# IS THE THIRD RESTATEMENT OF DESIGN DEFECT A DEFECTIVE PRODUCT?

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## I. INTRODUCTION

The American Law Institute's (ALI) Restatements of the law purport to be just that—*presentations* of the law as it is that effect a bit of change simply by cleaning up the inevitable messiness of cases in a country where our "common" law is articulated by fifty separate sovereign states. That multiplicity of jurisdictions, however, can present special difficulties for the Restatement project and has profound implications more generally for the character of American legal thinking and practice. Those of us who teach common law subjects are, I think, bound to teach basic concepts and general principles, telling our students that the details vary from jurisdiction to jurisdiction. This same fundamental fact shapes the ALI's Restatements. Indeed, they are valuable teaching material partly because they wrestle with the same problems we must confront as teachers. The Restatements, though, must grapple with this problem under more severe constraints than those binding law professors. As teachers, we can tell our students that different jurisdictions espouse different doctrines. For example, we can explain that some jurisdictions (e.g., California) espouse an enterprise liability conception of the scope of employment under vicarious liability law, whereas others adhere to older tests. Restatements, by contrast, are supposed merely to "restate." They purport to reshape law only by organizing and clarifying it.

Indeed, the project of "restating" itself appears "restatable" as an exercise of organizing by synthesizing and summarizing. The genre is familiar in legal discourse, though it is less common than it once was.

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Important, eminently respectable scholarly articles purport to lay bare the inherent logic of some legal field. For instance, the distinguished contracts scholar Allan Farnsworth once argued that—in the course of developing our law of remedies for breach of contract—"seven critical choices" were made.[1] "[F]rom these [choices] the reader who has the patience to work through the analysis can deduce the bulk of the law of contract remedies."[2] Farnsworth's "choices" form a decision tree of sorts and yield "principles" of a particular kind. The law of contract remedies, Farnsworth explains, prefers relief to compulsion; expectation damages to reliance or restitution damages; substitutional relief to specific performance; measuring loss by diminution in value to measuring loss by cost to complete; compensating for avoidable loss instead of for all loss; compensating only for foreseeable loss to compensating for all loss; and requires that losses be proved with certainty, not just by a preponderance of the evidence.[3]

Notwithstanding Farnsworth's reference to "deduction," the "preferences" he identifies are not rules; they do not apply without exception every time the facts relevant to their application are present. Sometimes, contract law does prefer specific performance to substitutional relief and sometimes contract law does award reliance instead of expectation damages.[4] Farnsworth's "preferences" are, instead, principles of a sort—reasons that tell us that we should generally proceed in one way rather than another. In general, we should prefer substitutional relief to specific performance, expectation damages to reliance ones, and so on. Among principles, though, Farnsworth's are distinctively *legal*. To see this, we need only to contrast his principles with those favored by another familiar form of legal scholarship. Some scholars argue, as Charles Fried does, that contract law puts flesh on the bones of a moral skeleton—that the formal legal doctrine of contract fleshes out the morality of promising.[5]

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1. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1145, 1215 (1970). Farnsworth's excellent paper instantiates a genre. Another illuminating example is Robert Charles Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Interpretation and Reform,* 87 YALE L.J. 90 (1977). Writing in this genre has diminished, but it has not withered away entirely.

2. Farnsworth, *supra* note 1, at 1145.

3. *Id*.

4. *Id*.

5. *See generally* CHARLES FRIED, CONTRACT AS PROMISE (2d ed. 2015). Lon Fuller similarly connects contract doctrine to a moral principle, but a different one. *See generally* Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). For Fuller, the general truth latent in contract damages is a tort-like idea of responsibility for harm done. When people enter into contracts, they induce their counterparties to act on the representations that they make about their own conduct. When they fail to perform as promised, their counterparties suffer losses by virtue of their reliance on promised performance.

This kind of argument connects contract doctrine to *moral* principles. It seeks to endow the law of contract with the authority of morality. Farnsworth is engaged in an entirely different kind of enterprise. The "principle" that losses should be measured by diminution in value, not cost to complete, is not a moral principle. It is, Farnsworth thinks, a summary of settled case law.[6] Farnsworth's principles do not purport to confer the authority of morality on legal doctrine. Instead, they claim to inherit the authority of the law that they distill.[7] They represent to us the essence of what we are, in fact, already doing and thereby enable us to do it better going forward.

The ideal to which the ALI's Restatements aspire is to write large the ambitions of articles like Farnsworth's. Restatements aim to summarize, synthesize, and organize the law as it is. They may, perhaps, attempt to prune and adjust the law but—officially, anyway—Restatements do not claim to revise, rewrite, or reform the law.[8] They pursue the path of "restating," not "revising" for obvious reasons. Unlike courts and legislatures, the ALI is not endowed with the authority to legislate or articulate law. The only authority that the ALI can claim is the authority of the law that it restates. It seeks authority through perspicuity; it aims to present the law in a clear and compelling way. By doing so, Restatements attempt to work the law pure, thereby distilling out a better version of the law than we do, in fact, have. Because Restatements are committed to this enterprise, though, they must often confront a basic predicament. How do

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6. Farnsworth, *supra* note 1, at 1172–75.

7. *Id.* at 1153.

8. This, at any rate, is the default aspiration of Restatements. *See* Kenneth W. Simons & W. Jonathan Cardi, *Restating the Intentional Torts to Persons; Seeing the Forest and the Trees*, 10 J TORT L. 1, 1 (2018) (embracing the approach in explaining how they understood their own role as Restatement Reporters). Simons and Cardi stated:

> We see our task, not as creating a grand theory from which all of intentional tort doctrine can be deduced, but as a bottom-up endeavor, accurately characterizing developments in the case law and then providing the most sensible and persuasive justifications for extant doctrine. At the same time, however, we strive to provide intellectual coherence to this body of law. Thus, we examine not only the holdings in narrow doctrinal categories, but also the consistency of those holdings with more general tort law principles.

*Id.; see also* Nora Freeman Engstrom & Michael D. Green, *Tort Theory and Restatements: Of Immanence and Lizard Lips* 14(2) J. TORT L. 333–72 (2021) (espousing a similar understanding of their role as Reporters, I think, albeit in a roundabout way). Restatements and related ALI projects also embody other modes of discourse, albeit less frequently. *See generally* John C.P. Goldberg, *Torts in the American Law Institute*, *in* THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY (Andrew S. Gold & Robert W. Gordon eds., 2023) (distinguishing "appellate court," "law reform commission," and "think tank" modes of ALI "attention" to tort law).

you extract *the* law from the decisions of courts when those courts are deeply divided over the matters you are restating?

This article aims to suggest that this problem is not "academic" or "theoretical" but real and immediate. To do so, I shall briefly sketch and comment on the conflicting positions of the Second and Third Restatements of Torts concerning product defect law. Whereas the Second Restatement sought to institute a form of strict enterprise liability for product defects, the Third Restatement seeks to institute a form of negligence liability. Yet, the law that the Third Restatement restated was sharply divided and remains so to this day. In the face of sharply divided decisions, the Third Restatement's embrace of negligence liability is not a summary of the law that it restated. Faced with deeply divided law, the Third Restatement embraced one conception of product liability law and rejected another, but it presented that choice as a summarization of existing law, not as a decision to prefer one possible product liability regime over another.

## II. THE ENTERPRISE LIABILITY CONCEPTION OF § 402A

Section 402A of the Restatement (Second) of Torts (Second Restatement) embraces a strict enterprise liability conception of product liability law. That conception was itself the product of a long history of common law development, ebbing and flowing across both contract and tort law. In the course of that history, fault liability and strict liability vied with each other for dominion over the field. Both legal fields bear on product accidents because the core products liability suit arises when a manufacturer sells a faulty product to a distributor, who then distributes it to a customer who is injured in the course of using the product.[9] A chain of contracts thus connects the parties. If the injured victim sues the manufacturer of the defective product, the fundamental questions are whether the manufacturer is liable to the victim and, if so, on what basis. Over the century of common law evolution that culminated in the promulgation of section 402A in the mid-1960s, American law provided four consecutive answers to this inquiry.[10]

The first answer, exemplified by the case of *Thomas v. Winchester*, was that only those who stood in privity of contract with the manufacturer of the product could sue for an injury caused by defect.[11] The second answer was that product injury lawsuits were controlled by tort doctrine, in

9. Gregory C. Keating, *Products Liability as Enterprise Liability*, 10(1) J. TORT L. 41, 45 (2017).

10. *Id.*

11. Thomas v. Winchester, 6 N.Y. 397, 408 (1852).

the specific form of ordinary negligence liability. Here, *MacPherson v. Buick* is canonical.[12] The third answer brought us back to contract, but to a significantly different contractual framework. During this third stage, products liability was warranty liability.[13] Warranty liability was itself embedded in a highly regulated consumer contract regime. *Henningsen v. Bloomfield Motors* and the Uniform Commercial Code are the representative texts of this stage.[14] Strict liability in tort was the fourth and final answer offered by American law. It was proposed by Roger Traynor in his prophetic concurring opinion in *Escola v. Coca Cola Bottling Co.* and adopted by section 402A of the Second Restatement.[15]

For the most part, we are still living in the law of this fourth stage, a law that preserves certain aspects of the prior phases. For instance, even when products liability constitutes strict liability in tort law, instances involving pure economic loss are governed by contract law, and warning liability introduces a kind of contractual choice within a tort framework.[16] Similarly, strict liability in tort incorporates the strictness of warranty liability in the consumer expectation test for product defect and retains the *MacPherson* idea that the possibility of physical harm (harm to persons and their property) overrides contractual obligations and brings an unavoidable responsibility in tort into play.[17] These complexities, however, do not change the fact that this fourth stage is products liability as strict enterprise liability.

The transition from the third stage to the fourth was achieved by embracing the simplifications implicit in Judge Traynor's concurrence in *Escola*.[18] First, the fiction that products liability was based on fault—a fiction created by the liberal use of res ipsa loquitor and other devices—was dispatched with the observation that res ipsa was negligence in theory, but strict liability in fact.[19] Next, the branch of products liability law rooted in contractual conceptions of warranty was assimilated into tort law by adopting the strictness of warranty liability as articulated in *Henningsen*, but separating warranty liability from its contractual origins and redefining

12. MacPherson v. Buick, 217 N.Y. 382, 390 (1916); *see also* Alexandra D. Lahav, *The New Privity in Personal Jurisdiction*, 73 ALA. L. REV. 540, 540–42 (2022).

13. Keating, *supra* note 9, at 45.

14. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); *see generally* U.C.C. (AM. L. INST. & UNIF. L. COMM'N 1977).

15. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461 (1944) (Traynor, J., concurring).

16. *See, e.g.*, Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875, 879–80 (1997).

17. Keating, *supra* note 9, at 45.

18. *Escola*, 24 Cal. 2d at 461 (Traynor, J., concurring).

19. Keating, *supra* note 9, at 45–46.

it as an independent expectational test of product defectiveness.[20] Finally, the complex, largely fictitious narratives required to extend the scope of strict liability beyond immediate product consumers when product liability is housed in contract law (as it was during the third phase of its development) can be dispensed with when products liability law is relocated into tort.[21] Strict liability without privity arises from these simplifications.

Thus, although it encompasses elements of the prior stages of product liability law's evolution, the products liability regime established by section 402A created a new liability system whose overarching conception was one of strict enterprise liability in tort. Section 402A imposes liability that is: (1) strict; (2) independent of contract; (3) for defective products; that (4) harm ultimate users or consumers or their property, if "(a) the seller is engaged in the business of selling such a product and (b) [the product] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[22] This is products liability as strict enterprise liability.

### *A. Justifications*

In embracing this doctrinal framework, section 402A also adopts the theory of liability outlined in Judge Traynor's famous concurrence written two decades earlier. And that theory is a theory of enterprise liability. Comment *c* explains:

> [T]he seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper people to afford it are those who market the products.[23]

This passage represents a succinct endorsement of the two fundamental principles that define strict enterprise liability as a distinctive liability regime. At the base is the idea that enterprises—not individual actors—

20. *Id.*
21. *Id.* at 46.
22. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).
23. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965).

should be considered the primary unit of legal responsibility.[24] Two premises are then linked to this fundamental basis. The first is that enterprises should bear the costs of the accidents that they cause, regardless of their fault in causing the harm. The second is that enterprises should distribute the costs of their characteristic harms to those involved in the enterprise, ideally based on the extent of their involvement. The participants in an enterprise are ultimately accountable—collectively—for the harm caused by the enterprise.[25]

Section 402A's twin theses—that costs should be internalized, and losses distributed—are supported by policies of accident-avoidance and loss-spreading, and by a principle of fairness. In turn:

- *Accident avoidance*. Strict liability ensures optimal protection against hazardous items by assigning the duty for product safety to manufacturers, distributors, and retailers. Why does this offer maximum protection? Because the entities forming the "enterprise" are in a better position to identify and implement actions to reduce the risk associated with the use of their products than are courts applying negligence liability.[26] In comparison with negligence liability, making the firms that manufacture and market products bear the costs of all physical injuries caused by their defective products provides a more powerful incentive to ensure that products are safe.
- *Loss-Spreading*. The individuals involved in the distribution process, particularly the producers, are in the best position to spread the costs of accidents caused by defective products. Why? Because "in a world where manufacturing defects are the paradigm instances of product defectiveness, product users are all exposed to the same, relatively rare, product risks."[27] Imposing strict liability on product manufacturers results in the construction of large and relative uniform risk pools. Those risk pools cover hazards that are relatively uncorrelated, relatively unlikely to occur, and likely to inflict relatively similar injuries. In these circumstances, product manufacturers are excellent insurers against product risks.
- *Fairness*. Strict enterprise liability distributes the costs of product accidents across all parties who benefit from the product, including

24. *See infra* note 30 and accompanying text.

25. Keating, *supra* note 9, at 46.

26. *Id.* at 47. The idea of accident avoidance at work here is the idea explicated in Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

27. Keating, *supra* note 9, at 47.

> consumers, producers, and distributors. Strict enterprise liability allocates the costs of product accidents among all those who benefit from the manufacture, sale, and use of the product. Negligence liability places the financial burden of many such accidents on those who are simply unlucky enough to experience them.[28]

### *B. Responsibility*

Comment *c* to section 402A prefaces its invocation of these three justifications for strict enterprise liability with the remark that "the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it."[29] This remark may not get much attention, but it emphasizes a significant point: strict liability is a form of responsibility, rather than merely a means to desirable social ends such as sharing widely the losses inflicted by product accidents. The claim of this prefatory statement is that firms bear the responsibility for the harms caused by defective products not because loss-spreading and deterrence are socially valuable objectives, but rather because the firms upon whom section 402A imposes strict liability, design, manufacture, and market the products that inflict the relevant injuries. Because these firms are responsible for designing, manufacturing, and selling defective products they are therefore responsible for the risks and injuries caused by such products.[30] By actively encouraging customers to purchase and use their products, firms thus assume a "special responsibility" and become liable for the harms caused by their activities.[31] Firms are well aware that product failures can inflict devastating harm on consumers. Manufacturers are therefore obligated to market items that are presumed to be safe for their intended uses. Strict products liability articulates an assumed responsibility to ensure product safety and to protect the firms' customers from harm at the firms' hands.[32]

Conceptually, the liability embraced by section 402A is strict because it holds the responsible party liable without any proof of improper behavior.

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28. *Id.*

29. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965).

30. *See generally* Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT L. 1 (2015) (providing an instructive account of "attributive responsibility" and the way that it figures in corporate responsibility).

31. Keating, *supra* note 9, at 48.

32. *Cf.* Seana Shiffrin, *Enhancing Moral Relationships Through Strict Liability*, 66 U. TORONTO L.J. 353, 353 (2016) (considering the apparent tension between contract's strict liability doctrine and the general moral precepts that liability should track fault).

But it is strict liability for product defects and its tests of defectiveness determine appropriate levels of product safety. Section 402A embraces strict liability on the theory that strict responsibility for product accidents will maximize consumer protection against harm at the hands of defective products.

### *C. The Section 402A Framework*

The adoption of enterprise liability under section 402A set the agenda of American products liability law for the next several decades. In its formative period, the contemporary American law of products liability aimed to establish a clear and comprehensive liability system based on section 402A. This fourth stage of American product liability law is, among other things, a significant feat of legal engineering. Product accidents pose a significant challenge as an area for the imposition of enterprise liability. Enterprise liability is liability for the characteristic risks of an activity, and disentangling activities and their distinctive risks is especially difficult in the product accident context.[33] Product accidents arise at the intersection of two interdependent activities: the design, manufacture, and marketing of the product, and the purchase and use of that product. How do we charge some risks to product design or manufacturing, and others to product consumption or use, without deploying criteria of fault? How do we distinguish the activity of making and marketing a product from the activity of purchasing and using it when the two activities are conducted with each other in mind? These are the questions that products liability law struggles with in the wake of its embrace of enterprise liability through section 402A. Strict enterprise liability for defective products was born in a context where distinguishing the "characteristic risks" of product manufacture from those of product use was relatively simple. But as the doctrine developed, it confronted circumstances where distinguishing among the relevant activities was (and is) dauntingly difficult.

The great early cases of American products liability law—*MacPherson*, *Escola,* and *Henningsen*—involved what later came to be called "manufacturing defects."[34] A manufacturing defect turns out to be an ideal circumstance for the imposition of strict enterprise liability. To this day, liability for manufacturing defects remains strict, and

33. The discussion in the text assumes the account of enterprise liability offered in Keating, *supra* note 9, at 50–54.

34. *See supra* notes 12–18 and accompanying text.

uncontroversially so.[35] The suitability of manufacturing defects as a setting for strict enterprise liability has a great deal to do with the fact that a usable, reliable, and persuasive concept of a product "defect" all but tumbles out of the facts of the cases.[36] It was and is obvious that strict liability for defective products cannot be *absolute* liability for injuries caused by product *characteristics*. Perfectly designed and manufactured products can cause serious, even fatal, physical harm. This is clearly true of guns and knives, but it is also true of skis and bicycles. Holding knife manufacturers strictly liable for all intentional or accidental harm inflicted with knives in virtue of the fact that they are sharp is unattractive. Holding ski manufacturers liable for crashes that would not have happened had their skis not been effective at enabling their users to slide rapidly down a slope is equally unattractive. People purchase and use knives to cut things, and they purchase and use skis to glide down snow-covered slopes at speeds fast enough to risk injury. Product users—not product manufacturers—are responsible for the harms that result from the ways that they use well-designed and properly manufactured knives and skis. The harms that result from normal and desirable product characteristics should not be charged to product designers, manufacturers, and sellers. Responsibility for the safe use of properly designed and manufactured products belongs to product users.[37] For a product-related accident to be charged to the product, there must be some product disappointment, some failure of performance, manufacture, or design. But how do we define defectiveness without falling back on fault criteria?

In the context of manufacturing defects, the solution is evident on the facts of the cases. *Escola*'s exploding Coke bottle is a representative example. As Andrzej Rapaczynski observes,

> [T]here was something obviously "wrong" with the bottle that exploded in [Ms. Escola's] hand. Indeed, the whole point of a Coke bottle is that it is supposed to allow the consumer to enjoy the drink without anyone's ending up in the emergency room of a nearby hospital. So when the bottle exploded in the waitress's hand, it was clearly "defective": it did not work the way such bottles were *supposed* to work. And this remained true even if the manufacturer had not *done* anything wrong: the bottle at issue was a useful product that had probably been produced and filled according to state-of-the art technology . . . there was no evidence of any unreasonable

35. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(A) cmt. a (AM. L. INST. 1998).

36. Keating, *supra* note 9, at 50.

37. *Id.*

> failure in the inspection process or any other negligent action anywhere along the way of getting the bottle into the hands of Ms. Escola.[38]

Despite the absence of negligent conduct, it was evident that the product failed to perform as intended and expected, since Coca-Cola bottles, when used as intended, are not supposed to explode. This particular Coke bottle, judged against the standard of the ordinary Coke bottle, performed defectively.

In manufacturing defects cases, the puzzles of strict products liability all but resolve themselves. Liability is strict, but it is for harm caused by defective products, not for harm caused by product characteristics, full stop. And the test of product defectiveness is the product itself—the normal instance of a product sets the standard for identifying a manufacturing defect; the product with a manufacturing defect is a "lemon." When the product sets its own standard of defectiveness in this way, the ensuing liability (1) is strict, (2) incorporates an idea of "wrongness," inhering in the product, and (3) is not a form of fault liability.[39] Negligence is, to use the vocabulary of contemporary tort theory, a "conduct-based wrong."[40] Negligence norms are action-guiding. They govern the conduct of natural and artificial persons, enjoining the exercise of due care and imposing liability when due care is not exercised. The test of (or "norm for") a manufacturing defect is not action-guiding in this way. Both the presence and the absence of faulty conduct are irrelevant to the imposition of liability for a manufacturing defect. Assuming harm, normal use, and other conditions not of interest here, liability turns simply on whether the product is flawed.[41] The concept of a product defect has a clear and practical meaning that is wholly independent of fault, as articulated and applied by negligence law. The question of whether the defendant's conduct was deficient is irrelevant.[42] The resulting liability is strict but not absolute, and any "fault" attaches to the product itself, not to the conduct of those who

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38. *See generally* Andrzej Rapaczynski, *Driverless Cars and the Much Delayed Tort Law Revolution* 9-10 COLUM. L. SCH. L. & ECON. WORKING PAPER NO. 540 (2016).

39. Keating, *supra* note 9, at 51.

40. The characterization of torts as "conduct-based wrongs" is prominent in the work of John Goldberg and Ben Zipursky, and before them in Jules Coleman's work. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743 (2016); JULES COLEMAN, RISKS AND WRONGS (Cambridge U. Press 1992). Products liability poses a problem for this characterization because it targets products, not conduct. Many of its liability rules are not directly action-governing. *See generally* Gregory C. Keating, *Is There Really No Liability Without Fault? A Critique of Goldberg & Zipursky*, 85 FORDHAM L. REV. RES GESTAE 24 (2017).

41. Keating, *supra* note 9, at 51.

42. *Id.* at 51–52.

manufactured and sold it. Strict enterprise liability works, and it works exceptionally well.

The evolution of products liability law after the adoption of section 402A, however, required grappling with design defects and failures to warn. Bringing strict enterprise liability to bear on these kinds of "product defects" is more difficult.[43] Distinguishing the activities of the firm responsible for designing, manufacturing, marketing, and selling a product, from the activities of the purchaser and the user without appealing to fault criteria is challenging. Products are designed and marketed to meet the needs of purchasers and users, and products are purchased and used in ways that reflect their design and marketing. In the years following the adoption of section 402A, product liability law was, therefore, focused on the challenge of translating section 402A's cryptic reference to a "defective condition unreasonably dangerous to the user or consumer"[44] into workable tests of design and warning defects. And necessarily so. Section 402A left a great deal of work to be done.

## III. EFFECTING ENTERPRISE LIABILITY

Negligence liability is liability for harm that would have been avoided had reasonable care been exercised. When products are involved, negligence liability is liability for harms that would not have happened if the product's design were reasonably safe and there were reasonable product warnings. By contrast, enterprise liability is liability for harms that flow from the characteristic risks of an "activity" (or an "enterprise"), regardless of whether those risks could have been avoided through the exercise of reasonable care.[45] Identifying the specific risks associated with an activity is at the heart of enterprise liability. Enterprise liability only works when risks can be accurately attributed to an enterprise. If risks cannot be reliably attributed to activities, enterprise liability becomes unpredictable and erratic at best, and at worst, the nightmare of unlimited liability that its critics complain that it is.[46]

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43. The claim that early products liability law as crystallized in section 402A was *only* about manufacturing defect is, in my view, an overstatement. For that claim, see George L. Priest*, Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2301–05 (1989). The pertinent concept of defectiveness was broader. Its focus was product failure causing physical harm.

44. RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. L. INST. 1965).

45. *See* Ira S. Bushey & Sons, Inc. v. United States*,* 398 F.2d 167, 171–72 (2d Cir. 1968).

46. *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (marking the classic statement of this criticism and the nightmare to which it leads).

To attribute accidents to activities, it is necessary to distinguish between (or among) activities. In the realm of vicarious liability law, for example, it is necessary to distinguish between the activities of the firm for which the tortfeasor works and the "personal" adventures of the employee.[47] In that context, risks may be categorized as either inherent to the firm's activity or as inherent to the employee's personal life.[48] When it comes to attributing accidents to activities, product accidents present unique challenges. Product accidents occur at the intersection of two complex activities: designing, manufacturing, and marketing a product on the one hand and purchasing and using it on the other.[49] Product accidents occur only during the use of the product, but in enterprise liability terms, they may be characteristic of product manufacture. Or not. Risks that materialize during product use might be "characteristic" of the activity of the user, not of the product itself. When someone misuses a product—say by using a lawnmower to trim a hedge—the harms issuing from that misuse should be attributed to the user's activity, not to the design or manufacture of the product. Relatedly, product risks might be shifted from the manufacturer and seller to the purchaser at the time of sale. Transferring them is indeed one of the primary responsibilities of warnings (and of the branch of product liability law that determines their adequacy).[50]

Differentiating the activity of designing, manufacturing, and marketing a product from the activity of purchasing and using it—so that some accidental harms may be attributed to product manufacturers and others to product users—is often a challenging task. Manufacturing defects, which served as the basis for the development of modern American products liability law as evidenced in *MacPherson*, *Escola*, and *Henningsen*, are comparatively easy to handle. First, manufacturing defects surprise and disappoint product users when they put the product to their normal and intended use. Manufacturing defects are usually latent product flaws which manifest only when the product fails during normal use. Second, the occurrence of manufacturing defects is directly influenced by the quality of

47. Keating, *supra* note 9, at 78.

48. This can be hard to do. *See, e.g.*, *Bushey & Sons*, 398 F.2d at 171. Some of the controversy now surrounding the enterprise liability turn in English law appears to involve courts struggling to locate the boundaries of the enterprise. *See, e. g.*, Cox v. Ministry of Justice, UKSC 10 (2016); Mohamud v. WM Morrison Supermarkets plc, UKSC 10 (2016); Lister v. Hesley Hall, UKHL 22 (2001). English law is following the lead of Canadian law here. *See* P. Cane, *Vicarious Liability for Sexual Abuse*, 116 L.Q.R. 21 (2000). The leading Canadian case is Bazley v. Curry, 174 DLR (4th) 45 (1999).

49. Keating, *supra* note 9, at 78.

50. *Id.*

the manufacturing processes and of inputs to those processes.[51] This is true even when those processes are free of fault—when the care necessary to reduce the incidence of product defects even further is not worth taking. Enterprise liability is not about fault, after all. As a matter of fairness, products should bear responsibility for the accidents that issue from product risks that should not have been avoided. Enterprise liability is about placing responsibility for accident-avoidance (or not) on the party best able to make that decision.[52] Product users do not have an impact on the occurrence of manufacturing defects. Only when a consumer continues to use a product once a manufacturing defect has become apparent is the consumer plausibly held responsible for the materialization of a manufacturing defect into a harm.[53]

Differentiating between manufacturer and user activity in the context of design defects and defective warning claims is considerably more difficult. Because product injuries occur at the intersection of activities that are mutually dependent and aware of one another, disentangling those activities can be difficult. In an enterprise liability framework, the challenge confronting design defect rules is to identify those injuries which are linked to something untoward about the product which is itself rightly traced to the product's design, manufacture or marketing. The trick is to do this without simply reverting to negligence liability. Similarly, when defective warning claims are at issue, the problem is to articulate criteria for determining when product related risks have transferred from the product manufacturer and seller to the product user at the time of purchase. Warning rules specify the conditions under which product risks are properly transmitted.[54]

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51. *See* ROBERT KEETON, VENTURING TO DO JUSTICE 163 (1969) (emphasizes mine):

> At least in those cases in which harm results from an identifiable defect in the product, it is easy to grasp the idea that the harm is the fruition of a distinctive risk of the activity of making that product, or the activity of making and marketing it. For example, the risk of harm from defects in in a woodworking machine such as the Shopsmith in Greenman v. Yuba Products, Inc. when the user is not aware of the defect, *is fairly to be treated as a distinctive risk of making Shopsmiths and not as a distinctive risk of using them*. Similarly, one might say that the risk of harm from defective brakes in a new car being used by one not aware of the defect is fairly to be treated as a distinctive risk of making new cars and not as a distinctive risk of using them. *The risks are not to be described to the activity of use, as distinguished from that of making, because the defect arises during the making even though its fruition in harm comes about only during use.*

Importantly, Keeton's discussion contemplates defects which are latent and probably manufacturing defects. Distinguishing the activities of using and making is more difficult when design defects and product warnings are at issue.

52. This is the most important lesson of Guido Calabresi's and Jon Hirschoff's seminal article, *Toward a Test for Strict Liability in Torts*, *supra* note 26.

53. Keating, *supra* note 9, at 79–80.

54. *Id.* at 80.

### *A. Case Law Development of the Enterprise Liability Doctrine under the Second Restatement*

As we have remarked, perhaps because section 402A emerged from case law which itself was formed by addressing what we now refer to as manufacturing defects, it left the development of criteria of defectiveness mostly to courts. The pertinent clause of section 402A speaks only about selling a "product in a defective condition unreasonably dangerous to the user or consumer."[55] Courts were charged with the task of developing tests of product defectiveness out of this cryptic language. Articulating rules appropriate to an enterprise conception of responsibility for product accidents was a (and perhaps *the*) fundamental project of American products liability law in the years immediately following the adoption of section 402A. Courts approached this task first by formulating a tripartite division of product defects, distinguishing manufacturing, design, and warning "defects."[56] It was, and still is, easy to both articulate and apply a test for manufacturing defects. The standard instance of a product is the measure of a manufacturing defect, whereas a product with a manufacturing defect is referred to as a "lemon." Articulating just what makes a design or a warning defective requires more work and more ingenuity. If, however, we juxtapose the California products liability law framework crystallized by the California Supreme Court in the leading case of *Barker v. Lull*—call it "the *Barker* regime"—to the highly negligence inflected regime of the Third Restatement, we see a products liability regime which is both highly articulated and, by conscious design, stricter than negligence liability.[57]

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55. RESTATEMENT (SECOND) OF TORTS § 402A(1) (AM. L. INST. 1965).

56. Keating, *supra* note 9, at 80.

57. Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978). In this period, the California Supreme Court was the most important state court in the country. It is only a slight overstatement to say that the common law of products liability in the United States at large followed the trail blazed by the California Supreme Court. Many states have cited *Barker* and adopted its products liability regime (courts in at least eight states have cited and followed *Barker*). The consumer expectation test adopted in *Barker* has been modified by the court's decision in Soule v. Gen. Motors Corp., 882 P.2d 298, 308 (1994) (affirming *Barker*'s two tests, but reserving the expectation test "for cases in which the *everyday experience* of the product's users permits a conclusion" of defectiveness). "The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." *Id.* at 309. Design claims based on the consumer expectation test appeal to "the common knowledge of lay jurors"; therefore, expert testimony "may not be used to demonstrate what an ordinary consumer would or should expect." *Id.* at 308*; see also* Romine v. Johnson Controls, Inc., 224 Cal. App. 4th 990, 1004-05 (2014) (citing Soule, 882 P.2d at 568-79 & n.6 (not allowing expert testimony on the risk-utility of the vehicle in question because the court had already allowed plaintiff to advance claims on a consumer expectation test basis); Izzarelli v. R.J. Reynolds Tobacco Co., 136 A.3d 1232, 1249 (Conn. 2016) (citing *Soule*, 882 P.2d at 567)

The differences are especially clear if we attend to the criteria of design defectiveness and defenses.[58]

Generally speaking, the products liability regime that was established by section 402A is *not* a regime of *pure* strict liability. In design defect and warning doctrine, fault conceptions and fault criteria intermingle with strict ones. Both design defect liability and warning liability have a strong hybrid quality. One aspect of this hybrid characteristic becomes evident when we contrast the forward-looking and backward-looking aspects of tort liability. Looking backward, defect liability under the Second Restatement is strict. The imposition of liability does not require impugning the conduct of the manufacturer in making and marketing the product. The question is simply whether the product design itself is defective.[59] Looking forward, however, a finding of design defectiveness implies a negligence-like judgment that the product should be redesigned and made safer. Conceptually, design defect liability is strict in application and fault-based in prescription.

A second respect in which the *Barker* hybrid product liability regime is stricter than ordinary negligence liability is that its tests of inadequate warning and design are more stringent than the negligence criteria of the Third Restatement. Even when *Barker* deploys negligence criteria, its overarching ambition is to design liability rules that impose a more demanding form of responsibility on product manufacturers compared to ordinary negligence liability. The *Barker* regime's overriding concern is to ensure that product users get "maximum protection" from harm, and to obtain that protection from firms that manufacture and market the products. Section 402A's remark in comment *c* that "the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it" gets concrete incarnation in a set of liability rules whose self-conscious stringency is designed to stimulate responsibility for manufacturing and marketing safe products—and for shouldering the harmful consequences of product failure when that failure results in

(refusing to apply ordinary consumer expectation test to cigarette case because, as *Soule* held, that test is reserved for cases involving everyday experiences of consumers); Scantlin v. Gen. Elec. Corp., No. EDCV 10-00333 VAP(OPx), 2014 U.S. Dist. LEXIS 177378, at *14 (C.D. Cal. Dec. 22, 2014) (citing *Soule*, 882 P.2d at 556) (allowing expert testimony on consumer expectation of safety of an industrial switchboard because no ordinary consumer would be able to form a reasonable expectation of safety for this specialized product).

58. California and other jurisdictions also sought to make warning liability more stringent than ordinary negligence liability. For a comprehensive discussion, see Keating, *supra* note 9, at 84–92. The points that this paper makes can be made more easily by discussing design defect doctrine and defenses in the Second and Third Restatements.

59. Keating, *supra* note 9, at 81.

physical harm.[60] When the *Barker* regime draws on negligence conceptions, it reworks them in order to make the resulting liability more strict.[61]

### *B. Design Defects*

The California Supreme Court opinion in *Barker* synthesized fifteen years of case law into a regime for analyzing design defects. In outline form, the elements of the *Barker* are:

1. *Two tests of defect*. The *Barker* opinion embraces two general, independent, and sufficient tests of design liability. These are the consumer-expectation test and the risk-utility test. The consumer-expectation test is rooted in contract law (specifically, in warranty) and evaluates product safety from the perspective of a product user. The risk-utility test is rooted in tort negligence law and takes the perspective of a product engineer. A design's failure to pass either of these tests leads to liability.[62]
2. *Strict Liability*. The *Barker* regime for design defects is stricter than ordinary Hand Formula negligence in three ways. First, each of the two tests of defective design goes beyond negligence. This is clear in the case of the expectation test, but it is also true of the risk-utility test, even though that test has its roots in negligence. Second, *Barker*'s articulation of the plaintiff's *prima facie* case and its approach to the proof of product defectiveness also go beyond negligence. Third, failing *either* test leads to liability. *Barker* makes clear that its adoption of two tests is designed to impose a form of liability more stringent than the liability imposed by either test alone.[63]
3. *The Expectation Test.* Asking whether a design disappoints consumer expectations about product safety does not require a negligence inquiry into either the safety of the product design or the care taken by those who produced it. The costs and benefits of greater safety are beside the point. The expectation test is strict by nature, as is warranty obligation—the root of the expectation test.[64]

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60. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965). The phrase "maximum protection" appears earlier in the same comment.

61. Keating, *supra* note 9, at 81–82.

62. *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 455–56 (Cal. 1978); *see also* Keating, *supra* note 9, at 82.

63. *Barker*, 573 P.2d at 455-56.

64. *See id.* at 454; *see also* Keating, *supra* note 9, at 82.

a. The expectation test asks questions such as: "Would a normal consumer expect a [Sport Utility Vehicle (SUV)] to be as stable as a normal sedan is on slick pavement?"[65] or "Would a health care worker expect that wearing protective latex gloves would put them at significant risk of disabling physical harm?"[66] If the answer to such questions is "yes," then products that fail these expectations are defective, full stop. This is true even if the manufacturer of the gloves was not negligent in marketing them because the allergic reaction was not reasonably foreseeable when the product was placed on the market. Similarly, the SUV's greater propensity to roll over on-road is the consequence of a justified design feature. The high, narrow wheelbase that makes the SUV less stable on-road also enables the vehicle to be driven off-road.

4. *The Risk-Utility Test*. In *Barker*, the court explains that the "expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defect because '[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.'"[67] Because liability can be established under either test, coupling an expectation test to a risk-utility test is a way of constructing a liability regime more stringent than either test would be by itself.

a. *Duality and Stringency*. In some cases—patent defects are the obvious example—the expectation test will be less stringent than the risk-utility test. In other cases, the expectation test will be more stringent than the risk-utility test. When latex gloves worn as protective equipment create severe, disabling allergic injuries in a significant percentage of their users, they disappoint the expectations of product users, even if the manufacturer was not negligent in marketing them because the risks were not reasonably known at the time of sale.[68] When an SUV rolls over on a paved road because its high, narrow wheelbase makes it more prone than a normal sedan to doing so, the design may pass muster under the risk-utility test but

65. *See* Denny v. Ford Motor Co., 662 N.E.2d 730, 738 (N.Y. 1995).

66. *See* Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727 (Wis. 2001).

67. *Barker*, 573 P.2d at 454 (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS L.J. 825, 829 (1973)).

68. *See Green,* 629 N.W.2d at 752–53.

fails the expectation test.[69] Moreover, the *Barker* risk-utility test is more stringent than normal Hand Formula negligence in several important ways.[70]

i. *Hindsight Balancing.* *Barker* holds that the jury should determine whether the benefits of a design are outweighed by its risks "through hindsight."[71] This means that risk-utility balancing should be conducted with the benefit of knowledge available at the time of trial. By charging harms caused by risks which may not have been reasonably foreseeable to manufacturers, *Barker*'s version of the risk-utility test imposes liability more extensively than the negligence version of the test does. Negligence balancing is foresight-based. Hindsight balancing institutes a stricter form of liability because it places the costs of unforeseeable product harms on the manufacturer instead of leaving them on the victim. Negligence leaves the costs of accidents that are not reasonably foreseeable on those who suffer them.[72]

ii. *Relaxing and shifting the burden of proof.* In applying the risk-utility test, *Barker* (1) does not require the plaintiff to put on evidence of a feasible alternative design, and (2) shifts the burden of proof from the plaintiff to the defendant. The defendant must prove that the product's utility is greater than its risks, or bear liability. Thus, even in those cases where hindsight and foresight are the same, the risk-utility balancing test is administered in a way that is more stringent than ordinary negligence liability. [73]

These features allow for a regime of design liability stricter than normal negligence liability.

### *C. Defenses*

Unlike the Third Restatement, which explicitly recognizes user negligence in any form as a defense, section 402A of the Second Restatement does not consider contributory negligence as a defense "when such negligence consists merely in a failure to discover the defect in the

69. *See Denny*, 662 N.E.2d at 738. The design may pass muster under the risk-utility test because the very feature that makes the SUV more prone to tipping over also makes it suited for off-road driving. The design feature is therefore justifiable.

70. Keating, *supra* note 9, at 83.

71. *Barker*, 573 P.2d at 454.

72. Keating, *supra* note 9, at 84.

73. *Id.*

product, or to guard against the possibility of its existence."[74] In contrast, section 402A does recognize the concept of contributory negligence in the form of "voluntarily and unreasonably proceeding to encounter a known danger."[75] This form of contributory negligence, however, constitutes assumption of risk, as the Second Restatement rightly acknowledges.[76] Comment *h* to section 402A also recognizes misuse, which differs from ordinary negligence in that it is "a use or handling so unusual that the average consumer could not reasonably expect the product to be designed against it."[77] This conceptual framework guides the development of the original doctrine and remains the law in some jurisdictions to this day.[78] Consistent with the logic of this structure, case law adds to this framework the category of foreseeable misuse.[79]

The choice between assumption of risk and misuse as the only defenses once again reflects one of the basic ideas underlying strict liability. The responsibility for avoiding a particular class of risks should be placed on the party in the best position to decide how to handle those risks. The decision of whether to encounter or avoid the risk is theirs to make, on the understanding that they will bear the costs of whatever harm results. The defenses of misuse and knowing unreasonable assumption of risk delineate zones of user responsibility. The rationale that implicitly underpins the decision to recognize these two defenses (and only these two defenses) is based on the fact that users are in the best position to decide if it is worth it to them to misuse a product or to deliberately and imprudently encounter known product defects, whereas manufacturers are in the best position to decide how to make products fit for their ordinary use (as determined by the expectation test), make products acceptably safe (as determined by the risk-utility test), and guard against ordinary user carelessness in the course of ordinary product use.[80] Put differently, the defenses of assumption of risk

74. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (AM. L. INST. 1965).

75. *Id.* Section 402A was formulated just before the rise of comparative negligence.

76. Keating, *supra* note 9, at 92.

77. Findlay v. Copeland Lumber Co., 509 P.2d 28, 31 (Or. 1973). *Compare* Hernandez v. Barbo Mach. Co., 957 P.2d 147 (Or. 1998), *with* Huffman v. Caterpillar Tractor Co., 908 F.2d 1470 (10th Cir. 1990) for circumstances where the choice between the adoption of section 402A defenses or ordinary comparative negligence impacts the result.

78. *See, e.g.*, *Hernandez*, 957 P.2d 147.

79. This addition raises some subtle doctrinal questions. For a comprehensive discussion, see Peter Zablotsky, *The Appropriate Role of Plaintiff Misuse in Products Liability Causes of Action*, 10 TOURO L. REV. 182 (1993).

80. To be sure, this is a controversial approach. It seems unproblematically true of latent defects (as manufacturing defects usually are), but less true of at least some design and warning "defects." *Compare* Daly v. Gen. Motors, 575 P.2d 1162 (Cal. 1978), *with* Findlay v. Copeland Lumber Co., 509 P.2d 28 (Or. 1973).

and misuse identify zones where whatever harms occur are characteristic of the user's activity. The user assumes responsibility for their own harm by stepping forward and choosing to encounter a known product risk or by choosing to use the product improperly.[81]

The "foreseeable misuse" doctrine, which was later developed by courts, is a further expansion of the same idea. Foreseeable misuse reestablishes the liability of the product manufacturer in circumstances where user negligence is present. It does so when product manufacturers are in a better position than product users to prevent product accidents by taking durable precautions such as safety guards, kill switches, air bags, or antilock brakes, which are considered the best ways to prevent users from suffering harm from the use of the product.[82] Specifically, it does so when determining whether or not to install a safety device is the salient issue. The manufacturer is in the best position to make the decision between adding or omitting such safety devices.[83]

This is consistent with the aspiration of section 402A to establish a regime of strict enterprise liability. The implementation of defenses that delineate zones of user responsibility is a logical complement to liability rules that delineate zones of manufacturer responsibility. But if the defenses recognized by section 402A are unsurprising, they are also instructive. These defenses are strict liability defenses, not negligence defenses. They charge accidents to product users not when they fail to exercise adequate care, but when they are in the best position either to prevent product accidents or to allow them to occur. This approach involves distinguishing between those risks that are characteristic of the user's activity and those that are characteristic of the product itself.

## IV. PRODUCTS LIABILITY AS NEGLIGENCE LIABILITY

As synthesized in *Barker*, design defect doctrine incorporated a risk-utility test derived from negligence doctrine. In doing so, *Barker*'s liability regime failed to fully realize the strict liability aspirations of section 402A. Liability for manufacturing defects is strict in a simple and straightforward way, but liability for design defects is sometimes strict and sometimes not so strict. Liability for design defects is strict when it is predicated on a product's failure to satisfy the demands of the expectation test. But when liability turns on whether a design passes muster under the risk-utility test, the differences between *Barker* and ordinary negligence liability are both

81. Keating, *supra* note 9, at 93.

82. *See* Micallef v. Miehle Co., 348 N.E.2d 571, 577 (N.Y. 1976).

83. Keating, *supra* note 9, at 93–94.

more subtle and more nuanced. The *Barker* version of the risk-utility test uses knowledge available at the time of trial, not knowledge available at the time of manufacture and sale. *Barker* imposes hindsight liability, whereas negligence law embraces foresight liability. When knowledge has not changed between the time of manufacture and sale and until trial, however, the only significant difference between the *Barker* test and a standard negligence version of the risk-utility test is that *Barker* relaxes the plaintiff's burden of proof and does not require the plaintiff to prove the superiority of an alternative feasible design. To be sure, taken as a whole, the design defect liability doctrine adopted in *Barker* is stricter than negligence liability. *Barker* adopts two tests of design defect, holds that liability under either test is sufficient, adopts hindsight not foresight as the test of liability, and specifies plaintiff's burden of proof in a way that makes design defectiveness easier to establish than it would be under a pure negligence approach.

By 1978, then, California's the highest court had developed a body of design defect law that owed a significant debt to negligence liability, but which reworked the risk-utility test derived from negligence doctrine to fashion a significantly stricter form of liability. Moreover, though the California Supreme Court has unique importance in modern American tort law—California is the country's most important state and its Supreme Court pioneered modern product liability law—it is not the only state. Not all jurisdictions were as strict as California. For example, in 1974, the Texas Supreme Court propounded a version of design defect doctrine, which appeared to marginalize the expectation test and to embrace a version of risk-utility analysis that called for nothing more than the exercise of "ordinary care."[84] In the fifteen years following the adoption of section 402A, design defect law evolved in a classic common law fashion by devising doctrinal tests to flesh out section 402A's reference to a "defective condition unreasonably dangerous to the user or consumer,"[85] but it also developed fundamental disagreements over how to flesh out that language. Courts struggled with, and were divided over, the extent to which negligence conceptions should figure in product liability law. The dominant tendency was to develop design defect law as a form of strict enterprise liability, but themes and tests drawn from negligence liability competed with and challenged inclinations towards enterprise liability.

84. Henderson v. Ford Motor Co., 519 S.W.2d 87, 102 (Tex. 1974) (Johnson, J., dissenting). Justice Johnson's acute dissent highlights the majority's failure to follow through on the promise of *strict* products liability.

85. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

The pace of controversy and conflict quickened in the 1980s. In the world at large, the tort reform movement emerged, and strict products liability was one of its targets. Within the American legal academy, consensus support for the product liability regime birthed by section 402A dissipated and vigorous debate broke out. Academic debate over the internal morality of products liability was defined by two poles.[86] One pole, represented by George Priest, asserted that products liability was strict enterprise liability and deemed enterprise liability itself to be profoundly defective.[87] The other pole, represented by Gary Schwartz, asserted that negligence conceptions had been at work all along.[88] One way of reconciling these apparently irreconcilable positions is to say that products liability as strict enterprise liability was itself defective and that the resurgence of negligence liability is the cure for that defect. The products liability sections of the Third Restatement, drafted and adopted in the 1990s, fit nicely into this narrative. The Third Restatement is conspicuously careful not to repudiate the general concept of strict products liability, but many of its important provisions adopt a view of products liability as negligence liability. The Third Restatement's rendering of products liability law confines strict liability to manufacturing defects, retaining an enterprise conception of responsibility for such defects.[89] It imposes a negligence framework on design defect liability, warning liability, and victim conduct.

Under the Third Restatement, the sole test for design defect is the risk-utility test. The consumer-expectation test, with its warranty heritage and strictness of liability, is banished as an independent, co-equal test of liability.[90] The risk-utility test, for its part, is an instantiation of Hand

86. Keating, *supra* note 9, at 42.

87. *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (analyzing the modern civil liability regime).

88. *See generally* Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) (examining the vitality of the negligence principle)*; see also* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602 (1992).

89. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (AM. L. INST. 1998) (noting that "[s]trict liability without fault in [manufacturing defects] is generally believed to foster [three] objectives," it "encourages greater investment" in product safety, "discourages the consumption of defective products" by the market, and "reduces the transaction costs involved in litigating the issue").

90. The Third Restatement provides that a product 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." *Id.* § 2. Comment *g* states: "Under Subsection (b), consumer expectations do not constitute an independent standard for judging the defectiveness of product designs." *Id.* § 2 cmt. g. Arguably, some of the expectation test is retained in section 3,

Formula negligence, modified slightly to address the fact that—when products are involved—what we care about is how safe a *product* is, not how carefully those who designed the product *conducted* themselves.[91] Normally, negligence liability targets conduct; the risk-utility test promulgated by the Third Restatement addresses the design of the product itself, not the conduct responsible for producing that design. With that important but relatively modest adjustment, the risk-utility test is a straightforward Hand Formula negligence test. Liability is based on foresight, not hindsight—on the knowledge available at the time the product was marketed, not on the knowledge available at the time of trial. This can make a vast difference in the extent of liability when knowledge of product risks changes between the time of marketing and the time of trial, as it did, famously, in the case of asbestos.[92]

The Third Restatement's specification of burdens of proof also embodies orthodox negligence liability. As part of her *prima facie* case, the plaintiff bears the burden of pleading and proving the feasibility of an alternative design, which would have avoided the harm at issue. This is the Hand Formula "untaken precaution" analysis applied to product design.[93] And the test itself calls for balancing the advantages and disadvantages of the design to see if it is, all things considered, justified.[94] Warning liability is likewise an instantiation of negligence conceptions. It, too, is foresight-based, and the duty of the manufacturer is a duty of due care—to give

"Circumstantial Evidence Supporting Inference of Product Defect." *Id.* § 3. The section licenses a *res ipsa* type approach to product defects. In theory, its reach extends to design defects, and it is capable of establishing liability whenever a product fails in a way which disappoints secure expectations about product performance. Comment *b* explains: "The most frequent application of this Section is to cases involving manufacturing defects. *Id.* § 3 cmt. b. When a product unit contains such a defect, and the defect affects product performance so as to cause a harmful incident, in most instances it will cause the product to malfunction in such a way that the inference of a product defect is clear." *Id.* For a comprehensive discussion of this comment, see generally Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Reinstatements on Design Defects*, 74 BROOKLYN L. REV. 807 (2007).

91. Because it targets products—and not the conduct responsible for creating products—products liability law is another domain of tort law which presents problem for conceptions of tort law which identify it with conduct-based wrongs. *See generally* Goldberg & Zipursky, *supra* note 40.

92. *See, e.g., In re* Massachusetts Asbestos Cases, 639 F. Supp. 1 (D. Mass. 1985); *see also* Keating, *supra* note 9, at 76.

93. *See* Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 142–43 (1989).

94. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998). The test is applied instructively in Georgia. *See* Banks v. ICI Ams., Inc., 450 S.E.2d 671, 674 (Ga. 1994) ("[W]e conclude that the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product as designed.").

reasonable warnings.[95] Victim carelessness is recognized as a defense, and in the form of general comparative negligence.[96] The Third Restatement thus spells out the plaintiff's *prima facie* case, the criteria for determining defective product design, and defenses to liability in negligence terms. Only manufacturing defects are subject to strict liability.[97]

To sum up: under both section 402A and the Third Restatement, liability for manufacturing defects is strict enterprise liability.[98] Under the Third Restatement, liability for design defects and failures to warn is orthodox negligence liability, adjusted for the special case of products.[99] Under section 402A, liability for design defects and failures to warn is a mix of strict and negligence liability. With respect to design defects, section 402A's regime is more stringent because there are two independent tests of defect: the expectation test and the risk-utility test. Liability may be established under either test, making this regime's liability standard more stringent than either test in isolation. The risk-utility test, for its part, incorporate a negligence test but redesigns it to be more stringent than ordinary negligence liability. The *Barker* version of the test incorporates hindsight balancing, relieves the plaintiff of the burden of proving a feasible alternative design as part of its prima facie case, and places the burden of proving the safety of the product's design on the defendant. As far as defenses are concerned, section 402A does not recognize ordinary contributory negligence as a defense. Only misuse and knowing assumption of risk are recognized.[100]

Our question, then, is: how did the ALI "restate" its way from a body of law whose overarching conception of responsibility was strict enterprise liability, to a body of law whose overarching conception of responsibility was predicated on fault?

## V. TAKING STOCK

In articulating products liability law as a special case of negligence liability, the Third Restatement departed from the law of products liability

95. *See* RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998) ("A product is defective [because], at the time of sale or distribution, . . . [it includes] *inadequate instructions or warnings*.") (emphasis added).

96. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligence Enabling*, 44 WAKE FOREST L. REV. 1211, 1229–30 (2009).

97. RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 cmt. a (AM. L. INST. 1998).

98. *See supra* note 35 and accompanying text.

99. *See supra* notes 91–92 and accompanying text.

100. Keating, *supra* note 9, at 95.

as it developed in the twenty or so years following California's adoption of strict products liability in 1963 in *Greenman v. Yuba Power Products*.[101] Following *Escola*, *Greenman*, and section 402A, products liability during this period aspired to be strict enterprise liability.[102] Predictably, that ambition resulted in a products liability regime significantly different from the regime subsequently proposed in the Third Restatement. The Third Restatement was revisionary in relation to the law it restated. Critics promptly highlighted this fact. In 1995, for instance, Frank Vandall argued that, although the then-in-process Third Restatement of Products Liability was recasting the law of products liability as a relatively pure incarnation of negligence liability, the following statements were, in fact, all true: "A Majority of Jurisdictions Do Not Support the [Exclusive] Use of Risk-Utility Balancing in Design Defect Cases";[103] "A Majority of the Jurisdictions Do Not Support the Reasonable-Alternative-Design Requirement";[104] "The Jurisdictions Are Split Evenly on Whether a Seller Should Be Charged with Knowledge at the Time of Sale or the Time of Trial."[105] On the last point, Vandall wrote:

> The issue whether the manufacturer should be held to know of a risk at the date of trial or the date of sale is a subject that is presently being debated in the courts. By selecting the date-of-sale approach the reporters [of the Third Restatement] essentially *rewrote strict liability law into negligence* . . . .[106]

Analytically, Vandall is surely correct. With respect to the risk-utility test, the Third Restatement's shift from hindsight to foresight does turn strict liability into negligence liability.

Vandall's nose counts of various jurisdictions and their positions are grounded in solid scholarship, but no scholarship—however sound—can silence all debate on a topic as turbulent as product liability doctrine. The relevant case law is complex and contains multiple strands. In product liability case law, strict liability and negligence, tort, and contract, interact in complex ways. Just how their interactions ultimately cash out is contestable. Consequently, skilled lawyers can read the relevant law in different ways. There is a larger general truth here. When the law is turbulent and evolving, cases lend themselves to diverse interpretations.

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101. 377 P.2d 897 (Cal. 1963).

102. Keating, *supra* note 9, at 77.

103. Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect,* 68 TEMPLE L. REV. 167, 169 (1995).

104. *Id.* at 174.

105. *Id.* at 179.

106. *Id.* at 180 (emphasis added).

Tellingly, twenty-five years after the adoption of the Third Restatement's product liability provisions, the same debate about the nature of design defect law rages on. In a 2017 opinion applying the consumer expectation test—the test of defective design in Nevada—the Nevada Supreme Court cited only eight states that followed the Third Restatement's prescription by making the risk-utility test their exclusive test of product defects.[109] Clearly, the Nevada Supreme Court thought that the Third Restatement's prescriptions for design defect law are not the law of the land. Not everyone agrees. In 2020, Aaron Twerksi, one of the reporters for the Third Restatement's product liability provisions, published a paper arguing that—whether the participants in the practice realized it or not—product liability case law was, in fact, coalescing around the Third Restatement's prescription that risk-utility be the sole test of product defectiveness.[110]

To be sure, even if debates over the character and content of any conflicted and turbulent body of law cannot be settled definitively, there are better and worse accounts of turbulent bodies of law. There is no reason to be skeptical or nihilistic about readings of conflicted bodies of law or debates over alternative interpretations of such bodies of law just because such debates elude definitive settlement. As far as the Restatement project of summarizing the logic latent in the law is concerned, however, the important point is that these debates exist and endure. When a body of law is complex and conflicted, it can be restated in fundamentally different ways. At the time that the Third Restatement of Products Liability law was drafted and adopted, products liability law could have been restated either as an attempt to realize the enterprise liability vision of its founding text—section 402A of the Second Restatement—or as an incipient attempt to reassert a form of negligence liability. Both tendencies, both positions, were present in the law. When the Third Restatement restated product design defect law as a pure form of negligence liability, it took sides in a debate, and it did so in the guise of merely making perspicuous the logic latent in the law it was restating. Therein lies the rub. Taking sides in a debate by saying that one is simply stating a consensus is a misleading activity and a kind of bad faith. It is a way of smothering the debate, a way of ending debate by burying debate. Suppressing debate in this way—and asserting the existence of a consensus that is, in fact, absent—is particularly troubling when the party doing the asserting lacks the authority to impose its position, as the ALI does.

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[109] Ford Motor Co. v. Trejo, 402 P.3d 649, 654 (Nev. 2017) (asserting that Nevada has "consistently" followed the consumer-expectation test in manufacturing and design defect cases).

[110] *See* Aaron D. Twerski, *An Essay on the Quieting of Products Liability Law*, 105 CORNELL L. REV. 1211, 1216–18 (2020).

What, then, should Restatements do when they confront divided and conflicted bodies of law? Two possibilities come immediately to mind. One possibility is to adopt the approach of a Model Code and to offer a particular Restatement of the law as a proposal for courts and legislatures to adopt. The other is to adopt the approach of a teacher and seek to clarify for courts and legislatures the conflicts that are roiling the law. Restatements might come to look like treatises of a certain sort—treatises that attempt to summarize, synthesize, and organize the conflicting positions found in the law. But it is premature, I think, to adopt an answer, even tentatively. We have not yet begun to debate the matter. Instead, we have been suppressing the problem. We must first get it out in the open and discuss it. To begin that process, we must entertain the possibility that the Restatement project is haunted by a defect in its basic design. The Restatement project assumes that it is possible to "restate" our way to a systematic, coherent, unified conception of a legal field. The project proceeds on the assumption that a *single* coherent conception lies immanent in the law at issue, and that sufficiently careful rational reconstruction can tease out that conception. Some exercises in reconstructing the immanent logic of legal fields in terms of field-specific principles vindicate this assumption. Farnsworth's distillation of the seven basic principles of contract remedies is a case in point.[107] In some cases, then, rational reconstruction of a legal field (or sub-field) may yield a single, unified conceptual architecture. In these cases, the unity imposed may justifiably be presented as an immanent one. Recourse to the kinds of frankly moral principles that Charles Fried, for one, thought underpinned our law,[108] enabling us to choose among competing reconstructions of doctrinal concepts, may not be necessary.

Immanent coherence may well characterize some fields or some periods in our legal history—or some fields in some periods of our legal history. But a bit of skepticism that this kind of immanent formal unity is ever fully realized by our law may be the better view. The existence of robust scholarship that insists on the necessity of appealing to more abstract moral conceptions to impose coherence on the law is significant evidence that efforts to find purely immanent unity in fields of law may not achieve complete closure.[109] So, too, is the existence of scholarly works that study

107. *See* Farnsworth, *supra* note 1, at 1215; *see also supra* notes 1–4 and accompanying text.

108. *See supra* note 5 and accompanying text.

109. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (detailing the philosophy of law and its impact on politics and sociology).

our legal history and report ever-present debate and disagreement.[110] Perhaps tort is peculiarly afflicted with such conflicts. Our modern law of torts is dominated by liabilities predicated on fault, but it also contains strict liabilities.[111] The presence of two fundamental and competitive basic principles of responsibility is fertile soil for the growth of conflicting legal doctrine. To the extent that the law of torts (and that of other fields, too) is riven by conflict, we need to ask if we can imagine Restatements proceeding differently, so that they frankly acknowledge and illuminate conflicts in our law. Rather than asserting that the law speaks with a single voice when it does not, might Restatements offer the contending voices of the law to us in their best and most coherent incarnations?

110. *See generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW,1780–1860 (1977) (outlining the evolution of common law as intellectual history and demonstrating how the shifting views of private law became a dynamic element in the economic growth of the United States).

111. *See* GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 301–11 (2022).