.).

[40] *See* NIGEL FOSTER, GERMAN LAW & LEGAL SYSTEM 144–46, 235–37 (1993).

[41] Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 51, 91.

[42] *See* Joachim Zekoll, *The German Products Liability Act*, 37 AM. J. COMP. L. 809, 810 (1989).

> 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.[43]

The European Directive imposes strict liability through its definition of "defect." Article 6(1)'s definition of defect is modeled on the consumer expectations test of § 402A comment i to the Restatement (Second) of Torts.[44] Comment i provides the basis of the consumer expectation test by stating that a product is defective if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[45]

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[43] 1985 European Directive, *supra* note 7, art. 6. The key provisions of the European Directive present interesting similarities and differences with American law. A brief summary is useful.

Article 1 places liability on the producer for damage caused by a defect in his or her product. *See id.* art. 1. Article 2 defines "product" in terms of moveable items. *See id.* art. 2. This provision is analogous to the Uniform Commercial Code definition of "goods" in Article 2–105. *See* U.C.C. § 2–105 (1994).

Article 3 defines "producer" as: (a) the manufacturer of the finished product; (b) the producer of a component or raw material; or (c) one who holds himself or herself to be the product manufacturer by, for example, placing his or her name or trademark on the product. *See* 1985 European Directive, *supra* note 7, art. 3. In addition, the importer of a product is deemed to be a producer if the imported product is placed into distribution in the ordinary course of business. *See id.* If the actual manufacturer cannot be identified, Article 3 requires that each seller be treated as the producer unless he or she indicates the name of the actual manufacturer and that manufacturer is subject to local jurisdiction. *See id.* If the product is imported, the seller may avoid liability by indicating the name of the importer. *See id.* Article 4 requires proof of causation. *See id.* art. 4. Article 5 adopts joint and several liability. *See* 1985 European Directive, *supra* note 7, art. 5. Article 6 defines the defect in terms of the consumer expectations test. *See id.* art. 6. The defect must exist at the time the product was placed into commerce by the producer. *See id.* In addition, a product may be defective in its "presentations," which includes packaging, labeling and directions for use. *See id.* Therefore, failure to warn of *potential* dangers will be actionable. *See id.* The language of the European Directive strongly parallels the Restatement (Second) of Torts. *Compare* 1985 European Directive, *supra* note 7, art. 6 *with* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1964). Comment i to § 402A of the Restatement (Second) of Torts provides that: "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1964).

Article 7 establishes producer defenses. *See* 1985 European Directive, *supra* note 7, art. 7. An earlier draft had excluded "development risks" or a "state of the art" defense, as it is called in American products liability law. *See id.* However, Article 7(e) of the European Directive allows such a defense. *See id.* art. 7(e). "State of the art" generally refers to scientific knowledge available at a particular time. Article 15 permits the elimination of the state of the art defense. *See id.* art. 15. In most American jurisdictions, this defense is available in failure to warn cases.

[44] *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1964).

[45] *Id.* Professor Marshall Shapo argues that the European Directive "projects a conception of strict liability that is, if anything, more extensive and consumer biased than virtually any American

The attempt by the EU to harmonize the products liability law of the Member States should inform the American national debate on products liability. The European Directive recognizes that defective products can cause extensive harm to individual consumers.[46] Without the European Directive, however, the legal position of an injured person varies according to the legal standards of the individual Member States.[47] The European Directive establishes one standard, strict liability, as the common denominator for consumer product safety.[48] Significantly, it also adopts the consumer expectations test as the standard for determining product safety.[49]

Much of the scholarly criticism heaped on the American consumer expectations test might be avoided by focusing on what the consumer is entitled to expect, rather than on what the particular user actually knows or expects in either a literal or idiosyncratic sense. Once the emphasis is on the consumer's entitlement to certain product safety expectations, the consumer-oriented standard becomes quite workable. The consumer could establish the entitled expectation from a number of sources, including the following: (a) manufacturer's representations;[50] (b) governmental safety regulations;[51] (c) industry standards and guidelines; (d) information in the public domain; or (e) general community information concerning products.[52] Expert testimony would be permitted or, in some cases, even required, to demonstrate the standard of entitlement under this consumer expectation test.[53]

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state jurisprudence. . . . Its most salient feature is the strength of the desire for consumer protection reflected in its overall architecture." Shapo, *In Search of the Law, supra* note 4, at 650.

[46] *See* Giulio Ponzanelli, *The European Community Directive on Products Liability, in* TORT LAW AND THE PUBLIC INTEREST 238, 241 (Peter H. Shuck ed., 1991).

[47] *See id.* at 239–41.

[48] *See id.* at 241.

[49] *See id.*

[50] *See* Leichthamer v. American Motors Corp., 424 N.E.2d 568, 578 (Ohio 1981) (safety representations of jeep manufacturer encouraged consumer risk-taking).

[51] Government-mandated warnings concerning cigarettes and alcohol, for example, may inform the public generally, thereby creating expectations concerning safety.

[52] *See* Garrison v. Heublein, Inc., 673 F.2d 189, 191 (7th Cir. 1982) (alcohol is not an unreasonably dangerous product because the dangers of drinking alcohol are common knowledge).

[53] For example, experts in human factors engineering, psychology and communications have testified about the adequacy of warnings. *See, e.g.*, Prevatt v. Pennwalt Corp., 237 Cal. Rptr. 488 (Cal. Ct. App. 1987); Long v. Deere & Co., 715 P.2d 1023 (Kan. 1986); Smith v. United States Gypsum Co., 612 P.2d 251 (Okla. 1980); *see generally* William H. Hardie, *Scare Tactics: Motivating Warning Compliance*, PROD. LIAB. DAILY (BNA) (Sept. 12, 1995), *available in* LEXIS, BNA Library, BNAPLD File.

The importance of this consumer-oriented approach is that it establishes the consumer viewpoint as the starting point for product liability analysis. This is more than a matter of mere semantics. Historically, reasonable consumer safety concerns have been and should remain the primary concern of products liability law.[54] Economic concerns should have only secondary significance.[55] At a minimum, consumers are entitled to an expectation that manufacturers, as experts in the field, will sell products which are as safe as possible, given technological and scientific feasibility.[56] At the same time, consumers are *not* entitled to expect product safety if harm is caused by product uses or misuses which the consumer knows or should have known to be unreasonably dangerous.[57]

Defect and consumer use issues must be determined according to the state of the art, that is, the scientific and technological knowledge available at the time the product is marketed.[58] To a significant extent, this approach recognizes that the product user and the product producer have reciprocal obligations concerning product safety.[59] In other words, if the product defect actually causes a safety hazard, product manufacturers should be held responsible for foreseeable harm unexpected by consumers.[60] However, product users ought to be held re-

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[54] *See generally* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[55] *See, e.g.*, Shapo, *In Search of the Law*, *supra* note 4.

[56] *See, e.g.*, Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 TENN. L. REV. 1105 (1994); Jerry J. Phillips, *Achilles Heel*, 61 TENN. L. REV. 1265 (1994).

[57] *See* TEBBENS, *supra* note 38, at 150.

> The meaning of the qualification "is *entitled* to expect" constitutes another "moral datum," to use Ehrenzweig's term. The Strasbourg Report observes only that the expectations may be higher than mere observance of statutory rules; the EC Memorandum is silent on this point. Again one looks for a yard-stick in determining what will make expectations legitimate (the French text renders this normative element by using "legitimement"). Perhaps the main criterion is what representations the producer has made, e.g., in publications and directions for use, in short the product's presentation as referred to in the Strasbourg Convention.

Id.

[58] *See* John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 750–51 (1983). State of the art is termed "development risks" under Article 7 of the European Directive. 1985 European Directive, *supra* note 7, art. 7.

[59] *See generally* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992) [hereinafter Owen, *The Fault Pit*]; David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995).

[60] *See generally* David G. Owen, *Products Liability Principles of Justice*, 20 ANGLO—AM. L. REV. 238 (1991).

sponsible for injuries resulting from product uses which they recognize or should recognize to create unreasonably dangerous risks.[61]

These reciprocal safety responsibilities are promoted by the prevailing consumer-oriented test employed in manufacturing defect cases.[62] Despite a manufacturer's non-negligent efforts and the reasonableness of these efforts, production errors can cause accidents.[63] Even if a manufacturer could demonstrate that he or she had exercised the highest possible care, societal attitudes have evolved to create the expectation that consumers are entitled to expect basic physical integrity in products: the soda pop bottle should not explode; food should not be contaminated.[64] Reasonable consumer expectations are protected in part because the consumer is entitled to the basic product safety for which he or she pays.[65] Consumer autonomy is preserved by the current approach.[66]

Some scholars argue that application of this consumer-oriented analysis to warning and design cases is unworkable and ineffective.[67] Focusing on reasonable consumer entitlement to expectations, rather than idiosyncratic knowledge, becomes crucial. Although design decisions cannot be expected to ensure absolute product safety, it is, nevertheless, essential to use consumer expectancy as the starting point of analysis. If the focus is on the safety the consumer is entitled to expect, the determination of entitlement necessarily takes into account the product design, including directions and warnings, technologically and scientifically possible at the time of manufacture.[68] Reasonable product users would not believe they are entitled to have manufacturers pay for their negligent or unforeseeable conduct in using products.[69] Similarly, reasonable consumers would not believe that manu-

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[61] *See generally* Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189 (1994); *see also* General Motors v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977) ("We cannot charge the manufacturers of a knife when it is used as a toothpick . . . .").

[62] *See* Owen, *Moral Foundations*, *supra* note 22, at 429–30.

[63] *See* Howard Klemme, *The Enterprise Liability of Torts*, 47 COLO. L. REV. 153, 191–92 (1976).

[64] *See, e.g.*, Shoshone Coca-Cola Bottling Co. v. Dolinski, 420 P.2d 855 (Nev. 1966) (decomposed mouse in bottle of "Squirt" soda).

[65] *See, e.g.*, Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

[66] *See* Phillips, *supra* note 56, at 1273.

[67] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters?*, 42 AM. U. L. REV. 1257, 1264 (1993).

[68] *See* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1197–98 (1992).

[69] The user's contributory negligence will bar recovery in strict liability in tort provided this

facturers could produce products beyond the safety possible under the scientific and technological knowledge available at the time of product design and manufacture.[70]

Professor James Henderson argues that the consumer expectations test permits the marketplace to decide the degree of safety which should be designed into the product.[71] In applying the consumer expectations test to design defects, courts do not evaluate the design itself.[72] Instead, courts require manufacturers to fully disclose product risks so as to permit consumers to make informed decisions about the amount of product safety to purchase.[73] If the consuming public wants certain safety features, manufacturers will respond to market demands.[74] On the other hand, products with too many safety features will not sell, ultimately driving them from the market.[75]

As a result, the consumer-oriented test might prove quite effective in design cases.[76] Admittedly, courts may not be equipped to evaluate the complicated scientific data inherent in product design choices. If courts cannot develop and apply meaningful design standards, ultimately cases will be decided by the whim of individual juries.[77] Such inconsistent jury verdicts promote neither safety nor efficiency. Nevertheless, employing a risk-utility balancing test does not insure that every jury will reach the same design conclusion about the effectiveness of a particular product.[78] Redesigning complex products according to the whims of conflicting jury decisions is unworkable.[79] However,

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negligence is the sole proximate cause of injury. *See, e.g.*, Yun v. Ford Motor Co., 647 A.2d 841 (N.J. App. Div. 1994); *see generally* Aaron Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974).

[70] *See, e.g.*, Little, *supra* note 61, at 1201–03.

[71] *See* Henderson, *Judicial Review*, *supra* note 2, at 1560–62.

[72] *See* Fischer, *supra* note 1, at 348 ("Many courts have used consumer expectations as a criteria for defining defect. If a consumer reasonably expects a product to be safe to use for a purpose, the product is defective if it does not meet this expectation.").

[73] *See, e.g*, Howard Latin, *Good Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193 (1994).

[74] Safety devices on circular saws are a common example. *See, e.g.*, Verne L. Roberts, *Circular Saw Design: A Hazard Analysis*, 1 J. PROD. LIAB. 127 (1977).

[75] *See* Henderson, *Judicial Review*, *supra* note 2, at 1558–62.

[76] Some jurisdictions continue to employ the consumer expectations test as the primary test of defect. *See, e.g.*, Lester v. Magic Chef, Inc., 641 P.2d 353 (Kan. 1982); Woods v. Fruehauf Trailer Corp., 765 P.2d 770 (Okla. 1988); *see also* Note, *The Consumer Expectations Test in New Jersey: What Can Consumers Expect Now?*, 54 BROOK. L. REV. 1381 (1989).

[77] *See* Henderson, *Judicial Review*, *supra* note 2, at 1558.

[78] *See* David Epstein, *The Risks of Risk Utility*, 48 OHIO ST. L. REV. 469, 475–76 (1987).

[79] This argument often arises in automobile crashworthiness or enhanced injury litigation. *See, e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

this concern is an issue of process or procedure rather than the result of employing a particular definition of product defect.[80]

Similar arguments apply to defective marketing or failure to warn cases. If warnings and instructions are overly detailed, increasing product price without corresponding safety improvement, consumers eventually will refuse to pay for this "unnecessary" safety.[81] On the other hand, if additional warnings and instructions result in useful safety information, consumers may be willing to bear the expense.[82] In this sense, stronger warnings complement stronger product designs.[83]

Ultimately, the manufacturer is responsible for producing a safe product, while the consumer is responsible for using that product safely. If the consumer expectations standard is viewed from this entitlement perspective, the standard requires the product user to be responsible for harm resulting from product uses falling below the norm to be expected of reasonable product safety.[84] Some scholars argue that products liability law should not entertain arguments concerning consumer user responsibility, because "contributory negligence" principles have no place in strict liability analysis.[85] However, consumer expectations about safety entitlement demand that individual consumers, rather than manufacturers or the entire consuming population, be responsible for their own errors and risk-taking in using products.[86] Moreover, in cases in which responsibility for the product accident is shared by both the manufacturer and the consumer, comparative fault principles should apply.[87]

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[80] The exploration of these procedural issues is beyond the purview of this article. However, areas to be looked at include expanded review of the role of the judge in keeping questionable cases from the jury, alternative dispute resolution, and expert panels.

[81] *See, e.g.*, Rebecca K. Phillips, *Crashworthiness in the Commonwealth: An Analysis of the Defectiveness of Tractors Without ROPS*, 23 N. KY. L. REV. 325 (1996) (considering whether a litigant can establish a cause of action in Kentucky against the manufacturer of a tractor lacking rollover protection devices (ROPS)); *see generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 175–86 (4th ed. 1972).

[82] *See generally* David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277 (1986).

[83] *See, e.g.*, Shea Sullivan, *Football Helmet Product Liability: A Survey of Cases and Call for Reform*, 3 SPORTS LAW J. 233 (1996); *see also* Schwartz, *Proposals for Reform*, *supra* note 21, at 396–98.

[84] *See* VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE § 17–5 (3d ed. 1994) [hereinafter SCHWARTZ, COMPARATIVE NEGLIGENCE].

[85] *See* Owen, *Rethinking the Policies*, *supra* note 29, at 710–711.

[86] *See, e.g.*, Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281 (1994).

[87] *See generally* SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 84, at ch. 11.

II. THE CREATION OF CONSUMER EXPECTATIONS

Product accidents occur because the manufacturer, the user, or both have imperfect knowledge about the product, its use and the user's level of knowledge.[88] Both manufacturers and users have concrete expectations about both the ability of consumers to use products safely and the degree of safety responsibility attributable to manufacturers or consumers. In effect, then, the consuming public possesses basic expectations about both consumer norms of conduct and manufacturer safety responsibility.[89]

To a significant degree, manufacturers create consumer safety expectations through product labeling and advertising.[90] The manufacturer who makes false statements about his or her product (even though made non-negligently, or even innocently) creates legitimate and reasonable consumer expectations which merit protection.[91] In effect, the manufacturer makes the statements to induce consumers to purchase the product.[92] Safety information provided by the manufacturer is justifiably important to consumers.[93] This is especially true when the harm created by the product defect creates a "surprise element of danger."[94] Consumers reasonably rely on the manufacturer's expertise and integrity in making safety promises.[95] Absent these promises, individual consumers might invest in independently obtaining more product information.[96]

Moreover, consumers actually pay for quality control or other safety-assurance procedures in the product price.[97] Consequently, manufacturers should be required to pay for false safety representations which cause injury.[98] Anything less results in the consumer losing both the

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[88] *See generally* Henderson, *Judicial Review*, *supra* note 2.

[89] *See* Hubbard, *supra* note 33, at 484–91; Marshall Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974) [hereinafter Shapo, *Representational Theory*].

[90] *See* Shapo, *Representational Theory*, *supra* note 89, at 1370.

[91] *See id.*

[92] *See id.*

[93] *See id.* at 1370–71.

[94] *See* Traynor, *supra* note 26, at 370.

[95] *See* Shapo, *Representational Theory*, *supra* note 89, at 370–71.

[96] *See, e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

[97] *See, e.g.*, Steven P. Croley & Jon D. Hawson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).

[98] *See* St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51, 70–71 (Ill. App. 1974).

benefits of his or her bargain and his or her bargaining autonomy.[99] Therefore, all manufacturer product representations, including labels and advertisements, should be considered in determining the safety expectations to which the consumer is entitled.[100]

Consumers also have a generalized understanding that governmental regulations mandate consumer safety.[101] The media and governmental entities, as well as manufacturers, may disseminate information about such governmental regulations,[102] as well as voluntarily adopted industry standards.[103] Clearly, the manufacturer's affirmative obligation to provide consumers with product information which warns of dangers or instructs about safe use depends on the general availability of this information.[104] If such information is already known to the reasonable consumer, there is no reason for the manufacturer to provide it. However, if the information is not known, or if the defect which creates harm is latent or hidden, the manufacturer should warn consumers.[105] Consumers are entitled to such information because they reasonably expect manufacturers will discover foreseeable product risks and will warn consumers about them.[106]

The issue of presumed knowledge creates troublesome issues for this consumer-oriented analysis. Even if product risks are neither known nor discoverable, given the state of the art (scientific and technological knowledge) at the time of sale, allocation of responsibility for resulting accidents can still be assigned from a consumer expectation view-

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[99] *See* Shapo, *Representational Theory, supra* note 89, at 1109.

[100] *Id.*

[101] The general public sees examples of governmental regulation in everyday life. For example, prescription drugs and medical devices are extensively regulated by the FDA, pursuant to the Federal Food, Drug and Cosmetic Act, originally enacted in 1932. *See* 21 U.S.C. §§ 301–395 (1994). Some drug warnings must be provided directly to consumers. *See, e.g.*, Patient Package Inserts for Oral Contraceptives, 21 C.F.R. § 310.501 (1995) (requiring package inserts for oral contraceptives).

[102] *See, e.g.*, The National Highway Traffic & Safety Administration Authorization Act of 1991, 49 U.S.C. §§ 30117–30121 (1994); *see also* The Flammable Fabrics Act, 15 U.S.C. § 1191 (1994); The Federal Hazardous Substance Act of 1970, 15 U.S.C. § 1272 (1994); The Poison Prevention Packaging Act, 15 U.S.C. § 1472 (1994); The Consumer Product Safety Act, 15 U.S.C. §§ 2054–2055 (1994).

[103] *See* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 127 (1991).

[104] *See, e.g.*, Lars Noah, *The Imperative to Warn: Disentangling the 'Right to Know' from the 'Need to Know' about Consumer Hazards*, 11 YALE J. ON REG. 293 (1994).

[105] *See* Shapo, *Representational Theory, supra* note 89, at 1153–55.

[106] *See* James A. Henderson, *Coping With the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 939–49 (1981).

point.[107] Unlike the previously discussed situations in which the manufacturer affirmatively makes representations of product safety, the manufacturer now remains silent.[108] Arguably, such silence cannot create false expectations of product safety, unless it is assumed that consumers believe, and are entitled to believe, the false concept that all product risks are discoverable prior to marketing.[109]

Nevertheless, the manufacturer still profits at the expense of the injured consumer from a product containing unknowable or undiscoverable product defects.[110] As a result, it may be inherently equitable to force the manufacturer to pay even for such undiscoverable product risks.[111] Since the manufacturer profits from the product, he or she should pay the entire cost of producing that product, including accident costs.[112] Moreover, the consumer cannot discover these unknowable or undiscoverable risks either.[113]

On the other hand, consumer expectations may be quite different. Consumers know that the world contains many unknown or undiscoverable dangers and that those who seek the benefits of innovative products may encounter such risks.[114] For example, the media informs consumers on an almost daily basis of newly discovered side effects of over-the-counter and prescription drugs. Consumers generally want the benefits of scientific and technological advancements, and realize that unknowable risks might be encountered.[115] Therefore, the consumer harmed by an unknowable product design defect may not be entitled to an expectation of safety.[116]

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[107] *See generally* Wertheimer, *supra* note 68.

[108] *See* 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, 273–78 (1990).

[109] *See id.*; *see also* Owen, *Rethinking the Policies*, *supra* note 29, at 703–07.

[110] *See* Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 547 (N.J. 1982) (imposing manufacturer liability for failure to warn of unknowable risks of asbestosis advances strict liability). *Beshada* was the subject of considerable criticism. *See, e.g.*, Symposium, *The Passage of Time: The Implications for Product Liability*, 58 N.Y.U. L. REV. 733, 751 (1983). The New Jersey Supreme Court refused to apply *Beshada* to prescription drugs in Feldman v. Lederle Lab., 479 A.2d 374, 388 (N.J. 1984).

[111] *See Beshada*, 447 A.2d at 547; *see also* Joseph A. Page, *Generic Product Risks: The Case Against Comment K and for Strict Liability*, 58 N.Y.U. L. REV. 853, 891 (1983) ("Both the justification of justifiable expectations on the part of product victims and the achievement of modest advances in safety justify the application of strict liability to harm from unknowable generic hazards.").

[112] *See Beshada*, 447 A.2d at 547.

[113] *See id.* at 548.

[114] *See* Birnbaum, *supra* note 14, at 604.

[115] *See* Brown v. Superior Court, 751 P.2d 470, 475 (Cal. 1988) (finding prescription drugs "unavoidably unsafe" under comment K to § 402A).

[116] Professor David G. Owen forcefully argues that permitting recovery for unknowable and

At the same time, manufacturing defects or flaws disappoint the very consumer expectations which consumers are entitled to expect (in large measure because the manufacturer expressly created those expectations), and which products liability law must therefore protect.[117] Understandably, when the consumer purchases a product, he or she pays for its qualities, including safety, common to each product unit made according to the same design.[118] In other words, the consumer is entitled to expect his or her product to be as safe as other units of that same product.[119] If the consumer receives a product with a dangerous manufacturing flaw, his or her reasonable expectations are thwarted. At a minimum, consumers are entitled to expect that a product does not contain atypical flaws, and that it minimally meets the manufacturer's own specifications and requirements.[120]

This focus on consumer expectations in manufacturing defect cases is equitable given the manufacturer's control of product safety.[121] The manufacturer establishes the level of quality control, designs the product, and generally possesses greater safety information.[122] On the other hand, the consumer bears responsibility for actual product use.[123] For example, if the consumer chooses to use a product which is obviously dangerous[124] or if he or she uses the product in a highly unusual and

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undiscoverable product defects is immoral, violating the basic purpose of the tort system. *See* Owen, *The Fault Pit*, *supra* note 59, at 714–20.

[117] *See* Singleton v. International Harvester Co., 685 F.2d 112, 115 (4th Cir. 1981) (product is defective if it fails to conform to manufacturer's specifications and promises).

[118] *See generally* Owen, *Defectiveness Restated*, *supra* note 8, at 751 (noting that section 2(a) of the Products Liability Restatement retains the consumer expectations test).

[119] *See, e.g.*, Ducko v. Chrysler Motors Corp., 639 A.2d 1204, 1205–06 (Pa. Super. 1994) (malfunction theory as complementary test for deviation from the norm).

[120] Commentators and courts agree that the manufacturing defect case presents the clearest and strongest case for applying both strict liability in tort and the consumer expectations test. *See* Fischer, *supra* note 1, at 348. Manufacturing defects exist when a product fails to meet the manufacturer's own specifications and quality control standards. *See id.* at 343. Two examples of manufacturing defects are flaws in the raw materials or component parts of a product, or an error in the assembly of component parts. Shortcomings in quality control might create such defects. The archetypical cases are the exploding soda bottle and the contaminated food or drink.

The appropriateness of the consumer expectations test for manufacturing defects is almost universally acknowledged. *See id.* at 348. Reasonable consumer expectations clearly are defeated by a product which fails to meet the manufacturer's own standards. *See id.*

[121] *See* Jenkins v. General Motors Corp., 446 F.2d 377, 380 (5th Cir. 1971) (car manufacturer's negligent failure properly to tighten and inspect bolt in left rear suspension).

[122] *See, e.g*, Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963).

[123] *Id.* at 901 ("Implicit in the machine's presence on the market . . . was a representation that it would safely do *the jobs for which it was built*. . . . To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith *in a way it was intended to be used* . . . .") (emphasis added).

[124] *See* Pressley v. Sears-Roebuck & Co., 738 F.2d 1222, 1223–24 (11th Cir. 1984) (under Georgia

unintended manner, he or she has no legitimate expectation of safety.[125] As a result, the consumer, rather than a potential product defect, has caused the harm.[126]

Fundamentally, the manufacturing defect affects a small percentage of litigated cases.[127] As a result, the manufacturer can treat the manufacturing defect as an unfortunate aberration or departure—the product line, as a whole, remains free from condemnation as being defective.[128] By contrast, design defects condemn the entire product line.[129] Defectively designed products are constructed and manufactured according to the manufacturer's intended specifications; nevertheless, the product contains an inherent danger.[130] The defectively designed product fails to perform intended functions safely, creates dangerous contraindications or side effects,[131] or fails to minimize foreseeable injury in the event of accident.

Unfortunately, classifying product defects as manufacturing, design or marketing defects (defective warnings and instructions) often proves a futile and ineffective analytical exercise. Some American cases and the European Directive treat warning defects as a type of design defect.[132] Warning defects, like design defects, exist in the entire product line, while manufacturing or production flaws are atypical.[133] Moreover, design and warning flaws may overlap. For example, a paydozer

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law, there is no liability for failing to equip riding lawn mowers with a deadman switch since danger of being hit by the moving blade in fall from the mower is obvious). *Cf.* Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976).

[125] *See* Estrada v. Schmutz Mfg. Co., 734 F.2d 1218, 1220 (7th Cir. 1984) (under Indiana law where factory worker's hand was injured while brushing ink on rollers, the court stated, ". . . go to the zoo and put your hand through the bars of the lion's cage, and the lion bites your hand off, . . . you do not have an action against the zoo").

[126] *See, e.g.*, Bartkewich v. Billinger, 247 A.2d 603, 605–06 (Pa. 1968).

[127] *See, e.g.*, Ducko v. Chrysler Motors Corp., 639 A.2d 1204, 1205 (Pa. 1994) (circumstantial evidence permitted to prove manufacturing defect in automobile).

[128] The main manufacturing defect tests, "deviation from the norm" and the "malfunction theory" indicate that the defective product is an unfortunate exception to the rest of the product line.

[129] Because the design defect affects each unit of production, "questions related to 'design defects' and the determination of when a product is defective, because of the nature of its design, appear to be the most agitated and controversial issues before the courts in the field of products liability." Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 182 (Mich. 1984).

[130] *See generally* Henderson, *Judicial Review*, *supra* note 2.

[131] *See Prentis*, 365 N.W.2d at 182.

[132] By this, I mean that, in defective warning cases, courts apply negligence concepts in strict liability failure to warn cases. *See, e.g.*, Feldman v. Lederle Lab., 479 A.2d 374 (N.J. 1984) (prescription drugs). The European Directive accomplishes the same result by employing its development defense language. *See* 1985 European Directive, *supra* note 7, art. 6(1)(c), 6(2).

[133] *See supra* notes 128–30 and accompanying text.

which lacks rear-view mirrors and back-up warning signals could be considered defectively designed, or the redesign could be viewed as providing adequate warnings.[134]

Design and production defects also may overlap or coincide. For example, a worker is injured when he or she slips on hydraulic fuel which has leaked into the operator's compartment of a roof-bolter machine. An expert concludes that such leaks are "virtually inevitable," but that the injury risk could be eliminated either by installing a floor grating or by putting the hydraulic valve outside the operator's compartment.[135] In this situation, oil leakage could be viewed as a random or atypical manufacturing defect. On the other hand, if such leakage is a "virtual inevitability," a design defect involving the entire product line exists.[136] Deciding the design defect on a negligence-based risk/utility analysis and the manufacturing defect on the consumer expectation standard becomes unworkable and doctrinally indefensible. Applying the consumer expectations test protects the reasonable product safety expectations to which such workers are entitled.[137]

Consumer expectancy analysis can be useful in many warning situations as well. An analogy to medical informed consent is illustrative. The consumer and the patient both know what warnings are necessary for informed safety decision-making, whether in the medical context or in the products liability situation. Medical malpractice law can teach significant lessons. In the context of informed consent, the law focuses on what the patient needs to be told in order to reach the informed consent decision.[138] In the products arena, the consumer often knows what information he or she needs in order to use the product safely.[139]

The availability of expert testimony may be important in these situations.[140] In the case of prescription drugs, warnings are made directly to physicians as learned intermediaries.[141] Courts have recognized that

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[134] *See* Pike v. Frank G. Hough Co., 467 P.2d 229, 234 (Cal. 1970).

[135] *See* Faucett v. Ingersoll-Rand Mining & Mach. Co., 960 F.2d 653, 654 (7th Cir. 1992).

[136] *See id.* at 655–56.

[137] *See, e.g,* Knitz v. Minster Mach. Co., 432 N.E.2d 814, 818 (Ohio 1982) (injured worker can rely on consumer expectations in a defective design case; if there are none, risk-benefit analysis should be employed).

[138] *See generally* Joseph H. King, Jr., *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213 (1975).

[139] *See* Hardie, *supra* note 53.

[140] *See* Karns v. Emerson Elec. Co., 817 F.2d 1452, 1459 (10th Cir. 1987) (expert permitted to testify that product was unreasonably dangerous beyond the expectation of the average user).

[141] *See, e.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); Hill v. Squibb & Sons, E.R., 592 P.2d 1383 (Mont. 1979).

expert testimony may be required to explain issues "with respect to which laymen can have no knowledge at all."[142]

Some scholars argue that the consumer expectations test is only an effective approach for manufacturing or production defects.[143] Clearly, the average consumer can understand that a foreign object in food or an exploding soda bottle does not meet ordinary safety expectations. On the other hand, many scholars argue that the consumer expectations test may not be useful in warning cases.[144] However, this argument may take too limited a view of consumer capabilities.

Basically, the consumer expectations test asks whether the product's safety conforms to what a reasonable consumer expects.[145] If the product does not so conform, it is defective.[146] Scholars recognize a number of problems with this test.[147] They argue that consumer expectations may be too high, too low or even non-existent because the consumer is particularly cynical, knowledgeable, or risk-averse.[148] These criticisms may focus too much on idiosyncratic or subjective consumer knowledge, rather than on what the reasonable consumer understands and expects. Obvious dangers present the archetypical situation. For example, because a punch press without a safety device presents an obvious danger to the consumer, it might be considered non-defective. Nevertheless, a consumer may be entitled to expect a product to be safe even if, as currently designed, it contains an obvious flaw.[149]

Similarly, the argument that the consumer can have no expectation of product safety with respect to obvious danger is misplaced. A consumer can expect product safety even when exposed to obvious danger.[150] By analogy, obvious workplace dangers which are known to the employee are nonetheless actionable under federal and state labor laws.[151] If a product meets government safety standards, this could

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[142] *Hill*, 592 P.2d at 1388 (quoting Callahan v. Burton, 487 P.2d 515, 518 (Mont. 1971)).

[143] *See* Henderson & Twerski, *A Proposed Revision*, *supra* note 3, at 1532–34.

[144] *See id.*

[145] *See, e.g.*, Vinces v. Esther Williams-All Aluminum Swimming Pool Co., 230 N.W.2d 794 (Wis. 1975).

[146] *See* Fischer, *supra* note 1, at 348.

[147] *See, e.g.*, Mary J. Davis, *Design Defect Liability: In Search of a Standard of Liability*, 39 WAYNE L. REV. 1217 (1993) [hereinafter Davis, *Design Defect Liability*].

[148] *See* Kennedy, *supra* note 33, at 143–44.

[149] *See* Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 305–06 (1979).

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

[151] *See* The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1994).

provide evidence of safety expectations to which the consumer is entitled.[152]

At the other extreme, scholars argue that consumers cannot have expectations about products involving complicated design issues.[153] Requiring expert testimony can overcome these problems even in complicated design situations. Juries often benefit from expert testimony in modern civil and criminal litigation. Expert testimony should be used as readily in products liability cases as in manufacturing defect cases.[154]

Some scholars argue that the consumer-oriented test requires some risk/utility balancing because courts must still determine whether such expectations are reasonable.[155] Nevertheless, the essence of the consumer expectations test is whether the product would be merchantable if the market knew of the danger. Significant policy considerations support retention of the consumer-oriented test. If risk/utility analysis is viewed as essentially identical to the theory of unreasonableness of risk in negligence law, strict liability is thwarted. To the extent that this is true, strict liability "failure to warn" cases also become indistinguishable from negligence cases.

A major controversy in American products liability centers on misuse, especially the question of whether misuse should be an affirmative defense or part of the plaintiff's prima facie case.[156] A cogent application of the consumer expectations test requires that it be an affirmative defense. Misuse consists of two components: plaintiff conduct and manufacturer foreseeability of such conduct.[157] In negligence actions, the plaintiff bears burdens of production and persuasion regarding defendant conduct, while the defendant carries these burdens for plaintiff conduct.[158] Strict products liability actions should be less burdensome for the plaintiff than traditional negligence. Requiring the plaintiff to establish the absence of misuse is burdensome, inconsistent

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[152] *See, e.g.*, Miller v. Lee Apparel Co., 881 P.2d 576, 587 (Kan. Ct. App. 1994) (product complying with federal flammability standards).

[153] *See* Davis, *Design Defect Liability*, *supra* note 147, at 1236–37.

[154] *See, e.g.*, Nadine E. Roddy, *Expert Testimony on the Adequacy of a Product's Warning: Recent Cases*, 12 PROD. LIAB. TRENDS 109 (Oct. 1987).

[155] *See* Kennedy, *supra* note 33, at 139–42.

[156] *See, e.g.*, Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 352–56 (Md. 1985) (treating misuse as part of plaintiff's case).

[157] *See* Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 420–21 (1978).

[158] *See id.* at 426.

and counterproductive. Therefore, plaintiff misuse should be an affirmative defense.

The main argument against this position is that intended use, the opposite of misuse, is part of the plaintiff's prima facie case.[159] As a result, the plaintiff must establish that the product is defective when used in the intended and/or foreseeable manner.[160] From this perspective, misuse becomes an issue of proximate cause. Since proximate cause is part of the plaintiff's burden of proof, by logical extension, misuse becomes part of the plaintiff's burden as well.[161]

A similar result is reached by decisions which focus on misuse in the context of causation in fact.[162] In this analysis, misuse becomes a superseding cause of injury. This concept is exemplified by the case of *Ellsworth v. Sherne Lingerie, Inc.*[163] The plaintiff wore a flammable nightgown inside out with two side pockets flapping and protruding. After placing a kettle on the burner of her stove, plaintiff turned on the burner. She reached above the stove to get a coffee filter from the cupboard, causing one of the protruding pockets to contact the burner, igniting her gown. The Court of Appeals of Maryland concluded that intended use constituted part of the plaintiff's prima facie case.[164]

III. THE EUROPEAN DIRECTIVE AND LITIGATION REALITIES

The European Directive seeks to promote integration of Member State markets by providing a uniform standard of product liability safety: strict liability.[165] Although the European Directive mandates that strict liability form the basis for producer (manufacturer) liability, it is unlikely that this will result in the development of products liability law similar to the American experience. Most EU Member States are civil law countries, without a strong tradition of case law creating substantial legal change.[166] Even in common law jurisdictions such as Ireland and

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[159] *See Ellsworth*, 495 A.2d at 355.

[160] *Id.*

[161] *Id.* at 355–56.

[162] *See, e.g.*, McCormick v. Custom Pools, Inc., 376 N.W.2d 471, 476 (Minn. App. 1985) ("a warning would not have deterred McCormick from diving since a warning would have merely informed him of risks of which he was already aware.").

[163] *Ellsworth*, 495 A.2d at 348.

[164] *See id.* at 356.

[165] 1985 European Directive, *supra* note 7, pmbl.

[166] *See* Patrick Thieffrey et al., *Strict Product Liability in the EEC: Implementation Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 66–67 (1989).

England, legislation holds the primary position over case law.[167] Moreover, European litigants face disincentives to litigation, including the cost of retaining counsel in light of the prohibition of contingent fees.[168] Most significantly, juries will not decide product liability disputes.[169] As a result, the development of strict product liability will have a uniquely European perspective. European adoption of strict liability for defective products need not result in an American-style litigation explosion.[170]

CONCLUSION

The abandonment of the consumer expectations test may be shortsighted and imprudent. Although it has become commonplace to criticize the consumer expectations test, these critiques apparently ignore the fact that a central and paramount purpose of products liability law is the protection of legitimate consumer safety expectations. Encouraging product development and innovation merits attention. However, such innovation neither compels nor should compel a move to a manufacturer-oriented negligence standard which defeats legitimate, bargained-for consumer expectations. These legitimate products liability goals are promoted by the European Directive.

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[167] *See id.* at 90–91.

[168] *See generally* Stapleton, *supra* note 7. Similar procedural limitations mean that other countries moving towards strict products liability do not anticipate a litigation explosion. *See, e.g.*, Mark A. Behrnes & 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 (1995); 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); Bruce A. Thomas et al., *Product Liability and Innovation: A Canadian Perspective*, 21 CAN.—U.S. L.J. 313 (1995).

[169] *See* TEBBENS, *supra* note 38, at 153–54.

[170] The 1970s and 1980s saw much discussion of a products liability crisis. *See, e.g.*, Stephanie Goldberg, *Manufacturers Take Cover*, 72 A.B.A. J., July 1, 1986, at 52; Bernard Wysocki, Jr., *Litigation Load: Case of the $154,100 Finger*, WALL ST. J., June 3, 1975, at 1. This "explosion" resulted in considerable reform. *See, e.g.*, Melvin Eisenberg & James A. Henderson, Jr., *Inside the First Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Martha Middleton, *A Changing Landscape—As Congress Struggles to Rewrite the Nation's Tort Laws, the States Already May Have Done the Job*, 81 A.B.A. J., Aug. 1995, at 56; *Message from the Chair*, ABA TIPS NEWSLETTER (ABA, Chicago, Il.), Spring/Summer 1995.