

RETHINKING DESIGN DEFECT LAW: SHOULD ARIZONA ADOPT THE *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY?*

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I. INTRODUCTION

For more than thirty-five years, products liability law in the United States has been dominated by Section 402A of the *Restatement (Second) of Torts*.¹ Dean William Prosser authored Section 402A in the mid-1960s, at a time when the concept of strict liability for product defects was novel and largely undeveloped.² In fact, Dean Prosser based Section 402A on a small handful of cases that, only a few years before, had pioneered the law of products liability.³ Section 402A, in other words, “restated” an area of the law that had barely been stated in the first place. Nonetheless, it was quickly adopted by nearly every jurisdiction in the country and took its current seat as the dominant standard for judging products liability claims.⁴

By the early 1990s, however, the landscape of products liability law had become greatly complicated by differing judicial interpretations and applications

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT (SECOND)].

2. See David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 282 (1998).

3. See *id.* at 277. Commentators agree that Dean Prosser relied primarily on Justice Robert Traynor’s seminal decision in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), although some have pointed as well to *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958), and *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

4. See Owen, *supra* note 2, at 277.

of Section 402A.⁵ In response to this growing confusion, the American Law Institute (ALI) decided in 1991 to produce a new Restatement of the law of products liability.⁶ Subsequently, in 1992, two Reporters were appointed to draft the new Restatement.⁷ In May 1997, the ALI unanimously adopted the *Proposed Final Draft of the Restatement (Third) of Torts: Products Liability*.⁸ Before long, a flood of criticism enveloped the ALI and the Reporters of the new *Restatement*, coming largely from plaintiffs' lawyers who felt, strongly in many cases, that the Reporters had produced what amounted to a "wish list" for manufacturing America.⁹ Countless law review articles surfaced attacking the *Restatement (Third)* as a policy-making document rather than a faithful "restatement" of the law as it truly existed in 1997.¹⁰ This debate continues to rage in academic circles and among practicing lawyers. On the other hand, enough time has passed since the ALI's adoption of the *Restatement (Third)* that we can expect our nation's courts to soon consider whether or not to adopt its standards in the products liability cases before them.¹¹ In short, the courts are about settle the argument for the rest of us.

In view of the impending clash between the old and new Restatements in our nation's courts, this Note considers whether the standards for design defect claims set forth in the *Restatement (Third)* should be adopted in Arizona. Section II examines the development of products liability principles from the mid-nineteenth century, through Section 402A of the *Restatement (Second) of Torts*, and up to current Arizona law. Section III outlines the new standards proposed in the *Restatement (Third)*. Section IV details some of the major criticisms of the *Restatement (Third)* and the debate surrounding its adoption. In Section V, existing Arizona law is contrasted with the law as embodied in the new *Restatement*. Based on this analysis, this Note concludes that Arizona should reject the *Restatement (Third) of Torts: Products Liability* because the new *Restatement* conflicts with

5. See, e.g., Michael J. Toke, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 241-42 (1996).

6. See David G. Owen, *Defectiveness Restated: Exploding The "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 746 (1996).

7. The Reporters were Professor James Henderson, Cornell Law School, and Professor Aaron Twerski, Brooklyn Law School. *Id.* at 746.

8. See Owen, *supra* note 2, at 279.

9. See Frank J. Vandall, *Constructing A Roof Before The Foundation Is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 261 (1997).

10. See, e.g., Howard Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173, 1173-74 (1994); Douglas E. Schmidt et al., *A Critical Analysis of the Proposed Restatement (Third) of Torts: Products Liability*, 21 WM. MITCHELL L. REV. 411 (1995); Vandall, *supra* note 9, at 261-62; Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

11. In fact, the Nebraska Supreme Court has already held that it will not adopt the *Restatement (Third) of Torts: Products Liability* as it applies to pharmaceuticals. See *Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827 (Neb. 2000).

well-established Arizona case law as well as public policy determinations articulated by the Arizona Supreme Court.

II. THE HISTORY OF PRODUCTS LIABILITY LAW IN ARIZONA

A. *Before Strict Tort Liability—Caveat Emptor and the Law of Warranty*

During the first half of the nineteenth century, the doctrine of *caveat emptor* dominated sales law in the United States, shielding manufacturers and retailers of defective products from liability for injuries to consumers.¹² Under this doctrine, consumers had no legal recourse in the case of injury caused by a defectively designed product.¹³ Beginning in the mid-nineteenth century, however, many jurisdictions began to replace the doctrine of *caveat emptor* with the implied warranty of merchantability.¹⁴ Essentially a contract-based form of strict liability, the implied warranty of merchantability allowed consumers to recover from the seller of a defective product without having to demonstrate fault on the part of the seller.¹⁵ By the turn of the century, thirty-seven states had adopted the Uniform Sales Act, which included an implied warranty of merchantability in the sale of goods.¹⁶ Later, with the advent of the Uniform Commercial Code in the mid-twentieth century, the implied warranty of merchantability was legislatively incorporated into the law of every state.¹⁷ In this way, warranty and the law of contract served as the foundation for American products liability law.

At the same time, however, the implied warranty of merchantability proved to be of only limited usefulness to consumers injured by defective products.¹⁸ First, the implied warranty concept required privity of contract between the injured consumer and the supplier of a defective product.¹⁹ Thus, the consumer could not recover from the primary manufacturer of a defective product under the implied warranty of merchantability if the product was sold through a retailer or other middleman. Second, the seller could easily limit its liability under the doctrine of implied warranty through the use of disclaimers.²⁰ Furthermore, the consumer was considered to have a duty to promptly notify the seller of a breach

12. See Owen, *supra* note 2, at 275.

13. See *id.* It should be noted that, independent of the development of strict liability principles described here, manufacturers and sellers of products have long been held liable for injuries caused by their *negligence*. In fact, since Justice Cardozo handed down his landmark decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), negligence law has applied to products cases even in the absence of privity between consumer and manufacturer. This Note does not address the development of negligence law in the products liability arena, but rather focuses solely on strict liability principles.

14. See Owen, *supra* note 2, at 275.

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.* at 275–76.

19. See *id.* at 276.

20. See *id.*

of the implied warranty.²¹ Failure to provide timely notification to the seller would result in a complete bar to the consumer's recovery.²²

B. *The Advent of Strict Tort Liability*

American products liability law took its first decisive step from a contract-based form of strict liability into the realm of tort-based strict liability in 1963, when Justice Roger Traynor of the California Supreme Court issued his opinion in *Greenman v. Yuba Power Products, Inc.*²³ In *Greenman*, the plaintiff was injured when a power lathe purchased by his wife malfunctioned and ejected a piece of wood, striking him in the forehead and causing serious injury.²⁴ Justice Traynor wrote that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."²⁵ In support of this holding, Justice Traynor identified several cases from other jurisdictions and concluded that, while those cases were purportedly based on the concept of express or implied warranty, the true basis for liability lay in tort.²⁶ In Justice Traynor's words:

[T]he abandonment of the requirement of a contract between [the consumer and the manufacturer], the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.²⁷

According to Justice Traynor, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the

21. *See id.*

22. *See id.* at 276 n.20.

23. 377 P.2d 897 (Cal. 1963).

24. *Id.* at 898.

25. *Id.* at 900.

26. *Id.* at 900-01 (citing *Peterson v. Lamb Rubber Co.*, 353 P.2d 575 (Cal. 1960) (grinding wheel); *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Rptr. 823 (Dist. Ct. App. 1961) (bottle); *Jones v. Burgermeister Brewing Corp.*, 18 Cal. Rptr. 311 (Dist. Ct. App. 1961) (bottle); *Gottsdanker v. Cutter Labs.*, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960) (vaccine); *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960) (insect spray); *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960) (surgical pin); *Thompson v. Reedman*, 199 F. Supp. 120 (D. Pa. 1961) (automobile); *Chapman v. Brown*, 198 F. Supp. 78 (D. Haw. 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (skirt); *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959) (automobile tire); *Markovich v. McKesson & Robbins, Inc.*, 149 N.E.2d 181 (Ohio Ct. App. 1958) (home permanent); *Graham v. Bottenfield's Inc.*, 269 P.2d 413 (Kan. 1954) (hair dye); *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. Ct. App. 1960) (automobile); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (automobile); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959) (airplane)).

27. *Greenman*, 377 P.2d at 901 (citations omitted).

manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”²⁸

C. *The Restatement (Second) of Torts § 402A*

A mere two years after *Greenman*, the American Law Institute adopted the *Restatement (Second) of Torts* § 402A, which largely codified Justice Traynor’s opinion.²⁹ The central thrust of Section 402A was to impose strict tort liability on manufacturers and sellers of defective products.³⁰ Like *Greenman*, Section 402A eliminated the requirement that there be privity of contract between the plaintiff and defendant and thus extended strict liability to manufacturers with whom the plaintiff had no direct contact.³¹ It further defined “defective” products as those that are more dangerous than an ordinary consumer would expect.³² This method for determining defectiveness became commonly referred to as the “consumer expectations test.”³³ Notably, Section 402A attempted to subsume all products and all conceivable types of defect under its singular “consumer expectations” definition.³⁴ The common scheme of trifurcating product defects into the separate categories of manufacturing defects, design defects, and warning defects is a judicially-created distinction that arose only later.³⁵

Section 402A enjoyed immense success from its inception, as it was rapidly adopted by virtually every American jurisdiction.³⁶ In the words of one prominent commentator, courts and legislatures across the nation embraced Section 402A “[w]ith a gusto unmatched in the annals of the Restatement of the Law If ever a Restatement reformulation of the law were accepted uncritically as divine, surely it is Section 402A.”³⁷

Arizona first adopted the concept of strict tort liability as defined in Section 402A in *O.S. Stapley Co. v. Miller*.³⁸ The facts of *Stapley* are typical of many personal injury products liability cases. The owner of a new speedboat was water-skiing off the back of his boat while a group of his friends rode inside.³⁹ One friend drove the boat while another friend, the plaintiff, sat on the boat’s rear deck acting as a look-out and keeping the driver informed of the skier’s progress.⁴⁰ Suddenly, the boat veered to the right, and the plaintiff was thrown from the boat

28. *Id.*

29. *See* Owen, *supra* note 2, at 277.

30. *See id.*

31. *See* RESTATEMENT (SECOND), *supra* note 1, § 402A(2)(b).

32. *See id.*, § 402A cmts. g, i.

33. *See, e.g.*, Toke, *supra* note 5, at 249.

34. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 870 (1998).

35. *See* Owen, *supra* note 6, at 743.

36. *See* Owen, *supra* note 2, at 275. As Professor Owen points out, by 1998 every state except Delaware, Massachusetts, Michigan, North Carolina, and Virginia had adopted the doctrine of strict liability in tort. *Id.* at 275 n.30.

37. Owen, *supra* note 6, at 744.

38. 447 P.2d 248 (Ariz. 1968).

39. *Id.* at 249–50.

40. *Id.*

and into the path of the boat's propeller.⁴¹ The propeller caught the plaintiff's foot, severely injuring her.⁴² The plaintiff then sued the O.S. Stapley Co., the boat's retailer and installer of the motor and steering system, as well as several other parties, including the driver of the boat.⁴³

The Arizona Supreme Court framed the issue in *Stapley* as nothing less than "whether or not the doctrine of 'Products Liability' . . . applies in Arizona."⁴⁴ In answering this question, the court cited several earlier cases in which it had alluded to strict products liability for manufacturers and had held that manufacturers are liable to consumers *in tort* and that liability is imposed *by law* and not by any explicit agreement.⁴⁵ Then, to clear up any doubt these earlier cases might have left, the court explicitly adopted Section 402A of the *Restatement (Second) of Torts* and thereby made clear that the doctrine of "Products Liability" was indeed the law in Arizona.⁴⁶

Several years after the Arizona Supreme Court adopted Section 402A in *Stapley*, it refined its approach to strict tort liability in *Byrns v. Riddle, Inc.*,⁴⁷ when it was faced with a case involving the alleged defective design of a football helmet. In *Byrns*, the Arizona Supreme Court reaffirmed its commitment to Section 402A and its consumer expectation test.⁴⁸ In addition, the court supplemented that test with a seven-factor risk/benefit analysis to be used as an alternative means for determining what constitutes an "unreasonable danger."⁴⁹ Just as the California Supreme Court later did in *Barker v. Lull Engineering Co.*,⁵⁰ the Arizona Supreme Court recognized that the consumer expectations test is ill-suited to design defect

41. *Id.* at 250.

42. *Id.*

43. *Id.*

44. *Id.* at 251.

45. *Id.* (citing *Shannon v. Butler Homes, Inc.*, 428 P.2d 990 (Ariz. 1967); *Phillips v. Anchor Hocking Glass Corp.*, 413 P.2d 732 (Ariz. 1966); *Nalbandian v. Byron Jackson Pumps, Inc.*, 399 P.2d 681 (Ariz. 1965); *Colvin v. Superior Equip. Co.*, 392 P.2d 778 (Ariz. 1964); *Crystal Coca-Cola Bottling Co. v. Cathey*, 317 P.2d 1094 (Ariz. 1957)).

46. *Id.* at 251–52.

47. 550 P.2d 1065 (Ariz. 1976).

48. *Id.* at 1067.

49. This multi-factor analysis was originally formulated by Dean John W. Wade in *On the Nature of Strict Liability for Products*, 44 *Miss. L.J.* 825, 837–38 (1973). As stated by the Arizona Supreme Court in *Byrns*, which adopted a formulation of the analysis used in *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759–60 (E.D. Pa. 1971), the analysis considers:

(1) [T]he usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Id. at 1068 (citing *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 760 (E.D. Pa. 1971)).

50. 573 P.2d 443 (Cal. 1978).

cases and that, in such cases, an alternative test should be available.⁵¹ In essence, *Byrns* accomplished implicitly in Arizona what *Barker* later stated explicitly in California. Namely, *Byrns* held that the primary test for “unreasonable danger” is the consumer expectations test, but, where the consumer expectations test is inappropriate or ineffective, the risk/benefit balancing test should be used in its stead.⁵²

On the other hand, by failing to state this two-prong analysis explicitly (as the California court did in *Barker*), the Arizona Supreme Court left the door open for confusion. In fact, confusion won the day two years later in *Brady v. Melody Homes Manufacturer*.⁵³ The *Byrns* court had intended the risk/benefit analysis to serve as merely an alternative method for determining what constitutes “unreasonably dangerous” in the *Restatement’s* definition of strict liability.⁵⁴ The court in *Brady*, however, misinterpreted *Byrns’* risk/benefit analysis as indicating an intent to employ a *negligence* approach to products liability.⁵⁵ According to *Brady*, whenever a plaintiff asserts that a product is defective in design and could have been designed more safely, the proper analysis shifts from strict liability to negligence.⁵⁶

D. Products Liability and Design Defect in Arizona Today

By 1985, the Arizona Supreme Court had found its footing in the unstable terrain of products liability law and was prepared to issue its definitive statement on the subject. In *Dart v. Wiebe Manufacturing, Inc.*,⁵⁷ the court overruled *Brady’s* misguided foray into negligence and attempted to clarify the role of the risk/benefit analysis in products liability law. In *Dart*, the plaintiff sued the manufacturer of an industrial paper shredder used at his place of employment after the machine tore off one of his arms.⁵⁸ Dart claimed that the paper shredder was defective and unreasonably dangerous because it was designed without safety guards that would have prevented his accident.⁵⁹

The plaintiff’s action included separate counts for negligent design and strict liability for design defect, and the plaintiff submitted separate jury instructions for each count.⁶⁰ The trial judge, however, refused to give separate jury instructions for the two counts and instead gave a single instruction to cover both.⁶¹ On appeal, Dart claimed that the trial judge’s refusal to give separate jury instructions deprived him of his strict liability design defect claim.⁶² The court of appeals, however, affirmed the trial judge’s instruction on the grounds that,

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51. See *Byrns*, 550 P.2d at 1068.
 52. See *id.*
 53. 589 P.2d 896 (Ariz. Ct. App. 1978).
 54. *Byrns*, 550 P.2d at 1068.
 55. See *id.* at 902–03.
 56. See *id.*
 57. 709 P.2d 876 (Ariz. 1985).
 58. *Id.* at 877.
 59. *Id.*
 60. *Id.*
 61. *Id.*
 62. *Id.*

although strict liability applies when a product fails to perform as safely as an ordinary consumer would expect, strict liability concepts do not apply when the plaintiff alleges that the manufacturer should have adopted a safer alternative design, as Dart had alleged.⁶³ The court of appeals relied on *Brady* to conclude that “negligence principles are dispositive and strict liability concepts inapplicable when a plaintiff claims that a product design was improper and that the manufacturer should have adopted a safer alternative design.”⁶⁴ In short, the plaintiff had “limited his own theories of recovery by couching his strict liability claim in the terminology of feasible [design] alternatives.”⁶⁵ The Arizona Supreme Court then accepted review of *Dart* “in order to examine and settle the law pertaining to strict liability claims involving alleged design defects.”⁶⁶

The court began by reaffirming Arizona’s adherence to strict products liability as defined in the *Restatement (Second) of Torts*.⁶⁷ As outlined in the *Restatement*, the primary test for determining whether a product is in a “defective condition unreasonably dangerous” is whether the product is in a “condition not contemplated by the ultimate consumer.”⁶⁸ The court noted that this test, the “consumer expectations test,” works extremely well in manufacturing defect cases, where the manufacturer’s own specifications provide a readily available external measure for defectiveness.⁶⁹ If a product fails to meet the manufacturer’s own specifications, the product clearly contains a risk of danger that the consumer does not expect.⁷⁰

On the other hand, the court pointed out, the “consumer expectations test” is not particularly helpful in design defect cases where “the consumer would not know what to expect, because he would have no idea how safe the product could be made.”⁷¹ Here, the risk/benefit analysis is required to determine what constitutes a “defective condition unreasonably dangerous.” This is precisely the two-prong approach the California Supreme Court adopted in *Barker* and implicitly adopted by the Arizona Supreme Court in *Byrns*.⁷² The first prong is simply the consumer expectations test.⁷³ Where that test does not apply, as in design defect cases, the second prong is the risk/benefit analysis.⁷⁴ Recognizing that this second prong had been the source of confusion in *Brady*, the court endeavored to clarify the precise role of the risk/benefit analysis.⁷⁵

In a negligence action, the court held, the plaintiff is required to prove that the manufacturer acted unreasonably *at the time the product was designed*,

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *See id.* at 878.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See id.* at 880.
73. *See id.*
74. *See id.*
75. *Id.* at 880–82.

operating with the knowledge available at that moment in time.⁷⁶ In a strict liability action, however, the risk/benefit analysis is applied based on the information available *at the time of trial*.⁷⁷ This is a “hindsight test” that is distinct from the standard test of negligence and that preserves strict liability in tort.⁷⁸ When viewed this way, it is clear that the risk/benefit analysis is indeed consistent with the concept of strict tort liability and was never intended to signify a retreat into negligence.⁷⁹

Two years after the Arizona Supreme Court revived strict liability and honed the test for design defectiveness in *Dart*, the Arizona Court of Appeals applied *Dart* and reaffirmed its holding in *Gomulka v. Yavapai Machine and Auto Parts, Inc.*⁸⁰ In fact, the court of appeals took the opportunity to restate with even greater precision the Supreme Court’s holding in *Dart*. The court of appeals explained:

One test of whether a product is unreasonably dangerous is whether its inherent danger exceeds the expectation of the ordinary consumer. This “consumer expectation” test does not always apply, however, as when the consumer would have no expectation because he would have no knowledge of how safe the product could be made. When the consumer expectation test does not apply, courts employ a risk/benefit analysis to determine whether the product is unreasonably dangerous. This test calls for the fact finder to weigh [the seven Wade factors].⁸¹

The court then went on to clarify the difference in a design defect case between a negligence test and a strict liability test:

A *negligent* design case focuses on whether the defendant’s conduct was reasonable in view of a foreseeable risk at the time of design of the product. A *strict liability* design defect case, where the risk/benefit analysis is appropriate, focuses on the quality of the product. To the extent the risk/benefit analysis involves a consideration of the conduct of the manufacturer or seller, such conduct is weighed as if the risk that the trial has revealed has always been known. . . . In such cases, it is immaterial whether the manufacturer knew or should have known of the risk accompanying

76. *Id.* at 880–81.

77. *Id.*

78. *Id.* at 881.

79. *See id.* at 880. The court explicitly rejects the suggestion that by adopting the Wade multi-factor analysis in *Brady*, the court intended to inject negligence principles into products liability law:

[The adoption of the Wade factors] was not intended to adopt a negligence test for design defect cases. The purpose was exactly the opposite, and immediately after [adopting the Wade analysis] we stated that “the foregoing analysis is offered as an approach to the question of whether a defect is unreasonably dangerous.”

Id.

80. 745 P.2d 986 (Ariz. Ct. App. 1987).

81. *Id.* at 989.

a product's harmful characteristics at the time the product was put on the market.⁸²

Gomulka, then, reflects the current state of design defect law in Arizona. This decision represents the culmination of twenty years of refinement, beginning with the adoption of Section 402A in *Stapley*, proceeding through the confusion of *Brady*, and finally arriving at the definitive statement of Arizona law in *Dart*. *Gomulka* reiterates what *Dart* made clear: Arizona adheres to strict liability and rejects a negligence-based approach to determine manufacturer liability in design defect cases.

It is also important to note that, throughout the evolution of Arizona design defect law, the Arizona Supreme Court has endeavored to remain true to the policy, as well as the substance, of Section 402A. Beginning with *Stapley*, the court adopted not only the *Restatement's* substantive formulation of strict products liability, but also the *Restatement's* policy justifications for that doctrine.⁸³ In fact, the court went so far as to quote comment c to Section 402A in its entirety:

On whatever theory, the justification for the strict liability has been said to be 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; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon by the seller, that reputable sellers will stand behind their goods; that 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 of protection at the hands of someone, and the proper persons to afford it are those who market the products.⁸⁴

After *Stapley*, the court's subsequent refinements of strict liability law, from *Byrns* through *Dart*, are all explicitly rooted in Section 402A and, implicitly, in the policies embodied in comment c. Professor John Vargo has observed that "[t]he legendary and primary reason for adopting strict liability was to relieve the consumer from the burden of proving negligence. This rationale has been well expressed in numerous decisions and commentaries."⁸⁵ One of these "numerous decisions" is surely *Dart*, where the Arizona Supreme Court went to great lengths to distinguish between negligence and strict liability.⁸⁶ The court held in no uncertain terms that Arizona adheres to the doctrine of strict products liability as embodied in Section 402A and that the hindsight risk/utility test, while focusing on the reasonableness of the manufacturer's conduct, is *not* a negligence-based test.⁸⁷ The court even overruled *Brady*, which made the mistake of using negligence

82. *Id.*

83. O.S. *Stapley Co. v. Miller*, 447 P.2d 248, 251–52 (Ariz. 1968).

84. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965)).

85. Vargo, *supra* note 10, at 508.

86. *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 880–83 (Ariz. 1985).

87. *Id.*

principles to decide a design defect case.⁸⁸ In short, Arizona's decisions in the area of strict products liability fit firmly within the consumer-protection tradition first expressed by Justice Traynor in *Greenman*, later canonized in Section 402A, and finally adopted by courts throughout the country.

III. THE *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*

A. *Recognizing Problems With Section 402A*

Professor Owen has observed that “[w]hen Dean William Prosser crafted Section 402A of the Second Restatement of Torts in the early 1960s, products liability law was in its infancy.”⁸⁹ At the time, the leading commentators thought to distinguish only between defective and non-defective products.⁹⁰ This explains why the language of Section 402A imposed liability simply for products in a “defective condition unreasonably dangerous” to the consumer.⁹¹ No mention was made of different varieties of products or different types of defects. Over time, courts began to develop three separate and distinct categories of defect: (1) manufacturing defects; (2) design defects; and (3) warning defects (sometimes called informational or instructional defects).⁹²

These categories arose out of courts' collective realization that not all defect cases are equal and that not all defect cases can be approached with the same method of analysis. In the case of an exploding soda bottle, for example, the plaintiff typically asserts that, while most bottles produced by the manufacturer are not defective, the exploding bottle was manufactured incorrectly, creating a flaw in the bottle that caused it to explode.⁹³ In such a case, the consumer expectations test works well because the bottle clearly contained a defect not intended by the manufacturer and not anticipated by the consumer.

On the other hand, the same analysis is less applicable in the case of a piece of heavy machinery that allegedly is prone to injuring its operator because of its poor design. In this case, the product is manufactured precisely to the manufacturer's specifications, but the design itself is flawed. Thus, each and every machine produced is allegedly defective due to the error in design.⁹⁴ When the plaintiff alleges such a defect in design, the consumer expectations test is inapposite because the consumer is usually not knowledgeable enough to form a reasonable expectation as to how safe the product could be made.

Recognizing this dilemma, courts throughout the country began to develop different approaches to design defect cases. Professor Owen has

88. *Id.* at 882.

89. Owen, *supra* note 2, at 282.

90. *See id.*

91. RESTATEMENT (SECOND), *supra* note 1, § 402A(1).

92. *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 625 (3d ed. 1997).

93. *See, e.g.,* Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426 (Minn. 1971).

94. *See, e.g.,* Knitz v. Minster Mach. Co., 432 N.E.2d 814 (Ohio 1982).

commented that, in the area of design defect, “judicial opinions are simply stuck in a no man’s land somewhere between negligence and true strict liability.”⁹⁵

The majority of courts, including those in Arizona, have turned to some form of risk/utility test.⁹⁶ In all such tests, courts look to determine whether the foreseeable risk of harm from the product outweighs the utility offered by the product. On the other hand, jurisdictions differ in terms of which risks are considered “foreseeable.”

In many jurisdictions that use a risk/utility test, the court will balance the utility of the product against the amount of information reasonably available to the manufacturer *at the time the product was designed*.⁹⁷ Under this formulation, the risk/utility test begins to look very much like traditional negligence, because the analysis reduces to whether the manufacturer acted reasonably in light of knowledge and information available at the time of design.⁹⁸ As shorthand, this will be referred to as the *foresight risk/utility test*.

Other jurisdictions apply the risk/utility test by imputing upon the manufacturer the degree of information and knowledge that is reasonably available *at the time of trial*, whether or not the manufacturer actually had such information at the time it designed its product.⁹⁹ This is the approach adopted by Arizona in *Dart*.¹⁰⁰ Much more than the foresight test, this *hindsight risk/utility test* conforms with the strict liability standard described in Section 402A.¹⁰¹ By shifting the reasonableness analysis to the time of trial, courts focus on the defectiveness of the product rather than on the conduct of the manufacturer. In this way, the hindsight test is closer to strict liability than it is to negligence.

Whether courts use the foresight or hindsight version of the risk/utility test, they often incorporate some formulation of Dean Wade’s multi-factor analysis, as the Arizona Supreme Court did in *Byrns*.¹⁰² By relying on the Wade factors, courts are able to introduce “some degree of regularity and structure into the analysis of the risks and utility of a product.”¹⁰³

Not every jurisdiction has resorted exclusively to a risk/utility analysis in design defect cases. Alaska, Hawaii, and California have adopted an analysis under which plaintiffs can prove design defects in either of two ways.¹⁰⁴ First, the plaintiff can demonstrate that the product is defective under the consumer expectations test outlined in Section 402A.¹⁰⁵ If this test is inapplicable or ineffective in a given case, the plaintiff may also employ the risk/utility test.¹⁰⁶

95. Owen, *supra* note 2, at 284.

96. See Toke, *supra* note 5, at 257.

97. See *id.* at 266.

98. See *id.*

99. See *id.* at 264–65.

100. *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876 (Ariz. 1985).

101. See Toke, *supra* note 5, at 264–66.

102. See *id.* at 258–59; *Byrns v. Riddle, Inc.*, 550 P.2d 1065, 1068 (Ariz. 1976).

103. *Id.* at 258.

104. See *id.* at 273.

105. See *id.*

106. See *id.*

Thus, the plaintiff can succeed under one test even though she could not have succeeded under the other.¹⁰⁷ This is distinct from the Arizona approach, in which the court determines which approach should apply, and the plaintiff is limited to pursuing that single approach.

Finally, a small number of jurisdictions still attempt to rely exclusively on the letter of Section 402A and its consumer expectations test.¹⁰⁸

B. Drafting the Restatement (Third) of Torts: Products Liability

Surrounded by these scattershot approaches to design defect cases, the Reporters of the *Restatement (Third)* had the formidable task of producing a single solution. They began by explicitly dividing product defectiveness into the three recognized categories: manufacturing defects, design defects, and warning defects.¹⁰⁹ In and of itself, this trifurcation of defectiveness is not terribly significant. As stated above, this approach merely reflects the actual practice of courts during the thirty years since Section 402A attempted to fit all types of defectiveness into a single definition.¹¹⁰ What is truly significant is that the Reporters co-opted this accepted trifurcation to create a different standard of liability for each category of defectiveness. Instead of preserving strict liability for all types of defectiveness, as the *Restatement (Second)* purported to do, Section 2 of the new *Restatement* sets up a different standard of liability for each of the three different categories of defectiveness.¹¹¹

Section 2(a) preserves strict liability for manufacturing defects, imposing liability whenever a product “departs from its intended design even though all possible care was exercised.”¹¹² Using different language, Section 2(a) essentially replicates the standard previously established by Section 402A.

Section 2(b), on the other hand, applies an entirely different standard to design defectiveness, stating 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 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.¹¹³

This language dispenses with the strict liability of Section 402A in favor of negligence concepts such as “foreseeable risk” and reasonableness-balancing

107. See *id.* at 273–74.

108. See *id.* at 272.

109. Section 2 states that a product is defective if “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.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997) [hereinafter RESTATEMENT (THIRD)].

110. See DOBBS & HAYDEN, *supra* note 92, at 625.

111. See RESTATEMENT (THIRD), *supra* note 109, § 2.

112. *Id.*

113. *Id.* § 2(b).

formulas. Professor Owen has observed that “[t]he quite transparent objective of Section 2(b) is to adopt a negligence standard of liability clothed in the ‘defect’ language of strict liability—to dress a pig in mule’s clothing.”¹¹⁴ In fact, the Reporters explicitly voice their intention to abandon strict liability for design defectiveness. “[The strict liability] rule developed for manufacturing defects is inappropriate for the resolution of claims of defective design. . . . [Section 2(b) relies] on a reasonableness test traditionally used in determining whether an actor has been negligent.”¹¹⁵

Section 2(b), then, replaces the strict liability of Section 402A with an express requirement that the plaintiff in a design defect case must demonstrate that the defendant could have adopted a “reasonable alternative design” and that the failure to do so rendered the product “not reasonably safe.”¹¹⁶ Whereas the availability of an alternative design was only one of several factors to be considered in the Wade risk/utility analysis, the new Restatement requires proof of reasonable alternative design in every case.

In effect, Section 2(b) necessitates a foresight risk-utility balancing test in every case. The plaintiff has the burden of showing that when the inherent utility and risks of the allegedly defective product are compared to those of the proposed alternative design, the alternative design provides a net improvement in utility over risk and that the defendant acted unreasonably in not adopting the alternative design. In addition, the Reporters state that the reasonable alternative design analysis should take into account the feasibility of the design, cost of production, product longevity, maintenance and repair, aesthetics, and marketability, among other considerations.¹¹⁷ This requirement effectively requires the plaintiff in all but the simplest and most egregious cases to employ expert witnesses to testify to these factors.

Furthermore, the Reporters explicitly reject the consumer expectations test, which constituted the heart of Section 402A of the *Restatement (Second)*, as a separate test for design defectiveness.¹¹⁸ Rather, the consumer expectations test is relegated to a minor role as simply one of the many factors to be considered within the overall test established in Section 2(b).¹¹⁹ As Professor Owen has observed, dispensing with the consumer expectations test was crucial to the Reporters’ overall conception of products liability because that test, deriving as it does from contract law, operates in a truly “strict” manner and is inconsistent with an approach to design defect “where reasonableness, optimality, and balance are the proper benchmarks of responsibility.”¹²⁰ Thus, in removing the consumer expectations test from its central role in the design defect analysis, “the Reporters

114. See Owen, *supra* note 6, at 753.

115. RESTATEMENT (THIRD), *supra* note 109, §1 cmt. a.

116. *Id.* § 2(b).

117. *Id.* § 2 cmt. f.

118. *Id.* § 2 cmt. g.

119. See Owen, *supra* note 2, at 286.

120. See Owen, *supra* note 6, at 761.

exploded the final obstacle to the complete and final victory of negligence principles in shaping the defect concept in design . . . cases.”¹²¹

IV. THE DEBATE SURROUNDING THE *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*

A. *The Critics*

Criticism of the *Restatement (Third)* came fast and heavy. Commentators accused the Reporters of attempting to change the law to reflect their own personal beliefs or to further the cause of “tort reform” rather than faithfully reporting the state of the law as it existed at the time the *Restatement* was formulated.¹²²

Frank J. Vandall, Professor of Law at Emory University, has been an outspoken critic of the new *Restatement*. He bluntly accuses the Reporters of putting together what amounts to “a wish list from manufacturing America.”¹²³ With biting sarcasm, Vandall describes how “[m]essy and awkward concepts such as precedent, policy, and case accuracy have been brushed aside for the purpose of tort reform.”¹²⁴

In Vandall’s estimation, the Reporters and the American Law Institute, in creating the *Restatement (Third)*, skipped the fundamental step of critiquing and analyzing the current approach to products liability to determine if and how it required fixing.¹²⁵ Instead, argues Vandall, they simply assumed that the time had come to replace current law with something new.¹²⁶ But, in Vandall’s words, “[t]his proposition is not self-evident. Before we replace the old law and old policies with the new, we must first debate their continued vitality.”¹²⁷ In other words, the Reporters have proceeded to constructing the “roof” before taking the time to focus on the “foundation” and the “support structure.”¹²⁸

What results from this slipshod approach to creating a *Restatement*, argues Vandall, is a new and largely unsupported legal standard that requires the

121. *Id.* Although not important for the purposes of this Note, Section 2(c) of the *Restatement (Third)* defines the last category of defectiveness, warning defect, as follows:

A product . . . 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 a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

RESTATEMENT (THIRD), *supra* note 109, § 2(c).

Thus, Section 2(c) (warning defect) is similar to Section 2(b) (design defect) in that it adopts a negligence standard in place of Section 402A’s strict liability standard.

122. *See, e.g.*, Vandall, *supra* note 9, at 261–62.

123. *Id.* at 261.

124. *Id.*

125. *See id.* at 262.

126. *See id.*

127. *Id.*

128. *Id.* at 261.

plaintiff in a products liability action to prove “radical negligence.”¹²⁹ Of course, the Reporters themselves do not use this term. In Vandall’s estimation, though, the term is appropriate because, by requiring plaintiffs to demonstrate that a manufacturer acted unreasonably in failing to adopt a reasonable alternative design, the *Restatement* not only retreats from the strict liability of Section 402A in favor of traditional negligence principles, but requires the plaintiff to show something more than simple negligence.¹³⁰

Vandall sees this shift from strict liability to “radical negligence” as a betrayal of the policy considerations that led to the development of strict liability at its inception and that were cited in Justice Traynor’s opinion in *Greenman*.¹³¹ Specifically, Vandall points out that strict liability developed largely because courts made the policy determination that manufacturers are in a better position than the consumer to evaluate their products, anticipate hazards, and make the necessary changes or improvements.¹³² The manufacturer carries insurance whereas many ordinary consumers do not, and the manufacturer can spread losses occasioned by liability among the consuming public as a cost of doing business.¹³³ Individuals, of course, have no such ability. These very same policy considerations appear in comment c to Section 402A.¹³⁴

Furthermore, Vandall asserts that the heightened standard of liability adopted in the Third *Restatement* did not exist in more than three jurisdictions before the Reporters adopted it for the new *Restatement* and does not even remotely represent the state of the law in the nation as a whole.¹³⁵ The Reporters assert that an overwhelming majority of jurisdictions rely on risk-utility balancing, and they construe this fact to indicate that a majority rely on a negligence standard.¹³⁶ Vandall argues that, on the contrary, the cases cited by the Reporters do not affirmatively use risk-utility balancing as a form of negligence. Rather, the courts in these cases clearly believed they were adhering to strict liability principles.¹³⁷ For this reason, concludes Vandall, “[t]he Restatement (Third) of Torts: Products Liability . . . is not an accurate representation of the law. It is simply not a Restatement as we know it.”¹³⁸

129. *Id.*

130. *See id.*

131. *See id.* at 264, 279.

132. *See id.* at 264.

133. *See id.*

134. RESTATEMENT (SECOND), *supra* note 1, § 402A cmt. c.

135. *See* Vandall, *supra* note 9, at 262. Professor Vandall relies on a study reported in John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996), to assert that only Alabama, Maine, and Michigan judicially require proof of a reasonable alternative design and that another five jurisdictions have adopted the reasonable alternative design requirement by statute.

136. *See id.* at 273.

137. *See id.*

138. *Id.*

Professor Howard Klemme of the University of Colorado at Boulder made similar objections at a 1994 Symposium on the new *Restatement*.¹³⁹ Much like Vandall, Klemme disapprovingly observed that, in switching from the consumer expectations test to a risk/utility analysis, the Reporters “have apparently decided that the holdings in such well-known defective design cases as *Greenman v. Yuba Power Products, Inc.* are no longer relevant authority.”¹⁴⁰ Professor Klemme also disagrees with the Reporters’ conclusion that existing case law supports the use of the risk/utility analysis as outlined in the *Restatement (Third)*. He points out that the Reporters have engaged in an “elaborate discussion and citation of cases purporting to support [their positions],” but argues that their conclusions amount to “substantial misrepresentations” of the cases they cite.¹⁴¹ “More than half the cases cited to provide anything but the most fanciful support for those statements. Indeed, the opinions in several of them actually contradict the propositions for which they have been cited.”¹⁴² Furthermore, argues Klemme, those cases that do seem to lend some support to the Reporters’ conclusions do so only in the form of dicta:

Even in the opinion which the Reporters describe as containing a “particularly lucid analysis,” the court’s discussion about the use of a risk-utility test in product cases, particularly in cases based on strict liability in tort, is obviously dicta. The plaintiff did not seek relief on that theory, but on the theory of a breach of an implied warranty of merchantability. Moreover, as the court acknowledged, it had never expressly adopted a strict liability in tort theory.¹⁴³

In addition to these common criticisms, Professor Klemme asserts that the *Restatement (Third)* fails for social policy and economic reasons as well.

[The Reporters’] treatment of [products liability] fails to recognize the common economic marketplace concepts and legal principles the modern law of products liability shares with other legislatively and judicially created areas of strict liability for accidental injuries—workers’ compensation, no-fault auto insurance, vicarious liability under respondeat superior, abnormally dangerous activities, and the like.¹⁴⁴

In Klemme’s estimation, the Reporters’ failure to recognize these “common principles” leads to their attempt to “shift back to juries the principal responsibility for making the economic marketplace decisions that the modern law of products liability has sought to leave primarily in the hands of those who participate in the manufacture, distribution and consumption of tangible goods.”¹⁴⁵

Professor Vandall adds several of his own policy concerns. First, Vandall points out that requiring plaintiffs to prove the existence of a reasonable alternative

139. See Klemme, *supra* note 10, at 1187 n.1.

140. *Id.* at 1174.

141. *Id.*

142. *Id.* at 1174–75.

143. *Id.* at 1175 (citing *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984)).

144. *Id.* at 1174.

145. *Id.*

design places upon such plaintiffs the “burden of knowledge.”¹⁴⁶ In reality, argues Vandall, this approach “ignores the fact that many of today’s products are complex and beyond the understanding of the average consumer.”¹⁴⁷

Second, because of the complex nature of today’s products, plaintiffs will be forced to rely heavily on the testimony of expert witnesses to delve into the specifics of product design, often a costly proposition.¹⁴⁸ Coupling this financial burden with the fact that plaintiffs may, in some cases, even be required to construct a working prototype of the proposed alternative design, it quickly becomes apparent that the reasonable alternative design requirement stands to drastically increase the cost of products liability litigation, thus pricing some plaintiffs out of the market.¹⁴⁹

Third, Vandall points out that by increasing the cost to the consumer of bringing suit, the reasonable alternative design requirement “shift[s] more of the loss to the shoulders of the consumer.”¹⁵⁰ This, argues Vandall, is contrary to the theory underlying Section 402A, that “the loss should rest on the manufacturer because he can build a safer product or obtain insurance.”¹⁵¹ According to Vandall, strict liability was intended to make recovery by injured consumers easier by avoiding the costs associated with a negligence action.¹⁵² Conversely, Section 2(b) requires the plaintiff to prove even more than negligence, constituting a total betrayal of the policy rationale of strict liability.¹⁵³ Furthermore, in shifting the loss to the consumer, the new Restatement assumes that the consumer is as well insured as the manufacturer when, in fact, “about one quarter of consumers lack health insurance.”¹⁵⁴

Perhaps most important, the increased cost of litigation deriving from the need for expert witnesses and product models may actually serve to reduce the number of suits brought against product manufacturers.¹⁵⁵ Vandall predicts that plaintiffs will bring suit under Section 2(b) only in cases involving non-complex products and substantial injury or damage.¹⁵⁶ In other words, suits will only be brought when the cost of experts is relatively low and the potential gain from a favorable verdict is high. In cases at either end of the spectrum, namely those involving highly complex products or a relatively small degree of injury, the cost of expert witnesses will often outweigh the potential gains to the plaintiff.¹⁵⁷ Insofar as it discourages litigation, Section 2(b) ensures that “responsibility will

146. Vandall, *supra* note 10, at 1423.

147. *Id.*

148. *See id.* at 1425–26.

149. *See id.*

150. *Id.* at 1423.

151. *Id.*

152. *See id.*

153. *See id.*

154. *Id.*

155. *See id.* at 1425–26.

156. *See id.*

157. *See id.* at 1426.

not be placed where it can best reduce the hazards of manufacturing dangerous products.”¹⁵⁸

B. The Supporters

The *Restatement (Third)* has its share of defenders as well, including the Reporters themselves. Both during the drafting process and after the ALI officially adopted the new *Restatement* in 1997, Professors James Henderson and Aaron Twerski published several law review articles defending their product and seeking to further explain the process by which they arrived at it.¹⁵⁹ Henderson and Twerski argue that the consumer expectations test, as it was set forth in comment i to Section 402A, was never intended, either by the American Law Institute or by Dean Prosser, “to constitute an independent governing standard for design defect liability under Section 402A.”¹⁶⁰ In fact, the Reporters point out, Dean Prosser, the author of Section 402A, wrote several years later “that the standard for both design and failure-to-warn defects sounds in classic negligence.”¹⁶¹ The bottom line, argue the Reporters, is that “liability for defective design was in its nascent stages in the early 1960’s and Section 402A did not address it meaningfully, if at all.”¹⁶²

Henderson and Twerski go on to argue that both normatively and in terms of actual case law, a risk/utility balancing test has emerged as the preferable standard for judging design defect claims because it eliminates, or at least reduces, many of the problems associated with the consumer expectations test.¹⁶³ For instance, the consumer expectations test, argue the Reporters, is inherently unquantifiable and is therefore based primarily on some sense of collective intuition.¹⁶⁴ Also, the consumer expectations test does not provide a workable standard in several circumstances, for example, when the consumer expectations are below those that design technology can offer, or when the risks of a design are patently obvious and consumers have no reasonable basis for expecting greater safety.¹⁶⁵ In all these situations, claim Henderson and Twerski, a risk/utility balancing test provides a superior standard both in terms of practicality and normative value.¹⁶⁶ In fact, they argue, case law demonstrates that the majority of courts have adopted risk/utility balancing tests for design defect cases and that those tests require the plaintiff to demonstrate a reasonable alternative design.¹⁶⁷

Perhaps most important, though, the Reporters take pains to point out that, under the *Restatement (Third)*, proof of a reasonable alternative design is not

158. *Id.* at 1424.

159. *See* Henderson & Twerski, *supra* note 34, at 867; James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667 (1998) [hereinafter Henderson & Twerski, *Politics*].

160. Henderson & Twerski, *supra* note 34, at 879.

161. *Id.*

162. *Id.* at 880.

163. *See id.*

164. *See id.* at 881–82.

165. *See id.* at 880–81.

166. *See id.* at 882.

167. *See id.* at 886–87.

required in every case.¹⁶⁸ They note that comment b to Section 2 refers the reader to Sections 3 and 4 of the *Restatement (Third)*, two areas that provide alternative standards for certain design defect claims. Section 3, for instance, reflects a trend in judicial opinions in which courts *infer* design defects in cases where a product fails to perform its manifestly intended function.¹⁶⁹ The Reporters refer to these types of claims as *res ipsa*-type claims or as claims of “demonstrably defective design.”¹⁷⁰ In such instances, a product’s design flaw is so obvious that there is no need to apply the general design defect standard outlined in Section 2(b).¹⁷¹

Section 4 of the *Restatement (Third)* likewise provides an alternative to the general design defect standard of Section 2.¹⁷² It deals with violations of statutory and regulatory safety standards, and again obviates the need to employ the Section 2 analysis.

Finally, the Reporters discuss the situation in which a product’s design combines an egregiously high risk of injury and a negligible social utility.¹⁷³ In such a case, the design might be found to be defective even if no reasonable alternative design is available.¹⁷⁴ Through these other sections and comments, then, the Reporters have included “loopholes” to the general design defect standard in Section 2 that are designed to reflect the practice of courts.

Aside from the merits of the new Restatement itself, Henderson and Twerski have defended the process by which they arrived at their finished product. “From the very outset of the project the ALI encouraged the broadest possible participation from all constituencies. . . . We tried to take heed of even the harshest of our critics.”¹⁷⁵ In fact, the Reporters attempt to turn the tables on their critics by asserting that “[t]hose seeking to characterize the Products Restatement as a ‘tort reform’ package have either not read the new Restatement or they have, themselves, a political agenda in retaining the outmoded and open-ended Section 402A as the operative rule in American courts.”¹⁷⁶

Professors Henderson and Twerski are not alone in their efforts to defend the *Restatement (Third) of Torts: Products Liability*. Professor David Owen argues that “by shifting from ‘strict’ liability to negligence principles, the Products Liability Restatement ‘restates’ what most courts have long been doing if rarely saying.”¹⁷⁷ He goes on to say that, “[I]t has long been an open secret that, while purporting to apply ‘strict’ liability doctrine to design and warning cases, courts in fact have been applying principles that look remarkably like negligence.”¹⁷⁸

168. *See id.* at 905, 909.

169. *See id.* at 905–06.

170. *See id.* at 899.

171. *See id.* at 906.

172. *See id.*

173. *See id.*

174. *See id.*

175. Henderson & Twerski, *Politics*, *supra* note 159, at 668–69.

176. *Id.* at 686.

177. Owen, *supra* note 2, at 286.

178. *Id.*

Professor Owen also points out what he perceives as serious problems with the way in which manufacturer liability for design defects has been viewed since the advent of Section 402A. In Owen's view, it is pure folly to argue simply that the law should ensure that products are "safe," as consumer advocates, plaintiffs' lawyers, and "persons untutored in law, economics, or utility theory" often do.¹⁷⁹ The reason this approach is wrongheaded, says Owen, is that it assumes that "safety" is an absolute concept, "that a product is either 'safe' or 'unsafe.'"¹⁸⁰ In reality, a product's "safety" should be conceived of as "a prediction of the avoidance of future injury, [which] is necessarily a matter of probability and, hence, degree."¹⁸¹ When viewed in this way, it is clear that "strict liability" implies that any degree of risk, no matter how small, is unacceptable.¹⁸² For this reason, argues Owen, "strict liability is intrinsically deficient as a true standard for design liability."¹⁸³

A more appropriate standard for manufacturer liability, in Owen's view, would reflect the reality that the degree of risk or safety associated with a product must be "counterbalanced by considerations such as cost, utility, and aesthetics."¹⁸⁴ In short, "the goal of both design engineers and the law should be to promote in products an ideal balance of product usefulness, cost, and safety."¹⁸⁵ Such an approach would comport with the economic notions of utility and efficiency.¹⁸⁶ This, in Owen's estimation, is precisely what the *Restatement (Third)* accomplishes by dispensing with strict liability and replacing it with negligence.

V. THE *RESTATEMENT (THIRD)* IN RELATION TO EXISTING ARIZONA LAW

As commentators continue to debate whether the *Restatement (Third) of Torts: Products Liability* represents the true state of the law in the United States, the foregoing analysis leads to a definite conclusion: the *Restatement (Third) of Torts* adopts a view of products liability that is wholly incompatible with Arizona law. The Arizona Supreme Court has made explicitly clear that strict liability has been, and will continue to be, the law in Arizona design defect cases.¹⁸⁷ Although the Reporters insist that many courts adhere to the language of strict liability while, in fact, drifting toward negligence, this is manifestly not the case in Arizona.

The Arizona court, in *Dart v. Wiebe Manufacturing, Inc.*, set forth a meticulously-reasoned approach to design defect cases that is firmly rooted in strict liability.¹⁸⁸ Beginning with *Dart*, Arizona has used a risk/utility analysis whenever the consumer expectations test is inapplicable.¹⁸⁹ In applying this

179. Owen, *supra* note 6, at 754.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See id.*

187. *See Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876, 880 (Ariz. 1985).

188. *Dart v. Wiebe Mfg., Inc.*, 709 P.2d 876 (Ariz. 1985).

189. *Id.* at 880.

risk/utility analysis, the manufacturer is imputed to have full knowledge of the risks associated with its product at the time the product was designed, even if it did not, in fact, have such knowledge until the time of trial.¹⁹⁰ Furthermore, the court erased any doubt about the intended effect of this new test by overruling *Brady* and explicitly stating that the *Dart* test is meant to preserve strict liability for design defects.¹⁹¹

It is important to note that the Arizona Supreme Court has considered the proper standard for design defect cases on several occasions, beginning with its initial forays in *Stapley* and *Byrnes*, through the confusion of *Brady*, and finally to its decisive statement of the law in *Dart*.¹⁹² With each successive case, the court refined and perfected its approach to design defect claims. By the time it handed down its opinion in *Dart*, the court had, by trial and error, arrived at its destination: a clearly articulated and well-considered standard for all design defect cases.

In addition, it is clear that the Arizona Supreme Court made a conscious policy decision in adopting and adhering to strict liability in design defect cases. Beginning with the court's original adoption of strict liability in *Stapley*, the court subscribed not only to the substance of Section 402A, but to its policy justifications as well. The court went so far as to quote comment c to Section 402A in its entirety. In doing so, the court accepted the view that "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."¹⁹³ Except for the temporary confusion engendered by *Brady*, Arizona has never deviated from its commitment to strict liability as it is embodied in Section 402A and comment c. In its seminal decision in *Dart*, the court went to great lengths to draw a firm distinction between negligence and strict liability, and reaffirmed its commitment to strict liability for design defects.

Since 1968, Arizona has remained firmly committed to the policy goals underlying strict products liability as they were first articulated by Justice Traynor in *Greenman* and later incorporated into Section 402A. Given this history, the Arizona Supreme Court should remain true to its stated values and reject the negligence standard of the *Restatement (Third) of Torts: Products Liability*. To do otherwise, as Professor Vandall and other critics have pointed out, would be to betray the policy considerations that served as the foundation for products liability law in Arizona over the last thirty years.

VI. CONCLUSION

The voluminous material written about the supposed wisdom (or lack thereof) of the new *Restatement (Third) of Torts: Products Liability* reveals that the debate surrounding this effort has been contentious and that strong

190. *Id.* at 880–81.

191. *Id.* at 880 ("Use of these risk/benefit factors does not signal the abolition of strict liability in tort. It is, to the contrary, simply an alternative method of determining unreasonable danger.").

192. *See supra* notes 38–88, and accompanying text.

193. RESTATEMENT (SECOND), *supra* note 1, § 402A cmt. c.

disagreements persist. While several studies have purported to identify and analyze the relevant products liability case law in every American jurisdiction, the commentators cannot seem to agree on what conclusions to draw from that case law.¹⁹⁴ Clearly, the Reporters have concluded, and the ALI as a whole has agreed, that the case law reflects a national consensus against the consumer expectations test and toward some form of negligence-based risk/utility analysis in design defect cases. Others, however, have called this conclusion a misrepresentation of the case law.¹⁹⁵

Furthermore, there exists a second debate about the normative goals of products liability law. The critics of the new *Restatement* accuse the Reporters of betraying the founding principles of Section 402A as expressed by Justice Traynor and Dean Prosser. The Reporters and their supporters, on the other hand, insist that strict liability is economically inefficient and that the old consumer expectations test is unworkable and “hopelessly open-ended.”¹⁹⁶

Against this confusing backdrop, one thing is clear: the *Restatement (Third)* is incompatible with Arizona law and the policy behind that law. The Arizona Supreme Court has made an explicit commitment to strict liability and the policies embodied in comment c to Section 402A, while the new *Restatement* abandons strict liability in favor of a return to negligence principles.

Contrary to the Reporters’ generalizations, it is clear that the Arizona Supreme Court’s adherence to strict liability for design defects is not mere verbiage obscuring an underlying negligence approach. Rather, the court made a conscious policy decision in keeping with its own prior case law, as well as with Justice Traynor’s seminal opinion in *Greenman* and Dean Prosser’s comments to Section 402A.

Arizona has, over the past thirty-five years, constructed a sensible and workable approach to design defect claims. While Restatements are traditionally accorded great respect and consideration in our state courts, it is clear that the *Restatement (Third) of Torts: Products Liability* adopts an approach to design defect claims that is entirely inconsistent with existing Arizona law. The two approaches, furthermore, are so diametrically opposed that they could not conceivably be melded together or incorporated into one another. To adopt the *Restatement*’s approach would be to cast aside decades of Arizona case law. Rather than pursue this drastic and unnecessary path, Arizona should reject Section 2(b) of the *Restatement (Third)* and adhere to its own well-considered approach.

194. See, e.g., Henderson & Twerski, *supra* note 34; Toke, *supra* note 5; Vargo, *supra* note 10.

195. See, e.g., Vargo, *supra* note 10.

196. Henderson & Twerski, *Politics*, *supra* note 159, at 674.