Consumer Expectations

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CONSUMER EXPECTATIONS

JERRY J. PHILLIPS*

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I. INTRODUCTION

The Restatement (Second) of Torts § 402A (Restatement Second) sets the standard for strict tort products liability that has been widely adopted in the United States. A business seller is strictly liable if it sells a product that is “in a defective condition unreasonably dangerous” and the condition causes physical harm to a user or consumer. A defective condition is defined in comment g of that section as “a condition not contemplated by the ultimate consumer.” Unreasonably dangerous is defined in comment i as “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” This standard is generally known as the consumer expectations test.

The Uniform Commercial Code (U.C.C.), which has been almost universally adopted in the United States, sets forth a standard similar to § 402A for the implied warranty of merchantability. Goods are unmerchantable under § 2-314(2)(c) if they are not “fit for the ordinary purposes for which such goods are used.”

The Restatement (Third) of Torts: Products Liability (Products Liability Restatement) eschews the consumer expectations test as the controlling standard for

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2. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT SECOND].
3. Id. cmt. g.
4. Id. cmt. i.
determining product design defect. Section 2(b) of the Products Liability Restatement says a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor. . . ." Comment g to that section states:

Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection (b). Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.

The consumer expectations test is applied throughout products liability cases, including those involving design defectiveness. It is probably the central test for determining a product defect. The other major test, that of weighing risk against utility, can be comfortably subsumed under consumer expectations. It is therefore a misapprehension to conclude that the importance of the consumer expectations test is declining.

Before examining the various definitions, and methods of proof, of consumer expectations, it is useful to consider the primary objections that have been leveled against the consumer expectations test. There are two. First, it has been said that the test is unsuitable where a product defect, or unreasonable danger, is obvious, since a consumer can allegedly have no expectations of safety with regard to a product that is obviously dangerous. Second, it has been said that the ordinary consumer can have no expectations of safety with regard to a complex product, since such

6. Restatement (Third) of Torts: Products Liability § 2 cmt. g (1998) [hereinafter Products Liability Restatement]
7. Id. § 2(b).
8. Id. cmt. g (citation omitted).
9. See infra Part III.
10. See Jerry J. Phillips et al., Products Liability: Cases, Materials, Problems 188 (1994). Products tort law usually requires that the products be unreasonably dangerous and cause physical harm to person or property. No such limitations on recovery are imposed under the U.C.C.
expectations allegedly lie beyond the knowledge of the average person. An examination of these objections shows that neither is compelling. Both objections can be accommodated within the consumer expectations test.

II. THE OBVIOUS DANGER

Many courts, probably a majority, have held that obviousness of danger is not a legal bar to recovery in products liability. It is a factor to be considered by the fact finder and fits well within the defenses of contributory negligence and assumption of risk. In an appropriate case the fact finder may find that contributory negligence, or at least assumption of the risk, will bar recovery. Only in rare cases should obviousness be a legal bar, and probably those cases should be restricted to situations where the benefits of a product clearly outweigh its risks.

A claim of product defectiveness based on failure to warn will usually be ineffective in the case of an obvious danger. The purpose of a warning is to make a danger apparent, and that purpose may be fulfilled by the danger’s obviousness. In other product cases, obviousness of danger is usually only one of the factors to consider in determining defectiveness.

If obviousness of danger is not generally a legal bar to recovery, then it seems odd that it should be a bar to a determination of legal defectiveness, however the standard of defectiveness is defined. Holding that obviousness of danger is not a legal bar to recovery should imply that the legal test for determining defectiveness can be met even though the danger is obvious. Otherwise, obviousness would serve a contradictory role of being both a bar and not a bar to recovery.

Courts appear to have semantic difficulty in conceiving that a person can expect a product to be safe when it is obviously dangerous. This difficulty involves a misunderstanding of the meaning of expectations. A product expectation contemplates safety which is not present. The absence of safety may be obscured, or it may be apparent.

Spouses expect each other to improve; parents expect their children to improve; teachers expect their students to improve. These expectations are often maintained in the face of obvious evidence to the contrary. Can a worker not expect the safety conditions of his workplace machinery to improve in spite of having to work, for example, with an unguarded or improperly guarded punch press?

11. Id. at 189.
13. Comparative fault has been widely adopted, generally eliminating plaintiff’s fault as a bar to recovery. See id. at 269-78.
Expectation may be equated with hope, a close synonym. Expectation implies more certainty than hope, but both are grounded in an expectancy of soundness, or wholeness — whether of product, person, or performance.

Expectation also has legal overtones of duty or obligation. People are expected to obey the law. Manufacturers are expected to make safe products.

Vautour v. BodyMasters Sport Industries, Inc. illustrates the point made here. In Vautour, the New Hampshire Supreme Court rejected — as have several other significant state supreme court decisions — the Products Liability Restatement's requirement of proof of a reasonable alternative design as a condition to recovery for design defectiveness. In doing so it noted that the Products Liability Restatement itself recognizes situations in which design defectiveness can be established without proof of an alternative design. For example, comment e to § 2 recognizes that there may be liability for harm caused by a "manifestly unreasonable" design, without proof of an alternative design. Comment f, the court said, recognizes that the plaintiff need not produce expert testimony of an improved design "in cases in which the feasibility of a reasonable alternative design is obvious and understandable to laypersons."

In support of the latter proposition, the New Hampshire court cited Pietrone v. American Honda Motor Co., where the California Court of Appeal held that the plaintiff, a passenger on a motorcycle, established a design defect by showing the "open, exposed, rotating rear wheel" of the motorcycle "in close proximity to the passenger's foot pegs." Once the plaintiff has established proximate cause,


17. See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in The Collected Works of Abraham Lincoln 332, 333 (Roy P. Baster, ed. 1959) ("Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away."). This speech was delivered on March 4, 1865, a little more than a month before Lee's surrender at Appomattox on April 9, 1865. The quoted sentence shows the close relation between hope and expectation. Southern defeat seemed foregone by March 4, 1865, but Lincoln, the word master, chose to express his expectation in terms of hope.

18. "England expects every man will do his duty!" Robert Southey, Life of Nelson 146 (London & Glasgow, Collins Clear-Type Press 1813) (quoting Admiral Nelson at the Battle of Trafalgar, Oct. 21, 1805); see also Merriam-Webster's Collegiate Dictionary, supra note 16, at 407 (defining expect "to consider bound in duty or obligated").


21. Vautour, 784 A.2d at 1184; Products Liability Restatement, supra note 6, § 2(b).

22. Vautour, 784 A.2d at 1183.

23. Restatement Third, supra note 6, § 2 cmt. e.

24. Vautour, 784 A.2d at 1183 (citing Products Liability Restatement, supra note 6, § 2 cmt. f).


26. Id. at 139; see Vautour, 784 A.2d at 1183.
California products law shifts the burden of proof to the defendant to show that "the benefits of the challenged design outweigh the risk of danger inherent in such design." However, the Pietrone court said:

\[E\]ven were it to be assumed that plaintiff's burden... exceeded such a showing [of proximate cause...] and required that she demonstrate the existence of some alternative design which would have prevented or lessened her injury, this burden was met by the jury's mere inspection of the photographs introduced into evidence. That is to say, no more than a cursory examination of this machine's configuration makes apparent both the danger of its design and potential solutions thereto.\[23\]

The New Hampshire court in Vautour approved the examples of product design defect in comments e and f and in the Pietrone case, but it rejected the Products Liability Restatement's requirement of proof of an alternative design.\[29\] Instead, the court applied the consumer expectations test and held that the plaintiff could establish a design defect by showing that a leg exerciser was unreasonably dangerous.\[30\] The user could be injured if the upper stops of the machine were not in a locked position when doing calf exercises.\[31\]

Thus, Vautour recognized that the consumer expectations test could be applied in finding an obviously dangerous design to be defective.\[32\] The examples cited, to which the court would presumably apply the consumer expectations test, involved obvious design dangers. Vautour itself, to which the test was applied, involved an obvious danger, since the plaintiff was aware of the warning label on the exerciser machine requiring that the upper stops be in the locked position when doing calf exercises.\[33\]

Delany v. Deere & Co. expressly held that obviousness of danger does not bar recovery based on consumer expectations.\[34\] There, the plaintiff was crushed "when a large round hay bale fell from a homemade bale fork attached to a Deere front-end loader" which the plaintiff was operating.\[35\] The court held the plaintiff stated a claim for defective design.\[36\] According to the Delany court, simply because a product is obviously dangerous, does not prevent the product from being

27. Pietrone, 235 Cal. Rptr. at 139 (citing Barker v. Lull Eng'g Co., 573 P.2d 443 (Cal. 1978)).
28. Id. at 139.
29. Vautour, 784 A.2d at 1183-84.
30. Id. at 1181-82.
32. Vautour, 784 A.3d at 1182.
33. Id. at 1180.
34. 999 P.2d 930, 942, 946 (Kan. 2000).
35. Id. at 932.
36. Id. at 946.
unreasonably dangerous to the consumer: "A patent and obvious danger may be an important factor in determining whether plaintiff's fault contributed to his or her own injury but does not foreclose the inquiry of whether the product was defectively designed."\textsuperscript{37}

It is often difficult to determine when the unreasonable danger of a product is obvious.\textsuperscript{38} Unless a consumer assumes the risk as a matter of law by intentionally injuring herself, the injury usually occurs inadvertently, or at least in circumstances where the consumer does not expect to be injured.\textsuperscript{39} In such a situation, the consumer does not expect the product, although obviously dangerous, to be unreasonably so. Rather, she expects the product to be safe enough to be used without mishap. Her expectations are sadly disappointed when she is proved wrong.

III. THE COMPLEX PRODUCT

\textit{Soule v. General Motors Corp.}\textsuperscript{40} is the leading case indicating that the consumer expectations test applies only in those cases where the ordinary consumer, based on her ordinary knowledge, could have expectations of safety.\textsuperscript{41} There the plaintiff was badly injured when her General Motors (GM) car collided with another vehicle.\textsuperscript{42} The plaintiff sued GM alleging the car's defective design caused "its left front wheel to break free, collapse rearward, and smash the floorboard into her feet."\textsuperscript{43} Expert witnesses debated the issues at length, and the case was submitted to the jury on both the consumer-expectations and the risk-benefit tests.\textsuperscript{44} The jury found for the plaintiff, and the defendant appealed alleging that expert testimony should not have been admitted under the consumer expectations test.\textsuperscript{45} The appeals court agreed, but found the admission harmless error since the case was essentially tried on a risk-benefit theory.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 942.
\item \textsuperscript{39} Some courts hold that a products liability plaintiff's negligence, amounting to mere carelessness or inadvertence, should not be considered in determining whether the plaintiff was at fault. See 2 JERRY J. PHILLIPS & ROBERT E. PRYOR, \textit{PRODUCTS LIABILITY} §8-18(a) (2d ed. 1995); \textit{PRODUCTS LIABILITY NUTSHELL}, supra note 12, at 276.
\item \textsuperscript{40} 882 P.2d 298, 308 (Cal. 1994).
\item \textsuperscript{41} This rationale appears to be supported by comment i to § 402A of the \textit{Restatement (Second) of Torts}: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, \textit{with the ordinary knowledge common to the community as to its characteristics}." \textit{RESTATEMENT SECOND}, supra note 2, § 402A cmt. i (emphasis added).
\item \textsuperscript{42} \textit{Soule}, 882 P.2d at 301.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 302-03.
\item \textsuperscript{45} \textit{Id.} at 303.
\item \textsuperscript{46} \textit{Id.}
\end{itemize}
In discussing this issue, the California Supreme Court said:

In Barker, we offered two alternative ways to prove a design defect, each appropriate to its own circumstances. The purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them. By the same token, the ordinary users or consumers of a product may have reasonable, widely accepted minimum expectations about the circumstances under which it should perform safely. Consumers govern their own conduct by these expectations, and products on the market should conform to them.

In some cases, therefore, “ordinary knowledge . . . as to . . . [the product’s] characteristics”, may permit an inference that the product did not perform as safely as it should. If the facts permit such a conclusion, and if the failure resulted from the product’s design, a finding of defect is warranted without any further proof. The manufacturer may not defend a claim that a product’s design failed to perform as safely as its ordinary consumers would expect by presenting expert evidence of the design’s relative risks and benefits.

However, as we noted in Barker, a complex product even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers’ reasonable minimum assumptions about safe performance. For example, the ordinary consumer of an automobile simply has “no idea” how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards.

An injured person is not foreclosed from proving a defect in the product’s design simply because he cannot show that the reasonable minimum safety expectations of its ordinary consumers were violated. Under Barker’s alternative test, a product is still defective if its design embodies “excessive preventable danger”, that is, unless “the benefits of the . . . design outweigh the risk of danger inherent in such design.” But this determination involves technical issues of feasibility, cost, practicality, risk, and benefit which are “impossible” to avoid. In such cases, the jury must consider the manufacturer’s evidence of competing design considerations, and the issue of design defect cannot fairly be resolved by standardless reference to the “expectations” of an “ordinary consumer.”

As we have seen, the consumer expectations test is reserved for cases in which the everyday experience of the product’s users permits a conclusion that the product’s design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design. It follows that where the
minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury’s function, and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product’s users.47

Tennessee followed Soule in Ray v. BIC Corp.48 In Ray, the four-year-old plaintiff was injured from a fire caused by a cigarette lighter manufactured by the defendant.49 The plaintiff alleged the lighter was defectively designed because it was not “child-resistant.”50 The federal district court granted the defendant summary judgment, and the plaintiff appealed.51 The Sixth Circuit Court of Appeals certified to the Tennessee Supreme Court the question of whether the Tennessee Code provided “separate and distinct” tests, consumer expectations and risk-utility, for determining product defectiveness.52 The Tennessee court answered in the affirmative.53 The court said the defendant would unquestionably be entitled to summary judgment on the consumer expectations test because the danger was obvious, but a jury question was presented on the risk-utility issue.54

The Tennessee statute in issue55 provides that a product can be found “unreasonably dangerous” if it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer,” or if the product “because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming the manufacturer or seller knew of its dangerous condition.”56 The Tennessee court found these to be separate tests, and equated the second (the prudent manufacturer or seller) test with that of risk-utility.57

47. Soule, 882 P.2d 298, at 307-08 (alterations in original) (citations and footnotes omitted); see Barker v. Lull Eng’g Co., 573 P.2d 443 (Cal. 1978).
48. 925 S.W.2d 527, 531 (Tenn. 1996).
49. Id. at 528.
50. Id. at 528-29.
51. Id. at 529.
52. Id. The risk-utility test of Ray is the same as the risk-benefit test of Soule. The utility of a product is the same as its benefit. The risk associated with a product is sometimes referred to as the product’s danger.
53. Ray, 925 S.W.2d at 533.
54. Id. at 530.
56. Id.
57. Ray, 925 S.W.2d at 531. Tennessee has a third statutory basis for determining defectiveness. A product manufacturer or seller may be held liable if the product is found to be in a “defective condition,” which “means a condition of a product that renders it unsafe for normal or anticipatable handling and consumption.” TENN. CODE ANN. § 29-28-102(2) (2000). The court in Smith v. Detroit Marine Eng’g Corp. held that “defective condition” was a separate and distinct basis for recovery, apart from the two distinct bases set forth in Section 29-28-102(8) under “unreasonably dangerous.” 712 S.W.2d 472, 474-75 (Tenn. Ct. App. 1985). See also Cruze v. Ford Motor Co., Prod. Liab. Rep.
Although, the Tennessee court recognized that some jurisdictions predicted that the two tests "should produce similar results," the court saw the two tests as distinct:

While this prediction may be accurate, we see distinct and important differences in the consumer expectation and the prudent manufacturer tests under our statute. First, the former requires the consumer to establish what an ordinary consumer purchasing the product would expect. The manufacturer or seller's conduct, knowledge, or intention is irrelevant. What is determinative is what an ordinary purchaser would have expected. Obviously, this test can only be applied to products about which an ordinary consumer would have knowledge. By definition, it could be applied only to those products in which "everyday experience of the product's users permits a conclusion. . . ." Soule v. General Motors Corp., 882 P.2d 298, 308 (Cal. 1994) (emphasis in original). For example, ordinary consumers would have a basis for expectations about the safety of a can opener or coffee pot, but, perhaps, not about the safety of a fuel-injection engine or an air bag.

Alternatively, the prudent manufacturer test requires proof about the reasonableness of the manufacturer or seller's decision to market a product assuming knowledge of its dangerous condition. What the buyer expects is irrelevant under this test. In contrast to the consumer expectation test, the prudent manufacturer test is more applicable to those circumstances in which an ordinary consumer would have no reasonable basis for expectations. Accordingly, expert testimony about the prudence of the decision to market would be essential.

The straight-forward, unambiguous language of our statute establishes two distinct tests for ascertaining whether a product is unreasonably dangerous: the consumer expectation test and the prudent manufacturer test. In addition to having completely different focuses, the two tests have different elements which require different types of proof. The two tests are neither mutually exclusive nor mutually inclusive. While the statute does not limit applicability of the tests, the prudent manufacturer test will often be the only appropriate means for establishing the unreasonable

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(CCH) ¶ 15,707 (Tenn. Ct. App. 1999) (holding that the Tennessee statute does not require both "defective condition" and "unreasonably dangerous"). Apparently no Tennessee court has defined "defective condition," so it is unclear how the term differs from the two definitions of "unreasonably dangerous."

dangerousness of a complex product about which an ordinary consumer has no reasonable expectation. Likewise, it may form the sole basis for establishing liability for a product whose dangerousness is the result of a latent defect.\textsuperscript{59}

Ray stated that the two tests (consumer expectations and risk-utility) "are neither mutually exclusive nor mutually inclusive,"\textsuperscript{60} leaving uncertain the boundaries of the two tests. In a subsequent case, \textit{Jackson v. General Motors Corp.},\textsuperscript{61} the Tennessee Supreme Court further conflated the two tests.

In \textit{Jackson}, the Tennessee Supreme Court accepted from the Sixth Circuit Court of Appeals the certified question of whether under Tennessee law a plaintiff may "use the 'consumer expectation test' to prove that his seatbelt/restraint system was unreasonably dangerous because it failed to conform to the safety standards expected by an ordinary consumer under the circumstances?"\textsuperscript{62} The court answered the question in the affirmative, stating:

Section 29-28-102(8) of Tennessee Code Annotated is silent as to any limitation on the application of the consumer expectation test in products liability cases. Absent contrary indication in the statute, we read Tennessee products liability law to permit application of the consumer expectation test in all products liability cases in which a party intends to establish that a product is unreasonably dangerous. It does not follow that, because the consumer expectation test may be applied in all such product liability cases, the manufacturer will be subject to absolute liability. Whether a plaintiff is successful on a products liability claim under the consumer expectation test will depend on whether the trier of fact agrees that the plaintiff's expectation of product performance constituted the reasonable expectation of the ordinary consumer having ordinary knowledge of the product's characteristics.

\ldots

The issue of whether the consumer expectation test applies to seat belts was addressed in \textit{Cunningham v. Mitsubishi Motors Corp.}, No. C-3-88-582, 1993 WL 1367436, at *1 (S.D. Ohio, June 16, 1993). In \textit{Cunningham}, the United States District Court for the Southern District of Ohio, Western Division, held that the consumer expectation test was applicable in a wrongful death/products liability action where the seatbelt was determined

\textsuperscript{59.} \textit{Id.}
\textsuperscript{60.} \textit{Id.}
\textsuperscript{61.} 60 S.W.3d 800 (Tenn. 2001).
\textsuperscript{62.} \textit{Id.} at 803.
to have killed the driver in a twenty-to-thirty miles per hour automobile crash. In its decision, the Cunningham court held:

[S]eat belts generally are familiar products for which consumers’ expectations of safety have had an opportunity to develop, and the function which they were designed to perform is well known. In recent years, consumers have been bombarded with information regarding the importance of wearing seat belts because of the protection which they provide.

... This Court is simply not willing to... preclud[e] the use of the consumer expectation test in a situation involving a familiar consumer product which is technically complex or uses a new process to accomplish a familiar function. Many familiar consumer products involve complex technology. In addition, manufacturers are constantly altering the methods in which products perform familiar functions. Thus, to conclude that the consumer expectation test cannot be used because a product is technologically complex or because a new process is used to achieve a familiar result would be to significantly reduce the use of that test. ... Because of their long usage and consumer familiarity with the measure of safety which seat belts provide, consumer expectations do provide useful guidance.

Id. at *3-4. The above statement in the Cunningham decision is significant because it recognizes that the consumer expectation test does not depend necessarily on a product’s complexity in technology or use. Instead, Cunningham recognizes that successful application of the consumer expectation test by a plaintiff simply requires a showing that the product’s performance was below reasonable minimum safety expectations of the ordinary consumer having ordinary, “common” knowledge as to its characteristics. This entails a showing by the plaintiff that prolonged use, knowledge, or familiarity of the product’s performance by consumers is sufficient to allow consumers to form reasonable expectations of the product’s safety.

... In response to the certified question, we conclude that the consumer expectation test is applicable to any products liability case in which a party seeks to establish that a product is unreasonably dangerous under Tennessee law. We affirm our decision in Ray ex rel Holman v. BIC Corp. that the consumer expectation test and the prudent manufacturer test are not exclusive of one another and therefore either or both of these tests
are applicable to cases where the product is alleged to be unreasonably dangerous. However, we recognize here, as we did in BIC, that it may be difficult for plaintiffs in cases involving highly complex products to establish that the product is dangerous to an extent beyond that which would be contemplated by an ordinary consumer, even though the consumer expectation test may, technically, apply.63

Both Soule and BIC-Jackson leave unclear when the consumer expectations test can be applied in a design case. Jackson indicates that the test may be applied in any such case, while stating that it may be “difficult” for the plaintiff to establish violation of consumer expectations in cases involving “highly complex products.”64

It would not be as difficult for a plaintiff to establish the violation of consumer expectations if she could use expert testimony to do so. Soule states that, “where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect,” because use of such evidence “would invade the jury's function, and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product’s users.”65

The first reason offered by Soule for rejecting expert evidence in a consumer expectations case—that such evidence would “invade the jury’s function”—is, as the court indicates, a reason for rejecting expert testimony as superfluous when the matter is one within the common knowledge of the jury.66 By definition, a matter involving a complex product is not within the jury’s common knowledge.

The second reason suggests, as did the Ray court, that consumer expectations and risk-benefit, or risk-utility, are separate and discrete tests.67 However, Jackson indicates that the consumer expectations test substantially overlaps that of risk-utility.68

The Connecticut Supreme Court, in Potter v. Chicago Pneumatic Tool Co.,69 found that in cases “involving complex product designs in which an ordinary consumer may not be able to form expectations of safety . . . a consumer’s expectations may be viewed in light of various factors that balance the utility of the

63. Id. at 804, 806 (alterations in original) (emphasis added).
64. Id. at 804.
66. Id. An expert is permitted to testify only if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702; see State v. Wooden, 658 S.W.2d 553, 556 (Tenn. Crim. App. 1983) (holding that an expert witness should not be permitted to testify about unreliability of eyewitness identification, since the jury could use its own common sense to determine the weight to be given such evidence).
69. 694 A.2d 1319 (Conn. 1997).
product's design with the magnitude of its risks. 70 This reasoning makes eminent sense because the risk-utility test mirrors the reasonable person standard enunciated by Judge Learned Hand in United States v. Carroll Towing Co., 71 except that in strict products liability the seller's knowledge of the condition of the product is presumed. 72 Thus, properly seen, the risk-utility analysis of a reasonable person is one way to determine reasonable consumer expectations.

Therefore, the remaining question is whether expert testimony can be used to establish consumer expectations. Soule appears to answer the question in the negative. 73 However, in footnotes to the opinion the Soule court says:

Plaintiff insists that manufacturers should be forced to design their products to meet the "objective" safety demands of a "hypothetical" reasonable consumer who is fully informed about what he or she should expect. Hence, plaintiff reasons, the jury may receive expert advice on "reasonable" safety expectations for the product. However, this function is better served by the risk-benefit prong of Barker. There, juries receive expert advice, apply clear guidelines, and decide accordingly whether the product's design is an acceptable compromise of competing considerations.

On the other hand, appropriate use of the consumer expectations test is not necessarily foreclosed simply because the product at issue is only in specialized use, so that the general public may not be familiar with its safety characteristics. If the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who do use it, perhaps the injured consumer should not be forced to rely solely on a technical comparison of risks and benefits. By the same token, if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper.

......

Contrary to GM's suggestion, ordinary consumer expectations are not irrelevant simply because expert testimony is required to prove that the product failed as marketed, or that a condition of the product as marketed was a "substantial," and therefore "legal," cause of injury. We simply hold that the consumer expectations test is appropriate only when the jury, fully

70. Id. at 1333.
71. 159 F.2d 169, 173 (2d Cir. 1947).
72. See PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 6(c). This section creates a risk-benefit test to be determined solely by health care providers in deciding whether the design of a prescription drug or medical device is defective. Id. This test lacks any support in case law.
appraised of the circumstances of the accident or injury, may conclude that the product’s design failed to perform as safely as its ordinary consumers would expect.74

In Lunghi v. Clark Equipment Co., cited by Soule, the court held that plaintiffs “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.”75 Apparently the harmless error committed by the trial court in Soule was in instructing the jury that they could find liability based on ordinary consumer expectations without expert testimony. They apparently should have been instructed that, on the facts of this case, ordinary expectations had to be established by expert testimony.

In Green v. Smith & Nephew AHP, Inc., the Wisconsin Supreme Court specifically held that expert testimony may be used to establish consumer expectations regarding the design of a complex product.76 The suit there was against a latex glove manufacturer for an allergy allegedly caused by exposure to the defendant’s latex gloves.77 The plaintiff, a health care worker, introduced extensive expert testimony to establish the allergenic quality of such gloves.78 Applying the consumer expectations test, the court stated that “this court has rejected the argument that the average jury cannot properly evaluate the often complex economic and engineering data presented at products liability trials.”79

It is generally held that expert testimony is admissible in res ipsa loquitur cases to establish that an accident ordinarily would not have happened had the defendant used due care.80 The ordinary-occurrence aspect of res ipsa loquitur is similar to that of ordinary consumer expectations.

The Products Liability Restatement § 3 states the rule for products liability recovery based on circumstantial evidence: a product defect may be inferred when the incident that caused harm “was of a kind that ordinarily occurs as a result of product defect.”81 It is widely held that expert testimony is admissible to prove defect, including a design defect, based on circumstantial evidence.82

74. Id. at 308 n.4, 309 n.6 (emphases in original) (citation omitted).
76. 629 N.W.2d 727, 742-43 (Wis. 2001).
77. Id. at 731-33.
78. Id. at 733-35.
79. Id. at 742-43.
81. PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 3.
82. See, e.g., Chad E. Wallace & Andrew T. Wampler, Comment, Skimming the Trout from the Milk: Using Circumstantial Evidence to Prove Product Defects Under the Restatement (Third) of Torts: Products Liability Section 3, Tennessee and Beyond, 68 TENN. L. REV. 647, 673 (2001) (discussing cases in which expert testimony was admitted to prove a defect based on circumstantial
Expert evidence is admissible in negligence cases to prove whether the risks of an activity outweigh its benefits.\textsuperscript{83} A negligence determination of risk-benefit, or risk-utility, is based on the reasonable expectations of an ordinary consumer as informed by expert evidence. Product consumer expectations can also be based on a risk-utility calculation, as informed by expert testimony, the difference being that seller knowledge of the product's condition is presumed in strict products liability.\textsuperscript{84}

The use of expert testimony to establish a prima facie case in civil litigation, including torts and products liability, is pervasive. The person being informed by expert evidence in such cases is the fact finder—the lay juror. That is the same person that needs to be informed of consumer expectations in products liability cases, where those expectations are not apparent to the ordinary person.

IV. METHODS OF SHOWING CONSUMER EXPECTATIONS

The \textit{Products Liability Restatement} § 2 lists three types of product defects: manufacture, design, and inadequate instructions or warnings.\textsuperscript{85} The \textit{Restatement} excepts design defects from the consumer expectations tests.\textsuperscript{86} However, as seen in the preceding section, a number of courts use consumer expectations—either alone or in conjunction with risk-benefit analysis—to determine design defectiveness.

A manufacturing defect is one where a product "departs from its intended design."\textsuperscript{87} Manufacturing defects clearly disappoint consumer expectations\textsuperscript{88}—the mouse in the coke bottle, the burr in the peas, and so on. A manufacturing defect presents the paradigm of disappointed consumer expectations.

Where there are inadequate warnings or instructions, again consumer expectations are clearly violated. The consumer expects that a product is safe for use, unless instructed or warned otherwise as to the latent dangers.\textsuperscript{89}

Another type of product defect is set forth in the \textit{Products Liability Restatement} § 9, which carries forward § 402B of the \textit{Restatement Second}.\textsuperscript{90} A product is defective if the business seller makes "a fraudulent, negligent, or innocent misrepresentation of material fact" concerning a product, causing harm to persons or property.\textsuperscript{91} The U.C.C. has a similar provision in § 2-313, which provides that a seller can create an express warranty through an affirmation of fact or promise,
a description of the goods, or a sample or model, which becomes part of the basis of the bargain. A breach of an express warranty, or a misrepresentation, regarding the goods clearly creates disappointed expectations for a user who is harmed by reliance on the misstatement.

A seller’s advertisements and marketing representations can create consumer expectations similar to those created by express warranties and express representations. If the goods do not measure up to marketing representations, liability can result. A good example of liability created by such representations is found in Denny v. Ford Motor Co. There the defendant manufacturer represented its Bronco II sports utility vehicle as safe for on-road use. The plaintiff was seriously injured when the vehicle rolled over on a highway after she suddenly applied the brakes. Although the jury found the benefits of the vehicle—apparently for off-road use—outweighed its risks, it nevertheless found for the plaintiff based on disappointed implied warranty consumer expectations—apparently arising from defendant’s advertising representations indicating that the vehicle was safe for on-road use.

Section 3 of the Products Liability Restatement recognizes liability based on circumstantial proof of defect. Where circumstantial evidence shows a product injury “of a kind that ordinarily occurs as a result of product defect,” the expectations of the ordinary consumer are violated. This interpretation is supported by § 8, which states that liability for harm caused by used products can be inferred under § 3 where “the seller’s marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new.”

Section 4 of the Products Liability Restatement sets forth the well-accepted common law rule that “a product’s noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation.” The section states that the rule applies “[i]n connection with liability for defective design or inadequate instructions or warnings.” This statement is underinclusive, since a

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93. See also PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 14. This section carries forward the holding-out concept of the Restatement Second. See RESTATEMENT SECOND, supra note 2, § 400.
94. 662 N.E.2d 730 (N.Y. 1995); see also Castro v. QVC Network, Inc., 139 F.3d 114 (2d Cir. 1998) (holding that a roasting pan was defective when it was unsafe for the purpose for which it was marketed).
95. Denny, 662 N.E.2d at 732.
96. Id. at 731.
97. Id. at 738-39.
98. PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 3.
99. Id.
100. Id. § 8(b).
101. Id. § 4(a).
102. Id. § 4.
statute or regulation can also control standards relating to manufacturing defects and to express warranties or representations.103

In the negligence area, a statutory violation gives rise to negligence per se on the part of the violator.104 Under § 4, it gives rise to a finding of product defect.105

A consumer may not consciously expect a product to comply with relevant statutes and regulations, but the law assures her of that expectation. This assurance is roughly comparable to the legal expectation of safety that one is entitled to have with regard to an obviously dangerous product.106

Two related situations that give rise to consumer expectations are industry standards and industry customs, which work similarly to statutory and administrative regulations. A product user or consumer may or may not be aware of an applicable custom or voluntary trade regulation. Whether or not she is aware, she is nevertheless legally entitled to expect industry compliance with such customs and regulations.

Another area in which the consumer is legally entitled to expect product compliance regards the expected life of a product.107 If the wings fall off a new airplane, the expectations of a consumer using the plane will quite clearly be disappointed.108 If expert testimony is required in order to establish the expectable life of a product, the consumer will nevertheless be legally entitled to expect a product to comply with such expectable or useful life standard.

Expert testimony is normally presented in products liability by an individual who is qualified to give an expert opinion based on her specialized scientific, technical, or practical experience regarding a product. Increasingly, public polling has been used as a method for determining factual disputes in civil litigation,109 and such polling methods may also come to be used to determine specialized consumer expectations in products liability.

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103. For example, the implied warranty provision of the U.C.C. requires that goods run of even kind, quality and quantity, subject to variations by agreement, or by custom. See U.C.C. § 2-314 (d) cmt. 9 (1987). Section 2-314(f) requires goods to “conform to the promises or affirmations of fact made on the container or label” of the product. U.C.C. § 2-314(f) (1987). The Federal Communications Commission and Food and Drug Administration extensively regulate consumer advertising.

104. The effect of a statutory violation is generally to shift the burden of proof to the defendant to offer an excuse for the violation. See JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 252 (2d ed. 1997).

105. PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 4 cmt. e. Comment e indicates that the presumption created by § 4 is intended to be conclusive.

106. See supra Part III.


108. PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 3 cmt. b.

V. Conclusion

Mark Twain cabled the Associated Press from London in 1897 stating: “The reports of my death are greatly exaggerated.”110 Similarly, the reports of the death of the consumer expectations test as a standard for determining products liability are also greatly exaggerated. The concerns regarding the unsuitability of the standard for testing obviously dangerous or complex products arise from a misunderstanding of the test. Indeed, if consumer expectations failed as a test both for obvious and for complex, non-obvious dangers, there would be little else to which the test could apply. The first concern can be resolved by a proper understanding of the meaning of consumer expectations. The second can be resolved by the introduction of expert testimony, which is widely used to enable the ordinary fact finder to resolve complex quasi-legal and factual issues.

The drafters of the Products Liability Restatement were probably largely motivated to jettison consumer expectations as the central test for determining product defectiveness because of their desire to establish reasonable alternative design under § 2(b) as the essential basis for determining design defect. Section 2(b) was the cornerstone of the Products Liability Restatement from its inception.111

A number of prominent courts have expressly rejected § 2(b) as a basis for determining design defect.112 Others reject it either by using consumer expectations alone or in conjunction with risk-benefit analysis to determine consumer expectations, without making proof of a reasonable alternative design a sine qua non for determining such expectations. Risk-benefit analysis fits neatly within the definition of consumer expectations. Courts widely recognize that expert testimony may be used to establish consumer expectations. In Potter v. Chicago Pneumatic Tool Co., the court found that “our independent review of the prevailing common law reveals that the majority of jurisdictions do not impose upon plaintiffs an absolute requirement to prove a feasible alternative design.”113

Courts reject the reasonable-alternative-design standard as the test for determining liability in design defect cases not so much because the standard often places a very heavy burden of proof on the plaintiff—although it does do that.114 Rather, courts, being practical, common-sense institutions, are aware that design defectiveness cannot be so easily cabined by the alternative-design test. Tort law is a many-splendored thing. It evolves in response to changing times and circumstances. Products liability for the last half century has been the crown jewel

110. JOHN BARTLETT, FAMILIAR QUOTATIONS 625 (15th ed. 1980).
112. See supra note 20 and accompanying text. The drafters themselves adopt consumer expectations, in § 7 of the Products Liability Restatement, as the basis for determining defective design of food products. PRODUCTS LIABILITY RESTATEMENT, supra note 6, § 7.
114. Id. at 1332.
of tort law. No temporary, conservative backlash is likely to stem the creative evolution of tort law and products liability.