

THE CONTEMPORARY CASE FOR CONSUMER EXPECTATIONS: REEVALUATING THE EVOLUTION OF THE ORIGINAL DEFECT STANDARD AND ITS PLACE IN MODERN PRODUCTS LITIGATION

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The consumer expectations standard for design defect has been the subject of fierce debate since its inception. Though many see it as the test that best reflects the plaintiff-friendly goals of products liability, others critique it as vague, outdated, and ripe for jury misuse. Once the primary test for design defect under the Restatement (Second) of Torts, the consumer expectations test has since been rejected by the Restatement (Third) of Torts, and its use has been eliminated or restricted in approximately half of all states in favor of the risk-utility test. Much of the reasoning behind this growing rejection revolves around the idea that juries cannot handle—or cannot be trusted to handle—design defect cases under the consumer expectations standard, which critics consider impractical and overly vague.

This Note explores the ways that states have crafted their design defect standards in the wake of the Restatement (Third) and evaluates the reasoning behind their choices to restrict or support the use of the consumer expectations test. In light of the way that consumer expectations jurisdictions have evolved their inquiry from the original test endorsed by the Restatement (Second), this Note argues that the common critiques against consumer expectations are themselves dated and unrepresentative of the test's capabilities, practical value, or rigor. Not only does this Note show that the basis for many states' and scholars' rejection of consumer expectations is built upon a caricature, it also demonstrates that the standard itself is sophisticated and helps meet a need within products liability that the risk-utility test alone cannot. This Note does not advocate for the elimination of other design defect standards such as "risk-utility." Instead, it simply advises that consumer expectations be included within all design defect

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frameworks, as the standard is a necessary tool to level the playing field for plaintiffs in products liability cases.

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INTRODUCTION

Products liability law, existing at the intersection of implied warranty under contract law and negligence suits under torts law, evolved to protect consumers from dangerous goods.¹ Especially after the onset of the Industrial Revolution, product safety was rarely prioritized during production.² During this era, household hazards alone caused three deaths per hour, and consumer products injured approximately twenty million Americans each year.³ However, as the doctrine of products liability expanded in response to glaring consumer protection issues, it also received pushback from those who believed this protection stifled economic growth and technological innovation.⁴

One of the most controversial issues within products liability is the legal standard for design defect. Although the original test introduced for all defects was the consumer expectations test under the Restatement (Second) of Torts,⁵ many courts considered it too vague or difficult to apply to design defect cases.⁶ Some jurisdictions have continued to embrace the consumer expectations test, although many others have barred it and turned towards other tests, such as risk-utility analysis, which closely mirrors negligence standards.⁷

However, this Note will show that much of the reasoning for courts' initial frustration with the consumer expectations test no longer applies, rendering many contemporary critiques of the standard to be little more than red herrings.⁸ Similar to common law in other areas, the consumer expectations test has evolved since its debut. Modern consumer expectations jurisdictions have adjusted their inquiry to be more specific and rigorous, with some even incorporating elements of "risk-utility" into their consumer expectations analysis.⁹ Research and case law show that this test—and any juror who applies it—is capable of handling the facts of complex design litigation.¹⁰

Furthermore, the restriction or elimination of the consumer expectations test presents major issues for plaintiffs. Products liability was created to level the playing field for injured consumers who could not survive the hurdles of a negligence action.¹¹ The consumer expectations test reflects these goals,

1. See *infra* Part I.A.

2. See Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U.L. REV. 431, 433–34 (2008).

3. *Id.*

4. See *infra* Parts I.C, II.B.

5. See *infra* Part I.B.

6. See *infra* Parts I.C, II.B.

7. See *infra* Part I.D for a full jurisdictional survey of design defect standards.

8. See *infra* Part III.A.

9. See *infra* Parts II.B, III.A.2.

10. See *infra* Part III.A.1.

11. See *infra* Parts I.B, II.A.1, III.B.

whereas alternative tests may often serve to rebuild these hurdles under a different name.¹²

This Note will advocate for the consumer expectations test as an integral legal tool to encourage consumer safety in products design and safeguard plaintiffs in design defect lawsuits.¹³ Importantly, this Note does not purport to discredit the benefits of risk-utility analysis, nor should it be taken as another piece of literature contributing to the academic tug-of-war over which test is superior. On the contrary, this Note fully recognizes the use of risk-utility alongside—or as a method of filling the gaps within—the consumer expectations test. It simply aims to combat the unfair and oversimplified criticisms that label the consumer expectations test obsolete without considering the test’s strengths or evolution through the years.

Part I recounts the history of products liability and design defect, including a survey of the current design defect standards across the fifty states and Washington, D.C. Part II discusses the arguments and reasoning for why different jurisdictions and scholars have embraced or restricted the consumer expectations test. Part III analyzes the reasoning discussed in Part II and determines that the critiques of the consumer expectations test are outdated and fail to accurately characterize or find fault with the modern iterations of the consumer expectations standard. This part will further call for the necessary inclusion of the consumer expectations test within all jurisdictions as the soundest reflection of products liability’s goals.

I. THE HISTORY OF PRODUCTS LIABILITY

Products liability is a relatively new area of law, developing only in the last 100 years.¹⁴ Nevertheless, it has taken on many different forms throughout its lifetime and continues to evolve in recent history.¹⁵ Part I.A will discuss the origins of products liability for defective products. Part I.B will discuss the proconsumer movement and the Restatement (Second)’s endorsement of the consumer expectations test for defective products. Part I.C will discuss the tort reform movement and the shift towards a more conservative, negligence-based standard in the Restatement (Third) of Torts, especially for design defect claims. Lastly, Part I.D will take a look at where America’s jurisdictions today lie in regard to their design defect standard.

A. *The Origins of Products Liability*

Strict products liability has come a long way from its origins, arising in an era where household products like TVs and cleaning products presented deadly hazards with little recourse against manufacturers.¹⁶ At common law, there was no protection for consumers of dangerous products outside of

12. *See infra* Part III.B.1.

13. *See infra* Part III.B.

14. *See infra* Part I.A.

15. *See infra* Part I.D.

16. *See* Gavin, *supra* note 2, at 433–34.

contractual privity.¹⁷ Without this privity, there could be no negligence claim against manufacturers.¹⁸ Though this made sense in the age of face-to-face transactions, the Industrial Revolution complicated classic contract principles.¹⁹ Even once the privity requirement was eliminated in states like New York and New Jersey,²⁰ the protective doctrine of negligence, laissez-faire politics, and caveat emptor still heavily favored enterprise over consumers.²¹

However, the available avenues for recovery against manufacturers began to evolve in the mid-twentieth century. The first major example of this was Justice Roger J. Traynor's famous concurrence in *Escola v. Coca Cola Bottling Co.*,²² in which he argued that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health."²³ Therefore, because manufacturers are in a better position to anticipate and solve these hazards, they should be liable.²⁴ Justice Traynor went on to claim that society's interest in discouraging unsafe products does not simply "become a matter of indifference because the defect arises from causes other than [manufacturer negligence]."²⁵ Instead, the fault is apparent from the product itself.²⁶

Fault linked not to negligence but to the inherent hazards of a product was an unusual concept for products at the time. However, it was not unheard of. Other areas of tort law had already imposed strict liability under certain circumstances, such as abnormally hazardous conduct.²⁷ The court in *Rylands v. Fletcher*,²⁸ decided in the mid-1800s, held a defendant constructing a reservoir liable for the abnormal risk they created.²⁹ By the time of *Escola*, strict liability had already been applied where "social policy requires that a defendant make good the harm [from] abnormal risks that are inherent in activities that are not considered blameworthy" for almost a

17. *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1327 (Conn. 1997) ("At common law, a person injured by a product had no cause of action against the manufacturer of the product unless that person was in privity of contract.")

18. See generally *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (establishing privity of contract as the necessary condition for negligence actions).

19. See Gavin, *supra* note 2, at 434–35.

20. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

21. See Gavin, *supra* note 2, at 434.

22. 150 P.2d 436 (Cal. 1944).

23. *Id.* at 440 (Traynor, J., concurring).

24. *Id.* at 441.

25. *Id.*

26. See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965) ("The reasons justifying strict liability emphasize that there is something wrong, if not in the manufacturer's manner of production, at least in his product."); see also Philip H. Corboy, *The Not-so-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1088 (1994).

27. See 7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 19:1 (Monique C. M. Leahy ed. 2018).

28. (1868) 3 LR 330 (HL) (appeal taken from Eng.).

29. See 7 SPEISER, KRAUSE & GANS, *supra* note 27, § 19:3.

century.³⁰ Similar to Justice Traynor's proposal for strict products liability, the basis of liability for ultrahazardous activity is simply the intentional exposure of the community to unusual risk.³¹

Almost twenty years after *Escola*, Justice Traynor's view finally swayed the majority of the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*³² The court ruled that manufacturers are strictly liable for the defective products they put on the market.³³ Echoing his *Escola* concurrence, Justice Traynor elaborated that "injured persons who are powerless to protect themselves" should not bear the cost of harm from defective products after manufacturers implicitly promised that the product would do what it was made to do.³⁴ Unlike negligence-based liability, this liability is strict in the sense that it attaches once the plaintiff proves they were injured by a product's defect, regardless of a manufacturer's fault.³⁵ *Greenman* introduced strict products liability to California's jurisprudence, but it was not long before the concept took off across the country.³⁶

B. The Proconsumer Movement and Expansion of Products Liability Law

After *Greenman*, strict products liability was quickly accepted in the legal community.³⁷ Within years, the Restatement (Second) endorsed Justice Traynor's concept of strict products liability in section 402A.³⁸ The Restatement (Second) held that manufacturers are "strictly liable for any condition not contemplated by the ultimate consumer that will be unreasonably dangerous to [them]."³⁹ The drafters did not mention negligence; instead, they based liability purely on a violation of consumer expectations.⁴⁰ The consumer expectations standard "spread like wildfire,"⁴¹ with almost every state adopting section 402A in a matter of years.⁴²

The approach "relieve[d] the plaintiff from problems of proof inherent in pursuing negligence [claims]."⁴³ Such proof was often in the hands of the

30. *Id.*

31. *See id.*

32. 377 P.2d 897 (Cal. 1963).

33. *See id.* at 900.

34. *Id.* at 901 ("Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built.").

35. *See id.*

36. *See* David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 277 (1998).

37. *See* Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1327–30 (Conn. 1997) (outlining a brief history of the development of products liability law).

38. *See id.* at 1328; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1965).

39. *Potter*, 694 A.2d at 1329.

40. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i; *see also infra* notes 43–51 and accompanying text.

41. Owen, *supra* note 36, at 277.

42. *See* 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, 507 (1996).

43. *Id.* at 583 (quoting *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972)).

defendants themselves, as the designers of the product, which made it harder for everyday plaintiffs to make their case under negligence standards.⁴⁴ Instead, plaintiffs now only had to prove that the product failed to meet consumer expectations, for which proof is more available to plaintiffs.⁴⁵ By focusing on what consumers reasonably expect of a safe product, rather than the manufacturer's reasonableness, strict products liability created a distinct cause of action that did not require proof of negligence.⁴⁶

Beyond the introduction of strict products liability to the tort landscape in the early 1960s,⁴⁷ the American Law Institute (ALI) had another reason for endorsing a strict products liability standard: increasing consumer protection.⁴⁸ Negligence and warranty had proved inadequate to protect consumers, whereas strict products liability emphasized consumer safety and lessened some of the barriers to plaintiff recovery.⁴⁹ Therefore, by holding manufacturers liable for any unexpected harm under the doctrine of strict products liability, the standard pushed producers to prioritize safety improvements when innovating new products.⁵⁰ Similar to other areas of tort law, greater consequences for neglecting safety were meant to pressure producers with a greater economic incentive to protect consumers.⁵¹

C. *The Restatement (Third) and the Rise of Risk-Utility Analysis*

The consumer expectations test was not without its flaws, and its application in court presented a host of new issues.⁵² The test was “vague and non-specific,”⁵³ yielded “unpredictable results,”⁵⁴ and, according to some, was poorly equipped to handle design defects.⁵⁵

One of the major difficulties with the Restatement (Second) was its blanket application of a one-size-fits-all test.⁵⁶ Section 402A “paint[s] with a broad

44. *See id.* at 508.

45. *See Corboy, supra* note 26, at 1057 (discussing the availability of evidence in design defect cases under the Restatement (Second) regime).

46. *See Vargo, supra* note 42, at 508.

47. *See Greenman v. Yuba Power Prods, Inc.*, 377 P.2d 897, 901 (Cal. 1963); *see also Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 100 (N.J. 1960).

48. *See Gavin, supra* note 2, at 436.

49. *See Dominick Vetri, Order Out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1374 (2009).

50. *See Corboy, supra* note 26, at 1083 (“[I]t should not be overlooked that safety is itself often innovative.”).

51. *See Gavin, supra* note 2, at 437–48.

52. This section will provide an overview of these issues, but for further analysis, see Part II.B.

53. Aaron D. Twerski, *An Essay on the Quieting of Products Liability Law*, 105 CORNELL L. REV. 1211, 1218 (2020).

54. Tiffany Colt, *The Resurrection of the Consumer Expectations Test: A Regression in American Products Liability*, 26 U. MIAMI INT’L & COMPAR. L. REV. 525, 533 (2019).

55. *See Aaron D. Twerski & James A. Henderson, Jr., Manufacturers’ Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1065 (2009).

56. *See James A. Henderson, Jr. & Aaron D. Twerski, Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 870–71 (1998).

brush” across all defect cases without distinction.⁵⁷ Yet many of the early landmark defect cases addressed a specific type of product failure: manufacturing defects.⁵⁸ Such defects are characterized by a product’s physical departure from an intended design or specification.⁵⁹ These manufacturing defect cases likely informed the drafting of section 402A in the Restatement (Second).⁶⁰

Courts soon confronted the reality that other types of defects would be litigated beyond manufacturer defects,⁶¹ such as failure to warn and design defect claims.⁶² It was not immediately clear if all types of defects could or should be litigated the same way under section 402A.⁶³ This was particularly challenging in design defect cases, where the product’s flaw or danger is not limited simply to one faulty unit, but instead exists within the manufacturer’s design itself.⁶⁴ Unlike cases involving manufacturing defects, a jury cannot look to other units within the same product line to compare the defect because the whole line is defective.⁶⁵ Beyond the notion of frustrating a consumer’s expectations, the Restatement (Second) provided little assistance on this matter, as it contained no self-executing test for how to determine a design’s defectiveness.⁶⁶

For many jurisdictions, these shortcomings culminated in shifts toward extra layers of analysis in design defect cases. In response to section 402A’s lack of guidance, some states inserted a risk-balancing step into their design defect inquiry to determine what constitutes unreasonable danger.⁶⁷ This analysis took a variety of forms: some courts applied an aggregate cost-benefit balancing approach and others only looked at the marginal costs and benefits of the safety feature in question.⁶⁸

The Restatement (Third) took this trend even further, dropping the consumer expectations test altogether in favor of a pure risk-utility perspective.⁶⁹ The drafters also added a “controversial” requirement that plaintiffs show that a reasonable alternative design (RAD) could have been

57. *Id.*

58. See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1713–14 (2003).

59. See James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 670 (2000).

60. See Kysar, *supra* note 58, at 1713–14.

61. See Henderson & Twerski, *supra* note 56, at 869–71 (discussing the confusion courts faced when applying the Restatement (Second)’s “single, unified definition of defectiveness” to cover cases besides manufacturer defects).

62. See 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 11.01 (2023).

63. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162–63 (Cal. 1972) (refusing to distinguish design and manufacturing defects for the purpose of products liability claims).

64. See Henderson & Twerski, *supra* note 56, at 870–71; Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2469 (2013).

65. See Kysar, *supra* note 58, at 1714 (“[S]ubjecting a manufacturer’s intended product design to the same measure of consumer expectations [as manufacturing defects] requires justification beyond the largely unhelpful Restatement comments.” (emphasis omitted)).

66. See *id.* at 1711.

67. See Colt, *supra* note 54, at 533.

68. See Kysar, *supra* note 58, at 1712–13.

69. See Colt, *supra* note 54, at 534–35.

implemented to avoid harm.⁷⁰ Unlike its predecessor, the Restatement (Third) moved away from strict product liability and back toward Judge Learned Hand's negligence formula—a point that the drafters themselves freely admitted.⁷¹ In essence, the Restatement (Third), with the introduction of a RAD requirement, “reject[ed]” the strict liability implicit in the consumer expectations test.⁷²

For proconsumer scholars and advocates, the Restatement (Third)'s reversal was deeply incompatible with the common law and the spirit of products liability. Some courts asserted that the rejection of strict products liability eschews the fundamental principle upon which the field of products liability was built—the avoidance of “undue burdens” of a negligence claim.⁷³ Professor Frank J. Vandall and Joshua F. Vandall further insisted that the Restatement (Third)'s flip back to negligence was unreflective of the current judicial landscape, considering that section 402A was the “most successful section” of the Restatement (Second).⁷⁴ Instead, supporters of consumer expectations insisted that this was a thinly veiled attempt for the pro-defendant “tort reform” movement to improperly limit manufacturer liability.⁷⁵

D. *The Changing Modern Landscape of Design Defect*

States have varied dramatically on their design defect standards, both across different jurisdictions and sometimes even within the same jurisdiction. Some states have even shifted back and forth between different standards multiple times in the last ten years.⁷⁶ This section will briefly survey the current landscape of design defect standards across the United States. The survey will identify whether a state adheres to the risk-utility test, consumer expectations standard, or a variation of either. It will also

70. See *id.* at 535–36; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998).

71. See Twerski & Henderson, *supra* note 55, at 1065 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)).

72. Colt, *supra* note 54, at 536.

73. See Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1332 (Conn. 1997) (“[F]easible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration.”); Rahmig v. Mosley Mach. Co., 412 N.W.2d 56, 81–82 (Neb. 1987).

74. Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEM. L. REV. 909, 918 (2003); see also 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, 269 (1997) (arguing that no court's ruling had indicated that the consumer expectations test was outdated or incorrect).

75. See Corboy, *supra* note 26, at 1065–68 (accusing the tort reform supporters of “legislative manipulation of tort rules”); John F. Vargo, *2(b) or Not 2(b), That Is the Question*, 6 TORTS L.J. 277 (1998) (discussing the Compensation Project under the ALI).

76. Compare *Aubin v. Union Carbide Corp.*, 177 So.3d 489 (Fla. 2015) (rejecting the risk-utility standard for Florida), with *Cavanaugh v. Stryker Corp.*, 308 So.3d 149 (Fla. Dist. Ct. App. 2020) (overruling *Aubin*'s rejection of risk-utility and instating a bifurcated standard, as in *Soule v. Gen. Motors Corp.*).

address some finer distinctions, such as use of RAD or major exceptions to the state's general rule.

The Restatement (Third) was met with fierce resistance and concern from courts,⁷⁷ scholars,⁷⁸ and judges.⁷⁹ These pro-consumer expectations advocates pushed for maintaining the standard, but, as of today, only seven states still adhere to the Restatement (Second)'s classic consumer expectations standard.⁸⁰ All seven states allow RAD evidence insofar as it proves elements of the consumer expectation test, but it is not required as an element.⁸¹

Furthermore, many other states still employ variations of the traditional consumer expectations test. Five states, while adhering to consumer expectations jury instructions,⁸² still require the plaintiff to prove a RAD in all cases.⁸³ Conversely, but to the same result, Wyoming has a RAD requirement within its jury instructions, but the state's common law applies the consumer expectations test.⁸⁴

Connecticut⁸⁵ and Oregon⁸⁶ employ a modified version of the consumer expectations test. This test bifurcates the consumer expectations inquiry based on whether the juror can apply their everyday knowledge to the facts

77. See, e.g., *Potter*, 694 A.2d at 1331–32 (refusing to “abandon” the consumer expectations standard and contending that the Restatement (Third) is *not* representative of national design defect jurisprudence).

78. See Vargo, *supra* note 42, at 510–11 (quoting Walter Hull Beckham, Jr., *Remarks at the American Law Institute Proceedings*, 64 A.L.I. Proc. 68–70 (1988)).

79. See *id.* at 512–13 (quoting Gerald T. Wetherington, *Remarks at the American Law Institute Proceedings*, 64 A.L.I. Proc. 70–71 (1988)).

80. Idaho, Kansas, Nebraska, Nevada, Oklahoma, Rhode Island, and Vermont apply a classic consumer expectations test. See *Toner v. Lederle Lab'ys*, 732 P.2d 297, 304 (Idaho 1987); *Delaney v. Deere & Co.*, 999 P.2d 930, 934 (Kan. 2000); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 60 (Neb. 1987); *Ford Motor Co. v. Trejo*, 402 P.3d 649, 652 (Nev. 2017); *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 267–68 (D.R.I. 2000); *Zaleskie v. Joyce*, 333 A.2d 110, 113 (Vt. 1975).

81. See Twerski, *supra* note 53, at 1222–23 (reporting that in a survey of pure consumer expectation jurisdictions, plaintiffs almost always “introduced a RAD into evidence” despite not needing to).

82. Arkansas, Indiana, North Dakota, Utah, and Virginia give juries a consumer expectations instruction. See ARK. MODEL JURY INSTRUCTIONS § 1017 (2023); IND. MODEL CIVIL JURY INSTRUCTIONS § 2117 (2024); N.D. JURY INSTRUCTIONS CIVIL § 21.00 (2019); UTAH MODEL JURY INSTRUCTIONS § 1006 (2024); VA. PRACTICE JURY INSTRUCTIONS § 39:16 (2023).

83. See *Dancy v. Hyster Co.*, 127 F.3d 649, 653–54 (8th Cir. 1997); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002); N.D. CENT. CODE § 28-01.3-01(4) (2023); UTAH CODE ANN. § 78B-6-702 (LexisNexis 2023); *Tunnell v. Ford Motor Co.*, 385 F. Supp. 2d 582, 584 (W.D. Va. 2005).

84. See *Sims v. Gen. Motors Corp.*, 751 P.2d 357, 365 (Wyo. 1988); WYO. CIVIL PATTERN JURY INSTRUCTIONS § 11.05 (2024).

85. See *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1241–42 (Conn. 2016); CONN. JUDICIAL BRANCH CIVIL JURY INSTRUCTIONS § 3.10-1 (2017). Connecticut has clarified that it will require RAD in almost every case, outside of litigation for obvious failures to meet “commonly accepted minimum safety expectations.” See *Izzarelli*, 136 A.3d at 1248.

86. See *Purdy v. Deere & Co.*, 492 P.3d 99, 106 (Or. Ct. App. 2021); OR. UNIFORM CIVIL JURY INSTRUCTIONS § 48.03 (2015).

of the case.⁸⁷ If so, the classic consumer expectations test is used. If not, additional evidence is necessary, including risk-utility and potentially RAD evidence.⁸⁸

Sixteen jurisdictions employ a risk-utility analysis with a RAD requirement.⁸⁹ New Hampshire similarly uses risk-utility, but does not require RAD evidence.⁹⁰ Three other states—New Mexico, Montana, and Delaware—do not have a risk-utility test per se, but have standards that, in effect, mirror a pure risk-utility analysis.⁹¹

Other jurisdictions give plaintiffs flexibility to choose which test they may bring their case under. Five of these states use the two-pronged approach, letting plaintiffs prove their case under either or both standards.⁹² South Dakota differs slightly by strictly requiring a consumer expectation instruction in all instances and also allowing the addition of a risk-utility

87. See, e.g., *Izzarelli*, 136 A.3d at 1241.

88. See *Purdy*, 492 P.3d at 106 (citing *McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 331 (Or. 2001)) (stating that if additional evidence is necessary, this may include “evidence that the magnitude of the product’s risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible” (internal quotations omitted)).

89. Alabama, the District of Columbia, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Ohio, South Carolina, Texas, West Virginia, and Wisconsin require risk-utility analysis and a showing of RAD. See *McMahon v. Yamaha Motor Corp.*, U.S.A., 95 So. 3d 769, 772 (Ala. 2012); *Warner Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. 1995); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 168–69 (Iowa 2002); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004); LA. STAT. ANN. § 9:2800.56 (2024); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285 (Me. 1988); *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1013–14 (Mass. 2013); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 329–330 (Mich. 1995); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984); MISS. CODE ANN. § 11-1-63(f) (West 2023); OHIO REV. CODE ANN. § 2307.75(F) (LexisNexis 2024); *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (S.C. 2010); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 355 (Tex. 1998); *Nease v. Ford Motor Co.*, 848 F.3d 219, 233–34 (4th Cir. 2017); WIS. STAT. ANN. § 895.047 (West 2023). North Carolina requires risk-utility and RAD evidence as well, with an exception for firearms, where the consumer expectations test is applied. See N.C. GEN. STAT. § 99B-6(a)–(b) (2024).

90. See *Vautour v. Body Masters Sports Indus.*, 784 A.2d 1178, 1183–84 (N.H. 2001).

91. New Mexico employs an “unreasonable risk of injury” test that requires the jury to “consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive.” N.M. UNIFORM JURY INSTRUCTIONS - CIVIL § 13-1407 (2024); see also *Bustos v. Hyundai Motor Co.*, 243 P.3d 440, 452 (N.M. Ct. App. 2010) (stating that New Mexico, “to some degree, applies the risk-utility considerations”). Montana employs a unique balancing test that consists exclusively of RAD factors. See *Rix v. Gen. Motors Corp.*, 723 P.2d 195, 201–02 (Mont. 1986). Delaware recognizes no strict liability, instead recognizing a cause of action for negligent manufacturing that closely mirrors a risk-utility analysis. See *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617, 620 (Del. Super. Ct. 1974); DEL. CIVIL PATTERN JURY INSTRUCTIONS § 9.1 (2006).

92. Alaska, Hawaii, Pennsylvania, Tennessee, and Washington employ the two-pronged approach. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 884 (Alaska 1979); *Ontai v. Straub Clinic & Hosp.*, 659 P.2d 734, 739 (Haw. 1983); *Tincher v. Omega Flex*, 104 A.3d 328, 368 (Pa. 2014); *Ray by Holman v. BIC Corp.*, 925 S.W.2d 527, 530 (Tenn. 1996); *Falk v. Keene Corp.*, 782 P.2d 974, 977–78 (Wash. 1989) (citing WASH. REV. CODE ANN. § 7.72.030(1)(a), (3) (West 2024)). Also known as the *Barker* test, the jury may receive both instructions and find the defendant liable on either. See *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 457–58 (Cal. 1978); see also *Twerski*, *supra* note 53, at 1228.

instruction if both instructions are given in the disjunctive.⁹³ New York has two causes of action for products liability, each employing a different test.⁹⁴ Plaintiffs can bring both of these claims in tandem or pick one, effectively allowing them the same flexibility as the two-pronged approach.⁹⁵

Although the two-pronged test originated in California, the state has since moved to a bifurcated standard determined by complexity.⁹⁶ Three states, most recently Florida, have followed California's lead.⁹⁷ If the facts of the case are too complex for lay jurors to reach a conclusion without expert testimony, a risk-utility standard must be used.⁹⁸ Otherwise, the plaintiff can proceed under either test.⁹⁹

Two states bifurcate not based on the complexity, but by the nature of the design defect. Maryland applies the consumer expectations standard unless the design defect is based on a malfunction, which warrants risk-utility and RAD evidence.¹⁰⁰ On the other end of the spectrum, New Jersey requires risk-utility in almost all cases besides patently obvious defects, where the consumer expectations standard is used.¹⁰¹

Two states employ an almost "anything goes" mentality, where both parties can bring whatever evidence they see fit to make their design defect case. In Missouri, no specific standard is given besides "unreasonable danger," and juries must apply their collective knowledge to determine liability.¹⁰² In Illinois, though both parties can make their case however they want, once RAD evidence is introduced by either party, the jury then only receives a risk-utility instruction to deliberate on.¹⁰³

Indeed, there is little consensus on design defect. Though only a handful of states have adhered purely to the Restatement (Second)'s classic consumer expectations test, many more have kept the spirit of the test alive with a

93. See *Karst v. Shur-Co.*, 878 N.W.2d 604, 610 (S.D. 2016); *First Premier Bank v. Kolcraft Enters.*, 686 N.W.2d 430, 445 (S.D. 2004).

94. See *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995). Under this model, juries decide breach of implied warranty claims on the basis of the consumer expectations test, whereas strict products liability claims require a RAD and risk-utility analysis. *Id.*

95. See *id.* at 735.

96. See *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 310 (Cal. 1994) (distinguishing *Barker*, 573 P.2d 443).

97. Arizona, Colorado, and Florida follow the *Soule* standard. See *Dart v. Wiebe Mfg.*, 709 P.2d 876, 879–81 (Ariz. 1985); *Walker v. Ford Motor Co.*, 406 P.3d 845, 849–50 (Colo. 2017); *Cavanaugh v. Stryker Corp.*, 308 So. 3d 149, 155–56 (Fla. Dist. Ct. App. 2020). Arizona notably leans heavily towards a preference for the consumer expectations standard. See *Dart*, 709 P.2d at 882 ("Such cases should, if possible, be decided upon the consumer expectation test.").

98. See *Soule*, 882 P.2d at 308.

99. *Id.*

100. See *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1152 (Md. 2002). Note that this overlaps heavily with the differentiation between malfunction defects and design defect, but that these can merge in cases where the whole product line is subject to the same type of malfunction. See *supra* Part I.C (discussing the difference between types of design defects).

101. See N.J. STAT. ANN. § 2A:58C-3(a)(1) (West 2024).

102. See *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 446 (8th Cir. 2008); MO. APPROVED JURY INSTRUCTIONS (Civil) § 25.04 (2023).

103. See *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 352 (Ill. 2008).

modified version of the test or by employing the two-pronged standard delineated in *Barker v. Lull Engineering Co.*¹⁰⁴ Others have restricted the use of the consumer expectations test only to specific situations, such as in *Soule v. General Motors Corp.*,¹⁰⁵ or have gone further to completely eliminate the Restatement (Second)'s test in favor of a risk-utility analysis. In Part II, this Note will examine the differences in rationale behind the major design defect frameworks, specifically diving into the reasons these standards allow or restrict the consumer expectations standard.

II. THE DIFFERING PERSPECTIVES ON THE AVAILABILITY OF CONSUMER EXPECTATIONS

As illustrated above, no consensus exists for how to approach design defect standards.¹⁰⁶ However, two major trends have emerged in the aftermath of the Restatement (Third). One camp of jurisdictions seeks to keep consumer expectations alive as an option for plaintiffs to use freely,¹⁰⁷ and the other restricts its use to a narrow set of circumstances, outside of which risk-utility is the only game in town.¹⁰⁸ This part does not claim to encompass all fifty-one of the jurisdictions, but instead aims to analyze the two majority groups of thought, as well as the legal arguments for embracing a certain design defect framework. Part II.A will discuss the jurisdictions that continue to embrace consumer expectations in spite of the Restatement (Third) and how they have handled the shortcomings of their preferred framework. Part II.B will examine the latter group of thought, including why these states and scholars aim to bar the consumer expectations test from general use.

A. Defect Standards That Allow Free Use of the Consumer Expectations Test

Since the introduction of the Restatement (Third), many jurisdictions have railed against the elimination or restriction of the consumer expectations test, insisting on its inclusion in their design defect framework.¹⁰⁹ However, one size does not fit all, and there are various defect standards that employ consumer expectations either exclusively or in tandem with others. Part II.A.1 will dive into the jurisdictions that exclusively employ classic consumer expectations and their reasoning. Part II.A.2 will discuss the jurisdictions that use a modified version of the consumer expectations test that embeds risk-utility factors into the analysis. Part II.A.3 will explore the jurisdictions that employ a two-pronged model for design defect and allow the use of either test freely by plaintiffs.

104. 573 P.2d 443 (Cal. 1978); *see also infra* Part II.A.3.

105. 882 P.2d 298 (Cal. 1994); *see also infra* Part II.B.1.

106. *See supra* Part I.D.

107. *See infra* Part II.A.

108. *See infra* Part II.B.

109. *See, e.g.,* Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1335 (Conn. 1997); Rahmig v. Mosley Mach. Co., 412 N.W.2d 56, 81–82 (Neb. 1987).

1. The Classic Consumer Expectations Test

Once in the majority, there are far fewer jurisdictions that now exclusively employ the consumer expectations test.¹¹⁰ However, a handful of states have maintained the use of the Restatement (Second)'s test, even amid critiques.

A consistent rationale across the jurisdictions that adhere solely to the consumer expectations test is that products liability was created to level a playing field that was, at the time, weighted heavily toward manufacturers and sellers.¹¹¹ Put another way, the concept of products liability was specifically developed in response to the imbalanced burden of negligence suits on plaintiffs.¹¹² States employing the consumer expectations test, such as Rhode Island, recognize that it is "harsher" on manufacturers than tests that focus on reasonableness.¹¹³ Yet, Rhode Island maintains that this harshness is by design because manufacturers are repeat players in litigation with the benefit of greater access to evidence and resources.¹¹⁴ Therefore, "[p]ublic policy justifies shifting the burden of proof" back to the product producer.¹¹⁵

Rather than requiring plaintiffs to prove elements that are often exclusively within the control and knowledge of manufacturers,¹¹⁶ some jurisdictions may only allow this evidence as a defense.¹¹⁷ In *Rahmig v. Mosley Machinery Co.*,¹¹⁸ the Nebraska Supreme Court illustrated the importance of this distinction by overruling a requirement that plaintiffs show a RAD in defect cases.¹¹⁹ Remarking on the similarity between RAD evidence and Kansas's state-of-the-art affirmative defense, the court noted the irony of forcing a plaintiff to "present evidence pertaining to a defense before the defendant evidentially presents such defense."¹²⁰ *Rahmig* refuses to put this onus on plaintiffs for fear that it would restore "the exact burden to be avoided by the doctrine of strict liability."¹²¹

Notably, this rejection has not been standard across all consumer expectations jurisdictions. Some courts require a preliminary showing of a RAD in spite of their adherence to the consumer expectations test.¹²² This indicates a position somewhat contrary to both the Restatement (Second) and

110. *See supra* Part I.D.

111. *See Vargo, supra* note 42, at 508 n.24 (collecting cases).

112. *See id.* at 508.

113. *See Castrignano v. E.R. Squibb & Sons*, 546 A.2d 775, 781 (R.I. 1988).

114. *See id.* at 782 ("Public policy justifies shifting the burden of proof to a defendant because the manufacturer . . . will invariably be expert in the field and have superior knowledge.").

115. *Id.*

116. *See Vargo, supra* note 42, at 508.

117. *See, e.g., Castrignano*, 546 A.2d at 781 (asserting that comment k of the Restatement (Second) is an affirmative defense).

118. 412 N.W.2d 56 (Neb. 1987).

119. *See id.* at 81–82.

120. *Id.* at 81.

121. *Id.*

122. *See supra* notes 82–84 and accompanying text.

(Third).¹²³ Such jurisdictions present an interesting hybrid, where courts still function as the gatekeeper to prevent litigation without sufficient evidence of fault,¹²⁴ but once the case reaches the jury they are instructed only on the consumer expectations standard.¹²⁵ Nevertheless, most consumer expectations courts find RAD requirements too burdensome to impose across all cases,¹²⁶ even if they recognize this type of proof to be highly probative when available.¹²⁷

This highlights another important foundation of the consumer expectations test: preserving the “fundamental human need” for jury trials.¹²⁸ Products liability’s goals were not only to make it easier for plaintiffs to receive compensation, but also to remove barriers that kept plaintiffs from a jury in the first place.¹²⁹ Ingrained within the U.S. Constitution,¹³⁰ trial by one’s peers is considered the backbone of the American common law system, which “places innate trust in the reasoned logic of citizen jurors.”¹³¹ Although the drafters of the Restatement (Third) were openly distrustful of the jury’s reasoning,¹³² the Restatement (Second) aimed to avoid stringent standards that would lead to excessive directed verdicts and summary judgment rulings.¹³³

Pure consumer expectations jurisdictions demonstrate a relatively high level of trust in juries’ capacity to consider a wide range of evidence. In *Ford Motor Co. v. Trejo*,¹³⁴ the defendant appealed a rollover case on the basis that no consumer would have expectations “regarding the strength-to-weight ratio of the vehicle roof.”¹³⁵ The Supreme Court of Nevada disagreed, ruling that expert evidence related to risk factors was admissible to show a jury that the design provided less protection than a reasonable consumer would expect.¹³⁶ The court maintains that this testimony, alongside evidence of instructions, warnings, and advertising, allows a jury to determine if a gap exists between the product’s performance and reasonable expectations.¹³⁷

123. See Twerski & Henderson, *supra* note 55, at 1091 (“Although the [RAD-embedded consumer expectations test] does not line up in all its particulars with section 2(b) of the Products Liability Restatement, it is a far cry from a strict liability consumer expectations test.”).

124. See *id.* (indicating that in spite of Arkansas’s statute “embrac[ing] the consumer expectations test,” courts require RAD evidence to avoid summary judgment or a directed verdict). For a greater discussion of fault and the role it plays in jurisdictions abiding by the Restatement (Third), see *infra* Part II.B.2.a.

125. See *supra* note 82 and accompanying text.

126. See *supra* Part I.D for full list of jurisdictions.

127. See *Tincher v. Omega Flex*, 104 A.3d 328, 397, 409 (Pa. 2014).

128. Corboy, *supra* note 26, at 1058.

129. See *id.* at 1057.

130. See U.S. CONST. amends. VI, VII.

131. Gavin, *supra* note 2, at 441.

132. See Henderson & Twerski, *supra* note 59, at 680.

133. See Corboy, *supra* note 26, at 1058, 1090.

134. 402 P.3d 649 (Nev. 2017).

135. *Id.* at 655.

136. See *id.*

137. See *id.* at 656.

Other courts echo similar reasoning to *Trejo* for why juries can receive consumer expectations instructions while considering risk-utility factors. In *Brown v. Sears, Roebuck & Co.*,¹³⁸ the U.S. Court of Appeals for the Tenth Circuit indicated that the divide is all in the perspective the jury is asked to take.¹³⁹ The *Brown* court determined that under Utah's model jury instructions, jurors should weigh a product's features—including its “characteristics, propensities, risks, dangers and uses”—with the caveat that they can only consider what “ordinary, prudent persons” would contemplate.¹⁴⁰ This is distinct from the design's actual risks and benefits, which *Brown* stated would typically only be known by experts outside the community.¹⁴¹ Therefore, juries would consider expert evidence only insofar as it impacted the ordinary prudent person standard.

The *Trejo* court also took issue with the defendant's characterization of the jury as naïve.¹⁴² Rather, the Tenth Circuit maintained that a lay juror *is* sufficiently equipped to digest unfamiliar technical material.¹⁴³ Echoing the Wisconsin Supreme Court,¹⁴⁴ *Trejo* reminds readers that juries are often faced with complex facts and expert testimony, so “[t]he problems presented in products liability jury trials would appear no more insurmountable than similar problems in other areas of the law.”¹⁴⁵ Nevada and other pure consumer expectations jurisdictions have remained skeptical of arguments that a jury cannot properly consider expert evidence or complex issues.¹⁴⁶

Pro-consumer expectations scholars also find fault with what they see as attempts to stifle the role of the jury. Critiquing tort reform's efforts to move away from products liability jury trials, Professor Sandra Gavin asserts that “[r]eason, not passion, is the bulwark of our judicial system.”¹⁴⁷ She argues that any characterization of the American tort system as frivolous or the jury as “fluff-headed” is a myth meant to manipulate public perception against the backbone of tort law.¹⁴⁸ Prominent personal injury lawyer, Phillip H. Corboy, commented that juries are the subject of stereotypes which label them as “incompetent, biased, [and] sentimental.”¹⁴⁹ However, he noted that empirical research shows jury awards tend to “reflect the severity of injuries”

138. 328 F.3d 1274 (10th Cir. 2003).

139. *See id.* at 1281.

140. *Id.* (internal citations omitted).

141. *See id.*

142. *See infra* notes 143–46 and accompanying text.

143. *See Ford Motor Co. v. Trejo*, 402 P.3d 649, 655 (Nev. 2017).

144. Notably, Wisconsin has since become a risk-utility jurisdiction by statute, superseding its common law commitment to the consumer expectations test. *See WIS. STAT. ANN.* § 895.047 (West 2024).

145. *Trejo*, 402 P.3d at 655 (quoting *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 743 (Wis. 2001)).

146. *See id.*; *see also, e.g., Delaney v. Deere & Co.*, 999 P.2d 930, 935 (Kan. 2000) (“[T]he proper test for jury instructions is the consumer expectations test, although this has nothing to do with evidence which may be offered at trial.”).

147. Gavin, *supra* note 2, at 442.

148. *See id.* at 441.

149. Corboy, *supra* note 26, at 1047.

and mirror similar awards by judges in bench trials.¹⁵⁰ If anything, evidence suggests that this rhetoric may bias jurors against plaintiffs.¹⁵¹

Across pro-consumer expectations jurisdictions and scholars, the consensus is that the standard increases fairness and properly reflects the goals of products liability. For these reasons, the test's supporters stand by its necessity as a fair and accurate gauge of liability.

2. Modified Consumer Expectations

Other jurisdictions recognize that the classic consumer expectations test can create practical problems for courts. Still, these courts stand by the core of the consumer expectations test. To counteract the shortcomings of the Restatement (Second)'s classic test, they have created modified versions of the test that add specificity and rigor to the consumer expectations inquiry.

In a fierce rejection of the Restatement (Third), the Connecticut Supreme Court reaffirmed the state's commitment to consumer expectations in *Potter v. Chicago Pneumatic Tool Co.*¹⁵² However, the court did give the standard a makeover, "modif[ying]" the classic test with some additional guardrails surrounding the use of expert evidence to educate a jury.¹⁵³ These guardrails were meant to assist a jury in ascertaining reasonable consumer expectations.¹⁵⁴

Under *Potter*, if an accident is so bizarre or obvious that a juror can conclude the product failed to meet minimum consumer safety expectations without expert evidence, risk-utility balancing is unnecessary.¹⁵⁵ This does not mean that juries in such cases *cannot* consider the expert testimony itself. To the contrary, the jury in *Potter* heard from various experts, including testimony regarding the product's use and testing, as well as medical experts speaking about the plaintiff's injuries.¹⁵⁶ The court simply ruled that the connection was clear enough that the jury could weigh the evidence—expert and otherwise—using classic consumer expectations alone.¹⁵⁷

However, the *Potter* court recognized that there will be times where consumers do not—or cannot—form accurate expectations.¹⁵⁸ In fact, a later Connecticut decision confirmed that most cases will not be so clear cut.¹⁵⁹ Under these circumstances, a plaintiff is required to produce expert testimony

150. *Id.* at 1081 nn.240–43 and accompanying text.

151. *See* Gavin, *supra* note 2, at 450–51; *see also* Corboy, *supra* note 26, at 1081 (“[J]uries tend to be more skeptical of personal injury plaintiffs than of corporate defendants.”).

152. 694 A.2d 1319 (Conn. 1997).

153. *Id.* at 1333.

154. *See id.* at 1333–34.

155. *See* Izzarelli v. R.J. Reynolds Tobacco Co., 136 A.3d 1232, 1242 (Conn. 2016) (citing *Potter*, 694 A.2d at 1334).

156. *See Potter*, 694 A.2d at 1335–36.

157. *See id.* at 1335 (affirming that a “jury can draw their own reasonable conclusions as to the expectations of the ordinary consumer” after hearing expert testimony).

158. *See id.* at 1333.

159. *See Izzarelli*, 136 A.3d at 1249. Importantly, this is not determined by a simple/complex product divide, but on whether juries can readily assess a consumer's minimum safety expectations. *See id.* at 1244.

that speaks to the product's design,¹⁶⁰ and the jury is explicitly instructed to weigh the risks and benefits of that design.¹⁶¹ The court qualified that the jury would still weigh these factors under a consumer expectations framework, considering them only insofar as they influenced a reasonable consumer's consideration of design safety.¹⁶² *Potter* cautions that under the modified standard, the jury's focus should remain on the product, rather than the manufacturer.¹⁶³

Oregon has also formalized a modified consumer expectations test, alongside some states that have recognized the modified analysis on a less formal basis.¹⁶⁴ Since 1967, *Heaton v. Ford Motor Co.*¹⁶⁵ has required parties in complex litigation to furnish the record with additional evidence about a product's cost and design to assist the jury in their consumer expectations inquiry.¹⁶⁶ In 2001, *McCathern v. Toyota Motor Corp.*¹⁶⁷ formally extended *Heaton* to require "evidence related to risk-utility balancing" where the facts were outside the realm of consumer experience.¹⁶⁸ *McCathern* clarified that whether or not risk-utility balancing is necessary, the test is still based on consumer expectations.¹⁶⁹

According to modified consumer expectations jurisdictions, their test "essentially provide[s] the jury with information that a fully informed consumer would know before deciding whether to purchase the product."¹⁷⁰ This allows the jury to easily apply the standard to bystanders and unknowing consumers who have not contemplated the full scope of risks.¹⁷¹ It also limits the role of comment (i) to section 402A, so that a consumer's contemplation of a product's danger is no longer a bar to recovery, but rather one of many factors to consider.¹⁷²

However, this construction of consumer expectations is not without its own critics. Scholars often point to these modifications to prove that the consumer expectations test must resort to a de facto rehash of risk-utility to be workable.¹⁷³ Yet Connecticut maintains that it differs from risk-utility by

160. *See id.* at 1249.

161. *See Potter*, 694 A.2d at 1333.

162. *See id.*

163. *See id.* at 1334.

164. *See, e.g., Delaney v. Deere & Co.*, 999 P.2d 930, 944–46 (Kan. 2000) (recognizing the validity of risk-utility analysis in complex cases but refusing to require it); *see also supra* notes 134–41 and accompanying text.

165. 435 P.2d 806 (Or. 1967).

166. *See id.* at 809.

167. 23 P.3d 320 (Or. 2001).

168. *Id.* at 331.

169. *See id.* at 332.

170. *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1252 (Conn. 2016).

171. *See infra* Part II.B.2.b for a deeper discussion of the vagueness critique of consumer expectations and its implications for bystanders and children.

172. *See Izzarelli*, 136 A.3d at 1252–53. Comment (i) provides the definition for "unreasonably dangerous" under 402A and historically barred recovery for activities that were patently dangerous, "including '[g]ood tobacco,'" which was the subject of the design defect claim in *Izzarelli*. *Id.* at 1234–35 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (Am. L. Inst. 1965)). *See infra* Part II.B.2.b for an explanation of the patent danger rule.

173. *See, e.g., infra* notes 321–24 and accompanying text.

asking the jury to “weigh various factors through the ultimate lens of the consumer’s expectations.”¹⁷⁴ Similarly, Oregon ruled that under the classic and modified tests, the theory of liability remains the same: defectiveness based on a failure to meet ordinary consumer expectations.¹⁷⁵ It is only the evidence necessary to prove the product’s defectiveness to an “unequipped” jury that changes.¹⁷⁶

Oregon has established caselaw discussing this distinction. As far back as *Heaton*, Oregon has maintained that consumer expectations is distinctive from other negligence-based defect standards, even when juries consider the feasibility and reasonableness of a product’s safety.¹⁷⁷ More recently, in *Purdy v. Deere & Co.*,¹⁷⁸ the Oregon Court of Appeals reversed a judgment due to jury instructions that suggested risk-utility as an appropriate basis for a design defect judgment.¹⁷⁹ The court noted that this error was substantial, emphasizing that “although evidence of [risk-utility] may be relevant to the jury’s determination of what the consumer expects from a product, the [risk-utility] standard is not the equivalent of the consumer-expectations test.”¹⁸⁰

Courts adhering to the modified consumer expectations test maintain that this test balances the evidentiary concerns that arise under a classic test while keeping with the spirit of strict products liability.¹⁸¹

3. The Two-Pronged Test

Some courts acknowledge the benefit of consumer expectations but are hesitant to force parties to prove their case under any standard. Instead, these jurisdictions offer plaintiffs the freedom to prove their case under either the consumer expectations test or risk-utility, or even both. Known as the two-pronged test or the *Barker* test, this design defect standard embraces both tests with no restrictions for what evidence can be considered under each.¹⁸²

The two-pronged test originated in *Barker v. Lull Engineering Co.*, which expanded California’s definition of a design defect beyond the language of the Restatement (Second).¹⁸³ The trial court below had applied the consumer expectations standard and ruled against the plaintiff-appellant, who was

174. *Izzarelli*, 136 A.3d at 1252.

175. *See McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 332 (Or. 2001).

176. *Id.* at 331–32.

177. *Heaton v. Ford Motor Co.*, 435 P.2d 806, 809 (Or. 1967).

178. 492 P.3d 99 (Or. Ct. App. 2021).

179. *See id.* at 108 (“The jury was told that it could consider whether the mower’s risk outweighed its utility; it was not told that it should consider [risk-utility] evidence in determining what a consumer expects.”).

180. *Id.* at 109–10.

181. *See Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1334 (Conn. 1997) (emphasizing that modification of the consumer expectations standard “does not signal a retreat from strict tort liability”). *Potter* also differentiates strict liability from absolute liability, suggesting that the former simply “relieves the plaintiff from proving [negligence].” *Id.* at 1329.

182. *See Barker v. Lull Eng’g Co.*, 573 P.2d 443 (Cal. 1978).

183. *See id.* at 451–52 (clarifying *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972)).

injured by a lift loader, but the Supreme Court of California reversed.¹⁸⁴ Reasoning that the public's awareness of a product's patent danger should not "diminish the manufacturer's responsibility,"¹⁸⁵ the court introduced alternative risk-utility criteria for imposing liability on the consumer.¹⁸⁶ *Barker* also acknowledged Professor John W. Wade's observation that consumers often do not know what to expect or how safe a product can be made, thus preventing consumer expectations from being the "exclusive yardstick for evaluating design defectiveness."¹⁸⁷

Though *Barker* acknowledged the shortcomings of the Restatement (Second)'s test, the aim was not for risk-utility to supersede consumer expectations, but instead to supplement a plaintiff's options for proving excessively dangerous designs.¹⁸⁸ The *Barker* court makes clear that its decision is meant to promote the goals of products liability to relieve the plaintiff's evidentiary burden.¹⁸⁹ In furtherance of this commitment, the court clarifies that a plaintiff must only make a prima facie showing that they were injured, after which the burden shifts to the defendant to show that the product is not defective.¹⁹⁰ Through this shift, *Barker* aimed to relieve plaintiffs of the burden of proof for "technical matters peculiarly within the knowledge of the manufacturer."¹⁹¹

Advocates of consumer protection in products liability applauded *Barker*. Professor Gavin cited California's spearheading of the two-pronged test as another step in its "tradition of being on the cutting-edge of products liability doctrine expanding consumer rights."¹⁹² Professor Douglas Kysar has also supported courts' use of the two-pronged test as a "sensible" alternative to either individual standard, suggesting it promotes "both maximization of utility and respect for qualitative nuances that might be missed in purely technical analysis."¹⁹³

Though California departed from this permissive two-pronged standard in 1994,¹⁹⁴ other states have kept the *Barker* precedent alive.¹⁹⁵ However, not all have maintained the test's exact form, with some jurisdictions removing the consumer-friendly burden shift in the second prong of *Barker*. Tennessee, for instance, adopted a two-pronged test in *Ray by Holman v. BIC Corp.*,¹⁹⁶ referring to the risk-utility prong as a "prudent manufacturer

184. *See id.* at 445–46.

185. *Id.* at 451.

186. *See id.* at 455–56.

187. *Id.* at 454 (citing John Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 829 (1973)).

188. *See id.*

189. *See id.* at 455.

190. *See id.*

191. *Id.*

192. Gavin, *supra* note 2, at 454 n.126.

193. *See Kysar, supra* note 58, at 1782.

194. *See infra* Part II.B.1 for a discussion of *Soule v. Gen. Motors Corp.*, 882 P.2d 298 (Cal. 1994).

195. *See supra* notes 92–95 and accompanying text.

196. 925 S.W.2d 527 (Tenn. 1996).

test.”¹⁹⁷ The court recognized that the two-pronged model could form the basis for liability across more cases than either standard could alone, opening up a greater range of tools for the plaintiff; but the court declined to go as far as to reduce their burden of proof.¹⁹⁸ Professor John F. Vargo has coined this variation of the two-pronged standard the “Modified *Barker* Test.”¹⁹⁹ Though the Modified *Barker* Test does not shift the plaintiff’s burden of proof, Professor Vargo still views it as distinct from the pure risk-utility stance of the Restatement (Third) because the consumer expectations prong maintains the heart of strict products liability.²⁰⁰

Other jurisdictions, like Hawaii, were not so clear about the burden shifting in their original adoption of *Barker*. The Supreme Court of the State of Hawaii switched to the two-pronged test in *Ontai v. Straub Clinic & Hospital Inc.*²⁰¹ The plaintiff in *Ontai* appealed from a directed verdict after the lower court ruled it was “common sense” that there was no design defect in a hospital footrest.²⁰² The state supreme court disagreed.²⁰³ First, the court clarified that under either prong of *Barker* the plaintiff need not demonstrate that the footrest was dangerous beyond an ordinary user’s contemplation, but simply that the design rendered the footrest dangerous beyond foreseeable use.²⁰⁴ Then, reversing the lower court, *Ontai* ruled that the plaintiff did show enough evidence of alternative design and state-of-the-art technology to reasonably find for the plaintiff.²⁰⁵

Despite this reversal, *Ontai* did not clarify exactly how the *Barker* test would function in Hawaii. First, it left open the question of whether the burden of proof actually shifts under the second prong of *Barker*.²⁰⁶ Instead, the court simply stated that the plaintiff “me[t] his burden” and exclusively cited risk-utility evidence to support that statement.²⁰⁷ It was not until six years later, in *Masaki v. General Motors Corp.*,²⁰⁸ that the Supreme Court of the State of Hawaii clearly established that the risk-utility burden does indeed shift to the defendant.²⁰⁹ *Ontai* also left unanswered the issue of how Hawaii juries should consider the evidence within each of the *Barker* prongs. True, *Ontai* determined that the plaintiff’s expert evidence could indicate the product “was in some way dangerously defective.”²¹⁰ However, it did not

197. *See id.* at 533 (“[I]t is obvious that the prudent manufacturer test set out in our statute and the analysis which plaintiff refers to as the risk-utility test are substantially the same.”).

198. *See id.*

199. *See* Vargo, *supra* note 75.

200. *See id.* (“[A] Modified Barker rule maintains strict liability in the first step by applying the Ordinary Consumer Expectation Test and continues to maintain it in the second step by using alternative rules of strict liability.”); *see also* Vargo, *supra* note 42, at 552.

201. 659 P.2d 734 (Haw. 1983).

202. *Id.* at 740.

203. *See id.* at 742.

204. *See id.* at 740.

205. *See id.* at 742.

206. *Id.* at 740–43.

207. *Id.*

208. 780 P.2d 566 (Haw. 1989).

209. *See id.* at 579.

210. *Ontai*, 659 P.2d at 742.

provide guidance for which prong(s) this danger could be found under, nor did it indicate whether either prong would change the evidentiary relevance of certain factors.²¹¹

Other two-pronged jurisdictions, however, have concluded that this evidence is relevant under either test. When shifting to the *Barker* standard in *Falk v. Keene Corp.*,²¹² Washington state recognized the universal value of evidence relating to industry custom, design feasibility, and regulatory compliance.²¹³ The state supreme court reasoned that, though these factors were only mentioned explicitly in the state's statute authorizing risk-utility analysis, they could be equally relevant under the state's alternative statute authorizing the consumer expectations test.²¹⁴ For instance, "it may be unreasonable for a consumer to expect product design to depart from [regulatory] standards, even if to do so would result in a safer product."²¹⁵ *Falk* "draw[s] attention to the consistency between [both tests]" and their evidentiary overlap, even if they may come to differing results on liability.²¹⁶ Moreover, the court noted that Washington lawmakers' recognition of both standards is consistent with the state legislature's goal to avoid any undue impairment of a consumer's right to recover from unsafe products causing injuries.²¹⁷

Falk highlights a theme consistent within the *Barker* jurisdictions—an embrace of an injured plaintiff's unencumbered right to recover. The twin test recognizes that neither of these tests are perfect, yet it also sees the use of both tests as a way to capture the nuances within the full spectrum of evidence that might slip through the cracks if only one standard is recognized.²¹⁸

B. Defect Standards with Restrictions on the Consumer Expectations Test

On the other end of the spectrum, many jurisdictions either restrict or have entirely eliminated the consumer expectations standard. Instead, these states require a risk-utility analysis under some or all circumstances. Part II.B.1 will explore the reason why some jurisdictions have employed a bifurcated standard, which only permits consumer expectations on a limited basis, but otherwise requires risk-utility. Part II.B.2 will discuss the logic behind states and scholars that have fully rejected consumer expectations as a viable standard, relying solely on the risk-utility standard for proving design defect.

211. *See id.*

212. 782 P.2d 974 (Wash. 1989).

213. *See id.* at 980.

214. *See id.*

215. *Id.*

216. *Id.*

217. *Id.* at 979.

218. *See Kysar, supra* note 58, at 1782.

1. Bifurcated Standards Barring the Consumer Expectations Test in Complex Cases

Some jurisdictions, although not entirely dismissive of the consumer expectations standard's benefit, are skeptical of its use across all situations. These states hold that the consumer expectations test is ill-suited to situations where consumers cannot form expectations properly by their own inferences. As a result, these courts have restricted the availability of the consumer expectations standard.

After years of being at the "forefront" of the proconsumer tort movement, California began to swing toward a standard more favorable to defendants by the tail end of the twentieth century.²¹⁹ This culminated in *Soule v. General Motors Corp.*,²²⁰ which overruled the state's influential *Barker* standard.²²¹ Under *Soule*, the California Supreme Court ruled that, where no inference of consumer safety expectations can be drawn, the jury must exclusively engage in risk-utility analysis.²²² Unlike the permissive *Barker* standard, which grants plaintiffs freedom to bring their case under either prong,²²³ *Soule* creates a bifurcated standard that bars the consumer expectations standard at the court's discretion.²²⁴

Although the court declined to make a hard-line rule that every complex case with technical issues will fall under this standard,²²⁵ *Soule* established that almost any case involving expert opinions must be proven under risk-utility.²²⁶ The only exception to this is for expert testimony from industrial or trade professionals about their expectations for niche machinery, which juries can still consider under the consumer expectations standard.²²⁷ The rationale for this carve-out is that the users already have specialized knowledge of their trade, so this evidence elaborates on what the ordinary user of the product would expect.²²⁸

This shift away from the permissive use of consumer expectations was in part due to a growing anxiety in the legal community that consumers no longer understood how most of their everyday products worked, and thus could not have reasonable expectations about them. In part, the Restatement (Third)'s drafters' support of risk-utility analysis grew from the idea that consumer expectations could not keep pace with the increasing sophistication

219. Gavin, *supra* note 2, at 454.

220. 882 P.2d 298 (Cal. 1994).

221. *Id.* at 309.

222. *Id.*

223. *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

224. *Soule*, 882 P.2d at 309.

225. *Id.*

226. *See id.* at 308.

227. *See id.* at 308 n.4; *e.g.*, *Lunghi v. Clark Equip. Co.*, 200 Cal. Rptr. 387, 393 (Ct. App. 1984) ("[A]ppellants are free to present evidence in the form of expert opinions on the reasonable expectations of consumers of the product involved here, which is outside the experience of ordinary consumers.").

228. *See Vetri, supra* note 49, at 1387.

of the average product.²²⁹ Professor Keith N. Hylton asserted that although the consumer expectations test may be more “socially preferable” in an ideal setting, it unfortunately fails to function in the real world of modern products.²³⁰

A prime example of this—and the subject of litigation in *Soule*—is automobiles.²³¹ The average person cannot accurately assess the risk of every feature in a vehicle.²³² No reasonable consumer “would possess risk beliefs . . . for [all] 30,000 [car] parts,” meaning no reasonable consumer could accurately balance the risks and benefits before purchasing.²³³ Yet “[e]ach of these features could form the basis of a products liability lawsuit.”²³⁴ Furthermore, cars involve an inherent degree of risk, some of which the consumer does not contemplate.²³⁵

Expert testimony can help overcome this problem. Where consumers might struggle to form accurate expectations for technical product safety, experts can inform a jury about what those expectations are, including risks and alternatives.²³⁶ Because no product is perfectly safe, experts can speak to “whether the design was an acceptable compromise of the multiple considerations including safety, functionality, cost, and aesthetics.”²³⁷

This raises the question of how appropriate a test based on consumer expectations would be if expert testimony is necessary to tell the jury how the risks of a product should have informed a consumer’s expectations.²³⁸ *Soule* confronted this same question.²³⁹ The Supreme Court of California pointed out the irony of cases applying the consumer expectations test where “expert testimony on what the consumer *should* expect” outweighed the plaintiff’s own testimony of their expectations.²⁴⁰ Rather than jumping through these hoops to allow consumer expectations, *Soule* opted to limit the test only to cases where consumers’ “everyday experience” would permit a conclusion “regardless of expert opinion.”²⁴¹ This reasoning is reflected in the cases adopting *Soule* in other states, such as *Cavanaugh v. Stryker Corp.*²⁴² in Florida, where the court ruled consumers could not form

229. See Henderson & Twerski, *supra* note 59, at 688–89 (suggesting consumer expectations “abandons technology as the cornerstone of rational products litigation” and is of limited use in our “world of incredible technological sophistication”).

230. Hylton, *supra* note 64, at 2460.

231. See generally *Soule*, 882 P.2d 298.

232. See Hylton, *supra* note 64, at 2490.

233. See Clayton J. Masterman & W. Kip Viscusi, *The Specific Consumer Expectations Test for Product Defects*, 95 IND. L.J. 183, 205 (2020).

234. Hylton, *supra* note 64, at 2490.

235. See *id.*; see also Vetri, *supra* note 49, at 1385.

236. See Masterman & Viscusi, *supra* note 233, at 192.

237. Vetri, *supra* note 49, at 1385.

238. See *id.* at 1387, 1392.

239. See *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 306 (Cal. 1994).

240. *Id.* at 307 (citing *Rosburg v. Minn. Mining & Mfg. Co.*, 226 Cal. Rptr. 299, 303–04 (Ct. App. 1986)).

241. *Id.* at 308.

242. 308 So. 3d 149 (Fla. Dist. Ct. App. 2020).

expectations about a medical device.²⁴³ Because ordinary consumers would neither purchase these products nor be the target of the manufacturer's marketing, they could have no relevant expectations besides "those of the health care professional."²⁴⁴

Another function of *Soule*'s framework is jury control. Reasonable consumers are unlikely to contemplate all the risks and side effects of the products they use, so they may not have any expectations—besides a general expectation that they will not be harmed.²⁴⁵ This was illustrated in the caselaw considered by *Soule*, including one dispute where the recipient of breast implants had expectations heavily at odds with the general advice provided by surgeons.²⁴⁶ Both parties in the aforementioned case waived a jury trial, so it is unclear how a jury would have ruled,²⁴⁷ but *Soule* exhibits concerns for how this type of consumer testimony may skew verdicts.²⁴⁸ Under any standard that finds liability based on the consumer expectations test alone, including the classic two-pronged *Barker* test, there is a fear that juries may not properly incorporate expert evidence about risks into their expectations.²⁴⁹ As the authors of the Restatement (Third) put it, "[i]n the teeth of technical expert testimony that a proffered alternative design would not have avoided the plaintiff's injury," a jury using the *Barker* test would be "permitted to turn its head and reach the intuition-based conclusion that the product failed consumer expectations."²⁵⁰

The result of this potential loophole, according to critics, is that consumer expectations can be used to explain away "most any result that a court or jury chooses to reach."²⁵¹ They fear that if jurors are permitted to "draw on their own life experiences rather than rely on proof adduced by the parties," the system is based on nothing more than a "jury's whim."²⁵² Instead, the drafters of the Restatement (Third) contend that expert testimony should only be analyzed using a risk-utility perspective.²⁵³ *Soule* echoes this sentiment, stating that the jury must follow the facts presented and "may not be left free to find a violation of ordinary consumer expectations whenever it chooses."²⁵⁴

However, this does not necessarily mean that consumer expectations is discarded altogether under the risk-utility prong of *Soule*. Indeed, consumer

243. *See id.* at 155.

244. *Id.* at 155–56.

245. *See* Henderson & Twerski, *supra* note 56, at 878.

246. *See Soule*, 882 P.2d at 307 (citing *Rosburg v. Minn. Mining & Mfg. Co.*, 226 Cal. Rptr. 299, 303–04 (Ct. App. 1986)).

247. *See Rosburg*, 226 Cal. Rptr. at 302.

248. *See Soule*, 882 P.2d at 307–08.

249. *See* Henderson & Twerski, *supra* note 59, at 680.

250. *Id.*

251. Henderson & Twerski, *supra* note 56, at 904.

252. Twerski & Henderson, *supra* note 55, at 1066–67. *But see* James A. Henderson, Jr., *Tort vs. Technology: Accommodating Disruptive Innovation*, 47 ARIZ. ST. L.J. 1145, 1161 (2015) (discussing how evidence of deviation from an industry's standards and customs is often persuasive to juries).

253. *See generally* Henderson & Twerski, *supra* note 59.

254. *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 309 (Cal. 1994).

expectations remains one of the factors for risk-utility analysis listed in the Restatement (Third).²⁵⁵ This reasoning is fleshed out by the Supreme Court of Illinois in *Mikolajczyk v. Ford Motor Co.*²⁵⁶ Though Illinois did not adopt a *Soule* standard per se, it did apply a similarly bifurcated standard that requires risk-utility analysis in any case where a party presents risk-utility evidence.²⁵⁷ *Mikolajczyk* reasoned that the consumer expectations inquiry is a single factor test that is “narrow in scope,” whereas risk-utility is an integrated standard weighing many factors, including consumer expectations.²⁵⁸ This integrated standard would allow jurors to adequately consider that factor while still performing a wider risk-utility analysis.²⁵⁹

2. Exclusive Risk-Utility

While *Soule* still permits use of the consumer expectations test where consumers can make reasonable inferences about products, other states deny the test outright. These jurisdictions go further than *Soule* to require risk-utility analysis in all cases, reflecting greater adherence to the test supported by the Restatement (Third). Part II.B.2.a will discuss the intuition-based reasons for exclusively adhering to risk-utility, and Part II.B.2.b will discuss the vagueness and clarity reasons for this adherence.

a. Intuition-Based Concerns

Similar to the concerns in *Soule*, advocates for a pure risk-utility test point to the problems with intuition-based decisions clouding juror’s minds. The drafters of the Restatement (Third) argue that under consumer expectations, the defect itself and causation are merged,²⁶⁰ and the jury is allowed to “wantonly [disregard]” causation evidence in favor of an intuition-based *res ipsa* judgment.²⁶¹ The drafters note that they are not alone in this line of thought and that their contemporaries, such as Professor Marshall S. Shapo, agree that jury intuitions “generate seriously uneconomic conceptions of [design] defect.”²⁶² These intuitions may even allow a jury to compare a product to nothing but a theoretical ideal that is unattainable under technical or economic constraints.²⁶³

Though jurors might believe that this encapsulates a fairness-based standard, the Restatement (Third) drafters suggest it is “incoherent” and “so vague as to be lawless.”²⁶⁴ Critics claim it threatens to hold manufacturers

255. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (Am. L. Inst. 1998).

256. 901 N.E.2d 329 (Ill. 2008).

257. See *id.* at 352–53.

258. *Id.* at 352.

259. See *id.*

260. See Henderson & Twerski, *supra* note 59, at 681.

261. *Id.* at 680 n.104, 681.

262. Henderson & Twerski, *supra* note 56, at 903 (quoting MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY, ¶ 9.15(2)(a) (2d ed. 1990)).

263. See Hylton, *supra* note 64, at 2504.

264. Henderson & Twerski, *supra* note 56, at 881–82.

liable “regardless of whether [they] exercised the utmost care,”²⁶⁵ and even when their “products perform exactly as intended.”²⁶⁶ This “enterprise liability,” as the drafters call it, would open up the door to an endless flood of frivolous claims with little to no merit.²⁶⁷

Within this concern is a desire to avoid a world where manufacturers are responsible for preventing every possible injury. As the Supreme Court of Georgia declared, in *Banks v. ICI Americas, Inc.*,²⁶⁸ “a manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury.”²⁶⁹ This aligns with a common view among tort reform scholars that, because no product is “perfectly safe,”²⁷⁰ consumers can only expect design engineers to exercise a reasonable level of care based on the knowledge and skill they possess.²⁷¹ Similarly, the *Banks* court reiterates that “although the benefits of safer products are certainly desirable, there is a point at which they are *outweighed* by the cost of attaining them.”²⁷² For the state of Georgia, “which has long applied negligence principles in making [design defect] determination[s],” *Banks* declared that risk-utility analysis was in line with this tradition.²⁷³

Also within *Banks* is the adoption of another hallmark of the Restatement (Third): a RAD requirement. Considered by the court to be “integral” to the utility assessment,²⁷⁴ RAD is proof that it was possible for the manufacturer to make different design choices that would have prevented injury.²⁷⁵ The Supreme Court of Georgia found that RAD evidence “diminishes the justification” for using the defective design because it would have been most reasonable to pick the safest available one.²⁷⁶ As Restatement (Third) drafter Professor Aaron D. Twerski puts it, RAD “points the finger at the defendant” because they “could have saved the client from serious injury” with different design choices.²⁷⁷

This blameworthiness concern plays a large role in the risk-utility perspective. As opposed to consumer expectations, which is fault neutral by

265. Cami Perkins, Note, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609, 614 (2004).

266. Twerski & Henderson, *supra* note 55, at 1065–66.

267. *See id.*

268. 450 S.E.2d 671 (Ga. 1994).

269. *Id.* at 675.

270. Vetri, *supra* note 49, at 1385.

271. *See* Henderson & Twerski, *supra* note 56, at 904 (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 699 (W. Page Keeton ed., 5th ed. 1984)).

272. *Banks*, 450 S.E.2d at 674 (quoting *Hunt v. Harley-Davidson Motor Co.*, 248 S.E.2d 15, 16 (Ga. 1978)).

273. *Id.*

274. *Id.* at 674.

275. *See* Twerski, *supra* note 53, at 1218.

276. *Banks*, 450 S.E.2d at 674.

277. Twerski, *supra* note 53, at 1219.

design,²⁷⁸ RAD requirements impose negligence via but-for causation.²⁷⁹ The drafters of the RAD requirement in the Restatement (Third) suggest that liability is only “warranted from a fairness perspective” if the manufacturer breached some duty to the consumer.²⁸⁰ They insist that, absent a clear alternative for a manufacturer to have taken, there is nothing the manufacturer could have done to avoid the injury, and therefore, no reason to hold them responsible.²⁸¹

Proponents of RAD evidence also claim that it reduces jury “guesswork” about a product’s unreasonable danger by supplying an expert-approved comparison point for lay jurors to work with.²⁸² Risk-utility scholars insist that adequate design alternatives be left to experts to determine because the court adjudication process “is not institutionally suited to establishing product safety standards.”²⁸³ The RAD requirement binds a jury’s intuitions to reasonable alternatives that exist or could exist,²⁸⁴ limiting their scope to the logical and technical circumstances of the case.²⁸⁵

Notably, although the Restatement (Third) includes a requirement for a RAD, not all risk-utility jurisdictions require it. New Hampshire declined to require RAD evidence in *Vautour v. Body Masters Sports Industries*,²⁸⁶ though plaintiffs may still choose to bring it.²⁸⁷ Nevertheless, New Hampshire’s caselaw still aligns with the Restatement (Third)’s position insofar as it does not view strict liability as a “no-fault system of compensation.”²⁸⁸

For risk-utility jurisdictions, RAD requirement or not, there is a general consensus that “absolute safety is not attainable,” nor is it the “sole desirable objective” of most product designs.²⁸⁹ Therefore, risk-utility jurisdictions, whether through RAD or other listed factors of the analysis, tend to limit a jury’s scope to the logical and technical circumstances of the case.²⁹⁰

b. Avoiding Vagueness

Beyond just keeping jurors from intuition-based reasoning, risk-utility jurisdictions insist their standard avoids other practical issues as well. A frequent challenge for courts using the consumer expectations standard is the

278. See Vetri, *supra* note 49, at 1399 (criticizing RAD requirements for defeating “one of the most significant justifications for strict products liability”—namely, a departure from fault-based negligence standards).

279. See Henderson & Twerski, *supra* note 59, at 661.

280. *Id.* at 662.

281. See *id.*

282. See Hylton, *supra* note 64, at 2504.

283. James A. Henderson, Jr., *Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1540 (1973).

284. See *id.*

285. Henderson & Twerski, *supra* note 59, at 681.

286. 784 A.2d 1178 (N.H. 2001).

287. See *id.*

288. *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 845–46 (N.H. 1978).

289. Henderson, *supra* note 283, at 1540.

290. Henderson & Twerski, *supra* note 59, at 681.

question of who the average consumer is and what that average consumer expects.²⁹¹ Some consumers may know the risks, whereas others may be less informed, obscuring a jury's calculations on the average or reasonable level of awareness.²⁹²

This inquiry is especially difficult when handling injured parties with differing expectations from the average consumer.²⁹³ Children plaintiffs, who “typically have no safety expectations” at all, are at particular risk for this.²⁹⁴ For instance, in *Price v. BIC Corp.*,²⁹⁵ New Hampshire faced the issue of determining if a lighter was an open and obvious danger when it burned a three-year-old.²⁹⁶ Under existing precedent, this danger was to be considered from the point of view of the parents as a stand-in, rather than the child.²⁹⁷ However, because a lighter's danger is obvious to an adult, the classic consumer expectations standard would bar recovery under the “patent danger rule,” regardless of how feasible and uncostly the alternative may be.²⁹⁸ To avoid this, *Price* remanded with instructions to apply risk-utility analysis instead, offering the plaintiff another chance at recovery.²⁹⁹

This problem of employing a stand-in for consumer expectations is not exclusive to child plaintiffs. It can also arise when the injured party *is* a theoretically reasonable consumer but remains distinct from the initial purchaser.³⁰⁰ For instance, a bystander likely has differing expectations for an automobile than its driver, given that each is prioritizing their own safety, yet only the latter contemplated the risks of that specific vehicle when they purchased it.³⁰¹ Depending on whose expectations the jury considers, a car that poses unreasonable danger to bystanders, but not occupants, may escape manufacturer liability.³⁰² Similarly, employers may not value workplace

291. See Masterman & Viscusi, *supra* note 233, at 194 (discussing court division on the “identity of the ordinary consumer”).

292. See Hylton, *supra* note 64, at 2490; Henderson & Twerski, *supra* note 56, at 880–81 (“[W]hat independent standard would courts apply to determine that these expectations are unreasonable? . . . Is the ordinary consumer to be characterized as risk-averse or risk-preferring? Is the ordinary consumer willing to sacrifice aesthetics, economy, or ease of repair for greater safety?”).

293. See Vetri, *supra* note 49, at 1373.

294. *Id.* at 1390.

295. 702 A.2d 330 (N.H. 1997).

296. See *id.* at 331.

297. See *id.* at 332 (citing *Bellotte v. Zayre Corp.*, 352 A.2d 723, 725 (N.H. 1976)).

298. See Vetri, *supra* note 49, at 1388. For a deeper discussion of the patent danger rule and the loophole it creates within the consumer expectations test, see Henderson & Twerski, *supra* note 56, at 892; Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 570, 570 (1982) (“Children[,] . . . incapable of assuming risks, have been denied recovery [under] the patent danger rule.”).

299. See *Price*, 702 A.2d at 333.

300. See Corboy, *supra* note 26, at 1088.

301. See Vetri, *supra* note 49, at 1389 (“[M]any individuals buy SUVs because they believe them to be safer Unfortunately, the higher bumpers on many SUVs present a major vehicle-penetration risk [This] has resulted in many serious injuries to the occupants in other cars.”).

302. See Kevin Case, Note, *Tanks in the Streets: SUVs, Design Defects, and Ultrahazardous Strict Liability*, 81 CHI.-KENT L. REV. 149, 150 (2006) (citing *De Veer v.*

safety as highly as the employees themselves, considering they are often shielded from liability by workers compensation statutes.³⁰³ When employers are the ones purchasing and benefiting from machinery, but a less knowledgeable operator is injured, whose expectations do juries consider?³⁰⁴

The outcome all hinges on whom the jury considers to be the “consumer.”³⁰⁵ Certainly, third-party expectations must be added to the “calculus” somehow,³⁰⁶ but the Restatement (Second) leaves the question open.³⁰⁷ In lieu of a clear answer, courts have differed in their bystander analysis.³⁰⁸ Some introduce risk-utility factors to altogether circumvent the questions surrounding a bystander’s incomplete expectations, but others adhere to the consumer expectations approach by expanding the doctrine to cover bystanders or other related third parties.³⁰⁹

Supporters of the Restatement (Third) insist that risk-utility is more appropriate—not merely for circumstances with third parties, but as analysis that works consistently across all plaintiffs and expertise.³¹⁰ They note that a bystander expectations test is riddled with uncertainty about what they may or may not have considered, leaving juries to “evaluate the product in light of expectations that are likely to be nonexistent.”³¹¹ This leads back to the same issue as evaluating expectations for complex products, where a consumer may have little more than “an unconscious hope” that a product is safe.³¹² Bystanders have even less chance to evaluate risks than unknowing consumers, resulting in even vaguer expectations.³¹³

This vagueness may also lead to economic consequences. If manufacturers cannot reasonably predict what consumers—or bystanders—expect, they cannot accurately design with these expectations in mind, thus dampening the deterring effect of products liability on unsafe products.³¹⁴ Not only does this result in inefficient product utility, it also has a “market-shrinking effect,” under which manufacturers and insurers overpredict the costs of litigation and pass these on to consumers.³¹⁵ Most

Land Rover N. Am., Inc., No. B141538, 2001 WL 34354946, at *1 (Cal. Ct. App. Aug. 14, 2001)) (explaining the grounds for granting summary judgment to the defendant, in large part due to the manufacturer owing a duty of care only to passengers in the vehicle, provided that the defect did not cause the crash itself).

303. See Hylton, *supra* note 64, at 2507–08.

304. See *id.*

305. See Vetri, *supra* note 49, at 1389–90 (comparing the differences in product knowledge between bystanders and consumers).

306. *Id.* at 1390.

307. See Kysar, *supra* note 58, at 1716 (noting a lack of guidance from the consumer expectations test if plaintiffs are bystanders).

308. See Vetri, *supra* note 49, at 1390 nn.96–99 (collecting cases).

309. *Id.*; e.g., Horst v. Deere & Co., 752 N.W.2d 406, 410 (Wis. Ct. App. 2008).

310. See Vetri, *supra* note 49, at 1390.

311. See Kysar, *supra* note 58, at 1716.

312. John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 823 (1976); see *supra* Part II.B.2.a.

313. See Vetri, *supra* note 49, at 1390.

314. See Masterman & Viscusi, *supra* note 233, at 225.

315. See Hylton, *supra* note 64, at 2490.

importantly, unclear standards may disincentivize firms from investing in safer products, instead “accept[ing] damages as a cost of doing business.”³¹⁶

The consumer expectations standard’s vagueness may be circumvented by applying risk-utility instead. The authors of the Restatement (Third) insist that the risk-utility perspective requires jurors to employ the perspective “of achieving reasonable design safety from an over all, societal standpoint, not the more subjective perspective of personal . . . psychological expectations.”³¹⁷ Under risk-utility, these scholars argue, there is significantly more structure—both for jurors to base their verdict on³¹⁸ and for manufacturers to base their design decisions on.³¹⁹

Despite these difficulties, courts adhering to the consumer expectations standard have attempted to fill the gaps by asking the jury what a *reasonable consumer* would expect instead.³²⁰ The hypothetical reasonable consumer has the necessary information to form an expectation, which is provided to the jury in the form of expert testimony.³²¹ Yet a “reasonable consumer” standard transforms the descriptive test into a normative one, asking what a consumer would choose if they knew all the risks and alternatives.³²² This pushes consumer expectations into a standard that Professor Mark Geistfeld declares to be indistinguishable from risk-utility.³²³ Other scholars too, such as Professor Dominick Vetri, insist that this convergence eliminates a meaningful distinction between the tests, and that it only further proves the necessity of risk-utility analysis to make consumer expectations a useable standard.³²⁴

III. REEVALUATING THE MODERN CONSUMER EXPECTATIONS TEST AGAINST ITS CRITIQUES AND PRACTICAL APPLICATION

This part will analyze how the modern versions of the consumer expectations standard from Part II.A stack up against the critiques against it from Part II.B and whether the test remains a necessary component of design defect litigation. Part III.A will put the practical critiques of the consumer expectations standard up against the pressure test of actual consumer expectations litigation and scholarship, finding that most—if not all—of the reasons for rejecting the standard are based on a caricature of consumer

316. Masterman & Viscusi, *supra* note 233, at 225; *see also id.* at 208 (“Because care is costly, firms will favor less safe levels until the probability of damages is sufficiently high to justify increasing the level of safety.”).

317. Henderson & Twerski, *supra* note 56, at 882–83 (internal quotations omitted).

318. *See* Hylton, *supra* note 64, at 2490.

319. *See* Henderson & Twerski, *supra* note 59, at 667 (“Given the integrity made possible by this give and take, manufacturers are presumably better able to respond intelligently and productively to the signals sent to them by the products liability system.”).

320. *See, e.g.,* Potter v. Chi. Pneumatic Tool Co., 694 A.2d 1319, 1333 (Conn. 1997). For a full discussion of this modification to consumer expectations, *see supra* Part II.A.2.

321. *See* Vetri, *supra* note 49, at 1392.

322. *See id.*

323. *See* Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 BROOK. L. REV. 781, 790–91 (2009).

324. *See* Vetri, *supra* note 49, at 1400.

expectations that does not accurately reflect the test's capabilities. Subsequently, Part III.B will discuss the reasons why the consumer expectations test is necessary to strict products liability jurisprudence and vouch for its inclusion in all jurisdictions.

A. Practicality and the "Naïve Juror Critiques" Are Not Valid Criticisms of the Consumer Expectations Standard

This part will examine how the practical critiques, which this Note will refer to as the "naïve juror critiques" of the consumer expectations test, fail to accurately judge the capabilities of the design defect standard. Part III.A.1 discusses the ways in which the consumer expectations standard handles complex evidence and expert testimony in sophisticated litigation. Part III.B.2 then analyzes how a modern consumer expectations inquiry stands up to the clarity issues raised by risk-utility supporters and how the standard remains distinct from risk-utility analysis.

1. The Consumer Expectations Standard Trusts Jurors to Weigh Expert Evidence

Many of the problems that scholars and courts identify with consumer expectations involve the test's ability to handle sophisticated litigation coherently.³²⁵ In particular, these courts question how the consumer expectations test handles expert testimony and allows the jury to use—or disregard—this evidence.³²⁶ Yet contrary to this narrative, courts adhering to the consumer expectations test recognize the necessity of such evidence. Rather than eschewing expert evidence as incompatible with their jurisdiction's defect standard, every consumer expectations jurisdiction welcomes its use—both to educate a jury and to prove that a product failed to meet safety standards.³²⁷

Consumer expectations jurisdictions frequently handle complex design defect litigation of the same level of sophistication as risk-utility states. For instance, automobile design defect cases are frequently cited as examples of why the consumer expectations standard is unworkable, yet these cases are frequently litigated within consumer expectations jurisdictions despite the technical expert testimony involved.³²⁸ The most obvious example is in modified consumer expectations states, where risk-utility factors are embedded within the consumer expectations test as a means of guiding the jury towards determining reasonable expectations.³²⁹ Yet even classic consumer expectations states like Kansas "recognize the validity of risk/utility analysis as a guide in determining the expectations of

325. See *supra* Part II.B.1.

326. See, e.g., *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

327. See *infra* notes 328–32 and accompanying text.

328. See, e.g., *supra* notes 175–80.

329. See *supra* Part II.A.2 (discussing the elements of a modified consumer expectations inquiry).

consumers.”³³⁰ These states are permissive toward expert evidence, even when it takes the form of risk-utility factors.³³¹ The same pertains to RAD evidence, which, although not required by most consumer expectations states, is welcomed for its probative value to a jury.³³²

In fact, there is only one jurisdiction in the country that recognizes consumer expectations but limits the evidence that can be considered under it: California.³³³ It is unsurprising that the one exception to consumer expectation’s liberal evidence admissibility is not actually a consumer expectations state, but the state that funnels all expert inquiries through the risk-utility standard.³³⁴ This more restrictive *Soule* model presupposes that any discussion of design beyond what a consumer might already reasonably know will inevitably extend beyond the ability of jurors to form a concept of reasonable expectations. In essence, it characterizes the jury as too naïve to judge the evidence for themselves.

Yet this caricature ignores the reality of what jurors are asked to do in every case in America. Juries are often required to weigh unfamiliar evidence and come to a legal conclusion based on a reasonable person standard.³³⁵ As the backbone of American trials, jurors are trusted to handle everything from political corruption cases³³⁶ to patent disputes,³³⁷ many of which involve consequential or complicated issues.³³⁸ Though certain areas of law, like intellectual property, may warrant stricter procedures given the exceptional sophistication of the parties and the dispute,³³⁹ product liability suits deal with injuries from everyday plaintiffs using everyday products. There is no reason why lay jurors are not equipped to evaluate expert evidence for a case revolving around consumer use.

Soule insists that jurors may be confused by testimony from the plaintiff regarding expectations in comparison with expert evidence about expectations.³⁴⁰ However, it is not at all unusual—and may even be a feature of trials—for jurors to hear conflicting testimonies from both lay and expert witnesses.³⁴¹ Credibility of witnesses is an issue for the jury, and an expert’s

330. *Delaney v. Deere & Co.*, 999 P.2d 930, 944 (Kan. 2000); *see also* *Ford Motor Co. v. Trejo*, 402 P.3d 649, 655 (Nev. 2017).

331. *See supra* notes 134–46 and accompanying text.

332. *See supra* notes 125–27 and accompanying text.

333. *See* Twerski, *supra* note 53, at 1229–30 (citing *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308–09 (Cal. 1994)).

334. *See supra* Part II.B.1 for a discussion of *Soule*.

335. *See Trejo*, 402 P.3d at 655; *see also supra* notes 143–46 and accompanying text.

336. *See* Ruth Igielnik, *Americans Still Put Their Trust in Juries. Will Trump’s Trials Break That Faith?*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/2023/08/28/us/juries-trust-trump-trials.html> [https://perma.cc/3M7Q-U4JP].

337. *See* Philippe Signore, *On the Role of Juries in Patent Litigation (Part 1)*, 83 J. PAT. TRADEMARK OFF. SOC’Y 791, 795 (2001).

338. *See supra* notes 335–37.

339. *See* Signore, *supra* note 337, at 795.

340. *See Soule v. Gen. Motors Corp.*, 882 P.2d 298, 307 (Cal. 1994).

341. *See* Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, 20 CURRENT DIRECTIONS IN PSYCH. SCI. 63, 64 (2011).

qualifications will already advantage the weight of their testimony.³⁴² *Soule*'s reasoning regarding jury confusion or inability to distinguish reliable and unreliable evidence is unconvincing, and furthermore, it ignores the jury's role as the trier of fact.

A similar claim is that juries are too sympathetic to plaintiffs to accurately deliver a verdict without sufficient guardrails like risk-utility analysis and RAD requirements.³⁴³ On the contrary, despite the tidal wave of antijuror sentiment lobbed by the prodefendant tort reform movement,³⁴⁴ this claim turns out to be nothing but fiction when analyzing studies.³⁴⁵ Rather than the stereotypes of "runaway" jury awards,³⁴⁶ the reality is that modern jurors have negligible bias toward plaintiffs, delivering comparable awards to those delivered by judges.³⁴⁷ There is little reason to believe that juries in products liability suits are any different.

The related anti-consumer expectations claim that juries get to decide a consumer's expectations based on nothing but opinion is equally false. Unlike juries in negligence cases deciding how producers *should* have behaved, or juries in Restatement (Third) jurisdictions weighing whether the manufacturer *should* have chosen a different design, juries in consumer expectations jurisdictions are not making a normative call on how a product *should* have behaved "nor even what consumers *should* expect."³⁴⁸ As the *Heaton* court put it, courts have already decided that products must perform as the ordinary consumer expects.³⁴⁹ This is an objective question of fact, rather than an opinion based on right or wrong choices.³⁵⁰ Therefore, when the jury does not have the "experiential basis" for reaching a verdict on their own, the "record must supply such a basis" in the form of factual data.³⁵¹

Rather than a juror's personal intuitions or bleeding-heart sympathies, it is more likely that the perceived variability in consumer expectations verdicts simply arises from inevitable jury variations. Indeed, even when applying the stricter risk-utility standard, courts still comment on the variation in jury verdicts and the "serious" economic consequences of allowing juries to set American product standards.³⁵² Yet, if the heart of the complaint is simply that juries vary their verdicts based on the controlling law and facts at hand

342. See FED. R. EVID. 702; see also 1 STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 10:4 (2023–2024 ed. 2023).

343. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. CONTEMP. PROBS. 269, 294 (1989).

344. See generally Gavin, *supra* note 2 (discussing the lobby behind the tort reform movement).

345. See *supra* notes 147–51 and accompanying text.

346. Corboy, *supra* note 26, at 1081.

347. See *id.*

348. *Heaton v. Ford Motor Co.*, 435 P.2d 806, 809 (Or. 1967) (emphasis added).

349. See *id.*

350. See *id.*

351. *Id.*

352. See, e.g., *Dawson v. Chrysler Corp.*, 630 F.2d 950, 962 (3d Cir. 1980).

(as the Third Circuit would suggest),³⁵³ the issue is not with any specific design defect standard but with the entire basis of the American court system.³⁵⁴ True, juries may inherently vary in their verdicts and opinions, but the argument that they are too naïve or fickle to be trusted with decisions of economic or technical consequence is neither constitutional nor empirically sound.³⁵⁵

For these reasons, any claims that the consumer expectations standard permits decisions based on a “jury’s whim”³⁵⁶ are little more than a red herring. Juries are skeptical of plaintiffs and tend to be swayed by expert testimony and industry standards.³⁵⁷ Furthermore, consumer expectations juries are already weighing the risks and benefits via expert testimony, explicit modified consumer expectation instructions, or both.³⁵⁸ This analysis is encouraged under all standards that freely allow consumer expectations, thus illustrating the rigor that juries can—and do—employ under the standard.

2. Addressing Clarity Concerns in a Consumer Expectations Inquiry

The critique that follows on the heels of the consumer expectations test’s ability to employ risk-utility factors is that the test cannot function without regressing into a risk-utility inquiry. Critics maintain that on its own, the consumer expectations standard faces the fatal flaw of obscurity regarding who the consumer is and what they expect.³⁵⁹ Critics further claim that, in an attempt to solve these issues, consumer expectations jurisdictions simply rehash risk-utility analysis under a different name.³⁶⁰ However, it is clear that this test, in its modern iterations, remains distinct from risk-utility.

It is undeniable that the consumer expectations standard outlined by the Restatement (Second) is an imperfect tool. Certainly, elements of section 402A, such as the patent danger rule, may have prevented recovery against obvious risks.³⁶¹ Furthermore, the test struggles to articulate the expectation calculus for bystanders and third parties.³⁶²

Yet these issues are not insurmountable, and consumer expectations-friendly jurisdictions have found ways to remove these barriers.

353. *See id.* (“[T]his permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards [with] conflicting requirements.”).

354. *See supra* notes 128–31 and accompanying text.

355. *See supra* notes 130, 345–47 and accompanying text.

356. Twerski & Henderson, *supra* note 55, at 1066–67.

357. *See* Henderson, *supra* note 252, at 1161; *see also supra* note 151 and accompanying text.

358. *See supra* notes 328–32 and accompanying text.

359. *See supra* Part II.B.2.b.

360. *See, e.g.,* Geistfeld, *supra* note 323, at 790–91.

361. *See, e.g.,* Kysar, *supra* note 58, at 1717 (“Much of [Section 402A] was in fact designed to prevent consumers from recovering against manufacturers of products, such as kitchen knives, alcohol, or cigarettes, that pose unavoidable health and safety risks.”).

362. *See supra* notes 300–06 and accompanying text.

Almost every state has abandoned the patent danger rule.³⁶³ Instead, courts have opted for a myriad of substitute tests for third-party plaintiffs, or alternatively have chosen to adopt a modified or two-pronged framework.³⁶⁴ Similar to the way that products liability was introduced to fill the gaps, courts continued to modify the consumer expectations standard to fit the needs of the jurisdiction.³⁶⁵ As is the nature of the judiciary, the common law permits evolution of legal standards where justice requires, such as incorporating risk-utility factors when necessary.³⁶⁶

Still, the application of risk-utility factors to consumer expectations should not be mistaken as a convergence with the risk-utility test itself. The inquiry has certainly evolved since the days of the Restatement (Second), but the test remains distinct from risk-utility.³⁶⁷ In each of these consumer expectations jurisdictions, the jury is still permitted to decide defectiveness on the basis of consumer expectations and the product's failure to meet them.³⁶⁸ The evidence that equips the jury to make this decision does not change the overall function of this inquiry.³⁶⁹

As noted by the *Brown* court, the difference lies in the perspective the jury takes when analyzing the different risk factors.³⁷⁰ Even when juries know all the risks, scholars recognize that juries are “less likely to make empirically defensible tradeoffs between risk and utility” than experts, but this is by design.³⁷¹ A lay juror is not the same as an expert manufacturer, nor should they be. To the same effect, a lay juror is also different than a lay consumer, as the lay juror gets to see the whole picture and analyze it from a more objective perspective.³⁷²

The consumer expectations test embraces the jury and its ability to view an issue from multiple perspectives. States that follow the test recognize that juries are never permitted to base their verdict on personal opinion,³⁷³ but also recognize the distinction between a manufacturer perspective and a consumer perspective.³⁷⁴ The consumer expectations test puts jurors in the shoes of a “reasonable consumer,” distinct from either the defendant or the plaintiff.³⁷⁵ Indeed, the reasonable consumer is merely hypothetical and may not even exist in real life. However, this perspective equips the jurors with the risks and alternatives of an expert yet weighs them as a consumer.

363. See 2 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 10:3 (4th ed. 2014).

364. See Vetri, *supra* note 49, at 1389–90; *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978).

365. See *supra* Parts I.A–C.

366. See *supra* Part II.A.3.

367. See *supra* notes 174–76 and accompanying text.

368. See *supra* note 175.

369. See *supra* note 176.

370. See *supra* notes 138–43 and accompanying text.

371. See Hylton, *supra* note 64, at 2510.

372. See *supra* note 176 and accompanying text.

373. See *supra* Part III.A.1.

374. *E.g.*, *Heaton v. Ford Motor Co.*, 435 P.2d 806, 809 (Or. 1967).

375. See Vetri, *supra* note 49, at 1392.

This Note acknowledges that this reasonable consumer sounds dangerously close to the reasonable person of negligence, inviting a critique that it is still indistinguishable. In fact, one of the Restatement (Third) drafters has drawn a similar analogy with “hypothetical reasonable [people]” to show that their design defect standard is no different than negligence.³⁷⁶ But to reiterate, the difference is in whose reasonableness is considered: the manufacturer’s, whose behavior would be under the microscope in a negligence case, or the consumer’s. If it is the latter’s perspective, then the integrity of consumer expectations is maintained. In many cases, the difference may be subtle enough that the result does not change, but, as evinced by many of the precedent-setting cases discussed within this Note, that small shift in perspective is often the difference between recovering and walking away empty-handed.³⁷⁷

Rather than collapsing into risk-utility or negligence, the consumer expectations test can use risk-utility evidence to bridge the gap between the technical and the ordinary. It equips the jury with the tools and information necessary to guide them to a verdict that is still based on the ordinary consumer, rather than the normative question of what the correct design decision would have been.

B. Consumer Expectations Is a Necessary Tool for Design Defect Litigation

This section vouches for the inclusion of the consumer expectations standard in a state’s strict products liability inquiry. Although this Note recognizes the value of risk-utility analysis, this standard alone is not enough to adhere to the spirit of products liability for two reasons. Part III.B.1 will discuss how consumer expectations is necessary to provide a distinct cause of action from negligence to promote plaintiff recovery, unlike the Restatement (Third), which has diametrically opposed goals.³⁷⁸ Part III.B.2 will discuss the importance of a jury trial to products liability cases, and how the elimination of consumer expectations only serves to decrease the chances of plaintiffs reaching a jury.

1. Products Liability Created a Distinct Cause of Action from Negligence That the Restatement (Third) Does Not Maintain

The consumer expectations test is crucial to strict products liability and cannot be fully replaced by the risk-utility analysis of the Restatement (Third). The ALI endorsed the consumer expectations test in part due to a growing realization that negligence was not enough to protect consumer safety.³⁷⁹ The original cause of action for products liability specifically

376. See Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 MARQ. L. REV. 7, 12 (2006).

377. E.g., *Heaton*, 435 P.2d at 809; *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997).

378. See *infra* notes 390–97 and accompanying text.

379. See *supra* notes 47–50 and accompanying text.

avoids proof of a manufacturer's reasonableness or lack thereof.³⁸⁰ However, the Restatement (Third)'s standard stifles these goals by introducing a standard that mirrors negligence.³⁸¹

Justice Traynor's *Escola* concurrence insisted that society should not be indifferent to a product's harm simply because a manufacturer was not negligent in causing it.³⁸² The Restatement (Second) echoed this rationale, defining "unreasonably dangerous" by a reasonable consumer expectation, with no mention of negligence.³⁸³ Products liability was meant to make it easier to bring these claims without having to prove elements that defendants are in a far better position to know of.³⁸⁴

This Note does not claim to adhere to the originalist perspective of products liability, nor does it contend that any point in history had the "correct" caselaw. To be sure, moving the needle a few years prior to the Restatement (Second) would yield one of the most disastrous ages of consumer protection.³⁸⁵ However, this Note does emphasize that products liability was created to do what negligence law could not by creating a specific, plaintiff-friendly cause of action.³⁸⁶ It was meant to lower the barriers for injured plaintiffs with few resources to go up against manufacturers who were "invariably [the] expert in the field [with] superior knowledge."³⁸⁷ Furthermore, this is not unique to Justice Traynor's early era of products liability. The same logic for reducing unfair dismissals for valid injuries was reflected in the *Barker* court's decision to add an additional risk-utility prong.³⁸⁸ Rather than limiting paths to plaintiff recovery, products liability has a tradition of removing arbitrary obstacles to meritorious claims.

In a sharp rejection of this tradition, the Restatement (Third) reinstated the burdens of negligence by another name. This has been recognized not only by courts,³⁸⁹ but also by the drafters themselves, who reference Judge Learned Hand's formula for negligence as a basis for risk-utility analysis.³⁹⁰ They have even explicitly admitted their strategy for replacing plaintiff-friendly section 402A by masquerading the Restatement (Third) as strict products liability, while in fact intending to strip the design defect standard of anything that separated it from negligence.³⁹¹ Unlike *Barker*,

380. See *supra* Parts I.B, II.A.1.

381. See *infra* notes 389–91.

382. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

383. See RESTATEMENT (SECOND) OF TORTS, § 402A cmt. i (AM. L. INST. 1965).

384. See *supra* notes 112–21 and accompanying text.

385. See *supra* note 3 and accompanying text.

386. See *supra* note 112.

387. *Castriagnano v. E.R. Squibb & Sons*, 546 A.2d 775, 782 (R.I. 1988).

388. See *supra* Part II.A.3.

389. See, e.g., *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994).

390. See *Henderson & Twerski*, *supra* note 56, at 883 nn.59–60.

391. See *Twerski & Henderson*, *supra* note 55, at 1065 (“[W]e were tempted to recognize that classic design defects reflected negligence . . . [b]ut we knew that many courts were deeply committed to section 402A’s ‘strict liability’ rhetoric . . . [s]o we decided to capture in

which uses risk-utility to address the blind spots of consumer expectations that made it overly restrictive, the Restatement (Third)'s use of risk-utility was explicitly meant to restrict.

The authors have made no attempt to hide their goals to limit the ability of plaintiffs to bring cases. Professors James A. Henderson, Jr. and Aaron D. Twerski have written frequently about the insurance crisis and stifling effect of strict products liability on the economy.³⁹² This duo was a major part of the prodefendant tort reform movement of the 1980s that sought to limit manufacturer liability and even abandon strict liability.³⁹³

These promanufacturer biases may have influenced the Restatement's survey of the then-existing legal landscape. Despite twenty-five states employing some form of the consumer expectations test at the time, the Restatement (Third) did not include any section on consumer expectations.³⁹⁴ Instead, it listed the risk-utility analysis with an absolute RAD requirement as the sole design defect standard.³⁹⁵ Only eight states had adopted such a strict standard at the time.³⁹⁶ Nevertheless, the coreporters indicated that section 2(b) reflected the design defect consensus among American jurisdictions.³⁹⁷

The anti-strict products liability movement behind the Restatement (Third) muddles its authority. Though it may not go as far as being a "wish list from manufacturing America," as Professor Frank J. Vandall has written,³⁹⁸ the corporate influences within the drafting of the Restatement (Third) make its exclusion of consumer expectations questionable at best. Unfortunately, Restatements "speak [with] considerable authority" and, over time, significantly influence "development of the law, especially in states where the law is less developed or in flux."³⁹⁹ In spite of its bias, the Restatement had its intended effect. Today, considerably fewer jurisdictions allow plaintiffs to use consumer expectations freely, and even fewer have refused to adopt a RAD requirement.⁴⁰⁰

As a reminder, this Note does not deny the value of the risk-utility analysis. However, the exclusive application of risk-balancing is markedly out of line with the goals of strict products liability.⁴⁰¹ Further, it is not enough to protect consumers, as evinced by the state of products safety prior to the

plain words the essence of Learned Hand's classic formulation."); Twerski, *supra* note 376, at 12.

392. See, e.g., Henderson & Twerski, *supra* note 55, at 1065–66 (warning that the consumer expectations test invites endless enterprise liability); Henderson & Twerski, *supra* note 56, at 903 (expressing concerns over a jury's "uneconomic" notions of design defect).

393. See *supra* note 75 and accompanying text.

394. See Vargo, *supra* note 42, at 556.

395. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998).

396. See Vargo, *supra* note 42, at 537.

397. See *id.* at 502.

398. Vandall, *supra* note 74, at 261.

399. Owen, *supra* note 36, at 292.

400. See *supra* Part I.D for the full list of jurisdictions.

401. See *supra* note 391.

recognition of strict products liability.⁴⁰² Though some jurisdictions maintain that consumer expectation is still adequately integrated into risk-utility,⁴⁰³ most of the other factors of the analysis are exclusively within the control of the manufacturer.⁴⁰⁴ Aside from a consumer's expectations, these factors are simply a rehash of negligence and what only a manufacturer would know.

Without a lens of consumer expectations with which to view each of these risk-utility factors, the inquiry fails to fulfill the goals of products liability. To be sure, these factors are often relevant, especially when a consumer's expectations are indeterminate.⁴⁰⁵ However, the solution is to have a jury determine reasonable expectations, not to throw the proverbial baby out with the bathwater. Otherwise, placing these raw, manufacturer-skewed factors on the scale against a consumer's understanding creates a nearly impossible burden for plaintiffs to overcome.

The consumer expectations standard is the only one that avoids the problems of negligence that strict products liability was created to solve. Although risk-utility analysis may be helpful to fill the gaps of consumer expectations in other areas, it is still necessary to make consumer expectations available as a tool for plaintiffs to avoid the pitfalls of a negligence suit.

2. Summary Judgment Under the Restatement (Third) Deprives Juries of the Ability to Weigh Factors

Another important reason for preserving consumer expectations is that the test leaves the decision of how to weigh evidence to the jury.⁴⁰⁶ On the other end of the spectrum, a joint requirement under the Restatement (Third) to bring a case under pure risk-utility and provide RAD evidence would lead to far more directed verdicts and summary judgment rulings.⁴⁰⁷ In turn, it would deprive many plaintiffs of their chance to reach a jury.

This is not to say that summary judgment is never warranted. Indeed, judicial verdicts are an important tool to prevent frivolous claims and increase court efficiency. Still, the erosion over time of a plaintiff's ability to reach a jury on design defect claims should raise alarms that this tool is being commandeered by manufacturers to avoid liability.⁴⁰⁸ The tort reform movement has strategically lobbied for standards that will keep juries from hearing these cases, for fear that the jury will rule against the

402. *See supra* Part I.A.

403. *E.g.*, *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 352 (Ill. 2008).

404. *Id.* at 330–31 (listing other factors besides consumer expectations, including “the likely effects of the alternative design on production costs, the effects of the alternative design on product longevity, maintenance, repair, and esthetics, and the range of [product choice]”).

405. *See supra* Part II.A.2.

406. *See supra* Part III.A.1.

407. *See infra* notes 414–20 and accompanying text.

408. *See supra* Part II.B.2.a for an explicit discussion of RAD as a tool to reduce manufacturer liability.

manufacturer.⁴⁰⁹ Those in support of such reform believe a jury cannot be trusted, but this misconception goes entirely against the empirical evidence and the point of America's litigation system altogether.⁴¹⁰

The RAD requirement is the clearest—but certainly not the only—result of this lobby.⁴¹¹ Touted by supporters of the Restatement (Third) as necessary to ensure a case is nonfrivolous,⁴¹² it functionally serves as a bar on many injured plaintiffs from bringing their case at all. RAD is undoubtedly a powerful tool for plaintiffs to prove their case under any standard, including consumer expectations.⁴¹³ However, it should not be required to prove liability under either standard, as there are some products that could not be made to avoid harm, regardless of design.⁴¹⁴ When RAD becomes a central element to prove, rather than a method of proof itself, it skews the focus of what the actual inquiry is—whether or not the product was unreasonably defective.⁴¹⁵

More importantly, even if a RAD does exist, the manufacturer is in a far better position to bring this evidence than the plaintiff. If it is the plaintiff's burden to present a RAD before a judge in order to avoid summary judgment, it creates a costly barrier for the average plaintiff.⁴¹⁶ The price of an independent expert who will testify about a RAD could increase the cost of litigation by upwards of \$25,000—an insurmountable sum for most plaintiffs.⁴¹⁷ Even under a contingency fee model, legitimate injuries with estimated verdicts below a plaintiff attorney's minimum are left without any feasible path to recovery.⁴¹⁸

True, many plaintiffs may require an expert to prove their case either way once they reach trial. However, the RAD requirement puts an unfair premium on one factor, requiring the plaintiff to put on a RAD “minitrial” before even knowing if it has the merits to reach a jury.⁴¹⁹ This imposes a great deal of risk—and a great deal of cost—that not only skews the likelihood of a plaintiff finding representation, but also dramatically reduces the likelihood that they will receive their day in court.⁴²⁰

RAD supporters have correctly noted that alternative design evidence is often produced regardless of a RAD requirement.⁴²¹ However, this is simply

409. See *supra* notes 132–33 and accompanying text.

410. See *supra* notes 128–31 and accompanying text.

411. See, e.g., Corboy, *supra* note 26, at 1099–103 (discussing the learned intermediary doctrine and its protection of pharmaceutical companies from liability).

412. See Colt, *supra* note 54, at 536 (citing 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 5:16 (4th ed. 2014)).

413. See *supra* note 127.

414. See Vandall & Vandall, *supra* note 74, at 922 (listing tobacco products, alcohol, and handguns).

415. See Corboy, *supra* note 26, at 1094 (citing *Ogg v. City of Springfield*, 458 N.E.2d 1331 (Ill. App. Ct. 1984)).

416. See *supra* notes 116–21 and accompanying text.

417. See Vandall & Vandall, *supra* note 74, at 923.

418. See *id.*

419. See Corboy, *supra* note 26, at 1090.

420. See *id.* at 1095–96.

421. See Twerski, *supra* note 53, at 1222–23.

evidence that the fear of summary judgment is so great that plaintiffs bring a RAD, even if it is unnecessary. Indeed, the threat of dismissal for lack of a RAD is not limited only to the courts that require it, but also rears its head in jurisdictions that do not purportedly require it.⁴²² There is no indication that widespread use of RAD indicates its necessity or value; in fact, it could just as equally evince its deterring effect for harmed plaintiffs. That is to say that many potential plaintiffs with otherwise meritorious claims may have abandoned their case when they could not afford expert witnesses to speak about a RAD.⁴²³

Instead, it should be up to the jury to decide how to weigh the RAD evidence and risk-utility elements alongside consumer expectations. RAD outweighing all these other factors is unfair to plaintiffs and gives manufacturers a huge advantage. Although RAD requirements are not unheard of under the consumer expectations standard,⁴²⁴ they are mainly a hallmark of the Restatement (Third), required in all but one risk-utility jurisdiction.⁴²⁵ RAD requirements represent another negligence-like barrier within the average risk-utility jurisdiction that could be avoided or lessened by the inclusion of the modern consumer expectations test.

CONCLUSION

The consumer expectations standard for design defect has evolved dramatically from its introduction in the mid-1900s. For far too long this evolution has gone unacknowledged by its critics, who continue to reject its use as outdated and archaic. Yet, when examining the way that modern jurisdictions apply consumer expectations, it is evident that the defect standard is not only capable of handling complex product liability cases but is also sophisticated in its treatment of challenging evidence.

Furthermore, the consumer expectations test is the only standard that maintains the integrity of products liability law as distinct from negligence. It levels the playing field for plaintiffs by offering a cause of action based not on the manufacturer's reasonableness and decisions, but on their own. Despite many states' prohibition of the consumer expectations test, this Note maintains that any design defect framework is incomplete without it.

422. See, e.g., *Shoemake v. Omniquip Int'l, Inc.*, 152 S.W.3d 567, 573 (Tenn. Ct. App. 2003) (granting summary judgment when plaintiff only provided suggestions, rather than proof, of an adapted design proposal).

423. See Corboy, *supra* note 26, at 1095–96.

424. See, e.g., *supra* notes 82–84 and accompanying text.

425. See *supra* Parts I.D, II.B.2.a.