

PRODUCT DESIGN LIABILITY IN OREGON AND THE NEW RESTATEMENT

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Oregon courts have been in the forefront in developing the law governing product design liability. From *Heaton v. Ford Motor Co.*, [FN1] decided over three decades ago by the Oregon Supreme Court, Oregon courts have set a tone of good common sense and sound theoretical structure in this sometimes confusing area of the law. A recent opinion by the Court of Appeals in *McCathern v. Toyota Motor Corp.* [FN2] provides cause for concern. *2 But on the whole, Oregon courts have been leaders in product liability. Thus, Oregon decisions have traditionally found their way into the leading torts and products liability casebooks as classic works that deserve the attention of scholars and students of the law. [FN3] More importantly, they are cited and relied upon with great frequency by courts throughout the country. [FN4]

From 1992 until 1998, the authors of this article served as co-reporters for the Restatement (Third) of Torts: Products Liability. [FN5] From the beginning, the authors turned to the Oregon decisions for guidance in drafting both the black letter rules and the official comments. [FN6] It became clear to us that Oregon is a paradigm state whose traditional law is almost totally congruent with the Products Liability Restatement. Although Oregon has yet to formally adopt the new Restatement, it is clear that the new Restatement has adopted Oregon law. To be sure, there remain some terminological differences between the Restatement and the law as articulated by the Supreme Court of Oregon. But the differences are, in our view, purely terminological- not substantive.

This Article first describes the test for design defect adopted *3 by the Products Liability Restatement and explains why the Restatement accepts one test and rejects others. It then focuses on several aspects of the Restatement that, although not discussed in the *McCathern* opinion, are clearly an integral part of Oregon law. Finally, the article examines Oregon case law dealing with design defect liability. It will become evident that, except for *McCathern* itself, almost total congruence exists between the Restatement and the Oregon decisions. We suggest, however, that the clarity of Oregon law would be enhanced if the high court were to reject what may constitute a departure from tradition in *McCathern* and clarify some of the terminology that it uses to describe what Oregon courts are actually doing.

I

Design Defect Liability Under the New Products Liability Restatement

A. Design Cases in Which Independent Design Standards Are Not Required

Before examining the standards that govern most classic design cases, [FN7] it is important to identify several classes of cases where independent standards for defective design are not required.

1. Products That Fail Their Manifestly Intended Functions: Drawing An Inference of Defect

When a product fails to perform its manifestly intended function, one may properly draw an inference of defect without proof of a specific defect. [FN8] For example, when an automobile's steering *4 mechanism fails after several hundred miles of use, one may properly draw an inference that the product was defective at the time of sale. [FN9] It is of no moment whether the product failed because it had a manufacturing defect or because it was badly designed. The malfunction of the product "speaks for itself" and thus obviates the need for a specific standard for defectiveness. [FN10] This malfunction doctrine is a close analog to the familiar doctrine of *res ipsa loquitur* that applies to negligence cases. [FN11] Just as one may circumstantially draw an inference of negligence in a general tort case, one may draw a similar inference of defect in a products liability case.

The new Restatement recognizes that liability may be established utilizing a *res ipsa*-type inference. Section 3 provides:

It may be inferred that the harm sustained by the plaintiff was *5 caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(a) was of a kind that ordinarily occurs as a result of product defect; and

(b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution. [FN12]

It should be noted that courts, when imposing liability under this doctrine, often talk of products failing to meet consumer-expectations. [FN13] There is little harm in doing so, as long as one recognizes that what is truly at work is not a new liability doctrine, i.e., the consumer expectations test, but rather a traditional inference of defect arising from the occurrence of manifest product failure. [FN14]

2. Noncompliance With a Product Safety Statute or Regulation

When a product design fails to comply with a product safety statute or regulation, the design is defective *per se*. [FN15] One need not search for an independent standard for design defect. The statute or regulation provides the minimum safety standard and failure to comply with that standard subjects the seller to liability *6 with respect to the risks sought to be reduced by the statute or regulation. Section 4 of the new Restatement sets forth this well-accepted rule. [FN16]

3. Misrepresentations--Specific Assertions of Product Performance

The tort of misrepresentation allows recovery when a defendant specifically represents that a product will perform in a certain manner. [FN17] When the product fails to meet the representation and, as a result, personal injury or property damage occurs, the defendant is subject to liability without regard to whether the product could have been made safer. [FN18] In effect, the defendant is required to "put its money where its mouth is." The Restatement of Products Liability recognizes the cause of action for misrepresentation without regard to product defectiveness or fault on the part of the defendant. Section 9 provides that "[o]ne engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation." [FN19] This section reflects the law as stated in Section 402B of the Restatement (Second) of Torts. [FN20] Courts have found that product portrayals or statements in advertisements may constitute misrepresentations within the meaning of these sections when they are sufficiently specific. [FN21] Compared with an action based on defective design, *7 advantages of the misrepresentation action are formidable. First, as noted, it makes no difference whether the product meets even the most exacting independent design standards. [FN22] Second, the requirement of but-for proximate cause disappears. To make out the tort of misrepresentation, a plaintiff must establish justifiable reliance as an element of the cause of action. Justifiable reliance is an element of Section 402B and is incorporated by reference in the comments to the new Restatement. [FN23] However, it is not necessary to overcome the hurdle of classic proximate causation to make out an action for misrepresentation. Thus, if the product fails to perform according to the representation, liability follows even if it is indisputable that no other product or alternative design could have avoided the injury. [FN24] It is important to note that misrepresentation is not dependent on a finding of product defect but constitutes a totally independent action and thus does not imply that there is something independently wrong with the product. [FN25] The product simply does not measure up to the specific claims of safety made for it.

*8 B. The Tripartite Test For Defect in the Products Liability Restatement

Although this article focuses on design defect liability, it is important to note that the new Restatement differs substantially from section 402A of the Restatement (Second) of Torts in its approach to product defects generally. Section 402A, written some thirty-five years ago when products liability law was in its infancy, does not distinguish among the various forms of defect. [FN26] Instead, it proclaims that one who sells a product in a defective condition unreasonably dangerous to the user or consumer is liable for physical harm caused by the defect. [FN27] Experience over the last three decades reveals that a single, all purpose test for defect is not adequate to the task. [FN28] Instead, courts recognize separate tests depending on the nature of the defect. [FN29] Section 2 *9 of

the new Restatement recognizes three categories of product defect:

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

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. [FN30]

Section 2(b) sets forth the test for defect in classic design defect cases not governed by the three rules set forth in the preceding section. How and why Section 2(b) came into being are the subjects of the ensuing discussions.

C. Risk-Utility Balancing and Consumer Expectations--Choosing Between a Flexible Standard and Formless Intuition

From the outset of the Restatement project, the reporters faced a choice between two fundamentally different tests for classic design defect. A strong majority of American jurisdictions adopt the risk-utility test for design defect. [FN31] This test is also favored *11 by an overwhelming majority of scholars. [FN32] This test, which has its origins in the Learned Hand test for negligence, [FN33] requires courts to take into account a number of factors in deciding whether a product is defectively designed. Among these factors are the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, *12 and the nature and strength of consumer expectations regarding the product. Factors such as the effects of the product design on product longevity, maintenance, repair, and aesthetics, together with the range of consumer choice among products, may also be taken into account in deciding whether the product violates risk-utility norms. [FN34]

A small cadre of courts [FN35] and scholars [FN36] favor a test for defects that would allow recovery based on the disappointment of consumer expectations regarding safe product performance. The reporters and the American Law Institute rejected the consumer expectations test as an independent test for design defect in classic design cases. [FN37] Mere intuition, whether based on product appearance, general advertising, puffing, or simply consumer belief that a product will perform safely, does not support a finding of design defect in classic design cases. The reasons for rejecting an intuitional test are many. First, this hopelessly open-ended and vague test for defect cannot serve as a guide to manufacturers, nor can it be fairly administered by the courts. [FN38] Second, if one *13 successfully attacks a product design as defective, a manufacturer seeking to avoid liability in the future presumably will redesign the product. Frequently, when a product is redesigned to eliminate the original risks, other risks of equal or perhaps even greater magnitude are introduced into the product. If consumer expectations based on a jury's intuition are to serve as a predicate for liability in classic design cases, then consumers injured by either of the designs can, with some justification, argue that their expectations were disappointed. [FN39] A manufacturer would thus be whipsawed. Anything short of an elaborate explanation of countervailing risks in its advertisements would lead to liability. Finally, as we have explained elsewhere, when a product is found to disappoint consumer expectations, the but-for proximate causation issue is predetermined by a finding of defect. [FN40] By definition, a product that fails consumer expectations is the proximate cause of the plaintiff's harm. [FN41] If consumer expectations are allowed to serve as an acceptable test for defect, a manufacturer is shorn not only of a structured test for defect, but also of any defense that the alleged defect did not proximately cause the plaintiff's harm. Where the expectations are vague, the absence of causation as an element of the action presents to the courts a cause of action that is wholly without substance. Under such a regime, no proof of any rigor whatsoever is necessary to make out a case for defective design. [FN42]

*14 It is worth emphasizing that, even under a risk-utility analysis, consumer expectations may have some bearing on the issue of whether a product is reasonably designed or whether a reasonable alternative design should have been adopted. [FN43] Manufacturers owe a duty to reasonably foresee how their products will be put to use in the real

world. Consumer expectations and perceptions of product safety provide important data regarding the levels of risk that inhere in product use and whether, given that level of risk, design alternatives should have been adopted. The Restatement is clear on this point. [FN44] It does, however, unequivocally reject consumer expectations as a stand-alone test for defects in classic design cases. [FN45]

D. Risk-Utility Balancing: Why All Roads Lead to Reasonable Alternative Design

Once a court is committed to risk-utility balancing in classic product design cases, logic dictates that a plaintiff must prove that a reasonable alternative design could have been adopted. In balancing the advantages and disadvantages of a product, a court has two choices: (1) it can conclude that the product as designed was defective because a reasonably safer alternative was available; or (2) it can decide that, given the overall risks and benefits of the product, it should not be marketed at all even though the risks attendant to its use have been fully warned against and no reasonable alternative is available.

1. Reasonable Alternative Design and the General Rejection of Product Category Liability

In the overwhelming majority of products liability cases alleging defective design, courts reject out of hand the notion that the product in question should not have been marketed at all. [FN46] It would be strange, indeed, for a court to conclude that unavoidably dangerous products such as minivans, [FN47] above-ground swimming*15 pools, [FN48] alcoholic beverages, [FN49] consumer power tools for do-it-yourselfers, [FN50] handguns, [FN51] or motorcycles [FN52] present greater risks than benefits to society and should be declared defective per se. All of these products inherently involve serious dangers related to their use. They kill and maim with predictable frequency. However, with rare exception, when importuned to use macro risk-utility balancing to declare that certain product categories are defective, courts have refused to do so. [FN53] Whether or not such products should be marketed is better left to the market or to governmental regulators. We have argued in several articles that the courts' refusal to enter this thicket is based on a judgment that decisions of this magnitude are simply beyond the institutional capabilities of the adjudicative process. [FN54] Furthermore, courts are painfully aware that reliable data supporting issues such as the overall pleasures and benefits to society from use of such products are, and will remain, unavailable. [FN55]

*16 With the rejection of category liability, the only question that faces a court in a design defect case is whether the product could, and should, have been made safer. This, of course, raises the question of whether the manufacturer should have adopted a reasonable alternative design.

2. The Possibility of Manifestly Unreasonable Designs

Notwithstanding judicial rejection of the sort of categorical liability just considered, several courts have suggested, in dicta, that some product categories have such low utility and such high risk potential that they should be declared categorically defective even if no reasonable alternative design is available. [FN56] Although there are no actual holdings to that effect, it is clear that some courts wish to retain the future option of finding that, in extreme circumstances, an entire product category may be defective per se. [FN57] The Restatement recognizes this possibility in § 2, comment e. This comment sets forth the conditions for the possible application of category liability:

e. Design defects: possibility of manifestly unreasonable design. Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of how the range of relevant alternative designs are described. For example, a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children could be found to be defectively designed within the rule of Subsection (b). Toy guns unlikely to cause injury *17 would constitute reasonable alternatives to the dangerous toy. Thus, toy guns that project ping-pong balls, soft gelatin pellets, or water might be found to be reasonable alternative designs to a toy gun that shoots hard pellets. However, if the realism of the hard pellet gun, and thus its capacity to cause injury, is sufficiently important to those who purchase and use such products to justify the court's limiting consideration to toy guns that achieve realism by shooting hard pellets, then no reasonable alternative will, by hypothesis, be available. In that instance, the design feature that defines which alternatives are relevant—the realism of the hard-pellet gun and thus its capacity to injure—is precisely the feature on which the user places value and of which the plaintiff complains. If a court were to adopt this characterization of the product, and deem the capacity to cause injury an egregiously unacceptable quality

in a toy for use by children, it could conclude that liability should attach without proof of a reasonable alternative design. The court would declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or to allow children to use, the product. [FN58]

E. The Complete Restatement Package on Defective Design

Putting all of the relevant sections dealing with defective design in a package, the following picture emerges. The Restatement recognizes several non-controversial rules for the imposition of liability for defective design without the need for an independent standard for defective design. In each of the following instances, plaintiff need not establish a reasonable alternative design to establish a prima facie case:

- (1) When the product fails to perform its manifestly intended function;
- (2) When the product fails to comply with a safety statute or governmental safety regulation;
- (3) When the product fails to conform to defendant's specific misrepresentations about product performance.

In all other cases, described herein as presenting "classic" design claims, risk-utility principles govern as to whether a product is defectively designed. In the vast majority of cases, such balancing requires plaintiff to establish that a reasonable alternative design could have been adopted and that failure to do so renders the product not reasonably safe. Some products may be so manifestly *18 dangerous, in that the risks are so high and the benefits so low, that a court might conclude that the product is defective even absent a reasonable alternative design.

II Overview and Critique of Oregon Law Governing Liability for Product Design

A. History of Design Liability in Oregon: Adoption of Risk Utility Balancing

In product design cases involving what are described as "classic" design claims, Oregon courts apply a risk-utility analysis, requiring the plaintiff to prove that the manufacturer could feasibly have adopted a reasonable alternative design and that the omission of such an alternative rendered the defendant's design not reasonably safe. [FN59] In the Heaton decision alluded to earlier and published more than 30 years ago, the Supreme Court of Oregon adopted this standard in the context of a claim that a wheel on a pickup truck was defectively designed in that it disintegrated after being driven at highway speed over a five-inch rock. [FN60] Plaintiff argued that the manufacturer had advertised the truck as "solid" and "rugged," leading the driver reasonably to believe that it was safe to encounter the rock. The trial court granted defendant's motion for involuntary nonsuit and the plaintiff appealed. The Supreme Court affirmed, asserting that the test for defect was what reasonable consumers expect in the way of wheel strength and concluding that the plaintiff had failed to introduce "data concerning the cost or feasibility of designing and building stronger products." [FN61] The court concluded: "Without reference to relevant factual data, the jury has no special qualifications for deciding what is reasonable" [FN62] The court also held that the advertising did not constitute tortious misrepresentation and that "[a] general impression of durability . . . does not help a customer form an expectation about the breaking point of *19 a wheel." [FN63]

In *Phillips v. Kimwood Machine Co.*, [FN64] the court continued its allegiance to risk-utility balancing but opined that whether a product was reasonably designed was to be determined from the perspective of a "reasonable manufacturer." [FN65] Subsequently, after the Oregon legislature had codified § 402A of the Restatement (Second) of Torts, including all of the official comments thereto, [FN66] the Oregon Supreme Court returned to its original "consumer expectations" terminology. [FN67]

Rejection of the "reasonable manufacturer" test is sound, inasmuch as that perspective might invite a pro-manufacturer bias. Traditionally, tort law has decided risk-utility cases by asking whether a reasonable person would have acted in the same manner. [FN68] Thus, the test for design liability under the Products Liability Restatement is whether the product fails the risk-utility norms given the perspective of a reasonable person. [FN69] The test provides a more general societal perspective and not necessarily that of a manufacturer or a consumer. One is hard pressed to perceive any substantive difference between the terminology adopted by the Restatement and the consumer perspective favored by the Oregon courts. We would urge the Oregon courts to utilize the reasonable person perspective for two reasons. First, its congruence with the traditional standard for all cases in which

reasonableness is the issue to be decided would bring Oregon terminology into line with case law throughout the country. Second, as we have noted earlier, the consumer expectations test raises the specter of a wholly independent, vague test for defect that is not consistent with the law of Oregon regarding defective design. To be sure, Oregon courts have construed the legislative codification of § 402A and comment i to constitute a commitment *20 to instructing juries in terms of whether designs disappoint consumer expectations. [FN70] This is somewhat ironic inasmuch as Dean Prosser, the reporter responsible for drafting § 402A, noted, that the consumer expectations test as expressed in comment i was never intended to govern defective design. [FN71] But as long as the underlying standard for measuring the sufficiency of plaintiff's proof remains rooted in risk-utility, how juries are instructed is of decidedly secondary importance. [FN72]

Thus, regardless of the appropriate terminology, Oregon courts have, over the years, steadfastly required plaintiffs in "classic" product design cases to prove the availability to the manufacturer, at the time of sale, of a feasible, safer alternative design. Moreover, the Oregon high court has made clear that, consistent with the new Restatement of Products Liability, the omission of the safer alternative design must render the defendant's product design not reasonably safe, [FN73] and must have proximately caused the plaintiff's harm. [FN74]

B. Other Grounds In Oregon for Establishing Design Defect

In addition to this risk-utility standard applied in what have been characterized as "classic" product design claims, Oregon courts have also recognized the other bases of design liability included in the new Restatement and described earlier in this article. Thus, Oregon courts impose liability when product designs fail safely to perform their manifestly intended functions [FN75] and *21 when product designs fail to conform to applicable safety statutes or regulations. [FN76] Furthermore, Oregon courts recognize, at least in dicta, the legitimacy of imposing liability when products are so egregiously dangerous that they should not be distributed at all, even if no safer alternative design was available at the time of sale. [FN77]

C. Representational Theories: Getting It Right and Getting It Wrong

Oregon, like all other American jurisdictions, recognizes causes of action for common law misrepresentation [FN78] and breach of express warranty. [FN79] These actions require specific representations and do not depend on vague references to reasonable consumer expectations. [FN80] Sellers are held to their word. If they claim or portray a product as being capable of performing safely in a given manner, they are subject to liability if the product does not safely perform.

*22 It is at this juncture that the recent McCathern [FN81] case provides cause for concern. McCathern recognizes two approaches to determining whether consumer expectations have been disappointed: the traditional risk-utility approach discussed earlier and what it describes as a "representational approach." Regarding the recognition in McCathern of the representational approach to product design liability, we have no particular quarrel with it to the extent that Oregon courts require plaintiffs to establish the formal elements of either tortious misrepresentation or breach of express warranty. Portions of the court's discussion suggest that the defendant's advertising and marketing must be sufficiently specific to satisfy the traditional requirements of tortious misrepresentation. [FN82] The new Restatement recognizes this basis of product sellers' liability, albeit not as part of the definition of "defect." [FN83]

To the extent, however, that McCathern may be read to condone the imposition of liability based on heightened consumer expectations flowing out of vague, generalized assertions of quality and safety in product advertising, we most strongly urge the Oregon high court to reject such a position. Some portions of the opinion suggest that the Court of Appeals in McCathern is, indeed, advocating a vague consumer expectations test. [FN84] In any event, the court explains that, in connection with the representational approach to consumer expectations, the plaintiff need not prove that a safer design was feasible or practicable, [FN85] nor must the plaintiff prove but-for causation. [FN86]

The reasons for urging the Oregon Supreme Court to reject a vague consumer expectations test based on product representations are many. First, there is no authority in Oregon to support a pure consumer expectations test. As noted earlier, the *23 landmark Heaton case made it clear that general consumer expectations resulting from vague impressions in advertisements that do not rise to the level of specific misrepresentations do not suffice to establish a case for design defect. [FN87] Second, for the host of policy reasons set forth in Section II of this article, a vague impressionistic consumer expectation test is both unfair and judicially unmanageable. [FN88] Third, such a potentially mischievous approach is unnecessary. When product sellers create vague impressions of safety through

advertising and do not alert consumers to product-related risks, they are subject to a classic failure to warn action. [FN89] Whether a warning is adequate in any given case must take into account the general impressions that consumers harbor with regard to how products will function. [FN90] Fourth, many of the cases that the McCathern court cites as supporting the consumer expectations test do not support its use in classic design cases. [FN91] Fifth, there is no legislative mandate in Oregon *24 for adopting the consumer expectations test as an independent test for defect in a classic design case. Whatever may be said for the proposition that the legislature may have expressed preference for a terminological consumer risk-utility test in framing jury instructions, there is nothing to be said for the proposition that it mandated a wholly independent consumer expectations test for defective design. [FN92] As noted earlier, § 402A, comment i need not be read as imposing such a general standard for design defect liability. [FN93] Dean Prosser's commentary emphatically rejects such a reading and his view has been confirmed by other scholars. [FN94]

*25 Conclusion

Oregon courts have traditionally adopted a test for defect in classic design cases that, in substance, is perfectly congruent with § 2(b) of the new Restatement of Products Liability; risk utility balancing with the requirement that the plaintiff prove that a reasonable, safer alternative was available at the time of sale that would have reduced or eliminated plaintiff's harm. Oregon courts recently returned to "consumer expectations" terminology in such cases, apparently out of dissatisfaction with "reasonable manufacturer" terminology employed during a 20-year interim. The new Restatement offers a middle-ground--"reasonable person" terminology--that the authors, who were co-reporters on the Restatement project, urge the Oregon Supreme Court to adopt. Substantively, however, until quite recently, the Oregon courts had design defect liability "right."

The event earlier this year that gives rise to concern is the publication of the Court of Appeals decision in *McCathern v. Toyota Motor Corp.* [FN95] In the *McCathern* opinion, the court appears to embrace vague "reasonable expectations" as a substantive--not merely terminological-- alternative to risk-utility balancing via what it refers to as an independent "representational approach." Read in its worst light, the decision recognizes the disappointment of expectations, heightened through vague assertions in product advertising and marketing, as an independent basis of design liability. No prior holdings by Oregon courts support such an essentially lawless approach to classic design litigation. Neither comment i to § 402A nor the Oregon statute codifying § 402A support it; and the new Restatement emphatically rejects it. If Oregon courts are to maintain the integrity of their products liability law and to retain its well-deserved position of eminence, the Supreme Court of Oregon must also reject this misapplication of the concept of consumer expectations.

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[FN3]. 435 P.2d 806 (Or. 1967).

[FN4]. 160 Or. App. 201 (1999). This Article will focus only on the liability theories discussed in *McCathern*. All issues concerning the sufficiency of evidence to establish liability are beyond the scope of this article.

[FN5]. See, e.g., Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation* 639 (3d ed. 1997) (citing *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978)); David A. Fischer & William Powers, Jr., *Products Liability: Cases and Materials* 177 (2d ed. 1994) (citing *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974)); James A. Henderson, Jr. & Aaron D. Twerski, *Products Liability: Problems and Process* 462 (3d ed. 1997) (citing *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967)); *id.* at 540 (citing *Wilson v. Piper Aircraft Corp.*); W. Page Keeton, et al., *Products Liability and Safety* 179 (2d ed. 1989) (citing *Heaton v. Ford Motor Co.*).

[FN6]. *Heaton v. Ford Motor Co.*, *Phillips v. Kimwood Mach. Co.*, and *Wilson v. Piper Aircraft Corp.*, for example, have been cited and relied upon in many cases by courts outside of Oregon. See, e.g., *Virgil v. "Kash n'Karry" Serv. Corp.*, 484 A.2d 652, 656 (Md. Ct. Spec. App. 1984) (citing *Heaton*); *Uder v. Missouri Farmers Ass'n, Inc.*, 668 S.W.2d 82, 93 (Mo. Ct. App. 1983) (citing *Heaton*); *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.*, 502 N.E.2d 651, 655 (Ohio Ct. App. 1985) (citing *Heaton*); *Potter v. Van Waters & Rogers, Inc.*, 578 P.2d 859, 865 (Wash. Ct. App. 1978) (citing *Heaton*); *Johnson v. International Harvester Co.*, 702 F.2d 492, 496 (4th

Cir. 1983) (applying Maryland law) (citing Wilson); *Dart v. Wiebe Mfg. Inc.*, 709 P.2d 876, 881 (Ariz. 1978) (citing Phillips, Wilson); *Ortho Pharm. Corp. v. Heath*, 722 P.2d 410, 413 n.1 (Colo. 1986) (citing Wilson); *Freund v. Cellofilm Properties, Inc.*, 432 A.2d 925, 929 (N.J. 1981) (citing Phillips). Moreover, all three cases have been cited 148 times in law reviews and journals.

[FN5]. Restatement (Third) of Torts: Products Liability (1998) [hereinafter Restatement (Third)].

[FN6]. Restatement (Third), *supra* note 5, § 2 Reporters' Notes to cmt. d at 60-61.

[FN7]. Classic design cases are those that do not fall within the three classes of cases governed by the non-controversial rules set forth in this section. Typically these cases require a manufacturer to make tradeoffs between competing values in order to decide the appropriate level of safety for any given product. For a comprehensive discussion of classic design cases, see James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 *Cornell L. Rev.* 867, 876-904 (1998) [hereinafter *Achieving Consensus*].

[FN8]. See, e.g., *Sanders v. Quikstak, Inc.*, 889 F. Supp. 128, 131 (S.D.N.Y. 1995) ("Under certain circumstances, however, a plaintiff need not prove a specific defect in the product at issue. Despite an absence of proof of any specific defect in a product, a jury may infer that an accident occurred because of a defect when the plaintiff has proven that the product did not perform as intended and has excluded all causes of the accident not attributable to the defendant."); *Dietz v. Waller*, 685 P.2d 744, 745 (Ariz. 1984) ("[N]o specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect."); *Harrell Motors, Inc. v. Flanery*, 612 S.W.2d 727, 729 (Ark. 1981) ("[P]roof of the specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect."); *Mote v. Montgomery Ward & Co.*, 466 N.E.2d 593, 596 (Ill. App. Ct. 1984) (it was reasonable for jury to conclude that there was an absence of abnormal use and that a ladder failed to perform in the manner reasonably expected in light of its intended function); *Tulgetske v. R.D. Werner Co.*, 408 N.E.2d 492, 496 (Ill. App. Ct. 1980) (plaintiff can make out strict liability claim by proving that product failed to perform in a manner reasonably expected in light of its intended function); *Landahl v. Chrysler Corp.*, 534 N.Y.S.2d 245, 246 (App. Div. 1988) ("[P]laintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case.").

[FN9]. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

[FN10]. See, e.g., *Knight v. Otis Elevator Co.*, 596 F.2d 84, 89 (3d Cir. 1979) (applying Pennsylvania law) (plaintiff need not prove the existence of a specific defect if plaintiff can show that the product malfunctioned in the absence of abnormal use and reasonable secondary causes); *Marcus v. Anderson/Gore Homes, Inc.*, 498 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1986) ("When a product malfunctions during normal operations, a legal inference arises that the product is defective"); *Farmer v. International Harvester Co.*, 553 P.2d 1306, 1312 (Idaho 1976) ("Proof of malfunction is circumstantial evidence of a defect in a product since a product will not ordinarily malfunction within the reasonable contemplation of a consumer in the absence of defect."); *Stackiewicz v. Nissan Motor Corp.*, 686 P.2d 925, 928 (Nev. 1984) ("[P]roof of an unexpected, dangerous malfunction may suffice to establish a prima facie case for the plaintiff of the existence of a product defect."); *Harkins v. Calumet Realty Co.*, 614 A.2d 699, 705 (Pa. Super. Ct. 1992) ("[Malfunction theory] permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes").

[FN11]. See *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 211 (7th Cir. 1994) (citation omitted) ("The doctrine [of *res ipsa loquitur*] is not strictly applicable to a products liability case because ... the defendant ... has parted with possession and control of the harmful object before the accident occurs. But the doctrine merely instantiates the broader principle, which is as applicable to a products case as to any other tort case, that an accident can itself be evidence of liability.").

[FN12]. See Restatement (Third), *supra* note 5, § 3.

[FN13]. See, e.g., *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1146 (Fla. Dist. Ct. App. 1981) ("[E]vidence of the nature of an accident itself may, under certain circumstances, give rise to a reasonable inference that the product was defective because the circumstances of the product's failure may be such as to frustrate the ordinary consumer's expectations of its continued performance."); *Doyle v. White Metal Rolling & Stamping Corp.*, 618 N.E.2d 909,

916 (Ill. App. Ct. 1993) ("[A] plaintiff may create an inference that a product was defective by direct or circumstantial evidence that: (1) there was no abnormal use of the product; (2) ... there was no reasonable secondary cause of the injury; and (3) ... the product failed to perform in the manner reasonably to be expected in light of its nature and intended function."); *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.*, 502 N.E.2d 651, 655 (Ohio Ct. App. 1985) (In a fire case, "the reasonable expectations of a buyer of a motor vehicle is that the main electrical cable harness of such vehicle will not start a fire.").

[FN14]. The *res ipsa* inference has a long history in the law of torts and does not rest on doctrinal ground. See, e.g., Restatement (Second) of Torts § 328D (1965) [hereinafter Restatement (Second)].

[FN15]. See, e.g., *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958) ("[A] defect resulting from a violation of ... statute which causes the injury or death of an employee creates liability without regard to negligence."); *Orthopedic Equip. Co. v. Eutsler*, 276 F.2d 455, 461 (4th Cir. 1960) ("The majority of American courts which have passed on this question, in cases arising under state laws resembling the Federal Act, have held violations [of safety statutes] to be negligence per se."); *Wells v. City of Vancouver*, 467 P.2d 292, 295 (Wash. 1970) ("The scope of the duty imposed by statutory rule is a matter of law.").

[FN16]. See Restatement (Third), *supra* note 5, § 4.

[FN17]. See Restatement (Second), *supra* note 14, § 402B, cmt. g.

[FN18]. See, e.g., *Baxter v. Ford Motor Co.*, 35 P.2d 1090, 1092 (Wash. 1934) (representation that windshield was shatterproof constituted a warranty even though no safer windshield was available).

[FN19]. Restatement (Third), *supra* note 5, § 9.

[FN20]. Restatement (Second), *supra* note 14, § 402B.

[FN21]. See, e.g., *Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975) (statement ("COMPLETELY SAFE BALL WILL NOT HIT PLAYER") on cover of instruction booklet of a golf training device constituted misrepresentation); *Huebert v. Federal Pacific Electric Co., Inc.*, 494 P.2d 1210, 1214 (Kan. 1972) ("In the highly competitive world of marketing and selling, manufacturers must seek and explore methods of increasing the sale of their products. One of these methods is the use of many forms of advertising which may include statements that their products will perform or not perform in a certain way. If pertinent, the advertising may claim certain safety features that assure a purchaser that the product will operate in a manner on which the purchaser can rely and no injury will occur.... These warranties are express rather than implied."); *Klages v. General Ordnance Equip. Corp.*, 367 A.2d 304 (Pa. Super. Ct. 1976) (statement in promotional literature that mace weapon "rapidly vaporizes on face of assailant effecting instantaneous incapacitation" was a misrepresentation when intruder, after being sprayed in face, was still able to pursue and shoot victim); *Ladd v. Honda Motor Co.*, 939 S.W.2d 83 (Tenn. Ct. App. 1996) (Portrayals in advertisements that all-terrain vehicles could be operated safely by children could constitute an innocent misrepresentation under Section 402B of the Second Restatement. The Ladd case contains an excellent review of authority dealing with the issue of product portrayal and advertisements serving as a predicate for an action in misrepresentation.).

[FN22]. See *supra* note 18 and accompanying text.

[FN23]. Section 402B sets forth a more extensive articulation of the tort of product misrepresentation. It includes direct reference to the element of misrepresentation. Section 9 of the Third Restatement sets forth a very sparse black letter rule. The comments make clear that it intends to incorporate both the black letter and comments of Section 402B. Thus, Section 9, comment b states: "The rules governing liability for innocent product misrepresentation are stated in the Restatement, Second, of Torts, Section 402B." Section 9, comment c incorporates by reference comments g and j of Section 402B. Comment j of Section 402B deals with justifiable reliance and states that "[T]he rule here stated applies only where there is justifiable reliance upon the misrepresentation of the seller, and physical harm results because of such reliance, and because of the misrepresented fact. It does not apply where the misrepresentation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct."

[FN24]. In a misrepresentation case, once the misrepresentation is established and the product failed in a manner

that would not have happened had the representation been true, liability is established even if no other product or design would have avoided the injury. Thus, the but-for question is, in practicality, mooted. See *supra* note 23 and accompanying text.

[FN25]. See Restatement (Third), *supra* note 5, § 9.

[FN26]. Restatement (Second), *supra* note 14, § 402A.

[FN27]. *Id.*

[FN28]. See Restatement (Third), *supra* note 5, § 2, cmt. a. Scholars throughout the country agree. See, e.g., Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 *Vand. L. Rev.* 593, 599-600 (1980); Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 *Drake L. Rev.* 465, 471 (1991); David G. Owen, *The Moral Foundations of Product Liability Law: Toward First Principles*, 68 *Notre Dame L. Rev.* 427, 437, 466-67 (1993); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 *U. Ill. L. Rev.* 639 (1991); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 *Cal. L. Rev.* 435, 460-81 (1979); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 830-38 (1973); Note, *Minnesota Replaces the Restatement Standard with a Negligence Standard in Design Defect Cases*, 11 *Wm. Mitchell L. Rev.* 891, 892-96 (1985).

[FN29]. See, e.g., *Glover v. BIC Corp.*, 987 F.2d 1410, 1414 (9th Cir. 1993) (applying Oregon law); *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1194 (Alaska 1992); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 881-82 (Alaska 1979); *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 878-79 (Ariz. 1985) (en banc); *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978) (recognizing that different liability standards apply depending on which type of defect is involved); *Hunt v. Harley-Davidson Motor Co.*, 248 S.E.2d 15, 15-17 (Ga. Ct. App. 1978) (drawing distinction between design and warning cases, and latent manufacturing defect cases); *Cosse v. Allen-Bradley Co.*, 601 So. 2d 1349, 1351 (La. 1992); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701, 703 (Md. Ct. Spec. App. 1988)); *Back v. Wickes Corp.*, 378 N.E.2d 964, 970 (Mass. 1978); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 182 (Mich. 1984); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 621-22 (Minn. 1984) (holding that strict liability test, which is appropriate for manufacturing defects, is not appropriate for design defects); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1035-38 (Or. 1974); *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E. 2d 666, 682 (W. Va. 1979). See also La. Rev. Stat. Ann. §§ 9:2800.55-57 (West 1988) (establishing different liability tests for manufacturing defects, design defects, and failure to warn); Miss. Code Ann. § 11-1-63 (1993) (establishing different liability tests for manufacturing, design, and failure to warn defects); Or. Rev. Stat. § 30.900 (1991); Tex. Civ. Prac. & Rem. Code Ann. § 82.005 (West 1993) (setting standards for proving a design defect which do not govern a manufacturing defect).

[FN30]. Restatement (Third), *supra* note 5, § 2.

[FN31]. The case law supporting risk-utility balancing as the standard for design defect is overwhelming. See, e.g., *Townsend v. General Motors Corp.*, 642 So. 2d 411, 418 (Ala. 1994); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1191 (Ala. 1985) (requiring both a reasonable alternative design and that the "utility of the alternative design outweighed the utility of the design actually used"); *Armentrout v. FMC Corp.*, 842 P.2d 175, 182 (Colo. 1992) (en banc) (affirming the trial court's jury instruction which stated that "[a] product is unreasonably dangerous because of a defect in its design if it creates a risk of harm to persons which is not outweighed by the benefits to be achieved from such design"); *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 535 (Del. 1998) (holding that a reasonable alternative design is necessary to prove a design defect in a crashworthiness case); *Warner Freuhauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995) (holding that "the plaintiff must show the risks, costs and benefits of the product in question and alternative designs, and that the magnitude of the danger from the product outweighed the costs of avoiding the danger" (quoting *Hull v. Eaton Corp.*, 825 F.2d 448, 453-54 (D.C. Cir. 1987))); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) (stating that the court's review of case law and treatises "revealed a general consensus regarding the utilization in design defect cases of a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product"); *Guiggey v. Bombardier*, 615 A.2d 1169, 1172 (Me. 1992) (determining whether a product is defectively dangerous by balancing "the danger presented by the product against its utility"); *Ziegler v. Kawasaki Heavy Indus.*, 539 A.2d 701, 706 (Md. Ct. Spec. App. 1988) (finding the risk-utility test "the only appropriate test to be applied in the instant case because it allows full consideration of the relative merits of a product design" (quoting Edward S. Digges, Jr. & John G. Billmyre, *Product Liability in Maryland: Traditional and Emerging Theories of Recovery*

and Defense, 16 U. Balt. L. Rev. 1, 16 (1986)); Caron v. General Motors Corp., 643 N.E.2d 471, 476 (Mass. App. Ct. 1994) (noting that jury must engage in a risk-utility analysis in defective design cases); Holm v. Sponco Mfg., 324 N.W.2d 207, 213 (Minn. 1982) (rejecting the latent-patent danger rule in design defect cases and substituting a "reasonable care" balancing test); Sperry-New Holland v. Prestage, 617 So. 2d 248, 254 (Miss. 1993) (noting that a plaintiff may "recover for any injury resulting from" a product if she can prove that "the utility of the product is outweighed by the danger that the product creates"); Rix v. General Motors Corp., 723 P.2d 195, 201 (Mont. 1986) (finding that a jury must engage in risk-utility balancing in design defect cases); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 846 (N.H. 1978) (stating that when "weighing utility and desirability against danger, courts should also consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing cost"); Smith v. Keller Ladder Co., 645 A.2d 1269, 1270 (N.J. Super Ct. App. Div. 1994) (stating that determining "whether a product has been defectively designed ordinarily involves a risk-utility analysis"); Green v. General Motors Corp., 709 A.2d 205, 210 (N.J. Super Ct. App. Div. 1998) ("[I]n determining whether [the product] was defective, a jury must determine the risks and alternatives that should have been known to the manufacturer, and then assess whether the manufacturer discharged its duty to provide a 'reasonably fit, suitable and safe' vehicle. To do this, the jury employs a risk-utility analysis."); Lewis v. American Cyanamid Co., 715 A.2d 967, 980 (N.J. 1998) ("Plaintiffs who assert that the product could have been designed more safely must prove under a risk-utility analysis the existence of an alternative design that is both practical and feasible."); Carrel v. Allied Products Corp., No. 9-94-24, 1995 WL 423388, at *4 (Ohio Ct. App. July 11, 1995) (noting that under the statutory risk-utility test a plaintiff must prove "that the product design is in a defective condition because the benefits of the challenged design do not outweigh the risks inherent in such design" (quoting State Farm Fire & Casualty Co. v. Chrysler Corp., 523 N.E.2d 489, 494 n.5 (1988), rev'd on other grounds, 677 N.E.2d 795 (Ohio 1997))); Hoyt v. Vitek, Inc., 894 P.2d 1225, 1231 (Or. Ct. App. 1995) ("Whether a product is defectively designed ... is a question ... for the court to consider by balancing the product's utility against the magnitude of the risk associated with its use." (citing Roach v. Kononen/Ford Motor Co., 269 Or. 457, 525 P.2d 125 (Or. 1974))); Morningstar v. Black and Decker Mfg., 253 S.E.2d 666, 682-83 (W. Va. 1979) (testing allegedly defective products by a risk-utility balancing test.).

Some states have enacted statutes requiring a risk-utility balancing approach for design defect claims. See, e.g., La. Rev. Stat. Ann. § 9:2800.56 (West 1997) (adopting a risk-utility standard and providing that a product is designed unreasonably dangerously if, "at the time the product left its manufacturer's control," a safer, alternative design for the product existed and the "likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product"); Miss. Code Ann. § 11-1-63(b) (Supp. 1997) (providing that a product is not defectively designed if claimant's harm "was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability"); Ohio Rev. Code Ann. § 2307.75(E) (Anderson Supp. 1996) (providing that a product is not defectively designed if a plaintiff's injury resulted from "an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability"); Tex. Civ. Prac. & Rem. Code Ann. § 82.005 (West 1997) (providing that plaintiff must prove the existence of a "safer alternative design" that "would have prevented or significantly reduced" the claimant's risk of injury "without substantially impairing the product's utility").

[FN32]. See, e.g., William L. Prosser, *The Law of Torts* 149, 644 (4th ed. 1971) (defining the standard of conduct in negligence as a balancing of "the risk, ... probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued" and writing that in the area of design defect a manufacturer's liability appears to be "essentially a matter of negligence"); David A. Fischer, *Products Liability--The Meaning of Defect*, 39 Mo. L. Rev. 339, 359 (1974) (arguing that "courts should consider, in light of the facts of the particular case, the merits of the policies underlying strict liability and balance [those] considerations against countervailing factors"); W. Page Keeton, *Products Liability-Design Hazards and the Meaning of Defect*, 10 Cumb. L. Rev. 293, 313 (1979) (proposing that a product be determined defectively designed "if a reasonable person would conclude that the magnitude of the danger ... outweighs the utility of the design"); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. Legal Stud. 535, 553-54 (1985) (endorsing use of risk-utility analysis in design defect cases); David G. Owen, *Risk-Utility Balancing in Design Defect Cases*, 30 U. Mich. J.L. Reform 239, 239 (1997) ("Courts and commentators increasingly comprehend that ascertaining design defectiveness in products liability cases requires some kind of risk-utility balancing."); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 Cal. L. Rev. 435, 464 (1979) ("There can be little doubt about the correctness of the risk-benefit standard for design defect"); Victor E. Schwartz, *The Uniform Products Liability Act--A Brief Overview*, 33 Vand. L. Rev. 579, 586 (1980) (writing that the Uniform Product Liability Act has adopted a standard for design defect cases that "balances

risk against utility"); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837-38 (1973) (listing factors to be balanced in a risk-utility analysis).

[FN33]. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

[FN34]. Restatement (Third), *supra* note 5, § 2 cmt. f.

[FN35]. See, e.g., *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981) (applying Arkansas law); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734 (Haw. 1983); *Kudlacek v. Fiat*, 509 N.W.2d 603 (Neb. 1994); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283, 1285 (Okla. 1984) ("Plaintiffs ... must prove ... that the defect made the product unreasonably dangerous as defined by ordinary consumer expectations."); *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 360 N.W.2d 2, 16-17 (Wis. 1984).

[FN36]. See, e.g., Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 *Tenn. L. Rev.* 1173 (1994); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 *Vand. L. Rev.* 631 (1995); Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 *Tenn. L. Rev.* 1407 (1994).

The authors responded to the critics in *Achieving Consensus*, *supra* note 7, at 911-19.

[FN37]. Restatement (Third), *supra* note 5, § 2 cmt. g.

[FN38]. Professors Prosser and Keeton make this point about the consumer expectations test:

The meaning is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense, he does not "expect" to be adversely affected by a risk or hazard unknown to him. In another sense, he does contemplate the "possibility" of unknown "side effects." In a sense the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised. The test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, at 699 (W. Page Keeton ed., 5th ed. 1984). See also Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 *Wayne L. Rev.* 1217, 1236 (1993).

[FN39]. See *Achieving Consensus*, *supra* note 7, at 880.

[FN40]. See James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 *Geo. L.J.* (forthcoming Feb. 2000).

[FN41]. *Id.* The authors argue that the logic supporting the proposition that in a consumer expectations test there is no but-for proximate cause question is irrefutable:

The consumer expectations test asks the jury to determine whether a reasonable consumer would have expected to be harmed in the same manner in which the plaintiff was harmed when using the product in the manner that caused the plaintiff's harm. Once the jury decides that the product is defective because it allowed the plaintiff to suffer a harm that a reasonable consumer would not have expected, the jury has also automatically decided that, if the product had not been defective, the harm to plaintiff would not have resulted. Under consumer expectations, a finding of design defect automatically predetermines the issue of proximate causation. (footnote omitted).

Id.

[FN42]. See, e.g., *id.*

[FN43]. Restatement (Third), *supra* note 5, § 2 cmt. g.

[FN44]. *Id.*

[FN45]. *Id.*

[FN46]. See, e.g., James A. Henderson, Jr. and Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. Rev. 1263, 1314-1315 (1991) [hereinafter Closing the American Products Liability Frontier].

[FN47]. Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) (applying Virginia law).

[FN48]. See, e.g., O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983) (above-ground swimming pool with vinyl bottom may be defective even though no alternative design was feasible). This decision was effectively overturned by statute. N.J. Stat. Ann. § 2A:58C-3a(1) (West 1987).

[FN49]. See, e.g., McGuire v. Joseph Seagram & Sons, Inc., 790 S.W.2d 842, 852 (Tex. Ct. App. 1990) (requiring warning since alcohol is dangerous beyond the contemplation of ordinary consumers), rev'd, 814 S.W.2d 385 (Tex. 1991). For explanation as to why the intermediate appellate court's decision was, in truth, an attempt to declare alcohol as defective per se, see Closing the American Products Liability Frontier, supra note 46, at 1324-25.

[FN50]. See, e.g., Falls v. Scott, 815 P.2d 1104, 1109 (Kan. 1991) (holding that machine designed to cut brush, small trees, or high weeds and grass was not defective per se).

[FN51]. See, e.g., Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533-34 (11th Cir. 1986) (applying Florida law); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1268 (5th Cir. 1985) (applying Louisiana law), reh'g denied sub nom. Richman v. Charter Arms Corp., 768 F.2d 1350 (5th Cir. 1985); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 773 (D.N.M. 1987), aff'd, 843 F.2d 406, 407 (10th Cir. 1988) (applying New Mexico law); Hilberg ex rel. Hilberg v. F.W. Woolworth Co., 761 P.2d 236, 240 (Colo. Ct. App. 1988), overruled on other grounds by Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1298-99 (Ill. App. Ct. 1985); Knott v. Liberty Jewelry and Loan, Inc., 748 P.2d 661, 663 (Wash. Ct. App. 1988). See also McCarthy v. Olin Corp., 119 F.3d 148, 151 (2d Cir. 1997) (holding that talon bullets are not defective per se).

[FN52]. For an argument that motorcycles might indeed be defective per se because they fail the risk-utility test, see Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 1, 30-34 (1995).

[FN53]. See generally Achieving Consensus, supra note 7, at 884-87; Closing the American Products Liability Frontier, supra note 46.

[FN54]. See Closing the Products Liability Frontier, supra note 46, at 1300-06; Achieving Consensus, supra note 7, at 884-87.

[FN55]. See Kotler v. American Tobacco Co., 731 F. Supp. 50, 53 (D. Mass. 1990), aff'd, 926 F.2d 1217 (1st Cir. 1990); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985); O'Brien v. Muskin Corp, 463 A.2d 298, 314 (N.J. 1993) (Schrieber, J., dissenting).

[FN56]. See Wilson v. Piper Aircraft Corp., 577 P.2d 1322 (Or. 1978).

There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce.

Id. at 1328 n.5. See also, e.g., Armentrout v. FMC Corp., 842 P.2d 175, 185 n.8 (Colo. 1992) (en banc); Kallio v. Ford Motor Co., 407 N.W.2d 92, 97 n.8 (Minn. 1987) ("Conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned"); Rix v. General Motors Corp., 723 P.2d 195, 201 (Mont. 1986). See also N.J. Stat. Ann. § 2A:58C-3(b) (West 1987).

[FN57]. The lack of actual holdings and the tentative nature of the courts' suggestions that liability might be imposed in such circumstances indicates that courts simply wish to retain the judicial prerogative of imposing liability in the future.

[FN58]. Restatement (Third), supra note 5, § 2 cmt. e.

[FN59]. See *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 (Or. 1978) (holding that plaintiff did not produce sufficient evidence to show that use of fuel injected, as opposed to carbureted, engine was either practicable or necessary to render airplane reasonably safe).

[FN60]. See *supra* note 1.

[FN61]. *Id.* at 809.

[FN62]. *Id.*

[FN63]. *Id.* at 810.

[FN64]. 525 P.2d 1033 (Or. 1974); see also *Roach v. Kononen*, 525 P.2d 125, 128-29 (Or. 1974) (identifying seven factors to be considered when applying reasonable manufacturer test).

[FN65]. *Phillips*, 525 P.2d at 1036 ("The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved.").

[FN66]. Or. Rev. Stat. § 30.920 (1997).

[FN67]. See, e.g., *Ewen v. Mclean Trucking Co.*, 300 Or. 24, 706 P.2d 929 (Or. 1985); *Burns v. General Motors Corp.*, 133 Or. App. 555, 562-63, 891 P.2d 1354, 1358 (Or. App. 1995) (holding that trial court should only have charged jury on consumer expectations and thus erred when it instructed on reasonable seller test).

[FN68]. See, e.g., *Prosser et al.*, *supra* note 38, at 175 ("[N]egligence is a failure to do what the reasonable person would do 'under the same or similar circumstances.' ").

[FN69]. Restatement (Third), *supra* note 5, § 2 cmt. d.

[FN70]. See *Ewen*, 300 Or. 24, 706 P.2d 929; *Burns*, 133 Or. App. 555, 891 P.2d 1354.

[FN71]. See, e.g., *Prosser*, *supra* note 32, at 644-47 (indicating that the standard for design defects sounds in classic negligence).

[FN72]. See Restatement (Third), *supra* note 5, § 2 cmt. f ("The necessity of proving a reasonable alternative design as a predicate for establishing design defect is, like any factual element in a case, addressed initially to the courts. Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted. Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact. This Restatement takes no position regarding the specifics of how a jury should be instructed.").

[FN73]. See, e.g., *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 70-71, 577 P.2d 1322, 1327-28 (Or. 1978).

[FN74]. See, e.g., *Austria v. Bike Athletic Co.*, 107 Or. App. 57, 61, 810 P.2d 1312, 1314 (Or. App. 1991) (holding that failure to adopt alternative design of football helmet proximately caused injuries to plaintiff).

[FN75]. See, e.g., *Vanek v. Kirby*, 253 Or. 494, 450 P.2d 778 (Or. 1969) (car became uncontrollable during normal operation on morning it was bought); *Brownell v. White Motor Corp.*, 260 Or. 251, 490 P.2d 184 (Or. 1971) (wheel separated from axle of new truck). See also Restatement (Third), *supra* note 5, § 3.

[FN76]. While no Oregon court has explicitly held that the failure to conform to a safety statute or regulation is *per se* proof of defective design, Oregon has adopted the more general proposition that such failure constitutes *per se* negligence. See, e.g., *Ettinger v. Denny Chancler Equip. Co.*, 139 Or. App. 103, 107, 910 P.2d 420, 422 (Or. App. 1996). Moreover, several Oregon courts have held that noncompliance with safety statutes or regulations, even when they on their face do not apply to the defendant, is highly persuasive evidence of defective design. See, e.g., *Hansen v. Abrasive Eng'g & Mfg., Inc.*, 317 Or. 378, 387, 856 P.2d 625, 630 (Or. 1993) (holding that trial court erroneously refused to allow jury to view violation of regulations as evidence of design defect, even though

regulations applied only to employers and not to defendant manufacturer); *Hagan v. Gemstate Mfg., Inc.*, 148 Or. App. 192, 206-07, 939 P.2d 141, 149 (Or. App. 1997) (holding that trial court erred in failing to instruct jury more specifically on use of noncompliance with regulation as proof of design defect, even though regulation applied only to employers and not to defendant manufacturer). See also Restatement (Third), supra note 5, § 4.

[FN77]. See, e.g., *Wilson*, 282 Or. at 71 n.5, 577 P.2d at 1329 n.5 (1978) ("If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce.").

[FN78]. See, e.g., *Webb v. Clark*, 274 Or. 387, 391, 546 P.2d 1078, 1080 (Or. 1976); *Rice v. McAllister*, 268 Or. 125, 128, 519 P.2d 1263, 1265 (Or. 1974); *Conzelmann v. Northwest Poultry & Dairy Prods. Co.*, 190 Or. 332, 225 P.2d 757 (Or. 1950).

[FN79]. See Or. Rev. Stat. § 72.3130. See also, e.g., *Western Feed Co. v. Heidloff*, 230 Or. 324, 370 P.2d 612 (Or. 1962); *Sol-o-lite Laminating Corp. v. Allen*, 223 Or. 80, 353 P.2d 843 (Or. 1960).

[FN80]. See, e.g., *Heaton v. Ford Motor Co.*, 248 Or. 467, 475, 435 P.2d 806, 810 (Or. 1967) ("The plaintiff does not contend that the advertising constituted misrepresentation under Restatement (Second) of Torts § 402B, but rather that the advertising in general tends to create expectations of strength and durability under Section 402A. A general impression of durability, however, does not help a customer to form an expectation about the breaking point of a wheel.").

[FN81]. *McCathern v. Toyota Motor Corp.*, 160 Or. App. 201 (1999).

[FN82]. *Id.* at 209 ("[P]roduct defect is established by proving that the manufacturer specifically represented to the consuming public that the product would be able to perform certain functions, when, in fact, it could not, resulting in the plaintiff's injury.").

[FN83]. See Restatement (Third), supra note 5, § 9 (misrepresentation); *id.* § 9 cmt. e (express warranty).

[FN84]. *McCathern*, 160 Or. App. at 209 ("The commercial advertising of a product will be the guiding force upon the expectations of consumers with regard to the safety of a product, and is highly relevant to a formulation of what those expectations might be.") (quoting *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568, 578 (Ohio 1981)).

[FN85]. *Id.* at 210.

[FN86]. *Id.*

[FN87]. See supra note 77 and accompanying text.

[FN88]. See supra Part II.C.

[FN89]. See Restatement (Third), supra note 5, § 2(c).

[FN90]. *Id.* § 2 cmt. i.

[FN91]. The *McCathern* opinion asserts that "roughly a dozen" jurisdictions have adopted a consumer expectations standard for defective design. *McCathern v. Toyota Motor Corp.*, 160 Or. App. 201, 208 n.5 (1999), and accompanying text. The court cites eleven cases in support of this assertion. Of these, arguably only four really support the assertion. *French v. Grove Mfg. Co.*, 656 F.2d 295, 298 (8th Cir. 1981) (applying Arkansas law) ("Unreasonably dangerous' means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user [There is] no requirement that a feasible and safer alternative be proven by the plaintiff"); *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1220 (Alaska 1998) ("[T]he factfinder can find a product defective ... if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."); *Ontai v. Straub Clinic & Hosp., Inc.*, 659 P.2d 734, 739 (Haw. 1983) ("[T]he plaintiff need not show that the article was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases or uses it. It is enough that the plaintiff demonstrates that because of its manufacture or design, the

product does not meet the reasonable expectations of the ordinary consumer or user as to its safety." (footnote and citation omitted)); *Kudlacek v. Fiat*, 509 N.W.2d 603, 610 (Neb. 1994) ("Unreasonably dangerous' means that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it"). As for the others, two measure consumer expectations by a risk-utility standard. *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978) ("Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use."); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) ("The relative cost of the product, the gravity of the potential harm ... and the cost and feasibility of eliminating or minimizing the risk may be relevant' [to the issue of defective design]."). One decision involved a *res ipsa*-type case for which a standard for defect was unnecessary. *Queen City Terminals, Inc. v. General Am. Transp. Corp.*, 653 N.E.2d 661 (Ohio 1995) (railway cars designed to transport hazardous chemicals leaked); cf. *supra* note 72 and accompanying text. Three jurisdictions involved cases in which a safer alternative design was proven and thus the talk of consumer expectations constituted *dicta*. *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283 (Okla. 1984); *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 360 N.W.2d 2 (Wis. 1984). The Connecticut decision is explained in *Achieving Consensus*, *supra* note 7, at 908-11. The Oklahoma decision may have involved a *res ipsa* situation, in which case a design standard would not have been required. Cf. *supra* note 72 and accompanying text. And one decision cited in the McCathern opinion involved the court clearly invoking a no-duty rule that abrogated liability regardless of the standard for design defect. *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990) ("[a] screen in a window, obviously and of common knowledge, is not placed there for the purpose of keeping persons from falling out of a window." (quoting *Crawford v. Orner & Shayne, Inc.*, 73 N.E.2d 615, 617 (Ill. App. Ct. 1947))). The authors comprehensively explain the various ways in which courts and commentators have mischaracterized decisions as involving consumer expectations in *Achieving Consensus*, *supra* note 7, at 888-93. As explained earlier, the case law and statutory authority requiring courts to engage in risk-utility balancing in design cases is overwhelming. See *supra* note 31, and accompanying text.

[FN92]. Although there is limited authority suggesting that the Oregon legislature intended for courts to decide design defect cases based on a consumer expectations test, see, e.g., *Burns v. General Motors Corp.*, 133 Or. App. 555, 560, 891 P.2d 1354, 1357 (1995), such decisions are typically based upon legislative history. See, e.g., *id.* However, legislative history, while persuasive, is not controlling. See, e.g., *Henthorn v. Grand Prairie Sch. Dist. No. 14, Linn County*, 287 Or. 683, 691, 601 P.2d 1243, 1248 n.5 (1979). A leading commentator on Oregon products liability law, writing shortly after enactment of the statute, argued that § 402A was primarily drafted to address cases of manufacturing defect. Dominick Vetri, *Legislative Codification of Strict Products Liability Law in Oregon*, 59 Or. L. Rev. 363, 366 (1981). In fact, Professor Vetri observed that "[t]he complex design defect and inadequate warning cases which present the hard policy choices and difficult legal issues today were still on the horizon." *Id.*

[FN93]. See *supra* note 69.

[FN94]. Prosser, *supra* note 32, at 644-47 (indicating that the standard for design defects sounds in classic negligence). See also *Achieving Consensus*, *supra* note 7, at 880 ("The simple truth is that liability for defective design was in its nascent stages in the early 1960s and section 402A did not address it meaningfully, if at all."); George L. Priest, *Strict Products Liability: The Original Intent*, 10 *Cardozo L. Rev.* 2301 *passim* (1989).

[FN95]. 160 Or. App. 201 (1999).